COMMISSION DECISION (EU) 2019/1246

of 23 November 2018

on alleged State aid SA.35905(2016/C) (ex 2015/NN)(ex 2012/CP) — Belgium Concessionaires active in the Port of Antwerp

(notified under document C(2018) 7690)

(Only the Dutch and French texts are 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 17 December 2012, the Commission received a complaint lodged by Katoen Natie NV ('the Complainant' or 'KN') regarding alleged State aid provided by Belgium to two terminal concessionaires active in the Port of Antwerp, namely: PSA Antwerp NV ('PSA') ([2]) and Antwerp Gateway NV ('AG'). On 4 and 7 January 2013, the Complainant provided the Commission services with additional information concerning the alleged aid.

(2) On 29 January 2013, the complaint was forwarded to Belgium for comments. By letter dated 8 April 2013, Belgium informed the Commission services that, in its view, the measure subject to the complaint did not involve unlawful aid. Belgium provided additional information on 11 July 2013.

(3) By letter dated 12 July 2013, the Commission services subsequently requested further information from Belgium, to which Belgium replied on 2 September 2013. Following the request from the Commission services dated 4 March 2014, Belgium provided additional clarifications on 6 March 2014, 1 and 24 April 2014 as well as on 19 May 2014.

(4) On 11 August 2014, the Commission services sent a preliminary assessment letter to the Complainant stating that *prima facie* the measure subject to the complaint did not constitute State aid. By the same letter the comments of Belgium on the complaint were forwarded to the Complainant.

(5) By letter dated 9 September 2014, the Complainant challenged the Commission services' preliminary assessment and provided informed the Commission about new facts of the case. On 7 January 2015, Belgium provided comments on the new elements provided by the Complainant.

([1]) OJ C 104, 18.3.2016, p. 17.
([2]) Any reference to PSA shall be understood as referring to either PSA Antwerp NV or, as the case may be, to its legal successor PSA DGD.

(6) By letter dated 18 January 2016, the Commission informed Belgium that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU'). Further to the initiation of the procedure, Belgium submitted comments on 15 March 2016. The Commission decision to initiate the procedure ('the opening decision') was published in the *Official Journal of the European Union* ([3]) on 18 March 2016. The Commission called on interested parties to submit their comments.

(7) Between 18 April and 3 May 2016, three interested parties provided the Commission services with comments. On 20 May 2016, the Commission services forwarded the comments of the interested parties to Belgium. Belgium replied to those comments on 15 June 2016.

(8) On 23 June 2016, the Commission services requested further information from Belgium, which was provided on 19 and 29 August 2016.

(9) On 10 October 2016, AG filed a submission with the Commission services.

(10) On 20 October 2016, the Commission services requested additional information from the Belgian authorities, which was provided on 16 December 2016.

(11) On 20 February 2017, the Commission services requested additional information from Belgium, which was provided on 21 March 2017.

(12) In connection with a meeting with the Commission services, which took place on 2 March 2017, the Complainant filed a submission dated 2 March 2017.

(13) On 7 March 2017, the Commission services requested additional information from Belgium, which was provided on 5 and 20 April 2017.

(14) By letters dated 4 August 2017, the Commission services sought information from PSA and AG, which each of them provided on 15 September 2017.

(15) On 13 November 2017, the Commission services requested additional information from Belgium, which was provided on 1, 4 and 14 December 2017.

(16) On 16 July 2018, the Commission services requested additional information from Belgium, which was provided on 18 and 27 July and on 10 August 2018.

2. **BACKGROUND AND DESCRIPTION OF THE MEASURES**

(17) In 2004, following a public tender, the Antwerp Port Authority (Gemeentelijk Havenbedrijf Antwerpen, 'the GHA') concluded concession contracts ([4]) with PSA and AG for a duration of 42 years for the operation of container transhipment services in the port's new Deurganckdok ('DGD') terminal.

(18) The contracts provided for minimum tonnage requirements ('MTRs'), measured in Twenty-foot Equivalent Units ('TEU'), the purpose of which is to prevent concessionaires from keeping idle the areas attributed to them.

([3]) cf. footnote 1.

([4]) The expression 'concession contracts', used in the present decision for reasons of readability, does not prejudge whether or not those contracts are genuine concession contracts within the meaning of Article 5(1) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

MTRs for the DGD were gradually phased in during a start-up phase lasting until 2012 ([5]). As of then, the MTRs were supposed to be fixed. Where the concessionaires fell short of the MTRs provided for they were contractually obliged to pay penalties/compensations to the GHA. The concessions also provided that they could be terminated before the set expiry by the GHA in case of manifest underuse by the concessionaire or in case of insolvency of a concessionaire.

(19) Container traffic in the so-called Hamburg-Le Havre range ([6]) decreased by 15,8 % from 2008 to 2009, and in the five biggest ports (Rotterdam, Antwerp, Hamburg, Bremen and Le Havre) in that range by 16,3 % ([7]). That traffic decline reflected the impact of the global economic contraction observed since 2008 (hereinafter referred to as 'the Crisis') on the Hamburg-Le Havre range. In Antwerp overall container traffic also decreased by 16,3 %. In the DGD, traffic decreased by 38,6 % overall (by 37,7 % for PSA and by 39,9 % for AG). PSA and AG were no longer able to meet their respective MTRs that were still increasing from year to year owing to the phase-in mechanism. Consequently, they were contractually obliged to pay compensations to the GHA, no compensation was however collected in the years 2009 to 2012.

(20) Following an email exchange between the GHA and AG in December 2009, discussions took place with regard to the lowering of the original MTRs. In that context, the GHA initially suggested to lower the original MTRs by the decline rate observed in the Hamburg-Le Havre range in that year (i.e.: 15,8 %) ([8]). Since February 2011 the GHA repeatedly reminded PSA and AG of the unachieved MTRs and asked for their view. PSA and AG pointed in several answers ([9]) to their importance for the development of the port ([10]), hinted at their possible move to other ports ([11]), and to the impact of the Crisis. In addition, both PSA and AG also submitted legal opinions by their counsels, setting out why the penalty clauses were not applicable or non-enforceable ([12]). Those arguments were later used by both PSA and AG in arbitration disputes against the GHA ([13]).

(21) As mentioned in recital 1, on 17 December 2012, KN submitted a complaint to the Commission on the non-enforcement of compensation payments due by PSA and AG for unachieved MTRs. In 1992, the GHA concluded a concession contract with KN. In 1998, MTRs were introduced in the concession contract of KN. KN failed to meet the MTRs in the year 2009. The GHA reduced the contractually due compensation for KN (as it did with regard to other terminal operators in the context of the Crisis), i.e. instead of ca. EUR [180 000-250 000] (*), KN had to pay EUR [7 500-9 000] for the year 2009 (and only for the year 2009).

(22) On 26 March 2013, the GHA decided to readjust the concession agreements with PSA and AG ('2013 GHA Decision'). The 2013 GHA Decision involved the following:

Measure 1 (applicable to PSA and AG) — see charts ([14]) **1 and 2 below:** Measure 1 ([15]) consists in the reduction of the compensation payments due by PSA and AG for failing to fulfil the MTRs with a retroactive effect from 2009 under the '75/125 rule' determined by the GHA. According to that rule, the MTRs were

([5]) In case of PSA MTRs were set at following levels: in 2008 – 1 010 183 TEU, in 2009 – 1 522 103 TEU; in 2010 – 2 034 023 TEU; in 2011 – 2 447 751 TEU; from 2012 until the end of the concession – 2 559 600 TEU. In case of AG MTRs were set at following levels: in 2008 – 665 208 TEU; in 2009 – 1 023 583 TEU; in 2010 – 1 383 208 TEU; in 2011 – 1 595 167 TEU; from 2012 – 1 755 000 TEU.

([6]) The Hamburg Le Havre range comprises the most important maritime ports located at the North Sea shore in continental Europe, in particular Rotterdam, Antwerp, Hamburg, Bremerhaven and Le Havre.

