



# Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 9 October 2014<sup>1</sup>

**Case C-531/13**

**Marktgemeinde Straßwalchen and Others**

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria))

(Environment — Directive 85/337/EEC — Assessment of the effects of certain public and private projects on the environment — Projects which must be made subject to an assessment — Concept of ‘extraction of ... natural gas for commercial purposes’ — Exploratory drilling — Cumulation of projects)

## I – Introduction

1. This is not the first time that the EIA Directive<sup>2</sup> has been the subject of the Court’s attention — quite the contrary.<sup>3</sup> It none the less constantly throws up new questions.
2. In the present preliminary ruling proceedings, it is necessary to clarify whether the trial production of natural gas in the context of exploratory drilling operations constitutes an ‘extraction of ... natural gas for commercial purposes’ for which an environmental impact assessment is mandatory where a particular threshold is reached. It must also be examined how that threshold is to be applied, in particular whether any further drilling operations or other projects must be taken into account and, if so, which.
3. In addition, consideration must be given to the question of how to evaluate whether such exploratory drilling, as a deep drilling operation, requires an assessment because it is likely to have significant effects on the environment.

1 — Original language: German.

2 — Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 (OJ 2009 L 140, p. 114). The EIA Directive was consolidated by Directive 2011/92/EU (OJ 2012 L 26, p. 1), which was recently amended in a number of areas by Directive 2014/52/EU of 16 April 2014 (OJ 2014 L 124, p. 1).

3 — There are already some 100 judgments and orders that refer to that directive.

## II – Legal context

### A – EU law

4. Article 2(1) of the EIA Directive sets out its objective:

‘Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects.’

5. More detailed rules on the projects that must be made subject to an environmental impact assessment are laid down in Article 4(1) to (3) of, and Annexes I to III to, the EIA Directive:

‘(1) ... projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

(2) Subject to Article 2(3), for projects listed in Annex II, Member States shall determine through:

(a) a case-by-case examination;

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in points (a) and (b).

(3) 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.’

6. Annex I, No 14, to the EIA Directive concerns the extraction of natural gas:

‘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 m<sup>3</sup>/day in the case of gas.’

7. Annex II, No 2(d) and (e), also refers to types of project that may, potentially, involve the search for natural gas:

‘(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;

(e) Surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale.’

8. Reference must also be made to Annex II, No 13(b), to the EIA Directive, which concerns development and testing:

‘Projects in Annex I, undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than two years.’

9. Finally, Annex III to the EIA Directive contains the selection criteria, referred to in Article 4(3), for projects in Annex II:

‘1. Characteristics of projectsThe characteristics of projects must be considered having regard, in particular, to:

- (a) the size of the project;
- (b) the cumulation with other projects;

...

- (e) pollution and nuisances;

...

2. Location of projectsThe environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:

- (a) the existing land use;

...’

#### B – *Austrian law*

10. In Annex 1, column 1, No 29(a), to the Umweltverträglichkeitsprüfungsgesetz (Law on Environmental Impact Assessments) 2000 (2000 UVP Law), Austria established that the thresholds laid down in Annex I, No 14, to the EIA Directive must be satisfied ‘per probe’:

‘Production of petroleum or natural gas with a capacity of 500 tonnes/day or more per probe in the case of petroleum and 500 000 m<sup>3</sup>/day or more per probe in the case of natural gas.’

11. Paragraph 1, points 1 and 2, of the Mineralrohstoffgesetz (Law on Mineral Resources) 1999 distinguishes between prospecting for raw materials and their extraction:

‘Paragraph 1. For the purposes of this Federal Law:

1. “Prospecting” means any direct or indirect search for mineral resources, including the associated activities preparatory thereto, as well as the development and examination of natural deposits of mineral resources and discarded heaps containing such resources in order to determine their exploitability;

2. “Extraction” means the removal or release (exploitation) of mineral resources and the associated activities preparatory, parallel and subsequent thereto;

...’

### III – National proceedings and the request for a preliminary ruling

12. In the national proceedings, the Austrian Marktgemeinde Straßwalchen (market municipality of Straßwalchen) and 59 of its inhabitants, including Mr Kornhuber (the 'Marktgemeinde' or 'Marktgemeinde Straßwalchen and others'), object to the fact that, on 29 August 2011, the Austrian Federal Minister for the Economy, Family and Youth authorised the Rohöl-Aufsuchungs AG ('RAG') to undertake exploratory drilling within the territory of that municipality.

