State aid

Two Dutch cases on State aid and soil rehabilitation

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Introduction

In 2002 the Commission approved the Dutch aid scheme N 520/01 the Soil Protection Agreement (\(^2\)). The basic principles of this covenant are currently incorporated in the “Soil Rehabilitation Decree”. At the moment the Soil rehabilitation Decree contains two State aid measures: one subsidy scheme related to the support of non-liable landowners for the rehabilitation of their sites, the other one is a subsidy scheme for situations where the enforcement of the remediation obligation would lead to serious financial difficulties for the involved enterprise. This article describes some of the modifications introduced with the implementation of the covenant into the Soil Rehabilitation Decree and aims to give a brief overview of some developments in aid schemes for soil rehabilitation in the Netherlands.

Background

It is estimated that 15,000 industrial sites in The Netherlands are seriously polluted. According to the Dutch law on soil protection, the obligation for the rehabilitation of these polluted industrial sites rests in principal on the owners of these sites (\(^3\)), regardless of whether the owner is liable for the pollution of the site.

Regarding the national law applicable on liability, the Dutch Supreme Court ruled in several cases that undertakings could not be held liable if the pollution took place before 1-1-1975, even if they had polluted the sites themselves. The Dutch Supreme Court decided that undertakings that caused the pollution of industrial sites were not able to judge the economic and environmental consequences of that pollution before 1-1-1975. This means that although these enterprises are technically responsible for the pollution, they can not be held liable under Dutch Law for the cost of the rehabilitation of the polluted industrial sites.

This led to the implementation of two aid schemes for the rehabilitation of polluted sites in the Netherlands: the first one is related to the liability for the pollution of the sites and access to subsidy for the rehabilitation, the second one is related to the legal obligation to rehabilitate for the owners of polluted sites. Below a description of the two aid schemes.

Description of the measures

Related to liability for the pollution

The Soil Protection Agreement of June 2001 was a covenant between the national authorities, the provincial executives, the association of Netherlands municipalities, the confederation of Netherlands Industry and Employers and the Royal Association MKB-Nederland (organisation of SME employers). In this covenant the participating parties agreed on a scheme to partly support rehabilitation of Dutch polluted industrial sites, for those cases where no private party can be held liable for the pollution. This covenant was approved as aid scheme N 520/01 the Soil Protection Agreement (\(^4\)) on 27 February 2002.

Meanwhile the basic principles of the above mentioned covenant are incorporated in the “Soil Rehabilitation Decree” (\(^5\)) and this State aid scheme was approved with decision N 85/05 (\(^6\)), Soil rehabilitation of polluted industrial sites.

Some adjustments were also implemented, for example the application of the pro rata temporis principle (\(^7\)) was introduced. Before the introduction of this principle it had to be established whether the pollution took place before 1-1-1975, in this context the Dutch authorities distinguished two types of cases: obvious and non-obvious cases. In obvious cases it is clear when the industrial site was polluted. In so called non-obvious cases the Dutch authorities have set up criteria to determine what part of the pollution was caused before 1-1-1975 and what part was caused after that date. To this end a so called “age protocol” entered into force on 11 June 2001. This age protocol includes

\(^{1}\) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and the view expressed lies entirely with the author.
\(^{3}\) Artikel 55b Wet bodembescherming, Staatsblad 1986, 374.
\(^{4}\) An article by Melvin Koenings about this case was published in the Competition Policy Newsletter, no. 2, June 2002 p. 65.
\(^{5}\) Besluit Financiële bepalingen bodemsanering, Staatsblad 2005, 681.
\(^{7}\) Liability in proportion to the moment of causing the pollution.
The “age protocol” was modified and made it possible to apply for a grant also in cases where less than 80% of the contamination dates from before 1-1-1975. In the approved measure when for example only 79% dates from before 1-1-1975, the grant would be refused. However, in the new measure the aid can only be granted in relation to the part of the pollution caused before 1-1-1975. This is the application of the pro rata temporis principle: liability in proportion to the moment of cause. For example if 78% of the contamination dates prior to 1-1-1975, the grant will be allowed at the applicable subsidy rate only with respect to 78% of the decontamination costs (9).

Other modifications introduced were: the different classes of beneficiaries where simplified, the aid intensities where adjusted and a uniform SME (10) bonus was introduced (11).

Obligation for the rehabilitation

The other aid scheme is designed for situations when polluted sites have not been rehabilitated because the owner does not have the financial resources to finance the rehabilitation. As described above article 55b of the Soil Protection Act contains an obligation upon the owner of an industrial site to rehabilitate the site, regardless of whether the owner is liable for the pollution on the site. In return, a subsidy is possible in so far as the owner cannot be held liable for the pollution, and provided that the other conditions for the subsidy are fulfilled.

However, the enforcement of the rehabilitation obligation could result in situations where some businesses become insolvent because of disproportionately high rehabilitation costs in relation to a relatively low turnover or cash flow. In such situations no soil rehabilitation will be carried out for quite a long time and in the end the government will have to include the rehabilitation in its own governmental rehabilitation programme.

To avoid such situations, a “Financial Strength Support Instrument (FSSI)” is developed by the Dutch authorities. This instrument can be offered to ‘otherwise healthy’ businesses who are in the circumstance where — as a result of enforcement of the obligation to rehabilitate — the viability of a business is put in such jeopardy that the continued existence of the business is uncertain. In this context the enterprise may request the competent authority to carry out the rehabilitation against payment of a contribution by the enterprise itself. The owner will pay a contribution to the authority for the execution of the rehabilitation. This so called ‘buy-off sum’ is determined according to the ability to pay.

