II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 23 December 1992

establishing that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas does not constitute in France an activity defined in Article 2 (2) (b) (i) of Council Directive 90/531/EEC and that entities carrying on such an activity are not to be considered in France as operating under special or exclusive rights within the meaning of Article 2 (3) (b) of the Directive

(Only the French text is authentic)

(93/18/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1], and in particular pursuant to Articles 3 (4) and 32 (4) to (7) thereof,

Whereas, pursuant to Article 3 of Directive 90/531/EEC, Member States may request the Commission to provide that exploitation of geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels is not to be considered to be an activity defined in Article 2 (2) (b) (i) of the Directive and that the entities carrying out that activity are not to be considered as operating under special or exclusive rights within the meaning of Article 2 (3) (b) by virtue of doing so, provided that a number of precise conditions are satisfied with respect to the relevant national provisions concerning such activities and that any Member State requesting such a decision ensures that entities observe the principles of non-discrimination and competitive procurement in awarding contracts and communicates to the Commission information relating to the award of such contracts;

Whereas, by letter dated 10 April 1992, France requested the Commission to provide that exploitation of geographical areas for the purpose of exploring for or extracting oil or gas should not be considered in France to be an activity as defined in Article 2 (2) (b) (i) of Directive 90/531/EEC and that entities carrying on such an activity are not to be considered in France as operating under special or exclusive rights within the meaning of Article 2 (3) (b) of the Directive; whereas that the request did not cover the exploitation of geographical areas for the purpose of exploring for or extracting coal or other solid fuels;

Whereas that request was accompanied by a copy of the legislative and regulatory provisions in force and a statement of how the five criteria listed in Article 3 (1) could be satisfied with respect to those provisions;

Whereas France supplied additional information on compliance with Article 3 (1) and (2) of the Directive in a letter dated 20 July 1992;

[1] OJ No L 297, 29. 10. 1990, p. 1.

Whereas, as regards compliance with the conditions laid down in Article 3 (1) of the Directive, the Commission has carried out a detailed analysis of the rules in force in France (the Mining Code, as consolidated by Law No 55-720 of 26 May 1955 and as last amended by Decree No 80-204 of 11 March 1980 on mining rights; Decree No 81/-374 of 15 April 1981 approving the standard specifications for oil or gas production concessions; and the Ministerial Order of 11 March 1980 laying down the conditions under which applications for mining concessions and their annexes are to be drawn up), which was communicated in full to the French authorities by letter dated 30 July 1992 and the main findings of which are set out below:

— the provisions of the Mining Code (Articles 7 *et seq.*, the first paragraph of Article 26 and the first paragraph of Article 54) and its implementing provisions satisfy the requirements of Article 3 (1) (a) relating to freedom of access,

— Article 25 of the Mining Code, Article 3 of Decree No 80-204 and Article 2 of the Ministerial Order of 11 March 1980 refer to the need for sufficient technical and financial capacity but do not define what constitutes such capacity or indicate how it can be demonstrated; the requirement laid down in Article 3 (1) (b) of the Directive that technical and financial capacity must be established in advance is not therefore satisfied with respect to the legislative or regulatory provisions currently in force in France,

— the requirements laid down in Article 3 (1) (c) of the Directive relating to the prior establishment and publication of the criteria for assessing the way in which it is intended to carry out the exploration or extraction are not satisfied by the legislative or regulatory provisions currently in force in France, since only Article 3 of Decree No 80-204 refers to the criteria used, and even then in very general and summary terms,

— the requirements laid down in Article 3 (1) (d) of the Directive relating to the prior establishment and communication of the conditions for carrying out exploration or extraction are not satisfied by the legislative or regulatory provisions in force in so far as only a few of those conditions are indicated, but not defined, in Articles 30-II and 51-II off the Mining Code and in so far as some of them are not only based on discretionary assessment by the competent authorities but are also incompatible with the principles enshrined in the Treaty; these conditions are, in particular, those providing for possible supervision of companies and the possibility of imposing restrictions on the use of products,

— none of the general provisions examined lays down any obligation as referred to in Article 3 (1) (e) of the Directive to provide information on sources of procurement;

Whereas, in response to the comments addressed to them, the French authorities agreed in a letter dated 24 September 1992 to make the necessary adjustments and have submitted to the Commission the text of the amendments they propose to make to the legislative and regulatory provisions in force; whereas these adjustments, the details of which are set out in the Annex hereto, are aimed initially at defining the concepts of technical and financial capacity and establishing the way in which such capacity is to be demonstrated as well as laying down the criteria for selecting applications for authorization referred to in Decree No 80-204; whereas they are also intended to delete the incompatible provisions (Articles 30 and 51 of the Mining Code; Decree No 81-374 in full, with the compatible provisions thereof being into another Decree, No 80-330 of 7 May 1980, on the administrative supervision of mines);