13. The authorisation granted covers the construction of the drilling site and access to and assembly and dismantling of the rig, the carrying-out of drilling, assembly and dismantling of the test facilities, the carrying-out of test operations, clearance of the land needed for the rig and the completion of recultivation measures if the exploration is unsuccessful, clearance of the land required for the rig to the dimensions of the future well site and measures to recultivate adjoining areas if the exploration is successful. The anticipated drilling depth is approximately 4 150 m.

14. If the exploration is successful, the authorisation also includes the trial production of natural gas up to a total quantity of 1 000 000 m<sup>3</sup> in order to prove that drilling is economically viable. For that to be the case, some 150 000 to 250 000 m<sup>3</sup> per day must be produced. The gas produced will then be flared off on the fringes of the drilling site. No provision has been made for connection to a natural gas high-pressure pipeline. If the exploration is successful, there will also be a trial production (on a much smaller scale) of petroleum and associated gas (no more than 150 m<sup>3</sup> and 18 900 m<sup>3</sup> per day respectively).

15. An environmental impact assessment was not carried out because, it was claimed, the project did not involve the extraction of natural gas or petroleum and was not connected to other projects.

16. RAG submits that drilling has now been completed and that no petroleum or natural gas was found.

17. In the main proceedings, the Marktgemeinde takes the view, however, that the project should have been the subject of an environmental impact assessment. It argues inter alia that, in its territory alone, more than 30 drillings were carried out and further drillings were authorised. It also submits that a large number of natural gas storage facilities and pipelines were erected in the territory of the municipality and in the surrounding area.

18. The Verwaltungsgerichtshof therefore addresses the following questions to the Court of Justice:

1. Does the trial production of natural gas, for a limited period and in a limited quantity, which is carried out in the context of an exploratory drilling operation designed to establish whether the permanent extraction of natural gas would be economically viable, constitute an 'extraction of ... natural gas for commercial purposes' within the meaning of Annex I, No 14, to the EIA Directive?

If the answer to Question 1 is in the affirmative:

2. Does Annex I, No 14, to the EIA Directive preclude a provision of national law which, with regard to the extraction of natural gas, does not relate the threshold figures in Annex I, No 14, to the EIA Directive to extraction ('Gewinnung') as such, but to 'production per probe' ('Förderung pro Sonde')?
3. Is the IEA Directive to be interpreted as meaning that, in a situation such as that in the main proceedings, in which an application is being made for authorisation for the trial production of natural gas in the context of an exploratory drilling operation, the authority, in order to

determine whether there is an obligation to carry out an environmental impact assessment, must examine, as to their cumulative effect, only all projects of the same kind, specifically, all drilling sites which have been opened in the municipal district?

19. The Marktgemeinde Straßwalchen and others, the Republic of Austria, Rohöl-Aufsuchungs AG, the Federal Republic of Germany, the Republic of Poland and the European Commission have submitted written observations and presented oral argument at the hearing on 3 September 2014.

#### IV – Legal assessment

20. The request for a preliminary ruling seeks to ascertain whether an environmental impact assessment is mandatory for a trial production of natural gas carried out in the context of an exploratory drilling operation. To that end, the Court is asked to clarify first of all whether this constitutes extraction of natural gas for commercial purposes within the meaning of Annex I, No 14, whether, for the purposes of ascertaining whether the prescribed threshold has been reached, the scale of production may be examined per probe and, finally, what other projects have to be taken into account in the examination of the need for an environmental impact assessment.

##### A – *The first question*

21. By the first question, the Verwaltungsgerichtshof seeks to ascertain whether the concept of ‘extraction of ... natural gas for commercial purposes’ set out in Annex I, No 14, to the EIA Directive includes a trial production of natural gas, for a limited period and in a limited quantity, carried out in the context of an exploratory drilling operation to establish whether the permanent extraction of natural gas would be economically viable.

22. First of all, it must be recalled that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the purpose of the legislation in question.<sup>4</sup> How the concept of extraction is defined in Austrian law is therefore irrelevant.

