

DECISIONS

COMMISSION DECISION (EU) 2019/367

of 9 November 2018

on the measure SA.35065 (2016/C) (ex 2016/NN, 2012/FC) implemented by the United Kingdom for MMD Shipping Services Ltd

(notified under document C(2018) 7360)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 10 April 2013, the Commission received a complaint alleging unlawful aid provided by Portsmouth City Council ('PCC') to MMD Shipping Services Ltd ('MMD'). The submission of a formal complaint was preceded by an informal submission by the complainant of 8 June 2012 and a meeting of 29 November 2012.
- (2) The Commission forwarded the complaint to the United Kingdom on 8 May 2013. The United Kingdom provided their comments on 1 July 2013. On 10 October 2013, the Commission sent a request for additional detailed information about the measures alleged. The United Kingdom replied on 25 November 2013 and 9 December 2013.
- (3) The Commission met with the complainant on 10 April 2014, and, on 16 April 2014 sent a non-confidential version of the United Kingdom submissions to the complainant for their comments. The complainant provided comments on 12 November 2014.
- (4) By letter dated 19 September 2016, the Commission notified the United Kingdom of its decision to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the measure. The United Kingdom provided observations on the Commission decision to initiate the procedure by letter dated 21 November 2016.
- (5) The Commission decision to initiate the procedure ('the Opening Decision') was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measures.
- (6) The Commission received comments from two interested parties the complainant and an Anonymous Interested Party. It forwarded them to the United Kingdom on 21 January 2017, and the United Kingdom was given the opportunity to respond. Comments were received from the United Kingdom by letter dated 15 February 2017.
- (7) On 26 April 2017, the Commission held a meeting with the United Kingdom. Following this meeting, the United Kingdom submitted additional information by letter dated 12 January 2018.
- (8) On 18 April 2018, the Commission held a telephone conference with the United Kingdom, following which the United Kingdom submitted additional information by letters dated 5 June and 22 June 2018.

⁽¹⁾ OJ C 452, 2.12.2016, p. 4.

⁽²⁾ Cf. footnote [1].

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Recipient

- (9) As of 2008 MMD is a wholly-owned subsidiary of PCC and provides cargo-handling services (stevedoring, warehousing and distribution of mainly fruit and other fresh produce) to customers at Portsmouth International Port ('the Port'), which is also owned and operated by PCC. MMD is the principal cargo handling operator in the Port with a long-term lease for the main cargo handling quays. Other operations of the Port relate to roll-on, roll-off ferry services and cruise ships.
- (10) MMD has an annual turnover of around GBP 15 million and employs almost 200 people. Prior to PCC's acquisition of MMD, MMD had been loss-making at least since the 2002/2003 financial year. Following its acquisition by PCC in 2008, the financial results of MMD were largely balanced thanks to the annual revenue grants provided by PCC, and without which MMD would have recorded an operating loss between 2008 and 2016. The financial year 2016/2017 was the first year that MMD recorded a profit without any revenue grant from PCC (see Table 1).

2.2. Alleged State aid measures raised by the Complainant

- (11) The Complainant in its 2013 complaint identified a number of measures which it alleged constituted illegal and incompatible State aid by PCC to MMD. The alleged aid measures include:
- Measure 1: Acquisition of MMD by PCC in 2008 ('Measure 1');
 - Measure 2: Revenue grants provided annually by PCC to MMD ('Measure 2');
 - Measure 3: Long-term loan facility provided by PCC to MMD as of 2010 ('Measure 3');
 - Measure 4: Acquisition of two cranes by PCC and their subsequent long-term lease to MMD in 2010 and 2011 ('Measure 4');
 - Measure: 5: Security for overdraft facility ('Measure 5').
- (12) The original complaint argued generally that PCC did not act in line with the market economy investor principle ('MEIP') by acquiring and financially supporting a loss-making business despite its continued losses since 2008. The complaint estimated that the overall support provided by PCC to MMD would as at November 2014 amount to GBP 17,3 million. Without the continued support from PCC, MMD would have not been able to survive on the market. Thus, according to the Complainant, PCC's continued support using public funds provided a significant economic advantage to MMD and allowed MMD to offer discounted cargo handling rates to its existing and potential customers. As a result, the competition in the market for handling and storage of imported fresh produce was allegedly distorted.

2.2.1. Measure 1: Acquisition of MMD by PCC in 2008

- (13) PCC acquired MMD from a previous private owner for a price of GBP 2,07 million. As part of the initial investment, PCC also funded MMD with additional capital investments of GBP 2,34 million in the form of capital grants and planned to cover the losses of MMD in the financial years 2008/2009 and 2009/2010 with total funds of GBP 1,443 million.
- (14) Despite the claims of the Complainant, the Commission concluded in the Opening Decision that PCC acted in line with the MEIP by acquiring MMD under these conditions and therefore Measure 1 does not provide any economic advantage to MMD and does not constitute State aid. In addition, neither the Complainant nor the Anonymous Interested Party provided any additional arguments or evidence with respect to Measure 1. In view of that, Measure 1 is not assessed in this Decision.

2.2.2. Measure 2: Revenue grants provided annually by PCC to MMD

- (15) Since the acquisition in 2008, PCC has provided MMD with revenue grants in the form of cash transfers recorded as 'other operating income', thus increasing the operating profits (and thereby reducing operating losses). The original investment case envisaged the need to cover MMD's losses only in the first two years and for a total amount limited to GBP 1,443 million. However, PCC continued to provide revenue grants after the 2009/2010 financial year and the total amount of revenue grants provided up to 2016 reached GBP 16,71 million (see Table 1 below). No revenue grant was provided in the financial year 2016/2017 and MMD recorded a profit in that year.

Table 1

**Revenue grants provided by PCC to MMD and profits/losses of MMD in financial years
2008/2009-2016/2017**

(million GBP)

	08/09	09/10	10/11	11/12	12/13	13/14	14/15	15/16	16/17
Revenue grant	2,60	3,30	2,10	1,20	2,16	1,44	2,40	1,51	0
Operating profit (excl. revenue grants)	- 1,84	- 2,92	- 2,03	- 1,09	- 2,04	- 1,24	- 2,18	- 1,26	+ 0,43
Total profit (excl. revenue grants)	0,62	- 2,92	- 2,04	- 1,07	- 2,16	- 1,37	- 2,33	- 1,47	+ 0,21
Total profit as reported in annual reports (i.e. incl. revenue grants)	+ 3,22	+ 0,38	+ 0,06	+ 0,13	0,00	+ 0,07	+ 0,07	+ 0,04	+ 0,21

- (16) The grants were provided in the form of cash transfers in order to cover the annual trading loss of MMD. The Complainant argues that MMD would not have been viable without that constant financial support by PCC. In addition, it claims that PCC did not conduct any proper analysis of whether the provision of additional grants to MMD was economically justifiable.

