

## Editorial

### The EU's Recommendation on hydraulic fracturing and its implementation in the UK\*

From claims that it represents the best hope for a 'secure' energy future to protest banners calling for its proponents to 'frack off', hydraulic fracturing is fast becoming one of the most divisive issues of our time.

On 22 January 2014, the European Commission issued a Recommendation on the use of hydraulic fracturing ('fracking') in Member States. This Editorial analyses the Recommendation from a legal and environmental policy perspective, and then considers the UK Government's response.

#### The Recommendation

With this Recommendation, the Commission aims at supporting Member States in ensuring that the environment is safeguarded, resources are used efficiently and the public is informed, while enabling potential energy security and competitiveness benefits to be reaped in those Member States who wish so.<sup>1</sup>

Recommendations are a curiosity of European Union law – a somewhat awkward accommodation of demands for something stronger than 'guidance' mixed with reticence about 'yet more' regulation. Provided for by Article 288 of the Treaty on European Union, they 'have no binding force'.<sup>2</sup> Essentially, a recommendation is a tool for the Commission to set out its 'to do' list for Member States on a particular topic when there is either no appetite, or no perceived need, for the legal enforceability of a directive.

The Recommendation on fracking feels like the product of a lack of appetite for legislation, rather than the result of there being no perceived need. Despite the absence of binding force, the Recommendation often speaks in statutory language. Recital 9 refers to the provisions therein as 'a set of rules'. Recital 11 calls for the Recommendation to 'be implemented by Member States within 6 months'.<sup>3</sup>

The impression created is that the Commission wanted to issue a directive on the subject, but settled for a recommendation instead, perhaps in the face of sustained pressure from pro-fracking governments such as the UK, together with the relevant section of the Brussels lobbying machine. Reports from *The Guardian* support this inference:

Lobbying by Poland and the UK is thought to have stymied a directive regulating shale drills that the commission's environment directorate had planned to include in its 2030 climate and energy package of EU legislation.<sup>4</sup>

Overtly oriented towards environmental protection, the rationale for the Recommendation is readily discernible in the 8th recital, which reads: 'The Union's environmental legislation was developed at a time when high-volume hydraulic fracturing was not used in Europe', before continuing at greater length that:

Therefore, certain environmental aspects associated with the exploration and production of hydrocarbons involving this practice are not comprehensively addressed in current Union legislation, in particular on strategic planning, underground risk assessment, well integrity, baseline and operational monitoring, capturing methane emissions and disclosure of information on chemicals used on a well by well basis.

Whilst listing all the EU legislation that is relevant to the development of fracking in Member States and calling for its express application to fracking activities, the Commission's view is that the existing legal architecture may not be sufficient to regulate the particular risks presented by the unconventional extraction of shale gas and oil. The foundations and justification for future legislation are thereby laid out.<sup>5</sup>

If the essence of the Recommendation was reduced to a slogan, that slogan would be 'proceed with caution'. Recital 9 states:

This set of rules neither implies that Member States are under any obligation to pursue the exploration or exploitation of activities using high-volume hydraulic fracturing if they choose not to nor that Member States are prevented from maintaining or introducing more detailed measures matching the specific national, regional or local conditions.

\* Any opinions expressed in the Editorial are entirely the author's own.

1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the exploration and production of hydrocarbons (such as shale gas) using high volume hydraulic fracturing in the EU (17 March 2014) COM(2014) 23 (final) 2 (Fracking Communication).

2 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2010:083:FULL&from=EN>.

3 Commission Recommendation of 22 January 2014 on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing OJ L39/72.

4 'EC serves notice to Poland over shale gas defiance' *The Guardian* (30 July 2014) [www.theguardian.com/environment/2014/jul/30/ec-serves-notice-to-poland-over-shale-gas-defiance](http://www.theguardian.com/environment/2014/jul/30/ec-serves-notice-to-poland-over-shale-gas-defiance).

5 Recital 10.

Rather than a green light for fracking across the EU, the Recommendation is a flashing amber sign that encourages Member States to move forward only if they judge it safe and wise to do so.

That a high level of environmental protection and the precautionary principle lie at the heart of the Recommendation is evident throughout. First, the Recommendation sets out only ‘minimum principles’ and, as noted above, Member States are expressly informed that they are free to impose more stringent controls on fracking if they so wish.

