

## COMMISSION DECISION

of 4 March 2002

following a request by Austria applying for the special regime provided for in Article 3 of Directive 93/38/EEC

(notified under document number C(2002) 684)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/205/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors <sup>(1)</sup>, as last amended by Directive 98/4/EC of the European Parliament and of the Council <sup>(2)</sup>, and in particular Article 3(4) thereof,

Having regard to 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 <sup>(3)</sup>, and in particular Article 12 thereof,

Having regard to the request submitted by Austria on 6 September 2000,

After consulting the Advisory Committee for Public contracts,

Whereas:

(1) Pursuant to Article 3 of Directive 93/38/EEC, a Member State may request the Commission to provide that exploitation of geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels is not to be considered to be an activity defined in Article 2(2)(b)(i) of that Directive and that entities are not to be considered as operating under special or exclusive rights within the meaning of Article 2(3)(b) by virtue of carrying on one or more of those activities, provided that a number of precise conditions laid down in its paragraphs 1 and 3 are satisfied with respect to the relevant national provisions concerning such activities

and that, pursuant to its paragraph 2, any Member State requesting such a decision ensures that entities observe the principles of non-discrimination and competitive procurement in awarding contracts and communicate to the Commission information relating to the award of such contracts.

(2) Member States, which have complied with the provisions of Directive 94/22/EC, shall be considered to satisfy the conditions laid down in Article 3(1) of Directive 93/38/EEC.

(3) By letter dated 6 September 2000 <sup>(4)</sup>, Austria submitted to the Commission a request pursuant to Article 3 of Directive 93/38/EEC. That request did not cover the exploitation of geographical areas for the purpose of exploring for or extracting coal or other solid fuels.

(4) By letter dated 11 December 2000, the Commission requested Austria to submit the laws, regulations and administrative provisions necessary for the legal analysis of the request and to provide information on whether individual concessions or authorisations had been granted before the date on which it had implemented Directive 93/38/EEC and if on that date other entities were free to seek authorisations for the exploitation of geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels, on a non-discriminatory basis and in the light of objective criteria;

(5) By letter dated 20 March 2001, Austria sent the Commission the relevant documents and answered the questions raised by the Commission.

(6) By adopting the Berggesetz 1975 <sup>(5)</sup>, replaced as of 1 January 1999 <sup>(6)</sup> by the Mineralrohstoffgesetz <sup>(7)</sup>, Austria has complied with Directive 94/22/EC.

(7) With reference to Article 3(3) of Directive 94/22/EC a notice was published on 12 September 1995 in the *Official Journal of the European Communities* <sup>(8)</sup> declaring that the whole territory of Austria is available on a permanent basis in the sense of the Article provided that there are no existing prospection, production and storage contracts relating to hydrocarbons, or existing mining rights which also include hydrocarbons.

<sup>(1)</sup> OJ L 199, 9.8.1993, p. 84.

<sup>(2)</sup> OJ L 101, 1.4.1998, p. 1.

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

<sup>(4)</sup> The request was originally based on section 86 of the Bundesvergabe-gesetz 1997.

<sup>(5)</sup> BGBl. 259/1975.

<sup>(6)</sup> BGBl. I 38/1999.

<sup>(7)</sup> The provisions concerning the prospection and production of oil and gas are — as they are of relevance for the present situation — unchanged in relation to the Berggesetz 1975.

<sup>(8)</sup> OJ C 237, 12.9.1995, p. 16.

- (8) The 'Bundesgesetz 1997 amending the Bundesvergabegesetz 1993' <sup>(1)</sup>, ( hereinafter the 'Bundesvergabegesetz 1997') which entered into force on 1 January 1997, implemented Directive 93/38/EEC into Austrian law at federal level. Section 86 of the Bundesvergabegesetz 1997 repeats the terms of Article 3(2) of Directive 93/38/EEC and guarantees compliance with the principles of non-discrimination and competitive procurement by entities carrying out exploration or extraction, in particular as regards the information they make available to enterprises concerning their intentions with respect to the award of contracts, and compliance with the obligation to transmit to the Commission information on the award of such contracts. It further provides that compliance with Article 3(1) of Directive 93/38/EEC through the corresponding provisions in Section 86(2)(1 to 5) Bundesvergabegesetz 1997 is presumed for enterprises which are granted the right to exploit geographical areas for the purpose of exploring for or extracting oil or gas on the basis of Section 68 and following of the Mineralrohstoffgesetz.
- (9) On 1 July 1994, five contracts for the exploration, production and storage of hydrocarbons existed between the Republic of Austria and the OMV AG and three such contracts existed between the Republic of Austria and the Rohöl-Aufsuchungs AG (RAG), to all of which the provisions of the Berggesetz 1975 applied.
- (10) On the basis of the Allgemeine Berggesetz 1854, limited authorisations were granted for production of oil and gas. These authorisations concern mineral raw materials (mining rights) and were granted before the implementation of the Bitumengesetz on 31 August 1938 or on the basis of interim provisions laid down in this law. The production of oil and gas by the RAG, the Van Sickle GesmbH and the OMV in the Land Niederösterreich is based on such authorizations,

HAS ADOPTED THIS DECISION:

*Article 1*

From 4 March 2002 the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas shall not be considered in Austria as an activity defined in Article 2(2)(b)(i) of Directive 93/38/EEC.

Entities carrying on such an activity shall not be considered in Austria as operating under special or exclusive rights within the meaning of Article 2(3)(b) of the Directive.

*Article 2*

1. This Decision is taken on the basis of the provisions adopted by Austria as of 4 March 2002 in order to implement Directive 94/22/EC and Article 3 of Directive 93/38/EEC and communicated to the Commission.

2. Austria shall notify to the Commission any laws, regulations or administrative provisions amending the rules referred to in paragraph 1 as soon as they are adopted in order to enable it to assess if it is appropriate to amend, withdraw or maintain this Decision.

*Article 3*

This Decision is addressed to the Republic of Austria.

Done at Brussels, 4 March 2002.

*For the Commission*

Frederik BOLKESTEIN

*Member of the Commission*

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<sup>(1)</sup> BGBl. I 56/1997.