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Subject: Notification 2023/603/BE

Draft Decree on Animal Welfare

**Delivery of comments pursuant to Article 5(2) of Directive (EU)
2015/1535 of 9 September 2015**

Madam,

Within the framework of the notification procedure laid down under Directive (EU) 2015/1535 ⁽¹⁾, the Belgian authorities notified to the Commission on 23 October 2023 a draft “**Draft Decree on Animal Welfare**”, under the reference 2023/603/BE (hereafter, the ‘notified draft’).

According to the notification message, the notified draft aims in particular to:

- ensure a coherent and comprehensive regulatory framework in Flanders for all segments of the Flemish animal welfare policy, from farm animals to pets, experimental animals, zoo animals, and exotic animals;
- establish proportionate measures to increase the protection of the welfare of the targeted animals due to their ability to suffer and feel;
- replace and supplement the Federal (Framework) Law of 1986.

The examination of the notified draft has prompted the Commission to issue the following comments.

¹ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1.

The keeping of animals

Article 8(1) of the notified draft establishes that the prohibition to keep animals not included in the list elaborated by the Flemish Government is “*without prejudice to the rules on the protection of endangered species and legislation on invasive exotic species*”. Paragraph 2 of the same Article introduces a derogation on the prohibition to keep animals which do not belong to the species or categories on a list drawn up by the Flemish Government for an exhaustive list of actors.

Likewise, Article 9(1) establishes that the prohibition to keep animals caught in the wild is “*without prejudice to the application of the legislation on nature conservation and agriculture referred to in Article 6 (1) (III) and V of the Special Law of 8 August 1980 on institutional reform*” and lays down, in paragraph 2 of that Article a derogation on the prohibition to keep animals caught in the wild for an exhaustive list of acts and establishments in the field of animal welfare.

The Commission notes that the list of actors who can benefit from the exemptions are exhaustive. Furthermore, the lists do not appear to include entities other than zoos, whose aim is to keep animals for the purpose of conservation and reintroduction into their natural habitats. The EU Birds² and Habitats³ Directives are referenced in Articles 8 and 9 of the notified draft.

The Commission notes that under these EU rules, while the taking from the wild and keeping of species protected under the Birds and Habitats Directive is prohibited, both legislations provide for derogations for the purpose of conservation (Habitats Directive Article 16 (a) and (d), Birds Directive Article 9 (a) fourth indent and (b)). In addition, Article 22 (a) of the Habitats Directive reads: “*Member states shall study the desirability of re-introducing species in Annex IV that are native to their territory where this might contribute to their conservation, provided that an investigation , also taking into account experience in other Member States or elsewhere , has established that such re-introduction contributes effectively to re-establishing these species at a favourable conservation status and that it takes place only after proper consultation of the public concerned;*”. The Commission reminds the Belgian authorities that the objective of conservation of species is paramount to the spirit of both the Birds and Habitats directive and further recalls that in practice, in certain circumstances ex situ breeding in dedicated facilities other than zoos has been necessary (for example European hamster, Iberian lynx, European bison, different bird species), followed by reintroduction. Therefore, an exclusion of such entities would be against the spirit of the directives.

The Belgian authorities are therefore invited to clarify Articles 8(2) and 9(2) to include scientifically managed captive breeding facilities for the breeding, conservation, and reintroduction of protected species other than zoos, in the scope of the derogation for the keeping of animals.

Operation of the establishments

² Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L 20, 26.1.2010, p. 4, arts. 9(1)(a)(4), 9(1)(b).

³ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7, arts. 16(1)(a), 16(1)(d), p. 9, art. 22(a).

Article 17(1) of the notified draft requires *“the operation of dog farms, cat farms, animal shelters, animal pensions, animal shops and zoos to be subject subject to prior approval by the Flemish Government”*.

The Commission notes that the conditions for the approval of the establishments referred to in Article 17(2) of the notified draft are comparable to the conditions for obtaining a licence under Article 4(1) of the Zoos Directive⁴, which requires Member States *“to adopt measures for licensing and inspection of existing and new zoos in order to ensure that the requirements of Article 3 are met.”*

