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C(2021) 6919 final

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**Subject: State Aid SA.62368 (2021/N) – Netherlands  
COVID-19: Aid to the fireworks sector**

Excellency,

## 1. PROCEDURE

- (1) By electronic notification of 13 July 2021, the Netherlands notified aid to fireworks wholesalers and certain retailers (the “beneficiaries”) that import fireworks themselves (the “measure”) under Article 107(2)(b) of the Treaty on the Functioning of the European Union (“TFEU”) in accordance with Article 108(3) TFEU. The measure aims at compensating the beneficiaries for part of their losses due to a ban imposed on the sale of fireworks by retailers on 29, 30 and 31 December 2020.<sup>1</sup>
- (2) The Netherlands exceptionally agrees to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958,<sup>2</sup> and to have this Decision adopted and notified in English.

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<sup>1</sup> Apart from 29 to 31 December, the Netherlands bans the sale of fireworks.

<sup>2</sup> Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

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## 2. DESCRIPTION OF THE MEASURE

- (3) Pursuant to the Decree of 22 January 2002, containing new rules with regard to consumer and professional fireworks (the “Fireworks Decree”),<sup>3</sup> the sale to and use by natural persons of fireworks is in principle prohibited in the Netherlands. The sale of fireworks to natural persons is exceptionally allowed on 29, 30 and 31 December of each year. The use of fireworks by natural persons is only allowed between 31 December 18:00h and 1 January the following year 02:00h.<sup>4</sup>
- (4) As a result of the COVID-19 pandemic, on 15 December 2020, the Netherlands imposed a ban on the sale of fireworks by retailers and the use of fireworks by natural persons in the run-up to New Year’s Eve 2020-2021. In particular, the Netherlands prohibited the sale of fireworks by retailers to natural persons on 29, 30 and 31 December 2020 as well as the use of fireworks by natural persons during the period between 18:00h on 31 December 2020 and 02:00h on 1 January 2021. According to the Dutch authorities, the rationale of that ban was twofold.<sup>5</sup>
- (5) *First*, the ban aimed to relieve hospitals and general practitioners from an increase in patients with firework-related injuries on top of the already very high workload associated with patients suffering from COVID-19.
- (6) *Second*, through the ban on the sale of fireworks by retailers the Dutch authorities aimed to prevent gatherings of people in groups to set off fireworks together that would substantially increase the risk of infection with COVID-19.
- (7) While the ban entered into force on 15 December 2020, the Dutch government had already informed the Parliament by letter of 13 November 2020 of its decision to introduce a temporary fireworks ban.<sup>6</sup> That letter stated:

*“The cabinet has [...] decided to introduce a one-off and temporary ban on fireworks for end-of-year fireworks during the upcoming New Year’s Eve. It means that the sale and setting off of end-of-year fireworks during New Year’s Eve is prohibited only once. [...] We assume that the sector following publication of this letter will whenever possible annul pending*

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<sup>3</sup> Vuurwerkbesluit, BWBR0013360, available at:

<https://wetten.overheid.nl/jci1.3:c:BWBR0013360&z=2021-07-01&g=2021-07-01>.

<sup>4</sup> According to Article 1A.1.3 of the Fireworks Decree, there are different types of fireworks, namely F1, F2, F3 and F4. F1 fireworks cause very little danger and create a negligible noise level; they can be used indoors. F2 fireworks cause little danger and a low noise level; they should be used outside in a demarcated place. F3 fireworks cause medium danger and should be used outside in a big open space where the noise level is not harmful to human health. F4 fireworks cause a lot of danger and are to be used exclusively by people with specialized knowledge; the noise level is not dangerous for human health. The ban on the sale and use of fireworks for New Year’s Eve 2020 concerns only F2 fireworks. F1 fireworks are allowed the whole year, while F3 and F4 fireworks are always banned for natural persons, i.e., also on 29, 30 and 31 December of each year.

<sup>5</sup> See the Decision of 10 December 2020 to change the Fireworks Decree in relation to a temporary fireworks ban because of COVID-19 [*Besluit van 10 december 2020 tot wijziging van het Vuurwerkbesluit in verband met een tijdelijk vuurwerkverbod vanwege COVID-19*], available at: <https://zoek.officielebekendmakingen.nl/stb-2020-520.html>.

<sup>6</sup> Available at: <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/11/13/kabinetsbesluit-tot-tijdelijk-vuurwerkverbod>. The announcement of the ban was also reported on in national media the same day or even before, see for example an article in the national newspaper AD (<https://www.ad.nl/politiek/vuurwerkverbod-nu-definitief-compensatiepakket-van-40-miljoen-voor-handelaren-a4fe3e75/>) and an article on the website of the national news broadcaster NOS (<https://nos.nl/artikel/2355867-kabinet-komt-voor-dit-jaar-met-algeheel-vuurwerkverbod>).

*orders and organizes solutions to minimize the amount of fireworks that will come in circulation in the Netherlands. It is good to mention that the stock, just like in other years, always has to be stored safely or will need to be transported safely to a storage location in line with applicable legislation, both before and after New Year's Eve*<sup>7</sup> (unofficial translation).

