

PRESS RELEASE

NETHERLANDS: Civil Court confirms doubts on legitimacy of proposed direct award to NS

THE HAGUE, 4th December 2020: The Dutch Civil Court of The Hague published a preliminary ruling this week, expressing doubts about the legitimacy of the proposed new direct award of the Dutch “Hoofdrailnet” (Main Rail Network) Public Service Contract – representing 95% of the total market – to the state rail incumbent Nederlandse Spoorwegen (‘NS’).

Together with FMN, the Dutch association of independent operators, ALLRAIL had complained to the Civil Court that the new direct award will not start until 2025, although the option to implement such direct awards expires in 2023. The government is attempting to circumvent this by arguing that it will sign the award decision before expiry in 2023, although the contract will start in 2025.

The Court of The Hague did not reject the complaint. Instead it stated that the procedure of a preliminary ruling was not the optimal place to decide such an important matter. **The court then highlighted that the arguments of the independent passenger rail operators are “not implausible”¹.**

The ruling also stated that EU legislators probably did not intend for direct award decisions to be taken before expiry but with contracts starting years later. After all, if this is allowed to happen, then the market opening provisions of the EU 4th Railway Package could be circumvented for a long time, even indefinitely.

The Dutch Civil Court has now referred the case to the European Court of Justice. The ruling also says the government must change its plans if it appears that the proposed direct award is in violation of EU regulation.

On top of that, FMN and ALLRAIL argue that the proposed new direct award – an exclusive contract for NS until 2035 – should not be allowed at all:

- The principle of proportionality is one of the general principles of EU law. Giving exclusive access to 95 % of a national market clearly contradicts this.
 - Numerous parts of the Dutch Main Rail Network are profitable, rendering them ineligible for a Public Service Contract.
- (Continued Overleaf)

¹ <https://www.uitspraken.nl/uitspraak/rechtbank-den-haag/civiel-recht/aanbestedingsrecht/kort-geding/ecli-nl-rbdha-2020-12226>

The Secretary of State for passenger rail, Mrs Stientje van Veldhoven, is now arguing that the extent of the contract has not been decided yet. However, ALLRAIL will start proceedings on the merits (in Dutch: “bodempcedure”). We are confident the proposed direct award of the Main Rail Network as a Public Service Contract will fail any in-depth judicial review.

ALLRAIL has an alternative plan:

We provided the Civil Court of The Hague with an extensive analysis of the Dutch Main Rail Network and an alternative, much more viable plan for the future:

- The profitable Intercity network should come under the “open access” framework, meaning NS can still operate them, but together with other train operators offering competing services, such as is the case in Sweden or Italy.
- Subsidised regional trains, such as the “Sprinter” services, should be part of competitively tendered Public Service Contracts.

ALLRAIL’s President Dr. Erich Forster states: *“We are calling for compliance with the EU passenger rail market opening regulation – for very good reasons: The emergence of new open access operators and tendering of subsidised trains has brought about positive effects all across in Europe, including better service quality and lower ticket prices. This has led to modal shift to rail, which will help Europe achieve the goals of the EU Green Deal”.*

There are no special circumstances that justify continued protectionism to help NS until 2035. After all, NS is clearly capable of doing competition:

- NS has already had 12 years of experience competing against Deutsche Bahn in the neighbouring German federal state of North-Rhine Westphalia².
- North-Rhine Westphalia has as similar population density and size as the Netherlands with a comparable, densely used rail network. Why does NS embrace competition there – but not at home in the Netherlands?

For the sake of a level playing field, NS’ home market must be opened to the same extent.

Applying double standards will mean treating the Single European Rail Area with contempt.

² Abellio, a 100 % subsidiary of NS, has been competing against Deutsche Bahn in Germany since 2008. That means **27 years** (!!) before Dutch government plans to open NS’ home market in 2035.