

Commission Decision of 8 July 2009 exempting exploration for and exploitation of oil and gas in the Netherlands 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 number C(2009) 5381) (Only the Dutch text is authentic) (Text with EEA relevance) (2009/546/EC)

COMMISSION DECISION

of 8 July 2009

exempting exploration for and exploitation of oil and gas in the Netherlands 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 number C(2009) 5381)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(2009/546/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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),

Having regard to the request submitted by Nederlandse Aardolie Maatschappij B.V. (hereinafter referred to as NAM) by e-mail of 26 February 2009,

After consulting the Advisory Committee for Public Contracts,

Whereas:

I. **FACTS**

- (1) By Commission Decision 93/676/EEC⁽²⁾, contracting entities exploring for or extracting oil or gas in the Netherlands were authorised to apply an alternative regime in place of the normal set of rules provided for under the then applicable Directive. The alternative regime entailed certain statistical obligations and an obligation to observe the principles of non-discrimination and competitive procurement in respect of the award of supplies, works and service contracts, in particular as regards the information which the entity makes available to economic operators concerning its procurement intentions. The effects of that Decision were safeguarded without prejudice

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to the provisions of Article 30 of Directive 2004/17/EC through its Article 27 of when it replaced the previous Directive.

- (2) On 26 February 2009, NAM 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 Dutch authorities thereof by letter of 5 March 2009, to which the Dutch authorities answered by e-mail of 26 March 2009. The Commission also requested additional information of NAM by e-mail of 9 March 2009, which was transmitted by NAM by e-mail of 23 March 2009.
- (3) The request submitted by NAM concerns the exploration for and exploitation of oil and gas in the Netherlands. In line with previous Commission Merger Decisions⁽³⁾, three distinct activities where NAM is active, have been described in the request, namely:
 - a) exploration for oil and natural gas;
 - b) production of oil; and
 - c) production of natural gas.

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.).

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 Community legislation opening a given sector or a part of it.
- (5) Since the Netherlands have 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 in a particular market should be evaluated on the basis of various criteria, none of which are, per se, decisive.
- (6) In respect of the markets concerned by this Decision, the market share of the main players on a given market constitutes one criterion which should be

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taken into account. Another criterion is the degree of concentration on those markets. As the conditions vary for the different activities that are concerned by this Decision, the examination of the competitive situation should take into account the different situations on different markets.

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

III. ASSESSMENT

- (8) Each of the three activities that are the subject of this request (exploration for oil and natural gas, production of oil and production of natural gas) have been considered to constitute separate product markets in the previous Commission Decisions referred to in Recital 3 above. They should therefore be examined separately.

Exploration for oil and natural gas

- (9) According to established Commission practice⁽⁵⁾, 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 geographic scope of that market is worldwide.
- (10) Three ways of measuring the market shares of operators active in exploration can be distinguished: capital expenditure, proven reserves and expected production. Using capital expenditure as a parameter when evaluating the market shares of operators on the exploration market has at times been envisaged⁽⁶⁾. It has however 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. Two other parameters have, on the other hand, 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⁾
- (11) As of 31 December 2007, the combined, proven oil and gas reserves amounted to a total of 378,6 billion standard cubic metres oil equivalent (in the following Sm³ o.e.) worldwide, according to the available information⁽⁸⁾. As of 1 January 2008, the combined, proven oil and gas reserves in the Netherlands amounted to slightly more than 1 426 billion Sm³ o.e.⁽⁹⁾, or slightly more than 3,7 ‰. NAM's share thereof is, even smaller. According to the available information, NAM's market share would also have to be considered as being negligible if the expected production was used as a yardstick. Thus, while NAM's actual oil production of 0,04 million barrels of oil per day is expected to rise to 0,06 million barrels a day through the full re-deployment of the Schoonebeek oil-field in Eastern Netherlands, this would, however, have to be seen against a daily, worldwide oil-production of 81 533 million barrels of oil and would

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therefore be equivalent to a share of approximately 0,7 %. Considering also the degree of concentration on the exploration market, which, apart from state-owned companies, 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 factors should be taken as an indication of direct exposure to competition.

Production of oil

- (12) According to established Commission practice⁽¹⁰⁾, development and production of (crude) oil is a separate product market whose geographic scope is worldwide. According to the available information⁽¹¹⁾, the total, daily production of oil worldwide amounted to 81 533 million barrels in 2007. That same year, NAM produced a total of 0,04 million barrels per day, giving it a market share of 0,49 %. Considering also the degree of concentration on the market for crude oil production market, which, apart from state-owned companies, is characterised by the presence of three international vertically integrated private players named the super majors (BP, ExxonMobil and Shell), whose respective parts of oil production in 2007 amounted to 3,08 %, 2,32 % and 2,96 %, according to the available information) as well as a certain number of so-called ‘majors’⁽¹²⁾, these factors should be taken as an indication of direct exposure to competition.