23. Austria and RAG point out that the primary purpose of exploratory drilling is not directly to extract natural gas for economic exploitation. Rather, such drilling serves only to determine whether and to what extent natural gas can be extracted on a economic basis.

24. On the other hand, however, as Germany explains, in natural German usage, the term ‘Gewinnung’ (‘extraction’) describes in a very general way the mining of minerals and raw materials. It is not necessary for the materials extracted to be economically exploitable or for there to be any intention to engage in such exploitation.

25. Germany and the Commission also correctly point out that the English and French versions of the EIA Directive use the term ‘extraction’,<sup>5</sup> in which the implication of commercial exploitation of the materials mined is even weaker than in the term ‘Gewinnung’. A ‘Testförderung’ (‘trial production’) is not incompatible with any of the language versions.

4 — *Linster*, C-287/98, EU:C:2000:468, paragraph 43; *Umweltanwalt von Kärnten*, C-205/08, EU:C:2009:767, paragraph 48; and *Edwards*, C-260/11, EU:C:2013:221, paragraph 29.

5 — The Spanish (‘extracción’), Italian (‘estrazione’), Maltese (‘l-estrazzjoni’), Portuguese (‘extracção’) and Romanian (‘extracția’) versions are based on the same stem. The Bulgarian (‘Добиваното’) and Hungarian (‘kitermelése’) versions, too, are probably similar.

26. The fact that only extraction for commercial purposes is covered does not necessarily exclude a trial production carried out in the context of exploratory drilling from the scope of this type of project. Since it is carried out in order to establish the feasibility of producing natural gas or petroleum commercially, a trial production also serves commercial purposes. The position would be different in the case of a trial production carried out only for research purposes rather than in preparation for an economic activity.

27. Austria and RAG argue, however, that, in the context of mining and mining law, the term ‘Gewinnung’ (‘extraction’) has a narrower meaning. It refers only to the production of raw materials, whereas the removal of raw materials in the course of exploration is classified as ‘Aufsuchung’ (‘prospecting’). In their submission, the legislature was guided by the meaning ascribed to that term in mining law when drafting Annex I, No 14, to the EIA Directive.

28. That understanding is confirmed by the directive on safety of offshore oil and gas operations.<sup>6</sup> In Article 2(15) and (16), that directive distinguishes between exploration and production (‘Förderung’), the latter being defined as including extraction (‘Gewinnung’). By converse inference, exploration would not constitute extraction. Militating in favour of the proposition that that distinction is also relevant to the EIA Directive is the fact that, according to recital 16 in the preamble to the former directive, not all exploratory operations are covered by existing provisions on public participation — including the EIA Directive.

29. The Mining Waste Directive,<sup>7</sup> too, supports the inference of a distinction between prospecting and extraction. Article 3(21) of that directive defines ‘prospecting’ (‘Aufsuchen’) as the search for mineral deposits of economic value, including sampling, bulk sampling, drilling and trenching, but excluding any works required for the development of such deposits, and any activities directly associated with an existing extractive operation.

30. Common to both directives is the fact that they define prospecting separately in order to include it within their regulatory scope. In the context of the EIA Directive, too, therefore, it seems, if anything, doubtful that prospecting is included within extraction in the absence of any express provision to that effect.

31. None the less, the terminological delimitations adopted in other provisions are not binding when it comes to interpreting the types of project covered by the EIA Directive. Thus, the Court has interpreted the concept of waste disposal in the EIA Directive as including waste recovery, while the Waste Directive makes a clear distinction between those two concepts.<sup>8</sup> If the delimitation adopted in other provisions is extraneous to the environmental consequences and the EIA Directive makes no express reference to the other provision, a term in the EIA Directive must be interpreted independently of those provisions and, above all, in the light of the project’s effects on the environment.<sup>9</sup> Furthermore, restricting the concept of waste disposal in the EIA Directive to the meaning given to it in the Waste Directive would have had the effect of removing waste recovery from the scope of environmental impact assessment entirely.

6 — Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC (OJ 2013 L 178, p. 66).

7 — **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 2006 L 102, p. 15).**

8 — *Commission v Italy (Massafra)*, C-486/04, EU:C:2006:732, paragraph 44.

9 — *Commission v Italy (Massafra)*, C-486/04, EU:C:2006:732, paragraphs 42 and 43.

