

# DECISIONS

## COMMISSION DECISION

of 29 March 2010

**exempting exploration for and exploitation of oil and gas in England, Scotland and Wales 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(2010) 1920)

(Only the English text is authentic)

(Text with EEA relevance)

(2010/192/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 <sup>(1)</sup>, and in particular Article 30(5) and (6),

Having regard to the request submitted by Shell U.K. Limited (hereinafter referred to as Shell) by e-mail of 15 October 2009,

After consulting the Advisory Committee for Public Contracts,

Whereas:

### I. FACTS

(1) According to Article 27 of Directive 2004/17/EC contracting entities exploring for or extracting oil or gas in the United Kingdom were authorised to apply an alternative regime in place of the normal set of rules. 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.

(2) The mechanism of Article 30, pertaining derogation from the provisions of Directive 2004/17/EC, under certain

circumstances for certain operators, applies also in respect of these reduced obligations under Article 27 of the same Directive.

(3) On 15 October 2009, Shell 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 United Kingdom authorities thereof by letter of 21 October 2009, to which the said authorities answered by e-mail of 16 November 2009. The Commission also requested additional information from Shell by e-mail of 17 November 2009, which was transmitted by Shell by e-mail of 25 November 2009.

(4) The request submitted by Shell concerns the exploration for and exploitation of oil and gas in England, Scotland and Wales. In line with previous Commission Merger Decisions <sup>(2)</sup>, three distinct activities where Shell 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 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.).

<sup>(1)</sup> OJ L 134, 30.4.2004, p. 1.

<sup>(2)</sup> 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) (OJ L 103, 7.4.2004, p. 1) and subsequent decisions, inter alia, Commission Decision of 3 May 2007 declaring a concentration to be compatible with the common market (Case No IV/M.4545 — Statoil/Hydro) according to Council Regulation (EC) No 139/2004.

## 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 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 the United Kingdom 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 authorizations for the prospection, exploration and production of hydrocarbons <sup>(1)</sup>, 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.
- (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 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 4 above. They should therefore be examined separately.

### Exploration for oil and natural gas

- (10) According to established Commission practice <sup>(2)</sup>, 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.

- (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.e. 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 <sup>(3)</sup>.
- (13) As of 31 December 2008, the global, proven oil and gas reserves amounted to a total of 385 billion standard cubic metres oil equivalent (in the following Sm<sup>3</sup> o. e.) worldwide, according to the available information <sup>(4)</sup>. Shell's part thereof amounted to 1,759 billion Sm<sup>3</sup> o. e., giving it a market share of 0,46 %. As of 1 January 2009, the combined, proven oil and gas reserves in Great Britain amounted to slightly more than 0,88 billion Sm<sup>3</sup> o. e. <sup>(5)</sup>, or slightly more than 0,22 %. Shell's share thereof is 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 Shell's market share would be substantially different if measured in terms of expected production rather than in terms of its share of proven reserves. Recitals (14) and (17) below present the market shares of Shell of its principal competitors of the production of, respectively, oil and gas. Given the links between proven reserves and actual production these figures can be taken as an indication also of the state of competition on the market concerned here. The exploration market is not highly concentrated. Apart from state owned companies, the market is characterised by the presence of two other international vertically integrated private players named the super majors (BP and ExxonMobil) as well as a certain number of so-called 'majors'. These elements are an indication of direct exposure to competition.

<sup>(1)</sup> OJ L 164, 30.6.1994, p. 3.

<sup>(2)</sup> 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 COMP/M.4934 — KazMunaiGaz/Rompetrol) according to Council Regulation (EEC) No 139/2004.

<sup>(3)</sup> See in particular the above-mentioned Exxon/Mobil Decision (recitals 25 and 27).

<sup>(4)</sup> See point 5.2.1 of the application and the sources quoted there, in particular the *BP Statistical Review of World Energy*, June 2009, annexed to it.

<sup>(5)</sup> That is, 0,34 trillion Sm<sup>3</sup> gas, equal to 0,34 billion Sm<sup>3</sup> o. e., and 3,4 thousand million barrels oil equal 0,540 billion Sm<sup>3</sup>, giving a total of 0,88 billion Sm<sup>3</sup>.

