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Ministry of Social Affairs and
Employment
PO Box 90801
The Hague
2509 LV
Netherlands

Subject: Questions on TOZO scheme

Dear

The Commission has been informed about possible issues relating to the ‘Temporary Bridging Scheme for Independent Entrepreneurs’ (Tijdelijke overbruggingsregeling zelfstandig ondernemers, in the following: ‘*TOZO*’), in particular the compatibility of the requirement to have a legal residence in the Netherlands (‘residence requirement’) with the freedom of establishment according to Article 49 TFEU.

The TOZO is one of the Dutch government's measures to support entrepreneurs who find themselves in financial difficulties as a result of the Corona crisis and consists of two parts:

- (1) A temporary subsistence allowance (in the following: ‘*TOZO benefit*’). The TOZO benefit is open to all self-employed entrepreneurs resident in the Netherlands.
- (2) A loan for working capital. This loan is open to self-employed entrepreneurs residing in the EU, EEA or Switzerland with a business based in the Netherlands (in the following: ‘*TROZO benefit*’).¹

According to the information at the disposal of the Commission, self-employed persons having their undertaking established in the Netherlands and paying social and tax contributions in the Netherlands are not eligible for the TOZO benefit only because they

¹ Regulation of the State Secretary for Social Affairs and Employment of 29 April 2020, no.2020-0000060351, to extend the circle of rightful claimants for assistance under the Temporary bridging scheme for self-employed persons.

do not have their residence in the Netherlands (but close to the Dutch border in Germany or Belgium).

According to the information at the disposal of the Commission around 2500 entrepreneurs having a business in the Netherlands and living in Belgium and around 1000 entrepreneurs having a business in the Netherlands and living in Germany would be – absent the residence requirement – eligible for the TOZO benefit. The above-mentioned persons are not eligible either for any Corona-crisis related financial support measures from their respective residence's state and, may therefore be financially in a difficult situation.

Based on a preliminary assessment the Commission considers that:

Compliance with secondary law

The Commission services understand that the TOZO benefit does not fall under Regulation (EU) 883/2004 of 29 April 2004 on the coordination of social security systems.

Indeed, the Court of Justice has consistently held that a benefit may be regarded as a social security benefit if it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and relates to one of the social security risks expressly listed in Article 3(1) of Regulation No 883/2004².

On the basis of the information provided by the Dutch authorities, the Commission services understand that the TOZO benefit is allocated following a means test in order to determine whether the self-employed person's income (plus the partner's income under TOZO 2, plus assets under TOZO 3) falls below the social minimum. Additionally, it is paid as a supplement to the social minimum to self-employed persons to enable them to overcome financial difficulties, which may result from a complete or partial interruption of their activity following the Corona crisis. Hence, the grant of the TOZO benefit is not linked to the risks mentioned in Article 3(1) of Regulation No 883/2004.

Therefore, the Commission services take the view that the TOZO benefit is not a social security benefit in the sense of Regulation (EC) No 883/2004 but rather a social assistance benefit, which is excluded from the scope of the aforementioned Regulation.

In addition, the TOZO benefit does also not fall under Regulation (EU) 492/11 of 5 April 2011 on freedom of movement for workers within the Union since this Regulation does not apply to self-employed persons.

Compliance with fundamental freedoms of the Treaty

The Commission services take the view that the TOZO, and in particular the residence requirement foreseen in TOZO, needs to comply with the fundamental freedoms of the Treaty.

According to Article 49 TFEU, the freedom of establishment guarantees the right to take up and pursue activities as self-employed person or as a company within the meaning of the second paragraph of Article 54 TFEU, under the conditions laid down for its own

² C-249/83 - *Hoeckx*, para.12 to 14 ; C-372/18 - *Dreyer*, para. 32.

nationals by the law of the country where such establishment is effected. In other words, the foreign economic operators are entitled to the right of equal treatment when they establish in a given country.