32. In the present case, however, the situation is not as clear-cut as with the distinction between waste disposal and waste recovery. At first sight, the environmental effects of a permanent production of natural gas and of a trial production carried out in the context of an exploratory drilling operation differ primarily in terms of their duration and the infrastructure necessary to exploit the gas produced.

33. It is true that the drilling in particular, which does not differ significantly whether conducted as part of prospecting or production, may conceivably have a bearing on the extent of the environmental effects. In this particular regard, however, there is no appreciable difference between drillings for the production of natural gas within the meaning of Annex I, No 14, to the EIA Directive and other deep drillings for which, in accordance with Article 4(2) and (3) and Annex II, No 2(d), an assessment is compulsory only if they are likely to have significant effects on the environment.<sup>10</sup> The fact that there is drilling does not therefore necessarily mean that natural gas is being extracted.

34. Since there is every likelihood that exploratory drilling will as a rule be covered by the EIA Directive in its capacity as a deep drilling operation, it is unnecessary to extend the concept of extraction of natural gas beyond the sense in which it is used in mining law in order to ensure that such effects are the subject of assessment. It is true that Germany considers the interpretation of this type of project to be unclear, since the concept of deep drilling is not defined. However, this concept of EU law, too, cannot be defined unilaterally by the Member States; it must be interpreted autonomously and, in particular, in the light of the aims of the EIA Directive.

35. A further systematic argument in favour of not including prospecting in extraction lies in the use of *daily* thresholds in the definition of this type of project in Annex I, No 14, to the EIA Directive. A daily threshold suggests that the legislature had in mind not temporary trial production but extraction projects extending over a protracted period of time. It is true that even a trial production may last for several days, as is shown by the development consent at issue here, which prescribes the maximum total production quantity and a lower maximum daily production quantity. However, a trial production of natural gas carried out in the context of an exploratory drilling operation does not have the same characteristics as a permanent production operation.

36. In the light of those arguments, not even the settled case-law to the effect that the EIA Directive has a wide scope and a very broad purpose so far as the obligation to carry out environmental impact assessments is concerned<sup>11</sup> is capable of supporting a different conclusion.

37. The answer to the first question must therefore be that a trial production of natural gas, for a limited period and in a limited quantity, which is carried out in the context of an exploratory drilling operation designed to establish whether the permanent extraction of natural gas would be economically viable does not constitute an 'extraction of ... natural gas for commercial purposes' within the meaning of Annex I, No 14, to the EIA Directive.

<sup>10</sup> — See point 60 et seq. below.

<sup>11</sup> — *Kraaijeveld and Others*, C-72/95, EU:C:1996:404, paragraph 31; *WWF and Others*, C-435/97, EU:C:1999:418, paragraph 40; *Commission v Spain*, C-227/01, EU:C:2004:528, paragraph 46; *Commission v Italy*, C-486/04, EU:C:2006:732, paragraph 37; *Abraham and Others*, C-2/07, EU:C:2008:133, paragraph 32; *Ecologistas en Acción-CODA*, C-142/07, EU:C:2008:445, paragraph 28; *Umweltanwalt von Kärnten*, C-205/08, EU:C:2009:767, paragraph 48; *Brussels Hoofdstedelijk Gewest and Others*, C-275/09, EU:C:2011:154, paragraph 29; *Commission v Spain*, C-404/09, EU:C:2011:768, paragraph 79; *Commission v Spain*, C-560/08, EU:C:2011:835, paragraph 103; *Iberdrola Distribución Eléctrica*, C-300/13, EU:C:2014:188, paragraph 22; and order in *Aiello and Others*, C-156/07, EU:C:2008:398, paragraph 33.

B – *The second question*

38. I shall answer the second question in the event that the Court does not concur with my answer to the first. The second question seeks to ascertain whether Annex I, No 14, to the EIA Directive permits a provision of national law which, in the context of the extraction of natural gas, does not apply the threshold figures laid down in Annex I, No 14, to extraction as such but to ‘production per probe’, that is to say to each individual drilling operation.

39. The wording of Annex I, No 14, to the EIA Directive does not support the inference of a restriction of the threshold to production per probe. For that reason alone it is doubtful whether that condition is compatible with the broad scope of the directive and its objectives.

