

COMMISSION IMPLEMENTING DECISION (EU) 2022/1296**of 1 July 2022****on the applicability of Article 34 of Directive 2014/25/EU of the European Parliament and of the Council to the award of contracts to pursue the extraction of crude oil and natural gas in Romania***(notified under document C(2022) 4485)***(Only the Romanian text is the authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ⁽¹⁾, and in particular Article 35(3) thereof,

After consulting the Advisory Committee for Public Contracts,

Whereas:

1. FACTS

- (1) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee for Public Contracts.
- (2) On 2 November 2021, OMV Petrom S.A. ('the applicant') submitted a request pursuant to Article 35(1) of Directive 2014/25/EU ('the request'). The request complies with the formal requirements set out in Article 1(1) of Commission Implementing Decision (EU) 2016/1804 ⁽²⁾ and in Annex I to that Implementing Decision. The applicant submitted additional information on 27 January 2022 and on 25 February 2022. The Commission requested further information from Romania on 12 April 2022. Romania submitted further information on 2 May 2022.
- (3) The applicant is a contracting entity within the meaning of Article 4(1) of Directive 2014/25/EU and is entitled to make a request to the Commission, in accordance with Article 35 of that Directive. The applicant is active in oil and gas exploration and production. The applicant's share capital is divided as follows: 51 % is owned by OMV Aktiengesellschaft; 21 % is owned by the Romanian State; 10 % is owned by Fondul Proprietatea S.A. and 18 % is owned by natural and legal persons.
- (4) The request is accompanied by a reasoned and substantiated position of 10 February 2021 adopted by the Romanian Competition Council. Where the application refers to the 'point of view' of the Romanian Competition Council, this should be understood as the 'position' of the Romanian Competition Council. Pursuant to the request, the Commission is asked to establish that Directive 2014/25/EU does not apply to activities for the extraction of crude oil and natural gas in Romania.

⁽¹⁾ OJ L 94, 28.3.2014, p. 243.

⁽²⁾ Commission Implementing Decision (EU) 2016/1804 of 10 October 2016 on the detailed rules for the application of Articles 34 and 35 of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L 275, 12.10.2016, p. 39).

2. LEGAL FRAMEWORK

- (5) Pursuant to Article 14, point (a) of Directive 2014/25/EU, that Directive applies to activities relating to the exploitation of a geographical area for the purpose of extracting oil or gas.
- (6) The request concerns the production of crude oil and natural gas in Romania.
- (7) According to recital 25 of Directive 2014/25/EU, “extraction” should be considered as the “production” of oil and gas. In line with established practice in merger cases, “production” should be considered also to include “development”, i.e. the setting up of adequate infrastructure for future production (oil platforms, pipelines, terminals, etc.).
- (8) Pursuant to Article 34(1) of Directive 2014/25/EU, contracts intended to enable the performance of an activity to which that Directive applies are not to 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.
- (9) Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. That assessment is, however, limited by the short deadlines applicable and by the need to rely on the information available to the Commission. That information originates either from already available sources or from the information obtained in the context of the application pursuant to Article 35 of Directive 2014/25/EU and cannot be supplemented by more time consuming methods, including, in particular, public inquiries addressed to the economic operators concerned.
- (10) Direct exposure to competition in a particular market should be evaluated on the basis of various criteria, none of which are, *per se*, decisive. 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 undertakings and the degree of concentration of those markets should be taken into account.

3. ASSESSMENT

- (11) The aim of this Decision is to establish whether the activities concerned by the request are, in markets to which access is not restricted within the meaning of Article 34 of Directive 2014/25/EU, exposed to a level of competition, which ensures that, also in the absence of the procurement discipline brought about by the detailed procurement rules laid down in Directive 2014/25/EU, procurement for the pursuit of the activities concerned will be carried out in a transparent and non-discriminatory manner.
- (12) This Decision is based on the legal and factual situation as of November 2021 and on the information submitted by the applicant, the authorities of Romania and the information that is publicly available. It may be reviewed if, as a result of significant changes in the legal or factual situation, the conditions for the applicability of Article 34(1) of Directive 2014/25/EU are no longer met.