2.2.3. Measure 3: Long-term loan facility provided by PCC to MMD from 2010

- (17) In 2010, PCC decided to provide a long-term (up to 20-years) loan facility of GBP 6,944 million to MMD. The interest rate for the loan facility amounts to 4,81 %, corresponding to PCC's costs of borrowing plus an administration fee of 0,25 %. The purpose of the loan facility is to support MMD's capital expenditure. The general terms of the loan facility are set out in a Commercial Loan Agreement between PCC and MMD, while for each draw-down of the loan additional documents are necessary (information on the capital expenditure intended to be covered by the loan, financial appraisal of each draw-down by MMD and PCC, appropriate collateral documents). Between 2010 and 2017, a total of GBP 5,7 million has been drawn-down by MMD under this facility.
- (18) The Complainant argues that the loan facility by PCC provided MMD with long-term funding on terms which would not have been available to it from ordinary commercial lenders. It also claims that the loan agreement between PCC and MMD is not only unsigned but in particular lacks provisions which any commercial lender would routinely require (such as financial covenants or events of default). Finally, it argues that the financing from PCC enables MMD to invest in new operating infrastructure and assets and thus provides it with a competitive advantage. Therefore, the Complainant argues that the long-term loan facility does not correspond to market economy operator terms and, since all other criteria are also fulfilled, constitutes illegal State aid.

2.2.4. Measure 4: Acquisition of two cranes by PCC and their subsequent long-term lease to MMD in 2010 and 2011

- (19) In order to support the operations of MMD, PCC decided in 2010 and 2011 to purchase two mobile harbour cranes for approximately GBP 2,1 million each and to lease them to MMD under an operating lease agreement valid for 7 years. The monthly rent of GBP 16 000 (in excess of GBP 190 000 per year) for each crane has been calculated so that the investment made by PCC is repaid over the expected lifetime of the cranes of 15 years while also covering PCC's own cost of capital (in total leading to effective interest rates of 4,46 % and 4,62 %).
- (20) Even though the complaint does not contain any specific arguments with respect to this particular measure, the acquisition and lease of cranes belongs among the various financing measures included in the complaint by which PCC supports MMD's investment in new equipment in a manner allegedly not consistent with market conditions.

2.2.5. Measure: 5: Security for overdraft facility

- (21) Upon acquisition, MMD was brought under the umbrella of PCC's banking relationship with Lloyds TSB Bank. In return, Lloyds TSB required an additional security cash deposit of GBP 1 million. In May 2009, this security deposit was increased to GBP 1,2 million and in spring 2010 decreased to GBP 0,55 million. In 2011, this security deposit to Lloyds TSB Bank was supplemented by a guarantee by PCC to the bank for a monthly overdraft facility of GBP 1 million available to MMD.

- (22) The deposit and subsequently also the guarantee were required by Lloyds TSB Bank to cover MMD's normal commercial transactions and to serve as security for payments that the bank makes on behalf of MMD (such as CHAPS payments, BACS payments, customs indemnity facility and Corporate Charge cards). Lloyds TSB Bank is able to call upon the deposit or guarantee in the event that these payments made by the bank are subsequently not honoured by MMD.
- (23) The complaint includes the security for overdraft facility among the measures representing continued financial support by PCC to MMD, which gives MMD an allegedly undue economic advantage.

2.3. Grounds for initiating the procedure

2.3.1. Measure 2: Revenue grants provided annually by PCC to MMD

- (24) In the Opening Decision the Commission expressed concerns that the continued support to MMD by means of the annual revenue grants might not be MEIP-compliant. The support by PCC in the form of revenue grants went far beyond the time and amount planned in the original investment case (GBP 16,71 million over 8 years as opposed to the originally planned GBP 1,44 million over two years) and therefore there were concerns that these cash grants could be considered as short-term and temporary support for the restructuring of the business.
- (25) In addition, it was already evident in the first year 2008/2009 that the original financial forecasts would not materialise. Further, while there was evidence of a proper economic analysis for the acquisition of MMD, there was little if any evidence on the file that demonstrated that each grant of additional revenue grant had been properly analysed as regards its economic sense.
- (26) The argument that the grants are almost balanced with the revenue streams from MMD to PCC that would be lost if it ceased operations was considered to be flawed since there was no evidence suggesting that the port assets (quays, warehouses etc.) used by MMD would remain idle if MMD were liquidated or would lead to a complete loss of the lease rentals and tonnage dues paid to PCC.
- (27) Finally, there was no evidence that PCC had weighted up its continued support with alternative scenarios (such as putting MMD into liquidation) in order to demonstrate that it was in fact the most advantageous option, economically, throughout the whole period.

2.3.2. Measure 3: Long-term loan facility provided by PCC to MMD as of 2010

- (28) In view of MMD's inability to achieve profitability over a number of years without PCC's revenue grants, in the Opening Decision the Commission expressed concerns as to whether the terms of the loan corresponded to the risks of default by MMD. It seemed doubtful that a private creditor, even in a position of a parent company, would have granted such a loan without adequately addressing the financial difficulties of its subsidiary.
- (29) The concerns as regards the market terms of the loan facility were confirmed also by the Commission Reference Rate Communication of 2008, according to which a market rate for a company in difficulty (without the continued support by PCC, MMD would have almost certainly been a company in difficulty) even presuming a high level of collateral (for which there was no evidence) would amount to 5,48 % in 2011 and between 5,46 % and 5,74 % in 2012. Without collateral, the rate would have been more than 11 %.
- (30) Finally, the Commercial Loan Agreement submitted by the United Kingdom was relatively general and lacked some standard provisions normally required (such as financial covenants or event of default).

2.3.3. Measure 4: Acquisition of two cranes by PCC and their subsequent long-term lease to MMD in 2010 and 2011

- (31) Since the measure is in its effects very similar to a long-term loan facility analysed above (financing of capital expenditure of MMD based on the costs of borrowing of PCC), the concerns expressed in the Opening Decision were analogous to those related to the long-term loan facility.

2.3.4. Measure: 5: Security for overdraft facility

- (32) According to the Opening Decision, the documents analysing the acquisition of MMD provided by the United Kingdom did not appear to take account of the increased cash deposit by PCC. However, even if the argument that such deposit was implicitly envisaged were to be accepted, there was no evidence demonstrating that PCC had analysed its continued exposure subsequently. Despite the continued losses of MMD, PCC simply continued to provide the security for MMD's working capital loan facilities.