- (8) That letter also indicated that the ban would be accompanied by a scheme for compensating the fireworks sector without however providing any further details about that scheme.
- (9) The applicable legislation referred to as regards storage in the letter is notably the Fireworks Decree, which contains strict requirements for the storage of fireworks.<sup>8</sup> For example, fireworks generally need to be stored on the ground floor of a building in a space without windows and a door of at least 4m<sup>2</sup>; the space needs to be exclusively used for fireworks; and the storage location needs to be built out of masonry, concrete or aerated concrete. There are also strict requirements as to ensure fire safety. For example detailed requirements for fire hose reels and sprinklers, but also for the positioning of fireworks close to heating sources (pipes, heaters). In addition, while retailers can have a maximum of 500kg in the sales area during opening hours, outside opening hours no fireworks are allowed in the sales area.
- (10) According to the Dutch authorities, the consequences of the ban went beyond 29, 30 and 31 December 2020 and the early hours of 1 January 2021. Since retailers could no longer sell and thereby deliver fireworks to natural persons, retailers cancelled their preorders and orders to the beneficiaries.<sup>9</sup> Undoing all the transactions between the beneficiaries and retailers led to a drop in revenues for the beneficiaries and additional costs for transport and storage in 2021.
- (11) The measure aims to compensate beneficiaries only for the additional costs for transport<sup>10</sup> during the period from 13 November 2020 until 1 February 2021 multiplied with a factor of 2 (see recital (22)) and the additional costs for storage based on the amount of fireworks stored on 1 February 2021 and still in storage on 31 August 2021. According to the Dutch authorities, there were no real alternatives to storing the fireworks until the next sale period on 29, 30 and 31 December 2022. They explain that returning the fireworks to the producer (often

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<sup>7</sup> *“Het kabinet heeft [...] besloten om te komen tot een eenmalig en tijdelijk vuurwerkverbod voor eindejaarsvuurwerk tijdens de komende jaarwisseling. Het betekent dat eenmalig het verkopen en afsteken van eindejaarsvuurwerk tijdens oud en nieuw is verboden. [...] We gaan er vanuit dat de branche na publicatie van deze brief al lopende bestellingen waar mogelijk annuleert en oplossingen organiseert om de hoeveelheid vuurwerk dat in omloop komt in Nederland te beperken. Goed is hierbij op te merken dat de voorraad op basis van de geldende regelgeving net als in andere jaren altijd veilig moet worden opgeslagen of op veilige wijze moet worden getransporteerd naar een opslaglocatie, ook voor en na de periode rond de jaarwisseling”.*

<sup>8</sup> Annex 1 of the Fireworks Decree.

<sup>9</sup> Among other things, those orders were cancelled for safety reasons. When the ban was announced on 13 November 2020, it was clear that deliveries to retailers should not take place, or in case they had already taken place, should be undone. This is because the storage facilities of retailers are not suitable for long-term storage of fireworks. Moreover, not retrieving the fireworks from the retailers would have enhanced the risk of illegal sales that undermine the ban.

<sup>10</sup> Excluding transport **from** a port and transport **to** a storage facility of a retailer (Article 1 of the Temporary Subsidy Scheme Fireworks ban).

located in China) was not an option, as China imports very few fireworks. Moreover, the last ship with fireworks for the Netherlands had already left China before the announcement of the firework ban in the Netherlands on 13 November 2020. Alternatives such as selling the fireworks in neighbouring countries was not an option either, as in the same period (i.e., end 2020) both Belgium and Germany also had a ban on fireworks. To make arrangements for the sale of fireworks in other Member States, there are several steps to be taken, among which is ensuring compliance with the requirements of EU Directive 2013/29/EU of the European Parliament and the Council of 12 June 2013.<sup>11</sup> That directive requires that instructions on the fireworks have to be in the official language of the Member State where they are sold. The fireworks delivered from China to the Netherlands were tailor-made (and so contained labels in Dutch) for the Dutch market. Another alternative such as the incineration of fireworks would have been a costly solution, not only because of the cost of incineration but also because of the loss of value of the fireworks.

(12) As regards the different dates chosen for the compensation of additional transport and storage costs under the measure, the Dutch authorities have explained the following:

- a. 13 November 2020 as the starting date for calculating the additional transport costs compensated under the measure: According to the Dutch authorities, even though the ban on the sale and use of fireworks entered into force on 15 December 2020, the Dutch Government had already announced that ban on 13 November 2020 (recital (7)). That announcement had an immediate effect on the operations of the beneficiaries, who had to provide for the transport of fireworks to appropriate storage locations.
- b. 1 February 2021 as the end date for calculating the additional transport costs and as the starting date for calculating the additional storage costs compensated under the measure: According to the Dutch authorities, fireworks that arrive in Dutch ports are transported to the temporary storage facilities of retailers. Following the announcement of the ban on 13 November 2020 and the subsequent cancellation of retailers' orders, those fireworks had to be transported to other facilities suitable for safe storage for the duration of one year, i.e., until New Year's Eve 2021/2022. In order to transport the fireworks to such other safe and long-term storage facilities multiple transportation movements were necessary. For example, the beneficiaries needed to first move the fireworks to temporary storage facilities in the Netherlands and subsequently to other storage facilities, notably in Germany due to insufficient storage capacity in the Netherlands. That logistical operation took considerable time and the Dutch authorities have established that it was finished only by 1 February 2021.<sup>12</sup> After the fireworks had been brought to the storage facilities, the

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<sup>11</sup> Directive 2013/29/EU of the European Parliament and of the Council of 12 June 2013 on the harmonisation of the laws of the Member States relating to the making available on the market of pyrotechnic articles (recast), OJ L 178, 28.6.2013, p. 27.