3.1. Unrestricted access to the market

- (13) Access to a market is deemed to be unrestricted if the Member State has implemented and applied the relevant Union legal acts opening a given sector or a part of it. Those legal acts are listed in Annex III to Directive 2014/25/EU.
- (14) Pursuant to Point G of Annex III to Directive 2014/25/EU, 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 extraction of oil or gas.

⁽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).

- (15) Romania has transposed ⁽⁴⁾ and applied Directive 94/22/EC. Therefore, access to the market for the extraction of crude oil or natural gas is deemed not to be restricted in accordance with Article 34(3), first subparagraph, of Directive 2014/25/EU.
- (16) The Romanian Competition Council acknowledges that the access to the markets for the extraction of crude oil and natural gas is deemed not to be restricted in Romania pursuant to Article 34 of Directive 2014/25/EU ⁽⁵⁾.
- (17) The Commission has previously established that access to the market is deemed to be unrestricted if the Member State has transposed and applied the relevant Union legislation opening a given sector or a part of it ⁽⁶⁾. As a result, a more detailed assessment on the access to the relevant market, *de facto* and *de jure*, is not deemed necessary for the scope of this request.
- (18) In view of the factors examined in recitals 12 to 16, the Commission agrees with the Romanian Competition Council that the access to the markets for the extraction of crude oil and natural gas is considered not to be restricted in Romania under Article 34 of Directive 2014/25/EU.

3.2. Competition assessment

- (19) For the purposes of assessing whether the relevant activities are directly exposed to competition on markets to which access is not restricted, the market share of the main undertakings and the degree of concentration of those markets is to be taken into account, including the specific characteristics of the activities that are the subject of the request.

3.2.1. Relevant product market definition

- (20) The applicant submits that the relevant product markets are: (a) the market for the production of crude oil; and (b) the market for the production of natural gas ⁽⁷⁾.
- (21) The applicant further submits that the production of crude oil and of natural gas includes: (a) the development, i.e. the setting up of adequate infrastructure such as oil platforms, pipelines, and terminals for future production, and (b) production and sale, i.e. the exploitation of reserves and the first sale (wholesale) of the crude oil and of natural gas.

⁽⁴⁾ Petroleum Law no. 238/2004, of 7 June 2004, published in the Official Journal of Romania no. 535 of 15 June 2014; Government Decision no. 2075/2004 for the approval of the Implementing Rules (or Methodological Norms) for the application of Petroleum Law no. 238/2004, that was published in the Official Journal of Romania no. 1170 of 10 December 2004; Government Emergency Ordinance no. 27/2020 on the amendment and completion of Petroleum Law no. 238/2004, published in the Official Journal of Romania no. 161 of 27 February 2020.

⁽⁵⁾ See under point 3.2 of the point of view of the Romanian Competition Council.

⁽⁶⁾ See, inter alia, 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 (OJ L 307, 25.11.2015, p. 27); Commission Implementing Decision (EU) 2015/1120 of 8 July 2015 exempting exploration for oil and gas in Greece 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 (OJ L 182, 10.7.2015, p. 88); Commission Implementing Decision 2013/39/EU of 18 January 2013 exempting exploration for oil and gas in Cyprus 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 (OJ L 18, 22.1.2013, p. 19).

⁽⁷⁾ Request, page 6, point 15.

Crude oil

- (22) In its previous decisional practice, the Commission has defined the upstream wholesale supply of crude oil as a separate market from the upstream wholesale supply of natural gas because gas and crude oil have different applications and are subject to varying pricing behaviour as well as cost restraints ⁽⁸⁾. The Commission noted that the market for upstream wholesale supply of crude oil comprises the activities of development, production and wholesale of crude oil ⁽⁹⁾.
- (23) In view of the above, for the purposes of evaluating the conditions laid down in Article 34 of Directive 2014/25/EU and without prejudice to Union competition law, or the application of any other Union law, the Commission considers that the relevant product market is the market for production of crude oil.

Natural gas

- (24) The Commission has found in its decisional practice that there is one relevant product market for the upstream wholesale sale of natural gas ⁽¹⁰⁾. The Commission noted that the upstream wholesale of natural gas comprises the activities of development, production and wholesale of natural gas ⁽¹¹⁾.
- (25) The Commission also considered whether the upstream wholesale supply of natural gas should be divided into two distinct markets, one for liquefied natural gas ('LNG') and one for piped gas ⁽¹²⁾. For the purposes of this Decision, that distinction is irrelevant because there is currently no LNG terminal in Romania ⁽¹³⁾. In view of the above, for the purposes of evaluating the conditions laid down in Article 34 of Directive 2014/25/EU and without prejudice to Union competition law, or the application of any other Union law, the Commission considers that the relevant product market is the market for production of natural gas.

