

What's in a Name?: Legal Implications of the EU Recommendation on Shale Gas

by Cándido García Molyneux and Luca Tosoni

Cándido García Molyneux, Ph.D., is Of Counsel in the Brussels office of Covington & Burling LLP and an External Professor at the College of Europe, Natolin. Luca Tosoni is a Trainee-Lawyer in the Brussels office of Covington & Burling LLP. The opinions expressed in this Article are those of the authors and not of any organization, client, or group.

On January 22, 2014, the European Commission published its Recommendation on Shale Gas¹ calling on the Member States of the European Union (EU) to apply a set of common principles for the performance of exploration and production of hydrocarbons by means of high-volume hydraulic fracturing. These principles are considered as minimum and “complementary” to existing EU environmental and safety legislation.²

From a political perspective, the Recommendation is a transitional compromise among the Commission and Member States for the next years, which overall has been well-received by industry.³ On the one hand, while the Recommendation puts forward a series of principles that will help hydraulic fracturing gain public confidence in Europe, it does not significantly affect the current state of play of diverse national rules and practices across Europe. Thus, the Recommendation allows Member States wishing to encourage the exploration and exploitation of shale gas in their territories (e.g., Poland, Spain, and the United Kingdom) to proceed without having to face a proposal for binding legislation, which could entail years of negotiations. In exchange, the Recommendation also allows Member States to keep their national bans (e.g., Bulgaria and France) or moratoria (e.g., the Netherlands) on hydraulic fracturing.

On the other hand, Point 16 of the Recommendation warns that the Commission will review the Recommendation 18 months after its publication and, on that basis,

“will decide whether it is necessary to put forward legislative proposals with legally-binding provisions.” Hence, the European political (and eventually regulatory) landscape on hydraulic fracturing could change significantly once a new European Parliament and Commission are in office by the end of this year.

From a legal perspective, the Recommendation in itself is not legally binding on Member States or operators. Indeed, unlike EU Regulations, Directives, and Decisions, Recommendations are not legally binding on EU Member States or citizens.⁴ Commission Recommendations in particular are only a form of “soft law” intended to express the views or guidance of the Commission in a certain regulatory area. This is also made clear in Point 16 of the Recommendation, which states that Member States that choose to explore or exploit hydrocarbons using high-volume hydraulic fracturing are “invited” to give effect to the minimum principles set out in the Recommendation.

However, this does not mean that the Recommendation is without legal relevance. In particular, the principles of the Recommendation could have the legal impacts described below.

I. Implementation Into National Law

Some Member States may decide to implement the principles of the Recommendation into their national legislation, thus making them binding. In fact, this is probably the scenario preferred by the Commission. Point 16 of the Recommendation invites Member States to “give effect” to the principles of the Recommendation within six months from its publication, and warns that the Commission “will closely monitor the Recommendation’s application by comparing the situation in Member States.” Not surprisingly, many of the issues that the

1. 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 (2014/70/EU) [2014] O.J. L 39/72 [hereinafter Recommendation].

2. *Id.* at Recital 11.

3. Cándido García Molyneux & Jean De Ruyt, *The Upcoming European Commission’s Recommendation on Shale Gas: A Transitional Political Compromise?*, INSIDE ENERGY & ENVIRONMENT (COVINGTON & BURLING LLP), Jan. 17, 2014, <http://www.insideenergyandenvironment.com/2014/01/the-upcoming-european-commissions-recommendation-on-shale-gas-a-transitional-political-compromise/> (last visited Apr. 9, 2014).

4. Article 288 of the Treaty on the Functioning of the European Union (TFEU).

Recommendation addresses (e.g., planning, installation assessment, permits, operational and environmental performance and closure, and public participation and dissemination of information) are very similar to the regulatory gaps identified by the Commission's Report of July 2013⁵ on the legislation applicable to hydraulic fracturing in several Member States.

There are various examples of Commission Recommendations that have been implemented into national law. A good example is the Commission Recommendation 2003/361/EC on the Definition of Micro, Small, and Medium Sized Enterprises.⁶ Member States have implemented this Commission's Recommendation into their national binding laws by either adopting a specific piece of legislation that copied almost verbatim the Recommendation's provisions or amending different legal acts or guidance to take account of the principles of the Recommendation. Importantly, where national legal provisions refer to principles or definitions provided in a Commission Recommendation, the Court of Justice (CoJ) of the EU is competent to interpret those terms and principles.⁷

II. Stricter National Rules

Other Member States may decide that the principles of the Recommendation are insufficient to regulate the exploration and production of hydrocarbons by means of hydraulic fracturing. In this regard, Recital 9 of the Recommendation addresses two possible situations. First, the Recital makes clear that "Member States are under [no] obligation to pursue the exploration or exploitation of activities using high volume hydraulic fracturing." Second, it also reassures Member States that the Recommendation lays down only "minimum principles" and, therefore, it does not prevent Member States "from maintaining or introducing more detailed measures matching the specific national, regional or local conditions."