- (33) The Commission thus in the Opening Decision expressed concerns that such facilities could be acquired by MMD without PCC's support and at the same time it appeared unlikely that a private parent company in the same situation would have continued such financial support without adequately addressing the financial difficulties of its subsidiary.

3. COMMENTS FROM INTERESTED PARTIES

3.1. Comments from the Complainant

- (34) The Complainant in its comments supported the Opening Decision while reserving its position as regards the conclusion concerning Measure 1 without providing any additional arguments or evidence with respect to this measure. With respect to Measures 2 to 5 the Complainant referred to its previous submissions and reiterated its belief that there are no grounds on which PCC could have reasonably concluded that its financial support would ever deliver an adequate commercial return, without providing any additional evidence or arguments in its comments. The Complainant thus urged the Commission to conclude that Measures 2 to 5 constitute an incompatible State aid that needs to be recovered.

3.2. Comments from an Anonymous Interested Party

- (35) The Anonymous Interested Party supported the preliminary analysis in the Opening Decision and considered that Measures 2 to 5 clearly constituted State aid to MMD by which PCC provided ongoing financial support to a chronically inefficient and unprofitable business. Without the on-going support, it alleged that MMD would have long become insolvent and gone out of business. The Anonymous Interested Party did not provide any comments on Measure 1.
- (36) The Anonymous Interested Party considered that PCC was not acting as a rational commercial investor since it continued providing funding to MMD without securing any meaningful or successful restructuring of MMD to address its problems. It claimed that no rational investor would have purchased a failing business and continued to fund its failure over many years without achieving any reforms to address those failures.
- (37) With respect to the revenue grants (Measure 2) the Anonymous Interested Party concurred with the Opening Decision and stressed that PCC simply made good MMD's operating losses each year without any proper assessment. As regards Measures 3 and 4, the Anonymous Interested Party again concurred with the Opening Decision and claimed that without the support of PCC no financing on comparable conditions would have been available to MMD. Finally, it concurred that Measure 5 also constituted an undue benefit to MMD that would have not been available from a rational economic investor.
- (38) The Anonymous Interested Party thereafter confirms the preliminary assessment in the Opening Decision that these aid measures do not meet even the basic conditions for a compatible rescue or restructuring aid.
- (39) The Anonymous Interested Party further stresses that these subsidies had a significant impact on competition since the fresh produce handling sector is a highly competitive market with low margins where legitimate un-aided operators are particularly vulnerable to an operator supported by illegal State aid. It also claims that MMD was reputed to have been offering below-market handling rates (including allegedly offering free storage) to attract and retain customers. The aid thus did not only harm specific competitors but also the overall operations of the market.
- (40) The Anonymous Interested Party thus requested the Commission to require recovery of the illegal and incompatible aid provided to MMD.

4. COMMENTS FROM THE UNITED KINGDOM

4.1. United Kingdom comments on the Opening Decision

- (41) The United Kingdom in their comments on the Opening Decision contested the Commission's preliminary findings that Measures 2 to 5 could constitute State aid and provided additional arguments in support of its claim that all the measures were MEIP-compliant. It also provided a large number of additional *ex ante* evidence in support of its claim.
- (42) The United Kingdom, in particular, argued that PCC's decision to support MMD in the years after 2008, either with revenue grants or by other means, was commercially motivated and based on a reasoned assessment of the

potential benefits and risks. This included consideration of the numerous inter-related economies and synergies of maintaining a commercial operation on a wholly-owned site whose activities are limited by law and policy to port-related activity. The United Kingdom argues that the economic rationality of the continued support to MMD was continuously tested against all reasonable alternatives on this restricted site.

- (43) The United Kingdom argued that PCC has exercised close financial scrutiny of its investment in the business and thus that the Commission's claim that PCC 'blindly' followed the unduly optimistic forecasts of MMD management is incorrect. PCC appointed its most senior financial officer as a Director of MMD in order to oversee the business financial performance, to provide 'the appropriate financial acumen' and to ensure that PCC's statutory financial management duties are properly discharged. As demonstrated by the internal documents attached to the United Kingdom submission, PCC members regularly considered whether the factors which motivated the acquisition of the business in 2008 continued to provide the justification for further support. Moreover, as any other market economy operator with embedded interests in a wholly owned site with limited scope for alternative uses, and a host of related supply chain economies, PCC acted to promote the value of its land, and to promote sustainable returns to itself.
- (44) Similar to all port related businesses, MMD's main business of fruit handling is 'lumpy' and in the short term is vulnerable to individual customer losses/gains. In the first few years following 2008, the business was hit by unforeseeable problems. However, MMD's financial performance has significantly improved — albeit more slowly than originally envisaged — by some new customer gains and through an active restructuring programme (set out in the 2008 business case for the purchase of MMD and updated as part of the MMD's forward looking business plans) which has cut costs and streamlined the business making it more competitive.
- (45) The United Kingdom also stresses that PCC also owns and operates a busy ferry port adjacent to MMD's site. PCC can, and does, exploit synergies between the two businesses for the benefit of the ferry port, for example PCC is able to offer to commercial ferry operators MMD's stevedoring services to handle commercial cargoes. This has helped to bring new business to the ferry port.
- (46) Moreover, PCC receives an income from MMD in the form of a rental yield, tonnage dues, pilotage fees and other income. While this, in and of itself, would not necessarily justify continued support of the business over the longer term, the United Kingdom argues that it is appropriate for PCC to take account of these income streams in the assessment of the overall commercial rationality for PCC to continue its support.
- (47) The United Kingdom also stresses that, at various occasions, possible alternatives to the continued operations of MMD with the support of PCC were considered and compared with the status quo as to their economic merits.
- (48) First, since 2008 PCC considered diversifying MMD's business to alternative cargoes, but for various logistical reasons there are no alternative activities which are more likely to improve MMD's financial performance ⁽³⁾.
- (49) Second, PCC considered the alternative of liquidating the company and re-acquiring the land for alternative use (e.g. during the discussions of the case for continued investment in 2013 — see Recital 57), but there were a multitude of factors that militated against this option:
 - (a) the 7,7 Ha site is relatively small, and its location (between the ferry port and the military naval dockyard) makes it unsuitable for many other uses;
 - (b) the land site is on reclaimed land and is heavily contaminated. It is therefore extremely unlikely that it could be used for alternative commercial or residential development;
 - (c) the land is earmarked for port uses under the planning regime, and it is unlikely that the local planning authority would see the case for granting planning consent for alternative uses;
 - (d) PCC would need to obtain statutory consent to close the wharves and use the land for alternative commercial purposes, but it would be extremely difficult to secure such consent — committing it, therefore, to a medium and long term view of its viability and commerciality;
 - (e) the site occupied by MMD lies in a limited overall area of operable port land. This means that it is of such strategic importance to PCC (given the potential need for future expansion or adaptation of the port) that PCC has a clear market imperative to maintain commercial port activity on the site.

