

## The EU Provides Guidance on Shale Gas

***The EU's new minimum principles for shale gas exploration and production may pave the way for new industry activity.***

The European Commission (EC) has decided not to propose legislation restricting shale gas exploration and production. Instead, it has opened the door to shale gas in Europe by publishing non-binding guidelines to provide greater clarity for the extracting industry. If Member States choose to permit fracking — they remain free to ban it — they are to comply with the EC guidance so as to ensure adequate environmental protection. However, the environmental agenda no longer trumps other policy objectives. Europe is facing high energy costs and shale gas may offer partial relief.

### Shale gas potential in the EU

The EU is a large consumer of natural gas and indigenous production is declining. Europe's high import dependency and the shale gas revolution in the US are exposing the EU to a significant energy cost disadvantage. In the US, natural gas prices are three to four times lower than in Europe. In addition, shale gas has the potential to help Europe reaching its emission targets by reducing the use of carbon intensive fossil fuels such as coal. These factors are causing Europe to warm to exploiting its unconventional hydrocarbon reserves. Among unconventional fossil fuels, production of shale gas appears to have the greatest potential, even though uncertainty remains about which portion of these resources will actually be economically recoverable.

### Need for action at EU level

On 22 January, the EC issued a Communication<sup>1</sup> providing guidance on the exploration and production of unconventional gas and a Recommendation<sup>2</sup> establishing minimum principles with which such activities must comply. The EC will monitor Member States' compliance and, in 18 months, will decide whether binding legislative measures are necessary. These documents are part of the EC's broader strategy to integrate climate and energy policies for the period up to 2030.

Shale gas extraction is an emerging industry in the EU — shale gas has never been commercially sold in Europe. Exploration activities are underway or foreseen in several Member States. However, absent a common legislative framework for fracking, Member States are giving diverging interpretations to the existing EU rules partially applicable to shale gas exploration. Some have even introduced conflicting national provisions. For example, France has banned fracking whereas the UK and Poland have emerged as the EU's main fracking proponents.

A common approach is desirable because several shale gas plays<sup>3</sup> spread across Member State borders. Environmental impacts and risks do not respect national border. Therefore impacts on air or water in one country may cause, or aggravate, pollution problems in other countries. Since EC guidelines are non-binding they do not fully achieve this objective. However, given divisions between Member States, the EC

has no doubt taken the view that proposing binding rules now would be premature. Given the EU's history of incremental law-making, the guidelines appear to set a course for shale gas development in the EU.

### **Environmental concerns and minimum principles**

The EC guidelines reflect the tension between the EU's need to diversify energy supplies and develop indigenous energy resources on one hand, and the need to protect the public health and environment from the risks of water, air and soil contamination associated with shale gas production on the other. The Recommendation aims at addressing the environmental concerns by establishing several minimum principles that Member States and operators should follow in conducting shale gas exploration and/or production. The Recommendation invites Member States to ensure, among other guidelines, that:

- They plan in advance and carefully assess the impacts on and the risks for human health and the environment before granting licenses.
- The site is suitable and operators carry out a characterization and risk assessment.
- Operators determine the status of the site and its surrounding area before the operations start, in order to allow monitoring of any changes and deal with potential risks on water, air and seismicity.
- The well is properly built in order to prevent surface leaks and spills to soil, water or air.
- An independent and qualified third party ensures the well's operational performance and its environmental and health safety at all stages of project development and after well closure.
- Operators use the best available techniques as well as good practices.
- Use of chemical substances, water consumption and waste stream are minimized.
- Operators engage in continuous monitoring.
- The public is informed about chemical substances used, number of wells completed, incidents occurred, results of inspections, non-compliance and sanctions.

### **Implications for industry**

The EC guidelines seek to ensure that national provisions on shale gas follow convergent approaches to environmental protection so that companies can operate on a level playing field and benefit from a workable framework for investments. However, since the guidelines are non-binding they do not override Member State bans on shale gas development. Moreover, since the EC will conduct a review in 18 months, the guidance is subject to change in the relatively near future. However, by issuing the guidelines the EC is sending the important signal that shale gas has a significant role to play in securing competitive energy costs for Europe. Reading between the lines, the EC is taking a more favorable view of shale gas development than in the past. The EC could have sided with environmentalists and Member States opposed to fracking such as France. It did not. By emphasizing the potential of shale gas and establishing a minimum set of principles the EC has opened the door to shale gas development in Europe. Member States must obviously ensure that the environmental concerns are properly addressed. Assuring that these concerns can be managed and addressed may in fact pave the way for binding EU standards. The Member States, such as Poland and the UK, which favor shale gas development, now face the task — as front runners — of persuading a skeptical public across Europe that fracking is safe and that shale gas can make a significant contribution to Europe's energy mix.

### **Next steps**

The Member States are invited to apply the minimum principles within six months and inform the EC about the measures implemented to comply with the Recommendation.

The EC will closely monitor compliance with the Recommendation and compare the situations in different Member States in a publicly available scoreboard.

The EC will review the status of compliance with the Recommendation in 18 months and then decide whether adopting binding provisions will be required.

Finally, industry participants should remember that the Recommendation complements existing European legislation<sup>4</sup> applicable to projects involving high volume hydraulic fracturing.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**Javier Ruiz-Calzado**

Javier.Ruiz-Calzado@lw.com  
+32.2.788.6206  
Brussels

**Lars Kjølbbye**

Lars.Kjolbye@lw.com  
+32.2.788.6252  
Brussels

**Claudia Piu**

Claudia.piu@lw.com  
+32.2.788.6229  
Brussels

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**Endnotes**

- <sup>1</sup> Communication on the exploration and production of hydrocarbons (such as shale gas) using high volume hydraulic fracturing in the EU.
- <sup>2</sup> Recommendation on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high volume hydraulic fracturing. Note that the Communication and the Recommendation were accompanied by an Impact Assessment (see [http://ec.europa.eu/environment/integration/energy/unconventional\\_en.htm](http://ec.europa.eu/environment/integration/energy/unconventional_en.htm)).
- <sup>3</sup> Play is a set of oil or gas accumulations sharing similar geologic, geographic properties, such as source rock, hydrocarbon type, and migration pathways.
- <sup>4</sup> See, among others, Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons (OJ L 164 , 30.06.1994 p.3); Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1); Directive 2004/35/EC of the European parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L 143, 30.4.2004, p. 56); Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC (OJ L 102, 11.4.2006, p. 15); Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration (OJ L 372, 27.12.2006, p.19); Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH); Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC (OJ L 197, 24.7.2012, p. 1).