COMMISSION IMPLEMENTING DECISION

of 28 July 2011

exempting exploration for oil and gas and exploitation of oil in Denmark, excluding Greenland and the Faroe Islands, 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) 5312)

(Only the Danish text is authentic)

(Text with EEA relevance)

(2011/481/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(4) and (6),

Having regard to the request submitted by the Kingdom of Denmark by e-mail of 26 May 2011,

Whereas:

I. FACTS

(1) On 26 May 2011, the Commission received a Danish request pursuant to Article 30(4) of Directive 2004/17/EC, transmitted to the Commission by e-mail.

(2) The request submitted by the Kingdom of Denmark concerns the exploration for oil and gas and exploitation of oil in Denmark, excluding Greenland and the Faroe Islands. 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.

In accordance with the above-mentioned 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 oil.

(3) 29 companies are participating as licensees or operators in Danish oil and/or gas concessions, with three operators being responsible for the current production of oil and gas. These are Mærsk Olie og Gas A/S ('Mærsk', operates 15 fields), DONG E&P A/S ('Dong', operates 3 fields) and Hess Denmark ApS ('Hess', operates 1 field) [4]. Furthermore, Wintershall Nordzee B.V. and Altinex Oil Denmark A/S (NORECO), have as operators made discoveries in undeveloped fields with no present production. For reasons of risk-sharing, the normal management of exploration and exploitation activities is by means of joint venture agreements, in which one part is appointed as 'operator' and where the other parties to the joint venture obtain a pro-rata share to any oil and gas produced by the consortium. The non-operating participants have full control over where, when and to whom they sell and they are therefore at the same time partners and competitors of the operators.

(4) The request is introduced, and thus endorsed, by Konkurrence- og Forbrugerstyrelsen (the Danish Competition and Consumer Authority).

II. LEGAL FRAMEWORK

(5) 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

[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 i.a. Commission Decision 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 (OJ L 18, 19.1.2001, p. 1).

[4] The fields mentioned are the producing ones.

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.

(6) Since Denmark 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 authorizations for the prospection, exploration and production of hydrocarbons ([5]), 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 in a particular market should be evaluated on the basis of various criteria, none of which are necessarily decisive.

(7) 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.

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

III. ASSESSMENT

(9) 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 recital 2 above. They should therefore be examined separately.

Exploration for oil and natural gas

(10) According to established Commission practice ([6]), 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. 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 the present decision.

(11) 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, i.a. 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.

(12) 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 ([7]).

(13) 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 ([8]). As of 31 December 2009, the combined, proven oil and gas reserves in Denmark amounted to slightly more than 0,19 billion Sm^3 o.e. ([9]), or slightly more than 0,05 %. The share thereof of the individual contracting entities operating in Denmark is obviously 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 Denmark 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.

(14) The exploration market is not highly concentrated. Apart from state owned companies, the market is characterised by the presence of three international vertically integrated private players named the super majors (BP, 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

(15) According to established Commission practice ([10]), development and production 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 the present decision. According to the available information ([11]), the total, daily production of oil worldwide amounted to 79,948 million barrels in

([5]) OJ L 164, 30.6.1994, p. 3 and OJ L 79, 29.3.1996, p. 30.

([6]) See in particular the above-mentioned 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.

([7]) See in particular the above-mentioned Exxon/Mobil Decision (paragraphs 25 and 27).

([8]) See point 5.2.1 of the application and the sources quoted there, in particular the BP Statistical Review of World Energy, June 2010, annexed to it; in the following referred to as 'BP Statistics'.

([9]) That is, 0,06 trillion m^3 gas, equal to 0,0594 billion Sm^3 o.e., and 0,9 thousand million barrels oil equal 0,135 billion Sm^3, giving a total of 0,1944 billion Sm^3.

([10]) See footnote 6.

([11]) See page 8 of BP Statistics.

2009. That same year, a total of 0,265 million barrels per day were produced in Denmark, giving it a market share of 0,33 %. Looking at the 2009 share of the individual contracting entities operating in Denmark, the situation is as follows: with a worldwide production of 381 thousand ([12]) barrels per day, Mærsk has a share of 0,5 % of oil production worldwide; Dong's worldwide, daily production of 23 thousand barrels of oil gives it a market share amounting to 0,029 % of the global oil production; finally, Hess' total production of 11 575 barrels per day gives it a share of 0,014 % of oil production worldwide.

(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 respective parts of oil production in 2009 amounted to 3,2 %, 3,0 % and 2 %) as well as a certain number of so-called 'majors' ([13]). 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 5 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 the Denmark, excluding Greenland and the Faroe Islands, 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) to (b) of recital 17 to be carried out in Denmark, excluding Greenland and the Faroe Islands, nor when design contests are organised for the pursuit of such an activity in that geographic area.

(19) Generally exploration fields can produce both oil and gas, in different proportions. The production of gas is not subject to this exemption request, and the provisions of Directive 2004/17/EC continue to apply to this sector. In situations where a field produces both oil and gas, 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, to support the performance of both activities (i.e. 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 May 2011 to July 2011 as it appears from the information submitted by the Danish 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 Denmark, excluding Greenland and the Faroe Islands:

(a) exploration for oil and natural gas; and

(b) production of oil.

Article 2

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 28 July 2011.

For the Commission
Michel BARNIER
Member of the Commission

([12]) Of which 90 thousand barrels are produced daily in Denmark.
([13]) E.g. Total, Chevron, Eni and Conoco, whose market shares are smaller than those of the super majors.