The Commission notes that the animal welfare provisions included in Article 17(2) of the notified draft address one of the conditions of Article 3 of the Zoos Directive, namely the requirement to *“accommodating their animals under conditions which aim to satisfy the biological and conservation requirements of the individual species”*. However, zoos need to implement four additional conservation measures in order to obtain a licence. Article 3 of the Zoos Directive includes additional conservation measures that the licensing and inspection authorities must verify as being implemented, such as education and awareness raising, keeping up-to-date records, preventing the escape of invasive alien species, training on conservation issues, research, exchange of information on biodiversity issues or captive breeding and reintroduction where appropriate. Furthermore, the Commission reminds the Belgian authorities that Article 4(1) of the Zoos Directive requires Member States to *“adopt measures for licensing and inspection of existing and new zoos in order to ensure that the requirements of Article 3 are met.”* Furthermore, paragraphs 3 and 4 of Article 4 specify that *“Each licence shall contain conditions to enforce the requirements of Article 3. Compliance with the conditions shall be monitored inter alia by means of regular inspection and appropriate steps shall be taken to ensure such compliance. Before granting, refusing, extending the period of, or significantly amending a licence, an inspection by Member States’ competent authorities shall be carried out in order to determine whether or not the licensing.”*

The Commission notes that the notified draft is unclear as to whether the license referred to in Article 17 of the notified draft is the same as a zoo license, in which case all the conditions of Article 3 of the Zoos Directive would need to be satisfied, including designating a competent authority who would be responsible for ensuring compliance with the additional conservation requirements laid down in Article 3 of the Zoos Directive (besides animal welfare).

The Commission invites the Belgian authorities to align Article 17(2) of the notified draft with Article 3 of the Zoos Directive, clarify which are the authorities responsible for checking compliance with all relevant conservation requirements and to monitor compliance with these conditions by means of regular inspections or other appropriate measures to ensure such compliance in order to determine whether the licence should be granted⁵.

Release of cetaceans

⁴ Council Directive 1999/22/EC of 29 March 1999 relating to the keeping of wild animals in zoos, OJ L 94, 9.4.1999, p. 1-2, arts. 3-4.

⁵ Ibid, p. 2, art. 4(4).

Article 21 of the notified draft lays down a general prohibition of keeping cetaceans in captivity, while paragraphs 1 and 2 of that article provide for the applicable derogations, namely:

“By way of derogation from paragraph 1, cetaceans may be kept in captivity:

1° temporarily, by specialised reception centres for cruised and sick cetaceans in the wild, with a view to their rehabilitation and release into nature;

2° by the current operator of the only already existing dolphinarium, provided that the animals are kept at the site where the dolphinarium is located at the time of entry into force of this Article. This can continue its activities at the existing site only if the additional conditions to be laid down by the Flemish Government are respected by 1 July 2024 at the latest. Relocation in Flanders is not allowed. There is also a breeding ban and an import ban except for the number of individuals has fallen to 6.

The derogation referred to in point 2 of the second paragraph shall apply until the Flemish Government, on the advice of the Flemish Council for Animal Welfare, establishes that an alternative housing is possible for the animals concerned with guarantees of significantly improved animal welfare. That opinion follows an evaluation of the derogation that takes place every 10 year. The first evaluation shall take place after the end of the 10-year period starting from 1 January 2027.”

The Commission notes that the derogation in Article 21(1) is ambiguous as to whether and how it would apply to a rehabilitated cetacean that can no longer be released. The Belgian authorities are therefore invited to review the formulation of Article 21(1) to clarify this aspect.

The Commission would like to draw the attention of the Belgian authorities again to the Article 3(3) of the Zoos Directive, which requires Member States to *“ensure that all zoos implement the following conservation measures: accommodating their animals under conditions which aim to satisfy the biological and conservation requirements of the individual species, inter alia, by providing species specific enrichment of the enclosures and maintaining a high standard of animal husbandry with a developed programme of preventive and curative veterinary care and nutrition.”*

The Commission would like to underline that it is the responsibility of the Belgian authorities to monitor the compliance of the only Belgian dolphinarium with the above conditions and, if the current operator does not comply with these welfare provisions, it is also their responsibility to close the zoo or part of it⁶ and relocate the animals ensuring that they are *“treated or disposed of under conditions which the Member State deems appropriate and in accordance with the purposes and provisions of the Zoos Directive”*⁷.

To ensure legal clarity, the Commission invites the Belgian authorities to include in Article 21(2) of the notified draft some clearer provisions ensuring compliance with the above conditions.

The Belgian authorities are invited to take these comments into account.

⁶ Ibid, p.2, art. 4(5).

⁷ Ibid, p.2, art. 6.

The Commission furthermore recalls that once the definitive text has been adopted, it must be communicated to the Commission in accordance with Article 5(3) of Directive (EU) 2015/1535.

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For the Commission

Kerstin Jorna
Director-General

Directorate-General for Internal
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and SMEs