COMMISSION DECISION

of 10 December 1993

establishing that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas does not constitute in the Netherlands 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 the Netherlands as operating under special or exclusive rights within the meaning of Article 2 (3) (b) of the Directive

(Only the Dutch text is authentic)

(93/676/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European 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, 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 entities are not to be considered as operating under special or exclusive rights within the meaning of Article 2 (3) (b) by virtue of carrying on one or more of these 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 February 1991 from their Ministry of Economic Affairs, confirmed by letter dated 10 April 1991 from the Office of their Permanent Representative to the European Communities, the Dutch authorities 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 Netherlands to be an activity 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 the Netherlands as operating under special or exclusive rights within the meaning of Article 2 (3) (b) of the Directive;

Whereas that request was accompanied by a copy of the laws and regulations in force;

Whereas, by letter of 24 October 1991, the Office of the Dutch Permanent Representative sent the Commission a statement of how the five criteria listed in Article 3 (1) could be satisfied with respect to those laws and regulations;

Whereas additional information and documentation on the regulations or administrative provisions in force was supplied, in accordance with Article 3 (4) of the Directive, in correspondence from the Ministry of Economic Affairs dated 8 April 1992 and from the Office of the Dutch Permanent Representative dated 20 July 1992 and 6 November 1992;

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 the Netherlands (the Law of 21 April 1810 on mines and quarries (Mijnwet 1810), as amended by the Mining Law of 1903 (Mijnwet 1903); the Laws of 20 June 1924 and 3 May 1967 on minerals exploration; the Law of 23 September 1965 on exploration for and extraction of minerals on the North Sea continental shelf (Mijnwet continentaalplat); the Decree of 27 January 1967 implementing Article 12 of the Mining Law and the Decree of 6 February 1976 implementing the same Article, as amended by the Decrees of 20 February 1986 and 4 July 1988; the Decrees of 31 March 1967 and 30 March 1976 implementing Article 3 of the Mining Law and the Decree of 9 November 1983 implementing the same Article, as amended by the Decree of 22 July 1988; the Decrees of 30 October 1968, 14 December 1971 and 15 October 1982 implementing Article 5 of the Mining Law; the Decree of 7 February 1967 governing applications for authorizations and exemptions under the Mining Law, as amended by the Decree of 13 February 1976; and documents containing additional information, used during the procedure for granting authorizations to engage in exploration or extraction (such as the 'Declaration of priority for geophysical exploration' [2]), and the information distributed by the Ministry of Economic Affairs for the seventh round of authorizations (Toewijzing 7e ronde Opsporingsvergunningen)). The findings of the analysis were communicated to the Dutch authorities by letter dated 9 October 1992, and by fax dated 1 December 1992, the main ones being set out below:

— as regards offshore exploration and extraction activities, the provisions of the Law of 23 September 1965 on the continental shelf satisfy the requirements of

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

[2] *Regeling geofysisch onderzoek ter ondersteuning van in te dienen aanvragen voor een boorvergunning.*

Article 3 (1) (a) relating to freedom of access ; however, as far as onshore exploration or extraction activities are concerned, although the applicable legislation is broadly in line with the aims of Article 3 (1) (a), it is apparent from the declaration of priority for geophysical exploration, and in particular Articles 5 and 12 thereof, that firms which are members of NOGEPA (1) receive, if they make an application for authorization, preferential treatment incompatible with the abovementioned provision ;

— with regard to offshore exploration and extraction activities, the Law on the continental shelf, and in particular Article 14 thereof, and Articles 5a and 6a of the Decree of 7 February 1967, including its two Annexes, are such as to satisfy the requirement laid down in Article 3 (1) (b) that the technical and financial capacity of candidates must be established in advance ; as far as onshore activities are concerned, however, the nature of the financial and technical information that must be supplied in support of an application for authorization is specified neither in the Mining Law of 21 April 1810 nor in the Law of 3 May 1967 on minerals exploration, with the result that the requirements of Article 3 (1) (b) are not satisfied,

— only the provisions governing offshore exploration or extraction activities satisfy the requirements laid down in Article 3 (1) (c) 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 ; on the other hand, neither the Mining Law of 21 April 1810 nor the Law of 3 May 1967 on minerals exploration gives any indication as to the criteria applied for onshore activities,

— with regard to 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, the provisions relating to offshore activities in force in the Netherlands were, in the light of further explanations given by the Dutch authorities, deemed satisfactory ; however, although equivalent conditions apply in practice to authorizations for onshore exploitation, the corresponding provisions of the legislation do not satisfy the requirements of Article 3 (1) (d) since the conditions are not laid down in a binding general instrument which is published in advance,

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

(1) *Nederlandse Olie en Gas Exploratie en Produktie Associatie* (Dutch Oil and Gas Exploration and Production Association).

