OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 17 November 2010 [1]

1. As is well known, one of the major difficulties arising in connection with environmental impact assessments is that of interpreting the list of activities in the Annexes to the directive governing that area which may or must be subject to the procedure leading to such an assessment. In the present case, concerning Brussels Airport, the Court must rule on the concept of the 'construction' of an airport. It must be ascertained, in particular, whether the operation of an existing airport may be said to fall within the definition of a 'construction' where it has not undergone any physical alterations.

I — Legislative context

2. Environmental impact assessments are governed by Directive 85/337/EEC [2] ('the Directive'). In particular, the version of the Directive applicable to the facts of the present case is that resulting from the amendments made to it by Directive 97/11/EC. [3]

3. Article 1(2) of the Directive sets out the following definitions:

'…

"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;

…

1 — Original language: Italian.

2 — 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).

3 — Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (OJ 1997 L 73, p. 5).

"development consent" means:

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

…'

4. Annexes I and II to the Directive contain detailed lists of various types of project. Article 4 of the Directive, in general, provides that the projects listed in Annex I must always be made subject to an environmental impact assessment. On the other hand, as regards the projects listed in Annex II, the Member States must determine, on the basis of a case-by-case examination or thresholds or criteria, which projects are to be made subject to an environmental impact assessment.

5. Annex I, which contains the list of projects for which an environmental impact assessment is always necessary, refers in point 7(a) to the 'construction of … airports with a basic runway length of 2 100 m or more'. [4]

4 — A note to the text states that, for the purposes of the Directive, "airport' means airports which comply with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organisation'. In any event, in this case the parties all agree that Brussels Airport falls under that definition of an 'airport'.

6. Annex II, relating to projects for which an impact assessment may be required, but is not necessarily mandatory, refers in point 10(d) to the 'construction of airfields (projects not included in Annex I)' and, in point 13, to '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'.

II — Facts, the proceedings before the national court and the questions referred

7. The dispute before the referring court concerns Brussels Airport. This airport has three runways and is located entirely within the territory of the Flemish Region (Vlaamse Gewest).

8. Under the legislation currently in force in the Flemish Region, the operation of an airport such as that in question requires an 'environmental permit' (milieuvergunning). This is an administrative authorisation of limited duration, valid at most for a period of 20 years, which has been mandatory for airports since 1999. There is no provision under European Union law for such an authorisation and it is therefore an instrument for environmental protection introduced independently by Belgium.

9. In other words, the present case concerns two separate authorisation procedures the purpose of which is to protect the environment: the *environmental permit procedure*, provided for only under national law, and the *environmental impact assessment procedure*, provided for under European Union law and, therefore, also under the national law transposing the Directive.

10. Brussels Airport, which has existed for many decades, was granted an initial environmental permit, for a period of five years, in 2000. That permit was renewed in 2004, *without any change to the method of operation,* for a period of 20 years. As is apparent from the order for reference and was confirmed at the hearing, during the administrative procedure the possibility of carrying out certain structural alterations to the airport was considered. [5] However, that possibility was ruled out by the national authorities, which therefore renewed the permit, leaving the airport's method of operation unchanged. The measure contested before the national court is the decision to renew the permit.

11. In the proceedings before the referring court, the main argument relied on by the numerous applicants is that the renewal of the environmental permit should have been accompanied by an environmental impact assessment in accordance with the Directive. It is in these circumstances that the Raad van State (Belgian Council of State) decided to stay the proceedings and refer the following questions to the Court 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 only granted for a fixed period, should the term "construction", referred to in point 7(a) of Annex I to [Directive 85/337/EEC], as amended by [Directive 97/11/EC], 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

5 — In particular, in its written observations and at the hearing, The Brussels Airport Company, which operates the airport, referred to the fact that, during an initial stage of the procedure, it was required to construct a taxiway and to install ILS instrument flight systems on pre-existing runways: however, both those requirements were withdrawn prior to the adoption of the final measure. For its part, as is apparent from the order for reference, that company applied for an extension of the surface area of the airport: this application was in turn rejected. It is for these reasons that, according to the national authorities, there was no need to carry out an environmental impact assessment.

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?'

