



Brussels, **XXX**  
[...] (2013) **XXX** draft

**COMMISSION IMPLEMENTING DECISION**

of **XXX**

**on the non-application of certain provisions of the Decree of the Kingdom of Netherlands of 8 June 2012 establishing detailed rules with regard to the liberalisation of international rail passenger transport ("Liberalisation Directive Decree")**

(Only the Dutch text is authentic)

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**on the non-application of certain provisions of the Decree of the Kingdom of Netherlands of 8 June 2012 establishing detailed rules with regard to the liberalisation of international rail passenger transport ("Liberalisation Directive Decree")**

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast)<sup>1</sup>, and in particular Article 61 thereof,

After consulting the Single European Railway Area Committee,

Whereas:

### I. Facts and procedure

- (1) The Kingdom of Netherlands adopted its Decree of 8 June 2012 establishing detailed rules with regard to the liberalisation of international rail passenger transport (the "Liberalisation Directive Decree"). This Decree was notified to the Commission on 22 June 2012 in accordance with Article 3 of Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure<sup>2</sup>.
- (2) The Liberalisation Directive Decree sets pre-determined criteria to define the principal purpose of a new passenger service and to ascertain whether the economic equilibrium of a public service contract may be compromised.
- (3) Article 3 of the Liberalisation Directive Decree provides that in order to consider the principal purpose of a new service as international, the part of the route lying outside the Netherlands shall amount to at least 30% of the total, the proportion of cross-border passengers shall amount to at least 75% of the total and the proportion of the turnover from cross-border passengers shall amount to at least 75% of the total. The regulatory body may derogate from these provisions if its economic analysis justifies it and under the condition that neither the Minister for Infrastructure and Environment nor the holder of the Hoofdrailnet (HRN) concession has made a request for the review of the principal purpose of a new service.
- (4) Article 5 of the Liberalisation Directive Decree provides that the economic equilibrium of the HRN concession shall be regarded as compromised in the case of a decline of more than 0.4% in the number of passengers of the transport provided under

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<sup>1</sup> OJ L 343, 21.11.2012, p. 32

<sup>2</sup> OJ L 315, 3.12.2007, p. 44.

this concession, or in the case of a decline of more than 0.4% in the turnover that the holder of this concession generates on the basis of the transport to be provided under this concession. The regulatory body may derogate from these provisions to a limited extent if its analysis of the economic equilibrium of a public service contract justifies it.

- (5) The Commission informed the Netherlands via the EU PILOT database that the pre-determination of assessment criteria by a national legislation giving very limited rights of derogation contradicts the independence of the decision-making of the regulatory body and that, in addition, the thresholds set in the Liberalisation Directive Decree seem to be quite restrictive.
- (6) In its response received by the Commission on 3 September 2012, the Netherlands explained that the "percentage threshold quotas" regarding the principal purpose of a new service were based on the "existing and projected figures for the international carriage of passengers on the main rail network, based on the current composition of ICE and Thalys passengers", while the percentages regarding the economic equilibrium were "related to and derived from the turnover of the recipient for the main rail network (over previous years and forecast), the direct impact that a fall in turnover is expected to have on profits in the case of cabotage, and the relationship to and potential impact on the price set in the concession for the main rail network until 2015". In the opinion of the Dutch Government, these criteria were necessary to bring transparency and clarity to the process of assessment. The Commission maintained its position and, rejecting these arguments in its letter of 7 December 2012, informed the Netherlands that it might use its powers in accordance with Union legislation to address the non-compliance with EU law.
- (7) On 22 January 2013, the representatives of the Commission met the representatives of the Dutch Government to discuss the concerns of the Commission regarding the Liberalisation Directive Decree in more detail. At that meeting, the representatives of the Dutch Government asked for additional time to examine the possibility of an amendment of the Decree. After two deadlines for the communication of their final position (mid-February 2013, later postponed to 1 April 2013) passed without any action, the Netherlands finally informed the Commission on 1 May 2013 that it maintained its position and did not intend to amend the Decree.
- (8) The committee established by Article 62(1) of Directive 2012/34/EU (the Single European Railway Area Committee) examined the draft of this Commission Implementing Decision on 14 June 2013. At this meeting, the Dutch delegation expressed its opinion that the Commission was not entitled to decide on the non-application of the Liberalisation Directive Decree that could not be regarded as a "specific measure adopted by a national authority in relation to the application of Directive 2012/34/EU" but was "a general binding regulation of the legislator". On the substance, the Dutch delegation stated that on the basis of the Liberalisation Directive Decree, the regulatory body did have discretionary powers "to a limited extent" and that in their opinion the Netherlands needed relatively strict rules because of the density of the railway network as well as the fact that the concession holder was paying a fee to operate the main rail network which newcomers did not have to pay while they could concentrate on the most profitable lines.
- (9) The Commission explained that all the conditions for an application of Article 61 were met. The Liberalisation Directive Decree is a decree of the Dutch Ministry for Infrastructure and Environment, which is undoubtedly a "national authority" in the

