COMMISSION DECISION

of 15 January 2004

on a request from Germany to apply the special procedure laid down in Article 3 of Directive 93/38/EEC

(notified under document number C(2003) 5351)

(Only the German text is authentic)

(Text with EEA relevance)

(2004/73/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1], as last amended by Commission Directive 2001/78/EC [2], and in particular Article 3(4) thereof,

Having regard to Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons [3], and in particular Article 12 thereof,

Following Germany's new application of 12 November 2002 [4],

Having consulted the Advisory Committee on Public Procurement,

Whereas:

(1) Pursuant to Article 3 of Directive 93/38/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 shall not be considered to be an activity defined in Article 2(2)(b)(i) and that entities shall not 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 certain conditions are satisfied with respect to the relevant national provisions concerning such activities, that the requesting Member State guarantees that the principles of non-discrimination and competitive procurement are observed in respect of the award of contracts, and that the Commission is informed of the award of these contracts.

(2) Member States that have fulfilled their obligations under Directive 94/22/EC are deemed to have met the requirements set out in Article 3(1) of Directive 93/38/EEC with respect to oil and gas.

(3) In its letter of 12 November 2002, Germany asked the Commission to adopt a Decision under Article 3 of Directive 93/38/EEC on the exploitation of geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels.

In this communication, Germany referred to a letter dated 15 November 1991 in which it had originally made an application under Article 3 of Directive 90/531/EEC [5], which was in force at the time. Article 3 of Directive 90/531/EEC and Article 3 of Directive 93/38/EEC, which is currently in force, are entirely equivalent, except for the reference to Directive 94/22/EC and the legal assumption it implies. This application resulted in correspondence between the Commission and the Federal Republic of Germany.

The Commission informed Germany of its initial findings in its letters of 9 July 1992 and 30 November 1992, asking for replies to a number of outstanding questions by a given date. In its letter of July 1992, the Commission pointed out that the Federal Mining Act (*Bundesberggesetz*) did not in itself satisfy all of the cumulative criteria laid down in Article 3(1). According to the wording of Article 3(1), the conditions should be set out and described in detail in national provisions having legal force. The Council and the Commission had, however, stipulated in the Council Protocol to Directive 90/531/EEC that the conditions and requirements could also be contained in laws or other general implementing instruments. A case-by-case examination of the conditions for authorisation referred to in Article 3(2) is not sufficient. Those conditions must also be laid down in laws or general implementing instruments. In its letter of November 1992, the Commission asked the German authorities to confirm that regulations adopted

[1] OJ L 199, 9.8.1993, p. 84.
[2] OJ L 285, 29.10.2001, p. 1.
[3] OJ L 164, 30.6.1994, p. 3.
[4] On 15 November 1991, Germany had initially made an application under Article 3 of Directive 90/531/EEC that the Commission had to reject because it was incomplete. The rule on legal protection set out in Section 57a of the Budgetary Principles Act (*Haushaltsgrundsätzegesetz*) was not deemed adequate for granting effective legal protection. This provision was not amended until 1998, with the adoption of part 4 of the Restriction of Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*).

[5] OJ L 297, 29.10.1990, p. 1.

by the *Länder* by way of supplement to the Federal Mining Act would not only be published, but that compliance with them would be peremptory and that beneficiaries would be able to cite them as a basis for asserting their rights. In response to the draft Regulation which was presented to the Commission by way of implementation of Article 3(2), the Commission stated that the draft was in need of revision, both in substantive terms and with regard to its legal basis. Indeed, as the German authorities themselves had stated, the purpose of the Regulation is not to facilitate rules which create rights which a potential contractor can successfully cite in court in a dispute with an awarding authority which has failed in its obligation to ensure a competitive procurement procedure.