40. Furthermore, the objective of the EIA Directive cannot be circumvented by splitting projects and failure to take into account the cumulative effect of projects cannot have the consequence of removing projects in their entirety from the obligation to carry out an environmental impact assessment, when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1).<sup>12</sup>

41. It is true that that principle was for the most part established in connection with projects under Annex II to the EIA Directive.<sup>13</sup> However, projects under Annex I, too, must not be split in such a way as to circumvent the obligation to carry out an environmental impact assessment.<sup>14</sup> As the Marktgemeinde rightly submits, restricting the examination of the threshold laid down in Annex I, No 14, to production per probe is an invitation to engage in precisely such project splitting.

42. There is no need for a ruling on the correctness of RAG’s counter submission to the effect that such splitting is precluded on economic grounds. After all, in this case, it would make no difference if the thresholds ceased to be applied to individual probes.

43. It is true that Austria and RAG argue that Austrian law, more specifically Paragraph 3(2) of the 2000 UVP Law, requires that account be taken of cumulative effects. However, the Verwaltungsgerichtshof has not made that provision the subject of its request for a preliminary ruling.

44. Nor is this surprising. After all, in cases where a number of projects combine to reach the threshold, the cumulation rule cited by Austria does not necessarily trigger an environmental impact assessment as provided for in Article 4(1) of, and Annex I, No 14, to, the EIA Directive. Rather, an assessment is carried out only if it is also found that there are likely to be significant harmful, disturbing or adverse effects. The Austrian cumulation rule can therefore, at most, be regarded as serving to transpose Article 4(2) and (3) and Annex II, where an additional finding to that effect is necessary.

45. Annex I, No 14, to the EIA Directive thus precludes a provision of national law which, in the context of the extraction of natural gas, applies the threshold figures laid down there to ‘production per probe’.

12 — *Commission v Ireland*, C-392/96, EU:C:1999:431, paragraph 76; *Abraham and Others*, C-2/07, EU:C:2008:133, paragraph 27; and *Commission v Spain*, C-560/08, EU:C:2011:835, paragraph 98.

13 — In addition to the judgments cited in footnote 12, this is probably also true of *Ecologistas en Acción-CODA*, C-142/07, EU:C:2008:445, paragraph 44; *Brussels Hoofdstedelijk Gewest and Others*, C-275/09, EU:C:2011:154, paragraph 36; and *Salzburger Flughafen*, C-244/12, EU:C:2013:203, paragraph 37.

14 — *Commission v Spain*, C-227/01, EU:C:2004:528, paragraph 53; *Umweltanwalt von Kärnten*, C-205/08, EU:C:2009:767, paragraph 53; and *Iberdrola Distribución Eléctrica*, C-300/13, EU:C:2014:188, paragraph 24.



C – *The third question*

46. By the third question, the Verwaltungsgerichtshof wishes to ascertain which other projects must be taken into account when it comes to examining whether there is an obligation to carry out an environmental impact assessment. In so far as that question is directed at Annex I, No 14, to the EIA Directive, I shall answer it, too, only in the event that the Court arrives at a different conclusion when answering the first question.

47. Since this question is raised only in the event of an affirmative answer to the first question, the Verwaltungsgerichtshof clearly assumes that an obligation to carry out an environmental impact assessment can be based only on Article 4(1) of, and Annex I, No 14, to, the EIA Directive, which concerns the extraction of natural gas for commercial purposes where the amount extracted exceeds 500 000 m<sup>3</sup>/day (see section 1 below). However, that obligation may also arise from Article 4(2) and (3) and Annex II, No 2(d), if the exploratory drilling is to be regarded as deep drilling irrespective of the volume produced. The Court should therefore consider this point, too, if it is to provide a useful answer to the request (see section 2 below).<sup>15</sup>

1. The obligation to assess the extraction of natural gas

48. If the trial production of natural gas carried out in the context of an exploratory drilling operation is to be regarded as an extraction of natural gas, then, in accordance with Article 4(1) of, and Annex I, No 14, to, the EIA Directive, that production must be assessed if the volume produced exceeds 500 000 m<sup>3</sup>/day. Since the volume produced cannot be assessed by reference to an individual probe, the question arises as to how it is to be measured.

