

## ANNEX

**Subject: Guidance note on the application of Directive 85/337/EEC to projects related to the exploration and exploitation of unconventional hydrocarbon**

The exploration and exploitation of unconventional hydrocarbon have to comply with the requirements of the EU legislation. A comprehensive legislative framework on environmental protection and non-discriminatory access to hydrocarbon resources is already in place and applies to all hydrocarbons, conventional and unconventional, from planning to aftercare of sites following exploitation. Within this framework Member States have to ensure appropriate licensing and permitting regimes. The letter sent on 12/12/2011 by the Commission services refers to the EU environmental legislation applicable to unconventional hydrocarbon projects using advanced technologies such as hydraulic fracturing and horizontal drilling. The present note provides further guidance on the applicability of Council Directive 85/337/EEC to the above projects.

Council Directive 85/337/EEC<sup>1</sup>, as amended, on the assessment of the effects of certain public and private projects on the environment (known as the Environmental Impact Assessment or the EIA Directive) is an essential part of the permitting process. In fact, the EIA Directive plays a central role, as it ensures that the environmental implications of projects are taken into account in the permitting process, before the final decisions are made, and it involves the public in the decision-making process making it more transparent.

The services of the European Commission are of the opinion that both the exploration and exploitation of unconventional hydrocarbons fall within the scope of the EIA Directive. This conclusion has been presented and discussed during the meeting of the Commission Group of EIA/SEA national experts, held in Budapest on 14-15 April 2011. During this meeting held, the EIA/SEA national experts agreed with the views presented by the Commission<sup>2</sup>. This position has also been confirmed by the Commission in the letter of 12/12/2011.

The present note aims at summarizing the main requirements of Directive 85/337/EEC, known as the Environmental Impact Assessment (EIA) Directive, which are relevant for projects related to the exploration and exploitation of unconventional hydrocarbon, in particular shale gas projects using advanced technologies such as hydraulic fracturing and horizontal drilling.

### **1. Guiding principle of the EIA Directive**

- The fundamental objective of the EIA Directive is to ensure that projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location, are made subject to an assessment of their environmental effects prior to development consent.
- This has been stressed by the Court in several occasions<sup>3</sup>. Hence, when applying the EIA Directive (e.g. decide whether an EIA is required or assess the effects of projects), the above objective should be taken into consideration.

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<sup>1</sup> OJ L 175, 5.7.1985, p.40; OJ L 73, 14.3.1997, p.5; OJ L 156, 25.6.2003, p.17; OJ L 140, 5.6.2009, p.114.

<sup>2</sup> The minutes of the meeting are available on <http://ec.europa.eu/environment/eia/meetings.htm>.

<sup>3</sup> E.g. C-287/98, *Linster*, §52; C-486/04 *Commission/Italy*, §36; C-215/06, *Commission/Ireland*, §49.

## 2. Unconventional hydrocarbon projects listed in Annex I of the EIA Directive

- An EIA is mandatory for projects falling within **Annex I.14** of the Directive, i.e. extraction of natural gas where the amount of gas extracted exceeds 500.000 m<sup>3</sup> per day.
- A **scoping** procedure is recommended prior to the preparation of the environmental information to be submitted by the developer. "Scoping" is the stage of the EIA process that determines the content and extent of the matters to be covered in the environmental information to be submitted to a competent authority. Even though the scoping procedure is optional under the EIA Directive, it can be helpful for adequately assessing the environmental effects of unconventional hydrocarbon projects, for which there is not sufficient knowledge. A scoping procedure would not only improve the quality of the environmental information to be submitted, but it would also save time for the developer, as the content and extent of the environmental information required will be known in advance.
- This environmental information should assess the likely significant (direct and indirect) effects from all related **associated works and sub-activities** intrinsically linked to the implementation and purpose of the unconventional hydrocarbon project (e.g. new infrastructure necessary to serve the project in question, storage facilities, etc.)<sup>4</sup>.
- For infrastructure projects, the question of **alternatives** is often raised and this is likely to be the case for unconventional hydrocarbon projects. In this regard, the preparation of energy plans and the application of Directive 2001/42/EC (known as the Strategic Environmental Assessment – SEA Directive) can be helpful. The SEA aims to encourage a more integrated and efficient approach to territorial planning where environmental considerations are taken into account much earlier on in the planning process and at a much more strategic level. This usually translates itself into fewer conflicts further down the line at the level of individual projects and it allows for a more appropriate siting of future developments.
- For public acceptability and transparency purposes, the public participation stage of the EIA process is crucial. It is therefore recommended that the Member States should take particular care to ensure that public consultations are widely open using appropriate means of communication, e.g. internet, open discussions, workshops, hearings. Furthermore, it is important that the Member States ensure that the comments made by the public are adequately taken into account in the development consent process.