<sup>12</sup> Finding a suitable storage place also took considerable time. As can be seen from the many criteria a storage location for fireworks needs to fulfill (recital 9), the beneficiaries could not transport the fireworks to just any location. Indeed, finding storage for 18 million kg of fireworks (the quantity that remained unsold in 2020) within 2,5 months was already not easy.

Dutch authorities checked the amount of fireworks stored on 1 February 2021, which forms the basis for calculating the additional storage costs compensated under the measure (recital (21)).

- c. 31 August 2021 as the end date for determining how many kilograms of fireworks are in storage: According to the Dutch authorities, the beneficiaries normally use the period starting from 1 September to prepare their deliveries to retailers. As a consequence, the amount of fireworks in storage gradually decreases as of 1 September. In 2021, that preparation may even take more time as the first priority after the announcement of the ban was to store the fireworks safely until the New Year's Eve 2021/2022, rather than to store them efficiently from a logistical point of view.
- (13) Furthermore, as can be seen from **Table 1**, the ban on the sale and use of fireworks caused a drastic decrease in the turnover generated by beneficiaries in the Netherlands, while the number of Dutch retailers buying fireworks from the beneficiaries was essentially reduced to zero. The Dutch authorities collected data from 10 potential beneficiaries. For those potential beneficiaries the decrease in turnover compared to the same period in 2019 was more than [75 % - 100 %], while the respective decrease in clients (i.e., the retailers) compared to December 2019<sup>13</sup> was between [75 %] and [100 %]<sup>14</sup>. Based on that data, the Dutch authorities submit that the loss of turnover is due to the exclusion of a highly material category of clients, namely the retailers that could no longer sell fireworks to natural persons because of the ban, as laid down in point 15*bis* of the Temporary Framework.<sup>15</sup>

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<sup>13</sup> The reference period is December 2019 as this is the month when the majority of fireworks are sold in the Netherlands.

<sup>14</sup> As can be seen from Table 1, one beneficiary reported a decrease of [35 % - 55 %] in clients. This is explained by the fact that some clients bought also products other than fireworks from the beneficiaries.

<sup>15</sup> Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 pandemic (OJ C 91I, 20.3.2020, p. 1), as amended by Commission Communications C(2020) 2215 (OJ C 112I, 4.4.2020, p. 1), C(2020) 3156 (OJ C 164, 13.5.2020, p. 3), C(2020) 4509 (OJ C 218, 2.7.2020, p. 3), C(2020) 7127 (OJ C 340I, 13.10.2020, p. 1) and C(2021) 564 (OJ C 34, 1.2.2021, p. 6).

**Table 1**

<b>Beneficiary</b>	<b>Loss in gross revenues December 2020 compared to December 2019 for fireworks and other activities combined<sup>16</sup></b>	<b>Loss in clients (i.e., retailers of fireworks)</b>
A	-[75 % - 100 %]	-[75 % - 100 %]
B	-[75 % - 100 %]	-[75 % - 100 %]
C	-[75 % - 100 %]	-[75 % - 100 %]
D	-[75 % - 100 %]	-[35 % - 55 %]
E	-[75 % - 100 %]	-[75 % - 100 %]
F	-[75 % - 100 %]	-[75 % - 100 %]
G	-[75 % - 100 %]	-[75 % - 100 %]
H	-[75 % - 100 %]	-[75 % - 100 %]
I <sup>17</sup>	-[75 % - 100 %]	-[75 % - 100 %]
J <sup>18</sup>	-[75 % - 100 %]	-[75 % - 100 %]

- (14) The Dutch authorities have explained that the beneficiaries are in a comparable situation to economic operators particularly hard hit by a temporary ban since they cannot simply resume the sale of fireworks once the ban is over and try to make good the damages they have incurred. Instead, they have to wait one year until they can resume their activities.

### **2.1. The nature and form of the measure**

- (15) The aid will take the form of direct grants.

### **2.2. National legal basis**

- (16) The legal basis of the measure is the Framework Decision subsidies I en M [*Kaderbesluit subsidies I en M*<sup>19</sup>] and the Temporary Subsidy Scheme Fireworks ban COVID-19 [*Tijdelijke subsidieregeling vuurwerkverbod COVID-19*].
- (17) The Dutch authorities have confirmed that the Temporary Subsidy Scheme Fireworks ban COVID-19 will be signed and become legally binding only after the notification of the Commission's decision approving the measure. The Temporary Subsidy Scheme will also explicitly refer to the present decision and can therefore become legally binding only after the notification of the Commission's approval.

<sup>16</sup> Rounded up to full percentages.