49. The Verwaltungsgerichtshof mentions the possibility of including in the assessment all drilling operations which have been opened in the territory of the municipality. In so doing, it raises two points which may be important in this regard, that is to say, first, the types of project or subproject that must be taken into account and, secondly, the delimitation of the area within which those projects are relevant. There is also a third point to bear in mind, that is to say the point in time at which the individual subprojects are executed.

a) The relevant projects or subprojects

50. The Marktgemeinde takes the view that the assessment must include not only the various probes but also natural gas pipelines and storage facilities.

51. I am not convinced by this, however. If the obligation to carry out an environmental impact assessment is assessed in the light of Annex I, No 14, to the EIA Directive, natural gas pipelines and storage facilities cannot be taken into account. The reason for this is that they are not referred to in that provision. Nor can they count towards attainment of the threshold, since pipelines and storage facilities are not used to produce natural gas. Rather, the assessment must look only at whether the extraction of natural gas for commercial purposes exceeds the threshold of 500 000 m<sup>3</sup>/day. The relevant factor, therefore, as Germany and Poland, too, submit, is the volume produced from probes or drillings.

<sup>15</sup> — *Teckal*, C-107/98, EU:C:1999:562, paragraph 39; *Abraham and Others*, C-2/07, EU:C:2008:133, paragraph 24; and *Bonnier Audio and Others*, C-461/10, EU:C:2012:219, paragraph 47.

b) The geographical delimitation

52. There is also the question of which probes are to be included in the measurement of the volume produced.

53. Poland and the Commission are correct when they state that limiting the measurement to the territory of the municipality, as alluded to by the Verwaltungsgerichtshof, is not a suitable criterion. There is not necessarily a correlation between the administrative delimitation of the municipal territory and the delimitation of a project or the extent of its environmental effects. The territory of the municipality may prove to be too limited or too extensive. It may also be only partly co-extensive with the area covered by the project.

54. More convincing, since the volume produced is an expression of the project's potential yield, is the Polish suggestion of including in the assessment all technologically and geologically associated drilling operations. Germany uses the term 'Förderstandort' ('production site') to describe this, and the Commission, too, takes a similar approach in the form of its functional definition of the project's geographical scope.

55. The criteria for a technological and geological association between drillings at a production site cannot be defined in any greater detail in the present case, since the necessary information is unavailable. In particular, it is impossible to decide whether RAG is correct when it submits that every drilling project is technologically and geologically isolated from all others. In making such an assessment, it must be borne in mind, however, that the EIA Directive has a wide scope and a very broad purpose.<sup>16</sup> Consequently, the requirements for the existence of a technological and geological association must not be too strict, but must in particular take appropriate account of the possibility that drilling operations may have combined environmental effects.

c) The temporal dimension

56. Finally, account must be taken of the temporal dimension, which is not addressed in the request for a preliminary ruling. After all, for the purposes of applying Annex I, No 14, to the EIA Directive, it is not possible simply to add together the volumes produced from all technologically and geologically associated exploratory drilling operations at a given production site.

57. Rather, as Germany points out, even where drilling operations are assessed collectively, the production threshold of 500 000 m<sup>3</sup>/day is attainable only if the natural gas from those drilling operations is produced simultaneously, that is to say on the same day.

58. As the first question illustrates, a trial production carried out in the context of an exploratory drilling operation is limited not only in quantity but also in time. Even in cases involving a large number of exploratory drilling operations, it therefore seems relatively unlikely that several such drilling operations will be engaged at the same time in the trial production of natural gas. If this evaluation is correct, then exploratory drilling operations with a maximum permissible production volume of 250 000 m<sup>3</sup>/day each will not necessarily reach the threshold of 500 000 m<sup>3</sup>/day even if assessed collectively with other exploratory drilling operations. On the other hand, the permitted production volume for an exploratory drilling operation may conceivably reach that threshold if assessed collectively with existing production drilling operations. For this to be the case, however, the drilling operations must be technologically and geologically associated. It is for the referring court or the competent authorities to examine whether that is so in each particular case.

<sup>16</sup> — See point 36 above.

d) Interim conclusion

59. The answer to this part of the third question must therefore be that, in order to assess whether a project for the extraction of natural gas for commercial purposes exceeds the production threshold of 500 000 m<sup>3</sup>/day laid down in Annex I, No 14, to the EIA Directive and must therefore be made subject to an environmental impact assessment, account must be taken of the volumes simultaneously produced by all technologically and geologically associated drilling operations at a production site.

