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**Subject: State Aid SA.103571 (2022/N) – The Netherlands
COVID-19: Third compensation scheme for zoos under Article
107(2)(b) TFEU**

Excellency,

1. PROCEDURE

- (1) By electronic notification of 30 September 2022, following pre-notification contacts¹, the Netherlands notified the above-mentioned scheme (“the measure” or “the scheme”) on the basis of Article 107(2)(b) of the Treaty on the Functioning of the European Union (“TFEU”).
- (2) The Netherlands exceptionally agrees to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958,² and to have this Decision adopted and notified in English.

2. DESCRIPTION OF THE MEASURE

- (3) The first case of the infectious disease SARS-CoV-2 (COVID-19) in the Netherlands was confirmed on 27 February 2020. The number of confirmed cases

¹ A request for information was sent by the Commission services on 15 July 2022, to which the Dutch authorities replied on 30 September 2022.

² 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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on 11 October 2022 was 8 465 022³. In reality, the number of cases is higher due to a change in reporting and testing policies since the start of the pandemic.

- (4) As in other countries, in response to the COVID-19 outbreak, the Netherlands has taken sequential mitigation measures to prevent the spread of COVID-19 pandemic in the country. Non-compliance with the limitations imposed or violation of the rules was subject to sanctions.
- (5) To limit the spread of the coronavirus, the Dutch authorities ordered zoos in the Netherlands to close between 18 March 2020 and 14 May 2020. The Dutch authorities compensated the zoos for part of the damages suffered in that period. The Commission approved the damage compensation under Article 107(2)(b) TFEU by decision of 12 February 2021 in case SA.59706⁴.
- (6) From 15 May 2020 to 8 November 2020, zoos in the Netherlands were open and could operate with restrictions. However, due to a surge in infections after the 2020 summer period, the Dutch authorities again had to take restrictive measures aimed at limiting the spread of the coronavirus. For zoos, this meant that they had to close their doors from 9 November 2020 to 18 November 2020 (19 November 2020 was the first day that they were open again) and from 15 December 2020 to 18 May 2021 (19 May 2021 was the first day that they were open again). Indoor zoos could only reopen on 4 June 2021. The Dutch authorities compensated the zoos for part of the damages suffered in those two periods. The Commission approved the damage compensation under Article 107(2)(b) TFEU by decision of 9 December 2021 in case SA.100258⁵.
- (7) Due to another surge in infections and hospitalisations, the Dutch authorities had to again take restrictive measures aimed at limiting the spread of COVID-19. For zoos this meant that they had to close their doors from 19 December 2021 to 25 January 2022.
- (8) The closure from 19 December 2021 to 25 January 2022 was imposed by the national authorities. Based on Chapter V(a) of the Law on Public Health (Articles 58e, first paragraph; 58 g, first paragraph; 58h, first paragraph; 58i; 58j, first paragraph, b and d; 58q, first paragraph; and 58r, first and second paragraphs), the Minister of Public Health issued a ministerial decree that ordered zoos in the whole country to close from 19 December 2021 until 25 January 2022⁶.

³ See report on the epidemiological situation in the Netherlands of 11 October 2022, available at: <https://www.rivm.nl/coronavirus-covid-19/actueel/wekelijkse-update-epidemiologische-situatie-covid-19-in-nederland>.

⁴ Commission Decision C(2021) 1045 final in SA.59706 (2021/N) of 12 February 2021 – the Netherlands, *COVID-19: Compensation scheme for zoos under Article 107(2)(b) TFEU*, OJ C 60, 19.2.2021, p. 5.

⁵ Commission Decision C(2021) 9335 final in SA.100258 (2021/N) of 9 December 2021 – the Netherlands, *COVID-19: Second compensation scheme for zoos under Article 107(2)(b) TFEU*, OJ C 521, 27.12.2021, p.17.

