

JUDGMENT OF THE COURT (First Chamber)

17 March 2011 (*)

(Directive 85/337/EEC – Assessment of the effects of certain public and private projects on the environment – Airports with a runway length of 2 100 metres or more – Concept of ‘construction’ – Renewal of operating consent)

In Case C-275/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Raad van State (Belgium), made by decision of 14 July 2009, received at the Court on 21 July 2009, in the proceedings

Brussels Hoofdstedelijk Gewest,

Pieter De Donder,

Fernande De Becker,

Katrien Colenbie,

Philippe Hutsenbaut,

Bea Kockaert,

VZW Boreas,

Frédéric Petit,

Stéphane de Burbure de Wezembeek,

Lodewijk Van Dessel,

v

Vlaams Gewest,

intervening party:

The Brussels Airport Company NV,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet, M. Ilešič and M. Berger (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 6 October 2010,

after considering the observations submitted on behalf of:

- Brussels Hoofdstedelijk Gewest, by F. Tulkens and J. Mosselmans, advocaten,
- Mrs De Becker, Mrs Colenbie, Mr Hutsenbaut, Mrs Kockaert and VZW Boreas, by I. Larmuseau and H. Schoukens, advocaten,
- Mr. Petit, by J. Verstraeten and S. Vanthienen, advocaten,
- Mr de Burbure de Wezembeek, by M. Denys, advocaat,
- Mr Van Dessel, by P. Flamey and P.-J. Vervoort, advocaten,

- Vlaams Gewest, by J. Vanpraet and S. Ronse, avocats,
- The Brussels Airport Company NV, by D. Ryckbost and A. Lippens, advocaten,
- the Italian Government, by G. Palmieri, acting as Agent, and G. Fiengo, avvocato dello Stato,
- the Austrian Government, by E. Riedl, acting as Agent,
- the European Commission, by P. Oliver, J.-B. Laignelot and B. Burggraaf, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2010,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of point 7(a) of Annex I to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337').
- 2 The reference was made in proceedings between the Brussels Hoofdstedelijk Gewest (Brussels Capital Region) together with a number of other applicants and the Vlaams Gewest (Flemish Region) concerning a decision relating to the operation of Bruxelles-National Airport.

Legal context

European Union law

- 3 Article 1(2) of Directive 85/337 provides as follows:

'For the purposes of this Directive:

"project" means:

- the execution of construction works or of other installations or schemes,
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

...

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.'

- 4 The first subparagraph of Article 2(1) of Directive 85/337 provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects'.
- 5 The projects concerned are defined in Article 4 of Directive 85/337. That provision distinguishes between the projects listed in Annex I, which must be made subject to an environmental impact assessment, and the projects listed in Annex II, for which the Member States must determine, on the basis of a case-by-case examination or thresholds or criteria set by the Member State, whether they are to be made subject to such an assessment.
- 6 Point 7(a) of Annex I to Directive 85/337 refers to the 'construction ... of airports with a basic runway length of 2 100 m or more'.
- 7 The first indent of point 13 of Annex II to Directive 85/337 covers '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment'.

National law

- 8 The legislation applicable in the Flemish Region distinguishes between a 'planning permit', which authorises the execution

of certain works, and an 'environmental permit', which authorises the operation of an establishment that is classified as causing environmental nuisance.

- 9 The grant of an environmental permit, which is valid for a limited period of time, is governed by the Decree of the Flemish Parliament of 28 June 1985 on Environmental Permits, which was supplemented by an implementing order of the Flemish Government of 6 February 1991.
- 10 Since the entry into force on 1 May 1999 of a new Classification List, as amended by an order of the Flemish Government of 12 January 1999, 'sites for airports with a runway length ... of at least 1 900 metres' are classified in the category of establishments causing environmental nuisance, for which an environmental permit is required.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 11 Bruxelles-National Airport, situated in the Flemish Region, has three take-off and landing runways over 2 100 metres in length. It has existed for decades but its operation has been subject to the grant of an environmental permit only since 1999.
- 12 The first environmental permit was granted on 1 February 2000 for a period of five years. That permit, which laid down, inter alia, noise emission standards, was amended on three occasions with a view to a greater reduction in overall noise load. The Raad van State states that it does not appear from the documents submitted to it that an environmental impact assessment was carried out in connection with that permit or the subsequent amendments to it.
- 13 On 5 January 2004, The Brussels Airport Company NV submitted an environmental permit application for the continued operation of and alterations to the airport, involving the addition of parcels of land.
- 14 On 8 July 2004, the Permanent Delegation of the Provincial Council of Vlaams-Brabant granted the permit sought as regards the continued operation of the airport but rejected the application to extend it. The Permanent Delegation considered that an environmental impact assessment was unnecessary.
- 15 An administrative appeal was lodged against that decision. The applicants submitted inter alia that an environmental impact assessment report should have been annexed to the environmental permit application.
- 16 On 30 December 2004, the Flemish Minister for Public Works, Energy, the Environment and Nature confirmed the decision of the Permanent Delegation of the Provincial Council of Vlaams-Brabant. He considered that an environmental impact assessment was unnecessary under both Flemish legislation and Directive 85/337.
- 17 The Brussels Hoofdstedelijk Gewest and several other applicants brought an action before the Raad van State against that confirmatory decision. They submit that the decision is vitiated by an irregularity because the grant of the environmental permit was conditional upon an environmental impact assessment being carried out and that requirement was not met.
- 18 It was in those circumstances that the Raad van State decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