([7]) http://ec.europa.eu/eurostat/statistics-explained/images/a/a7/Top_20_container_ports_in_2015_-_on_the_basis_of_volume_of_containers_handled_in_%281000_TEUs%29.png

([8]) See e.g. email of GHA to AG of 14 January 2011, referring to a letter of 3 December 2010. Note that in the concession contracts it was stipulated that in case of reduction of transhipment capacity during the concession, not attributable to the concessionaire, the volumes to be achieved should also be reduced on a pro rata basis.

([9]) 12 January 2012 AG letter to GHA (annex 7.9 to Belgium's submission of 19 August 2016); 17 January 2011 AG letter to GHA (annex 7.5 to Belgium's submission of 19 August 2016); 19 December 2011 PSA letter to GHA (annex 7.44 to Belgium's submission of 19 August 2016); 24 August 2012 PSA letter to GHA (annex 7.50 to Belgium's submission of 19 August 2016); 28 March 2013 PSA letter to GHA (annex 7.55 to Belgium's submission of 19 August 2016).

([10]) In 2014, the activities of PSA and AG counted for ca. [15-40] % of GHA's total revenue, taking into account all direct and indirect revenues linked to the PSA and AG activities in the Port of Antwerp.

([11]) Cf. footnote 9.

([12]) 15 February 2012 memo by AG's counsels (submission by Belgium of 15 March 2016, Annex 10); 11 February 2013 memo by PSA's external counsels (submission by Belgium of 20 March 2017, Annex 7.2)

([13]) On 20 June 2014, GHA requested arbitration for non-payment of penalties by AG for the non-achievement of the adjusted MTRs and AG challenged the penalties on the grounds of abuse of law and excessive penalty clause (18 April 2016 submission by AG with AG's summary memorandum in the arbitration proceedings).

(*) Confidential information.

([14]) Compiled by the Commission based on data submitted by Belgium.

([15]) See also recitals 49(i) and (81) of the opening decision.

adjusted by adding 125 % of the yearly Hamburg-Le Havre range growth rate to the MTR of the previous year. When there was a traffic decline, 75 % of the yearly Hamburg-Le Havre range decline rate was deducted from the MTRs of the previous year. The rule thus implies that PSA and AG have to perform 25 % better than their peers in the Hamburg-Le Havre range. The reference for establishing the new MTRs for the year 2009 was the traffic realised in 2008 in the DGD. The 'outperformance factor' of 25 % is based on the historic performance of the Port of Antwerp, which, in terms of yearly traffic growth rates, over a longer timespan average was 25 % better than the average of the ports in the Hamburg-Le Havre range. The implementation of Measure 1 led with regard to 2009 alone to MTRs reductions of – 41,7 % (PSA) and – 29,7 % (AG), when compared to the 2009 original MTRs.

(23) On 12 May 2014, the GHA decided the following:

Measure 2 — see chart 2 below: Measure 2 ([16]) consists in maintaining the reduced compensations (in accordance with the 75/125 rule) with regard to AG only.

(24) PSA paid to the GHA the reduced penalties following the MTRs readjustment under the 2013 GHA Decision, but reserved its right to challenge this payment on the grounds that the contractual penalty clause was in violation of public order in that it was purely punitive, and that the enforcement of penalties amounted to an abuse of right by the GHA. On 2 May 2016, PSA asked an arbitration panel to order the GHA to repay PSA the compensations it had paid following the 2013 GHA Decision. The outcome of the proceeding is pending at the time of the adoption.

(25) AG did not pay the reduced penalties and was subsequently summoned by the GHA. The case was referred to an arbitration panel. AG argued, inter alia, that a penalty clause could only apply if the MTRs were not achieved due to circumstances related to AG, but in fact they were not achieved due to the Crisis, and that the enforcement of reduced penalties amounted to an abuse of rights by the GHA. The outcome of the proceeding was, however, that the reduced penalties applied by the GHA were ruled to be reasonable.

(26) On 12 May 2014, the GHA unilaterally amended the concession contracts with PSA and AG. The changes involved the attribution to PSA of an area in the DGD, initially attributed to AG but unused by it. As a result, PSA disposed of an area ca. 20 % larger, and, in turn, AG disposed of an area ca. 30 % smaller, as compared to the initially attributed areas. At the same time, the GHA decided to maintain the 75/125 rule with regard to AG under Measure 2 (see recital 22). With regard to PSA, the GHA decided to apply the 75/125 rule for the last time in 2013. The GHA gradually reinstated the originally contracted MTRs (after a phase-in lasting until 2016) ([17]). In addition, as of 2016, PSA has been subject to additional MTRs applicable to the area attributed to it in 2014.

(27) In 2015, the Brussels Court of First Instance rejected the claim by KN against the GHA that the GHA's adjustment of MTRs towards AG and PSA amounted to State aid ([18]). The court found, inter alia, that by adjusting MTRs the GHA reasonably took into account the Crisis and that it could be assumed that a private creditor would have adopted a similar decision. This judgement of 12 February 2015 was appealed by KN. The appeal is pending before the Brussels Court of Appeal at the time the present decision is adopted.

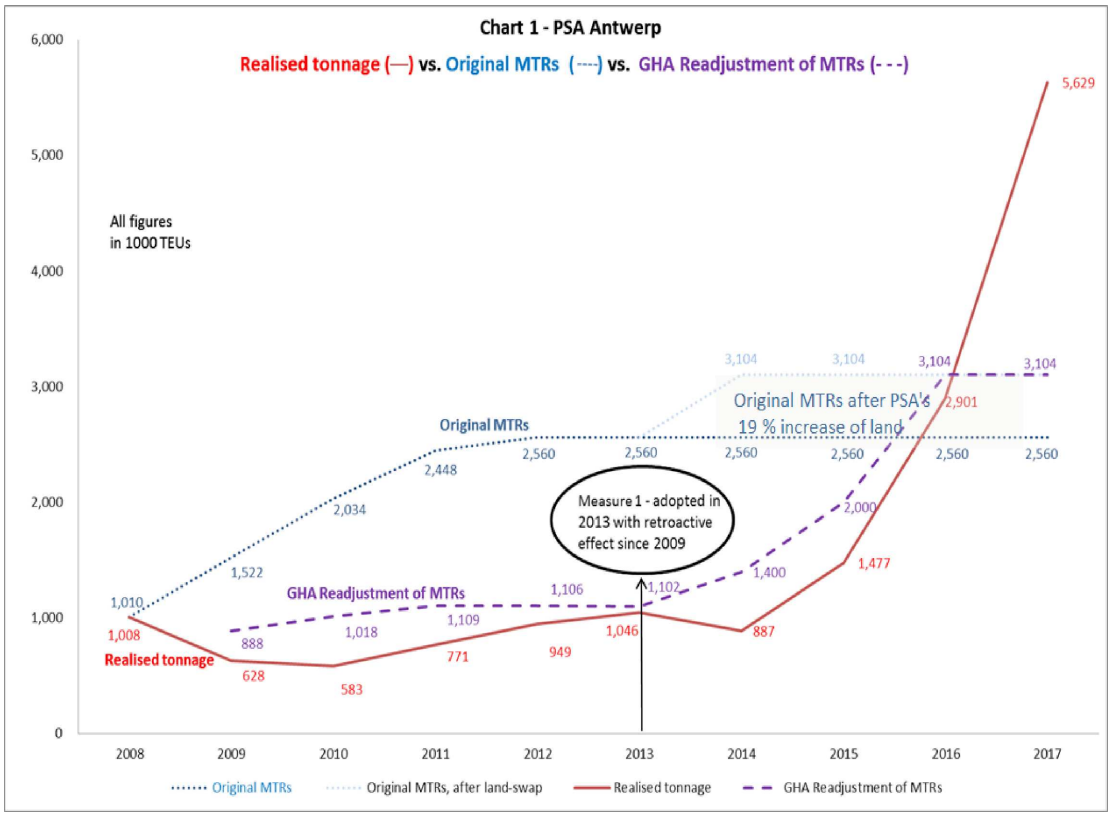
(28) On 15 January 2016, the Commission initiated the formal investigation procedure. It expressed doubts as to whether Measures 1 and 2 constituted State aid.

