

OPINION OF ADVOCATE GENERALEAL

KOKOTT

delivered on 29 November 2007¹

I — Introduction

II — Legal framework

2. Article 1 of the EIA directive defines the subject-matter of the directive and some terms:

‘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.

1. This reference for a preliminary ruling concerns Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment² in its original version (‘the EIA directive’). It relates to works at Liège-Bierset Airport which are alleged to have promoted its use for air freight services and to have caused an increase in night flights. The issue is essentially under what conditions modifications to the infrastructure of an airport require an environmental impact assessment, and in particular whether an intended increase in air traffic is to be taken into consideration.

2. For the purposes of this Directive:

“project” means:

— the execution of construction works or of other installations or schemes,

1 — Original language: German.

2 — OJ 1985 L 175, p. 40.

- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;
- effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment with regard to their effects.

“developer” means:

These projects are defined in Article 4.’

the applicant for authorisation for a private project or the public authority which initiates a project;

4. Article 3 describes the subject-matter of the environmental impact assessment:

“development consent” means:

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

‘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:

3. ...’

— human beings, fauna and flora,

3. Article 2(1) defines the objective of the EIA directive:

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

‘1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant

— the inter-action between the factors mentioned in the first and second indents,

- material assets and the cultural heritage.’ ‘Construction of motorways, express roads ... and lines for long-distance railway traffic and of airports ⁽²⁾ with a basic runway length of 2 100 m or more.

5. Article 4 defines which projects are to be assessed:

...

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

⁽²⁾ For the purposes of this Directive, “airport” means airports which comply with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (Annex 14).’

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

7. Annex 14 to the Chicago Convention on International Civil Aviation contains standards for the whole area in which aircraft operate at an airport and when taking off and landing, that is to say for runways, taxiways and the air space at the airport. It also governs signals for the use of the airport by aircraft.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.’

8. Point 10(d) of Annex II mentions inter alia airfields:

6. Airports are listed in point 7 of Annex I:

‘Construction of roads, harbours, including fishing harbours, and airfields (projects not listed in Annex I)’.

9. Modifications to projects are covered by point 12 of Annex II:

type of project and of the environmental features likely to be affected;

‘Modifications to development projects included in Annex I and projects in Annex I undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than one year.’

- (b) the Member States consider that a developer may reasonably be required to compile this information having regard *inter alia* to current knowledge and methods of assessment.

10. Article 5 specifies what information is to be supplied in connection with an environmental impact assessment:

2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

‘1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

- a description of the project comprising information on the site, design and size of the project;
- a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or

- the data required to identify and assess the main effects which the project is likely to have on the environment;

- a non-technical summary of the information mentioned in indents 1 to 3.
- an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.

3. ...'

...

11. The information referred to in Article 5(1) is specified in Annex III:

4. A description ⁽¹⁾ of the likely significant effects of the proposed project on the environment resulting from:

'1. Description of the project, including in particular:

- the existence of the project,
- a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases,
- the use of natural resources,
- a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used,
- the emission of pollutants, the creation of nuisances and the elimination of waste;

and the description by the developer of the forecasting methods used to assess the effects on the environment.

regarding the contract concluded with Cargo Airlines Ltd ('CAL') on an unspecified date. However, the agreement entered into with the express courier company TNT on 26 February 1996 ('the agreement') is set out in detail.

...

(¹) This description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.'

12. According to the referring court, the directive was transposed largely verbatim into national law.

15. The parties who live near the airport submit that the agreement provided, *inter alia*, that:

- the entire length of the main runway (23L/05R) of the airport was to be fully operational and equipped with a landing system;

III — Facts, procedure and questions referred for a preliminary ruling

13. The main proceedings concern an action brought by individuals who live near Liège-Bierset Airport in Belgium. For some time that airport has had a runway well over 2 100 metres in length. Following an economic study carried out by a third party, the Region of Wallonia decided to develop air freight activity at the airport which would take place 24 hours a day.