In order to determine the payment of an enterprise according to its capability to pay, a financial strength test has been developed. This test intends to serve as an objective examination of the capability to pay for a business owner of polluted ground who is obliged to rehabilitate. The exact amount of the payment (buy-off sum) by an owner to the authority for taking over the execution of the rehabilitation is calculated on the basis of five different steps (12).

For establishment of the minimum payment by the authorities point 38 of the Community guidelines on State aid for environmental protection (hereafter the environmental aid guidelines) (12) is taken into account and the payment made by the enterprises to the competent authority determined in the different steps must not be lower than the outcome from the calculation of the following formula:

\[
\text{Minimum payment of the company to the competent authority:} = \text{the increase in value from decontamination of the site concerned minus } 0,15 \times \text{the rehabilitation costs}
\]

If the payment by the business to the competent authority is determined according to the above described formula, the procedure is as follows. The competent authority carries out the rehabilitation and the business pays the ‘buy-off sum’. For determination of the buy-off sum account has already

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(9) For example: An enterprise exists since 1960. The application of the age protocol shows that 78% of the contamination dates prior to 1-1-1975. Assuming that the applicable subsidy rate is 30%, the enterprise gets a grant equal to 78% of 30% (= 23.4%) of the rehabilitation costs.

(10) Of L 124, 25.5.2003, p. 36. SMEs are defined in accordance with the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, replacing the Recommendation 96/280/EC as from 1 January 2005

(11) For a detailed description of the modifications see the text of decision N 85/05, see footnote 6.

(12) Of C 37, 3.2.2001, p. 3.
been taken of any right to other subsidies for the soil decontamination of operational and permanent industrial sites \(^{(13)}\). The remaining rehabilitation costs are borne by the competent authority.

The maximum gross aid intensity cannot be expressed in amounts \(^{(14)}\) or percentages, but it can be expressed in the formula below:

<table>
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<tr>
<th>Maximum contribution of competent authority:</th>
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<td>(= 115% \text{ of the decontamination costs} - \text{the increase in value as a result of rehabilitation of the site concerned} )</td>
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The increase in value of the land will be established by means of an independent valuation.

The use of the FSSI is directly linked to the enforcement of the obligation upon the owner or leaseholder of an industrial site under the Soil Protection Act to rehabilitate. One of the conditions for access to the FSSI instrument is that there is a need of rehabilitation of the site in the short term and the authorities have established that there is serious pollution that urgently needs to be rehabilitated.

Where the company is liable under the national liability regime, the support of the government can in no circumstances go above the ceilings of Commission Regulation (EC) No 69/200 of 2 January 2000 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid \(^{(15)}\) (hereafter the de minimis Regulation).

### Application of point 38 of the environmental aid guidelines

As regards the rehabilitation of polluted industrial sites, point 38, second paragraph of the environmental aid guidelines states 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”. This point refers to the polluter pays principle which is a leading principle in European environmental law \(^{(16)}\).

Community rules have been adopted in the field of environmental responsibility: “Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage \(^{(17)}\)”. However, according to its Article 17, this directive shall not apply to damage caused by an emission, event or incident that took place before 30 April 2007. Therefore the Commission had, in the two cases, still to rely on the national law.

As described above, the Dutch Supreme Court ruled in several cases that undertakings could not be held liable if the pollution took place before 1-1-1975, even if they had polluted the sites themselves. These judgements should be seen as the national law applicable on liability for the pollution \(^{(18)}\).

According to the third paragraph of point 38 of the environmental aid guidelines “where the person responsible for the pollution is not identified or cannot be held liable to bear the cost, the person responsible for the work may receive aid”.

Paragraph four of point 38 of the environmental aid guidelines stipulates further that “Aid for the rehabilitation of polluted industrial sites may amount to up to 100% of the eligible costs, plus 15% of the cost of the work. The eligible costs are equal to the cost of the work less the increase in the value of the land.”

For the application of the pro rata temporis principle the Commission decided that the fact that now also cases where less than 80% of the pollution is caused before 1-1-1975 can apply for this scheme, will undoubtedly lead to a higher number of beneficiaries. However, the eligible costs remain the same. Only the rehabilitation cost of the part of the pollution caused before 1-1-1975 is taken into account.

As far as the other notified modifications concerned: they were in line with the thresholds of the guidelines \(^{(19)}\).

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\(^{(13)}\) E.g. Decision N 85/05, see footnote no. 6.

\(^{(14)}\) This applies to situations where company is not liable. Otherwise the ceiling of the de minimis must be respected.


\(^{(16)}\) Article 174 (2), EC Treaty.

\(^{(17)}\) OJ L 143, 30.4.2004, p. 56.

\(^{(18)}\) This approach was also accepted in the decision in the State aid case N 520/01.

\(^{(19)}\) For a detailed assessment see decision N 85/05, footnote 6.
With the application of the FSSI the maximum contribution of the authorities falls within the thresholds set by the aforementioned point 38 of the environmental aid guidelines. The possible cumulation with other subsidy schemes is taken into account in the determination of the buy-off sum so that the total amount of State aid always respects the ceilings allowed under the environmental aid guidelines.

As regards the cases where the pollution took place on or after 1-1-1975 and the owner or long term leaseholder is liable under the national liability regime, the financial strength support instrument may only apply under the conditions of the de minimis Regulation. Under these conditions, such support is not considered State aid. Should the support of the government go above the ceilings of the de minimis Regulation then such support would constitute State aid which cannot be approved under the environmental aid guidelines because it is not in line with the polluter pays principle.

Therefore, in both cases the Commission has decided not to raise objections to the notified measures as the State aid could be found compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty, since it respects the conditions laid down in the environmental aid guidelines.