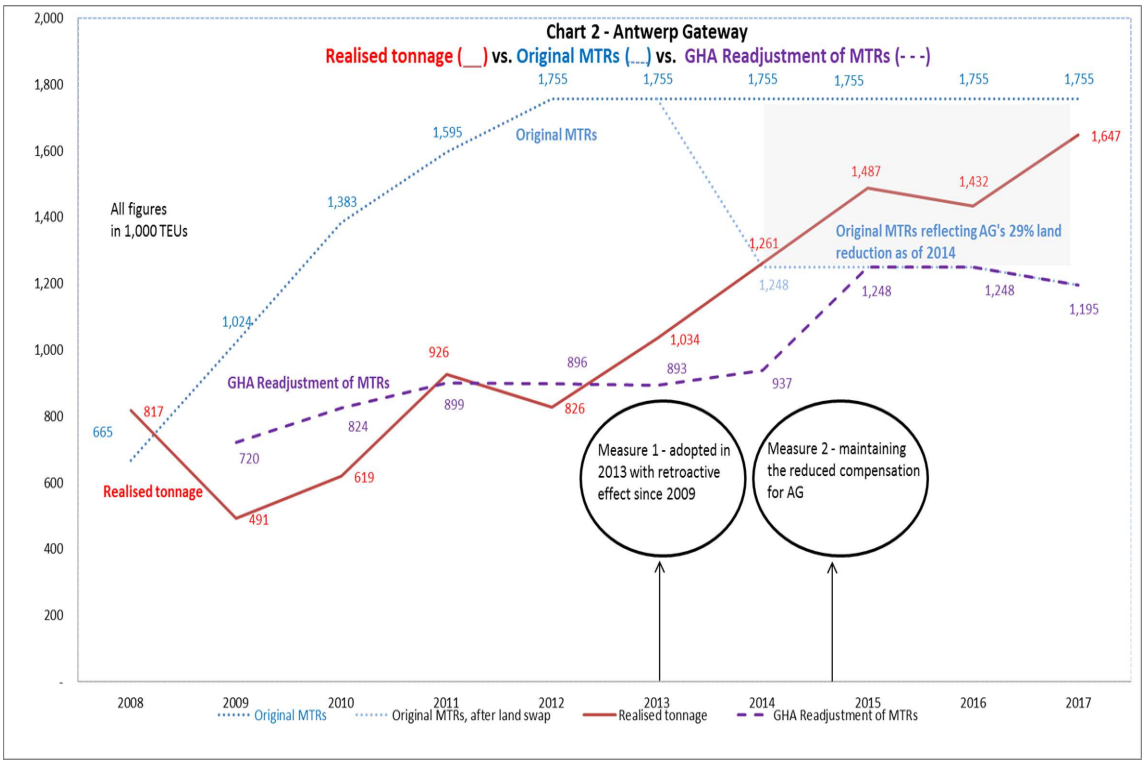
(29) The present Decision describes and assesses Measures 1 and 2, as defined in recital 22 above, and as initially defined in the opening decision, recitals 49(i) and (ii) as well as 81 and 82.

([16]) See also recitals 49(ii) and (82) of the opening decision.

([17]) The phase-in mechanism provided for the following MTRs applicable to PSA: 2014: 1 400 000 TEU, 2015: 2 000 000 TEU, 2016: 2 559 600 TEU, plus 544 526 TEU for the additional area attributed to PSA.

([18]) KN claimed, inter alia, that GHA breached the suspension obligation prescribed by Article 108(3) TFEU and requested the court to prohibit GHA from implementing the 2013 GHA Decision, and to order GHA to invoice and collect the remaining compensation, or, in subsidiary order, to oblige GHA to revoke the decision and to adopt a new decision to collect the compensation due, with damages being imposed on a daily basis in case of non-compliance.





3. THE OPENING DECISION

3.1. Existence of aid

(30) In the opening decision the Commission expressed doubts as to whether or not Measures 1 and 2 constituted State aid within the meaning of Article 107(1) TFEU.

3.1.1. *Measure 1*

(31) First, the Commission raised doubts as to whether a rational private market operator would have waited with a decision concerning the reduction of the due compensations for four years. It was noted that the impact of the Crisis should have been taken into account when assessing the market conformity of Measure 1. It was further noted that only PSA and AG were subject to progressive MTRs, which increased annually over the period 2004-2012, while all other concessionaires in the Port of Antwerp, including the Complainant, were subject to fixed MTRs. Therefore, in the context of the Crisis, the situation of PSA and AG was specific and distinct from other operators active in the Port of Antwerp.

(32) The Commission acknowledged that the unprecedented impact of the Crisis forced undertakings in all sectors of the economy to readjust their behaviour.

(33) In addition to the context of the Crisis, the Commission noted that it was important for the long-term interests of the port to maintain the cooperation with PSA and AG.

(34) In spite of those arguments, it was nevertheless considered that a rational private market operator would have aimed at maximising its profits (or minimising its losses) by launching the recovery of the sums due as soon as possible. Compensations unpaid and accumulated since 2009 were reduced significantly and only dealt with retroactively by the 2013 GHA Decision.

(35) In several meetings taken place since 2009, the Board of Directors discussed issues concerning traffic data as well as the Crisis but not directly the question of sending an invoice for the compensations due by PSA and AG for failure to comply with the MTRs. As indicated in point 5.3 of the 2013 GHA Decision, the issue of the MTRs was subject to ongoing consultations but the invoicing of the compensations due was postponed ([19]).

(36) Second, the Commission raised doubts as to whether a rational private market operator would have granted PSA and AG a similar reduction as the GHA had done. It was noted that even if in 2009 the actual downfall of the traffic in the DGD was – 38,6 % (and not – 16 % as indicated by the Complainant), the reduction of the compensation equalled to ca. – 80 % (albeit over a period of four years) ([20]).

(37) Third, the Commission raised doubts as to whether a rational private market operator would have granted PSA and AG a reduction of the compensation in view of the fact that the negotiation position of the GHA seemed to be quite strong based on the concession contracts. Given that the container terminal operators could not unilaterally terminate their relationship with the GHA, while the GHA could completely or partly revoke the concession in case of the manifest underuse on the DGD, PSA and AG could not credibly threaten to leave the Port of Antwerp in case the MTRs would not have been reduced or the compensation waived.

(38) Fourth, the Commission also noted that the non-enforcement of compensation payments by the GHA might have incentivised PSA and AG to relocate their traffic to ports in which compliance with the MTRs was strictly enforced, in order to avoid being sanctioned in those ports.

(39) Fifth, the Commission raised doubts as to the fact that the 2013 GHA Decision took into account such elements as land-use planning, mobility and long-term employment. In line with settled case-law ([21]), such non-economic aspects of business decisions should be left aside for the purposes of the application of the market economy operator principle.

(40) Sixth, the Commission raised doubts as to whether the GHA was in fact faced with a serious risk of litigation from the side of PSA and AG and with their threats to leave the Port of Antwerp. Letters from PSA and AG explaining their legal viewpoint dated 19 February 2013 and 23 February 2013 were sent to GHA after the complaint in the present case was forwarded to Belgium for comments on 29 January 2013.

([19]) In addition, with reference to PSA, point 4.3 of the Decision of 2013 states that the decision was made to put the invoice on hold for further investigation.

([20]) The reduction of compensation is distinct from the reduction of MTRs. Example: Original MTR = 2 500, adjusted MTR = 1 500, realised traffic = 1 200, penalty per unit = 8. In this hypothetical case the reduction of MTRs would amount to 40 % but the reduction of penalties would amount to 77 %.

([21]) Judgment of the Court of Justice of 5 June 2012, *Commission v Électricité de France (EDF)*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 79 to 81.