<sup>17</sup> This beneficiary is a foundation ('stichting') as opposed to a private company that operates as a collective purchasing organisation ('inkooporganisatie') for fireworks only. This organisation does not pre-finance the purchase from China, but rather collects orders from affiliated retailers and requires them to pay up front. The foundation bills throughout the year (since it accepts orders throughout the year), rather than only towards the end of the year and therefore the reference period is January to September 2019. The organisation was active in December 2019 and 2020; however it has generated its revenues already before, namely between January and September.

<sup>18</sup> J is a retailer that does its own imports. As a retailer and importer in one, J is already directly affected by the ban, which targeted retailers.

<sup>19</sup> Available at: <https://wetten.overheid.nl/BWBR0036381/2015-07-01>.

### 2.3. Administration of the measure

- (18) The measure will be administered by RVO (Netherlands Enterprise Agency). The Dutch authorities have explained that RVO implements policy aimed at entrepreneurs on behalf of ministries, and has the necessary expertise to do so. The Ministry of Infrastructure and Water Management has given a mandate to RVO for the present measure.

### 2.4. Budget and duration of the measure

- (19) The Dutch authorities indicated that the estimated amount of aid under the measure will be EUR 16 million.
- (20) The measure will enter into force from the notification of the Commission's decision approving the measure. Beneficiaries can apply for compensation between 1 October and 18 October 2021. Once an application is accepted, 80 % will be paid out as an advance payment. Under Dutch procedural rules, a decision on the application has to be taken within 13 weeks after closure of the application window<sup>20</sup>. That term can be extended by another 13 weeks<sup>21</sup>. At the latest on 18 February 2022, beneficiaries need to submit a request to determine the final amount of aid. Again a decision should be taken within 13 weeks with the possibility of an extension for another 13 weeks<sup>22</sup>. Requests submitted after 18 February 2022 could lead to recovery of the full sum already paid out. Taking into account the 13-week deadlines, the final date by which the aid has to be granted is 19 August 2022.
- (21) The reference period for establishing the exclusion of a highly material category of clients (see recital (13)) is December 2019 as this is the month when the majority of fireworks are sold in the Netherlands. However, the specific type of costs that the Dutch authorities want to cover under the measure and that are incurred as a consequence of the three-day ban extend to a longer period. Beneficiaries need to store the unsold fireworks outside the period of the ban. It follows from the Fireworks Decree that they are legally obliged to do so since it is impossible to sell the fireworks after the ban ends, since there is a continuous ban throughout the year. Therefore, the Dutch authorities want to compensate storage costs incurred as a consequence of the ban based on a fixed amount of EUR 0,63 per kg<sup>23</sup> of unpackaged fireworks and transport costs incurred in the period from 13 November 2020 (the date of the letter of the Dutch Government to the Dutch parliament, see recital (7)) until 1 February 2021 (see recital (10)), multiplied with a factor 2.
- (22) The Dutch authorities have explained that the factor 2 results from the fact that the additional transport needed may continue until the end of 2021. The fireworks will also need to be picked up from the storage locations before the sale of fireworks for New Year's Eve 2021/2022 can start. Moreover, transport between

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<sup>20</sup> Article 14.1 of the Kaderbesluit subsidies I en M.

<sup>21</sup> Article 14.4 of the Kaderbesluit subsidies I en M.

<sup>22</sup> Article 17 of the Kaderbesluit subsidies I en M.

<sup>23</sup> The Dutch authorities have calculated the amount of EUR 0,63 on the basis of the actual in-house storage costs of several beneficiaries. The average costs for (in house and external) storage are estimated at EUR 300 per full pallet of fireworks. Pallets carry an average weight of 475 kg firework. The storage cost per kg firework then amounts to  $(300 / 475 =)$  EUR 0.63 per kg.

storage locations during 2021 may be needed when a storage location is not available for the whole year. Therefore the additional transport costs incurred as a consequence of the ban may continue until the end of 2021. By multiplying the actual costs incurred in the period 13 November 2020 to 1 February 2021 with 2, the Dutch authorities effectively cover the costs of both transporting the fireworks **to** the (temporary) storage locations and transporting them **from** storage locations as part of the preparations for the sale on 29, 30 and 31 December 2021. The Dutch authorities submit that the factor 2 is conservative considering that the beneficiaries could incur transport costs in addition to the costs of bringing the fireworks to a storage location and picking them up from that location.

- (23) Only additional transport costs obtained from third parties are covered. This means that all transport carried out by the beneficiary itself is not taken into account in the compensation amount because such costs are already covered under other schemes.

## **2.5. Beneficiaries and sectoral scope of the measure**

- (24) The beneficiaries of the measure are an estimated 10 wholesalers of fireworks in the Netherlands. In addition, 10 to 20 retail chains that do their own import of fireworks could be eligible under the same conditions as wholesalers if they apply.