Production of natural gas

- (13) A previous Commission Decision⁽¹³⁾ concerning down-stream supply of gas to end-customers has distinguished between Low Calorific Value (LCV) Gas, High Calorific Value (HCV) gas. The Commission has also considered whether Liquefied Natural Gas (LNG) supplies should be distinguished from supplies of piped natural gas⁽¹⁴⁾. However, a subsequent Commission Decision⁽¹⁵⁾ concerning i.a. development and production of natural gas left the question open whether, for the purpose of that Decision, separate markets existed for Low Calorific Value (LCV) Gas, High Calorific Value (HCV) gas and Liquefied Natural Gas (LNG), ‘as the final assessment is not affected regardless of the definition adopted’. For the purpose of this Decision, the question can also be left open for the following reasons:
- NAM does not produce LNG,
 - NAM operates only in the Netherlands, where the spot market for gas, the so-called Title Transfer Facility, (TTF), no longer makes any distinction between LCV and HCV as of 1 July 2008. Furthermore, since that date Gas Transport Services (the Dutch national gas network manager) has complete control over conversion of quality. It is thus not necessary for shippers to book conversion capacity.
- (14) For the purposes of this Decision, the relevant product market can therefore be left open as being production of natural gas in general, without distinguishing between LCV, HCV and LNG. As far as the geographic market is concerned,

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previous Commission Decisions⁽¹⁶⁾ have considered that it includes the European Economic Area (EEA) and possibly also Russia and Algeria.

- (15) According to the available information⁽¹⁷⁾, the total gas production in the EU amounted to 191,9 billion Sm³ in 2007 and that of the EEA for the same year to 281,6 billion Sm³. NAM's production for 2007 amounted to 50 billion Sm³, giving it a market share of 17,76 %. For 2007, productions in Russia and Algeria amounted to respectively 607,4 and 83,0 billion Sm³. The total production for the EEA plus Russia and Algeria therefore amounted to a total of 972 billion Sm³ of which NAM's share amounted to 5,14 %. Considering also the degree of concentration on the market for natural gas production market, which is characterised by the presence of three super majors (BP, ExxonMobil and Shell) as well as other major players such as the Russian Gazprom, these factors should be taken as an indication of direct exposure to competition.

IV. CONCLUSIONS

- (16) In view of the factors examined in recitals (3) to (15), 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 Netherlands in respect of the following services:
- a) exploration for oil and natural gas;
 - b) production of oil; and
 - c) production of natural gas.
- (17) 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 c) of recital (16) to be carried out in the Netherlands, nor when design contests are organised for the pursuit of such an activity in the Netherlands.
- (18) This Decision is based on the legal and factual situation as of February to March 2009 as it appears from the information submitted by NAM and the Kingdom of the Netherlands. 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,

HAS ADOPTED THIS DECISION:

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- (1) [OJ L 134, 30.4.2004, p. 1.](#)
- (2) Commission Decision 93/676/EC 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, [OJ L 316, 17.12.1993, p. 0041.](#)
- (3) 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 03/05/2007 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.
- (4) [OJ L 79, 29.3.1996, p. 30.](#)
- (5) See in particular the abovementioned Exxon/Mobil Decision and, more recently, Commission Decision of 19/11/2007 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.
- (6) See in particular the abovementioned Exxon/Mobil Decision (paragraphs 23–24).
- (7) See in particular the abovementioned 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 2008, annexed to it.
- (9) That is, 1 390 billion Sm³ gas, equal to 1 390 million Sm³ o.e., and 36,6 million Sm³ oil, giving a total of 1.426,600,000 Sm³.
- (10) See in particular the abovementioned Exxon/Mobil Decision and, more recently, Commission Decision of 19/11/2007 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.
- (11) See p. 8 of ‘BP Statistical Review of World Energy, June 2008’, annexed to request, in the following referred to as ‘BP Statistics’.
- (12) Whose market shares are smaller than those of the super majors.
- (13) Commission Decision 2007/194/EC of 14 November 2006 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.4180 — Gaz de France/Suez), [OJ L 88, 29.3.2007, p. 47.](#)
- (14) See in particular the abovementioned Gaz de France/Suez Decision.
- (15) The abovementioned Case M4545, point 12.
- (16) See for instance those mentioned under Recital 3 above.
- (17) See in particular BP Statistics, p. 24.

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