⁶ There were two Ministerial Decrees which together covered the period 19 December 2021 until 25 January 2022, i.e. (i) the Ministerial Decree that ordered closure from 19 December 2021 until 15 January 2022 (*Regeling van de Ministers van Volksgezondheid, Welzijn en Sport, van Justitie en Veiligheid en van Binnenlandse Zaken en Koninkrijksrelaties van 18 december 2021, kenmerk 3282709-1019936-WJZ, houdende wijziging van de Tijdelijke regeling maatregelen covid-19 in*

- (9) Similar to the earlier periods during which zoos had to close (recitals (5) and (6)), the impact of the closure on zoos was significant, according to the Dutch authorities. They note that, under normal circumstances, zoos hardly make a profit and many of them have a not-for-profit status. The Dutch authorities estimate that the different measures that they adopted to limit the spread of COVID-19 led to a drop in revenues for zoos of about EUR 150 million in 2020 and 2021 combined.
- (10) According to the Dutch authorities, during spring and summer, zoos normally build up a buffer that they need in winter to take care of the animals and keep the zoo operational. Due to the earlier periods during which zoos were mandatorily closed (see recital (5) and (6)) and the restrictions in place in the period that zoos were allowed to be open⁷, it was difficult for zoos to build up such a buffer. Zoos have high expenses for animal care (staff, heating, food, environmental enrichment, cleaning) and ensuring the safety of animals, visitors and staff. Ensuring safety of visitors goes hand in hand with ensuring safety of animals and staff. Generally, those costs do not vary even when the zoos are closed.
- (11) Instead of compensating the full damages suffered by the zoos during the period of mandatory closure, the Dutch authorities want to limit the compensation to the fixed costs linked to animal care.

2.1. The nature and form of the measure

- (12) Under the scheme, the Dutch government can compensate zoos for up to 100% of their fixed costs linked to animal care (“eligible costs”) incurred in the period 19 December 2021 to 25 January 2022 (“compensation period”).
- (13) The compensation takes the form of direct grants. Costs linked to animal care are approximately 50% of the overall costs of a zoo. All the costs that will be compensated are fixed costs and include the following:
 - Staff costs for animal care. That activity equals to approximately 70 % of the overall staff costs since approximately 45 % of the staff take care of the animals and about 25 % of the staff facilitates their work.

verband met verzwaring van de maatregelen), available at: <https://zoek.officielebekendmakingen.nl/stcrt-2021-50593.html> and (ii) the Ministerial Decree that extended the closure until 25 January 2022 (*Regeling van de Minister van Volksgezondheid, Welzijn en Sport, de Minister van Justitie en Veiligheid en de Minister van Binnenlandse Zaken en Koninkrijksrelaties, van 14 januari 2022, kenmerk 3282713-1019938-WJZ, houdende wijziging van de Tijdelijke regeling maatregelen covid-19 in verband met verlenging van de lockdown en het doorvoeren van enkele versoepelingen en van de Tijdelijke regeling maatregelen covid-19 Bonaire, de Tijdelijke regeling maatregelen covid-19 Saba en de Tijdelijke regeling maatregelen covid-19 Sint Eustatius in verband met maatregelen met het oog op het oplopende aantal infecties*), available at: <https://zoek.officielebekendmakingen.nl/stcrt-2022-1381.html>. The reopening of zoos, was ordered by way of Ministerial Decree of 25 January 2022 (*Regeling van de Minister van Volksgezondheid, Welzijn en Sport, de Minister van Justitie en Veiligheid en de Minister van Binnenlandse Zaken en Koninkrijksrelaties, van 25 januari 2022, kenmerk 3308323-1023192-WJZ, houdende wijziging van de Tijdelijke regeling maatregelen covid-19 in verband met aanpassing van de maatregelen ten aanzien van openingstijden, de placeringsplicht, de bezoekersnorm en het coronatoegangsbewijs en met enkele andere aanpassingen*), available at: <https://zoek.officielebekendmakingen.nl/stcrt-2022-3238.html>.