- parallel runway (23R) was to be equipped by 1 March 1996 at the latest;

14. The Region of Wallonia and the Société de développement et de promotion de l'aéroport de Liège-Bierset (Liège-Bierset Airport Development and Promotion Company; 'SAB') entered into agreements with air freight undertakings. No further information has been conveyed to the Court

- parallel runway 23L/05 was to be widened to 45 metres and comply with standards sufficient to enable an Airbus 300 to manoeuvre;

- runway 23ML was to be equipped with two additional high-speed exits and the Air Traffic Control (ATC) tower was to be moved;

— a new apron of 18 hectares was to be sited directly opposite TNT's main sorting centre;

— the apron was to be extended towards the aircraft maintenance hangar and linked to the new high-speed exit;

— a control tower was to be erected, and a refuelling centre with a minimum capacity of one million litres was to be retained, with TNT having the option of requiring it to be enlarged;

— the airport was to be open 24 hours a day, 365 days a year, and an appropriate power source was to be available for TNT's operations (approximately 2 000 amperes) with a back-up system enabling an uninterrupted supply of energy to be maintained, which required permission to be granted for the construction of two 15 kV high-tension electricity substations.

16. The first night flights were carried out in 1996 by CAL. TNT began its own night flights in March 1998.

17. The individuals who live nearby complain of very serious noise pollution, mostly at night, and of its effects on sleep and health. They have instituted civil proceedings, seeking compensation for the damage suffered by reason of the use of the infrastructure referred to in the agreement and a ban on the use of those infrastructure.

18. They argue that no environmental impact assessment was carried out prior to the grant of the planning consent and operational authorisation necessary for carrying out the works referred to in the agreement; as a result of the lack of impact assessment, the consents necessary for the implementation of the agreement and, therefore, also the infrastructure covered by those consents and the use thereof are unlawful.

19. The Tribunal de première instance de Liège (Court of First Instance, Liège) granted the application partially; on appeal, the Cour d'appel de Liège (Court of Appeal, Liège) dismissed it. The Cour d'appel stated *inter alia* that the EIA directive contemplates and defines the notion of an airport by reference to the length of its runway and not by reference to the installations connected with the runway, such as hangars or a control tower. However, the runway was not substantially modified. The Cour d'appel added that Annex I to the directive refers to the

‘construction’ of an airport and Annex II applies to modifications to a project included in Annex I, that is to say modifications to the construction.

ment by Council Directive 97/11/EC of 3 March 1997?

20. In the appeal to the Cour de cassation (Court of Cassation), the individuals who live nearby challenge the interpretation by the Cour d’appel of the notion of a ‘project’.

- (2) Do works to modify the infrastructure of an existing airport with a view to adapting it to a projected increase in the number of nighttime and daytime flights, without extension of the runway, correspond to the notion of a “project”, for which an impact assessment is required within the terms of Articles 1, 2 and 4 of Directive 85/337, as applicable before its amendment by Directive 97/11?

21. The Cour de cassation has therefore referred the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Does an agreement between public authorities and a private undertaking, signed with a view to having that undertaking become operational at an airport with a runway more than 2 100 metres in length, featuring an exact description of work on the infrastructure to be carried out in relation to the adaptation of the runway, without its being extended, and the construction of a control tower with a view to permitting large aircraft to fly 24 hours per day and 365 days per year, and which provides for both nighttime and daytime flights with effect from the date on which the undertaking becomes operational at that airport constitute a project within the meaning 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 applicable before its amend-

- (3) Since a projected increase in the activity of an airport is not directly referred to in the annexes to Directive 85/337, must the Member State in question nevertheless take account of that increase when examining the potential environmental effect of modifications made to the infrastructure of that airport with a view to accommodating that increase in activity?’

22. For the individuals who live near the airport, the parties Abraham and Others, Beaujean and Others and Descamps and Others took part in the written procedure and in the oral procedure, each making separate submissions, as did the respondents SAB and TNT, the Member States Belgium and the Czech Republic, and the Commission.

IV — Legal assessment

subject to an assessment with regard to their effects.³

23. Under Article 4(1) of the EIA directive and point 7 of Annex I, development consent for the construction of airports with a basic runway length of 2 100 m or more is necessarily subject to an environmental impact assessment.

24. Under Article 4(2) of the EIA directive and points 10 and 12 of Annex II, modifications to such projects and the construction of airfields are not made subject to an assessment on a mandatory basis, but only where the Member States consider that their characteristics so require. To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment.

25. The Court has consistently held that Article 4(2) of the EIA directive confers on Member States a measure of discretion, the limits of which are to be found in the obligation set out in Article 2(1) of the EIA directive that projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made

26. Against this background, the questions asked by the Cour de cassation relate, first of all, to the significance of the agreement regarding the adaptation of the airport to the requirements of freight traffic and, secondly, to whether modifications to an airport which do not affect the runway may be regarded as a project subject to an assessment and whether the airport's activity is to be taken into account in assessing its effects on the environment.