3.1.2. *Measure 2*

(41) As regards Measure 2, the Commission noted that the initial MTRs were impossible to achieve due to the Crisis. Because the GHA in its decision of 12 May 2014 stated that it could no longer be maintained that the initial MTRs were impossible to achieve due to the Crisis, the Commission raised doubts as to whether maintaining the reduced amount of compensation in case of failure to comply with the MTRs for AG could be considered market conform.

(42) In particular, maintaining the reduced compensation seemed unnecessary to compensate AG for the temporary loss of part of its concession since AG was in any event not actually using this part of the concession area. As adopted under Measure 2, the reduced MTRs for AG (and subsequently reduced compensations) were meant to remain in force until 2042, i.e. much longer than the 7 years during which part of the concession would be transferred ([22]).

3.2. **Compatibility**

(43) The Commission noted that the measures in question resulted in a mitigation of charges which should normally be borne by PSA and AG and would therefore constitute operating aid. Such aid could not be held compatible with the internal market as it did not facilitate the development of any activities or economic areas. At the stage of the opening decision, the Commission therefore considered that the exceptions laid down in Article 107(2) and (3) TFEU were not applicable.

4. **COMMENTS BY INTERESTED PARTIES**

4.1. **Katoen Natie**

(44) KN agreed with the Commission's preliminary assessment that the measures at issue were imputable to the Belgian State and it added that as the principles of sound administration were applicable to the 2013 GHA Decision, the Board of the GHA must have been aware that it was acting in the public interest as a public law entity.

(45) According to KN, every sensitive Board decision of the GHA (such as the decision on the consequences for not achieving MTRs) was taken with the full support of the governing coalition in the Antwerp City Council.

(46) KN also agreed with the Commission's preliminary assessment that the measures at issue were selective in nature.

(47) According to KN, in the light of the decisions taken by the GHA in 2013 and 2014, the GHA reserved the right to make specific and individual discretionary assessments of any special circumstances applying to the concession at hand and to take any decision that it would consider appropriate. In the 2013 GHA Decision, the GHA set out that its decision was taken further to a 'margin of discretion' available to the GHA. In the view of KN, this proves that the measures were specific to PSA and AG and therefore selective.

(48) KN also agreed with the Commission's preliminary assessment that the measures distorted competition and affected trade between Member States. In this context, KN stressed that due to its inland location and convenient hinterland connections by rail, waterway and road, the Port of Antwerp operated as an international hub and that PSA and AG competed with other terminal operators such as KN, both in the Port of Antwerp and in the Hamburg-Le Havre range.

(49) KN agreed with the Commission's doubts expressed in the opening decision that Measure 1 entailed an economic advantage for both PSA and AG.

(50) KN further asserted that a market economy operator with a negotiation position as strong as the GHA's would have fully charged the compensations due, or would have at least negotiated a significantly smaller and proportionate reduction.

(51) KN pointed out that the concession contracts granted the GHA strong rights in that they entitled the GHA to demand EUR 7,31 per TEU not met and in case of manifest under-use to either impose additional conditions upon the concessionaire in order to increase its performance or to completely or partly revoke the concession.

([22]) GHA abandoned Measure 2 and reinstated the original MTRs on AG as of 2015, duly adjusted for the loss of land that AG incurred. As of 2015, AG has had to meet a yearly MTR of 1 247 630 TEU.

(52) KN also highlighted that the respective concession contracts allowed the GHA to directly debit the due penalty payments.

(53) According to KN, the size of the reduction of the penalty payments in question was disproportionate and therefore unrelated to the Crisis. Whereas the total traffic downfall observed in the port of Antwerp amounted to 15,6 %, and whereas in the DGD, where PSA and AG were active, the downfall was 38,6 %, the reduction amounted to actually 80 %.

(54) As KN further commented, the reduced MTRs for PSA and AG would continue to apply for the future, regardless of the period in which the Crisis would persist. Therefore, Measure 2 maintaining the reduced MTRs beyond 2013 was in KN's view not Crisis-related.

(55) KN also noted that land-use planning, mobility and long-term employment were taken into account by the GHA when taking the contested decisions and that the pursuit of such aims was incompatible with the Market Economy Operator Principle ('MEOP').

(56) KN alleged that the conduct of the GHA in the aftermath of the Crisis was unparalleled by other port authorities in neighbouring and competing ports. The Port of Rotterdam acknowledged according to KN that an exemption of compensation would only have counterproductive effects.

(57) KN considered that Measure 1 was not justified in order to prevent PSA and AG from leaving the Port of Antwerp. According to KN, there were no indications that PSA and AG had plans to make disinvestment decisions due to difficulties with meeting their MTRs. In this context, KN referred to the consolidated turnovers and profits generated between 2013 and 2015 by the groups PSA and AG were part of. The profits constituted multiples of the penalty payments initially payable by PSA and AG for the missed MTRs in the port of Antwerp.

(58) KN also asserted that only the GHA had the right to unilaterally terminate the concession contracts. The termination of the concession contract would not have entailed any negative economic consequences for the GHA, since in light of the termination clause in the contract, the GHA would always be able to seek compensation from the concessionaire for any damage that it experiences as a result of termination for cause on the part of the concessionaire. The additional financial burden as a result of a termination would thus rather lie with the concessionaire than with the GHA.

(59) KN noted that MSC-Maersk was also interested in engaging in a concession with the GHA. Any loss incurred following the termination of the contracts with PSA and AG would have been mitigated by the revenues generated from such new concession-holder. KN further stated that when the concession was initially granted to PSA in 2004, Maersk was also an interested party but the concession was awarded to PSA because it agreed to stronger MTRs.

(60) KN considered any threat of litigation against the concession contracts by PSA and AG not credible, because the compensations for unachieved MTRs were enforceable under Belgian law. Moreover, no hardship doctrine ([23]) was applicable to contracts under Belgian law.

(61) As to Measure 2 with regard to AG, KN agreed with the Commission's preliminary assessment that any potential advantage related to the reduced MTRs would still be ongoing in favour of AG because Measure 2 maintained the reduced MTRs (under the 75/125-rule) for that undertaking.

(62) With regard to PSA, KN asserted that the GHA conferred an unjust advantage on PSA by failing to reinstate PSA's 2004 MTRs immediately rather than gradually, thus at least in part maintaining the lower MTRs. Given that the GHA acknowledged that the Crisis could no longer be invoked as the ground for holding the 2004 MTRs impossible to achieve, there was no objective reason to not immediately raise the MTRs. Nonetheless, the GHA only gradually increased PSA's MTRs between 1 January 2014 and 31 December 2015. This constituted an additional advantage for PSA.

(63) KN also alleged that the aforementioned advantage was further increased in light of the additional area PSA received on 12 May 2014 and for which PSA did not need to comply with any MTRs for the years 2014 and 2015.

([23]) Hardship clause is a clause in a contract that is intended to cover cases in which unforeseen events occur that fundamentally alter the equilibrium of a contract resulting in an excessive burden being placed on one of the parties involved (https://en.wikipedia.org/wiki/Hardship_clause).

(64) KN noted that an operational vessel sharing agreement between Maersk, MSC and CMA CGM ('P3 Network') was supposed to result in an improved economic outlook. As a consequence, the GHA should have taken this into account in readjusting the MTRs for PSA. KN further indicated that even if from 2016 onwards PSA was subject to the original MTRs, increased by additional specific MTRs for the transferred area, there would continue to be an advantage for the joint venture of PSA with MSC replacing the original concession-holder. KN did not quantify this advantage.

(65) With regard to the concession area transferred from AG to PSA, KN asserted that AG's loss of the transferred area did not justify maintaining the reduced compensation with regard to AG because AG was in any case not using the area and that PSA's increased concession size should have resulted in an increase of the 2004 MTRs for PSA.