Secondly, in stark contrast to UK pronouncements on the subject, references to the potential economic benefits of fracking are heavily outweighed by expressions of the need for environmental safeguards and protection. ‘Ensuring that the public health, climate and environment are safe-guarded’ is part of the stated purpose of the Recommendation, albeit expressed in slightly ungrammatical Brussels English. The environmental imperative is manifested in Article 3, which calls for both a strategic environmental assessment (SEA) and an environmental impact assessment (EIA) to be carried out before permission is given, even for exploration or production that only *might* involve fracking.

The influence of the precautionary principle is most readily apparent in the requirements of Article 5 for a risk assessment to be carried out with regard to the ‘geological characterisation’ of the area at the site selection stage. Reflecting current scientific uncertainty about the effects of fracking on geological foundations, the risk assessment is not to be considered a static or ‘one-off’ affair, but is to be updated whenever new data is available.

Interestingly, perhaps in recognition of the power of pro-fracking forces, risk assessments should ‘take into account the relevant results of the information exchange’ between Member States, industry and the rather curiously phrased ‘non-governmental organisations involved in environmental protection organised by the Commission’. Although it was probably not the Commission’s intention, that phraseology could be taken to deny NGOs with a social agenda a place at the discussion table. Despite the peculiar language, granting a formal voice to NGOs is another curiosity of the EU’s approach, indicative of arguably a more balanced and less business-led stance than that which underlies much of current UK political decision-making. Given new research by Friends of the Earth highlighting that business groups held 10 times more meetings with the European Commission regarding fracking regulation

than did NGOs, the need for such a statement is perhaps far more important than it may initially seem.<sup>6</sup>

Rather than a procedural formality, the importance of the risk assessment in the Commission’s view is evident from the additional requirements under this section. Responding to one of the greatest fracking-related concerns – pollution of groundwater systems – the Recommendation states that the risk assessment should identify all possible exposure pathways. Crucially, only if the risk assessment shows that fracking will not result in any direct discharges of pollutants to groundwater, and that no activities around the installation will be affected, should a site be considered suitable. Unlike SEA and EIA, this is one form of EU-emanated assessment that has teeth and is designed to deliver a substantive outcome rather than a tick list of items ‘to be taken into account’. Or at least, it is an assessment that would have teeth if it were in legislative form.

Concern over the uncertainty of the impacts of fracking are further apparent in the provisions of Article 6. This requires Member States to ensure that baseline data on a wide range of environmental indicators relating to the site and surroundings is submitted to ‘the competent authority’ by the operator before operations commence. ‘If fracking is bad for the environment, we need to know so and know how it is so’ would appear to be the message underlying Article 6. The list of indicators covering both the natural and built environments for which a baseline is required is extensive, and are set out under 10 headings, many of which, such as ‘biodiversity’, ‘land use’ and ‘air quality’ would need to be broken down further.

The impact of events such as the *Deepwater Horizon* spill on the Commission’s thinking is obvious in Articles 7, 8 and 9, which cover installation design and construction, local infrastructure and the operational requirements for a fracking production site. If the Recommendation had a sub-slogan, it would be ‘no stone left unturned’. The intention is for Member States actively to ensure that operations are carried out so as to minimise all foreseeable risks and that a high level of environmental protection is maintained.

The integrity of wells is a particular focus of attention in the aftermath of events in the Gulf of Mexico, whereby the integrity of new wells must be verified by an independent third party throughout the operation of the site, and not simply left to the operator. Given concerns about the climate change impacts of fracking, flaring and the venting of methane are also to be avoided, whilst gases are to be captured for ‘subsequent use’.

6 Friends of the Earth Europe ‘Fracking Brussels: a who’s who of the EU shale gas lobby’ [www.foeeurope.org/fracking-brussels-240714](http://www.foeeurope.org/fracking-brussels-240714).

Concern regarding the water consumption involved in fracking is reflected in the requirement for water management plans to ensure that ‘water is used efficiently during the entire project’, with water flows fully traceable to enable the detection of adverse effects.<sup>7</sup> The environmental imperative is further reflected in the stipulation to ‘stop operations and urgently take any remedial action if there is a loss of well integrity or if pollutants are accidentally discharged into groundwater’,<sup>8</sup> as well as the requirement to ‘report immediately’ any incident or accident affecting public health and/or the environment.<sup>9</sup>

The links between the Recommendation and the EU’s flagship chemicals regulation (REACH) are made in Article 10, reflecting another primary concern with fracking, namely the use of chemical substances as part of the process. The Recommendation is clear not only that the use of chemicals should be kept to a minimum, but also that the ability to treat chemicals at the surface should be considered as part of the selection process, and that the public should be kept informed of the chemicals both intended to be used, and actually used, in the fracking operations.<sup>10</sup>

Unsurprisingly, given the amount of data that the Recommendation calls to be collected, monitoring is an important aspect of its provisions. The Recommendation calls on Member States to ensure regular monitoring not only of the baseline indicators in Article 6, but also of other factors, namely the volume of water usage and the precise chemical composition during the fracturing process, together with the level of pressure applied.