⁷ See Commission Decision SA.61300 of 12 February 2021, the Netherlands - COVID-19: Aid to zoos under section 3.1 of the Temporary Framework, OJ C60, 19.2.2021, p 8.

- The costs for food, heating, environmental enrichment, cleaning, veterinary costs, etc.
 - Costs to make sure that animals, visitors and staff stay safe.
- (14) The Dutch authorities have excluded variable costs from the compensation. Most of the variable costs that zoos have are linked to temporary workers for catering, ticket or shop sales and the purchase of goods related to visitors, e.g. food and drinks. The definition of the eligible costs excludes variable costs. For example, zoos can only take one-third of their “park costs” (a category that includes maintenance costs, design of animal shelters and materials used by the technical service) into account when applying for funding, while the other two-thirds are costs that are variable and could be avoided by a zoo.

2.2. National legal basis

- (15) The national legal basis of the measure is the Framework Act on EZK and LNV subsidies⁸, the Framework decision on national EHIC and LNV subsidies⁹ and the (Draft) Order of the Minister of Agriculture, Nature and Food Quality, No WJZ/22142833, establishing a temporary subsidy scheme in relation to a third instalment to compensate zoos, taken by the measures to combat the further spread of COVID-19, in the fixed costs for animal care (Temporary Regulation on the subsidy for zoos, third tranche)¹⁰.

2.3. Administration of the measure

- (16) The Minister of Agriculture, Nature and Food quality is the granting authority. RVO (Netherlands Enterprise Agency) will implement the scheme. RVO is a part of the Ministry of Agriculture, Nature and Food quality.

2.4. Budget and duration of the measure

- (17) The budget comes from the central government. It is approximately EUR 12.6 million for the compensation period covered by this decision.
- (18) Compensation can be granted for damage suffered during the compensation period. The application process for aid will start on 12 December 2022.

2.5. Beneficiaries

- (19) The Netherlands estimate that around 50 zoos will be able to benefit from the scheme. All of them are SMEs.

⁸ “Kaderwet EZK- en LNV- subsidies”, available at: <https://wetten.overheid.nl/BWBR0007919/2019-01-01>.

⁹ “Kaderbesluit nationale EZK- en LNV- subsidies”, available at: [https://wetten.nl - Informatie - Kaderbesluit nationale EZK- en LNV-subsidies - BWBR0024796 \(overheid.nl\)](https://wetten.nl - Informatie - Kaderbesluit nationale EZK- en LNV-subsidies - BWBR0024796 (overheid.nl)).

¹⁰ “Regeling van de Minister van Landbouw, Natuur en Voedselkwaliteit van nr. WJZ/22142833 , tot vaststelling van een tijdelijke subsidieregeling in verband met een derde tranche ter tegemoetkoming van dierentuinen, getroffen door de maatregelen ter bestrijding van de verdere verspreiding van COVID-19, in de vaste lasten voor diervoorziening (Tijdelijke regeling subsidie dierentuinen COVID-19 derde tranche)”.

2.6. Sectoral and regional scope of the measure

- (20) The scheme applies to zoos in the Netherlands. The criteria to receive aid are set in such a way that petting zoos and animal shelters are excluded.

2.7. Basic elements of the measure

- (21) Under the scheme, RVO will compensate zoos up to 100% of the eligible costs (see recital (12)).
- (22) The exact percentage of eligible costs that the Dutch authorities will compensate depends on the turnover loss in the compensation period compared to a reference period (19 December 2019 to 25 January 2020¹¹). According to the information submitted by the Dutch authorities for most zoos, the loss in turnover was more than 90%.
- (23) The formula to calculate compensation is as follows: [fixed costs for animal caretaking in EUR] * [percentage loss of turnover, compared to the reference period]. An example is provided below:

Calculation example:

