COMMISSION

COMMISSION DECISION

of 14 July 1993

establishing that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas does not constitute in the United Kingdom an activity defined in Article 2 (2) (b) (i) of Council Directive 90/531/EEC of 17 September 1990 and that entities carrying on such an activity are not to be considered in the United Kingdom as operating under special or exclusive rights within the meaning of Article 2 (3) (b) of the Directive

(Only the English text is authentic)

(93/425/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 Articles 3 (4) and 32 (4) to (7) thereof,

Whereas, under Article 3 of Directive 90/531/EEC, a Member State 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 of the Directive and that entities are not to be considered as operating under special or exclusive rights wihtin the meaning of Article 2 (3) (b) by virtue of carrying on one or more of those activities, 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 7 May 1992, the Office of the United Kingdom Permanent Representative to the European Communities 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 the United Kingdom to be an activity defined in Article 2 (2) (b) (i) of Directive 90/531/EEC and the entities carrying on such an activity are not to be considered in the United Kingdom as operating under special or exclusive rights wihtin the meaning of Article 2 (3) (b) of the Directive; whereas that 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 additional information and supplementary documentation relating to regulatory or administrative measures in force, have been supplied in compliance with the provisions of Article 3 (1) and (2) of the Directive in letters from the Office of the Permanent Representative dated 26 June 1992 and 26 February 1993, and in letters dated 4 August and 18 September 1992 from the Department of Trade and Industry;

Whereas, as regards compliance with the conditions laid down in Article 3 (1) of the Directive, the Commission's services have carried out a detailed analysis of the provisions in force in the United Kingdom (the Petroleum Production Act 1934; the Continental Shelf Act 1964, the Petroleum (Production) (Seaward Areas) Regulations 1988 and Amendments 1990 and 1992; the Petroleum (Production) (Landward Areas) Regulations 1991) as well as documents containing supplementary information used during the procedure of granting authorizations supplementary for exploration or extraction (such as notices in the *Gazette*, Guidance Notes, form for licence requests, model licences, guidance notes in relation to the development plan), which was communicated in full to the British authorities by letter dated 6 November 1992 and the main findings of which are set out below:

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

— for the offshore regime, the provisions of Regulation 6 of the Petroleum (Production) (Seaward Areas) Regulations 1992 satisfies the requirements of Article 3 (1) (a) relating to freedom of access ; on the other hand, with regard to the onshore regime, Regulation 6 of the Petroleum (Production) (Landward Areas) Regulations 1991, which limits the theoretical possibilities for the presentation of requests for authorizations, must be modified and brought into line with the text of the Petroleum (Production) (Seaward Areas) Regulations 1992,

— the requirement laid down in Article 3 (1) (b) relating to the prior establishment of technical and financial capacity by candidates, is not met by the legislative, regulatory or administrative provisions currently in force in the United Kingdom ; use of guidance notes peculiar to every authorization round, which are not binding on the administration, and which are made available on the application of the candidates to help them to prepare their application for authorization, and to give details on the type of technical or financial information which should be supplied, does not meet the requirement of legal certainty which is generally implied by the implementation of the provisions of the Community Directives, by reason of the specific nature of the guidance notes which are simply information documents,

— the requirements laid down in Article 3 (1) (c) relating to the prior establishment and publication for the criteria for assessing the ways in which it is intended to carry out the exploration or extraction are not satisfied by the legislative, regulatory or administrative provisions currently in force in the United Kingdom ; instructions relating to the applicable criteria have been put into the *Gazette* notices published for each round but the content of these publications, which is not binding on the administration, can vary considerably from one round to another, and like the guidance notes, they do not, because of their specific nature, provide the legal certainty which is essential for the implementation of the Community Directives ; finally the definition of the criteria is not complete and places great discretionary power in the hands of the Secretary of State for Energy,

— the requirements laid down in Article 3 (1) (d) relating to the prior establishment and communication of the conditions for carrying out exploration or extraction are not satisfied by the legislative regulatory and administrative provisions currently in force in the United Kingdom in so far as some of the typical clauses which appear in the regulatory provisions (Petroleum (Production) (Seaward Areas) Regulations 1988 and Petroleum (Production) (Landward Areas) Regulations 1991) are either of a discriminatory nature, or are non-transparent and non-binding in the way in which they give the Minister a discrrtionary power to determine certain conditions as to the way the system works, in detail :