27. Since the interpretation and application of the EIA directive must be guided by the objective laid down in Article 2(1) that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to an assessment with regard to their effects,⁴ the questions should be answered in reverse order.

3 — Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50; Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paragraph 64; Case C-117/02 *Commission v Portugal* [2004] ECR I-5517, paragraph 82; Case C-83/03 *Commission v Italy* [2005] ECR I-4747, paragraph 19; and Case C-121/03 *Commission v Spain* [2005] ECR I-7569, paragraph 87.

4 — Case C-486/04 *Commission v Italy* [2006] ECR I-11025, paragraph 36. See also the judgments cited in footnote 3.

28. I will therefore first examine, under A, whether an airport's activity or an increase in its activity is to be taken into account in assessing its effects on the environment. In the light of the answer to that question, the second question will then be considered, under B, regarding the extent to which modifications to an airport are to be regarded as a project subject to an assessment for the purposes of the EIA directive. Lastly, under C, I will look at the first question, which concerns a specific feature of the contested works, namely that they were first laid down in an agreement. The question therefore arises as to how the agreement is to be classified in the EIA directive's assessment system, in particular whether the effects of agreed works on the environment should possibly have been assessed.

A — *The third question*

29. By the third question, the referring court seeks to ascertain whether under the EIA directive air traffic at an airport or an increase in traffic is to be taken into account among the effects on the environment. The basis for the question is the claim that the modifications to the infrastructure of Liège-Bierset Airport have resulted in an increase in activity at the airport.

30. The doubts of the Cour de cassation are based on the fact that an increase in an airport's activity is not expressly mentioned in the EIA directive. Nevertheless, it is clear from the directive's provisions that it is to be taken into account.

31. Under Article 3 of the EIA directive the environmental impact assessment extends to the direct and indirect effects of a project. The rules on the information to be provided by the developer under Article 5(1) of the EIA directive show that the notion of indirect effects is to be construed broadly and in particular includes the effects of the operation of a project. Thus, the footnote to point 4 of Annex III states that the description of the effects should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project. Under the third indent of point 1 of Annex III, the estimate of effects includes, by type and quantity, expected residues and emissions resulting from the *operation* of the project, that is to say from the activity that takes place.

32. It is true that the information under Article 5(1) and Annex III is necessary only where the Member States consider that the information is relevant and that a developer

may reasonably be required to compile that information. However, the discretion thus conferred on the Member States is not unlimited.⁵

B — *The second question*

33. In the case of an airport, the type and extent of the proposed air traffic and the resulting effects on the environment are relevant. The developer can also as a rule be expected to provide that information. Failure to require information on air traffic or on the effects of increased air traffic would therefore be incompatible with the EIA directive.

36. The second question seeks to ascertain whether modifications to the infrastructure of an existing airport require an environmental impact assessment if they do not include any extension of the runway. It therefore concerns the criteria for determining whether modifications to the infrastructure of an airport require an environmental impact assessment.

The construction of an airport under point 7 of Annex I to the EIA directive

34. The information thus to be provided on an intended increase in air traffic is to be taken into account in the development consent procedure pursuant to Article 8 of the EIA directive.

37. Under Article 4(1) of the EIA directive and point 7 of Annex I, the construction of airports with a basic runway length of 2 100 m or more requires an environmental impact assessment.

35. The answer to the third question must therefore be that the effects of modifications to the infrastructure of an airport on the environment for the purposes of the EIA directive include the increase in the airport's activity which is thereby sought.

38. Although Liège-Bierset Airport already existed before the contested works were agreed and carried out, Beaujean and Others take the view that those works constitute the construction of an airport. The proposed renovation of the main runway, the introduction of a landing system for it and the widening of the parallel runway to 45 metres

⁵ — Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 37.

amount to the construction of a new runway. They add that the works allowed a significant increase in freight volume at the airport (by a factor of 464 between 1994 and 1998). Descamps and Others take the same view and also stress that the works were required for night operation of the airport, which had previously been used in the daytime.