‘Member States should ensure that the competent authorities have adequate human, technical and financial resources to carry out their duties’ is an interesting *diktat* in Article 13 and a common feature of draft legislation that rarely makes it onto the statute book. Given the Commission’s apparent lack of resources properly to enforce compliance with the EU’s sizeable body of environmental legislation, this statement is also somewhat ironic,<sup>11</sup> albeit well intentioned and apposite.

There are two other aspects of note. The first is the emphasis on public information and transparency. The Commission’s view is that the greater the openness surrounding fracking operations close to people’s homes, the greater the level of public acceptance is likely to be.<sup>12</sup>

Under Article 15, therefore, Member States are to ensure that details of the amounts of water consumed, the chemicals used, the number of permits granted, to whom and with what conditions, together with the number of wells planned and completed, are all made publicly available. The information was to be provided within six months of the Recommendation, and is to be updated at least every 12 months.

The statutory language of the recitals is somewhat tempered in the final section of the Recommendation. Member States are thereby ‘invited to give effect to the minimum principles set out in this Recommendation by 28 July 2014’ reads Article 16.1, in contrast to the far more robust phrasing of Recital 11. In a further hint at future legislation on the subject, the ‘effectiveness’ of the Recommendation will be reviewed 18 months after its publication in August 2015. Article 16.4 states that: ‘The Commission will decide whether it is necessary to put forward legislative proposals with legally-binding provisions on the exploration and production of hydrocarbons using high-volume hydraulic fracturing’, thereby rendering the theoretical possibility of a directive a realistic prospect.

### The UK Government’s response

On 28 July 2014, the UK Government published a post-adoption statement as part of the SEA of its Licensing Plan for greater onshore oil and gas exploration.<sup>13</sup> The timing, in line with the 28 July ‘deadline’ for ‘giving effect’ to the Recommendation could show Whitehall officials paying somewhat greater heed to EU pronouncements than might be imagined in the current political climate. Or it could be a mere coincidence.

The fact that an SEA has been carried out on the Licensing Plan reflects compliance with Article 3 of the Recommendation. If a slogan were attached to the government’s overall approach to the Commission’s steer on the subject, however, it would be ‘cherry-picking’.

There are positive aspects of note. Well design is to be ‘scrutinised’ by the Health and Safety Executive, fitting the description of the neutral third party provided for in the Recommendation. All applications will need approval from the Environment Agency (in England and Wales, SEPA in Scotland) and will be refused if there are deemed likely to be ‘unacceptable impacts to the

7 Article 9.2(a).

8 Article 9.2(g).

9 Article 9.2(h).

10 Articles 10.1 and 15(a).

11 As told to the author by a current European Commission lawyer at DG Environment in Brussels.

12 Fracking Communication (n 1) 7.

13 Department for Energy and Climate Change (DECC)

‘Strategic environmental assessment for further onshore oil and gas licensing: post adoption statement’ (June 2014) [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/337389/post\\_adoption\\_statement.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/337389/post_adoption_statement.pdf).

environment'.<sup>14</sup> An environmental risk assessment (ERA) is to be provided by the operator in respect of shale gas applications once it has received a licence to operate. The ERA must be undertaken at a very early stage and engage both the Minerals Planning Authority (MPA) and stakeholders, including local communities.

Whether these provisions encompass the Commission's vision of a risk assessment in Article 5 is unclear. There is no requirement, for example, to ensure an absence of risk of direct discharges to groundwater before an application is approved. Nor is there a suggestion that, if certain risks are identified, the application will need to be amended or rejected. The safeguards are therefore procedural – 'show us you've thought about it', rather than substantive – 'show us that this risk will definitely not materialise'. In short, the UK Government's approach ticks many of the right boxes, but it appears to be more about formalities than the risk assessment provisions of the Recommendation.

On a less positive note, the provisions regarding EIA are a clear example of positional misalignment. Article 3.2 of the Recommendation is unequivocal: 'Member States should take the necessary measures to ensure that an environmental impact assessment is carried out'. The UK's stance is that the Minerals Planning Authority (MPA) will 'screen' to assess the need for an EIA,<sup>15</sup> meaning that there is no requirement for one actually to be undertaken.