12. The order for reference was lodged at the Court Registry on 21 July 2009. The hearing was held on 6 October 2010.

III — Analysis

A — *Preliminary observations*

13. Although the Raad van State did not frame them in this manner, a reading of the questions clearly shows that Questions 2 and 3 are subordinate to Question 1.

14. By Question 1, as has been seen, the Court is asked to clarify whether the term 'construction of airports' also encompasses the simple operation of an airport. On the assumption that Question 1 has been answered in the affirmative and that, accordingly, in a case such as this, the environmental permit required under Belgian law for the operation of an airport must necessarily be accompanied by an environmental impact assessment in accordance with the Directive, Questions 2 and 3 ask whether the following may be of importance:

(a) the fact that the application for an environmental permit is simply an application for renewal, without any change to the operating conditions (Question 2);

(b) the fact that an environmental impact report was compiled in relation to a previous application for an operational permit (the first part of Question 3);

(c) the fact that the airport was already in operation before the entry into force of the provisions requiring an environmental impact assessment (the second part of Question 3).

15. If the answer to Question 1 is in the negative, that is, if it were to be found that the simple operation of an airport does not fall within the definition of 'construction' provided in

Annex I to the Directive, it will not therefore be necessary to answer Questions 2 and 3.

B — *The first question*

1. The positions of the parties

16. The main argument relied on by the applicants for the annulment of the permit that is challenged before the referring court is, as has been seen, that an environmental impact assessment should have been carried out before the environmental permit to operate the airport was granted. To that end, both before the national court and this Court, the applicants in the main proceedings have placed particular emphasis on the requirement, which is also consistently confirmed by the case-law, to interpret the Directive broadly, in order to fully achieve the environmental objectives pursued by the legislator. Such a broad purposive interpretation would make it possible to regard a permit which, in itself, relates only to the operation of the airport as a permit for the 'construction' of an airport.

17. In that connection, the applicants also refer to the case-law of the Court on the need to ensure that the environmental impact assessment covers not only the environmental consequences of the specific activities covered by the permit but also those which may result from it indirectly.

18. The defendants in the main proceedings, whose arguments are supported before this Court by the Austrian and Italian Governments and, to a large extent, by the Commission, stress that the activity of the 'construction' of an airport entails the execution of construction works in a physical sense, so that it cannot include the simple 'operation' of the airport itself.

2. Assessment

(a) Whether an environmental impact assessment is necessary

19. In general, in order to determine whether a given activity should be made subject to an environmental impact assessment in accordance with the Directive, it is necessary to carry out a two-stage assessment. It must first be determined whether the activity

concerned constitutes a 'project' within the meaning of Article 1(2) of the Directive. If it does, it is then necessary to ascertain whether that activity is one of those listed in Annexes I and II to the Directive. An impact assessment must be carried out only in relation to the activities specifically indicated, which are listed exhaustively. [6]

(i) Whether the authorised activity constitutes a 'project'

20. In the present case, it should be recalled, the only activity authorised by the national authorities is the *operation* of Brussels Airport, which does not extend to any physical intervention to alter the existing structure of the airport.

21. In my opinion, those activities do not constitute a 'project' within the meaning of the Directive. The very concept of a 'project', as defined in Article 1 of the Directive, entails the carrying out of activities *which alter the physical reality of a specific place.* This is also apparent from the case-law, according to which 'the term "project" *refers to works or physical interventions*'. [7]

22. Some of the parties have referred to, as a precedent which would permit a broader concept of 'project' to be accepted, the judgment in the '*Waddenzee*' case (Case C-127/02), in which the Court held that the activity of mechanical cockle fishing constituted a 'project' within the meaning of the Directive. [8] While that judgment appears prima facie to support the position of the applicants in the main proceedings, it does not alter my observation in the previous paragraph. In the '*Waddenzee*' case, which did not, in any event, concern the environmental impact assessment Directive but the 'Habitats' Directive, [9] the parties did not dispute that mechanical cockle fishing could be regarded as a 'project' within the meaning of Directive 85/337, apparently because of the effects on the seabed of that activity, which is comparable to the 'extraction of mineral resources' specifically referred to in Article 1(2) of the Directive. [10] Moreover, mechanical fishing of that kind entailed genuine physical changes to the environment,

6 — Order in Case C-156/07 *Aiello and Others* [2008] ECR I-5215, paragraph 34.

