COMMISSION IMPLEMENTING DECISION (EU) 2015/2177

of 20 November 2015

exempting exploration for oil and gas in Portugal 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(2015) 8043)

(Only the Portuguese text is authentic)

(Text with EEA relevance)

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),

Having regard to the request submitted by Eni Portugal BV by email of 28 July 2015,

Whereas:

I. FACTS

(1) On 28 July 2015, Eni Portugal BV (hereinafter 'the applicant') submitted an formal request to the Commission pursuant to Article 35(1) of Directive 2014/25/EU of the European Parliament and of the Council ([2]), transmitted to the Commission by e-mail. The request was accompanied by a reasoned and substantiated position of 16 July 2015 adopted by Portuguese Competition Authority. Pursuant to the request, the Commission was asked to establish that the provisions of Directive 2004/17/EC, and the procurement procedures provided for in that Directive, did not apply to exploration for oil and gas in Portugal.

II. LEGAL FRAMEWORK

(2) Until repealed, Directive 2004/17/EC applies to the award of contracts for the pursuit of exploration for oil and gas, unless this activity is exempted pursuant to Article 30 of that Directive. From a procedural point of view, however, the provisions of the Directive 2014/25/EU apply to requests for exemption, as the material conditions for granting an exemption remain unchanged as to substance.

(3) According to Article 30 of Directive 2004/17/EC, contracts intended to enable one of the activities referred to in Articles 3 to 7 of that Directive are not subject to that Directive if, in the Member State in which it is performed, 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 to a given market is deemed to be unrestricted if the Member State has implemented and applied Union legislation relating to the opening of the relevant market as set out in Annex XI to Directive 2004/17/EC. Pursuant to Point G of that Annex XI, Directive 94/22/EC of the European Parliament and of the Council ([3]) constitutes relevant Union legislation relating to the opening of the market for the exploration for and extraction of oil or gas.

([1]) OJ L 134, 30.4.2004, p. 1.
([2]) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).
([3]) 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 (OJ L 164, 30.6.1994, p. 3).

(4) Portugal has transposed ([4]) and applied Directive 94/22/EC. Therefore, access to the market for the exploration for and extraction of oil or gas is deemed not to be restricted in accordance with the first subparagraph of Article 30(3) of Directive 2004/17/EC.

(5) For the purposes of assessing whether the relevant activity is 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 is to be taken into account.

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

III. **ASSESSMENT**

(7) The applicant is a contracting entity in the meaning of Article 2(2)(b) of Directive 2004/17/EC. The applicant cannot be qualified as contracting authority or a public undertaking. It pursues an activity exploration for oil and gas referred to in Article 7 of Directive 2004/17/EC. In addition, it operates on the basis of special rights acquired on 18 December 2014. These special rights comprise of concession contracts for blocks 'Santola', 'Lavagante' and 'Gamba' acquired by the applicant. The initial concession contracts were signed on 1 February 2007 between the Portuguese State on the one hand, and the Harman Resources Ltd (80 %) Petróleos de Portugal — Petrogal, SA (Galp) (10 %) and Partex Oil and Gas (Holdings) Corporation (10 %) on the other. On 25 March 2010, the concession contracts were assigned to Petrobras International Baspetro BV (50 %) and Petróleos de Portugal — Petrogal SA (Galp) (50 %). Finally, by amendment executed on 18 December 2014, said contractual positions were assigned to Eni Portugal BV (70 %) and Petróleos de Portugal — Petrogal, SA (Galp) (30 %).

(8) The request is limited to the exploration for oil and gas. Eni Portugal BV and Petróleos de Portugal — Petrogal, SA (Galp) form together a joint-venture whereby the applicant is the project operator and is in charge of exploration, appraisal, development, production and decommissioning operations. The applicant is responsible for all procurement required for the development of the exploration for and production activities.

(9) According to established Commission practice ([5]), exploration for oil and natural gas should be regarded as constituting 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. Moreover, in accordance with such practice, the geographical scope of that market should be considered to be worldwide. Given that there is no indication that the definition of the geographical scope of the market would be different in this case, it should 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: capital expenditure, proven reserves and expected production.

(11) The use of capital expenditure to measure the market shares of operators on the exploration market has, however, been considered unsuitable because of the extent of the differences between the required levels of investment that may be necessary in different geographic areas. The two other parameters, namely proven reserves and expected production, have typically been applied to assess the market shares of economic operators within this sector ([6]).