⁽³⁾ See for example the internal reports for the May/June 2013 assessment of the case for continued investment in MMD.

- (50) In the context of these constraints, the United Kingdom argues that PCC is motivated to get the best return achievable on the land asset by investing in MMD as a sustainable and viable tenant.
- (51) To support its claims, the United Kingdom also provided copies of an economic model prepared by PCC in order to assess its investment in MMD and analyse various options available and calculating their economic merits. This model was regularly updated to take into account the performance of MMD, changing market conditions, prospects etc. and the economic rationality of further support of MMD in the form of revenue grants and other financing was thus regularly checked against other alternative options. The United Kingdom explained that it does not have all past versions of this model available for individual years since it constituted a single Excel file that was continuously updated without archiving previous results. However, it confirmed that the model was consistently used as the basis for deciding whether it makes economic sense to continue supporting MMD or whether to choose another alternative. It provided two working versions of the model of May/June 2013 that were found in the files.
- (52) Balancing all these factors, PCC has adopted the view that it is commercially more advantageous over the medium to long term to continue to support the business and to carry out the various restructuring measures to restore MMD to profitability. The United Kingdom stresses that there is a strong underlying commercial rationale to support the business. MMD is well located to handle fresh produce cargoes from southern producers, and is one of the few ports to have the necessary expertise and ability to handle 'reefer' shipping with refrigerated fresh produce cargoes. It has successfully adapted itself to trends in new ship types, which has led to some significant new customer wins. The investment it has made in the specialised handling of fresh fruit and vegetable (refrigerated storage, cranes, and haulage) will ensure that it remains competitive as a leading point of entry for fruit importers.
- (53) The United Kingdom also stresses that the positive financial results of MMD in the financial year 2016/2017 show a significant improvement in financial performance and confirm its previous assumptions that MMD may become a profitable business even without continued revenue grants.
- (54) Finally, the United Kingdom points to the fact that the test which the Commission is required to apply on assessing whether the Measures 2 to 5 conform to the MEIP is whether a private shareholder in PCC's position would have been motivated to continue to support the company in these circumstances. This requires an *ex ante*, not *ex post*, assessment based on the information available to PCC at the relevant point in time. PCC is satisfied that all its support measures were properly considered and weighed up in terms of the likely benefits and risk. Nowhere, after its initial acquisition of MMD, has PCC included non-economic criteria in its financial appraisals of MMD (such as local employment, environmental risk or regional policy). It has at all times behaved as a private shareholder in similar circumstances would have done.
- (55) Following a meeting with the Commission on 26 April 2017, the United Kingdom provided further details about the evolving circumstances of the MMD business throughout the entire period concerned and indicated what PCC knew at the time of the granting of each support measure. Within each year, key events which impacted on MMD's financial performance were considered to demonstrate that PCC did not 'blindly' follow unsupported, over-optimistic forecasts presented by MMD management. On the contrary, the United Kingdom argues that the evidence clearly demonstrates that, as issues arose, they were addressed in a robust, commercially-minded fashion by MMD's management as it moved the business towards future profitability, with entirely appropriate supervision by PCC at the times of key decision-making.
- (56) This submission by the United Kingdom was supplemented with additional contemporaneous evidence of these economic and commercial *ex ante* evaluations by MMD and PCC. Furthermore, the United Kingdom explained that many of the internal briefings provided to PCC about MMD were provided orally rather than in writing and thus they cannot be demonstrated by written evidence. Nevertheless, the United Kingdom considers that the documents submitted provide sufficient evidence that PCC has since acquisition of MMD in 2008 taken reasonable, commercially motivated decisions in relation to MMD.
- (57) Furthermore, the additional submission also stresses (and provides relevant documentary evidence) that during the relevant period there were a number of instances in which PCC considered alternative proposals:
- In 2011, Condor Logistics approached PCC with a view to negotiating the purchase of MMD. PCC entered into discussions with Condor Logistics relating to a full or partial sale of the business and investigated open-mindedly this commercial opportunity, but Condor Logistics' discontinued its freight service in October 2012 and the discussions were terminated;

- In 2012, there was a PCC meeting on 30 October 2012 to further discuss the option of retaining or selling/closing MMD;
 - On 21 June 2013, an internal paper prepared by MMD's management evaluated the possibility of selling the business or of using the site for alternative purposes;
 - In October 2013, PCC carried out a full appraisal of alternative options for MMD based on a documented assessment of MMD's economic prospects for each of the options;
 - In 2014/2015, PCC assessed a proposal to use MMD's site to construct wind turbines for the production of electricity. However, the scheme did not receive planning permission and therefore could not proceed;
 - In 2015/2016, [...] (*).
- (58) Finally, following a conference call on 18 April 2018, the United Kingdom submitted additional contemporaneous evidence of the *ex ante* economic evaluations of different available options together with a detailed explanation of the methodology of the underlying economic model.

4.2. United Kingdom Comments on interested parties' observations

- (59) As regards the comments of the Complainant, the United Kingdom pointed out that they merely repeat the allegations of State aid in the Opening Decision without offering any specific comments or evidence. The United Kingdom position with respect to these allegations was set out in the United Kingdom comments on the Opening Decision.
- (60) As regards the comments of the Anonymous Interested Party, the United Kingdom also pointed out that most of the comments simply repeat the allegations of the Opening Decision without offering any specific comments or evidence. However, the United Kingdom commented on three specific points made by the Anonymous Interested Party.
- (61) First, the United Kingdom disagreed with the allegation that PCC has been content to cover MMD's losses without seeking to restructure or reform the business. As the United Kingdom explains also in its comments on the Opening Decision, PCC has in conjunction with MMD management taken a number of steps to restructure the business, reduce costs, improve efficiencies and put the business on a more competitive footing. These measures included:
- agreeing a new employment contract with the unions to introduce more flexibility and efficiency in the workforce (projected to save around GBP 250 000 in annual labour costs);
 - modernisation of container handling and storage facilities to address trends in demand;
 - termination and outsourcing of MMD's haulage operations to enable MMD to focus on its core business (while the contract with the third party haulier would be expected to bring around GBP [50 000-150 000] additional income from storage rental payments and share in profit);
 - improvements to IT (such as new track-and-trace computer system or a vehicle booking system) and other infrastructure (for example power perfectors fitted in refrigerator sheds saving GBP 30 000 in electricity costs per annum, solar panels installed onto the roof of the sheds estimated to save around GBP 230 000 on electricity per annum or installation of LED lightning expected to save around GBP 70 000 in annual electricity costs) which have driven an improved financial performance;
 - investment in meeting quality standards and accreditations (ISO 9001, OHSAS 18001, AEO Status or 360 Quality code);
 - creation of additional storage areas;
 - changes to the Board of MMD to improve financial accountability.
- (62) The restructuring plan formed part of the original business case for the acquisition of MMD in 2008, and there were regular oral and written reports to PCC on MMD's progress in implementing the restructuring programme. PCC has thus behaved as a private operator in securing the necessary changes to the business so that it is in a position to improve performance and become more competitive. These measures are well documented in the *ex ante* internal documents of PCC and MMD submitted as evidence by the United Kingdom.