Whereas, in response to the comments addressed to them and following a meeting with the Commission held on 4 December 1992, the Dutch authorities agreed in a letter from their Ministry of Economic Affairs dated 18 December 1992 to make the necessary adjustments and submitted to the Commission the text of the amendments they proposed to make to the laws, regulations and administrative provisions in question ; whereas those adjustments were aimed at :

— reproducing the rules on the declaration of priority in a ministerial decree to be published in the Dutch Official Gazette to enable non-members of NOGEPA to obtain a declaration of priority under the same conditions as members,

— establishing, in a ministerial decree to be published in the Dutch Official Gazette, the requirements regarding technical and financial capacity to be met by entities applying for authorization to engage in onshore activities, such requirements being equivalent to those applied in the case of offshore activities,

— establishing, in a decree also to be published in the Dutch Official Gazette, the objective criteria on which authorizations to engage in onshore exploration or extraction are to be granted ;

Whereas, to remedy the shortcomings identified by the Commission, the Dutch authorities communicated, in an annex to the abovementioned letter dated 18 December 1992 from their Ministry of Economic Affairs, the draft texts of two ministerial orders, one relating to the requirements regarding technical and financial capacity to be met by entities requesting authorization and the other to applications for a declaration of priority ;

Whereas, by letter dated 24 February 1993, the Commission informed the Dutch authorities that the provisions of those two draft measures were such as to satisfy the requirements of Article 3 (1) ;

Whereas the two ministerial orders, one relating to the financial and technical conditions for obtaining authorization and for carrying on activities subject to such authorization and the other to applications for a declaration of priority, were adopted on 19 July 1993 ;

Whereas, by a notice published in the *Official Journal of the European Communities* (2), the Commission invited interested parties to comment on the Dutch rules and

(2) OJ No C 170, 29. 6. 1991, p. 8.

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, by the abovementioned letter dated 18 December 1992 from their Ministry of Economic Affairs, the Dutch authorities communicated the text of a draft Royal Decree transposing Article 3 (2) of Directive 90/531/EEC into Dutch law;

Whereas a Royal Decree transposing into Dutch law the provisions of Directive 90/531/EEC, with the exception of Article 3 thereof, was adopted on 6 April 1993;

Whereas a Royal Decree amending the Royal Decree cited in the preceding recital and transposing Article 3 (2) of Directive 90/531/EEC was adopted on 6 July 1993; whereas that Royal Decree guarantees 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;

Whereas, in accordance with Article 3 (3) of the Directive, the said Royal Decree also refers to the obligations on entities holding authorizations to carry out exploration or extraction issued before 1 January 1993 as regards non-discrimination, competitive procurement and transmission to the Commission of information on the award of contracts;

Whereas, by letter dated 28 July 1993 from the Office of their Permanent Representative, the Dutch authorities communicated to the Commission the texts of the Royal Decree transposing Article 3 (2) of the Directive and of the two ministerial orders adopted with a view to bringing the Dutch rules on the granting of authorizations to carry out exploration or extraction into line with Article 3 (1) of the Directive;

Whereas, in accordance with Article 32 (4) to (7) of Directive 90/531/EEC, the Advisory Committee for Public Contracts met on 13 October 1993 to deliver its opinion on this Decision,

HAS ADOPTED THIS DECISION:

Article 1

From 10 December 1993, the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas shall not be considered in the Netherlands to be 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 the Netherlands as operating under special or exclusive rights within the meaning of Article 2 (3) (b) of the Directive.

Article 2

This Decision is taken on the basis of the rules governing the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas and applicable in the Netherlands on 10 December 1993.

Article 3

1. Any laws, regulations or administrative provisions amending the rules applicable on 10 December 1993 to the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas in the Netherlands shall be communicated to the Commission as soon as they are adopted.

2. Whenever the Dutch authorities decide to grant authorizations to exploit geographical areas for the purpose of exploring for or extracting oil or gas, any documents laying down additional requirements for obtaining such authorization shall likewise be communicated to the Commission as soon as they are published, in so far as they differ substantially from documents published previously.

3. The information referred to in paragraphs 1 and 2 is notified to the Commission in order to enable it to assess if it is appropriate to amend, withdraw or maintain this Decision.

Article 4

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 10 December 1993.

For the Commission

Raniero VANNI D'ARCHIRAFI

Member of the Commission