Yet, this Member State discretion is subject to the principles of the EU Treaties and, in particular, to that of proportionality. This entails that in areas already regulated by EU legislation such as chemicals and environmental impact assessment, Member States' discretion will first depend on the wording and legal basis of the relevant EU rules. For example, Member States are likely to have very little discretion to restrict the use of chemicals subject to the Regula-

tion on the Registration, Evaluation, Authorization, and Restriction of Chemicals (REACH) in projects involving hydraulic fracturing.⁸ This is because the REACH Regulation is based on the EU's harmonization clause—Article 114 TFEU—and its provisions establish a general prohibition on additional national restrictions on substances that already comply with the Regulation's requirements. Moreover, even in cases where existing EU legislation does not prevent Member States from adopting stricter rules on hydraulic fracturing, these national rules must be necessary and proportionate to the objectives pursued.⁹

III. Interpretation of National Rules

Probably, a more interesting legal scenario is that where Member States decide not to implement the Commission's Recommendation into their national law. Even in this case, the Recommendation could still have a significant impact on the interpretation of those national rules that implement relevant EU environmental legislation. The CoJ has held that while Commission Recommendations "are not intended to produce binding effects [. . .] national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular [. . .] where they are designed to supplement binding [Union] provisions".¹⁰ It is therefore particularly relevant that Recital 11 of the Recommendation states that the Recommendation "is complementary to existing EU legislation."

In effect, this means that when interpreting national rules implementing EU environmental legislation that apply to projects involving hydraulic fracturing, national courts should take into consideration the principles of the Recommendation. For example, in case of doubt on whether a particular shale gas exploration or exploitation activity is subject to the national rules implementing the EU Environmental Liability Directive,¹¹ national courts are likely to take into account Point 12 of the Recommendation, which states that Member States should apply the provisions on environmental liability to all activities taking place at an hydraulic fracturing installation, including those that currently do not fall under the scope of the Environmental Liability Directive.

In this context, the reference to the Mining Waste Directive¹² in Recital 7 of the Recommendation and its implications under the Environmental Liability Directive are particularly interesting. Reportedly, some Member States interpret the Mining Waste Directive so as to exclude unconventional gas exploration and exploitation

5. REGULATORY PROVISIONS GOVERNING KEY ASPECTS OF UNCONVENTIONAL GAS EXTRACTION IN SELECTED MEMBER STATES: FINAL REPORT (July 1, 2013), available at <http://ec.europa.eu/environment/integration/energy/pdf/Final%20Report%2024072013.pdf> [hereinafter REGULATORY PROVISIONS FINAL REPORT].

6. Commission Recommendation of 6 May 2003 on the Definition of Micro, Small, and Medium Sized Enterprises (2003/361/EC) O.J. [2003] L 124/36.

7. Article 267 of the TFEU provides that "the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings on [. . .] the interpretation of acts of the institutions [. . .] of the Union." The Recommendation is an act of an EU Institution. See Case C-110/13, *HaTeFo v. Finanzamt Haldensleben* Judgment of the Court of 27 February 2014; Joined Cases C-297/88 and C-197/89 *Massam Dzodzi* [1990] ECR I-03763.

8. Regulation (EC) 1907/2006 on the Registration, Evaluation, Authorization, and Restriction of Chemicals (REACH), establishing a European Chemicals Agency [2004] O.J. L 396/1.

9. Case C-192/01 *Commission v. Denmark* [2003] ECR I-9693.

10. Case C-322/88 *Grimaldi* [1989] ECR 4407; Case C-188/91 *Deutsche Shell AG* [1993] I-363.

11. Directive 2004/35/EC on Environmental Liability With Regard to the Prevention and Remedying of Environmental Damage [2004] O.J. L143/56.

