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**Subject: State aid SA.36556 (2013/N) - The Netherlands  
Anti-opt-out scheme water boards**

Excellency,

I am pleased to inform you that the Commission raises no objections to this measure.

## **1. PROCEDURE**

- 1) On 22/07/2013, the Netherlands notified a scheme introducing a water levy reduction, based on a previous scheme from 2002, approved by the Commission decision of 17 July 2002 in case N/157/2002 for 10 years.<sup>1</sup>
- 2) The Netherlands consented to extending to 16/10/2013 the deadline for adoption of a decision by the Commission.<sup>2</sup>

## **2. DESCRIPTION OF THE AID MEASURE**

### ***a. Objective***

- 3) The purpose of the scheme that was in place from 2002-2012 was to incite large dischargers of waste water to use the public water boards' waste water treatment plants to ensure their efficiency.
- 4) There are 27 water boards throughout the Netherlands responsible for managing the quality of regional waters. Each provincial government in the Netherlands

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<sup>1</sup> JOCE C/238/2002

<sup>2</sup> In accordance with Article 4(5) of Regulation 659/1999

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determines the tasks and areas served by a water board. The water boards are public authorities and are legal entities under public law.

- 5) The national Act on Surface Water Pollution (Wet Verontreiniging Oppervlaktewateren) regulates the management of surface water quality in the Netherlands. The Act gives a water board the power to impose pollution levies. The revenues from these levies are used to cover all costs incurred by the water boards as a result of reducing and preventing surface water pollution. These costs include primarily the building and operating of purification plants, which accounts for about 60% of the budget of water boards. The other 40% of the budget of the water boards is used on financing the handing out of permits, monitoring, policymaking and rehabilitation of polluted water sites.
- 6) All the purification plants of the water boards purify the run-off rainwater and waste water of households and industry. The purification plants are not used for purifying ground water.
- 7) Undertakings, individuals or government organisations that discharge polluted wastewater pay the pollution levy. The size of the levy is related to the pollution value of the waste substances discharged. The pollution value of the wastewater is expressed in pollution equivalents. The number of pollution equivalents per household or undertaking is determined by measuring, sampling and analysing wastewater discharged into surface water or at water board installations.
- 8) Companies can reduce or avoid this levy by pre-treating their waste water in-house. The law gives them this choice.
- 9) However, according to the Netherlands, pre-treating the waste water in-house has a negative impact on the functioning of the public waste water treatment plant. A large supply of pre-treated wastewater reduces the efficiency of the installation, increases its operating costs, and ultimately raises the costs of the dischargers of waste water remaining in the system.
- 10) First, as regards efficiency, these plants are technically set up to treat water with certain contamination values and pre-treated waste water disturbs that balance, ultimately reducing their efficiency.
- 11) Second, without the large dischargers of waste water, the treatment plants would be underused, which would result in economies of scale being lost and operating costs being raised.
- 12) Third, if major dischargers of waste water were to opt out, it would lead to a considerable increase in levies for those still participating in the system. Indeed, in such a case, the remaining dischargers would need to cover the annual

depreciation expense of the treatment plant.<sup>3</sup> In absence of the large dischargers of waste water, the levy paid by these other users would rise, as it would include the proportion of the fixed costs of the treatment plants otherwise supported by the large discharges of waste water.

- 13) An illustrative example given by the Dutch authorities of the water board of Rijn en IJssel shows that, in absence of the large users, the annual levy for the remaining dischargers would increase by almost 7%.
- 14) This means the other companies and households would have an increase in the levy even though their pollution would remain at the same level. The Netherlands considered an increase in levy without an increase in pollution disproportionate.
- 15) The scheme therefore allows the water authorities to reduce the levy in order to stimulate companies to make full use of the public plants and thereby to ensure their maximum effectiveness and an acceptable level of the levy for their use. Companies that can demonstrate that they are technically and financially able to treat their wastewater in-house for a price below the levy can apply for a reduction.
- 16) The levy always needs to remain above what a company would pay for in-house treatment. Additionally, the company must at least pay minimum 50% of the levy.
- 17) The Dutch authorities provided information on application of the 2002 scheme. Around 50 companies received aid under this scheme. Aid was first granted in 2006. The information shows per annum less than EUR 10 million was granted.<sup>4</sup> The maximum individual aid amount was EUR 1,383,590.- and the minimal amount EUR 29,031.-. Overall, from 2006 to 2011, EUR 29 million was granted.
- 18) The Dutch authorities provided two illustrative examples showing the aid is effective in keeping big dischargers of waste water using the public plants:
  - The water board Rijn en IJssel kept two companies that were planning to leave in the public system by means of the reduced levy under the scheme.
  - In the case of Reest en Wieden water board, two companies receiving subsidies chose to opt-out and purify in-house, because of uncertainty if the subsidy would be continued.

***b. Legal basis***

- 19) The Circular for subsidies relating to section 122d, subsection 5, opening words and (b) of the Water Authorities Act.

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<sup>3</sup> The plants have an amortization period from 30 to 40 years.

<sup>4</sup> The highest amount given under the scheme to all beneficiaries was EUR 9.09 million in 2007, when 25 Water Authorities were giving reductions.