1. schedule 4, clause 30 — 1988 Regulations (offshore) : which could lead to discriminatory treatment as it imposes restrictions on disposal of oil and gas ;

2. schedule 4, clauses 17 (1) and (4), clause 18 — 1988 Regulations (offshore) : which are not transparent as the criteria concerned are to established prior to the issue of licences ;

3. schedule 4, clause 5 — 1988 Regulations (offshore) : which is not transparent as it is not clear which procedure will be used ;

4. schedule 6, clause 13 and 14 — 1991 Regulations (onshore) : — which are not transparent as it is not possible to determine which type of procedure will be applied and the nature of the criteria for consent to future development ;

5. schedule 4, clause 13 — 1988 Regulations (offshore) ; schedule 6, clause 10 — 1991 Regulations (onshore) : which are not transparent as the determinatiion of conditions relates to the exercise of discretion ;

6. schedule 4, clause 42 (2) (g) — 1988 Regulations — offshore,
schedule 3, clause 28 (e) — 1991 Regulations — onshore,
schedule 5, clause 33 (f) — 1991 Regulations — onshore,
schedule 6, clause 35 (g) — 1991 Regulations — onshore :
which are all discriminatory as they require licences to have central management in United Kingdom ;

7. schedule 4, clauses 5 and 6 — 1988 Regulations — offshore,
schedule 6, clause 4 — 1991 Regulations — onshore :
which are not transparent as no criteria relating to requests for extension of a licence are fixed,

— none of the general provisions examined lay down any obligations, as referred to in Article 3 (1) (e), to provide information on sources of procurement, but additional information about the new role of the Offshore Supplies Office and the nature of its relationship with the sector concerned has been judged necessary in order to allay the concerns caused by its previous interference ;

Whereas, in response to the comments addressed to them, the British authorities in letters form the Office of their Permanent Representative dated 19 November, 3, 14, 22 December 1992, 26 February 1993 and 9 June 1993 and following the meeting of 14 May 1993 with the Commission's services have given assurances and information on the new devolved role of the Offshore Supplies Office, which will no longer be in conflict with Article 3 (1) (e), have agreed to make the necessary adjustments by submitting to the Commission the text of the amendments they propose to make to the legislative regulatory and administrative provisions ; whereas these adjustments, the details of which are set out in the Annex to this Decision, are aimed :

— initially, at removing all the provisions judged by the Commission's services not to conform,

— secondly, at introducing into a new statutory instrument the required definition of technical and financial capacities, and the essential and permanent evaluation criteria of the application fo authorization,

— only complementary requirements justified by technical reasons specific to each round are to be defined in the *Gazette* notices;

Whereas, by a notice published in the *Official Journal of the European Communities* on 5 August 1992 [1] the Commission invited interested parties to comment on British provisions and practices; whereas no reply alleging discrimination in the treatment of requests of authorization to carry out exploration or extraction has been received by the Commission;

Whereas the amendments to be made to the provisions in force in the United Kingdom in order to comply with Article 3 (1) of Directive 90/531/EEC have to pass through the legislative process and cannot therefore be adopted before the adoption of the present decision; whereas the British authorities have nevertheless undertaken to strive to complete the process as quickly as possible, whereas this commitment is contained in a Ministerial Statement; whereas British authorities have committed themselves to respect all the aforementioned provisions in practice;

Whereas 'the utilities supply and works contracts Regulations 1992' adopted on 23 December 1992 transpose Directive 90/531/EEC into British law; whereas paragraph 8 is made up of a series of implementing provisions conforming to Article 3 (2); whereas paragraph 8 refers to the principles of non-discrimination and competitive procurement, in particular as regards the informations made available to enterprises; whereas these provisions entered into force on 13 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, as provided for in Article 3 (2) of Directive 90/531/EEC, corresponds to the aim pursued by the Directive; whereas, since such compliance with those conditions is guaranteed as of 13 January 1993 by the provisions of a binding legal instrument, the benefit of the arrangemets introduced by Article 3 of the Directive can be authorized on a temporary basis until the amendments to be made to the national provisions corresponding to Article 3 (1) have been adopted in full;

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

HAS ADOPTED THIS DECISION:

Article 1

From 15 July 1993 and for not more than one year, the United Kingdom 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 Council Directive 90/531/EEC, and entities carrying on such an activity shall not be considered in the United Kingdom as operating under special or exclusive rights within the meaning of Article 2 (3) (b) of the Directive.

