

Case Study on the implementation of the EIA Directive

Facts of the case

Last year, Fracking R Us (FRUS), a company that carries out high-volume hydraulic fracturing (fracking), applied for a licence to carry out exploratory work for shale gas in Municipality A of your Member State. The drilling site area is 0.99 hectares. The area covered by the horizontal drilling (but not the drilling site itself) includes a Natura 2000 site that is protected under the Habitats Directive (92/43/EEC) and which depends on groundwater for the protected species on it.

If the exploratory work shows that commercial quantities of shale gas exist (considered to be the extraction of more than 500,000 cubic metres/day due to estimated large reserves in your Member State), FRUS has stated that it will apply for a production licence.

An SEA was prepared for fracking in Municipality A and adjacent Municipalities B and C. The environmental report recognised potentially significant effects of fracking on human health, air quality, soil, water, biodiversity and waste but assumed that these would be mitigated to an acceptable level by spatial planning controls. Since preparation of the SEA, FRUS has been granted exploration licences for shale gas at five sites in Municipality B and two sites in Municipality C.

The competent authority granted an exploration licence to FRUS for the site in Municipality A after concluding that it was not necessary to carry out EIA.

A non-governmental organisation, Frack Free Forever, has applied for judicial review of the grant of the exploration licence on the basis that FRUS was required to prepare an EIA because:

- the exploration works will have ‘indirect, secondary [or] cumulative effects’ (EIA Directive, annex IV(5)) due to:
 - a. their connection with the projected production licence for the site; and
 - b. the existence of seven sites at which exploratory licences have been granted;
- environmental effects of the production works as well as the exploration works should be considered at the ‘earliest possible stage in all the technical planning and decision-making processes’ (EIA Directive, recital 2); and
- the fracking has potential environmental effects on the Natura 2000 site.

The competent authority argues that EIA is not required because:

- the legislation transposing the EIA Directive in your Member State has a threshold of one hectare for deep drillings under annex II and the proposed site is 0.99 hectares;
- the exploration works and the production works are entirely separate, therefore, environmental effects from any production works need not be considered at the exploration stage;
- the seven sites for which exploration licences have been granted are not in Municipality A; and
- the horizontal drilling will be carried out over 1,500 metres below the surface of the ground and could not, therefore, affect the Natura 2000 site.

Relevant EU legislation on fracking

On 22 January 2014, the European Commission issued Commission Recommendation on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high volume hydraulic fracturing (2014/70/EU; OJ L39/72, 8 February 2014).

The Recommendation, which applies to FRUS' proposed works due to their high volume, states that Member States should:

- 'prepare a strategic environmental assessment to prevent, manage and reduce the impacts on, and risks for, human health and the environment [under the SEA Directive]';
- 'take the necessary measures to ensure that an environmental impact assessment is carried out on the basis of the requirements of [the EIA Directive]'; and
- 'provide the public concerned with early and effective opportunities to participate in developing the strategy [under the SEA Directive] and the impact assessment [under the EIA Directive]'.

Article 288 of the Treaty on the Functioning of the European Union provides, in pertinent part, that: 'Recommendations ... shall have no binding force'.

This case study concerns only the EIA Directive. It does not concern the SEA Directive, any other EU or national legislation or any other permits, licences or approvals that may be required by FRUS.

Questions

You are the judge at the hearing on the application for judicial review and must rule on the following issues.

1. Is the exploration licence for the site in Municipality A subject to the EIA Directive?
2. Is the production licence for the site in Municipality A subject to the EIA Directive?
3. Does the transposing legislation in your Member State breach the EIA Directive by creating a one hectare threshold for deep drilling sites?
4. Did the competent authority err in concluding that FRUS did not need to carry out EIA when the exploration works may have 'indirect, secondary [or] cumulative effects' (EIA Directive, annex IV(5)) due to:
 - a. their connection with the projected production licence for the site; and
 - b. the existence of seven sites at which exploration licences have been granted?
5. Did the competent authority err in concluding that FRUS did not need to carry out EIA despite recital 2 of the EIA Directive stating that environmental effects of a proposed project should be considered at the 'earliest possible stage in all the technical planning and decision-making processes'?
6. Did the competent authority err in concluding that FRUS did not need to carry out EIA when the horizontal drilling will be under a Natura 2000 site?