*3.2.2. Relevant geographic market definition**Crude oil*

- (26) The applicant submits that the market for the production of crude oil is worldwide in scope.
- (27) The Commission has previously considered the market for the upstream wholesale supply of crude oil to be worldwide in scope ⁽¹⁴⁾. For some specific 'difficult to reach' customers, such as refineries in certain land-locked European Economic Area (EEA) countries, the Commission has considered that the geographic scope could be limited to a specific supply pipeline, such as the Druzhba pipeline ⁽¹⁵⁾.
- (28) For the purposes of evaluating the conditions laid down in Article 34 of Directive 2014/25/EU and without prejudice to Union competition law, or the application of any other Union law, the Commission considers that the relevant geographic market for the production of crude oil is worldwide.

⁽⁸⁾ COMP/M. 9175 – Total/Chevron Denmark; page 6, point 21.

⁽⁹⁾ Commission Decision of 10 September 2014 in Case M.7316 – Det Norske Oljeselskap/Marathon Oil Norge, paragraph 6.

⁽¹⁰⁾ COMP/M. 9175 – Total/Chevron Denmark; paragraph 23.

⁽¹¹⁾ Commission Decision of 10 September 2014 in Case M.7316 – Det Norske Oljeselskap/Marathon Oil Norge, paragraph 7.

⁽¹²⁾ See decisions in cases COMP/M.8773 – Letterone Holdings/BASF/Wintershall Dea and COMP/M.7631 – Royal Dutch Shell/BG Group.

⁽¹³⁾ Transgaz (Romanian National Transport gas Operator) announced that, by 2028, the Romanian natural gas transport system will be connected to an LNG terminal located in the Romanian Black Sea shore. Request, point 92.

⁽¹⁴⁾ Commission decision of 3 September 2014 in Case M.7318 – Rosneft/Morgan Stanley Global Oil Merchanting Unit, paragraph 11; Commission decision of 11 December 2009 in Case M.5629 – Normeston/MOL/MET JV, paragraph 13.

⁽¹⁵⁾ Commission decision of 8 March 2013 in Case M.6801 – Rosneft/TNK-BP, paragraph 19.

Natural gas

- (29) The applicant submits that the market for the production of natural gas comprises at least the EEA along with Russia and Algeria. However, the applicant considers that, for the purposes of this Decision, the exact scope can be left open because the market is directly exposed to competition even under narrowest possible definition ⁽¹⁶⁾ ⁽¹⁷⁾.
- (30) In its decisional practice, the Commission has not yet taken a definitive view regarding the geographic scope of the upstream wholesale supply of natural gas. Although the Commission has considered that from a demand side perspective the market could potentially be considered to include the EEA, Algeria and Russia ⁽¹⁸⁾, from the supply side perspective, depending on the level of the supply chain (import/wholesale, sale to industrial customers and electricity generators, sale to household customers) where the supply takes place, or due to limited interconnection infrastructure or lack of available cross-border capacity, the Commission considered in some cases the geographic market to be narrower (i.e. regional, covering several Member States, or even national ⁽¹⁹⁾).
- (31) For the purposes of evaluating the conditions laid down in Article 34 of Directive 2014/25/EU and without prejudice to Union competition law, or the application of any other Union law, the Commission considers that the relevant geographic market for the production of natural gas can be left open.

*3.2.3. Market analysis**Crude oil*

- (32) According to the available information ⁽²⁰⁾, the total, daily production of oil worldwide amounted to 82 168 million barrels in 2019 and 76 000 million barrels in 2020. In 2019, OMV Petrom produced a total of 65,90 thousand barrels per day, giving it a market share of 0,08 % ⁽²¹⁾. In 2020, OMV Petrom produced a total of 63,87 thousand barrels per day giving it the same market share as in 2019. 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 three other international vertically integrated private undertakings (the so called super majors: BP, ExxonMobil and Shell whose respective parts of crude oil production in 2019 amounted to 1 %, 3 % and 2 %) ⁽²²⁾ as well as a certain number of so-called 'majors' ⁽²³⁾. Those factors suggest that the market comprises a number of undertakings, which have the capacity to exert competitive pressure on the market. At the same time, the specific factors of this market, namely the practice of prices based on international quotations, as well as the absence of significant barriers in crude oil transactions, support the idea of a market with a low degree of concentration, on which activate a number of operators between which effective competition can be presumed.