(66) With regard to any compatibility of the measures at issue with the internal market, KN noted that Article 107(3)(c) of the TFEU refers to 'aid to facilitate the development of certain activities or of certain economic areas'. The word 'facilitate' indicated in view of KN that the aid must give an incentive to the beneficiary to invest into the development of an activity or area. According to KN, the GHA merely incentivised PSA and AG to redirect traffic away from the Port of Antwerp. Compatibility under the said provision could therefore not be present.

(67) Further on the matter of compatibility with the internal market, KN addressed the issues of objective of common interest, necessity and proportionality of the aid, distortion of competition and effect on intra-EU trade. KN further agreed with the Commission's preliminary assessment that the measures constituted operating aid to PSA and AG. KN concluded that they were incompatible with the internal market.

4.1.1. *Additional comments from KN*

(68) On 2 March 2017, KN submitted additional comments regarding alleged State aid to PSA and AG, stating that, the GHA continued to grant State aid at least until 2015. TGHA continued to apply the Crisis reductions and waived any compensation payments that AG and PSA had to pay for its non-compliance with the original MTRs. In 2015, PSA and AG did not meet the contractual MTRs. However, the GHA decided ([24]) to waive the implementation of the contractual obligations of PSA and AG. KN stated that, as a consequence, PSA and AG are still not required to pay any compensation for the material breach of the contractually agreed MTRs obligations.

(69) KN further detailed that AG had been granted a selective advantage amounting to EUR 31 039 997,83 over the period 2009-2015 and PSA had been granted a selective advantage amounting to EUR 61 122 116,16 over the period 2009-2015.

(70) KN stressed that the economic advantage granted to AG and PSA could not be characterised as a Crisis measure but rather constituted a structural benefit.

(71) KN also noted that PSA had refused to pay the compensations and had started proceedings before the Brussels Court of Appeal to recover the compensation payments it had made earlier.

4.2. **PSA Antwerp**

(72) PSA contested that the measures at stake were financed from State resources. With reference to Articles 15(1) and 20 of the Flemish Ports Decree, PSA asserted that the GHA collected to its own benefit port dues 'of whatever nature' and 'to the exclusion of all other authorities', and that the GHA received all income from the exercising of powers relating to the administration of a port and from 'all the other activities' that it undertook. The losses of the GHA were not imputable to the Belgian State and did not incur any additional burden for it. As all income from the exercising of the GHA's powers in relation to port administration was effectively owned by the GHA, and as the State did not bear any costs whatsoever in this regard, any advantage to PSA was not funded through State resources.

(73) PSA further stressed that the control structure over the GHA was independent. The Flemish Ports Decree intended to establish a legal entity distinct from the City of Antwerp that took over all powers relating to port administration from the City of Antwerp (Article 1 of the Articles of Association of the GHA).

([24]) GHA Board decision No 161146 of 17 May 2016.

(74) PSA pointed out that the GHA was able to conclude one or more policy agreements with the City of Antwerp — particularly in relation to port and urban policy (Article 7(2) of the Articles of Association of the GHA) and that therefore the City of Antwerp played no controlling role, but was obliged to negotiate with the GHA in order to arrive at these policy agreements.

(75) PSA further explained that members of the municipal council only account for a majority, but not for the entirety of the Board of Directors. These members came from various parties, with a variety of political opinions, and in total they did not even represent one third of the municipal council of Antwerp in its entirety. In addition, there was never a meeting in which a general viewpoint of the municipal council would be presented to the appointed board members.

(76) In summary, PSA disagreed that the measures at issue were imputable to the Belgian State. According to PSA, there was no indication in the reports of the municipal council that the municipal council played a controlling role in relation to the GHA. On the contrary, the GHA was frequently referred to as an independent party in negotiations and agreements. PSA referred, inter alia, to the recent Court judgment *Commerz Nederland* ([25]), which stated that it must be possible to infer imputability to the State 'from a set of indicators arising from the circumstances of the case and the context in which that measure was taken'. PSA further quoted in this context the research of Professor Eric Van Hooydonk, according to whom decision-making in municipal port authorities was almost exclusively focussed on promoting the interests of the port, and not on wider municipal interests.

(77) PSA further outlined that the port supervisory director was only able to perform an administrative review of legality with regard to the decisions of the GHA (Article 25(c) of the Articles of Association of the GHA). The port supervisory director did not possess the powers to assess the content or the necessity of a measure taken by the port operator. In the case at hand, the regional port supervisory director was not involved in the decision-making by the Board of Directors of the GHA. Because the decision of the GHA did not violate the Flemish Ports Decree the port supervisory director could not even oppose the specific decision at hand. Because there was no actual control by the City of Antwerp or the Flemish Region, the conditions of the Stardust Marine case were not fulfilled.

(78) As to the question whether the measures at stake involved any economic advantage, PSA pointed out that for the sake of applying the market economy operator principle (MEOP) the Courts have recognised that maximising profit did not happen exclusively as a result of recovering actual costs in the short term ([26]). According to PSA, a private creditor would also have let itself be guided by long-term prospects, also because the waived amounts constituted an incentive imposed in order to stimulate the development of the port. Therefore, no loss was involved for the GHA, but only the non-collection of extraordinary income. According to PSA, the established MTRs were based on a 1998 market survey forecasting a continued yearly growth of 10 %, and therefore, in view of PSA, too ambitious from the outset. PSA added that by 2012 the effects of the Crisis had not yet completely disappeared, as in 2012 imports into Europe were still below the level achieved in 2008 ([27]).

(79) PSA stressed that the fees they had to pay for unachieved MTRs at the DGD were higher than the fees charged for other docks in the port of Antwerp (e.g.: EUR [0,30-0,70] per ton for PSA at the DGD v EUR [0,12-0,20] per ton for KN at the Vrasenedock).

(80) PSA further suggested considering that the DGD was still in a start-up phase when the Crisis occurred.

(81) As to the risk that PSA might leave the port of Antwerp, PSA asserted that there were means by which the concession contract could be terminated or dissolved. In that regard, PSA referred to the premature terminations of the concession contracts it held with the Port Authority of […], effective on […]and […]. If PSA had terminated the concession contract with the GHA, the loss in concession fees for the GHA would have amounted to approximately EUR [10-16] million yearly.

([25]) Judgment of the Court of Justice of 17 September 2014, *Commerz Nederland NV v Havenbedrijf Rotterdam NV*, C-242/13, ECLI:EU:C:2014:2224, paragraph 32.

([26]) Judgment of the Court of Justice of 21 March 1991, *Italian Republic v Commission of the European Communities*, C-305/89, ECLI:EU:C:1991:142, paragraph 20. Judgment of the General Court of 11 September 2012, Corsica Ferries France SAS v European Commission., T-565/08, ECLI:EU:T:2012:415, paragraph 83.

([27]) WTO, World merchandise imports by region and selected economy, 2002-2012, https://www.wto.org/english/res_e/statis_e/its2013_e/its13_appendix_e.htm

(82) PSA alleged to be able to terminate the contract by either invoking *force majeure* as the contract proved to be unfeasible following the serious impact of the Crisis on the port activities, or by cancelling the contract because the penalty clause was invalid, or after PSA becoming insolvent, if the originally imposed penalties had been charged in full.

(83) PSA further submitted a simplified calculation of the profits generated by PSA for their activities at the DGD, showing that in 2013 the activities would have been loss-making if the originally due penalties had been charged in full.

(84) PSA further commented the following:

— PSA could have forced the GHA to terminate the concession contract by creating a situation of underuse.

— Persistence by the GHA in the original tonnage requirement could have affected future investments of PSA in Port of Antwerp.

— PSA's departure from the Port of Antwerp would have negative consequences for the GHA since, firstly, the GHA would lose income in concession fees of approximately 12 million EUR yearly, and secondly, the GHA would have had to pay financial compensations for the significant real estate investments PSA had made. In addition, PSA would have abstained from making further investments in the Port of Antwerp.

— Other sources of incomes for the GHA would have been negatively affected in case PSA had left the port, such as port dues, which relate directly to the quantity of traffic attracted by PSA.