## **2.6. Basic elements of the measure**

- (25) The Dutch authorities will not cover all damages incurred as a consequence of the ban. The compensation is limited to the additional storage and transportation costs. According to the Dutch authorities the additional storage and transportation costs constitute approximately 52 % of the total costs incurred in a normal year without a ban<sup>24</sup>. The conditions attached to the compensation for storage costs are the following:
- a. Eligible retailers need to have their own storage capacity where more than 10 000 kg for fireworks can be stored and where at least 10 000 kg of fireworks was stored between 1 February 2021 and 31 August 2021. Eligible wholesalers can only receive compensation for storage costs if the fireworks are stored in a storage location of at least 10 000 kg.

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<sup>24</sup> The Dutch authorities have explained that based on data collected from the same 10 beneficiaries as referred to in recital (13), it appears that the total turnover for New Year's Eve 2019/2020 was approximately EUR 38 million. This is in line with the turnover of the retail sector for New Year's Eve 2019/2020 (which charges the consumer two times the wholesale price) of approximately EUR 79 million. Half of the turnover is considered to be costs for purchasing the fireworks from the factories in notably China. The Dutch authorities have established that in a competitive and healthy market such as the market for fireworks in the Netherlands, a profit margin of 10 % is realistic, i.e. approx. EUR 4 million. This means that the remaining EUR 15 million constitute other costs that the beneficiaries incur in normal years such as staffing, administration, housing, storage and transportation. The storage and transportation costs referred to are not the costs covered by the present measure, which only covers additional transport and storage costs, but are for example storage and transportation costs that are provided in-house (recital (23)) or transport costs from a port (footnote 10). The budget of the measure is EUR 16 million. It follows that the additional transport costs and additional storage costs constitute  $(16/(16+15)=)$  52 % of the total costs. Including the purchasing costs of the fireworks would decrease the percentage to  $(16/(16+15+19)=)$  32 %.



- b. Each beneficiary, if it fulfils all conditions, will receive EUR 0,63 per kg of unsold and unpackaged fireworks. The amount of EUR 0,63 per kg is calculated based on the costs for rent, security, sprinkler systems, maintenance of safety and security mechanisms<sup>25</sup>.
  - c. The beneficiary needs to be registered with the Dutch Chamber of Commerce [*Kamer van Koophandel*] at the moment of application and for the period for which funding is requested and needs to store the unsold fireworks at least until 31 August 2021.
  - d. When applying for the compensation, the beneficiary must indicate the amount of fireworks that is stored on 1 February 2021.
  - e. 80 % of the compensation will constitute an advance payment.
  - f. Applicants need to submit a request for assessment [*verzoek tot vaststelling*], following which RVO will disburse the remaining 20 %. This request for determination needs to contain documentation showing the amount of fireworks stored on 31 August 2021 (which needs to be at least 10 000 kg, see letter a).
  - g. Together with the request for assessment an accountant report needs to be submitted which verifies the financial statements. Already after the application has been submitted RVO will assess the facts presented in the application. On the basis of this assessment a decision on the amount of compensation will be taken.
  - h. RVO will carry out random checks and can ask for proof of purchase invoices. To make this possible, beneficiaries need to keep those invoices for five years.
- (26) The conditions attached to the compensation for transport costs are the following:
- a. An eligible beneficiary, if it fulfils all conditions, will receive compensation of two times (see recital (22)) the demonstrably incurred costs in the period 13 November 2020 until 1 February 2021.
  - b. The beneficiary needs to be registered with the Dutch Chamber of Commerce at the moment of application and for the period for which funding is requested and needs to have incurred fireworks transport related costs.
  - c. The fireworks transport needs to have been carried out by a third party, excluding transport from a port or transport to a storage location of a retailer. It follows that only transport between storage locations is eligible.
  - d. The total volume in kilograms of fireworks transported in the period 13 November 2020 to 1 February 2021 needs to be provided in the application.
  - e. 80 % of the compensation will constitute an advance payment.

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<sup>25</sup> See footnote 23.

- f. Applicants need to submit a request for assessment, following which RVO will disburse the remaining 20 %.
  - g. Together with the request for assessment an accountant report needs to be submitted, which verifies the financial statements. Already after the application has been submitted RVO will assess the facts presented in the application. On the basis of this assessment a decision on the amount of compensation will be taken.
  - h. RVO will carry out random checks and can ask for proof of waybills, transport invoices and proofs of payment. To make this possible, beneficiaries need to keep those documents for five years.
- (27) For both types of compensation, the beneficiary need to declare that the costs claimed are not already covered by other types of funding and it needs to confirm that it was not loss-making in the reference period. If a beneficiary was loss-making in the reference period, the Dutch authorities will cap the compensation at the foregone profit (EBITDA 2019 – EBITDA 2020).
- (28) In addition, the Dutch authorities have confirmed the following:
- a. Any payment exceeding the damage suffered as a direct consequence of the COVID-19 pandemic will be recovered.
  - b. The payment made to beneficiaries shall be net of any amount recovered by insurance, litigation, arbitration or other source for the same damage. If the aid is paid out before the insurance, the authorities will recover the insurance amount from the beneficiary.
  - c. The benefit of the aid is excluded for any applicant who is responsible for the damage suffered and/or did not conduct his activities with due diligence or in compliance with applicable legislation or did not take any measure to mitigate its damages.

## **2.7. Cumulation**

- (29) The Dutch authorities confirm that aid provided under the measure cannot be cumulated with other aid for the same part of the damage already compensated under the present measure.