Significantly, the precautionary approach embodied in the Recommendation appears to have capsized in the English Channel en route from Brussels to London. Instead of a cautious, risk management-based approach, the UK mentality relies firmly upon the efficacy of existing planning controls and environmental permitting regulations to 'do the trick' and prevent 'unacceptable effects'.<sup>16</sup> This is perhaps a reflection of the Licensing Plan having been formulated in 2010, and therefore something upon which the Recommendation was destined to have limited effect.

In relation to what the Recommendation calls 'flaring and venting' and what the post-adoption statement labels 'fugitive emissions', the SEA reveals an absence from the UK approach of provision for their avoidance or minimisation. Instead, we are to take comfort from the UK Onshore Operators Group having devised 'good practice guidance' on the subject. Ironically, given its name, the Department for Energy and Climate Change (DECC)

agrees with consultees that fracking operations are likely to have a significant adverse effect on the UK's greenhouse gas emissions, yet is silent as to how this will be addressed. Presumably this is because DECC knows it cannot be addressed easily and the inference from fracking's climatic footprint is that it is perhaps not the direction in which the UK's energy mix should be moving.

In terms of site selection, the process envisaged in the Recommendation of careful identification on the basis of the risk assessment does not appear to have been transposed. The fact that most of the UK has been 'selected' for fracking licensing suggests that this is one part of the Recommendation that has been comprehensively overlooked.

Interestingly, two of the aspects of the government's proposals that have been most heavily criticised do not feature in the Recommendation. A number of consultees, including Natural England, have called for a Habitats Regulations Assessment (HRA) of the Licensing Plan to be carried out to assess its impacts on European sites.<sup>17</sup> Given the stringent provisions of the Habitats Directive, it is surprising that the Recommendation is silent on this subject and does not call for them to be considered. Equally surprising is the failure to counsel against fracking development in areas of high landscape and biodiversity importance such as national parks, which leaves those opposing the government's 'partially open door' policy to fracking licensing in the UK's most protected places without an important piece of ammunition.

The position can be summarised thus. It would be unfair to assert that the UK Government's fracking plans disregard environmental imperatives. The SEA process appears thorough and some modification of the proposals in light of views already expressed has occurred. What is striking, however, is that the high level of environmental protection and the precautionary principle shining through the Recommendation shimmer far more dimly in the UK's approach. Whilst the European Commission's tagline is 'proceed with caution, assess risk, monitor and evaluate impacts to avoid problems occurring', the UK Government's is more 'forge ahead unless and until a problem arises'. Where the Commission tempers consideration of economic benefits with environmental and social essentials, the UK Government prefers to mitigate the negative environmental and social consequences of economic primacy in its fracking-related decision-making.

14 DECC 'Onshore oil and gas exploration in the UK: regulation and best practice' (December 2013) at 7 [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/265988/](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265988/)

15 Onshore\_UK\_oil\_and\_gas\_exploration\_England\_Dec13\_contents.pdf. *ibid* 13.

16 DECC 'Strategic environmental assessment' (n 13) 13.

17 'Government pushes ahead with fracking despite widespread opposition' *The Guardian* (28 July 2014) [www.theguardian.com/environment/2014/jul/28/fracking-expansion-shale-gas-opposition-britain](http://www.theguardian.com/environment/2014/jul/28/fracking-expansion-shale-gas-opposition-britain).

Given the fact that, of all the 28 EU Member States, only one submitted any kind of response to the Commission's request for the minimum principles to be implemented by 28 July 2014, the evidence suggests that the Recommendation has had little impact on the European hydraulic fracturing landscape. The Commission's decision to issue a formal warning to the Polish Government for non-compliance with the EIA Directive in respect of its fracking plans indicates, however, that a careful watching brief is being maintained by the European civil service.<sup>18</sup>

Unless the Recommendation is afforded greater respect by Member State governments ahead of the August 2015 review, a directive on hydraulic fracturing in the EU may well be on the legislative agenda for 2016.

Perhaps rightly so. However, a legislative project will only be worthwhile if it requires substantive outcomes from the plethora of environmental and risk assessments that operators are to undertake. More mandatory tick box exercises are not what environmental regulation needs. Clear red lines that demarcate acceptable from unacceptable fracking applications are the contribution that additional legislation in this arena needs to make. Otherwise, not only will the 'no more regulation' lobby gain more traction, but crucially, meeting the objectives underpinning EU environmental law in Article 191(1) and (2) of the TFEU will continue to elude us.

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18 'EC serves notice to Poland over shale gas defiance' (n 4).