(*) Confidential information.

- (63) Second, the United Kingdom refuted the allegation that MMD is alleged to have offered below market handling rates to attract and retain fresh produce customers and that MMD has even offered customers free storage. The Anonymous Interested Party offered no evidence to substantiate these allegations and merely stated that MMD is 'reputed' or 'reported' to be offering such pricing without stating by whom. The United Kingdom claims these allegations are baseless since MMD's prices reflect tariffs offered at other ports and indeed are often higher than competing prices. The United Kingdom submitted evidence that in reality MMD's rates have not been reduced following PCC's acquisition of MMD in 2008. On the contrary, pallet rates have increased by almost [...] % in this period. Furthermore, even though there is little transparency in pricing between ports, some customers quoted rates offered to them by other ports during the price negotiations with MMD. These quotes demonstrate that MMD's prices reflect market pricing at other ports. Similarly, the United Kingdom rejected the allegation that MMD offered free storage to its customers.
- (64) Third, the United Kingdom refuted the allegation that as a result of unlawful State aid fresh produce has become a much less attractive proposition for non-aided operators. There is again no evidence of this allegation and, as pointed out in the United Kingdom comments on the Opening Decision, other ports, such as Dover, continue to invest in the handling of fresh produce (Dover has recently acquired Hammond which operates a fruit handling business).

5. ASSESSMENT OF THE MEASURES

- (65) By virtue of Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

5.1. Existence of State aid

- (66) In view of the definition of the notion of State aid in Article 107(1) of the Treaty, the constituent elements of State aid are: (i) the existence of an undertaking, (ii) the imputability of the measure to the State and its financing from the State resources, (iii) the granting of an economic advantage, (iv) the selectivity of the measure, and (v) its effect on competition and trade between Member States. These criteria need to be fulfilled cumulatively for any measure to constitute State aid.
- (67) The United Kingdom claims that these measures do not provide any economic advantage to MMD since they are in line with the Market Economy Investor Principle (MEIP). According to this principle, economic transactions carried out by public bodies in the role of investors do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions ⁽⁴⁾.
- (68) Therefore, in order to establish whether the alleged aid measures constitute State aid, the Commission will first analyse the criterion of economic advantage.

5.1.1. Existence of economic advantage

- (69) Following the Opening Decision, the United Kingdom provided substantial additional evidence indicating that all measures taken by PCC in support of MMD, either in the form of revenue grants or various forms of financing, were preceded by a thorough analysis of their economic merits. For the purpose of assessing the existence of an advantage in this case, the Commission applies the market economy investor test. Based on the additional evidence and arguments submitted, the Commission will analyse whether a hypothetical market economy investor in a similar position as PCC (that means, in particular, in a position of a 100 %-shareholder in MMD with additional commercial activities in the port and of a comparable size as PCC) would have provided Measures 2 to 5 ⁽⁵⁾. This assessment needs to be based on *ex ante* evidence showing that the decisions to grant Measures 2 to 5 was based on economic evaluations comparable to those which, in the circumstances, a rational

⁽⁴⁾ See, for instance, Judgment of the Court of Justice of 21 March 1990, *Belgium v Commission* ('Tubemeuse'), C-142/87, ECLI:EU:C:1990:125, paragraph 29; Judgment of the Court of Justice of 21 March 1991, *Italy v Commission* ('ALFA Romeo'), C-305/89, ECLI:EU:C:1991:142, paragraphs 18, 19 and 20; Judgment of the General Court of 30 April 1998, *Cityflyer Express v Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 51; Judgment of the General Court of 21 January 1999, *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission*, Joined Cases T-129/95, T-2/96 and T-97/96, ECLI:EU:T:1999:7, paragraphs 104 and 109; Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, paragraph 245; Judgment of the General Court of 25 June 2015, *SACE v Commission*, T-305/13, ECLI:EU:T:2015:435, paragraphs 91 to 93; Judgment of the General Court of 16 January 2018, *EDF v Commission*, T-747/15, ECLI:EU:T:2018:6, paragraphs 18 to 79.

⁽⁵⁾ See for example Judgment of the Court of Justice of 3 April 2014, *ING Groep NV*, C-224/12 P, ECLI:EU:C:2014:213, paragraphs 35 to 36.

private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment and in view of the available alternative options ⁽⁶⁾. In addition, this assessment must be applied leaving aside all considerations which exclusively relate to a Member State's role as a public authority (for example social, regional or sectoral policy considerations) ⁽⁷⁾.

- (70) In order to examine whether Measures 2-4 comply with the market economy investor test, the Commission places itself in the context of the period during which the financial support measures were taken ⁽⁸⁾.
- (71) The United Kingdom's arguments and evidence point to the fact that Measures 2 to 5 were in practice part of an overall financial support to MMD, provided by PCC as its parent company, in order to facilitate and accompany an ongoing restructuring of the business with the aim of achieving sustainability and profitability of its operations. The measures were thus continuously assessed in their complexity in order to determine the most economically rational way forward. They were thus all part of the economic model used by PCC for this assessment. The MEIP-compliance assessment of Measures 2 to 5 is therefore closely interlinked and cannot be simply assessed measure by measure. For this reason, the Commission will first analyse the MEIP-compliance of Measures 2 to 5 as a whole and only then, to the extent necessary, will the Commission add specific considerations with respect to individual measures.
- (72) The documents submitted by the United Kingdom represent objective and verifiable evidence demonstrating to a sufficient legal standard that PCC since its acquisition of MMD meticulously analysed its actual situation and commercial prospects based on purely economic considerations. The documents are generally duly dated and include a reasoned analysis by PCC as well as PCC's forecasts based on generally reasonable assumptions. The documents are thus not simply relying on figures and arguments submitted by MMD itself but assess them critically and represent a proof of PCC's active and continuous economic oversight over MMD.
- (73) The documents submitted demonstrate that the regular economic analysis included considerations on the numerous inter-related economies and synergies of maintaining a commercial operation on a wholly-owned site, in particular the synergies with other activities in the Port of Portsmouth (mainly ferry and cruise operations), also fully owned by PCC. These synergies include:
- the MMD site is adjacent to other parts of the Port of Portsmouth and by keeping a full control over the MMD site, PCC retains flexibility to expand the port, ferry or cruise operations;
 - annually, approximately [...] pallets of cargo are picked up or dropped off at MMD, having started or ended their journey on a vessel calling at the adjacent ferry port. The additional value to the international ferry port due to this cargo is approximately GBP [...] per annum and the port would most likely not be able to earn this income without being adjacent to MMD's stevedoring and handling services. In addition, MMD is only able to secure its own handling fees for these volumes precisely because it is located adjacent to the ferry port;
 - PCC has been able to secure additional commercial ferry traffic because of its ownership of MMD. For example, the operator Transfennica was attracted to the port in 2015 because of the container handling facilities and stevedoring operation of MMD. This resulted in additional revenue for the ferry port of approximately GBP 107 000;
 - discussions with some operators are underway as to the possibility to take further advantage of MMD's facilities being located adjacent to the ferry port. For example, the roll-on roll-off ferry route at the port can be used to bring in or dispatch lorries with cargo handled by MMD. MMD is also in advanced confidential discussions with [...] who proposes to [...]. This could derive a combined income for the ferry port as well as for MMD of around GBP [...] per annum;
 - the port sometimes uses MMD's berths for cruise ships which again provides support to flex its available capacity, providing further financial benefits to the port.