## **2.8. Monitoring and reporting**

- (30) The Dutch authorities have committed to provide a report no later than one year after the approval of the Commission, specifying the amount of compensation and recoverable advances granted and including a summary of all recoveries ordered under the measure (if any).

# **3. ASSESSMENT**

## **3.1. Legality of the measure**

- (31) By notifying the measure before putting it into effect, the Dutch authorities have respected their obligations under Article 108(3) TFEU.

### **3.2. Existence of State aid**

- (32) For a measure to be categorised as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measure must be imputable to the State and financed through State resources. Second, it must confer an advantage on its recipients. Third, that advantage must be selective in nature. Fourth, the measure must distort or threaten to distort competition and affect trade between Member States.
- (33) The measure is imputable to the State, since it is based on a legal act from a public authority as set out in recital (16) and it has to be approved by RVO, which is a public entity falling under the Ministry of Economic Affairs and Climate Policy (recital (18)). It is financed through State resources, because the funding comes directly from the State budget.
- (34) The measure confers an advantage on the beneficiaries in the form of direct grants (recital (15)). The advantage corresponds to (part of) the storage and transportation costs that the beneficiaries have incurred as a consequence of the ban on the sale of fireworks by retailers. The measure thus relieves the beneficiaries of costs that they would have to bear under normal market conditions.
- (35) The advantage granted by the measure is selective, since it is awarded only to beneficiaries carrying out firework wholesale activities (see recital (24)).
- (36) The measure is liable to distort competition, since it strengthens the competitive position of the beneficiaries. It also affects trade between Member States, since the beneficiaries are active in the fireworks sector, in which intra-Union trade exists.
- (37) In view of the above, the Commission concludes that the measure constitutes State aid within the meaning of Article 107(1) TFEU. The Dutch authorities do not contest that conclusion.

### **3.3. Compatibility**

- (38) Since the measure involves aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether that measure is compatible with the internal market. Following the notification of the Dutch authorities, the Commission has examined the measure pursuant to Article 107(2)(b) TFEU. This assessment has led to the following observations.

#### **The notion of exceptional occurrences within the meaning of Article 107(2)(b) TFEU**

- (39) Article 107(2)(b) TFEU provides that aid to make good damage caused by natural disasters or exceptional occurrences shall be compatible with the internal market. Neither the TFEU nor other Union legislation contains a precise definition of the notion of ‘exceptional occurrence’. As they constitute exceptions to the general prohibition of State aid within the internal market laid down in Article 107(1)

TFEU, the Commission, in line with the consolidated Union case-law<sup>26</sup> has consistently held that the notions of ‘natural disaster’ and ‘exceptional occurrence’ referred to in Article 107(2)(b) TFEU must be interpreted restrictively.

- (40) The characterisation of an event as being an exceptional occurrence is made by the Commission on a case-by-case basis, having regard to its previous practice in the field<sup>27</sup>. In this regard, the following indicators relating to the event concerned must be cumulatively met: (i) unforeseeable or difficult to foresee<sup>28</sup>; (ii) significant scale/economic impact<sup>29</sup>; and (iii) extraordinary<sup>30</sup>.

### **COVID-19 as an exceptional occurrence**

- (41) Following the first reports of cases of acute respiratory syndrome (COVID-19) in the Chinese Wuhan municipality at the end of December 2019, the Chinese authorities have identified a novel coronavirus (SARS-CoV-2) as the main causative agent, which had not been previously identified in humans. The outbreak has rapidly evolved, affecting not only other parts of China but spreading to the majority of countries worldwide. Specific sectors and areas are particularly affected by the outbreak, be it because of national outbreak control measures, travel restrictions or supply chain disruptions.
- (42) The WHO declaration of a pandemic<sup>31</sup>, associated with the public health risk deriving from the absence of therapeutics or vaccines for the novel COVID-19 determine the exceptional nature of the circumstances. The rapidness of the spread can cause enormous consequences both in terms of fatal outcomes in high-

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<sup>26</sup> Judgment of 11 November 2004, *Spain v Commission*, C-73/03, EU:C:2004:711, paragraph 37 and Judgment of 23 February 2006, *Giuseppe Atzeni and others*, in Joined Cases C-346/03 and C-529/03, EU:C:2006:130, paragraph 79.

<sup>27</sup> Exceptional occurrences which have been accepted in the past by the Commission include war, internal disturbances and strikes, and, with certain reservations and depending on their extent, major industrial accidents which result in widespread economic loss, see Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020, paragraph 330 (OJ C 204, 1.07.2014, p. 53).

<sup>28</sup> Commission Decision of 1 August 2008 in case SA.32163, Remediation of damage to airlines and airports caused by seismic activity in Iceland and the volcanic ash in April 2010, Slovenia, recital 31.