**c. *The beneficiary***

- 20) The eligibility conditions set out for the beneficiaries are the same as those in the previous scheme.
- 21) The wastewater of the company wishing to benefit from the reduction must represent at least 5% of the plant's treatment capacity or equivalent pollution units. The company must demonstrate that it is technically and financially able to treat its wastewater in-house at a price below the levy rate. The levy can be reduced to a level close to, but still above what the company would pay for in-house treatment. The beneficiaries must still pay at least 50% of the levy.
- 22) The Dutch authorities estimate that approximately 50 companies active in a variety of economic sectors such as chemicals, paper, beer, canned foods or soda drinks will receive aid under the notified scheme.

**d. *Budget and duration***

- 23) The estimated loss of State revenue is maximum EUR 15 million per year. The scheme will be in force until the end of 2023.

**3. ASSESSMENT**

**a. *Applicability of Article 107 (1) TFEU***

- 24) The Commission has assessed if Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU) applies to the measure. In order for a measure to constitute State aid within the meaning of Article 107(1) TFEU it has to fulfil four conditions. Firstly, the aid is granted by Member State or through State resources. Secondly, the measure confers a selective advantage to certain undertakings or the production of certain goods. Thirdly, the measure must be liable to affect trade between Member States. Fourthly, the measure must distort or threaten to distort competition in the internal market.
- 25) The measure is funded by water boards that are Dutch public authorities. The scheme is selective since it applies only to certain companies that produce waste water. The scheme has the potential to distort competition and affect trade between Member States, as these companies are active in economic sectors (such as chemicals, paper, beer, canned foods or soda drinks) that are open to competition and involve trade between Member States.
- 26) The aid scheme therefore constitutes State aid within the meaning of Article 107 (1) TFEU.

***b. Lawfulness of the aid***

27) By notifying the scheme and confirming that its prolongation is subject to Commission approval, the Netherlands fulfilled their obligation under Article 108(3) TFEU.

***c. Compatibility of the aid***

28) The Commission has assessed if the aid scheme can be considered compatible with the internal market pursuant to Article 107 (3) c) TFEU. The 2002 scheme was declared compatible under the 2001 Environmental Aid Guidelines<sup>5</sup> which have been replaced by new Guidelines in 2008 (“EAG”).<sup>6</sup> Reductions of environmental taxes, as defined in point 70 (14), fall within the scope of Section 4 of the 2008 Guidelines that contains different conditions from the 2001 Guidelines. The Commission must therefore assess whether this measure complies with these new conditions of 2008 Guidelines.

29) The compatibility assessment must also take into account the particularity of this levy. The levy is collected to finance the public waste water treatment system. Through the levy, companies pay for the provision of the public treatment services. The levy, that is the object of the notified measure fulfils the definition of point 70(14) EAG. For a tax to be considered as environmental its taxable base must have a clear negative effect on the environment. This is clearly the case of the Dutch water levy as its taxable base, namely polluted waste water, has a clear negative effect on the environment.

30) This levy is not harmonised, therefore it has to be assessed under points 155-9 EAG as noted in point 154 EAG

31) The companies can avoid paying this levy by in-house treatment of their wastewater which, however, has a negative impact on the functioning of the waste water treatment plants. The reductions allow the water boards to retain large companies contributing to the public waste water treatment system, thus preserving its efficiency. Additionally, the measure also provides benefits to the system as a whole. These particularities were taken into account in the assessment.

*Environmental objective*

32) Point 151 EAG states that aid in the form of reductions from environmental taxes will be considered compatible provided that it contributes at least indirectly to an improvement of the level of environmental protection and that the reductions do not undermine the general objective pursued.

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<sup>5</sup> OJ C37 of 3.2.2001, p.3

<sup>6</sup> Community Guidelines on State Aid for Environmental Protection, OJ C82, 2008, p.1.

- 33) The scheme has an indirect environmental benefit. The reason for inciting companies to use the public waste water treatment plants is to preserve their efficiency. In the absence of the measure large companies would opt-out and the efficiency of the wastewater treatment plants would be reduced. Moreover, the measure does not undermine the general objective pursued as companies still have an incentive to reduce their pollution as they pay a part of the levy.
- 34) Point 156 EAG requires information on the beneficiaries to be provided for the assessment under points 157-159 EAG. The Dutch authorities noted based on the application of the 2002 scheme that there are 47 potential beneficiaries. They provided information on the sectors in which they operate and the amount of aid companies will likely receive under this scheme.