— With regard to the future, the GHA would have difficulties in finding a new concessionaire ready to accept the same conditions that were initially agreed with PSA.

(85) As to the question if PSA had shifted traffic to other ports where MTRs were strictly enforced, PSA emphasised that the GHA never waived but only adjusted the MTRs and that the thus adjusted MTRs still require a better performance than the average of the Hamburg-Le Havre range.

(86) As to the size of the reduction, PSA commented that the combination of an inaccurate, future-orientated estimation method on the one hand, and the Crisis on the other, induced the GHA to grant the MTRs reduction in question. PSA further pointed out in this context that the tonnage requirements for the DGD concessionaires were progressive whereas those imposed on the other concessionaires in the Port of Antwerp were linear.

(87) As to elements such as land-use planning, mobility and sustainable employment, PSA commented that the commercial considerations alone would already have been sufficient for a private creditor to arrive at the decision taken by the GHA.

(88) As to the plausibility of a threat by PSA to initiate legal proceedings, PSA referred to the memorandum submitted to the GHA in February 2013. In that memorandum, PSA expressed the view that the penalty clause contained in the concession agreement was unenforceable under Belgian law. Also, PSA urged in that memorandum the GHA to rewrite the penalty clause in view of PSA's total volumes achieved in all terminals in Antwerp ([28]). Moreover, PSA asserted that if the penalties charged between 2009 and 2013 were found unlawful and hence unenforceable under Belgian Law, State aid could not be present because a claim by the GHA in respect of PSA would not exist. PSA added that the question of lawfulness under Belgian Law would be further pursued through the arbitration proceedings initiated in the meantime.

(89) PSA contested that the measures in question were selective in nature, because PSA and AG were in a special situation in comparison with port operators active at docks other than the DGD. The DGD was a dock specifically suitable for receiving and handling deep-sea containers. Other port operators focused on metal and agricultural products and were located on a highly logistics-orientated dock. Consequently, PSA and AG were not competitors of the Complainant in view of PSA. PSA further pointed out the measures were not taken specifically for PSA and AG but that they applied to the concessionaires in the DGD.

([28]) Because PSA performed in other terminals in Antwerp beyond the MTRs applicable in those terminals it proposed to offset the excess MTRs against the unachieved MTRs in DGD.

4.3. **Antwerp Gateway**

(90) AG pointed out that it did not even agree to the reduced penalty payment requested under the 2013 GHA Decision ('Measure 1'). A legal dispute over this issue was pending with the Arbitral Tribunal, after the Court of First Instance in Antwerp had declared itself incompetent to deal with the matter because of the arbitration clause in the Concession contract.

(91) AG questioned the raison d'être in the first place of penalty clauses in concession agreements between port authorities and concessionaires. AG pointed out that the objective of commercial companies (such as AG) is to generate profits. Moreover, AG had made significant investments in the DGD and naturally had a strong incentive to receive remuneration on them.

(92) According to AG, the purpose of the system of penalties was to evaluate the maximisation of the available capacity and to encourage the concessionaire to actively pursue and achieve the maximisation of the available capacity.

(93) AG further invoked that no penalty payments should have been charged for reasons of *force majeure* within the meaning of the Belgian Civil Code. *Force majeure* existed, according to AG, due to the Crisis. Another element the concessionaires could not be held responsible for and that prevented ultra-large container vessels to be handled in the port of Antwerp was the delayed deepening of the Schelde.

(94) AG also deemed penalty charges illegal under Belgian law because they were of a purely punitive nature and therefore did not compensate for any potential loss.

(95) In addition, AG claimed that the amount of compensation was excessive and incommensurate to the potential loss incurred by GHA. The compensation should therefore be reduced to 25 % of the claimed amount in accordance with the applicable rules under Belgian Civil Law.

(96) AG further added that no VAT should be payable on the compensation amount charged by the GHA, because payments that were classifiable as lump sums for potential losses were not liable to VAT.

5. **COMMENTS BY BELGIUM**

5.1. **Comments by Belgium further to the Opening Decision**

(97) Belgium contested that the GHA decisions were imputable to the State. In Belgium's view, the mere composition of the Board of Directors (decided by the 'State') and the existence of a 'Ports Commissioner' (with more limited powers than the Government Commissioner at SNCB), having regard to the autonomy guaranteed by the Ports Decree, were in no way sufficient evidence that the action of the GHA was to be imputed to the Government. Thus, the mere fact that the 2013 GHA decision had been submitted to the Management Board was not sufficient for it to be assumed that the decision was imputable to the State.

(98) Belgium furthermore contested that the GHA conferred economic advantages to PSA and AG when adopting Measures 1 and 2. In this regard, Belgium referred to the case-law in which the market economy operator test was at issue, in particular *HAMSA v Commission* ([29]), *Commission v EDF* ([30]), *Spain v Commission* ([31]) and *DM Transport* ([32]). Belgium stressed that the action by the authority was reasonably consistent with — in other words 'proportionate to' — the position a private creditor might have adopted in similar circumstances.

(99) As a general comment, Belgium submitted that in a judgment on the merits by the Court of First Instance in Brussels on 12 February 2015, it was already acknowledged that no State aid had been provided and that the GHA had acted as an MEO, more precisely as a hypothetical private creditor ([33]).

(100) As to the doubts raised in the opening decision in relation to the significant time gap between the start of the Crisis and the 2013 GHA Decision, Belgium emphasised that possible debt remissions or settlements are often examined for several years before legal action is taken.

([29]) Judgment of the Court of First Instance of 11 July 2002, *Hijos de Andrés Molina, SA (HAMSA) v Commission,* T-152/99, ECLI:EU:T:2002:188, paragraph 170.

([30]) Judgment of the Court of Justice of 5 June 2012, *European Commission v Électricité de France (EDF),* C-124/10 P, ECLI:EU:C:2012:318, paragraphs 78, 79, 86 and 103.

([31]) Judgment of the Court of Justice of 29 April 1999, *Kingdom of Spain v Commission,* C-342/96, ECLI:EU:C:1999:210, paragraph 46.

([32]) Judgment of the Court of Justice of 29 June 1999, *Déménagements-Manutention Transport SA (DMT),* C-256/97, ECLI:EU:C:1999:332, paragraphs 24 and 30.

([33]) The judgment has been appealed by KN, cf. recital 25. The appeal decision is pending.

(101) Belgium further stated that the effects of the Crisis, the exceptional consequences for operators with increasing MTRs and the impact on the port called for a more thorough investigation. The enormous reduction in traffic, with an unprecedented decline of 15,8 % in the Hamburg-Le Havre range and 15,6 % in Antwerp, had lasting and exceptional consequences: in 2012 container transhipment in the Port of Antwerp was still 0,1 % below the 2008 level. Because of the combination of a 15,6 % decline in Antwerp in 2009 and the lasting effect of the Crisis, the GHA undertook a structural review of the issue of MTRs in 2013. Furthermore, the procedure for determining and imputing volume deficits was formalised on a standard basis for all concessionaires with tonnage requirements in the 2013 GHA Decision.

(102) Belgium also questioned whether State aid investigations should concern the efficiency and decisiveness of the government and not, rather, the question whether the financial and economic effect of government action (and its impact on expenditure of State resources) corresponded to the action of a private creditor. Whether a private operator would have come to the same decision more quickly was much less relevant.

(103) As to the doubts raised in the opening decision in relation to the scale of the reduction, Belgium reiterated that only PSA and AG had progressively increasing MTRs, whereas other undertakings were subject to fixed MTRs. Consequently, the repercussions of the Crisis were exponentially greater for PSA and AG than for other concessionaires, and applying the same treatment for PSA/AG as for other undertakings would have implied discrimination.

(104) Belgium pointed out that the MTRs applicable to PSA and AG were correctly complied with in the first three years, despite the substantial increase of approximately 250 % from 298 000 TEU in 2006 to 1 010 183 TEU in 2008 in the case of PSA and from 187 000 TEU in 2006 to 665 208 TEU in 2008 in the case of AG.