- (1) When separate development consents are required for, on the one hand, the infrastructure works for an airport with a basic runway length of 2 100 metres or more and, on the other hand, for the operation of that airport, and the latter development consent – the environmental permit – is granted only for a fixed period, should the term 'construction', referred to in point 7(a) of Annex I to [Directive 85/337], be interpreted as meaning that an environmental impact report should be compiled not only for the execution of the infrastructure works but also for the operation of the airport?
- (2) Is that mandatory environmental impact assessment also required for the renewal of the environmental permit for the airport, both in the case where that renewal is not accompanied by any change or extension to the operation, and in the case where such a change or extension is indeed intended?
- (3) Does it make a difference to the obligation to produce an environmental impact report, in the context of the renewal of an environmental permit for an airport, whether an environmental impact report was compiled earlier, in relation to a previous operational consent, and whether the airport was already in operation at the time when the requirement to produce an environmental impact report was introduced by the European or the national legislator?

Consideration of the questions referred

- 19 In order to answer those questions, which it is appropriate to consider together, it is necessary to ascertain whether the operation of an airport may constitute a 'project' within the meaning of Article 1(2) of Directive 85/337 and, if so, whether such a project falls within those listed in Annexes I and II to the directive.
- 20 As the Court observed at paragraph 23 of its judgment in Case C-2/07 *Abraham and Others* [2008] ECR I-1197, it is apparent from the very wording of Article 1(2) of Directive 85/337 that the term 'project' refers to works or physical interventions.