Article 2

Until the adoption of each of the legislative, regulatory or administrative provisions required for the application of Article 3 (1), the United Kingdom respects the principles of non-discrimination, transparency and competition which are fundamental to the current Decision.

Article 3

The current Decision will be reviewed on the basis of an examination of all the legislative, regulatory and administrative provisions enacted in the United Kingdom for the the purpose of applying Article 3 of Directive 90/531/EEC.

To that end, all such provisions adopted by the United Kingdom must be communicated to the Commission on the date of their adoption and not later than 15 April 1994.

Article 4

The current Decision expires on 15 July 1994.

Article 5

This Decision is addressed to the United Kingdom.

Done at Brussels, 14 July 1993.

For the Commission

Raniero VANNI D'ARCHIRAFI

Member of the Commission

[1] OJ No C 198, 5. 8. 1992, p. 8.

ANNEX

AMENDMENTS PROPOSED BY THE UNITED KINGDOM TO ITS LEGISLATIVE, REGULATORY, OR ADMINISTRATIVE PROVISIONS RELATING TO ARTICLE 3 (1) OF DIRECTIVE 90/531/EEC

I. Article (3) (1) (a)

In order to guarantee freedom of access, paragraph 3 of Regulation 6 of the Petroleum (Production) (Landward Areas) Regulations 1991 will be drafted in terms similar to these of Regulation 6 of the Petroleum (Production) (Seaward Areas) Regulations 1992.

The wording of the new provision will be the following:

for paragraph 3 of Regulation 6 of the Principal Regulations (applications for exploration licenses), there shall be substituted the following paragraph:

'3. The requirement set out in paragraph 1 above shall not apply in the case of an application which relates to an area every part of which was comprised in an exploration licence (in this paragraph referred to as "the revoked licence") which has been revoked, either in whole or in relation to the area to which the application relates, provided that:

(a) at the time the revoked licence was revoked, it was held by two or more persons; and

(b) the application is made by one of those persons, or by a group including at least one of those persons.'

II. Article (3) (1) (b)

In order to define precisely the required conditions regarding the financial and technical capacity the Petroleum (Production) (Seaward Areas) Regulations and the Petroleum (Production) (Landward Areas) Regulations will be amended as follows:

1. *as regards the Seaward Regulations:*

(a) the following general provision will be introduced:

'The Secretary of State shall not evaluate the merits of any competing application unless he is satisfied that

(a) the applicant has the financial and technical capacity to engage in activities pursuant to the licence; and' (Regulation 4 of the Draft Seaward Regulations 1993);

(b) schedule 3 to the Principal Regulations (form of application for a licence) shall be amended as follows:

(a) for paragraph 5 there shall be substituted the following paragraph:

'5. In the case of an application for a production licence:

(a) the reference number of each block in respect of which the application is made and, if the application is made by tender, the consideration by way of initial payment which the applicant is prepared to offer for each such block (A);

(b) evidence of the applicant's technical and financial capacity to undertake that work programme, including the number of staff the applicant intends to assign for that purpose and any relevant technical qualifications held by those staff;

(c) the database available to the applicant which is relevant to activities under the licence applied for;

(d) an analysis of the geology of the area to which the application relates, identifying, in particular, petroleum prospects;

(e) the technical data on which the analysis is based;

(f) the work programme for evaluating the potential petroleum production from the area to which the application relates which the applicant would be prepared to undertake under the licence applied for;

and

(g) and explanation of the relevance of the work programme to the analysis of the geology.';

(b) in paragraph 7, after subparagraph (f) there shall be inserted the following subparagraphs:

'(g) where the applicant is or has a subsidiary (as defined in section 736 of the Companies Act 1985), a diagram identifying any companies of which it is a subsidiary and any subsidiaries it has;

(h) the training provided in the three-year period ending on the date of the application for the licence for graduate or professional staff employed by the applicant in connection with the exploration for and production of petroleum';

(c) after subparagraph 9 (2) there shall be inserted the following subparagraphs:

'3. If the most recent audited accounts are in respect of a period ending on a date more than 12 months before the date of the application for the licence, there shall accompany the application three copies of a balance sheet as of the latest date within that 12-month period in respect of which a balance sheet can be made available.