Whereas, by a notice published in the *Official Journal of the European Communities*(1), the Commission invited interested parties to comment on French rules and practices; whereas no reply alleging discrimination in the treatment of requests for authorization to carry out exploration or extraction has been received by the Commission;

Whereas the generally applicable provisions in force in France do not comprise any measure that is likely to satisfy the requirements of Article 3 (2) of the Directive;

Whereas, in their letter of 24 September 1992, the French authorities offered to insert into the text of the law which is to transpose Directive 90/531/EEC into French law an article referring to the principles of non-discrimination and competitive procurement, in particular as regards the information made available to enterprises, and communication to the Commission, and providing that these obligations will be defined in a decree the text of which has been communicated for the purposes of an opinion; whereas the text of this draft decree comprised errors or anomalies that were notified by letter of 8 October 1992 to the French authorities, which transmitted a revised and compatible draft on 20 October 1992;

(1) OJ No C 186, 23. 7. 1992, p. 10.

Whereas the provisions of that draft lay down in particular the obligations to be fulfilled by entities holding exploration or extraction permits granted prior to 1 January 1993 with regard to non-discrimination, competitive procurement and the transmission to the Commission of information on the award of contracts, in accordance with Article 3 (3) of the Directive;

Whereas the amendments to be made to the Mining Code and to its implementing provisions in order to comply with Article 3 (1) of Directive 90/351/EEC have to pass through the legislative process and cannot therefore be adopted by 1 January 1993, the date when the Directive is due to enter into force; whereas the French authorities have nevertheless undertaken to strive to complete the process as quickly as possible;

Whereas Law No 92-1282 of 11 December 1992 transposes Directive 90/531/EEC into French law; whereas the draft decree implementing Article 3 of that Law and establishing the arrangements for the award of supply and works contracts by entities holding permits to explore for a extract liquid or gaseous hydrocarbons has been transmitted to the Council of State prior to adoption; whereas, pending the completion of this procedure, the provisions of that decree were incorporated in a joint order dated 15 December 1992, issued by the Minister for Industry and Foreign Trade and the Minister for Energy; whereas, therefore, pending the forthcoming adoption of the definitive text, action has been taken to ensure that Article 3 (2) of the Directive will be effectively applied from 1 January 1993;

Whereas compliance with the principles of non-discrimination and competitive procurement by entities carrying out exploration or extraction, in particular as regards the information they make available to enterprises concerning their intentions with respect to the award of contracts, and with the obligation to transmit to the Commission information on the award of such contracts, as provided for in Article 3 (2) of Directive 90/531/EEC, corresponds to the very aim pursued by the Directive; whereas, since such compliance with those conditions is guaranteed as from 1 January 1993 by the provisions of a binding legal instrument, the benefit of the arrangements introduced by Article 3 of the Directive can be authorized on a temporary basis until the amendments have been made in full to the national provisions so as to make them consistent with Article 3 (1);

Whereas, in accordance with Article 32 (4) to (7) of Directive 90/531/EEC, the Advisory Committee for Public Contracts met on 25 November 1992 to deliver its opinion on this Decision,

HAS ADOPTED THIS DECISION:

Article 1

From 1 January 1993 and for not more than one year, France is authorized to consider that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas is not considered as an activity defined in Article 2 (2) (b) (i) of Directive 90/531/EEC and entities carrying on such an activity shall not be considered in France as operating under special or exclusive rights within the meaning of Article 2 (3) (b) of the Directive.

Article 2

Pending adoption of all the legislative, regulatory or administrative provisions required to give effect to Article 3 (1) of the Directive, France shall observe the principles of non-discrimination, transparency and competitive procurement, which warrant this authorization.

Article 3

This Decision shall be reviewed on the basis of an examination of all the laws, regulations and administrative provisions enacted in France for the purpose of applying Article 3 of Directive 90/531/EEC.

To that end, all such provisions adopted by France shall be notified to the Commission immediately upon their adoption and not later than 1 October 1993.

Article 4

This Decision shall expire on 31 December 1993 and may not be renewed.

Article 5

This Decision is addressed to the French Republic.

Done at Brussels, 23 December 1992.

For the Commission
Martin BANGEMANN
Vice-President

ANNEX

Amendments proposed by France to its legislative, regulatory or administrative provisions relating to Article 3 (1) of Directive 90/531/EEC

I. **Article 3 (1) (b)**

To define the concepts of technical and financial capacity, provisions will be inserted into the Mining Code along the lines of Articles 22 and 23 of Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts [1] and Articles 25 and 26 of Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts [2].