- Costs for animal care taking in the compensation period: EUR 1.5 million;
 - Loss of turnover in the compensation period compared with the reference period: 100%;
 - Compensation: EUR 1.5 million * 100% = EUR 1.5 million.
- (24) For zoos that were lossmaking (i.e. reported a negative EBIT (earnings before interest and taxes)) in the reference period, an additional safeguard will be introduced to avoid overcompensation. For those zoos, the amount of aid cannot exceed EBIT in the reference period minus EBIT in the compensation period.
- (25) Other forms of compensation for the same eligible periods that are for the compensation of costs for animal care will be deducted from the costs of animal care.
- (26) In addition, the Dutch authorities do not want to give a subsidy twice for the same eligible costs, even when a subsidy does not constitute State aid. For example, in the Netherlands, there is also a general scheme that subsidises staff costs across sectors, the so-called temporary scheme to keep employment (“*Tijdelijke noodmaatregel voor overbrugging werkgelegenheid*” (“NOW”)). Zoos will have to make a choice when applying for subsidies covering their staff costs. If a zoo chooses to apply for subsidies under the NOW, it can no longer claim staff costs under the scheme examined in this decision.

¹¹ If a zoo was closed on one or multiple days falling within the reference period (for example due to a public holiday such as Christmas or New Year’s Day), the costs incurred on that day in the compensation period cannot be compensated.

- (27) Variable costs are per definition excluded from the compensation mechanism since the eligible costs are only unavoidable fixed costs linked to animal care (see recital (14)).
- (28) The Dutch authorities have explained that since all beneficiaries were required to be closed throughout the compensation period, the damage they suffered during this period shows a direct causal link with restrictive measures adopted by the public authorities following the COVID-19 outbreak.
- (29) The Dutch authorities have confirmed that:
- Any payment exceeding the damage suffered will be recovered;
 - Payments to beneficiaries under the scheme will be net of any amount recovered by insurance, litigation, arbitration or other source for the same damage;
 - No payment under the scheme is possible for any applicant that is responsible for the damage suffered, that did not conduct its activities with due diligence or in compliance with applicable legislation;
 - Undertakings in financial difficulty prior to 31 December 2019 cannot benefit from the aid scheme; and
 - When a beneficiary requests compensation exceeding EUR 125 000, it will need to provide an accountancy report which shows the drop in costs and the actual costs for which compensation is requested related to the eligible costs (see recital (13)).

2.8. Cumulation

- (30) The Dutch authorities have confirmed that aid provided under the scheme cannot be cumulated with other aid for the same eligible costs.

2.9. Reporting

- (31) The Dutch authorities have committed to provide a report no later than 1 year after the Commission decision, specifying the amount of compensation and recoverable advances granted.

3. ASSESSMENT

3.1. Lawfulness of the measure

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

3.2. Existence of State aid

- (33) 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.

- (34) The measure is imputable to the State, since it is administered by RVO (recital (16)) and is based on the legal acts mentioned in recital (15). It is financed through State resources, since it is financed by public funds (see recital (17)).
- (35) The measure confers an advantage on its beneficiaries in the form of direct grants (see recital (12)) that they would not have been able to receive under normal market conditions.
- (36) The advantage granted by the measure is selective, since it is awarded only to undertakings that are a zoo and meet the eligibility requirements of the scheme (see recitals (19)-(20)).
- (37) The measure is liable to distort competition, since it strengthens the competitive position of its beneficiaries. It also affects trade between Member States, since the beneficiaries are active in sectors in which intra-Union trade exists.
- (38) In view of the above, the Commission concludes that the measure constitutes State aid within the meaning of Article 107(1) TFEU.

3.3. Compatibility

- (39) 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 notified measure pursuant to Article 107(2)(b) TFEU.
- (40) This assessment has led to the following observations.