<sup>29</sup> Elements taken into account by the Commission to consider that the occurrence reached a significant scale: negative consequences cannot be contained (Commission Decision of 4 October 2000 in case NN 62/2000, Régime temporaire d'aides aux entreprises victimes des intempéries et de la marée noire – France), or because of the number of dead or injured people (Commission Decision of 11 April 2012 in case SA.33487, Agricultural and fisheries aid to compensate for damage due to exceptional occurrence (red mud "Aluminium accident"), Hungary, recital 35; Commission Decision of 2 May 2002 in case N241/2002, Régime en faveur des entreprises victimes de la catastrophe industrielle de Toulouse, France, recital 19), the immense ecological and economic damage (Commission Decision of 11 April 2012 in case SA.33487, recital 36), the amount of material damage despite the local character of the industrial accident (Commission Decision of 2 May 2002 in case N 241/2002, recital 19).

<sup>30</sup> In its Decision of 19 May 2004 in case C-59/2001 (OJ L 32, 6.2.2007, p. 14), the Commission considered that the (alleged) fall in sales of poultry meat in a Member State not directly affected by the dioxin contamination, did not constitute in itself an exceptional occurrence. It was yet an unforeseeable event, but formed part of the normal commercial risks to which an undertaking is exposed.

<sup>31</sup> WHO Director-General's opening remarks at the media briefing on COVID-19 on 11 March 2020, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

risk groups and in terms of economic and societal disruption<sup>32</sup>. The necessity to adopt and encourage the respect of measures of lockdown aimed at interrupting transmission chains stems from this acknowledgement. Such measures can result in far-reaching disruption of various economic sectors. This disruption is thus clearly outside the normal functioning of the market.

- (43) In view of the above, this event qualifies as an exceptional occurrence as it was not foreseeable, as it clearly distinguishes itself from ordinary events by its character and by its effects on the affected undertakings and the economy in general and therefore lies outside of the normal functioning of the market.<sup>33</sup>
- (44) In this context, the COVID-19 pandemic can be considered as an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.

**Causal link between the COVID-19 pandemic and the damage compensated by the measure**

- (45) To limit the spread of COVID-19 the Dutch authorities banned the retail sale of fireworks to the general public with the aim to relieve hospitals and general practitioners of a potential increase in fireworks victims, at a time when they were already severely under pressure due a lot of patients infected with COVID-19, and to prevent people from gathering in large groups to set off fireworks together. As a consequence, beneficiaries were severely affected as retailers cancelled their orders with them and had to get their money back (see recital (10)). Retailers that imported their own fireworks were directly affected by the ban. The ban was limited to 29, 30 and 31 December 2020, but had an effect already from 13 November 2020 onwards, when the ban was announced, and also beyond 31 December 2020 as the beneficiaries had to incur costs for storage locations until the next fireworks' sale period end 2021 and had to organise safe transport to these locations.
- (46) The Commission observes that the period over which the storage and transport costs are calculated falls for the biggest part outside of the period of the ban (i.e., 29, 30 and 31 December 2020). However, the Commission concludes that this can be justified by the fact that the effects of the ban are far reaching and go beyond the period of the ban as such. Moreover, the Commission considers that due account should be taken of the specific circumstances in which the beneficiaries have been operating and are still operating.

*The additional transport costs*

- (47) First, the Commission observes that the start date (13 November 2020) for the compensation of additional transport costs coincides with the announcement of the ban by the Dutch authorities. Even though the ban only entered into force on 15 December 2020 and materialised only on 29 December 2020, from 13 November onwards the beneficiaries were already told to annul pending orders and organise solutions to minimize the amount of fireworks that will come in

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<sup>32</sup> ECDC's Rapid Risk Assessment, Pandemic of novel Coronavirus disease 2019 (COVID-19): increase transmission globally – fifth update, 2 March 2020.

<sup>33</sup> See, also, Commission Decision of 12 March 2020, SA.56685 - Denmark - Compensation scheme for cancellation of events related to COVID-19, OJ C 125, 17.4.2020, p. 8.

circulation in the Netherlands (recital (7)). Therefore, as of 13 November 2020 additional transport costs were incurred.

- (48) Second, the Commission observes that the end date (1 February 2021) for the compensation of additional transport costs also falls outside of the period of the ban, but is justified since the beneficiaries had to find last minute ad-hoc storage locations and efficiently distribute their stock over the limited available storage locations instead of distributing the fireworks to retailers. It follows that it was only by 1 February 2021 that they could finalise the logistical operations needed for picking up the fireworks and transporting it to (temporary) safe storage locations in the Netherlands and Germany (recital (12)). Because for the New Year's Eve sale in 2021, the same logistical operation is needed but in reverse, the costs incurred in the period 13 November 2020 to 1 February 2021 are multiplied by 2 (see recital (58) below).