The decisive criterion for the application of the provisions of the freedom of establishment (Article 49 to 55 TFEU) is the stable and continuous participation by the person concerned in the economic life of the host Member State

The Commission services consider that situations of self-employed persons, resident either in Belgium or in Germany, who have their undertaking established in the Netherlands and pay taxes and social contributions in the Netherlands (in the following: 'non-residents') fall under the scope of application of the freedom of establishment. They seem to be integrated in the Dutch economy in a stable and continuous way.³

Article 49 TFEU does not only preclude direct or overt discrimination on grounds of nationality but also all covert forms of discrimination, which, by the application of other distinguishing criteria, lead to the same result.⁴ Unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory, if it is intrinsically liable to affect the nationals of other Member States more than the nationals of the State whose legislation is at issue and if there is a consequent risk that it will place the former at a particular disadvantage.⁵ Moreover, it is settled case law that any national measure which, albeit applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the Treaty constitutes a restriction within the meaning of Article 49 TFEU.⁶

The residence requirement can in principle be met by Dutch and foreign nationals alike, however, because of its very nature it is more easily met by Dutch nationals since most of them have their residence in the Netherlands, than by foreign nationals who usually live in other Member States.⁷ The Commission services therefore take the view that, the residence requirement to obtain the TOZO benefit constitutes an indirect discrimination. Moreover, the residence requirement excludes non-residents (including those who have the Dutch nationality) from access to the TOZO benefit – even though they have a close economic and social link to the Netherlands as their undertaking is registered there and they pay social contributions in the Netherlands. It follows that the residence requirement constitutes also a restriction as it hinders or renders less attractive the exercise by EU nationals of the freedom of establishment guaranteed by Article 49 TFEU.

It follows from above that the residence requirement must be justified on grounds of public policy, public security or public health pursuant to Article 52 para. 1 TFEU or by

³ If – however – some of these border traders were only temporarily doing business in the Netherlands, the issue would fall under the scope of application of the freedom to provide services. This would, however, not change the outcome of this assessment, which is that the residence requirement is an indirect discrimination and must be objectively justified and proportionate.

⁴ C-571/07 – *Blanco Perez*, para. 118; C- 212/99 *Commission v Italy*, para 24; C- 224/00 *Commission v Italy*, para. 15.

⁵ C-212/05 - *Hartmann*, para. 30.

⁶ C-570/07 and C-571/07 – *Blanco Perez*, para. 53.

⁷ The fact that (i) also Dutch nationals living in Germany or Belgium cannot benefit from TOZO benefit since they have not their legal residence in the Netherlands (ii) and on the other hand there might be also foreign nationals with residence in the Netherlands eligible for TOZO benefit, does not exclude the fact that generally, the residence requirement has an adverse effect in particular for foreign nationals and hence constitutes an indirect discrimination.

an overriding reason relating to the general interest, provided that the residence requirement is appropriate for securing attainment of the objective pursued and does not go beyond what is necessary for attaining that objective.⁸

Based on the above, we would kindly ask you to explain:

- 1) The objective of the residence requirement and to what extent the residence requirement is appropriate for securing the attainment of the objective pursued and does not go beyond what is necessary for attaining that objective?
- 2) What the difference is between the TOZO benefit and the TROZO benefit and why - in contrast to the TOZO benefit - the TROZO benefit is open to self-employed entrepreneurs residing in the EU, EEA or Switzerland with a business based in the Netherlands?
- 3) If and to what extent the Netherlands plans amendments to TOZO to include non-residents that have a close economic and/or social link to the Netherlands to render them eligible for the TOZO benefit?
- 4) If and to what extent the Netherlands has approached Germany or Belgium to discuss solutions for non-residents currently ineligible for the TOZO benefit and who, according to the current legal situation, are not entitled to any financial aid related to the Corona crisis in their resident country either?

We would appreciate your response to these questions within two weeks from the date of the reception of this letter and are available to discuss the above in further detail. We thank you in advance for your kind cooperation.

Yours sincerely,

(e-signed)

Acting Head of Unit

c.c.: Permanent Representation of the Kingdom of the Netherlands to the European Union:

⁸ C-570/07 and C-571/07 - *Blanco Perez*, para. 61.