39. A judgment on a Spanish railway project suggests that a new project may exist even if there are existing installations.⁶ In that judgment, the Court held that improving an already existing railway line by doubling the original single track was not to be regarded as merely modifying an earlier project for the purposes of point 12 of Annex II to the EIA directive, but as the construction of a line for long-distance railway traffic under point 7 of Annex I. It based its position on the likely significant effects of that project on the environment.

40. In principle this idea may be applied to airport projects. Whilst point 7 of Annex I to the EIA directive does mention only the length of the runway as a criterion for the definition of airports, an airport's effects on the environment, which are the decisive issue in accordance with the directive's objective, also depend on other factors.

41. The length of the runway determines the types of aircraft that are able to use the airport and thus the likely effects of individual takeoffs and landings. Larger aircraft require longer runways.

42. However, the number of possible aircraft movements is dependent on other infrastructure elements, for example on the installation of electronic takeoff and landing support systems, and on aircraft handling facilities, available parking bays and air space capacity.

43. How much an airport is actually used, that is to say demand for air transport services, also depends on its links with the relevant demand markets and on the competitive position in relation to other comparable service providers.

44. Nevertheless, construction of an airport can include only works which at least concern parts of the airport. The elements

6 — Case C-227/01 *Commission v Spain* [2004] ECR I-8253, paragraph 46 et seq.

which form part of an airport can be seen primarily from the definition contained in Annex 14 to the Convention on International Civil Aviation, to which point 7 of Annex I to the EIA directive refers.

airport under point 12 of Annex II. Works in connection with an existing airport can therefore be regarded as the construction of an airport only where they are equivalent to the construction of a new airport in terms of their effects on the environment.

45. Since that legal instrument does not, however, concern the effects of airports on the environment, but their safety, the notion of an airport for the purposes of the EIA directive must also include installations with environmental relevance which are not covered in Annex 14 to the Convention but are inseparably linked with the core elements defined therein. In this respect, regard should be had above all to passenger and freight terminal buildings.

48. Consequently, significant extensions to runways which make the airport useable by types of aircraft with much greater effects on the environment, or realignments of runways which result in different takeoff and landing flight paths, might, in particular, be works in connection with existing airports which are to be regarded as the construction of an airport.

46. On the other hand, installations which might have been attracted by the air traffic, but have a stronger link to other project categories, such as ground transport connections, hotels, and office and commercial space, should not be attributed to the airport.

49. However, it cannot be ruled out either that in exceptional cases works which do not relate directly to the length and alignment of runways increase the airport's capacity so much that they are equivalent to the construction of a new airport. If the airport was originally jammed for a long time by a few incoming flights because of insufficient handling capacity and parking bays, additional capacity in those areas may give rise to a significant increase in traffic volume. This could be the case in particular with works to convert former military airfields with long runways for civil use.

47. A distinction must also be drawn vis-à-vis *modifications* to the construction of an

50. It cannot be assessed on the basis of the information available to the Court whether the contested works at Liège-Bierset Airport were, in extent, a new construction. The decisive factor is whether the works increased the airport's capacity so much that the effects of the expansion on the environment are to be treated as equivalent to the construction of a new airport.

51. Consideration must be given in particular to the claim that as a result of these works alone the freight volume increased by a factor of 464 and night operation was made possible. In particular, an extension of operating times can have significant effects on the environment.

52. It must be stated in summary that modifications to the infrastructure of an existing airport with a basic runway length of 2 100 m or more are to be regarded as the construction of an airport within the meaning of point 7 of Annex I and are therefore necessarily to be made subject to an environmental impact assessment if they are equivalent to the construction of a new airport in terms of their effects on the environment.

Modifications to an airport under point 12 of Annex II and point 7 of Annex I to the EIA directive

53. If the contested works are not to be regarded as the construction of an airport within the meaning of point 7 of Annex I to the EIA directive, an obligation to carry out an environmental impact assessment may follow from Article 4(2) of the EIA directive in conjunction with point 12 of Annex II. This presupposes, first of all, that the works are to be regarded as modifications to a project under Annex I.

54. However, Belgium, SAB and TNT stress the view that modifications to existing airports are not covered by the EIA directive. The wording of point 7 of Annex I and point 12 of Annex II — modifications to the construction of an airport with a basic runway length of 2 100 m or more — shows that only modifications in the course of the original construction process would be covered. If modifications to the completed airport were also meant, point 7 of Annex I would refer not to the construction of an airport, but only to the airport, as in the case of the other types of project mentioned in Annex I, for example refineries, thermal power stations or waste-disposal installations.

