**ANNEX**

JUDGMENT OF THE COURT (Fifth Chamber)

21 March 2013

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**

**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**

*EU law*

 […]

8        Annex II to that directive [85/337/EEC] 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’.

[…]

*Austrian law*

[…]

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…’

[…]

 **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 m2 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 m2 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?*

[…]

 **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**

[…]

 **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.**