At the Commission's request, and in order to demonstrate that Article 3(1) had been transposed, the German authorities, in their letters of 14 September 1992, 25 February 1993 and 28 September 1993, submitted draft implementing provisions for the issuing of permits and authorisations under the Federal Mining Act, together with evidence of their definitive publication in the appropriate journals. These provisions are still in force, unchanged, today. The Commission's questions were also answered.

In a letter dated 28 September 1993, the German authorities informed the Commission that Directive 90/531/EEC would be implemented by means of an amendment to the second Budgetary Principles Act (*Haushaltsgrundsätzegesetz*) which came into force on 1 November 1993, and that they therefore considered the conditions laid down in Article 3(2) to have been fulfilled.

(4) In the meantime, on 14 June 1993, Directive 93/38/EEC had been adopted, replacing Directive 90/531/EEC. Member States had to apply this Directive as from 1 July 1994 at the latest. Directive 93/38/EEC was transposed into German law at Federal level with the 'Law amending the legal provisions governing the award of Public Contracts' (*Gesetz zur Änderung der Rechtsgrundlagen für die Vergabe öffentlicher Aufträge — Vergaberechtsänderungsgesetz*) of 26 August 1998 ([1]).

The legal-protection provision in Section 57a of the Budgetary Principles Act that the Commission had complained about in its letter of 30 November 1992 was also replaced by part 4 of the Restriction of Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*).

Section 11 of the Regulation on the Award of Public Contracts (*Vergabeverordnung*) of 9 January 2001, which is based on the Restriction of Competition Act, reproduces the provision set out in Article 3(2) of Directive 93/38/EEC and guarantees observance of the principles of non-discrimination and competitive award of contracts by contracting authorities that have obtained authorisation under the Federal Mining Act to explore for or extract oil, gas, coal or other solid fuels, particularly with respect to the information made available to the contractors regarding their intention to award a contract and the obligation to provide the Commission with information on the award of the contracts. Since the Regulation on the Award of Public Contracts is based on Section 97(6) and Section 127 of the amended Restriction of Competition Act, the Commission's reservations set out in its letter of 30 November 1992 are no longer relevant.

(5) With the Federal Mining Act of 13 August 1980 ([2]) and the implementing provisions for the award of permits and authorisations under the Federal Mining Act of 1993, Germany has complied with its obligations under Directive 94/22/EC.

These provisions apply not only to hydrocarbons, but also to coal and other solid fuels.

(6) With reference to Article 3(3) of Directive 94/22/EC, Germany, on 22 October 1994 had a timely announcement ([3]) published in the *Official Journal of the European Communities* to the effect that the entire territory of Germany is, under the terms of that Article, permanently available for prospecting and exploring for and extraction of hydrocarbons provided no individual authorisations exist.

(7) With reference to Article 5(1)(5), second sentence, of Directive 94/22/EC, Germany, on 18 March 1995 had an announcement ([4]) published in the *Official Journal of the European Communities*, drawing attention to the publication of the criteria in accordance with Article 5(1) in the Federal Official Journal and the Official Journals of the 16 *Länder*.

(8) In accordance with Article 9 of Directive 94/22/EC, the Federal Government publishes an annual report entitled '*Der Bergbau in der Bundesrepublik Deutschland*' (Mining in the Federal Republic of Germany), containing a list of mining authorisations. Mining authorisations contain only the information necessary for meeting the legal requirements, particularly with respect to geographical extent and duration. Under the administrative legislation in force in Germany, the granting of authorisations may not be made subject to considerations that are not permitted by law.

(9) As regards oil and gas, the Commission assumes that Germany meets the requirements set out in Article 3(1) of Directive 93/38/EEC since, with the Federal Mining Act of 13 August 1980 and its implementing provisions, it has transposed all the provisions of Directive 94/22/EC, and hence the assumption embodied in Article 12, to the effect that the conditions set out in Article 3(1) of Directive 93/38/EEC are considered to be satisfied, comes into effect.

Article 3(2) of Directive 93/38/EEC was implemented in German law by means of Section 11 of the Regulation on the Award of Public Contracts.