55. Nevertheless, this interpretation, which is not supported by the Commission, the Czech Republic and the individuals living near the airport, is not compelling. The spirit and purpose of the EIA directive require, rather, the use of the term ‘construction’ to be understood as referring to the fact that, in accordance with the definition of project under Article 1(2), a project within the meaning of the EIA directive includes the execution of installations or other interventions in the natural surroundings and landscape, but not mere changes in the use of existing installations.⁷

56. Under Article 1(1) and Article 2(1) and the first, fifth, sixth, eighth and eleventh recitals, the fundamental objective of the directive is that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location should be made subject to an assessment with regard to their effects.⁸

57. That objective would not be achieved if in the case of the transport infrastructure projects mentioned in point 7 of Annex I, in particular airports, assessment

were restricted exclusively to the original construction process. Works following the construction of an airport can also have significant effects on the environment.

58. The Court thus not only takes the general view that the EIA directive has a very wide scope and a very broad purpose,⁹ but it also specifically gives a broad interpretation to the notion of modifications to a project under point 12 of Annex II. It has extended it to projects included in Annex II, even though point 12 of Annex II refers expressly only to projects included in Annex I.¹⁰

59. In the judgment in *WWF and Others*, it applied that case-law to the restructuring of an airport which did not reach the necessary dimensions for a mandatory impact assessment under point 7 of Annex 1 either before or after modification. The restructuring of the airport could not be excluded

7 — In principle the effects of possible uses on the environment should have been assessed when an installation was constructed so that the results of that assessment can be used in decisions on subsequent changes of use.

8 — See *Linster* (cited in footnote 5), paragraph 52; *Commission v Spain* (cited in footnote 6), paragraph 47; and the judgments cited in footnote 3.

9 — *Kraaijeveld and Others* (cited in footnote 3), paragraphs 31 and 39, and *Commission v Spain* (cited in footnote 6), paragraph 46.

10 — *Kraaijeveld and Others* (cited in footnote 3), paragraph 40, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 40.

from the scope of the EIA directive from the outset, irrespective of the likely effects on the environment.¹¹

extended. Belgium, SAB and TNT consider this to be ruled out because the EIA directive refers only to the criterion of the length of an airport's runway.

60. Therefore, as even modifications to smaller airports in principle fall within the scope of the EIA directive, the directive must — as the Commission argues — be applied *a fortiori* to modifications to larger airports whose construction would necessarily be subject to an assessment.

61. In contrast to the works to which the judgment in *WWF and Others* relates, however, no runways were extended in the present case. The runway-related works evidently amounted only to making the runway operational, the installation of a landing system, the widening of a parallel runway and the construction of two exits.

62. The question referred therefore expressly seeks to ascertain whether a project is subject to an assessment even where runways are not

63. However, as the Commission also argues, that criterion serves only to distinguish between larger projects, which must be assessed in any event, and smaller projects, which are subject to an assessment only if they are likely to have significant effects on the environment.¹² It is therefore such likely effects and not the extension of a runway that determine whether an assessment is required. An extension of the runway is only an important — in some cases even compelling — indication of significant effects on the environment. Other aspects of a project should not be disregarded, however.

64. In summary it should be stated that modifications to the infrastructure of an existing airport with a basic runway length of 2 100 m or more which are not to be treated as equivalent to the construction of a new airport must be assessed with regard to their effects on the environment pursuant to Article 4(2) of the EIA directive and point 7 of Annex I and point 12 of Annex II thereto if they are likely to have significant effects on the environment by virtue of their nature, size or local factors.

11 — *WWF and Others* (cited in footnote 10), paragraph 49. This is made even clearer in the Opinion of Advocate General Mischo in that case, point 43.

12 — See point 23 et seq. above.

C — *The first question*

consent for a project. If a project's effects on the environment must be assessed under the EIA directive, that assessment must, under Article 2(1), be conducted before consent is given.

1. The agreement as a project

65. According to the wording of the first question, the referring court seems to want to know whether an agreement may be regarded as a project within the meaning of the EIA directive.

68. The Czech Republic and the Commission believe that it is possible to regard an agreement as development consent if under national law it has the effect of development consent. In accordance with Article 1(2) the agreement would therefore have to contain the decision of the competent authority or authorities which entitles the developer to proceed with the project.

