The rehabilitation of polluted industrial sites in the Netherlands

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Introduction

The Commission has set specific provisions for rehabilitation of polluted industrial sites in the Community guidelines on State aid for environmental protection (1), hereafter the environmental guidelines. On 27 February 2002 the Commission decided not to raise objections to a State aid program by the Netherlands on soil rehabilitation. This Dutch program is providing subsidies for the rehabilitation of the polluted industrial sites for which no private individual is financially responsible for the rehabilitation costs. The budget of the arrangement is 1.13 billion euros. This was the first State aid scheme to be approved under these provisions of the new environmental guidelines. In this article you can find a concise description of the measure and a summary of the assessment by the Commission.

Description of the measure

In The Netherlands it is estimated that 15,000 industrial sites are seriously polluted. In June 2001 the Dutch national authorities, the provincial municipal executives and the confederations of employers signed a joint covenant on soil rehabilitation. The participating parties agreed on a scheme to partly support rehabilitation of Dutch polluted industrial sites, but only in those cases where there is no private party liable for the costs of the rehabilitation.

Under Dutch national law undertakings can not be held liable for the cost of rehabilitation for polluted industrial sites, when the pollution took place before 1-1-1975, even if the undertakings had polluted the site themselves. The Dutch Supreme Court has decided in various cases that undertakings causing pollution of industrial sites were not able to judge the economic and environmental consequences of that pollution prior to 1-1-1975. However, it is not always obvious what part of the pollution was caused before 1-1-1975. Therefore the Dutch authorities introduced a protocol with the purpose to avoid complicated and long lasting legal litigation on every individual case. This protocol went into force 11 June 2001 and includes a calculation method which results in a percentage of pollution dated before 1-1-1975. The protocol sets out a minimal limit of 80% of pollution dated before 1-1-1975 in order to consider the undertaking not liable for the pollution. The protocol constitutes therefore nowadays the applicable Dutch law as regards the liability for pollution of industrial sites.

The measure only aims at compensating the cost of rehabilitation of severely contaminated industrial sites in continuing use which were in totality polluted prior to 1-1-1975, or for which at least 80% of the pollution dates prior to 1-1-1975. It thus aims at compensating the costs of rehabilitation of contaminated sites where nobody is liable for the costs of rehabilitation according to Dutch law. The Dutch Authorities have classified the possible beneficiaries of the measure into several categories, in order to distinguish various aid intensities. The Dutch Authorities will thus compensate the undertakings by 15% to 70% of the eligible costs. Cumulation of State aid for the rehabilitation is explicitly prohibited in the notified measure.

Application of point 38 of the environmental guidelines

The Commission has assessed the notified scheme under the conditions laid down in the environmental guidelines. As regards the rehabilitation of polluted industrial sites point 38, second paragraph of the environmental guidelines state that where the person responsible for the pollution is clearly identified, that person must finance the rehabilitation in accordance with the ‘polluter pays principle’ and no State aid may be given. By ‘person responsible for the pollution’ is meant the person liable under the law applicable in each Member State, without prejudice to the adoption of Community rules in the matter. According to the third paragraph of point 38 of the environmental guidelines the person responsible for the work may receive aid, where the person responsible for the pollution is not identified or cannot be held liable to bear the cost.

The polluter pays principle is the leading principle in Community environmental legislation. However, there is no specific Community legislation that defines responsibilities for past pollution.

(1) OJ C 37 of 3.2.2001, p. 3
in this context. Therefore, the national law and jurisprudence is the relevant legal framework. As already mentioned above, the protocol of 11 June 2001 is the current applicable Dutch law as regards liability for pollution of industrial sites. The protocol is therefore considered as the law applicable in the Member State, as referred to in the second sentence of the second paragraph of point 38 of the environmental guidelines. It is according to the rules laid down in the protocol that the Dutch authorities will decide if the person responsible for the pollution is or is not identified and can or can not be held liable to bear the costs.

The eligible costs in the notified measure are defined as the gross costs of the rehabilitation project minus the overlapping costs. The overlapping costs are costs incurred for other reasons, such as site preparation or infrastructure costs, but which nevertheless reduce the costs of rehabilitation. This definition is in accordance with footnote 35 of the environmental guidelines, which states that all expenditure incurred by a firm in rehabilitating its site, whether or not such expenditure can be shown as a fixed asset on its balance sheet, ranks as eligible investment in the case of the rehabilitation of polluted sites.

The fourth paragraph of point 38 of the environmental guidelines states that aid for the rehabilitation of polluted industrial sites may amount to up to 100% of the eligible costs, plus 15% of the work. The eligible costs are equal to the cost of the work less the increase in the value of the land. The total amount of aid may under no circumstances exceed the actual expenditure incurred by the undertaking. (*)

The aid intensity of the Dutch scheme is between 15% to 70% of the eligible costs. These are aid intensities determined without taking into account the increase in the value of the land. Based on substantial experience the Dutch authorities expect the increase in the value of the land always to be lower than 28% of the rehabilitation costs. The Dutch authorities have proposed a general integration of the possible benefits of an increase in the value of the land in the aid intensities.

Until now, the Dutch Authorities have chosen to use an average value by lowering the maximum aid intensity of the eligible cost to the level of 15% to 70%. On average the aid intensity is estimated at 25%. Point 38, paragraph 4 of the environmental guidelines allow aid percentages up to 100% of the eligible costs, plus 15% of the costs of the work. The eligible costs are equal to the cost of the work less the increase in the value of the land. When the increase in the value of the land is expected to be 28% maximum, the maximum aid intensity allowed would be: 100% of the cost of the work – 28% = 72% + 15% = 87% of the cost of the work. The maximum aid intensity of the Dutch scheme is 70% of the cost of the work, which is well below the maximum aid intensity allowed. Hence the Commission has concluded that this scheme is in line with point 38 of the environmental guidelines.

(*) To clarify the calculation of the aid intensity, a maximum aid intensity is calculated in the following (theoretical) example:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of the site before rehabilitation:</td>
<td>500 000 euros</td>
</tr>
<tr>
<td>Value of the site after rehabilitation:</td>
<td>600 000 euros</td>
</tr>
<tr>
<td>Cost of the rehabilitation works:</td>
<td>300 000 euros</td>
</tr>
<tr>
<td>Eligible costs: 500 000 – (600 000 – 500 000):</td>
<td>200 000 euros</td>
</tr>
<tr>
<td>15% of the costs of the work (15% of 300 000):</td>
<td>45 000 euros</td>
</tr>
<tr>
<td>Possible aid allowed (200 000 + 45 000):</td>
<td>245 000 euros (= 82% of the cost of the work)</td>
</tr>
</tbody>
</table>

When there is no increase in the value of the land after rehabilitation, the eligible costs will be equal to the cost of the work (aid intensity: 100%). The provision to add 15% of the cost of the work can then not be applied, as the total amount of aid may under no circumstances exceed the actual expenditure incurred by the undertaking.