These provisions will consist of the following:

1. The following paragraph is to be added to Article 9 of the Mining Code:

   'An exclusive exploration licence shall not be granted to any person who does not possess the requisite technical and financial capacity for successfuly carrying out the exploration work. The criteria for assessing such capacity shall be laid down by decree of the Council of State.'

2. The first paragraph of Article 25 of the Mining Code is to be worded as follows:

   'A mining concession shall not be granted to any person who does not possess the requisite technical and financial capacity for successfully carrying out the extraction work. The criteria for assessing such capacity shall be laid down by decree of the Council of State.'

3. The following two Articles are to be inserted in Decree No 80-204 of 11 March 1980:

   Article A: 'To demonstrate his technical capacity, the applicant shall submit to the administration:

   (a) the particulars, diplomas and professional qualifications of the enterprise's main managerial staff, and in particular the persons responsible for organizing and supervising the exploration or production work concerned;

   (b) a list of the exploration or production activities in which the enterprise has been involved over the preceding three years, together with a brief description of the most important work;

   (c) a description of the technical means to be employed to carry out the exploration or production work concerned.

   These certificates and documents shall be annexed to the application referred to in Articles 4 or 9 below.

   The administrative authority may request further details or clarification from the applicant.'

   Article B: 'To demonstrate his financial capacity, the applicant shall submit to the administration:

   (a) appropriate bankers' statements;

   (b) the enterprise's three most recent balance sheets and profit-and-loss accounts.

   These certificates and documents shall be annexed to the application referred to in Articles 4 or 9 below.

   The administrative authority may request further details or clarification from the applicant.

   If, for any duly substantiated reason, the applicant is unable to supply the documents or certificates requested, he may be allowed to prove his financial capacity by any other appropriate document.'

II. **Article 3 (1) (c)**

To define explicitly the different criteria used by the French authorities, the Mining Code will be amended as follows:

1. the following paragraph is to be added to Article 9 of the Mining code:

   'The administrative authority shall assess the grounds and considerations whereby preference is to be granted to the different applicants in accordance with criteria laid down by decree of the Council of State.';

2. the following paragraph is to be inserted in Article 25 of the Mining Code:

   'The administrative authority shall assess the grounds and considerations whereby preference is to be granted to the different applicants for concessions in accordance with criteria laid down by decree of the Council of State.';

[1] OJ No L 13, 15. 1. 1977, p. 1.
[2] OJ No L 185, 16. 8. 1971, p. 5.

3. the following Article is to be added to Decree No 80-204 of 11 March 1980:

'Pursuant to Articles 9 and 25 of the Mining Code, the administrative authority shall assess the grounds and considerations whereby preference is to be granted to the different applicants for mining rights on the basis of:

(a) the applicants' financial and technical capacity;

(b) the efficiency and sense of responsibility demonstrated by applicants in connection with other authorizations;

(c) the level of financial commitments to the work;

(d) the technical merit of the work programmes submitted;

(e) the calibre of the prior studies carried out to prepare the work programme;

(f) proximity to any other area already explored or exploited by the applicant.'

Given the importance of the work programme for the purpose of applying these criteria, its content will be defined precisely enough to enable any interested entity to submit a valid application.

To that end, the following Articles are to be added to the Order of 11 March 1980:

Article A: 'The work programme annexed to the application for an exploration licence shall include:

(a) a technical description of the work which the application plans to carry out during the initial period of validity of the licence with a view to surveying and exploiting the area concerned;

(b) a description of the technical means to be employed to carry out the work concerned;

(c) the phasing of the work during the initial period of validity of the licence;

(d) the minimum financial commitment the applicant undertakes to make to the work;

(e) the prior studies carried out to prepare the work programme;

(f) an impact statement explaining how the general work programme meets environmental protection requirements'.

Article B: 'The work programme annexed to the applications for a concession shall include:

(a) a technical description of the work necessary for exploiting the concession applied for;

(b) a description of the technical means to be employed to carry out the work concerned;

(c) the financial commitment which the applicant plans to make to the work;

(d) the date on which exploitation of the concession is planned to begin;

(e) the forecasts for production resulting from the planned exploitation work;

(f) the prior studies carried out to prepare the work programme;

(g) an impact statement explaining how the general work programme meets environmental protection requirements'.

III. **Article 3 (1) (d)**

To repeal all provisions that could be applied in a discretionary manner, the following amendments will be made to the Mining Code and related provisions:

1. deletion of Articles 30 and 51 of the Mining Code (oil or gas);

2. deletion of the reference to specifications in Article 25 of the Mining Code;

3. repeal of Decree No 81-374 of 15 April 1981 laying down standard specifications for oil or gas concessions;

4. insertion into Decree No 80-330 of 7 May 1989 on administrative supervision of Articles 4, 5, 6 and 7 (1) of the standard specifications laid down by Decree No 81-374 of 15 April 1981.