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MEMBER OF THE EUROPEAN COMMISSION

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Niet voor openbaarheid

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Niet voor openbaarheid

Mme Vivianne HEIJNEN
Minister of Environment
Rijnstraat 8, 2515 XP 's Gravenhage
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The Netherlands

Dear Minister,

I am writing to you in connection with your government's plans to directly re-award the future Main Rail Network concession to Nederlandse Spoorwegen (NS) in 2023.

Our respective services started discussing these plans in May 2020, immediately after your predecessor announced them and before they were endorsed by the Dutch Parliament.

During our mutual exchanges, we have reiterated our serious concerns about the legality of the award and the excessively broad scope of the concession, having regard to EU law and jurisprudence. Our aim has been to reconcile your policy objectives of efficient and reliable rail services, which we entirely share, with the principles of the internal market and the provisions on market opening of the 4th Railway Package.

I am concerned that after several meetings and exchanges of formal letters, no substantial progress has been made so far. It has now become clear that your government intends to proceed with the direct award of the Main Rail Network concession as originally planned in a configuration which is quasi identical to the current concession.

I would like to recall once more the nature of our concerns:

1) Scope of the concession

Although Member States have a large margin of discretion in establishing the characteristics, both quantitative and qualitative, of the rail services they wish to see provided to their citizens in the general interest, they must carry out a market analysis to establish which services can be provided commercially, before imposing public service obligations for the remainder. This is a general principle of EU law, from which rail is not exempted, as confirmed by recent jurisprudence.

The fact that the concession commands a fee from NS strongly suggests that the market could, at least potentially, provide some of the services foreseen on the Main Rail Network. However, despite the Commission services' clear position, your government has chosen not to carry out a market analysis. In this respect, please note that the stakeholder consultation you have organised on the Schedule of Requirements for the Main Rail Network concession cannot be considered a market analysis, as you have not explored the operators' availability to provide commercial services. Therefore, your plan to entrust an all-encompassing concession to NS in the absence of market testing entails a serious risk of breaching EU law.

2) Type of award

We understand that the plan is to award the concession to NS before the end of 2023, although operations will only start in January 2025. There is no apparent reason why a direct award decision should be taken more than 12 months ahead of the start of operations, considering that the incumbent can switch seamlessly from the old to the new contract, which is of comparable scope. This would thus rather seem to suggest a possible circumvention of the new 4th Railway Package requirement of competitive award.

We consider that the plans as presented to us entail significant legal risks. As you know, we have received substantiated complaints from railway undertakings wishing to use their rights under the 4th Railway Package to provide services on the Dutch rail transport market. We are under an obligation to pursue these complaints and enforce EU rail legislation.

Some complainants have also initiated legal proceedings before Dutch courts. On the basis of the information at the Commission's disposal, we consider that their claims have merit, and will provide our interpretation of EU legislation if requested by a national Court or the European Court of Justice.

Needless to say, if the Main Rail Network concession is found to breach EU law, including State Aid rules, there could be significant legal and financial consequences for the concessionaire, regardless of whether operations under the new concession have already started.

In the light of these considerations, I would urge your government to reconsider its decision, both on the scope and the modalities of award. In particular, I would encourage you to take immediate steps to carry out a market analysis to correctly define the scope of the concession. Given the time frame of your government, in particular the published schedule for PSO requirements and the plans to conclude the formal process, including the Dutch parliament's approval, by the end of this year, the matter is extremely urgent.

I have not lost hope that this important matter can be solved outside formal infringement proceedings, and my services remain at your disposal, subject to your commitment to carry out the required market analysis, in order to ensure compliance of the Dutch Main Rail Network concession with EU law.

Yours faithfully,

Adina VALEAN