4. In the case of an application for a production licence for each applicant who is not a body corporate there shall accompany the application evidence demonstrating that he will have sufficient resources available to him to undertake the work programme.';

2. *as regards the Landward Regulations:*

(a) the following general provision will be introduced:

'The Secretary of State shall not evaluate the merits of any competing application for a licence unless he is satisfied that

(a) the applicant has the financial and technical capacity to engage in activities pursuant to the licence; and' (Regulation 4 of the Draft Landward Regulations 1993);

(b) in schedule 2 to the principal Regulations (form of application for a licence):

(a) for paragraph 5 there shall be substituted the following paragraph:

'5. in the case of an application for an exploration licence which is made in respect of one or more particular blocks:

(a) the reference number of each block in respect of which the application is made and, if the application is made by tender, the consideration by way of initial payment which the applicant is prepared to offer for each such block (A);

(b) evidence of the applicant's technical and financial capacity to undertake that work programme, including the number of staff the applicant intends to assign for that purpose and any relevant technical qualifications held by those staff;

(c) the database available to the applicant which is relevant to activities under the licence applied for;

(d) an analysis of the geology of the area to which the application relates, identifying, in particular, petroleum prospects;

(e) the technical data on which the analysis is based;

(f) the programme for evaluating the potential petroleum production from the area to which the application relates which the applicant would be prepared to undertake under the licence applied for;

and

(g) an explanation of the relevance of the work programme to the analysis of the geology.';

(b) in paragraph 9 after subparagraph (f) there shall be inserted the following subparagraphs:

'(g) where the applicant is or has a subsidiary (as defined in section 736 of the Companies Act 1985), a diagram identifying any companies of which it is a subsidiary and any subsidiaries it has;

(h) the training provided in the three-year period ending on the date of the application for the licence for graduate or professional staff employed by the applicant in connection with the exploration for and production of petroleum';

(c) after paragraph 10 there shall be inserted the following paragraph :

'10A (1) In the case of an application for a production licence, for each applicant which is a body corporate there shall accompany the application three copies of the most recent audited accounts of each such applicant and three copies of the most recent audited accounts of any body corporate having control of such applicant. Subsections (2) and (4) to (6) of section 416 of the Income and Corporation Taxes Act (a) shall apply, for the purpose of determining whether for the purpose of this paragraph a body corporate has control of another body corporate, with the following modifications, namely :

(a) for the words "the greater part" wherever they occur in the said subsection (2) there shall be substituted the words "one third or more" ;

(b) in the said subsection (b), for the word "may" there shall be substituted the word "shall", the words from "and such attributions" onwards shall be omitted, and in the other provisions of that sub-section any reference to an associate of a person shall be construed as including only a relative of his (as defined by section 417 (4) cf. that Act), a partner of his and a trustee of a settlement (as defined by section 581 (4) cf. that Act) of which he is a beneficiary ;

(c) there shall accompany the application of list of the bodies corporate whose acounts are submitted pursuant to subparagraph (1) above ;

(d) if the most recent audited accounts are in respect of a period ending on a date more than 12 months before the date of the application for the licence, there shall accompany the application three copies of a balance sheet as or the latest date within that 12-month period in respect of which a balance sheet can be made available ;

(e) in the case of an application for a production licence, for each applicant who is not a body corporate there shall accompany the application evidence demonstrating that he will have sufficient resources available to him to undertake the work programme.'

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

In order to specify all the criteria on the basis of which authorizations are granted the following provisions will be inserted into the Petroleum (Production) (Landward Areas) Regulations and the Petroleum (Production) (Seaward Areas) Regulations :

1. *as regards the Seaward Regulations :*

— Regulation 3 of the Draft Seaward Regulation 1993 :

'An application for a licence shall, subject to Regulation 4, be determined by the Secretary of State by reference to the following criteria :

(a) the assessment, by the applicant, of the hydrocarbon prospects in the area to which the application relates and the extent to which the work programme proposed by the applicant enables those prospects to be evaluated ;

and

(b) the database and experience available to the applicant which are relevant to activities under the licence applied for ;

predominant weight shall be given to the first of these criteria.',

— Regulation 4 of the Draft Seaward Regulations 1993 :

'The Secretary of State shall not evaluate the merits of any competing application for a licence unless he is satisfied that :

[. . .]

(b) the applicant will be able to engage in such activities with sufficient regard to the environment.' ;

2. *as regards the Landward Regulations :*

— Regulation 3 of the Draft Landward Regulations 1993 :

'An application for a licence shall, subject to regulation 4 be determined by the Minister by reference to the following criteria :

(a) the assessment, by the applicant, of the hydrocarbon prospects in the area to which the application relates and the extent to which the work programme proposed by the applicant enable those prospects to be evaluated ; and

(b) the database and experience avalable to the applicant which are relevant to activities under teh licence applied for;

predominant weight shall be given to the first of these criteria.',

— Regulation 4 of the Draft Landward Regulations 1993

'The Secretary of State shall not evaluate the merits of any competing application for a licence unless he is satisfied that:

[...]