7 — Case C-2/07 *Abraham and Others* [2008] ECR I-1197, paragraph 23. Emphasis added.

8 — Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraphs 24 to 25.

9 — Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

10 — See, in that connection, the Opinion of Advocate General Kokott in Case C-127/02 [2004] ECR I-7405, paragraph 31.

since it was carried out by scraping several centimetres from the seabed. [11]

23. On the other hand, as has been seen, nothing similar occurs in this case, since the permit does not entail any change to the physical aspect of Brussels Airport or its neighbouring areas. [12]

24. Consequently, it would already at this stage be possible to answer Question 1 in the negative, since there is nothing in the renewal of the environmental permit to operate Brussels Airport that enables it to be regarded as a 'project' within the meaning of the Directive. However, for the sake of completeness, and in the event that the Court should not concur with this first part of my reasoning, I shall now consider whether the activity of operating the airport can be classified as one of the activities listed in the Annexes to the Directive.

ii) Whether it is possible to include the authorised activity among the activities listed in the Annexes to the Directive

25. Even on the absurd assumption that the operation of Brussels Airport could be regarded as a 'project' within the meaning of the Directive, it is clear, in my view, that it cannot be said to fall within the definition of 'construction of airports' within the meaning of Annex I to the Directive. [13]

26. First, there is no ambiguity in the terminology used by the Directive and even a comparison of the different language versions [14] clearly shows that, in point 7(a) of Annex I, the legislator intended 'construction' to be understood as having its normal meaning. It refers to the carrying out of works not previously existing or of physical alterations to existing installations.

27. Second, an examination of the case-law shows that the interpretation given by the Court of Justice of this provision is also to the same effect. It is true that the Court has construed the expression 'construction of airports' broadly. However, all this means in practice is that the Court has stated that, in addition to works relating to airport runways, that concept encompasses 'all works relating

11 — Ibid., paragraph 10.

12 — Moreover, as mentioned above, not even the *method of operation* of the airport was changed, since the environmental permit was renewed without any change.

13 — I have also disregarded in this Opinion the possibility that the operation of the airport may be classified under Annex II: such a possibility was in fact expressly precluded by the Raad van State in its order for reference (paragraph 6.11). Moreover, the only category in Annex II which could be of significance here is that mentioned in point 13, which refers inter alia to '[a]ny change or extension of projects listed in Annex I': in other words, since there is no question here of any 'change' or 'extension' of the airport as a structure, we come back to the problem of defining the 'construction of airports' referred to in Annex I.

14 — See, for example, the use of the French word 'construction', the Italian 'costruzione', the German 'Bau', etc.

to the buildings, installations or equipment of an airport'.[15] It is therefore apparent that the idea that 'construction' cannot mean anything other than 'construction' is also firmly rooted in the case-law. In another judgment, relating to point 7(b) and (c) of Annex I to the Directive, in which the same word 'construction' is used, the Court stated that it can also include a simple 'project for refurbishment' (albeit a significant one), but it has adhered closely to the idea that the activities denoted by the term are physical in nature.[16]

28. To bring even the simple operation of an airport within the definition of 'construction' would therefore amount to failing to have regard to the text of the Directive, as, moreover the Court has always interpreted it to date. Even though it is settled case-law that the scope of Directive 85/337/EEC is rather broad,[17] a purposive interpretation of that provision cannot disregard the clearly expressed intention of the legislator.

29. One final observation appears to me to be necessary here with regard to the references, made in particular by the applicants in the main proceedings, to the judgments of the Court in which it was stated that environmental impact assessments should address not only the direct consequences for the environment of the activities to be carried out, but also the indirect consequences. For example, in the case of works to double a railway track, the environmental impact assessment must have regard not only to the effects of the construction works themselves, but also the long-term effects which the increase in rail traffic may have on the environment.[18] From the perspective of the applicants in the main proceedings, since the renewal of a permit to operate an airport may have a significant environmental impact, such a permit should also always be preceded by an impact assessment.

30. It appears clear to me that the applicants' position is not only – as has been seen – incompatible with the text of the Directive, but also vitiated by a fundamental error. It in fact confuses two separate aspects, namely *the purpose of the impact assessment* on the one hand, and *the conditions under which an*

15 — See *Abraham and Others*, cited in footnote 7, paragraph 36.

16 — Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-6097, paragraph 36.