([4]) Decree-Law no. 109/94, of April 26th (Decreto-Lei n.º 109/94 de 26 de Abril); Ministerial Order no. 790/94, September 5th (Portaria n.º 790/94 de 5 de Septembro).

([5]) See 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) (OJ L 103, 7.4.2004, p. 1); Commission Decision 2001/45/EC of 29 September 1999 declaring concentration to be compatible with the common market and the EEA Agreement (Case No IV M.1532 — BP Amoco/Arco) (OJ L 18, 19.1.2001, p. 1); Commission Decision of 6 March 2002 declaring a concentration compatible with the common market (Case No COMP/M.2681 CONOCO/PHILIPS PETROLEUM) (OJ C 79, 3.4.2002, p. 12); Commission Decision of 20 November 2003 declaring concentration to be compatible with the common market (Case No COMP/M.3294 EXXONMOBIL/BEB) (OJ C 8, 13.1.2004, p. 7); Commission Decision of 3 May 2007 declaring concentration to be compatible with the common market (Case No COMP/M.4545 STATOIL/HYDRO) (OJ C 130, 12.6.2007, p. 8); Commission Decision of 19 November 2007 declaring a concentration to be compatible with the common market (Case No COMP/M/4934 — KAZMUNAIGAZ/ROMPETROL) (OJ C 31, 5.2.2008, p. 2).

([6]) See in particular points 25 and 27 of Decision 2004/284/EC and subsequent decisions, inter alia, Case No COMP/M.4545 — STATOIL/HYDRO.

(12) In 2014, the worldwide proven and probable oil and gas reserves amounted to 209 934 817 170 standard cubic meters oil equivalent ([7]). In Portugal, the total number of exploration concessions amounted to 12 ([8]) and the number of exploration wells drilled in Portugal was 0 in 2014. There are currently no proven oil and gas reserves in Portugal.

(13) The applicant has not produced any oil or natural gas in Portugal or any other country in the past 3 financial years; however the estimation is such that exploration can lead to a possible discovery of hydrocarbon of around [… standard cubic meters] in the deep water exploration areas of Portugal where permits were assigned ([9]). In 2014, the parent company Eni SpA had a share of 0,9 % in the worldwide market for proved and probable reserves for exploration of oil and gas ([10]).

(14) The exploration market is not highly concentrated. Apart from state-owned companies, the market is characterised by the presence of majors, such as ExxonMobil, Chevron, Shell, BP and Total. In 2014, on the worldwide market for the exploration of oil and natural gas, the majors hold respective shares of 2,8 % (ExxonMobil), 2,1 % (Chevron), 1,9 % (Shell), 1,4 % (BP), 1,4 % (Total). As regards the state-owned companies, their respective shares in the worldwide market for the exploration of oil and natural gas are 13,6 % (Saudi Aramco), 7,4 % (Gazprom), 4,8 % (Qatar Petroleum), 4,7 % (National Iranian Oil Company) ([11]). Eni SpA holds a market share of 0,9 % of the worldwide proven and probable oil and natural gas reserves. As regards the EU territory, Eni SpA holds a market share of 4 % of proven and probable oil and natural gas reserves ([12]). These elements are an indication of direct exposure to competition.

IV. **CONCLUSION**

(15) On the basis of the considerations set out in recitals 1 to 14, 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 Portugal.

(16) 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 exploration for oil and natural gas to be carried out in Portugal, nor when design contests are organised for the pursuit of such an activity in that geographic area.

(17) This Decision is based on the legal and factual situation as of 29 July 2015 to 11 September 2015 as it appears from the information submitted by the applicant. 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.

(18) 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 exploration for oil and natural gas to be carried out in Portugal.

([7]) According to Wood Mackenzie quoted by the applicant.
([8]) These include the deep offshore blocks, the Barreiro concession and, in addition, the '*Caranguejo*' and '*Sapateira*' blocks in the Algarve Basin, which have already been granted but the concession contracts have not yet been signed.
([9]) [… confidential information].
([10]) See footnote 7.
([11]) See footnote 7.
([12]) See footnote 7.

Article 2

This Decision is addressed to Portuguese Republic.

Done at Brussels, 20 November 2015.

For the Commission
Elżbieta BIEŃKOWSKA
Member of the Commission