Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

21 March 2013*

(Assessment of the effects of certain projects on the environment — Directive 85/337/EEC — Articles 2(1) and 4(2) — Projects listed in Annex II — Extension works to the infrastructure of an airport — Examination on the basis of thresholds or criteria — Article 4(3) — Selection criteria — Annex III, point 2(g) — Densely populated areas)

In Case C-244/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 19 April 2012, received at the Court on 21 May 2012, in the proceedings

Salzburger Flughafen GmbH

v

Umweltsenat,

intervening parties:

Landesumweltanwaltschaft Salzburg,

Bundesministerin für Verkehr, Innovation und Technologie,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász (Rapporteur), D. Šváby and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Salzburger Flughafen GmbH, by G. Lebitsch, Rechtsanwalt,

— Landesumweltanwaltschaft Salzburg, by W. Wiener, Landesumweltanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

* Language of the case: German.

— the European Commission, by P. Oliver and D. Düsterhaus, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the relevant provisions of 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 request has been made in proceedings between Salzburger Flughafen GmbH ('Salzburger Flughafen') and the Umweltsenat (Administrative Chamber for Environmental Matters) concerning the obligation to subject certain projects which expand the infrastructure of the airport of Salzburg (Austria) to an environmental impact assessment.

Legal context

European Union law

3 Article 1 of Directive 85/337 provides:

'1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. 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;

…'

4 Article 2(1) of that directive provides:

'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. These projects are defined in Article 4.'

5 Under Article 3 of that directive:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— material assets and the cultural heritage,

— the interaction between the factors mentioned in the first, second and third indents.'

6 Article 4 of that directive is drafted as follows:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

…'

7 Annex I to Directive 85/337 lists the projects referred to in Article 4(1) of the directive, which must undergo a compulsory environmental assessment. Point 7(a) of Annex I to the directive refers to the '[c]onstruction … of airports … with a basic runway length of 2 100 m or more'.

8 Annex II to that directive lists the projects referred to in Article 4(2) thereof, in respect of which the Member States retain their discretion, in accordance with the conditions laid down in that article, as regards carrying out an environmental assessment. Point 10(d) of that annex concerns the '[c]onstruction of airfields (projects not included in Annex I)' and the first indent of point 13 of that annex refers to '[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'.

9 Annex III to Directive 85/337, which refers to the selection criteria set out in Article 4(3) thereof, provides in point 2, entitled 'Location of projects':

'The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:

…

— the absorption capacity of the natural environment, paying particular attention to the following areas:

…

(g) densely populated areas;

…'

Austrian law

10 Directive 85/337 was transposed into Austrian law by the Environmental Impact Assessment Act 2000 (Umweltverträglichkeitsprüfungsgesetz 2000), in the version applicable to the facts in the main proceedings (BGBl. I, 50/2002; 'the UVPG 2000').

11 Articles 1, 3 and 3a of the UVPG 2000 contain provisions concerning the object and content of environmental impact assessments, the principle in accordance with which the projects listed in Annex I to that law must be subject to such an assessment, the procedure and the conditions to be followed in that regard and the persons or entities authorised to request an assessment.

12 Thus, the projects which require an assessment are listed in Annex I to the UVPG 2000, in accordance with the principle stated in the provisions referred to above. Where there are changes to those projects, there must be an examination on a case-by-case basis above a certain threshold, with a view to carrying out an assessment. Column 1 of that annex, in point 14(d), refers, in that regard, to the following projects:

'Modification of airports, if this is expected to increase the number of aircraft movements (motor aircrafts, power gliders in powered flight or helicopters) by 20,000 or more per year…'

13 Operation of a civilian airport and all modifications to the extent of the operation limited by the licence require a 'civil airport licence' in accordance with Paragraph 68(1) of the Aviation Law (Luftfahrtgesetz) and an 'operating licence' under Paragraph 73(1) of that law. In addition, the construction, use and substantial modification of civilian ground installations require a licence in accordance with Paragraph 78(1) of that law.

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

14 Salzburger Flughafen operates Salzburg Airport, which has a runway of over 2 100 metres in length. On 30 July 2002, it applied for a permit to construct an additional terminal, which it justified on the ground that, in the light of the requirement to ensure full checks on hold luggage, the existing passenger handling facilities were no longer capable of handling peak volumes of passengers. By decision of 2 April 2003, the Landeshauptfrau von Salzburg (Head of Government of the Province of Salzburg), the competent administrative authority, issued the construction permit. The additional terminal was built in 2003/2004. It has been operational ever since.