sense of Article 61 of Directive 2012/34/EU. This Article does not circumscribe the term "authority" to any specific type of national authorities. The Decree also constitutes a "specific measure" adopted in relation to the application of Directive 2012/34/EU, since it contains the rules relevant to the application of Articles 10 and 11 of this Directive. The words "application of the Directive" used in Article 61 should be understood largely and thus do not only refer to measures taken "in application of transposed national law", but to all measures taken by national authorities in application of the Directive itself. The words "measures adopted in relation to the application of the Directive" cover therefore measures of transposition (which also fall within the scope of "the application of the Directive") as well as measures of application of transposed national law. This follows not only from the wording of Article 61, but also from the objective of this Article which allows the Commission to exercise its control over the implementing measures taken by authorities of Member States, independently of the level at which these implementing measures are taken. The Dutch statements concerning the discretionary powers of the regulatory body and the situation of the railway market in the Netherlands did not raise any new arguments to change the legal assessment of the Commission.

## II. EU legislation

- (10) Article 65 of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area ("Directive 2012/34/EU") provides that:

*"Directives 91/440/EEC, 95/18/EC and 2001/14/EC, as amended by the Directives listed in Annex IX, Part A, are repealed with effect from 15 December 2012, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Part B of Annex IX.*

*References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex X."*

Therefore, since the obligation to transpose Directive 2012/34/EU into national law is confined only to the provisions which represent a substantial change as compared to those of the previous Directives, the provisions of Directive 2012/34/EU listed below can be considered as applicable to for the purposes of the present Decision.

- (11) Article 10(2) of Directive 2012/34/EU gives the right of access to railway infrastructure in all Member States to railway undertakings for the purpose of operating an international passenger service. It also provides that in the course of an international passenger service, railway undertakings shall have the right to pick up and set down passengers at any station located along the international route, including stations located in the same Member State.
- (12) Article 10(3) of Directive 2012/34/EU provides that the regulatory body or bodies referred to in Article 55 of this Directive are responsible to determine, following a request from the relevant competent authorities or interested railway undertakings, whether the principal purpose of the service is to carry passengers between stations located in different Member States.
- (13) Article 11(1) of Directive 2012/34/EU specifies that Member States may limit the right of access to the railway infrastructure for the purpose of operating an international passenger service on services which are covered by one or more public

service contracts which are in accordance with Union law. However, such a limitation shall not have the effect of restricting the right to pick up passengers at any station located along the route of an international service and to set them down at another, except where the exercise of that right would compromise the economic equilibrium of a public service contract.