The Commission has no further information on Article 3(3) of Directive 93/38/EEC.

([1]) Federal Official Journal (*Bundesgesetzblatt — BGBl.*) I, p. 2512.

([2]) *BGBl.* I p. 1310.
([3]) OJ C 294, 22.10.1994, p. 11.
([4]) OJ C 67, 18.3.1995, p. 7.

(10) Directive 94/22/EC regulates the granting and use of authorisations for prospecting and exploring for and extracting hydrocarbons. It does not cover coal or other solid fuels. Directives cannot simply be extended to cover other areas without prior amendment. The legal assumption embodied in Article 12 is not, therefore, applicable to coal or other solid fuels. Member States can, however, decide on their own initiative to extend the scope of Directive 94/22/EC to cover other sectors, such as coal or other solid fuels, and adopt appropriate national provisions. Since coal and other solid fuels are commodities which are comparable to petroleum and gas, and given that authorisations for the prospection, exploration and extraction of all the said commodities are awarded by means of a similar procedure, the Commission considered it appropriate to compare the provisions of Directive 94/22/EC with those of Directive 93/38/EEC and, insofar as the two Directives were found to be mutually compatible, to determine the precise extent to which the implementation was correct with regard to coal and other solid fuels. Since the matter in hand does not concern an application of the legal assumption embodied in Article 12, the Commission must examine the relevant provisions of Article 3(1) in two stages.

First, it must examine the extent to which the provisions of Directive 93/38/EEC correspond with those of Directive 94/22/EC:

— Articles 2, 3, and 7 of Directive 94/22/EC correspond to Article 3(1)(a) of Directive 93/38/EEC,

— Article 5(1) of Directive 94/22/EC corresponds to Article 3(1)(b) of Directive 93/38/EEC,

— Article 4(a) of Directive 94/22/EC corresponds to Article 3(1)(c) of Directive 93/38/EEC,

— Article 5(2) to (5) of Directive 94/22/EC correspond to Article 3(1)(d) of Directive 93/38/EEC,

— Article 6(4) of Directive 94/22/EC corresponds to Article 3(1)(e) of Directive 93/38/EEC.

Second, it must examine the extent to which, given the correspondence between Directive 93/38/EEC and Directive 94/22/EC, the implementation for coal and other solid fuels is correct. It has already been established that the implementation for coal and other solid fuels was carried out completely and correctly with the Federal Mining Act. Since the provisions of that Act apply not only to oil and gas, but also to coal and other solid fuels, it is to be assumed that, since the two Directives correspond, Directive 93/38/EEC has also been implemented correctly for coal and other solid fuels.

Article 3(2) of Directive 93/38/EEC was implemented in German law by Section 11 of the Regulation on the Award of Public Contracts.

The Commission has no further information on Article 3(3) of Directive 93/38/EEC,

HAS ADOPTED THIS DECISION:

Article 1

The exploitation of geographical areas in Germany for the purpose of exploring for or extracting oil, gas, coal or other solid fuels shall not, as from 15 January 2004, be considered to be an activity defined in Article 2(2)(b)(i) of Directive 93/38/EEC.

Contracting authorities shall not be considered as operating under special or exclusive rights within the meaning of Article 2(3)(b) of Directive 93/38/EEC by virtue of carrying on such activities.

Article 2

1. This Decision is based on the legal and administrative provisions in force in Germany on 15 January 2004, which implemented Directive 94/22/EC and Article 3 of Directive 93/38/EEC, and of which the Commission has been notified.

2. Germany shall notify the Commission of legal and administrative provisions amending the legal and administrative provisions referred to in paragraph 1 as soon as they have been adopted, so that the Commission will be able to examine whether this Decision should be upheld, amended or withdrawn.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 15 January 2004.

For the Commission

Frederik BOLKESTEIN

Member of the Commission