### Production of oil

- (14) According to established Commission practice<sup>(1)</sup>, development and production of (crude) oil is a separate product market whose geographic scope is worldwide. According to the available information<sup>(2)</sup>, the total, daily production of oil worldwide amounted to 81 820 million barrels in 2008. That same year, Shell produced a total of 1 771 million barrels per day, giving it a market share of 2,16 %. For the purposes of this analysis, it is important to have regard to the degree of concentration and 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 two other international vertically integrated private players (the so called super majors: BP and ExxonMobil whose respective parts of oil production in 2008 amounted to 3,08 % and 2,32 %) as well as a certain number of so-called 'majors'<sup>(3)</sup>. These factors suggest that the market comprises a number of players between whom effective competition can be presumed.

### Production of natural gas

- (15) A previous Commission Decision<sup>(4)</sup> concerning downstream 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<sup>(5)</sup>. However, a subsequent Commission Decision<sup>(6)</sup> 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:

— Shell does not produce LNG;

— Shell U.K. Limited operates in Great Britain (Scotland England and Wales), where the spot market for gas, the so-called National Balancing Point, makes no distinction between LCV and HCV. National Grid plc (the British national gas network manager) is responsible for supervising the quality of gas entering the network.

<sup>(1)</sup> See in particular the above-mentioned Exxon/Mobil Decision and, more recently, the above-mentioned KazMunaiGaz/Romp petrol Decision.

<sup>(2)</sup> See p. 8 of *BP Statistical Review of World Energy*, June 2009, annexed to request, in the following referred to as BP Statistics.

<sup>(3)</sup> Whose market shares are smaller than those of the super majors.

<sup>(4)</sup> 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).

<sup>(5)</sup> See in particular the above-mentioned Gaz de France/Suez Decision.

<sup>(6)</sup> The above-mentioned Statoil/Hydro Decision, point 12.

- (16) As far as the geographic market is concerned, previous Commission Decisions<sup>(7)</sup> have considered that it includes the European Economic Area (EEA) and possibly also Russia and Algeria.

- (17) According to the available information<sup>(8)</sup>, the total gas production in the EU amounted to 190,3 billion Sm<sup>3</sup> in 2008 and that of the EEA for the same year to 289,5 billion Sm<sup>3</sup>. Shell's production for 2008 amounted to 37,60 billion Sm<sup>3</sup>, giving it a market share of 12,99 %. For 2008, productions in Russia and Algeria amounted to respectively 601,7 and 86,5 billion Sm<sup>3</sup>. The total production for the EEA plus Russia and Algeria therefore amounted to a total of 976,7 billion Sm<sup>3</sup> of which Shell's share amounted to 3,85 %. The degree of concentration on the market for natural gas production is also low, considering the presence of the super majors (ExxonMobil and BP with market shares between of between, respectively, [10-20] % and [5-10] %), and of the majors (Statoil and Total with market shares of the order, respectively, of [10-20] % and [5-10] % each), and the pressure of two other important state owned companies namely, the Russian Gazprom and the Algerian Sonatrach (with market shares between [30-40] % and of [10-20] %<sup>(9)</sup>, respectively). This provides further indication of direct exposure to competition.

### IV. CONCLUSIONS

- (18) In view of the factors examined in recitals (5) to (17), 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 England, Scotland and Wales in respect of the following services:

(a) exploration for oil and natural gas;

(b) production of oil, and

(c) production of natural gas.

- (19) 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 (18) to be carried out in England, Scotland and Wales, nor when design contests are organised for the pursuit of such an activity in those geographic areas.

- (20) This Decision is based on the legal and factual situation as of October to December 2009 as it appears from the information submitted by Shell and the authorities of the United Kingdom. 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,

<sup>(7)</sup> See for instance those mentioned under Recital (4) above.

<sup>(8)</sup> See in particular BP Statistics, p. 24.

<sup>(9)</sup> See the above-mentioned Statoil/Hydro Decision.

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 England, Scotland and Wales:

- (a) exploration for oil and natural gas;
- (b) production of oil, and
- (c) production of natural gas.

*Article 2*

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 29 March 2010.

*For the Commission*  
Michel BARNIER  
*Member of the Commission*

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