## 3. Unconventional hydrocarbon projects listed in Annex II of the EIA Directive

- Projects listed in Annex II of the EIA Directive are made subject to a **screening** procedure, in accordance with Articles 2(1), 4(2)-(4) and Annex III of the EIA Directive. This procedure determines whether projects are likely to have significant effects, requiring thus an EIA.

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<sup>4</sup> Case C-215/06, §§102-110.

### *Relevant project categories*

- The screening procedure is necessary for projects below the daily extraction threshold of 500.000 m<sup>3</sup> (Annex II.2.e of the Directive) or for exploration projects listed involving deep drillings (Annex II.2.d of the Directive).
- It should be recalled that Annex II.2.d refers to "*deep drillings*" and includes some indicative examples of deep drilling (i.e. geothermal drilling, drilling for the storage of nuclear waste material, drilling for water supplies). The text of the EIA Directive uses the term "*in particular*", which implies that the enumeration of examples is indicative. Hence, unconventional hydrocarbon projects, even exploratory ones, which use deep drillings, are covered by Annex II.2.d.

### *Relevant screening criteria*

- The screening takes places either **on a case-by-case basis or through thresholds** or criteria; in both cases, the criteria set out in Annex III of the Directive should be taken into account. If it appears that the projects are likely to have significant effects, an EIA is necessary; otherwise, no further steps are required.
- When setting thresholds or assessing the effects of unconventional hydrocarbon projects, the **criteria set out in Annex III** of the Directive should be taken into account. In particular, the screening process should not only be based on the size of projects (e.g. the depth of drillings and/or the size of the surface installations), but it should take into consideration all the criteria listed in Annex III. Even a small-scale project (e.g. exploration one) can have significant effects on the environment if it is in a location where the environmental factors, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration<sup>5</sup>. In particular, the following criteria of Annex III might be relevant for unconventional hydrocarbon projects: the cumulative effects with other projects, the use of natural resources, the production of waste, the environmental sensitivity of the areas where the projects are located, the magnitude and complexity of the impact, as well as the risk of accidents, having regard in particular to substances or technologies used.
- In particular as regards the criterion of **cumulative effects**, it should be recalled that the purpose of the EIA Directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of the EIA Directive<sup>6</sup>. The practice in other areas (e.g. wind energy) has shown that the best way to assess the cumulative effects is the preparation of a plan, which would be made subject to an assessment in accordance with Directive 2001/42/EC (known as the Strategic Environmental Assessment – SEA Directive).
- On the basis of the information and experience available, interactions with environmental media are likely to be complex and cross-cutting in nature and may lead to significant environmental impacts (in particular on water, air, climate, nature, soil, and landscape; more information can be found in the Annex 1 of the letter sent on 12/12/2011). This is why the screening decision on whether an EIA is needed should also take into account the **precautionary and prevention principles**. In the light of these principles, unconventional hydrocarbon projects would be subject to an EIA if it

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<sup>5</sup> See also case C-392/96, Commission/Ireland, §66.

<sup>6</sup> For instance: C-392/96, Commission/Ireland, §§76 and 82; C-142/07, Ecologistas en Acción-CODA, §44; C-205/08, Umweltanwalt von Kärnten, §53.

cannot be excluded, on the basis of objective information, that the project will have significant environmental effects. The precautionary and prevention principles also imply that in case of doubts as to the absence of significant effects, an EIA must be carried out.

*Content of the screening decision*

- In any case, Member States have to ensure that the screening decision by the competent authorities is **made available to the public**.
- A decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an EIA must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of the EIA Directive<sup>7</sup>.
- It is not required that the screening decision itself contains the reasons for the competent authority's determination that the EIA was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the **reasons for the determination or the relevant information and documents**. If a negative screening decision of a Member State states the reasons on which it is based, that determination is sufficiently reasoned where the reasons which it contains (added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information that the competent national administration is required to provide to those interested parties at their request) can enable the interested parties to decide whether to appeal against that decision<sup>8</sup>.

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<sup>7</sup> See case C-87/02, Commission/Italy, §49.

<sup>8</sup> See case C-75/08, Mellor, §§61, 66, operative part 1-2.