⁽¹⁶⁾ Request, point 29.

⁽¹⁷⁾ Request, point 31.

⁽¹⁸⁾ Commission decision of 29 September 1999 in Case M.1383 – Exxon/Mobil, paragraph 18; Commission decision of 29 September 1999 in Case M.1532 – BP-Amoco/Arco, paragraphs 16-17. In both decisions the Commission pointed out however, that due to purchasing policies as to the origin of the gas based on security of supply, certain legislations impose limits on the amount of gas that comes from the same country.

⁽¹⁹⁾ Commission decision of 8 March 2013 in Case M.6801 – Rosneft/TNK-BP, paragraph 12; Commission decision of 3 May 2007 in Case M.4545 – Statoil/Hydro, paragraphs 13-16.

⁽²⁰⁾ Additional information submitted by OMV Petrom on 25 February 2022, estimates based on the publicly available data, as estimated by the U.S. Energy Information Administration ('EIA'), page 3.

⁽²¹⁾ Additional information submitted by OMV Petrom on 25 February 2022, page 3.

⁽²²⁾ See point 4.1 page 12, of the point of view of the Romanian Competition Council, accompanying the request.

⁽²³⁾ Whose market shares are smaller than those of the super majors.

- (33) In addition, the competitive nature of the relevant market in Romania is also confirmed by the fact that in the previous tendering round in 2009/2010 for petroleum exploration, development and production activities, petroleum agreements have been assigned to non-Romanian companies via competitive tender procedures conducted by the National Authority for Mineral Resources ⁽²⁴⁾. This further confirms that the market is open to foreign undertakings, as most of the entities listed are subsidiaries of international groups or have international companies as majority shareholders.
- (34) The competitive nature of the Romanian market is also confirmed by the fact that the crude oil that is processed in the applicant's facilities is not limited to its own production ⁽²⁵⁾. The applicant processes both domestic and imported crude oil. During the period from 2017 to 2019, the imported crude oil represented respectively 20,13 %, 9,58 % and 14,28 % of the total crude oil processed in Romania ⁽²⁶⁾.
- (35) In relation to crude oil exports, the applicant submits that there are no barriers to exports between Romania and other Member States, even outside the Union, in the context of the global market. In practice, as the applicant suggests, the annual crude oil national production does not cover the volumes it processes downstream ⁽²⁷⁾.

Natural gas

- (36) According to the available information ⁽²⁸⁾, the total gas production in the Union amounted to 70 billion Sm³ ⁽²⁹⁾ in 2019 and that of the EEA for the same year to 185 billion Sm³. The production of OMV Petrom for 2019 amounted to 4,33 billion Sm³, giving it a market share at the Union level of 6,22 % ⁽³⁰⁾. For 2019, productions in Russia and Algeria amounted to respectively 678 and 88 billion Sm³ ⁽³¹⁾. The total production for the EEA plus Russia and Algeria therefore amounted to a total of 950 billion Sm³ of which the share of OMV Petrom amounted to 0,46 % ⁽³²⁾. That reduction in the share of the applicant, compared to the two previous years, also illustrates the competitive pressure exerted by a number of competitors in the market.
- (37) The degree of concentration on the market for natural gas production is moderate, considering the presence of the super majors (ExxonMobil and TotalEnergies with market shares of 1,59 % and 3,86 % respectively), the majors (such as Equinor with market share of 4,39 %), and two state owned companies Gazprom and Sonatrach (with market shares of 48,80 % and 12,99 % respectively) ⁽³³⁾. The Commission notes that, in view of the Union's declared intention to diversify gas supply sources, the market shares of gas producers in the EEA are expected to change significantly during the coming years. It is expected that the envisaged supply diversification will lead to new entry and therefore decrease market concentration. This provides further indication of direct exposure to competition.

⁽²⁴⁾ Out of the 27 of the petroleum agreements awarded, 23 were won by undertakings incorporated outside Romania. See in this regard Appendix 4, accompanying the Request, where the press release of ANRM (the National Authority for Mineral Resources) announces the winners of the 10th Round, and which includes details on their activities.