⁽⁶⁾ See for example Judgment of the Court of Justice of 5 June 2012, *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 84 to 85.

⁽⁷⁾ See for example Judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 79 to 81; Judgment of the Court of Justice of 10 July 1986, *Belgium v Commission*, 234/84, ECLI:EU:C:1986:302, paragraph 14; Judgment of the Court of Justice of 10 July 1986, *Belgium v Commission*, 40/85, ECLI:EU:C:1986:305, paragraph 13; Judgment of the Court of Justice of 14 September 1994, *Spain v Commission*, Joined Cases C-278/92 to C-280/92, ECLI:EU:C:1994:325, paragraph 22; Judgment of the Court of Justice of 28 January 2003, *Germany v Commission*, C-334/99, ECLI:EU:C:2003:55, paragraph 134.

⁽⁸⁾ Judgment of 16 May 2002, *France v Commission (Stardust Marine)*, C-482/99, EU:C:2002:294, paragraph 71.

- (74) Having regard to the purely commercial character of these synergies, the Commission considers that a hypothetical market economy investor would take such synergies with its other business activities into account when assessing *ex ante* the economic merits of any support measures for MMD.
- (75) In addition, a market economy investor would indeed have taken into account in its considerations the expected future revenue stream to PCC in the form of rents, pilotage and port dues paid by MMD, and the likelihood that they would be lost or reduced in case of alternative options. Such future revenues are pertinent for assessing economic rationale of measures to be taken by a market economy parent company to support its subsidiary. Therefore, while these revenues streams alone cannot justify the continued support to MMD, their inclusion into the overall economic model is in line with what a hypothetical market economy investor would have done.
- (76) Taking into account the above synergies and revenue streams within the group of companies controlled by PCC, the United Kingdom provided copies of an economic model analysing various options available and calculating their economic merits. This model was developed with the purpose of analysing the economic rationale of the continued investment in MMD and was regularly updated. The economic rationale of providing further support to MMD in the form of both the revenue grants and the various financing measures was thus regularly checked on an *ex ante* basis against other alternative options.
- (77) The alternative options considered by PCC in various stages of its involvement in MMD included:
- **sale of MMD** — the United Kingdom demonstrated that it was extremely unlikely that the sale of MMD as a going concern to a third party would have been a commercially advantageous alternative. The compelling case for acquisition by PCC in 2008 took into account the expected synergies with PCC's other port operations, the strategic value of the land for that port and the continuation of income streams from MMD (see also the analysis of Measure 1 in the Opening Decision). However, these considerations would not be taken into account by any third party potentially considering the purchase of MMD. Notwithstanding that, the evidence provided confirms that PCC [...] in 2011[...] ⁽⁹⁾ and [...] in 2015/2016 ⁽¹⁰⁾ (see Recital 57 above);
 - **change/diversification of MMD's business** — the United Kingdom indicated that since 2008 various options of changing or diversifying MMD's operations have been considered (such as aggregates, timber, cars, container traffic, heavy cargos, steel). However, when compared with the prospects of MMD's current business handling of fresh produce, none of these alternative products or services were commercially attractive and would be able to potentially generate higher returns;
 - **liquidation of MMD and alternative use of the site** — the principal asset within MMD is its leasehold interest in the site based on a lease contract which entitles PCC to terminate the lease in case of MMD's bankruptcy. Therefore, in case of bankruptcy, PCC would be able to recover the land and exploit it for alternative purposes. However, the United Kingdom has demonstrated with detailed arguments that the available alternatives for the site are extremely limited. The United Kingdom provided compelling evidence and arguments demonstrating the impact of the legal and planning limitations related to MMD's site on the availability and commercial viability of possible alternative options. PCC analysed in its internal documents the possibilities to use the site for expansion of its ferry port, storage, wind farms ⁽¹¹⁾ and residential/commercial use. However, none of the possible usages considered offered any economically more advantageous options due either to the market situation and/or planning and other regulatory and legal constraints ⁽¹²⁾.
- (78) The United Kingdom explained that PCC cannot provide all past versions of this economic model for individual years since it was developed as a single Excel file which was continuously updated without systematically archiving previous results. However, it confirmed that the economic model was the standard basis for deciding whether it makes economic sense to continue investing in MMD or whether to choose another alternative.
- (79) The United Kingdom provided two versions of the economic model prepared in May/June 2013 when one of the discussions about the future of PCC involvement in MMD was taking place (see also Recital 51 above). The model corresponds to standard market tools based on a calculation of a net present value of expected future cash flows for different alternatives considered. This specific model considered three basic options: (1) retaining MMD, (2) selling MMD as a going concern for its net assets value of GBP 2,4 million, (3) liquidation of MMD and

⁽⁹⁾ See email by [...] of [...].

⁽¹⁰⁾ See PCC internal evaluation document [...] of [...].

⁽¹¹⁾ See a summary report produced by Mosscliff Environmental Consultancy of 30.8.2014 analysing the option of using the MMD site for installation of wind turbines.

⁽¹²⁾ See a comprehensive evaluation of the possible alternatives prepared for the discussion of 'Case for continued investment in MMD' in June and October 2013.

alternative use of the site as a storage facility (as the most beneficial of the available alternative uses of the site). For each of these alternatives the model calculates the net present value of expected cash flows using as a discounting rate the weighted average costs of capital of PCC of 4,23 %.