15 In 2004, Salzburger Flughafen made further applications for expansion of the airport. They concerned, firstly, an area of approximately 90 000 m^2 in the south-western part of the present airport site for the construction of ancillary buildings, in particular warehouses, and the extension of vehicle parking areas and aircraft standing areas. Secondly, it applied to incorporate in that expansion further areas of almost 120 000 m^2 to the north west of the airport primarily for general aviation, the construction of hangars and vehicle parking and aircraft standing areas. It also sought authorisation to alter taxiways. The application did not involve any changes to the runway itself.

16 The fact that the airport is sited in an urban area, with, in addition, a high level of air pollution, and the expected effects on the environment led the Landesumweltanwaltschaft Salzburg (Provincial Legal Office for the Environment), on 13 March 2006, to request the Amt der Salzburger Landesregierung (Office of the Salzburg Federal Government; 'the Amt') to lay down a requirement for an

environmental assessment covering both the additional terminal and the expansion works to the airport infrastructure. Since the Amt rejected that request, the Landesumweltanwaltschaft Salzburg appealed against that decision to the Umweltsenat (Environmental Tribunal).

17 In its decision, the Umweltsenat found that both the extension of the airport infrastructure already in existence, following the construction and putting into operation of the additional terminal, and the expansion proposed in the permit applications require an environmental impact assessment, in accordance with the relevant provisions of the UVPG 2000, read in conjunction with Directive 85/337.

18 To justify its decision, that authority noted that if, in the context of the dispute in the main proceedings, the national legislation does not require any environmental impact assessment, since the threshold established, namely an increase in the number of aircraft movements of at least 20 000 per year, is not exceeded, that legislation only imperfectly transposes Directive 85/337. The UVPG 2000 establishes too high a threshold, so that changes to the infrastructure of small or medium-sized airports ought never, in practice, to give rise to an environmental impact assessment. In addition, the Umweltsenat noted that the national legislation at issue does not list sites requiring specific protection, whereas Directive 85/337 requires, under Annex III(2)(g) thereto, that special attention be paid to densely populated areas. The airport under consideration is near to the city of Salzburg.

19 The Umweltsenat therefore took the view that it was necessary to apply Directive 85/337 directly, because of the fact that the changes to the airport infrastructure can be regarded, in particular by reason of their nature, size and characteristics, as a modification of the airport itself, likely to increase its activity and aircraft traffic.

20 An appeal has been brought against that decision by Salzburger Flughafen before the Verwaltungsgerichtshof (Supreme Administrative Court).

21 The referring court notes that, in accordance with the case-law of the Court following from Cases C-2/07 *Abraham and Others* [2008] ECR I-1197 and C-275/09 *Brussels Hoofdstedelijk Gewest and Others* [2011] ECR I-1753, the relevant provisions of Annex II to Directive 85/337, read in conjunction with those of Annex I thereto, also encompass works to change the infrastructure of an existing airport. Furthermore, in order to avoid misuse of the European Union rules by splitting projects which, taken together, are likely to have significant effects on the environment, it is necessary to take into account the cumulative effect of such projects which have an objective and chronological link between them. The Verwaltungsgerichtshof is therefore of the opinion that the assessment of the environmental impact of the later project, namely the expansion of the airport area, must also take into account the impact of the earlier project, the construction of the additional terminal.

22 As regards the fact that the project at issue in the main proceedings, taken as a whole, appears to require an environmental impact assessment pursuant to the provisions of Directive 85/337 while the national legislation does not require such an assessment, the Verwaltungsgerichtshof observes that, in accordance with the case-law of the Court, the measure of discretion conferred on Member States by Article 4(2) of Directive 85/337 is limited by the obligation set out in Article 2(1) of the directive to make projects likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location, subject to an impact assessment. Thus, a Member State which establishes criteria or thresholds without taking into consideration the location of projects or which establishes them at a level which, in practice, means that all of a particular type of projects will be removed in advance from the obligation of carrying out an impact assessment exceeds the discretion which it has (*Abraham and Others*, paragraph 37; Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 53 and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 38).

23 As regards the monitoring of compliance with that discretion and the consequences if it is exceeded, the referring court points out that, in accordance with the case-law of the Court, where that discretion is exceeded by the legislative or administrative authorities of a Member State, individuals

may rely on Articles 2(1) and 4(2) of Directive 85/337 before the courts of a Member State against the national authorities and thus obtain an order that the national rules or measures which are incompatible with those provisions be set aside. In such a case, it follows from the judgments in *Kraaijeveld and Others* (paragraphs 59 to 61) and *WWF and Others* (paragraph 5 of the operative part) that it is for the authorities of a Member State to adopt, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

24 With regard to the direct effect of the relevant provisions of Directive 85/337, the referring court is of the opinion that, from the point of view of their content, those provisions are unconditional. As regards whether they are also sufficiently precise to be capable of direct application, it notes that the selection criteria laid down in Annex III to Directive 85/337 in any event state the limits of the discretion of the Member States under Article 4(2) of that directive. The rules at issue in the main proceedings do not take account of the criterion of location of the projects provided for in point 2(g) of Annex III to Directive 85/337. In addition, the threshold established in those rules means that it is, in practice, highly unlikely that there would be an environmental assessment for medium-sized or small airports. Thus, according to the referring court, not only does the legislation at issue in the main proceedings fail fully to transpose Directive 85/337, but, in addition, it manifestly fails to take account of the clear and sufficiently precise criteria laid down in Annex III to that directive.