⁽²⁵⁾ According to the applicant, most of the crude oil produced by the former is actually employed for its own refining processes and it is not sold. See in this regard point 81 of the request.

⁽²⁶⁾ Request, point 84.

⁽²⁷⁾ Request, point 85.

⁽²⁸⁾ The market size data included in the application below has been retrieved by the U.S. Energy Information Administration (publicly available data as of 25 February 2022). The EIA's data are expressed in billion cubic feet. Therefore, OMV Petrom has converted those data into billion cubic meters, in order to be consistent with the metric used in its application.

⁽²⁹⁾ Standard Cubic Meter.

⁽³⁰⁾ Additional information submitted by OMV Petrom on 25 February 2022, page 5.

⁽³¹⁾ Additional information submitted by OMV Petrom on 25 February 2022, page 5.

⁽³²⁾ Additional information submitted by OMV Petrom on 25 February 2022, page 5.

⁽³³⁾ According to the additional information provided by the applicant on 27 January 2022, for Sonatrach, the market shares have been estimated under the assumption that the total production quantities published in their annual reports are extracted from Algeria, as Sonatrach is a state-owned company which is predominantly active in that country.

- (38) According to the applicant, the Romanian natural gas exports have been historically low because of the limited infrastructure capacity. That limitation on the export side has been exercising pressure on national undertakings to compete in order to capitalise their production nationally ⁽³⁴⁾. However, during the last three years, the actual exported quantities show a growing and positive trend. Exports have been rising: during the first seven months of 2021, exports amount to three times the total natural gas exported during 2020. Romanian natural gas exports in 2020 amounted to almost six times the gas exported in 2017 ⁽³⁵⁾. Newly built infrastructure has contributed to that positive export trend ⁽³⁶⁾. The ongoing developments on infrastructure capacity improve export flows and further enhance the exposure to competition of Romanian natural gas producers.

4. CONCLUSION

- (39) In view of the factors examined in recitals 4 to 37, the condition of direct exposure to competition laid down in Article 34(1) of Directive 2014/25/EU should be considered to be met in Romania in respect of the following activities:
- (a) extraction of crude oil;
 - (b) extraction of natural gas.
- (40) Since the condition of unrestricted access to the market is deemed to be met, Directive 2014/25/EU should not apply when contracting entities award contracts intended to enable the activities referred to in recital 38, points (a) and (b), of this Decision to be carried out in Romania, nor when design contests are organised for the pursuit of such an activity in those geographic areas.
- (41) This Decision is without prejudice to the application of the Union rules on competition and of the provisions in other fields of Union law. In particular, the criteria and the methodology used to assess direct exposure to competition under Article 34 of Directive 2014/25/EU are not necessarily identical to those used to perform an assessment under Article 101 or Article 102 of the Treaty or Council Regulation (EC) No 139/2004 ⁽³⁷⁾ as confirmed by the General Court ⁽³⁸⁾,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2014/25/EU shall not apply to contracts awarded by contracting entities and intended to enable the extraction of crude oil and natural gas to be carried out in Romania.

Article 2

This Decision is addressed to Romania.

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- ⁽³⁴⁾ In the absence of significant export flows, national production could either be stored internally, with the consequence of higher costs, or offered for competitive prices.
- ⁽³⁵⁾ The data provided based on the information published by the National Energy Regulatory Authority (ANRE) in its monthly reports. See in this regard point 90 of the request.
- ⁽³⁶⁾ The Romanian part of the future Bulgaria, Romania, Hungary and Austria (BRUA) pipeline has been inaugurated in December 2020, strengthening the bidirectional interconnections between Romania and Hungary and between Romania and Bulgaria. With BRUA phase I being operational bi-directionally, the market liquidity has improved (since gas transports are possible not only from Hungary to Romania, but also from Romania to Hungary).
- ⁽³⁷⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).
- ⁽³⁸⁾ Judgment of the General Court of 27 April 2016, Österreichische Post AG v. Commission, T-463/14, EU:T:2016:243, paragraph 28. See also Directive 2014/25/EU, recital 44.

Done at Brussels, 1 July 2022.

For the Commission
Thierry BRETON
Member of the Commission