#### *The additional storage costs*

- (49) First, the Commission observes that the starting date (1 February 2021) for determining the amount of fireworks stored also falls outside of the ban. However, the Commission considers this logical since the beneficiaries only start to incur the additional storage costs once the fireworks have been transported to the storage locations. That logistical process takes time and storage was not always readily available due to the strict safety requirements (recital (9)). Therefore, the logistical process was only finalised by 1 February 2021 (recital (48)). It follows that the starting date for determining the amount of fireworks in storage can be justified by analogy with the justification of the end date for calculating the additional transport costs.
- (50) Second, the Commission observes that the end date (31 August 2021) for determining the amount of fireworks stored can be justified by the fact that from 1 September 2021 onwards the preparations start for the sale of fireworks for New Year's Eve 2021/2022. Moreover, by requiring beneficiaries to have at least 10 000 kg in storage over a longer period, it is ensured that: (i) the fireworks are stored in a safe way; and (ii) the beneficiary is not compensated for the storage of its fireworks and subsequently disposes of it. Under the measure there will be two moments that are sufficiently apart from each other at which the Dutch authorities will check the eligibility of the beneficiary for the compensation (see recital (25)d and (25)f).
- (51) As a consequence of the ban, beneficiaries were severely affected, leading to a drop in turnover of [75 %] to [100 %] as well as to a loss between [35 %] and [100 %] of their clients (i.e., retailers) as a direct result of the ban on the sale of fireworks (see recital (13)). There is therefore a direct link between the ban on the sale and use of fireworks by retailers and the loss of revenue for the beneficiaries arising from the exclusion of a highly material category of clients for the beneficiaries.
- (52) The Commission therefore concludes that there is a direct causal link between the damage suffered by the beneficiaries and the exceptional occurrence, namely the COVID-19 pandemic, as a direct result of the ban on the sale of fireworks. In addition, the measure is directly linked to that damage.

#### **Proportionality of the aid**

- (53) In order to be compatible with Article 107(2)(b) TFEU, the aid must be proportional to the damage caused by the exceptional occurrence. Aid must not result in overcompensation of damage and should only make good the damage caused by the exceptional occurrence.
- (54) The beneficiaries have suffered a significant economic damage from the fall in clients after the ban was announced on 13 November 2020, resulting in a loss in turnover and increase in storage and transportation costs (recital (10) and (13)).
- (55) Since the Netherlands has calculated the aid for the beneficiaries on the basis of a limited set of costs, namely storage costs with a minimum of 10 000 kg and transportation costs between storage locations carried out by third parties, the Commission concludes that the aid is always lower than the damage defined as the foregone profit (see recital (27)) because only a limited set of costs is covered. That conclusion is not undermined by the coverage of loss-making beneficiaries since the Dutch authorities will require applicants to demonstrate that they were not loss-making in the reference period in 2019. If a beneficiary was loss-making in 2019, the Dutch authorities will cap the compensation at the foregone profit.
- (56) Because two specific categories of costs (storage and transportation) are covered by the measure, the measure is limited in scope.
- (57) The maximum aid amount will be less than 100 % of the total costs (see recital (25) where the Dutch authorities estimate that this will be approximately 52 %) since only two types of additional cost will be compensated (see recital (55)). The measure therefore does not lead to overcompensation.
- (58) The fact that the additional transportation costs in the period 13 November 2020 to 1 February 2021 are multiplied by 2 is justified because the same logistical operations are needed for the preparations of the New Year's Eve sale in 2021 (recital (22)).
- (59) Moreover, the Dutch authorities have put in place the following additional safeguards, so that the compensation under the measure does not exceed what is necessary to make good the actual damage suffered and thus meets the above-mentioned criteria.
- (60) First, as described in recital (51) only costs resulting from the exceptional occurrence of the COVID-19 pandemic and the ban on the sale and use of fireworks will be taken into account. In addition, the level of compensation (estimated at 52 % of the total costs, see recital (25)) is limited to additional storage and additional transportation costs. Those two elements combined ensure that the aid does not compensate the beneficiaries for the economic effects of declines in demand due to lower aggregate demand, or to greater customer reluctance. Moreover, the damage left uncompensated is larger than the decline in the Netherlands's Gross Domestic Product (GDP)<sup>34</sup> because the proposed compensation is approximately 48 % lower than what would result from compensating the total costs of the beneficiaries.

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<sup>34</sup> According to the Centraal Bureau voor de Statistiek ("Statistics Netherlands, "CBS"), the GDP in the Netherlands declined with 3.8 % in 2020 compared to 2019.

- (61) Second, any expenses for which the beneficiary already has a claim for compensation (*e.g.*, due to insurance, litigation, arbitration awards or other sources) will be subtracted from the compensation amount (recital (27)).
- (62) Third, as described in recital (27), no payment will be made to the beneficiary if it is responsible for the damage suffered, by not conducting its activities with due diligence or in compliance with applicable legislation, or in case it did not take the necessary measures to mitigate the damage.
- (63) Fourth, as mentioned in recital (27), the Dutch authorities will recover any potential amounts paid to the beneficiary in excess of the damage suffered as a direct consequence of restrictions implemented in response to the COVID-19 pandemic.
- (64) Fifth, aid received under the measure cannot be cumulated with other aid for the same part of the damage already compensated under the present measure (recital (29)).
- (65) The Netherlands has therefore ensured that the compensation under the measure will not exceed the damage directly suffered by the beneficiary from the loss of revenue caused by the COVID-19 pandemic.
- (66) In light of the above, the Commission considers that the measure is compatible with the internal market in accordance with Article 107(2)(b) TFEU.



#### 4. CONCLUSION

The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(2)(b) TFEU.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to have agreed to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Yours faithfully,

For the Commission

Margrethe VESTAGER  
Executive Vice-President