66. However, as the parties rightly agree, an agreement as such cannot be treated as equivalent to the execution of construction works or of other installations or schemes or to other interventions in the natural surroundings and landscape, as required by the definition of project under Article 1(2) of the EIA directive, nor are agreements referred to in Annexes I and II as projects. Whilst an agreement may relate to such projects, its conclusion is not a project.

69. According to Descamps and Others, TNT, SAB and Belgium, however, the agreement does not grant any right to build. The projects described required official consents, which is even expressly acknowledged in the agreement.

2. The agreement as development consent

67. Nevertheless, some of the parties debate whether the agreement is the development

70. On the other hand, the Commission in particular points out a further possibility which may in principle lead to an agreement being regarded as development consent. The Court has inferred from the scheme and the objectives of the EIA directive that a decision on development consent may involve several stages, which are capable in turn of giving rise to a requirement for an impact

assessment.¹³ The need for further consents does not therefore necessarily mean that an environmental impact assessment does not have to be carried out at an early stage, even possibly at the first stage.¹⁴ As is clear from the first recital in the preamble to the EIA directive, the competent authority is to take account of the environmental effects of the project in question at the earliest possible stage in the decision-making process.¹⁵

EIA directive that is carried out in several stages where several successive decisions are necessary under national law in order to approve a project.¹⁷ However, Belgium explains in another context that the agreement is not a legal requirement for the planned works. If that submission is correct, the agreement is not part of a consent procedure carried out in several stages within the meaning of the previous case-law.

71. In accordance with this case-law, the EIA directive also covers acts which fall within the scope of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.¹⁶ The argument put forward by Belgium, SAB and TNT that the possible applicability of Directive 2001/42 *ratione materiae* precludes the application of the EIA directive to the agreement cannot therefore hold.

74. The question therefore arises whether decision-making stages for which no provision is made in law can also form part of a consent procedure carried out in several stages.

72. Consequently, it must be examined whether the agreement is to be regarded as part of a consent procedure carried out in several stages.

73. The Court has hitherto accepted a consent procedure for the purposes of the

75. The aim of environmental impact assessment is for the decision on a project to be taken with knowledge of its effects on the environment and on the basis of public participation. Investigation of the environmental effects makes it possible, in accordance with the first recital in the preamble to the EIA directive and the precautionary principle under Article 174(2) of the Treaty, to prevent the creation of pollution or nuisances where possible, rather than subsequently trying to counteract them. The requirement of public participation implies

13 — Case C-290/03 *Barker* [2006] ECR I-3949, paragraph 45.

14 — Case C-201/02 *Wells* [2004] ECR I-723, paragraph 52.

15 — *Wells* (cited in footnote 14), paragraph 51.

16 — OJ 2001 L 197, p. 30.

17 — *Wells* (cited in footnote 14), paragraph 52.

that the participation can still influence the decision on the project.¹⁸

clause 8(c) or 9 of the agreement — may also limit discretion.

76. Although the EIA directive does make a formal link between the environmental impact assessment and the notion of development consent, it would not be able to achieve its aim if the decision on a project were *de facto* already taken before any formal consent procedure was initiated.

79. The question whether the agreement in that form restricts the decision of the competent authorities, as is claimed in particular by Abraham and Others and Beaujean and Others, is one of national law which the national courts with jurisdiction must examine.

77. The agreement should therefore be regarded as the first stage of a consent procedure carried out in several stages if and in so far as it limits the discretion of the competent national authorities in subsequent consent procedures.

3. The agreement as a link between sub-projects

78. It cannot therefore only matter whether the discretion is formally unimpaired, as several of the parties claim. It is questionable whether an independent and impartial administrative decision taking full account of any environmental impact assessment and of public participation can be made if the bodies with political responsibility have decided clearly in favour of the project. Liability for damages as a result of failure to obtain consents — as might be provided for under

80. If the agreement does not impair the discretion of the authorities competent to grant consent, it may nevertheless have a function in the context of an environmental impact assessment which is at least intimated in the order for reference and is highlighted in the submissions made by Abraham and Others in particular. According to the referring court, the carrying out of a series of works is involved, entailing large-scale modifications to the structure of an airport, the runway of which is longer than 2 100 metres.¹⁹

18 — Cf. Case T-178/05 *United Kingdom v Commission* [2005] ECR II-4807, paragraph 57, on Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32).

19 — See p. 154 of the order for reference.