The notion of exceptional occurrences with the meaning of Article 107(2)(b) TFEU

- (41) 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-law¹² has consistently held that the notions of ‘natural disaster’ and ‘exceptional occurrence’ referred to in Article 107(2)(b) TFEU must be interpreted restrictively.
- (42) 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 field¹³. In that regard, the following indicators relating to the event concerned

¹² Judgment of the Court of Justice of 11 November 2004, *Spain v Commission*, C-73/03, EU:C:2004:711, paragraph 37 and judgment of the Court of Justice of 23 February 2006, *Atzeni and others*, in Joined Cases C-346/03 and C-529/03, EU:C:2006:130, paragraph 79.

¹³ 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

must be cumulatively met: (i) unforeseeable or difficult to foresee¹⁴; (ii) significant scale/economic impact¹⁵; and (iii) extraordinary¹⁶.

The COVID-19 pandemic as an exceptional occurrence

- (43) 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 identified the coronavirus (SARS-CoV-2) as the main causative agent. The outbreak rapidly evolved and spread 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.
- (44) The WHO declaration of a pandemic¹⁷, associated with the public health risk deriving from the initial absence of therapeutics or vaccines for the novel COVID-19 determine the exceptional nature of the circumstances. The rapidness of the spread has caused and continues to cause enormous consequences both in terms of fatal outcomes in high-risk groups and in terms of economic and societal disruption¹⁸. The necessity to adopt and encourage the respect of measures aimed at interrupting transmission chains stems from that 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.
- (45) 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

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).

¹⁴ Commission Decision of 1 August 2011 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, OJ C135, 9.5.2012, p. 1, recital 31.

¹⁵ 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).

¹⁶ 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.

¹⁷ 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>.

¹⁸ ECDC's Rapid Risk Assessment, Outbreak of novel Coronavirus disease 2019 (COVID-19): increase transmission globally – fifth update, 2 March 2020.

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.¹⁹

- (46) In that 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

- (47) Due to the measures imposed by the Dutch authorities (see recitals (7) to (9)) that were a consequence of the COVID-19 pandemic, zoos had to close their doors during the compensation period, i.e. 19 December 2021 until 25 January 2022, and were thereby unable to operate and no longer able to sell tickets or generate revenues in a different way²⁰.
- (48) The Commission reaches the conclusion that there is a direct link between the measures adopted by the authorities in the Netherlands in response to the COVID-19 pandemic and the damage suffered by zoos during the compensation period.
- (49) Therefore, the direct causal link between the damage caused by the exceptional occurrence and the aid is ensured.

Proportionality of the aid

- (50) 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.
- (51) Aid granted under the scheme compensates beneficiaries only for their fixed costs linked to animal care (see recital (11)). Possible compensation in excess of the damage incurred in all individual instances will be recovered (see recital (29)).
- (52) The Dutch authorities have put in place the following additional safeguards, so that the compensation under the scheme does not exceed what is necessary to make good the actual damage suffered.
- (53) First, as described in recital (29) of this Decision, the Dutch authorities will ensure that aid granted to beneficiaries will be net of any amount obtained from insurance, litigation, arbitration or any other source for the same damage.
- (54) Second, as described in recital (29), no payment under the scheme is possible for any applicant that is responsible for the damage suffered, who did not conduct its activities with due diligence or in compliance with applicable legislation.
- (55) Third, as described in recital (29), undertakings in financial difficulty prior to 31 December 2019 cannot benefit from the aid scheme.

¹⁹ 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.

²⁰ With some exceptions such as income from donations or inheritance.

- (56) Fourth, as described in recital (24), as an additional safeguard, for loss-making companies in the reference periods, the aid amount will not exceed EBIT in the reference period minus EBIT in the compensation period.
- (57) Fifth, as described in recitals (25) and (26), compensation, independently from its qualification as State aid, for the same eligible period or the same eligible costs will be deducted from the final aid amount.
- (58) The Netherlands has therefore ensured that the compensation under the scheme will not exceed the damage directly suffered by each beneficiary from the loss of revenue caused by the COVID-19 pandemic.
- (59) In view of the above, the Commission considers that the measure is proportional and consequently also 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.

The decision is based on non-confidential information and is therefore published in full on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President