2. The obligation to carry out an assessment of deep drilling operations

60. An obligation to carry out an environmental impact assessment may, however, also arise from Article 2(1) and Article 4(2) and (3) of the EIA Directive, since an exploratory drilling to a depth of more than 4 000 m must in any event be regarded as a deep drilling within the meaning of Annex II, No 2(d), irrespective of the volume produced from it.

61. In accordance with Article 4(2) of the EIA Directive, for projects listed in Annex II that are likely to have significant detrimental effects on the environment, Member States must determine, on the basis of a case-by-case examination or thresholds or criteria set by them, whether such a project is to be made subject to an environmental impact assessment.

62. It is true that Article 4(2)(b) of the EIA Directive allows the Member States a measure of discretion when it comes to setting thresholds or criteria for determining whether such a project must be made subject to an environmental impact assessment. However, that discretion is limited by the obligation, laid down in Article 2(1), to the effect that projects likely, by virtue inter alia of their nature, size and location, to have significant effects on the environment must be made subject to an assessment with regard to their effects.<sup>17</sup>

63. The need for an environmental impact assessment may therefore arise directly from Articles 2(1) and 4(2) of, and Annex II to, the EIA Directive if the project falls under that annex and is likely to have significant effects on the environment.<sup>18</sup> In addition, the competent national authorities, when they receive a request for development consent for a project falling under Annex II to the directive, must carry out a specific evaluation as to whether, taking account of the criteria set out in Annex III to the Directive,<sup>19</sup> an environmental impact assessment should be carried out.<sup>20</sup> Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation.<sup>21</sup>

64. Article 2(1) of the EIA Directive provides some preliminary guidance on how to determine whether a deep drilling operation is likely to have significant effects on the environment. Under that provision, the obligation to carry out an assessment relates to projects which, by virtue, inter alia, of their nature, size or location, are likely to have significant effects on the environment. It is not therefore sufficient to consider only the volume produced. Account must also be taken of the other characteristics of a project, in particular its location.<sup>22</sup>

17 — *Kraaijeveld and Others*, C-72/95, EU:C:1996:404, paragraph 50; *WWF and Others*, C-435/97, EU:C:1999:418, paragraph 36; and *Salzburger Flughafen*, C-244/12, EU:C:2013:203, paragraph 29.

18 — *Kraaijeveld and Others*, C-72/95, EU:C:1996:404, paragraph 61; *Wells*, C-201/02, EU:C:2004:12, paragraph 65; and *Salzburger Flughafen*, C-244/12, EU:C:2013:203, paragraphs 41 to 43.

19 — See *Salzburger Flughafen*, C-244/12, EU:C:2013:203, paragraph 32.

20 — *Mellor*, C-75/08, EU:C:2009:279, paragraph 51.

21 — *Mellor*, C-75/08, EU:C:2009:279, paragraph 58. The scope of this right in relation to Austria is the subject of *Gruber*, C-570/13, currently pending.

22 — *Abraham and Others*, C-2/07, EU:C:2008:133, paragraph 38.

65. Accordingly, it is not inconceivable that, in the light of the circumstances of a particular case, such as the type of drilling or the sensitivity of the area concerned, even a single deep drilling operation will be likely to have significant effects on the environment.

66. It must also be borne in mind, however, that, particularly in the case of Annex II projects, failure to take account of the cumulative effects of several projects must not have the consequence in practice of removing projects in their entirety from the obligation to carry out an environmental impact assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive.<sup>23</sup> After all, in accordance with Annex III, No 1 and No 2, first indent, the assessment of such projects must have regard in particular to cumulative effects and existing land use.

67. Consequently, in the consideration as to whether a project is likely to have significant effects on the environment, account must also be taken of facilities which, although not always associated with a project of this kind, are associated with it in the specific case in question.

68. The most important cumulative environmental effects that must be taken into account in the assessment of a deep drilling operation are other deep drilling operations, in particular those which are technologically and geologically associated with the drilling under assessment at a production site.