17 — See, for example, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 31; Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 40; and *Ecologistas en Acción-CODA*, cited in footnote 16, paragraph 28.

18 — Case C-227/01 *Commission* v *Spain* [2004] ECR I-8253, paragraph 49. See also *Abraham and Others*, cited in footnote 7, paragraph 45, and *Ecologistas en Acción-CODA*, cited in footnote 16, paragraphs 39 to 42.

impact assessment is required on the other. In other words, it is evident that in the case of the *construction* of or *significant alteration* to an airport, the obligation to carry out an impact assessment will be triggered, and not only the immediate effects of the construction works, but also the indirect effects which may be caused to the environment due to the subsequent activity carried on at the airport, will have to be examined. If, however, as in this case, the basic prerequisite for carrying out an impact assessment is not satisfied, since no physical activity involving construction or any alteration to the structure of the airport is being carried out, the problem of the scope of the impact assessment does not even arise, since it is devoid of purpose.

(b) The case-law on situations in which authorisation is granted 'in stages'

31. One specific point that must be addressed, which was raised in particular in the written observations submitted by the Commission, concerns the applicability to the present case of the case-law of the Court on situations in which authorisation is granted 'in stages'. According to that line of case-law, even a decision to grant authorisation that does not directly relate to an activity subject to an environmental impact assessment within the meaning of the Annexes to the Directive may require that an impact assessment be carried out, where it constitutes a 'stage' in a 'consent procedure'.[19] Thus, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other an implementing decision, it is as a general rule the principal decision which must be accompanied by an impact assessment, even where the measure granting the right to proceed with activities which may have an effect on the environment is the implementing decision.[20]

32. There are no grounds for calling into question that case-law and it is therefore clear that it will be for the referring court to determine whether the prerequisites for its application are met, on the basis of the examination of the consent procedure provided for under national law.

33. However, it appears to me essential to make very clear an important aspect which could preclude the possibility of applying that line of case-law in this case. I refer to the fact that, whenever it has determined whether a

19 — See *Abraham and Others*, cited in footnote 7, paragraphs 25 to 26. This judgment draws together in this regard the logical consequences of a series of earlier decisions of the Court, in particular the judgments in Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 20, and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 52.

20 — See *Wells*, cited in footnote 19, paragraph 52. However, a national provision which required that an environmental impact assessment be carried out *always and only* during the initial consent stage, and never during the subsequent stage of the implementing decision, would not be compatible with European Union law: see Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraphs 104 to 105.

permit granted on the basis of national law could be regarded as a stage in a consent procedure carried out in several stages, the Court has always done so within the context of a procedure *the ultimate purpose of which was to enable activities falling either under the definition of project or under one of the categories listed in the Annexes to the Directive to be carried out.*

34. In other words, the authorisation which must be accompanied by an environmental impact assessment is not simply any kind of authorisation whatsoever, but an authorisation that forms part of a procedure *the final outcome of which is an activity which the Directive makes subject to the requirement to carry out an impact assessment*. The Directive would be totally devoid of meaning if, as a result of the application of the case-law on consent procedures carried out in several stages, an environmental impact assessment were required without the substantive conditions for requiring such an assessment being met, that is, in the absence of any of the projects for which the Directive requires an impact assessment.

35. The fundamental purpose of that case-law is to prevent the various different national consent procedures from giving rise to genuine inconsistencies in the application of the Directive. This could occur if the impact assessment: (a) were to take place during a stage at which it no longer made any sense, since the decision to execute the works had in fact already been taken earlier; (b) were even avoided, on the basis that a certain authorisation for a project falling under the directive was in reality only an act implementing a previous decision adopted when the Directive was not yet applicable. [21] For these reasons, in the case of consent procedures carried out in several stages it may be necessary for the impact assessment to be carried out, for example, already at the preliminary planning stage, even though the actual authorisation is to be granted only at a later stage.

36. The case-law on consent procedures carried out in several stages therefore follows a well-established line of decisions by which the Court has sought to prevent the Directive from being circumvented or, in any event, deprived of meaning. Other typical examples of observations following the same line of thought are to be found in judgments concerning the artificial splitting of projects with the intention of avoiding the size thresholds set by the Directive or national law being exceeded, [22] as well as the judgments clarifying the limited measure of discretion granted

21 — This was the situation on which the *Wells* judgment, cited in footnote 19, was based.