- (80) The economic model evaluates the individual options based on a combination of methodologies:
- (a) **Contribution to fixed overheads** — this method evaluates the extent to which the cash generated by the site covers its variable costs of operation (in other words the costs that vary as activity varies) and then makes a contribution towards the fixed overheads associated with the site itself. The evaluation describes all of the revenue cash income flows to PCC including any surplus made by MMD (which in this analysis is assumed to be paid as a dividend to PCC) but equally deducts any revenue grant support paid by PCC. Any capital flows of loans and capital grants are excluded since their annualised consumption (amortisation) is reflected in the net surplus/deficit made by MMD;
 - (b) **Total surplus/deficit excluding any costs 'in kind'** — This method incrementally builds on the 'Contribution to fixed overheads' method described at (a) to also include fixed overheads of PCC (Investor) associated with all investments made into the company. Those overheads relate entirely to the financing costs of debt taken out by PCC in order to provide capital investment into MMD;
 - (c) **Return on investment** — This is represented by the total surplus/deficit (described in (b)) as a ratio of the total investment over the period. Since the investment is financed by debt, debt interest is included as part of the total surplus/deficit;
 - (d) **Increase in value at end of the period** — This represents the dividend plus change in the capital value of the asset;
 - (e) **Total return** — This includes both the total surpluses/deficits (as set out at (b)) plus any change in the capital value of the investment (as set out at (d));
 - (f) **Total return on investment** — This represents the total return (see (e)) as a ratio of the total investment.
- (81) The Commission considers that the assumptions made in the economic model are reasonable and confirms that they do not take into account factors other than economic factors, thus ignoring public policy considerations.
- (82) The June 2013 version of the economic model provided the following results of the individual alternative options over two considered investment periods of 5 and 10 years.

Investment in MMD — Options						
Investment Returns	Option 1		Option 2		Option 3	
	Retain MMD		Sell MMD		Alternative Use	
	Next 5 Years mGBP	Next 10 Years mGBP	Next 5 Years mGBP	Next 10 Years mGBP	Next 5 Years mGBP	Next 10 Years mGBP
Contribution/(Addition) to Fixed Overheads	14,3	28,6	11,3	19,7	– 4,4	– 4,3
Total Surplus/Deficit excluding any costs 'in kind'	7,0	16,0	4,5	10,0	– 8,5	– 10,7
Return on Investment	290,6 %	460,5 %	N/A	N/A	– 861,5 %	– 531,8 %
Increase in Value at end of Period (Net Worth)	1,0	2,3	0,0	0,0	0,4	0,9
Total Return — Surplus plus Value	8,0	18,2	4,5	10,0	– 8,1	– 9,8
Total Return on Investment	315,6 %	503,3 %	N/A	N/A	– 800,0 %	– 453,6 %

- (83) The results of the June 2013 economic model show that from all methodologies considered, the option to retain MMD was economically the most beneficial of the available options.
- (84) Despite several requests from the Commission, the United Kingdom was not able to provide additional copies of the economic model for other periods. However, the numerous other available pieces of documentary evidence show that the economic rationality of PCC's involvement in MMD was kept under regular review throughout the analysed period. All the available evidence also confirms that the assessment was based on purely economic and commercial considerations, leaving aside any public policy considerations that a hypothetical market economy investor would not have taken into account.
- (85) In addition, PCC has exercised close financial scrutiny of its investment in MMD by appointing its most senior financial officer as a director of MMD in order to oversee the business' financial performance. The United Kingdom provided copies of numerous reports on the commercial and financial situation of MMD and its outlook for the future which were regularly reviewed by PCC ⁽¹³⁾. MMD's business plan was regularly updated to reflect market developments and there was close engagement by PCC officials in MMD's progress. The United Kingdom also demonstrated that PCC carried out a detailed assessment of MMD's trading position by reference to its financial results, the progress of restructuring measures, customer gains/losses, and management's forecast for the business, both via specialist committees that oversaw MMD, as well as through the financial oversight of the PCC's most senior financial officer. The Commission also considered that the reports and business plan summaries presented to PCC provided an objective and balanced appraisal of the business, including the challenges and risks faced by MMD.
- (86) Further, the Commission found that PCC continued with various restructuring measures in order to reduce costs, boost profitability and enhance the competitiveness of MMD. In fact, PCC was only prepared to approve continued investment on the basis of an ongoing and regularly updated restructuring plan. For example, following three years of difficult negotiations, new labour contracts were signed with MMD's staff in 2016, projected to save around GBP 250 000 in annual labour costs. The restructuring plan also included a number of investment projects aimed at increasing the competitiveness of MMD (namely investment in quality certification, improvements to temperature-controlled storage, new equipment for container handling, installation of additional space for containers and further continual iterative improvements to infrastructure to enhance efficient operation). Further, in 2014, MMD took the decision to cease offering its own service for the onward transport of goods arriving at MMD and rather outsourced this service in order to be able to focus on its core business. In addition, since its acquisition of MMD, PCC has made a number of changes to the management of the business, not only to improve financial accountability, but also to maximise the synergies with PCC's port operations. Finally, MMD has also invested in improving and extending its relationships with key customers.
- (87) The United Kingdom thus demonstrated that the financial performance of MMD was under constant review and led to adaptations to its restructuring plan. This actually led to a return to profitability of MMD without any revenue grant from PCC in the financial year 2016/2017.
- (88) Therefore, as regards the revenue grants (Measure 2) specifically, the United Kingdom provided substantial evidence for the Commission to be able to remove the concerns raised in the Opening Decision. The United Kingdom demonstrated that, even though PCC's continued support to MMD by means of the revenue grants went beyond the initial investment plan, both as regards the amount and the duration, it at all material times constituted an economically rational behaviour that was more advantageous for PCC than all other available options.
- (89) As regards the long-term loan facility provided by PCC to MMD as of 2010 (Measure 3) specifically, the Commission notes primarily that its existence and the related economic effects for PCC were fully taken into account in the overall economic assessment of its continued support of MMD and were factored in the economic model described above.
- (90) In addition, the United Kingdom provided evidence confirming that the financial situation of MMD was assessed prior to the granting of the loan, and that the relevant commercial and financial forecasts provided good prospects for the repayment of the loan in the coming years once the planned restructuring measures are implemented. The United Kingdom also provided a detailed assessment of each individual project supported by the loan, analysing its expected economic benefits and comparing it with other available options. Therefore,

⁽¹³⁾ See e.g. commercial port update reports to PCC of March 2009, June 2009, November 2010, June 2011, October 2012, March 2013, March 2014 or March 2015.

the evidence submitted confirms that before the payment of each tranche of the loan, the economic rationale of the relevant investment was properly analysed. In addition, all the tranches of the loan were used only for capital expenditure and thus in principle increased the value of the business and PCC's investment.