(b) the applicant will be able to engage in such activities with sufficient regard to the environment.'

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

All provisions that could be applied in a discriminatory way or that do not offer the required conditions of transparence will be amended as follows:

1. *clause 30 of schedule 4 — 1988 Regulations (offshore)* shall cease to have effect;

2. *with regard to clauses 17 (1) and (4) and clause 18 of schedule 4 — 1988 Regulations (offshore):*

— paragraph 1 and subparagraph (a) of paragraph 8 of clause 18 (provisions supplementary to clause 17) shall cease to have effect,

— in clause 17 (development and production programmes):

(i) in paragraph (i), the words 'with the consent in writing of the Minister or' shall be omitted;

(ii) in paragraph 4, for subparagraph (a) there shall be substituted the following subparagraph

'(a) that the Minister approves the programme subject to such conditions as may be specified in the notice as the Minister considers necessary in the national interest to secure the maximum ultimate recovery of petroleum from the licensed area;

or';

(iii) in paragraph 7, for the words 'paragraph 4 (b)', there shall be substituted the words 'paragraph 4 (a) or (b)';

— in clause 18 (provisions supplementary to clause 17)

(i) in paragraph 7, for 'clause 17 (4) (b)' there shall be substituted 'clause 17 (4) (a) or (b)', and the words 'or a consent in pursuance of paragraph 1 of this clause' shall be omitted;

(ii) in paragraph 8, the words 'while the consent is in force or' shall be omitted;

3. *with regard to clause 5 of schedule 4 — 1988 Regulations (offshore):*

subparagraph (a) of paragraph 2 of clause 5 (continuance of licence after second term) shall cease to have effect;

4. *with regard to clauses 13 and 14 of schedule 6 — 1991 Regulations (onshore):*

— in clause 13 (development and production programmes):

(i) in paragraph 1, the words 'with the consent in writing of the Minister or' shall be omitted;

(ii) in paragraph 4, for subparagraph (a) there shall be substituted the following subparagraph:

(a) that the Minister approves the programme subject to such conditions as may be specified in the notice as the Minister considers necessary in the national interest to secure the maximum ultimate recovery of petroleum from the licensed area;

or';

(iii) in paragraphs 7 and 8, for the words 'paragraph 4 (b)' there shall be substituted the words 'paragraph 4 (a) or (b)';

— in clause 14 (provisions supplementary to clause 13):

(i) paragraph 1 shall be omitted;

(ii) in paragraph 7, for 'clause 13 (4) (b)' there shall be substituted 'paragraph 4 (a) or (b) of clause 13', and the words after 'of this licence' shall be omitted;

(iii) in paragraph 8 for the words 'a consent or approval' in subparagraph (a) there shall be substituted 'an approval', and the words 'while the consent is in force or' shall be omitted;

5. *clause 13 of schedule 4 — 1988 Regulations (offshore) and clause 10 of schedule 6 — 1991 Regulation (onshore)* shall be omitted;

6. *clauses 42 2 (g) of schedule 4 and 21 2 (f) of schedule 5 — 1988 Regulations (offshore), 28 2 (e) of schedule 3, 33 (2) (f) of schedule 5 and 35 2 (g) of schedule 6 — 1991 Regulations (onshore)* will be amended as follows:

the sentence 'The licensee's ceasing in the case of a company to have its central management and control in the United Kingdom' will be replaced by 'the licensee's operations or business activities under or in connection with the licence ceasing to be managed, directed and controlled from a fixed place within the United Kingdom';

7. *clause 5 and 6 of schedule 4 — 1988 Regulations (offshore) and clause 4 of schedule 6 — 1991 Regulations (onshore)* will be changed as follows:

— in subparagraph 2 (d) of clause 5 (continuance of licence after second term) and in clause 6 (power to extend term of licence), for the words 'in his discretion', there shal l be substituted the words 'with a view to securing the maximum economic recovery of petroleum from the licensed area',

— in clause 4 (extension or further extension of licence term), after the words 'any extension thereof' there shall be inserted the words 'and with a view to securing the maximum exonomic recovery of petroleum from the licensed area'.