22 — See, for example, Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 76.

to the Member States with regard to the projects listed in Annex II to the Directive. [23]

37. In this case, however, as has been seen, the environmental permit granted for the operation of Brussels Airport did not entail any physical change to the airport itself, *nor does it constitute a stage in a procedure which could lead to such a change*. Brussels Airport has existed for many decades, since before both the provisions on environmental impact assessments and the national provisions on environmental permits were approved. Therefore, it would appear that there is no 'project' for which an impact assessment is required for the purpose of the Directive.

38. Consequently, the case-law on consent procedures carried out in several stages will not, in my opinion, be applicable in these proceedings, since the issue of the environmental permit at issue in does not relate to any of the projects listed in the Directive, whether present, past or future.

39. Thus, concluding my analysis of Question 1, I propose that the Court should answer it to the effect that, in situations such as those in the present case, a permit to operate an airport which does not entail any physical change to the structure of the airport does not fall within the scope of the Directive on environmental impact assessments.

C — *Questions 2 and 3*

40. Since Question 1 has been answered in the negative, in view of both the absence of any 'project' within the meaning of the Directive and the fact that it is impossible to bring the simple 'operation' of an airport within the definition of the 'construction' of

23 — As is known, for projects listed in Annex II the Directive provides that the Member States must determine, on the basis of a case-by-case examination or thresholds or criteria, the cases in which an environmental impact assessment is necessary. The case-law of the Court has, however, clarified that a Member State may not establish thresholds taking account only of the size of projects, without, for example, taking their nature and/or location into consideration: see *Commission* v *Ireland*, cited in footnote 22, paragraphs 65 to 67. Moreover, such thresholds cannot have the effect of exempting entire classes of projects in advance from the obligation to carry out an impact assessment: see *WWF and Others*, cited in footnote 17, paragraph 37.

an airport, Questions 2 and 3 need not in my opinion be examined.

41. Those two questions, as has been seen, cease to have any relevance if the premiss is accepted that the operation alone of an airport, not accompanied by any activity involving any physical change thereto, does not amount to the 'construction' of an airport within the meaning of point 7 of Annex I to the Directive.

42. Nevertheless, should however the answer to Question 1 be in the affirmative, the answer to the other two questions could easily be found in the case-law of the Court.

43. In particular, the fact that an activity constituting a project within the meaning of the Directive is subject to a periodic authorisation does not in general preclude the possibility that, on each occasion on which the authorisation is to be renewed, the necessary environmental impact assessment of the activity in question should be carried out. [24]

44. Furthermore, if it were accepted that the 'operation' of an airport is a 'construction' within the meaning of the Directive, the fact that the airport was operating before the provisions on environmental impact assessments became applicable would be irrelevant: in fact, the decisive issue would be the fact that the renewal of the permit for the activity which required the impact assessment (an activity which would, in such a case, be the operation of the airport) was subsequent to the date of entry into force of the provisions in question. [25] On the other hand, if the Directive is interpreted (as proposed above) as meaning that only activity involving physical changes may amount to the 'construction' of an airport, the fact that the structure already existed prior to the entry into force of the provisions on impact assessments will automatically exempt the activity from that requirement. This will naturally only be for as long as the structure itself is not subject to any type of construction and/or alteration works. [26]

24 — See, by analogy, *Waddenvereniging and Vogelbeschermingsvereniging*, cited in footnote 8, paragraph 28.

25 — See Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 32, and *Gedeputeerde Staten van Noord-Holland*, cited in footnote 19, paragraph 27.

26 — The settled case-law of the Court on the time-limits for the application of legislation on environmental impact assessments: see, for example, Case C-396/92 *Bund Naturschutz in Bayern and Others* [1994] ECR I-3717, and *Gedeputeerde Staten van Noord-Holland*, cited in footnote 19, paragraph 23. Moreover, according to the information provided at the hearing, Brussels Airport had already been subject to an environmental impact assessment in relation to previous changes to its structure.

IV — Conclusion

45. On the basis of the foregoing considerations, I propose that the Court answer the questions referred by the Raad van State for a preliminary ruling as follows:

A permit to operate an airport which does not entail any physical change to the structure of the airport does not fall within the scope 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.