69. What is more, the Court has for the same reasons held that, for the purposes of the preliminary assessment as to whether a project for the ‘transmission of electrical energy by overhead cables’ as provided for in Annex II, No 3(b), to the EIA Directive is likely to have significant effects on the environment, the extension of substations may also be relevant. This presupposes that the competent court finds that that extension forms part of a project the subject-matter of which is the transmission of electrical energy.<sup>24</sup>

70. The same applies, in the main proceedings here, to natural gas pipelines, natural gas storage facilities and other facilities. The competent court or competent authority must examine whether those facilities are to be regarded as forming part of the same project as the exploratory drilling operations. The fact that the exploratory drilling is not to be connected to the pipeline or storage facility suggests that they are not. It is not inconceivable, however, that at least one of the reasons for the exploratory drilling is that, if the exploration is successful, the gas reserve can easily be exploited by recourse to the existing infrastructure.

71. The preliminary assessment must also consider whether, on account of the effects of other projects at the site or in the surrounding area, such as natural gas pipelines and storage facilities, the environmental effects of the exploratory drillings may be greater than they would be in the absence of such other projects.

72. Finally, it must be pointed out, in the light of the Marktgemeinde’s submission, that an obligation to obtain an environmental impact assessment may even arise retrospectively, as part of a later development consent procedure. If it should prove to be the case that, since the entry into force of the EIA Directive, works or physical interventions which would have required an environmental impact assessment as a project within the meaning of the Directive have been carried out without such an assessment having been made at an earlier stage in the development consent procedure, it will then be necessary to take this into account when a later consent is granted and to ensure that

23 — See points 40 and 43 above.

24 — *Iberdrola Distribución Eléctrica*, C-300/13, EU:C:2014:188, paragraph 29.

that directive is effective by carrying out such an assessment at the very least at that stage of the procedure.<sup>25</sup> In the case of an exploratory drilling operation, the foregoing is certainly true if that operation is technologically and geologically associated with the earlier projects at a production site or if the other infrastructure, constructed at an earlier date, forms a common project with it.

73. The answer to the second part of the third question must therefore be that the assessment as to whether a deep drilling operation is likely to have significant effects on the environment within the meaning of Article 2(1) and Article 4(2) and (3), in conjunction with Annex II, No 2(d), of the EIA Directive and must therefore be made subject to an environmental impact assessment must take account, inter alia, of the effects of all technologically and geologically associated drilling operations at a production site, the effects of all other facilities associated with the drilling operations as part of a project and the cumulative effects of that project combined with other projects at the site or in the surrounding area.

## V – Conclusion

74. I therefore propose that the Court reply to the request for a preliminary ruling as follows:

- (1) The trial production of natural gas, for a limited period and in a limited quantity, which is carried out in the context of an exploratory drilling operation designed to establish whether the permanent extraction of natural gas would be economically viable does not constitute an ‘extraction of ... natural gas for commercial purposes’ within the meaning of Annex I, No 14, to Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2009/31/EC.
- (2) The assessment as to whether a deep drilling operation is likely to have significant effects on the environment within the meaning of Article 2(1) and Article 4(2) and (3), in conjunction with Annex II, No 2(d), of Directive 85/337, as amended by Directive 2009/31, and must therefore be made subject to an environmental impact assessment, must take account, inter alia, of the effects of all technologically and geologically associated drilling operations at a production site, the effects of all other facilities associated with the drilling operations as part of a project and the cumulative effects of that project combined with other projects at the site or in the surrounding area.

75. In the event that the Court should arrive at a different conclusion when answering the first question, it should give the answer proposed at paragraph (2) above as paragraph (4) and answer the second question and the first part of the third question as follows:

- (2) Annex I, No 14, to Directive 85/337, as amended by Directive 2009/31, precludes a provision of national law which, in the context of the extraction of natural gas, applies the threshold figures laid down in Annex I, No 14, to ‘production per probe’.
- (3) In order to determine whether a project for the extraction of natural gas for commercial purposes exceeds the production threshold of 500 000 m<sup>3</sup>/day laid down in Annex I, No 14, to Directive 85/337, as amended by Directive 2009/31, and must therefore be made subject to an environmental impact assessment, account must be taken of the simultaneous production of all technologically and geologically associated drilling operations at a production site.

25 — *Brussels Hoofdstedelijk Gewest and Others, C-275/09, EU:C:2011:154, paragraph 37.*