- (91) Furthermore, the United Kingdom argued that the relevant benchmark is not an independent private lender but a private parent company in a similar situation. According to the United Kingdom, it would be economically rational for a parent company to provide a loan to its subsidiary at the parent's costs of borrowing with the aim to finance investments aimed at improving the subsidiary's competitiveness and thus ultimately increasing its value for the parent company.
- (92) The Commission acknowledges that the fact that PCC held (and still holds) 100 % of MMD should be taken into account for the assessment of the loan facility. PCC's economic considerations of the expected profit from the loan are not limited to the expected interest rate payments only, as in the case of commercial banks, but necessarily should take account of the fact that the loan would improve MMD's ability to reach future profits and thus increase the value of PCC's ownership interest. Indeed, the financing under the loan facility is closely connected to the restructuring measures addressing the financial difficulties of MMD and aimed at achieving long-term profitability. Further, the *ex ante* economic model prepared by PCC confirmed that despite a long period of losses incurred by MMD, providing the financing measures including the loan facility was economically the most rational economic behaviour in view of the available alternative options.
- (93) However, even disregarding this argument and considering MMD Shipping on a stand-alone basis, the Commission found that the terms of the loan do not provide any appreciable economic advantage to MMD. The United Kingdom provided no information about the rating of MMD that would permit its creditworthiness on a stand-alone basis to be verified. However, taking account of the fact that the company was recapitalised following its acquisition, became profitable overall and showed reasonably good prospects for future business, its rating would correspond at least to B (weak) rating as set out in the Commission Reference Rate Communication of 2008. Considering a normal level of security (see Recital 93), the corresponding margin would, in line with the Commission Reference Rate Communication of 2008, amount to 400 basis points. With a base rate for the United Kingdom in November 2010 amounting to 1,35 %, the corresponding presumed market interest rate would amount to 5,35 %. The rate set by PCC amounting to 4,81 % is very close to that (rather conservative) presumed market rate and the annual interest payment difference on the total loan would amount only to GBP 37 000 (around EUR 43 000), in any event well below the *de minimis* threshold of EUR 200 000 over any 3 consecutive years.
- (94) In addition, the presumed market rate based on the Commission Reference Rate Communication of 2008 does not take into account the fact that PCC is also in a position of a 100 %-shareholder of MMD (see Recital 91). In view of the overall context of the relationship between PCC and MMD, the Commission considers that a hypothetical market economy parent company would be ready to provide the loan facility under similar conditions.
- (95) Finally, the United Kingdom submitted a complete copy of the loan agreement that comprised the standard provisions of a loan contract, including a floating charge taken by PCC over all of MMD's assets/recoverables providing a security in the event of insolvency. Given that the value of the total net assets as included in the economic model for the financial year 2010/2011 was more than GBP 10 million, the security was substantial.
- (96) Therefore, the United Kingdom provided sufficient additional evidence removing the concerns expressed in the Opening Decision with respect to Measure 3 and demonstrating that the provision of the long-term loan was in line with what a rational private parent company would have done.
- (97) As regards the acquisition of two cranes by PCC and their subsequent long-term lease to MMD in 2010 and 2011 (Measure 4), its assessment is analogous to the long-term loan facility above in view to the similarities of the conditions of financing in both cases.
- (98) In particular, the evidence provided by the United Kingdom indicates that PCC, together with MMD, were indeed looking for the most cost-effective solution to secure the cranes which were necessary for MMD's operations. Even though the business case at the time of the acquisition of MMD envisaged that any replacement of cranes would be done by a lease from a third party, the duly substantiated *ex ante* internal analysis of possible options for the acquisition of cranes prepared by PCC as a basis for its decision-making process shows that a purchase of the

cranes by PCC with a subsequent lease to MMD would be more economically advantageous. In addition, the lease agreements included standard contractual terms and legal safeguards for both parties corresponding to common lease contracts concluded between commercial companies. The amount of the lease is calculated so as to ensure repayment of PCC's investment over the 15 years lifetime of the cranes including its average costs of borrowing, which may be considered as a common commercial practice for such intra-group arrangements. It is indeed economically rational for parent companies with 100 %-owned subsidiaries to use the economically most efficient arrangement (from the point of view of the whole group) for the acquisition of equipment necessary for its subsidiary's activities. The cranes were leased to MMD for a period of 7 years. In view of their expected 15 year lifetime, the internal reports stressed that PCC could after the end of the lease either lease again the cranes to MMD or to sell them on the secondary market. The report indicates that there is a strong second-hand market for such cranes enabling the sale of the cranes by PCC in case the situation changes.

- (99) Therefore, the United Kingdom provided sufficient evidence indicating that a rational private parent company would have accepted to finance the acquisition of the cranes under the conditions agreed between PCC and MMD.
- (100) Finally, as regards the security for overdraft facility (Measure 5), the concerns expressed in the Opening Decision were again linked to the allegedly problematic character of the revenue grants which has, however, been clarified during the formal proceedings. In addition, the United Kingdom provided internal documents demonstrating that the provision of the various working capital facilities was a commercially rational decision of PCC since it was the most cost effective way how to ensure smooth operations of MMD as its subsidiary. In addition, it was also taken into account in the economic model mentioned above. Further, as regards the replacement of the cash deposit by a guarantee by PCC, an *ex ante* internal document serving as a basis for PCC's decision comes to the conclusion that such guarantee is indeed more economically beneficial for both MMD and PCC than a cash deposit as it would allow PCC to avoid the loss of interest on the cash deposit. The United Kingdom thus demonstrated that it was economically rational for a parent company to provide the working capital facilities ensuring smooth operation of its fully owned subsidiary.

5.1.2. Conclusion on the existence of State aid

- (101) In view of the above, the Commission concludes that Measures 2 to 5 were provided in line with the MEIP and thus did not provide MMD with an undue economic advantage. Measures 2 to 5 thus do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

6. ADDITIONAL OBSERVATIONS

- (102) Since the United Kingdom notified on 29 March 2017 its intention to leave the Union, pursuant to Article 50 of the Treaty on European Union, the Treaties will cease to apply to the United Kingdom from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification, unless the European Council, in agreement with the United Kingdom, decides to extend that period. As a consequence, and without prejudice to any provision of the withdrawal agreement, this decision only applies until the United Kingdom ceases to be a Member State.

7. CONCLUSION

- (103) The Commission finds that the measures provided by the United Kingdom do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union,

HAS ADOPTED THIS DECISION:

Article 1

The measures which the United Kingdom has implemented for MMD do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 9 November 2018.

For the Commission
Margrethe VESTAGER
Member of the Commission