81. The question of taking a series of individual projects as a whole is therefore of interest because the individual works which were agreed apparently did not separately reach the threshold which would have made an environmental impact assessment necessary. Nevertheless, the individuals who live near the airport argue that, taken together, those works have significant (detrimental) effects on the environment.

82. The Court has already stated that it would not be compatible with the EIA directive to consider several similar projects or different sections of a track in isolation only, without taking into account their cumulative effect.²⁰ This is consistent with Article 5(1) and point 4 of Annex III, which require a description of cumulative effects on the environment. Those cumulative effects are, under Article 8, to be taken into consideration in the decision on the project.

83. The present case involves several different subprojects which are, however, linked together as an overall project by the agreement with the aim of enabling Liège-Bierset Airport to be used for certain forms of freight traffic. Even if the subprojects are not the subject of a joint decision on development consent, this does not mean that the subprojects can be considered in isolation. In each decision regard must be had and

due consideration given to the cumulative effects of the subprojects in the context of the overall project.

84. Lastly it must be pointed out that if an environmental impact assessment were required, it would not necessarily have to relate expressly to the agreement or the subprojects. It cannot be ruled out that the effects on the environment of an increase in air traffic, including the use of Liège-Bierset Airport at night, had already been adequately assessed in other procedures. The parties and the lower court mention various planning decisions and programmes in this regard. If these were based on an adequate study of the effects on the environment with public participation, no new assessment would have been required later.²¹

4. Interim conclusion

85. In summary, it must be held with regard to the first question that an agreement

20 — *Commission v Ireland* (cited in footnote 3), paragraph 76, and *Commission v Spain* (cited in footnote 6), paragraph 53.

21 — See Case C-431/92 *Commission v Germany* (*Großkrotzenburg*) [1995] ECR I-2189, paragraph 41 et seq., and *Commission v Spain* (cited in footnote 6), paragraph 56.

between public authorities and a private undertaking, signed with a view to having that undertaking become operational at an airport with a runway more than 2100 metres in length, featuring an exact description of work on the infrastructure to be carried out in relation to the adaptation of the runway, without its being extended, and the construction of a control tower with a view to permitting large aircraft to fly 24 hours per day and 365 days per year, and which provides for both nighttime and daytime flights with effect from the date on which the undertaking becomes operational at that airport:

- does not constitute a project within the meaning of the EIA directive,
- may, however, as the first stage in a consent procedure carried out in several stages, require an environmental impact assessment if and in so far as it limits the discretion of the competent national authorities in subsequent consent procedures, and
- links together the subprojects included as an overall project whose effects are to be taken into consideration as a whole in the context of the development consents for parts thereof.

V — Conclusion

86. I therefore suggest that the Court give the following answers:

The third question:

The effects of modifications to the infrastructure of an airport on the environment for the purposes 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 include the increase in the airport's activity which is thereby sought.

The second question:

Modifications to the infrastructure of an existing airport with a basic runway length of 2 100 m or more are to be regarded as the construction of an airport within the meaning of point 7 of Annex I to Directive 85/337 and are therefore necessarily to be made subject to an environmental impact assessment pursuant to Article 4(1) of that directive if they are equivalent to the construction of a new airport in terms of their effects on the environment.

If modifications to the infrastructure of an existing airport with a basic runway length of 2 100 m or more are not to be treated as equivalent to the construction of a new airport, they must be assessed with regard to their effects on the environment pursuant to Article 4(2) of Directive 85/337 and point 7 of Annex I and point 12 of Annex II thereto if they are likely to have significant effects on the environment by virtue of their nature, size or local factors.

The first question:

An agreement between public authorities and a private undertaking, signed with a view to having that undertaking become operational at an airport with a runway more than 2 100 metres in length, featuring an exact description of work on the infrastructure to be carried out in relation to the adaptation of the runway, without its being extended, and the construction of a control tower with a view to permitting large aircraft to fly 24 hours per day and 365 days per year,

and which provides for both nighttime and daytime flights with effect from the date on which the undertaking becomes operational at that airport:

- is not a project within the meaning of Directive 85/337,
- may, however, as the first stage in a consent procedure carried out in several stages, require an environmental impact assessment if and in so far as it limits the discretion of the competent national authorities in subsequent consent procedures, and
- links together the subprojects included as an overall project whose effects are to be taken into consideration as a whole in the context of the development consents for parts thereof.