25 Having regard to those considerations and to the fact that it rules at final instance, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does … Directive 85/337/EEC … preclude a national rule by which it is established that an environmental impact assessment for infrastructure works (not concerning the runway) at an airport, that is the construction of a terminal and the extension of the airport site to construct further facilities (in particular hangars, equipment buildings and parking areas), shall only be carried out if the annual number of aircraft movements is anticipated to increase by no less than 20 000?

In the event that Question 1 is answered in the affirmative:

2. In the absence of relevant national provisions, does Directive 85/337 require and allow for the direct application of its provisions to assess (taking due account of the objectives thereby pursued and the criteria set out in Annex III thereto) the environmental impact of a project — specified in Question 1 — which is covered by Annex II?’

Consideration of the questions referred

The first question

26 By its first question, the referring court asks, in essence, whether the provisions of Directive 85/337 preclude national legislation which makes projects which change the infrastructure of an airport and fall within the scope of Annex II to that directive subject to an environmental impact assessment only if those projects are likely to increase the number of aircraft movements by at least 20 000 per year.

27 In order to respond to that question, it is necessary to note that, as follows from the combined provisions of Article 4(2) of Directive 85/337 and the first indent of point 13 of Annex II thereto, any 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, the

Member States must determine on the basis of a case-by-case examination or of thresholds or criteria which they establish, whether such a project must be made subject to an environmental impact assessment.

28 In that regard, it must be borne in mind that, in accordance with the settled case-law of the Court, works to change the infrastructure of an existing airport, without extension of the runway, are likely to be covered by point 13 of Annex II 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 (see, to that effect, *Brussels Hoofdstedelijk Gewest*, paragraph 35 and the case-law cited).

29 As regards the establishment of thresholds or criteria to determine whether such a project must be made subject to an environmental impact assessment, it must be borne in mind that, indeed, Article 4(2)(b) of Directive 85/337 confers a measure of discretion on the Member States in that regard. However, that discretion is limited by the obligation set out in Article 2(1) of the directive to make projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment subject to an impact assessment (see, to that effect, *WWF and Others*, paragraph 36 and the case-law cited).

30 Thus, the criteria and/or thresholds mentioned in Article 4(2)(b) of Directive 85/337 are designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II to that directive which may be envisaged on the territory of a Member State (see, to that effect, *WWF and Others*, paragraph 37 and the case-law cited).

31 The Court has already held that a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of Directive 85/337 unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see, to that effect, *WWF and Others*, paragraph 38 and the case-law cited).

32 Finally, it is apparent from Article 4(3) of Directive 85/337 that for the establishment of thresholds or criteria under Article 4(2)(b), regard must be had to the relevant selection criteria established in Annex III to the directive. Those criteria include the absorption capacity of the natural environment and, in that regard, particular attention must be paid to densely populated areas.

33 It must be noted that a threshold such as that at issue in the main proceedings is incompatible with the general obligation laid down in Article 2(1) of that directive for the purposes of correct identification of projects likely to have significant effects on the environment.

34 As the referring court points out, the establishment of such a high threshold means that changes to the infrastructure of small or medium-sized airports can never, in practice, give rise to an environmental impact assessment, despite the fact, as the observation from the European Commission pertinently states, it cannot be excluded that such works may have significant effects on the environment.

35 Furthermore, by establishing such a threshold in order to decide on the need for an environmental assessment of projects such as those at issue in the main proceedings, the national legislation concerned, despite the obligation placed on Member States by Article 4(3) of Directive 85/337, takes into consideration only the quantitative aspect of the consequences of a project, without taking account of the other selection criteria in Annex III to that directive, particularly that laid down in point 2(g) of that annex, namely the population density of the area affected by the project. It is not in dispute that the airport whose infrastructure is affected by the changes at issue in the main proceedings is located near to the city of Salzburg.

36 Moreover, the referring court observes that, in the circumstances of the main proceedings, with a view to deciding whether an environmental assessment must be carried out, it is necessary to take account of the effects on the environment of both the earlier project concerning the construction of the additional terminal and the later project concerning the expansion of the airport area.