*Necessity of aid (points 157-158 EAG)*

- 35) Point 157 EAG requires the reductions to be necessary and proportional. Point 158 of the Environmental Aid Guidelines requires that three cumulative conditions are met to demonstrate the necessity of the aid.
- 36) Point 158(a) EAG requires that the rules set for aid to be granted must be objective and transparent and apply in principle in the same way for all beneficiaries if they are in a similar factual situation.
- 37) In that respect, only companies that impact on optimum utilisation of the wastewater treatment plants can benefit from the measure. This is determined by the objective criterion that the company's discharges of waste water are at least 5% of the plant's treatment capacity. Secondly, the company must demonstrate that it is technically and financially able to treat its wastewater in-house at a price below the levy. Any company fulfilling these criteria can apply for the reduction.
- 38) The condition of point 158 (a) of the Guidelines is thus met.
- 39) Point 158(b) of the Guidelines requires that the full tax must substantially increase production costs. In this particular case, considering the fact that companies can opt-out and avoid paying the levy, the relevant production costs taken into account are the waste water treatment costs.
- 40) The Dutch authorities brought convincing evidence to show that without a subsidy the waste water treatment costs for beneficiaries would increase considerably. The Dutch authorities submitted a representative example of the Rijn en IJssel water board, where two companies receiving subsidies provided their costs of in-house treating of the waste water. These costs would amount to EUR 1,273,077 and EUR 816,000 annually respectively. The costs that they would have to pay for full treatment by the water authority amount to EUR 1,980,342 and EUR 1,260,000 respectively. Without the levy reduction, the costs as compared to in-house treating would increase by respectively 55.6% and 54.5%.

- 41) This increase prompts companies to treat their wastewater themselves. Another example provided by the Dutch authorities, the case of Reest en Wieden water board, shows that companies effectively leave the public waste water system and treat their waste water in-house. In this case, two companies receiving subsidies chose to opt-out and purify in-house, because of uncertainty if the scheme would be extended.
- 42) Taking the specific elements of the case into account the condition of point 158 (b) of the Guidelines can be considered to be met.
- 43) Point 158 c) of the Guidelines requires that the substantial increase in production costs, which the full application of the levy would bring about, cannot be passed on to customers without leading to important sales reductions.
- 44) The fact that large dischargers investigate and identify concrete in-house alternatives to avoid the payment of the full levy provides an indication that they would not be able to pass the increased costs on. Otherwise, they would not spend resources trying to find alternative solutions to reduce these costs. However, since in order to reduce their levy by pre-treating their waste water or be eligible to the application of the levy reduction, companies would also incur additional treatment costs, the examination of the condition set out in point 158 c) of the Guidelines should take into account the specific features of the scheme under examination. In that respect, not only the beneficiaries' costs but also the efficiency of the system as a whole and the objective of the measure need to be taken into account.
- 45) The prolongation of the anti-opt-out scheme is also justified by technical necessity. Without the aid, the beneficiaries would opt-out from the system, with negative consequences for the waste water treatment plants and for the remaining users. This applies both to existing and new (to be constructed) plants.
- 46) The plants are set up to treat water with certain contamination values. Therefore, large supply of pre-treated water from the companies that opted out from the system and pre-treat their waste water in-house disturbs this balance, reducing the installation's efficiency.
- 47) Without the potential beneficiaries contributing to the costs of the system, the plants would be underused, raising their operating costs. A representative example of Rijn en IJssel water board showed the effects of the opting out of the two companies receiving subsidies. The water board would realize operational cost savings because it would have less water to treat. These savings amount to 26% of the levy lost. The water board would thus have to finance 74% of the levy lost in another way.
- 48) For new (to be constructed) plants, the potential withdrawal of big dischargers of waste water also constitutes a problem. Even if companies opt for in-house treatment of the wastewater, the treated water still arrives at the plant. The public

plant is legally obliged to deal with that volume. The volume of treated water therefore requires a plant of the same physical size, which, however, due to the pre-treated wastewater, is less efficient. Continued use of the plant by 'major dischargers' to treat their wastewater guarantees an optimum use of the plant's capacity.

49) New wastewater treatment plants also need to take into account all wastewater that can potentially be discharged within the water board's area. All wastewater treatment plants are legally obliged to be capable of dealing with all potential wastewater. This means that also the additional volume of wastewater in case of a return of major dischargers that opted out needs to be taken into account for the construction and size of the plant.

50) Without the aid, the levy for other users would increase to cover the plants' fixed costs. That means the other companies even though their pollution would remain at the same level would have an increase in the levy. Households would also incur an increased levy. This increase in the levy would be disproportionate given that these users' pollution does not increase.

51) In view of the above, the Commission considers that the condition of point 158 (c) of the Guidelines is thus met.

#### *Proportionality of the aid (point 159 EAG)*

52) Point 159(b) EAG considers the aid proportional if beneficiaries pay at least 20% of the levy.

53) The beneficiaries will pay at least 50% of the levy. Also, the subsidy may not exceed the difference between the levy and in-house treatment costs. Companies still have an incentive to reduce their pollution as they pay above what they would pay for in-house treatment.

54) The aid is thus proportional.

#### **4. CONCLUSION**

55) In light of the above, the Commission considers the notified scheme fulfils the conditions of the 2008 Environmental Aid Guidelines and is compatible with the internal market in accordance with Article 107 (3) (c) of the TFEU.

56) The Commission will publish this letter.<sup>7</sup> If it contains confidential information, please inform the Commission within fifteen working days of receipt. Otherwise you will be deemed to agree to publication of the full text.

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<sup>7</sup> On <http://ec.europa.eu/competition/elojade/isef/index.cfm>



For the Commission

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