- 21 It is expressly stated in the order for reference that the measure at issue in the main proceedings is limited to the renewal of the existing consent to operate Bruxelles-National Airport and does not entail works or interventions which alter the physical aspect of the site.
- 22 However, some of the applicants in the main proceedings have argued that the concept of physical intervention must be broadly construed as encompassing any intervention in the natural surroundings. They rely on paragraphs 24 and 25 of the judgment in Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, in which the Court held that an activity such as mechanical cockle fishing is within the concept of ‘project’ as defined in the second indent of Article 1(2) of Directive 85/337.
- 23 That argument cannot be accepted. As the Advocate General points out at point 22 of his Opinion, the activity at issue in the case which gave rise to that judgment was comparable with the extraction of mineral resources, an activity which is specifically referred to in the second indent of Article 1(2) of Directive 85/337 and entails genuine physical changes to the sea bed.
- 24 It follows that the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a ‘project’ within the meaning of the second indent of Article 1(2) of Directive 85/337.
- 25 It should be added that Article 2(1) of Directive 85/337 does not, in any event, require that any project likely to have a significant effect on the environment be made subject to the environmental impact assessment provided for in that directive, but only those referred to in Annexes I and II to that directive (order in Case C-156/07 *Aiello and Others* [2008] ECR I-5215, paragraph 34).
- 26 It should be noted in that connection, as pointed out by the Advocate General at point 26 of his Opinion, that the term ‘construction’ used at point 7(a) of Annex I to Directive 85/337 is not in any way ambiguous and is to be understood as having its normal meaning, namely as referring to the carrying out of works not previously existing or of physical alterations to existing installations.
- 27 It is true that, in its case-law, the Court has given a broad interpretation of the concept of ‘construction’, accepting that works for the refurbishment of an existing road may be equivalent, due to their size and the manner in which they are carried out, to the construction of a new road (Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-6097, paragraph 36). Similarly, the Court has interpreted point 13 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337 as also encompassing works to alter the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself (*Abraham and Others*, paragraph 40).
- 28 However, it is clear from reading those judgments that each of the cases which gave rise to them involved physical works, which is not the case in the main proceedings according to the information provided by the Raad van State.
- 29 As the Advocate General points out at point 28 of his Opinion, while it is established case-law that the scope of Directive 85/337 is wide and its purpose very broad (see, inter alia, *Abraham and Others*, paragraph 32, and *Ecologistas en Acción-CODA*, paragraph 28), a purposive interpretation of the directive cannot, in any event, disregard the clearly expressed intention of the legislature of the European Union.
- 30 It follows that, in any event, the renewal of an existing consent to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a ‘construction’ within the meaning of point 7(a) of Annex I to Directive 85/337.
- 31 It should nevertheless be pointed out that in the proceedings before the Court, in particular at the hearing, some of the applicants in the main proceedings submitted that, since the expiry of the period for transposition of Directive 85/337, the infrastructure of Bruxelles-National Airport has undergone alteration works without an environmental impact assessment being carried out.
- 32 In that context, it should be noted that, according to the established case-law of the Court, in a case involving a permit, such as that at issue in the main proceedings, which does not formally concern an activity subject to an environmental impact assessment for the purposes of Annexes I and II to Directive 85/337, it may nevertheless be necessary for such an assessment to be carried out where that measure constitutes a stage in a procedure the ultimate purpose of which is to grant the right to proceed with an activity which constitutes a project within the meaning of Article 2(1) of the directive (see, to that effect, *Abraham and Others*, paragraph 25).
- 33 According to that same line of authority, where national law provides that the consent procedure is to be carried out in several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment (see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 53, and *Abraham and Others*, paragraph 26). It has also been held that a national measure which provides that an environmental impact assessment may be carried out only at the initial stage of the consent procedure, and not at a later stage in the procedure, would be incompatible with Directive 85/337 (see, to that effect, Case C-508/03 *Commission v United Kingdom* [2006] ECR I-3969, paragraphs 105 and 106).

- 34 In the present case, it is therefore necessary to point out to the Raad van State that it is for it to determine, in the light of the case-law cited at paragraphs 27, 32 and 33 above and on the basis of the national legislation applicable, whether a decision such as that at issue in the main proceedings can be regarded as a stage in a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the relevant provisions of Directive 85/337 to be carried out.
- 35 For the purposes of examining the facts, it is appropriate to remind the national court that the Court has already held that works to alter the infrastructure of an existing airport, without extension of the runway, are covered by point 13 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself (*Abraham and Others*, paragraph 40).
- 36 The Court has also stated that the objective of the European Union legislation cannot be circumvented by the splitting of projects and that failure to take account of their cumulative effect must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of Directive 85/337 (*Abraham and Others*, paragraph 27).
- 37 If it should prove to be the case that, since the entry into force of Directive 85/337, works or physical interventions which are to be regarded as a project within the meaning of the directive were carried out on the airport site without any assessment of their effects on the environment having been carried out at an earlier stage in the consent procedure, the national court would have to take account of the stage at which the operating permit was granted and ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at that stage of the procedure.
- 38 The answer to the questions referred is, therefore, that the second indent of Article 1(2) of Directive 85/337 and point 7 of Annex I to the directive are to be interpreted as meaning that:
- the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a ‘project’ or ‘construction’, respectively, within the meaning of those provisions;
 - however, it is for the national court to determine, on the basis of the national legislation applicable and taking account, where appropriate, of the cumulative effect of a number of works or interventions carried out since the entry into force of the directive, whether that permit forms part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the directive to be carried out. If no assessment of the environmental effects of such works or interventions was carried out at the earlier stage of the consent procedure, it would be for the national court to ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at the stage at which the operating permit was to be granted.

Costs

- 39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The second indent of Article 1(2) of, and point 7 of Annex 1 to, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, are to be interpreted as meaning that:

- **the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a ‘project’ or ‘construction’, respectively, within the meaning of those provisions;**
- **however, it is for the national court to determine, on the basis of the national legislation applicable and taking account, where appropriate, of the cumulative effect of a number of works or interventions carried out since the entry into force of the directive, whether that permit forms part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the directive to be carried out. If no assessment of the environmental effects of such works or interventions was carried out at the earlier stage in the consent procedure, it would be for the national court to ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at the stage at which the operating permit was to be granted.**

[Signatures]

* Language of the case: Dutch.