- (14) Article 11(2) of Directive 2012/34/EU provides that the regulatory body or bodies referred to in Article 55 of this are responsible to determine, on the basis of an objective economic analysis and based on pre-determined criteria, whether the economic equilibrium of a public service contract would be compromised by a new international passenger service.
- (15) Recital (21) of Directive 2012/34/EU gives a list of pre-determined criteria which the assessment should take into account, such as the impact on the profitability of any services which are included in a public service contract, including the resulting impacts on the net cost to the competent public authority that awarded the contract, passenger demand, ticket pricing, ticketing arrangements, location and number of stops on both sides of the border and timing and frequency of the proposed new service. In accordance with such an assessment and the decision of the relevant regulatory body, Member States should be able to authorise, modify or deny the right of access for the international passenger service sought, in line with the economic analysis and in accordance with Union law and the principles of equality and non-discrimination.
- (16) Recital (23) of Directive 2012/34/EU emphasises that the regulatory body should function in a way which avoids any conflict of interests and any possible involvement in the award of the public service contract under consideration.
- (17) Recital (25) of Directive 2012/34/EU specifies that the regulatory bodies should exchange information and, where relevant in individual cases, should coordinate the principles and practice of assessing whether the economic equilibrium of a public service contract is compromised. They should progressively develop guidelines based on their experience.
- (18) Article 55 of Directive 2012/34/EU provides, inter alia, for the independence of the regulatory body from any other public or private entity, including in hierarchical and decision-making terms.
- (19) Article 61 of Directive 2012/34/EU specifies that at the request of a Member State, of a regulatory body or on its own initiative, the Commission shall examine specific measures adopted by national authorities in relation to the application of this Directive, concerning, inter alia, the conditions of access to railway infrastructure, within 12 months after adoption of those measures. The Commission shall decide in accordance with the procedure referred to in Article 4 of Regulation (EU) No 182/2011 whether the related measure may continue to be applied.

### III. Legal assessment

- (20) Article 10 of Directive 2012/34/EU foresees in its paragraph 2 that railway undertakings shall be granted the right of access to railway infrastructure in all Member States for the purpose of operating an international passenger service, with the right to pick up passengers at any station located along the international route and set them down at another, including stations located in the same Member State.
- (21) Article 10 of Directive 2012/34/EU provides further in its paragraph 3 that it is up to the regulatory body to determine whether the principal purpose of the service is to

carry passengers between stations located in different Member States. In this regard Directive 2012/34/EU does not foresee an involvement of any other authority of the Member States, apart from the regulatory body, in the determination of this principal purpose. Directive 2012/34/EU does not require and does not offer a possibility to establish the principal purpose of the service on the basis of any pre-determined criteria. Therefore the setting of pre-determined criteria in the Dutch Liberalisation Directive Decree is contrary to Directive 2012/34/EU.