(105) Belgium further pointed out that the MTRs applicable to concessions in the DGD differed fundamentally from those imposed on KN, which has held a concession in the Vrasendok, insofar as the MTRs per square metre was approximately [14-19] tons for the DGD concessions, compared with [2-4] tons for KN and the compensation payable for tons missed by the DGD concessionaires was approximately EUR [0,30-0,70] per ton, compared with EUR [0,12-0,20] per ton for KN. If the GHA had charged PSA and AG for the deficits in the period 2009-2012 based on the compensation per missing ton applicable to KN (i.e. EUR [0,12-0,20] per ton instead of EUR [0,30-0,70] per ton) -and based on the original MTRs applicable to PSA and AG-, the amount charged to PSA would have been approximately EUR [10-15] million instead of the EUR [8-10] million actually charged, the amount charged to AG would have been approximately EUR [4-7] million instead of the actually charged approximately EUR [2-5] million.

(106) Other concessionaires in the port achieved in 2012 tonnages in the range of the pre-Crisis level and had no difficulty in fulfilling the applicable MTRs.

(107) According to the original MTRs, PSA and AG had to achieve an additional increase of 70 %, whilst overall traffic in the port of Antwerp declined by 15,6 % in 2009 and in 2012 was still slightly below the 2008 level. The exponential impact of the 2009 decline was more severe for PSA and AG. Furthermore, it was not sufficient for PSA and AG that the volumes of traffic, both for the port of Antwerp and for themselves, were gradually restored to the pre-Crisis level. Whilst for other operators the return to the pre-Crisis level meant that they no longer had any problems, that situation still imposed heavy MTRs on PSA and AG.

(108) In principle and if volume in the DGD had developed normally in the first few years, the two operators would then actually have achieved their maximum volumes in the normal way. After recovery from the Crisis three or four years later, they would not have had to pay any compensation. Only because the Crisis occurred in the period the new dock was being built and the specific situation in relation to that new dock the problem for PSA and AG was much more serious than for other operators in the port. According to Belgium, there was neither any selectivity (since the position of the DGD operators was not comparable to that of the other operators in the port) nor any advantage.

(109) Moreover, Belgium claimed that the original MTRs were based on a specific expected market pattern supported by a broad consensus on anticipated trends. However, the underlying expectations were subsequently found unrealistic due to circumstances beyond the control of the operators concerned and the GHA. In Rotterdam, the original MTRs were adjusted to the changed economic situation before the Tweede Maasvlakte concessions came into operation. There, no one made any objections to this approach. By analogy, it would be unreasonable to require that the system of substantial increases still imposed on PSA and AG even for subsequent years should continue to apply, at a time when the European economy was facing an unprecedented and unpredicted Crisis.

(110) As to the risk that PSA and AG would, at least partly, leave the port of Antwerp, Belgium pointed out that in determining whether the GHA has acted as a private market investor, account may and must be taken of the long-term interests of the port authority. In that regard, Belgium stated that the absolute value of the concession payments and related payments that PSA and AG generated in the period 2008-2012 was many times larger than the sum of EUR 13,5 million, the compensation AG and PSA owed under the 2013 GHA Decision for not meeting the amended MTRs.

(111) In addition, Belgium referred to other revenue associated with the PSA/AG concessions and in particular to operating revenues of the GHA, regularly exceeding EUR [200-400] million in the period 2012 to 2014. Of this operating revenue, [30-50] % stemmed from concession fees whereas [30-50] % stemmed from harbour dues paid by mooring ships.

(112) Furthermore, Belgium pointed out that in 2014 the direct GHA revenue from management of the concessions held by PSA and AG amounted to around EUR [50-90] million, which is around [15-40] % of the total GHA turnover.

(113) As to the risk that the enforcement of the original MTRs would have led to PSA and AG scaling down their operations in the port of Antwerp, Belgium indicated that PSA and AG already decided in the past to disinvest in other ports. Belgium recalled that the operators concerned ran a worldwide network of terminals and that the performance and cost structures of individual terminals could be compared much more quickly in benchmarking exercises. As Belgium further pointed out, in other ports, steps were taken (for instance reduction of harbour dues) to offset the costs of the Crisis in part and, following the Crisis, spare capacity became available which enabled operations to be shifted. In view of the above factors, the GHA had considered that PSA and AG would not agree to being charged for missing the original MTRs and that there was a real danger that they would move to nearby ports.

(114) As to whether or not the concession agreements could be terminated or amended, Belgium alleged that PSA and AG could have invoked *force majeure* in the light of the Crisis or maintained that the compensation payments for non-compliance with MTRs were prohibited penalty clauses and that they were therefore invalid (this point was raised by both AG and PSA in arbitration proceedings). Moreover, the bankruptcy of a structurally loss-making concessionaire could also have led to the termination of a contract.

(115) Belgium further pointed out that in the Hamburg-Le Havre range the terminal operators competed to attract and retain traffic volumes. In that context, the GHA had to remain competitive and was subject to the buying power of concessionaires.

(116) As Belgium further explained, the GHA had to bear in mind that the concession contracts were drawn up in different economic circumstances, as regards both demand (boom) and capacity (limited capacity in North-West Europe). The consequence of the Crisis was that the ports became operating in a buyers' market. Hence the shipping companies, partly because of their size and the capacity situation, became the dominant party and used their negotiating strength.

(117) As to whether the 2013 GHA Decision specifically prompted PSA and AG to transfer their traffic to other ports where compliance with the tonnage requirements was strictly enforced in order to avoid being sanctioned in those ports, Belgium referred to steps taken by other competing ports to mitigate the effects of the Crisis for port users, for instance by reducing harbour dues. Belgium also cited the example of Hutchinson Whampoa that put its investments in the extension of its own port of Felixstowe on hold and that the operator (DP World) of the London Gateway container port and logistics park also scaled back its investments or put them completely or partly on hold. In this context, Belgium did however not quote any case that concerned reductions in MTRs but asserted that the cited examples pointed to the same underlying idea, which was the reduction in investments or commitments during the Crisis.

(118) Belgium further explained that because only in 2013 the GHA decided how to deal with the MTRs unachieved during 2009 to 2012, there was no incentive for PSA and AG to divert traffic to other ports.

(119) As to aspects such as land-use planning, mobility and long-term employment in the 2013 GHA Decision, Belgium pointed out that considerations of land use planning and long-term employment would reinforce the economic motives in this case. Even in so far as such considerations also played a role, they reinforced the idea that the GHA's action was prompted by the wish to avoid that PSA and AG left the port of Antwerp. In Belgium's view, the mere reference to non-economic aspects could not detract from the finding that the GHA had acted as a private market investor.

(120) As to the risk that PSA and AG took legal action to contest enforcement of the full contractual MTRs, Belgium stressed that a public authority might take account of procedural risks when deciding on its action (e.g. the risk of possibly lengthy debt rescheduling or bankruptcy proceedings) ([34]) and that the State aid rules did not, for instance, automatically preclude a settlement arrangement ([35]). Subsequently, the existence of a possibly legitimate claim was indeed a relevant factor when considering whether the public authority acted as a private creditor ([36]). Therefore, the GHA had to take into account that PSA and AG could contest the full collection of the compensation for the non-achieved MTRs in the national courts or arbitration, and that such full collection could have been refused by the courts or arbitration, inter alia, on the ground that it was an abuse of law by the GHA or an execution of the punitive penalty clause.

(121) Belgium referred to recital 78 of the opening decision, which stated that Belgium, in order to prove an alleged risk of litigation, provided the Commission with letters from PSA and AG explaining their legal standpoint. However, the letters were dated 19 February 2013 and 23 February 2013. They were therefore sent by the alleged beneficiaries to the GHA after the complaint in the present case was forwarded to Belgium for comments on 29 January 2013. Belgium claimed that at the time the complaint was made no decision had yet been taken on the unfulfilled MTRs for the period from 2009 to 2012. As that decision was only taken in the 2013 GHA Decision, PSA and AG could not have taken any legal action before the 2013 GHA Decision and the State aid complaint.

