COMMISSION IMPLEMENTING DECISION

of 24 June 2011

exempting exploration for oil and gas and exploitation of oil in Italy from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

(notified under document C(2011) 4253)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2011/372/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [1], and in particular Article 30(5) and (6) thereof,

Whereas:

I. FACTS

(1) On 23 March 2011 the Italian Petroleum and Mining Industry Association – Assomineraria transmitted a request pursuant to Article 30(5) of Directive 2004/17/EC to the Commission by e-mail. In accordance with Article 30(5) first subparagraph, the Commission informed the Italian authorities thereof by letter of 1 April 2011, to which the said authorities answered on 19 April 2011. The request submitted by Assomineraria concerns the exploration for oil and gas and exploitation of oil in Italy. In line with previous Commission Merger Decisions [2], two distinct activities have been described in the request, namely:

(a) exploration for oil and natural gas; and

(b) production of oil.

(2) In accordance with the abovementioned Commission Decisions, 'production' will for the purposes of this Decision be taken to include also 'development', i.e. the setting up of adequate infrastructure for future production (oil platforms, pipelines, terminals, etc.). Furthermore, established Commission practice also found that 'the development, production and sales of crude oil' constitutes 'one relevant product market' [3]. Thus, for the purposes of this Decision, 'production' will be taken as including both 'development' as well as (first) sale of oil.

(3) Assomineraria is a trade association which, in this context, acts on behalf of the main undertakings operating in the exploration and production of hydrocarbons sector in Italy. The four main companies affiliated to the association are ENI SpA, Edison SpA, Shell Italia E&P SpA and Total E&P Italia SpA.

II. LEGAL FRAMEWORK

(4) Article 30 of Directive 2004/17/EC provides that contracts intended to enable the performance of one of the activities to which Directive 2004/17/EC applies shall not be subject to that Directive if, in the Member State in which it is carried out, the activity is directly exposed to competition on markets to which access is not restricted. Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. Access is deemed to be unrestricted if the Member State has implemented and applied the relevant EU legislation opening a given sector or a part of it.

(5) Since Italy has implemented and applied 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 [4], access to the market should be deemed not to be restricted in accordance with the first subparagraph of Article 30(3) of Directive 2004/17/EC. Direct exposure to competition

[1] OJ L 134, 30.4.2004, p. 1.

[2] See in particular Commission Decision 2004/284/EC of 29 September 1999 declaring a concentration compatible with the common market and the EEA Agreement (Case No IV/M.1383 — Exxon/Mobil) and subsequent decisions, inter alia, Commission Decision of 3 May 2007 declaring a concentration to be compatible with the common market (Case No COMP/M.4545 – STATOIL/HYDRO) according to Council Regulation (EEC) No 139/2004.

[3] See, inter alia, Commission Decision 2001/45/EC of 29 September 1999 declaring a concentration to be compatible with the common market and the EEA Agreement (Case IV/M.1532. BP Amoco/Arco), point 14.

[4] OJ L 164, 30.6.1994, p. 3.

in a particular market should be evaluated on the basis of various criteria, none of which are, necessarily and per se, decisive.

(6) For the purposes of assessing whether the relevant operators are subject to direct competition in the markets concerned by this Decision, the market share of the main players and the degree of concentration of those markets shall be taken into account. As the conditions vary for the different activities that are concerned by this Decision, a separate assessment shall be undertaken for each activity/market.

(7) This Decision is without prejudice to the application of the rules on competition.

III. ASSESSMENT

(8) Each of the two activities that are the subject of this request (exploration for oil and natural gas and production of oil) have been considered to constitute separate product markets in the previous Commission Decisions referred to in recitals 1 and 2 above. They should therefore be examined separately.

Exploration for oil and natural gas

(9) According to Commission practice [1], exploration for oil and natural gas constitutes one relevant product market, since it is not possible from the outset to determine whether the exploration will result in finding oil or natural gas. On the exploration market, exploration companies acquire exploration licenses granted by 'host countries' usually via bidding procedures [2]. It has furthermore been established through the same, long-standing, Commission practice, that the geographical scope of that market is worldwide. Given that there is no indication that the definition would be different in this case, it will be maintained for the purposes of this Decision.

(10) The market shares of operators active in exploration can be measured by reference to three variables: the capital expenditure, proven reserves and expected production. The use of capital expenditure to measure the market shares of operators on the exploration market has been found to be unsuitable, inter alia, because of the large differences between the required levels of investments that are necessary in different geographic areas. Thus, larger investments are needed to explore for oil and gas in the North Sea than is the case for exploration in, e.g. the Middle East.

(11) Two other parameters have typically been applied to assess the market shares of economic operators within this sector, namely, their share of proven reserves and of the expected production [3].

(12) As of 31 December 2009, the global, proven oil and gas reserves amounted to a total of 385,58 billion standard cubic metres oil equivalent (in the following Sm^3 o. e.) worldwide, according to the available information [4]. As of 1 January 2010, the combined, proven oil and gas reserves in Italy amounted to slightly more than 0,205 billion Sm^3 o. e. [5], or slightly more than 0,05 %. The share thereof of the individual contracting entities operating in Italy is necessarily even smaller. According to the available information, there is a direct correlation between proven reserves of oil and gas and expected future production. Nothing in the available information therefore indicates that the market share of the individual contracting entities operating in Italy would be substantially different if measured in terms of expected production rather than in terms of its share of proven reserves. Given the links between proven reserves and actual production these facts can be taken as an indication also of the state of competition on the market concerned here.