- (22) Article 11 of Directive 2012/34/EU provides in its paragraph 2 that it is up to the regulatory body of the Member State to determine whether the economic equilibrium of a public service contract would be compromised in case the right of access to railway infrastructure was granted. To do so, the regulatory body should conduct an objective economic analysis and base its decision on pre-determined criteria. The question whether these pre-determined criteria should be set only by the regulatory body, or whether they could also be set by other national authorities, as is the case of the Dutch Liberalisation Directive Decree adopted by the Minister of Transport, should be answered on basis of the wording and the objectives of the Directive.
- (23) Article 11(2) requires that the regulatory body determine whether the economic equilibrium is compromised, and provides that this determination must be done on the basis of an objective economic analysis and based on pre-determined criteria. This Article does not mention any other entity than the regulatory body, thus circumscribing the competence to determine these criteria to the regulatory bodies only. Since the "pre-determined criteria" are mentioned in the sole context of the economic analysis, it follows that the actions mentioned in the first sentence of Article 11(2) can only be taken by the regulatory body. Should the legislator consider that the setting of the pre-determined criteria could also be done by another entity, Article 11(2) would have expressly specified it.
- (24) Recital (25) and paragraph 4 of Article 11 of Directive 2012/34/EU confirm this interpretation. Recital (25) of Directive 2012/34/EU specifies that the regulatory bodies should exchange information and, where relevant in individual cases, should coordinate the principles and practice of assessing whether the economic equilibrium of a public service contract is compromised. They should progressively develop guidelines based on their experience.
- (25) Such "guidelines" and "principles" have a general application and are valid for a number of cases. Therefore they correspond to the "pre-determined criteria" which are mentioned in Article 11(2) of Directive 2012/34/EU. The objective of Recital (25) is to make possible the determination of the criteria on the basis of developments occurring in a changing market and, if necessary, to adapt them. The regulatory body is the entity best suited to analyse such developments, since its task is to analyse specific cases of requests to run international trains, and it is able to develop general criteria and guidelines on the basis of this decision-making practice.
- (26) Regulatory bodies from all EU Member States should further compare their experience and establish common criteria for the assessment of the economic equilibrium. This cooperation could not take place if the regulatory bodies of some of the Member States were to apply the criteria set by restrictive national regulations, while the regulatory bodies of other Member States were free to set these criteria themselves. Moreover such a limitation by national regulations would not allow the adaptation of the criteria to changing circumstances of the railway markets, and their continuous development.

- (27) Furthermore the international cooperation between the regulatory bodies aiming to establish the criteria for the determination of the economic equilibrium is laid down in paragraph 4 of Article 11 of Directive 2012/34/EU. This Article requires the Commission to adopt measures setting out the details of this procedure and criteria to be followed for the application of Article 11 (paragraphs 1 to 3) "based on the experience of regulatory bodies" and "on the basis of the activities of the network of regulatory bodies". This Article does not provide that the Commission takes into consideration national regulations establishing such criteria.
- (28) The fact that the criteria can only be determined by an independent regulatory body also follows from the rules set by Directive 2012/34/EU to ensure that this regulatory body does not face any conflict of interest during this process. Recital (23) of Directive 2012/34/EU emphasises that the regulatory body should function in a way which avoids any conflict of interests and any possible involvement in the award of the public service contract under consideration. Article 55 of Directive 2012/34/EU provides, inter alia, for the independence of the regulatory body from any other public or private entity, including in hierarchical and decision-making terms. Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure<sup>3</sup> had already foreseen in its Recital 14 that the functional independence of the regulatory body from any competent authority involved in the award of a public service contract should be ensured. In the Netherlands, the Ministry of Infrastructure and Environment is the body which awards the concession for the main rail network. In this capacity, the Minister for Infrastructure and Environment may request the regulatory body to assess the principal purpose of a new service or to determine whether the economic equilibrium of an existing public service contract is compromised by a new international service. If these examinations are based on strict thresholds established by the Minister, this would create a conflict of interest which the Directive seeks to prevent by appointing an independent regulatory body as the entity which is setting the criteria for the assessment. The Commission explained in its Interpretative Communication on certain provisions of Directive 2007/58/EC<sup>4</sup> that the assessment concerning the economic equilibrium should be based on an objective method and pre-determined criteria. The regulatory bodies alone are responsible for developing such a method, including the criteria to be applied. This responsibility cannot be constrained by any public authority involved in awarding public service contracts.
- (29) However, even if Directive 2012/34/EU were to be interpreted as allowing another national entity to set the criteria in question, the Commission observes that the Liberalisation Directive Decree adopted by the Netherlands ties the decision of the regulatory body to a very narrow set of criteria linked to strict thresholds, turning the decision of the regulatory body into a pure threshold-based calculation. As a result, the regulatory body is unable to take account of the specific circumstances of the public services concerned. Contrary to the requirements of Directive 2012/34/EU, an objective economic analysis of each specific case based on criteria mentioned in the recitals of this Directive, could not be conducted, since the regulatory body may only apply specific thresholds determined in national regulation. Therefore the Dutch Liberalisation Directive Decree not only sets the criteria, but also imposes precise

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<sup>3</sup> OJ L 315, 3.12.2007 p. 44 – 50.

