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# CASE STUDY ON THE IMPLEMENTATION OF THE EIA DIRECTIVE

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# 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.

# FACTS OF THE CASE

- 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.

# FACTS OF THE CASE

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'.

# RELEVANT EU LEGISLATION ON FRACKING

- 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

# 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?

# ANSWERS

# ANSWERS

## 1. Is the exploration licence at the site in Municipality A subject to the EIA Directive?

- Yes; Section 2 of Annex II of the EIA Directive lists the following under the heading of Extractive Industry:
  - ‘(d) Deep drillings, in particular:
    - (i) geothermal drilling;
    - (ii) drilling for the storage of nuclear waste material;
    - (iii) drilling for water supplies;with the exception of drillings for investigating the stability of the soil’
- See *Commission v Poland* (C-526/16; OJ C14/21, 16 January 2017), noting the application of Section 2(d) to ‘[d]rilling activity designed to locate and search for mineral deposits’
- Note also Section 2(e) with the caveat that it refers to ‘extraction’ not exploration
  - ‘(e) Surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale’

# ANSWERS

2. Is the production licence for the site in Municipality A subject to the EIA Directive?

- Yes; Section 14 of Annex I of the EIA Directive lists the following:  
‘Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500 000 cubic metres/day in the case of gas’

# ANSWERS

3. Does the transposing legislation in your Member State breach the EIA Directive by creating a one hectare threshold for deep drilling sites?
  - Probably not

# ANSWERS

## Question 3 (continued)

- Article 4(2) provides, in pertinent part, that  
‘for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment .... Member States shall make that determination through:  
    (a) a case-by-case examination;  
    or  
    (b) thresholds or criteria set by the Member State.  
Member States may decide to apply both procedures referred to in points (a) and (b)’.
- Article 4(3) provides, in pertinent part, that  
‘When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account’

# ANSWERS

## Question 3 (continued)

- But note *Commission v Poland* (C-526/16; OJ C14/21, 16 January 2017)
  - ‘the measures of national law by which [the EIA Directive] has been transposed [into Polish law] exclude from the “screening” procedure projects to locate and search for mineral deposits by means of drilling activity to a depth of 5 000 metres (with the exception of drilling in so-called “sensitive areas”, that is to say, in areas intended for water extraction, areas containing protected inland waters and nature protection areas in the form of national parks, nature reserves, landscape parks and “Natura 2000” protection areas and the contiguous protection zones, in which drilling to a depth of more than 1 000 metres is subject to the ‘screening’ procedure).
  - This essentially has the result that the vast majority of drilling activities designed to locate and search for mineral deposits situated outside the ‘sensitive areas’ are excluded from the ‘screening’ procedure’

# ANSWERS

## Question 3 (continued)

- Note also
  - Some Member States including Bulgaria and Lithuania require EIA for the exploration and production of unconventional hydrocarbons
  - Other Member States (Denmark) require EIA for any drilling projects that involve the use of fracking
  - Some Member States do not require EIA but leave it to competent authorities to decide on a case-by-case basis

# ANSWERS

4. a. 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 their connection with the projected production licence for the site?
  - No EU case law on this issue

# ANSWERS

## Question 4(a) (continued)

- In a case involving whether the environmental effects of a production licence must be considered in the review of proposed consent for exploration of shale gas, the English Court of Appeal ruled in *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] EWCA Civ 9 (2018) that:
  - ‘a comprehensive environmental statement [had been prepared] for that whole project [the exploration project], undertaken on the basis of what was known at the time, and without speculation as to the content and timing of some other future project, which might never happen’
  - ‘no question of the purpose of the EIA Directive being circumvented by splitting into separate parts or phases what is truly a single project. The assessment here was of the whole project, not merely parts of it’

# ANSWERS

4. b. 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 the existence of seven sites at which exploration licences have been granted?
  - Yes; the CJEU ruled, in *Marktgemeinde Straßwalchen v Bundesminister für Wirtschaft, Familie und Jugend* (Case C-531/13, 2015) that a competent authority
    - ‘must examine inter alia whether the environmental impact of the exploratory drillings could, due to the impact of other projects, be greater than what it would be without the presence of those other projects. That assessment must not be confined to municipal boundaries’

# ANSWERS

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'?
- No EU case law

# ANSWERS

## Question 5 (continued)

- *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] EWCA Civ 9 (2018)  
‘If a future project is truly separate from the project under consideration, the assessment of its likely significant effects in the environmental statement for the present project is both unnecessary and inappropriate. If it is also uncertain in its conception and content, an attempt to assess its effects in the environmental statement for the present project would also be futile and potentially misleading. Such an exercise would not be timely; it would be premature and untimely. ... If, in the future, a project emerges for the commercial production of shale gas ..., it can only properly be the subject of assessment under the regime for EIA when it comes to be promoted as a real, not merely hypothetical, proposal in an application for planning permission’

# ANSWERS

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?
  - No EU case law

# ANSWERS

## Question 6 (continued)

- Note again article 4(2) and, especially article 4(3)
  - Article 4(2) provides, in pertinent part, that  
‘for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment .... Member States shall make that determination through:  
    (a) a case-by-case examination;  
    or  
    (b) thresholds or criteria set by the Member State.  
Member States may decide to apply both procedures referred to in points (a) and (b)’.
  - Article 4(3) provides, in pertinent part, that  
‘When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account’

# ANSWERS

## Question 6 (continued)

- Annex III provides, among other things, under Section 2. Location of projects:  
‘The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:  
...  
(c) the absorption capacity of the natural environment, paying particular attention to the following areas:  
...  
(v) areas classified or protected under Member States’ legislation; special protection areas designated by Member States pursuant to [the Birds Directive and the Habitats Directive]’