(13) The exploration market is not highly concentrated. Apart from the state-owned companies, the market is characterised by the presence of international vertically integrated private players named the super majors (BP and ExxonMobil and Shell) as well as a certain number of so-called 'majors'. These elements are an indication of direct exposure to competition.

Production of oil

(14) According to established Commission practice [6], development, production and sales of (crude) oil is a separate product market whose geographic scope is worldwide. Given that there is no indication that the definition would be different in this case it will be maintained for the purposes of this Decision.

[1] See in particular the abovementioned Exxon/Mobil Decision and, more recently, Commission Decision of 19 November 2007 declaring a concentration to be compatible with the common market (Case No COMP/M.4934 – KAZMUNAIGAZ/ROMPETROL) according to Council Regulation (EEC) No 139/2004.

[2] M.1532 BP Amoco/Arco, paragraphs 9 and 10.

[3] See in particular the abovementioned Exxon/Mobil Decision (paragraphs 25 and 27).

[4] See point 5.2.1 of the application and the sources quoted there, in particular the BP Statistical Review of World Energy, June 2010, in the following referred to as '2010 BP Statistics', annexed to it. The Canadian oil sands were not taken into account for reasons of consistency with previous Article 30 Decisions.

[5] According to 2010 BP Statistics, p. 8.

[6] See in particular the abovementioned Exxon/Mobil Decision and, more recently, Commission Decision of 19 November 2007 declaring a concentration to be compatible with the common market (Case No COMP/M.4934 – KAZMUNAIGAZ/ROMPETROL) according to Council Regulation (EEC) No 139/2004.

(15) According to the available information [1], the total, daily production of oil worldwide amounted to 79,948 million barrels in 2009. That same year, a total of 0,095 million barrels per day were produced in Italy giving it a market share of 0,11 %. Looking at the 2009 share of the individual contracting entities operating in Italy, the situation is as follows: with a worldwide production of 1 007 thousand [2] barrels per day, ENI has a share of 1,26 % of oil production worldwide; Shell's worldwide production of 1 581 thousand barrels of oil per day [3] gives it a market share amounting to 1,98 % of oil production in the world; Total has a worldwide production of 1 381 thousand barrels of oil per day [4] which gives it a market share amounting to 1,73 % of oil production worldwide; finally Edison has a worldwide daily production of 5 thousand barrels of oil per day [5] which gives it a market share amounting to 0,006 % of oil production in the world.

(16) For the purposes of this analysis, it is important to have regard to the degree of concentration in the relevant market as a whole. In this view, the Commission notes that the market for crude oil production is characterised by the presence of big state-owned companies and three international vertically integrated private players (the so called 'super majors': BP, ExxonMobil and Shell whose parts of oil production in 2009 amounted to: 3,2 %, 3,0 % and 2,0 % respectively [6]) as well as a certain number of so-called 'majors' [7]. These factors suggest that the market comprises a number of players between whom effective competition can be presumed.

IV. **CONCLUSIONS**

(17) In view of the factors examined in recitals 8 to 16 the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in Italy in respect of the following services:

(a) exploration for oil and natural gas; and

(b) production of oil.

(18) Since the condition of unrestricted access to the market is deemed to be met, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable the services listed in points (a) and (b) of recital 17 to be carried out in Italy, nor when design contests are organised for the pursuit of such an activity in those geographic areas.

(19) According to the application, in Italy most of exploitation fields produce both oil and gas, in different percentages [8]. The production of gas is not subject to this exemption request, and for this sector the provisions of Directive 2004/17/EC continue to apply. In this context, it is recalled that procurement contracts covering several activities shall be treated in accordance with Article 9 of Directive 2004/17/EC. This means that, when a contracting entity is engaged in 'mixed' procurement, that is procurement used to support the performance of both, activities exempted from the application of Directive 2004/17/EC and activities not exempted, regard shall be had to the activities for which the contract is principally intended. In the event of such mixed procurement, where the purpose is principally to support the production of gas, the provision of Directive 2004/17/EC shall apply. If it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the rules referred to in paragraphs (2) and (3) of Article 9 of Directive 2004/17/EC.

(20) This Decision is based on the legal and factual situation as of March 2011 to April 2011 as it appears from the information submitted by Assomineraria, and BP Statistical Review of World Energy 2010 and the Italian authorities. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC are no longer met.

(21) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee for Public Contracts,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2004/17/EC shall not apply to contracts awarded by contracting entities and intended to enable the following services to be carried out in Italy:

(a) exploration for oil and natural gas; and

(b) production of oil.

[1] See p. 8 of 2010 BP Statistics, annexed to request.
[2] Of which 56 thousand barrels per day are produced daily in Italy.
[3] Of which 30 thousand barrels per day are produced daily in Italy.
[4] Total does not produce oil in Italy.
[5] The entire oil production of Edison takes place in Italy.
[6] See point 5.2.3 of the application, p. 18.
[7] E.g.: Total, Chevron, Eni and Conoco, whose market shares are smaller than those of the super majors.
[8] See point 2.1 of the application.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 24 June 2011.

For the Commission
Michel BARNIER
Member of the Commission