<sup>4</sup> OJ C 353, 28.12.2010, p.1.

thresholds to be respected, leaving thus no room to the regulatory body to conduct an objective economic analysis.

- (30) A similar conclusion also applies to the assessment of the principal purpose of the new service, where the regulatory body cannot derogate at all from the thresholds set in the Decree if the assessment was requested by the Minister of Infrastructure and Environment or by the holder of the concession for passenger services on the main rail network.
- (31) It follows from the explanations of the Dutch authorities that the thresholds set in the Liberalisation Directive Decree are based on the figures of existing services. These restrictive thresholds concern the "principal purpose" and the "economic equilibrium". A threshold of only 0.4% for the loss in passengers or turnover of the public service provider could translate the intention of the Netherlands to protect the status quo existing before liberalisation and therefore the interests of the national railway company. These thresholds appear to be so low that not even one new international competitor could find it possible to enter the Dutch market. The objective of Directive 2012/34/EU is however to grant to all EU railway undertakings the right of access to the railway infrastructure and services in all Member States. This objective could be jeopardized with the thresholds set out in the Dutch Liberalisation Directive Decree. The possibility offered by Directive 2012/34/EU to limit access to the railway market in case the economic equilibrium of the public service is compromised, is not to block in general this access for all EU operators, but to protect the public service in case it is "compromised", which means that it loses its economic viability because of the new international services. It is doubtful that such could be the case with a simple loss of 0.4% in turnover or passengers. In any case, a decision in that sense could only be adopted by a regulatory body in individual cases of requests to run international trains, after having taken into consideration all relevant factors and circumstances of each specific case. It could not be done in a general way by setting thresholds in a ministerial decree, and before submission for an authorisation to run an international train.
- (32) Similarly strong doubts exist that it is appropriate to require 75% of cross-border passengers or cross-border turnover for the existence of a "principal purpose to carry passengers between stations located in different Member States". The Liberalisation Directive Decree does not justify why a train which carries more than half but less than 75% of international passengers should not be considered as a train operating an international passenger service.
- (33) However, irrespective of any assessment by the Commission of the compatibility of the Liberalisation Directive Decree with Directive 2012/34/EC as regards the methodology and criteria proposed to assess whether the economic equilibrium of a public service contract is compromised and to assess whether the principal purpose of a route is international, the Commission considers that the measures contained in Articles 3 and 5 of the Liberalisation Directive Decree are not compatible with the provisions of Directive 2012/34/EU. Indeed this Decree sets precise thresholds leaving no discretion for the regulatory body to determine the principal purpose of a service to carry passengers between stations located between Member States as required by Article 10(3) of Directive 2012/34/EU. Moreover it sets restrictive criteria for the determination of whether the "economic equilibrium" is compromised in the sense of Article 11(2) of Directive 2012/34/EU, leaving thus no possibility for the regulatory body to make an economic analysis for each individual situation.



#### IV. Conclusions

(34) For the reasons stated above, the Commission considers that the measures contained in Articles 3 and 5 of the Liberalisation Directive Decree are not compatible with Articles 10, 11 and 55 of Directive 2012/34/EU and should not continue to be applied.

HAS ADOPTED THIS DECISION:

##### *Article 1*

Articles 3 and 5 of the Decree of the Kingdom of Netherlands establishing detailed rules with regard to the liberalisation of international rail passenger transport, which set pre-determined criteria for the assessment of the principal purpose of a rail service and for determining whether the economic equilibrium of a public service contract is compromised by a new service, are incompatible with Articles 10, 11 and 55 of Directive 2012/34/EU and shall not be applied as from the adoption of this Decision.

##### *Article 2*

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels,

*For the Commission*  
*Siim KALLAS*  
*Vice-President*