37 In that regard, in accordance with the case-law of the Court, it can be necessary to take account of the cumulative effect of projects in order to avoid a circumvention of the objective of the European Union legislation by the splitting of projects which, taken together, are likely to have significant effects on the environment (see, to that effect, *Brussels Hoofdstedelijk Gewest and Others*, paragraph 36 and the case-law cited). It is for the referring court to examine, in the light of that case-law, whether and to what extent the effects on the environment of the projects referred to in paragraph 15 of this judgment and the projects already carried out during 2003 and 2004 must be assessed as a whole.

38 Consequently, the answer to the first question is that Articles 2(1) and 4(2)(b) and (3) of Directive 85/337 preclude national legislation which makes projects which change the infrastructure of an airport and fall within the scope of Annex II to that directive subject to an environmental impact assessment only if those projects are likely to increase the number of aircraft movements by at least 20 000 per year.

The second question

39 By its second question, the referring court asks, in essence, whether, when a Member State makes an incorrect transposition of Directive 85/337, that directive requires an environmental impact assessment of projects such as those at issue in the main proceedings, which fall within the scope of Annex II thereto.

40 The question referred must be understood as asking whether, when a Member State, pursuant to Article 4(2)(b) of Directive 85/337, with regard to projects falling within the scope of Annex II thereto, establishes a threshold which is incompatible with the obligations laid down in Articles 2(1) and 4(3) of that directive, the provisions of Articles 2(1) and 4(2)(a) and (3) of the directive have direct effect, which means that the competent national authorities must ensure that it is first examined whether the projects concerned are likely to have significant effects on the environment and, if so, that an assessment of those effects is then undertaken.

41 In accordance with the case-law of the Court, if the discretion conferred on Member States by Article 4(2) of Directive 85/337, read in conjunction with Article 2(1) thereof has been exceeded, it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to that effect, *Kraaijeveld and Others*, paragraph 61, and *WWF and Others*, paragraphs 70 and 71).

42 The same conclusion applies to a situation such as that of the main proceedings, equivalent from the point of view of its effects to that described in the preceding paragraph of this judgment, in which the threshold established by the national legislation results in an incorrect transposition of Article 4(2)(b), read in conjunction with Articles 2(1) and 4(3) of Directive 85/337.

43 Consequently, in a situation such as that of the main proceedings, as the Commission rightly points out, when a Member State, on the basis of Article 4(2)(b) of Directive 85/337, has established a threshold which is likely to exempt in advance entire classes of projects from an environmental assessment, the national authorities are obliged to ensure, in accordance with Article 2(1) and Article 4(2)(a) and (3) of that directive, that it is determined, in each individual case, whether such an assessment must be undertaken and if so, to undertake that assessment.

44 However, the Austrian Government and Salzburger Flughafen dispute that conclusion, referring to Case C-201/02 *Wells* [2004] ECR I-723, in accordance with which the principle of legal certainty preludes an individual from relying on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party.

45 That objection cannot be accepted.

46 In the case which gave rise to the *Wells* judgment, the Court held, firstly, that it had to be recognised that it is possible for an individual to rely on the provisions of Directive 85/337 and, secondly, that the owners of the land at issue had to bear the consequences of the belated performance of the obligations of the Member State concerned which follow from that directive.

47 Thus, in the main proceedings, in the event that a decision finds that an environmental study is necessary, Salzburger Flughafen, as the user of the land in question, must also bear the consequences of such a decision.

48 Accordingly, the answer to the second question is that, when a Member State, pursuant to Article 4(2)(b) of Directive 85/337, with regard to projects falling within the scope of Annex II thereto, establishes a threshold which is incompatible with the obligations laid down in Articles 2(1) and 4(3) of that directive, the provisions of Articles 2(1) and 4(2)(a) and (3) of the directive have direct effect, which means that the competent national authorities must ensure that it is first examined whether the projects concerned are likely to have significant effects on the environment and, if so, that an assessment of those effects is then undertaken.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fifth Chamber) hereby rules:

1. **Articles 2(1) and 4(2)(b) and (3) of 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, preclude national legislation which makes projects which change the infrastructure of an airport and fall within the scope of Annex II to that directive subject to an environmental impact assessment only if those projects are likely to increase the number of aircraft movements by at least 20 000 per year.**

2. **When a Member State, pursuant to Article 4(2)(b) of Directive 85/337, as amended by Directive 97/11, with regard to projects falling within the scope of Annex II thereto, establishes a threshold which is incompatible with the obligations laid down in Articles 2(1) and 4(3) of that directive, the provisions of Articles 2(1) and 4(2)(a) and (3) of the directive have direct effect, which means that the competent national authorities must ensure that it is first examined whether the projects concerned are likely to have significant effects on the environment and, if so, that an assessment of those effects is then undertaken.**

[Signatures]