12. Directive 2006/21/EC on the Management of Waste From Extractive Industries and Amending Directive 2004/35/EC [2006] O.J. L102/15.

operations from its scope.¹³ Among other things, this interpretation limits the environmental liability of hydraulic fracturing operators because the Environmental Liability Directive provides that operators carrying out activities covered by the Mining Waste Directive are subject to strict liability. The fact that Recital 7 of the Recommendation clarifies that hydraulic fracturing exploration and exploitation operations are covered by the Mining Waste Directive suggests that national courts will be more likely to hold that at least some hydraulic fracturing activities are subject to strict environmental liability. Nevertheless, it may also be argued that the legal impact of a Recital of a Recommendation is limited.

Importantly, the Recommendation also has a significant legal impact on the Commission's regulatory and enforcement activities and those of EU agencies. This is because under the EU general principles of equal treatment and protection of legitimate expectations, EU institutions and bodies cannot depart from the provisions that they publish, even if these are not legally binding.¹⁴ For example, Point 10 of the Recommendation on the use of chemicals and its call on manufacturers, importers, and downstream users of chemicals used in hydraulic fracturing to refer to "hydraulic fracturing" when complying with the REACH Regulation's obligations is likely to have an impact on how the European Chemicals Agency (ECHA)—and the Commission—ensure compliance with registration dossiers, chemical safety reports, authorization applications, and other REACH requirements.

The Commission Communication¹⁵ that accompanied the Recommendation of Shale Gas is also in line with this, as it announces that the Commission will request ECHA to make changes to its public data base on registered

chemicals under REACH so as to facilitate the identification of substances used in hydraulic fracturing. This will not only result in public disclosure of the identity of substances used in hydraulic fracturing, but in practice may also allow nongovernmental organizations and private parties to obtain information on the composition of such substances. A recent decision¹⁶ of the General Court of the EU held that the Aarhus Regulation (EC) 1367/2006¹⁷ requires EU authorities to disclose upon request the impurities and composition details of the substances emitted into the environment, even if this may affect the commercial interests of the companies that use or manufacture them.¹⁸

IV. EU Binding Law

Finally, while unlikely, there is also a fourth possible scenario whereby the European Parliament and Council could decide to make the Recommendation on Shale Gas or some of its principles legally binding by incorporating them into a separate legislative act. An example of this is Article 3 of the REACH Regulation, which provides that the definition of a small and medium enterprise is that contained in Commission Recommendation 2003/361/EC.

More likely, Members of the European Parliament could also use the principles of the Commission's Recommendation as a source of inspiration to propose amendments to other legislative proposals under their consideration. In this context, it is noteworthy that, during the Parliament's revision of the Environmental Impact Assessment Directive,¹⁹ its Environment Committee proposed to require that all projects involving the use of hydraulic fracturing be subject to mandatory impact assessment, in line with Point 3 of the Commission's Recommendation.²⁰

13. REGULATORY PROVISIONS FINAL REPORT, *supra* note 5, at 15.

14. Case C-464/09 P *Holland Malt v. Commission* [2010] ECR I-12443; Case C-91/01 *Italy v. Commission* [2004] ECR I-04355.

15. Communication From the Commission to the Council and the European Parliament on the Exploration and Production of Hydrocarbons (Such as Shale Gas) Using High-Volume Hydraulic Fracturing in the EU (COM/2014/0023 final).

16. See Cándido García Molyneux, *EU Court Requires EU Authorities to Disclose Information on Impurities and Composition of Substances Submitted by Companies*, INSIDE EU LIFESCIENCES (Covington & Burling LLP), Oct. 25, 2014, available at <http://www.insideeulifesciences.com/2013/10/25/eu-court-requires-eu-authorities-to-disclose-information-on-impurities-and-composition-of-substances-submitted-by-companies/> (last visited Apr. 10, 2014).

17. Regulation (EC) 1367/2006 on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community Institutions and Bodies [2006] O.J. L 264/13.

18. Case T-545/11 *Stichting Greenpeace Nederland and PAN Europe v. Commission* Judgment of the Court of 8 October 2013. The Commission appealed this decision before the CoJ of the EU.

19. Directive 2011/92/EU of the Assessment of the Effects of Certain Public and Private Projects on the Environment [2012] O.J. L 26/1.

20. The Environment Committee's proposal was not included in the final text agreed between the Council and Parliament due to the strong opposition of some Member States. European Parliament Legislative Resolution of 12 March 2014 on the Proposal for a Directive of the European Parliament and of the Council Amending Directive 2011/92/EU of the Assessment of the Effects of Certain Public and Private Projects on the Environment (COM(2012)0628—C7-0367/2012—2012/0297(COD)).