(122) Apart from the doubts raised by the Commission in the opening decision, Belgium observed that even the adjusted MTRs were still substantially higher than the MTRs proposed by PSA and AG in the original market consultation that, following a public tender, led to the award of the concessions in question to PSA and AG. Precisely, the initial tonnage requirements of 16 700 000 tons (= 1 336 000 TEU) were subsequently increased to 53 932 500 tons (= 4 131 600 TEU). The significant increase in the MTRs came about because a reconfiguration of the various concessions on the left and right bank of the DGD also allowed optimisation of transhipment by the operators concerned. In the adjustment, forecasts were based on a peak in the market.

(123) Belgium further alleged that the 2013 GHA Decision was consistent with similar decisions by other port authorities, which, in Belgium's view, was further evidence of its 'market conformity'.

(124) As to Measure 2, Belgium commented that according to the 2013 GHA Decision the adjusted MTRs remained applicable until the end of the concession contract.

(125) Belgium also pointed out that following the agreed land transfer, AG had to meet the applicable MTRs with a concession area ca. 30 % smaller than previously. Although AG was not using the part then transferred to PSA, the MTRs were still growing and AG would have needed the space in the future.

(126) Belgium further asserted that there was no selectivity within the meaning of Article 107(1) TFEU. As Belgium explained, all concessionaires with tonnage requirements were invited annually to explain and account for the volume deficits under the uniform procedure laid down in the 2013 GHA decision. Thus, the GHA had treated them all equally. The Complainant itself could take advantage of that system. According to Belgium, there was a single 'reference system' within the meaning of the Draft Commission Notice of 2014 ([37]), which applied for all concessionaires.

5.2. **Comments by Belgium further to the comments by third parties**

(127) Belgium reiterated the risk that PSA and AG might leave the Port of Antwerp if the compensation payments were enforced. In this context, they pointed to the example of PSA and AG, who in the past had disinvested in Dubai

([34]) Judgment of the Court of Justice of 24 January 2013, *Frucona Košice a.s. v European Commission*, C-73/11 P, ECLI:EU:C:2013:32, paragraph 81; Judgment of the Court of Justice of 21 March 2013, *European Commission v Buczek Automotive sp. z o.o.*, C 405/11 P, ECLI:EU:C:2013:186, paragraph 59 ff.

([35]) For example, Commission Decision of 13 March 2000 concerning State aid measure N 94/98, Germany, Leuna 2000/Elf/Mider, Settlement agreement (OJ C 327, 28.12.2002, p. 10), SG(2000) D/102293, paragraph 19 ff.; Commission Decision 2011/276/EU of 26 May 2010 concerning State aid in the form of a tax settlement agreement implemented by Belgium in favour of Umicore SA (formerly Union Minière SA) (State aid C 76/03 (ex NN 69/03)) (OJ L 122, 11.5.2011, p. 76).

([36]) Decision 2011/276/EU.

([37]) Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, Brussels, 2014, http://ec.European.eu/competition/consultations/2014_state_aid_notion/draft_guidance_nl.pdf para. 126 ff.

and India. Moreover, PSA had prematurely terminated their concession in the port of […]. Therefore, the fear of the GHA that PSA and AG might also terminate the concessions in Antwerp was real and the decisions taken by the GHA to reduce the MTRs, and thus to forego a part of the compensation payments were in line with the MEOP.

(128) Belgium also reiterated that other market participants took similar actions as the GHA did by reducing planned investments or by spreading them over periods longer than initially foreseen. Also, other port authorities had reduced harbour fees and MTRs (although some port authorities did not apply any MTRs in the first place).

(129) Further to the comments submitted by KN, Belgium contested that KN was competing with PSA and AG and referred in this context to decisions by the Raad van State and the Hof van Beroep.

(130) With regard to selectivity, Belgium disagreed with KN's allegation that the GHA Decisions were not taken in the framework of 'a general policy'. Rather, the 2013 GHA Decision provided a general measure that aimed at addressing the consequences of the Crisis and concerned container traffic as well as bulk cargo traffic. According to Belgium, the decision taken for PSA and AG took into account the specific factual situation of these two concessionaires.

(131) With regard to KN's comments further to Measure 2, Belgium noted that KN, in claiming that even higher MTRs should apply to PSA, failed to recognise the broader context of the relationship between the GHA and the concessionaires. Also, KN did not consider that the primary objective of MTRs was to incentivise concessionaires to make use of the potential of a concession as much as possible but not to constitute an autonomous source of income.

5.3. **Belgium's submissions further to the Commission information requests**

5.3.1. *Advantage — Measure 1*

(132) Belgium demonstrated that the GHA had in several cases waived compensation payments from concessionaires, others than PSA and AG, in derogation from the compensation clauses provided in the respective concession agreements where the contractually foreseen MTRs were not met in the years from 2009 to 2012. In several other cases, the GHA collected compensation payments in accordance with the compensation clauses provided in the respective concession agreements from concessionaires that had not met the contractually set MTRs.

(133) The decisions whether to charge or not compensation payments followed a procedure applied by the GHA. For instance, in April 2010, the GHA invited the concession-holders in the Port of Antwerp to explain why they had not met their contractual MTRs in 2009.

(134) In response to the Commission information request dated 23 June 2016 regarding the possible non-fulfilment of MTRs by AG beyond 2014, Belgium clarified that the GHA had decided [38] to wait for the outcome of the Commission formal investigation procedure before taking a decision for the year 2015. Besides, the GHA also wanted to wait for the outcome of the decision of the College of Arbitrators. A postponement of the decision did not imply that AG would be acquitted of any payment for the year 2015. The GHA had explicitly reserved all rights concerning the invoicing of a possible non-fulfilment of the MTRs by AG. The GHA also underlined in that decision that a postponement of the decision regarding the MTRs for the year 2015 could not be interpreted as a waiver of rights by the GHA.

(135) Belgium further informed the Commission that it had reinstated the original MTRs for AG with effect for the year 2015, duly adjusted for the loss of available land following the land transfer.

5.3.2. *Advantage — Measure 2*

(136) As to the question why the GHA did not reinstate the full original MTRs with regard to PSA in 2014 but rather gradually reinstated them with MTRs of 1 400 000 TEU in 2014 and 2 000 000 TEU in 2015, reaching the full level of 2 559 600 TEU only in 2016, Belgium explained the following:

[38] Belgium's submission dated 4 April 2017 referring to GHA Decision No 161146 dated 17 May 2016.

(137) Assuming that in 2014 the economic activity may have already reached the pre-Crisis level, this does not mean that for the DGD operators (AG and PSA), the MTRs could fall back on at their original level. Indeed, while after 3 to 5 years traffic has come back to pre-Crisis level, the MTRs had not stayed at that same level, but had continued to increase. That is specific for DGD as this was the only terminal where during the Crisis, the MTRs were still annually increasing due to the start of the operations at DGD and the fact that it always takes several years to fully equip a new terminal and take on new additional traffic until maximum capacity. Stated differently, while in a normal situation of fixed MTRs, reaching the pre-Crisis level solves the MTRs shortages due to the Crisis, this is not the case for the concessions at DGD. That alone, places the operators at DGD at a far more difficult situation and justifies a much longer period to recover. One can also consider this from a different angle: going back to the original levels would imply that the GHA imposed even more important increases in additional container traffic than what was laid down in the current concession agreements. There are obviously limits to what is reasonably attainable.

5.3.3. *Long-term profit simulations*

(138) Belgium submitted detailed calculations, which show that the amount of penalties waived would be offset by higher revenues in the long-term. The calculations were partly based on *ex ante* evidence but as such were made *ex post*.

6. **ASSESSMENT**

6.1. **Existence of aid**

(139) The Commission has to assess whether the measures covered by this procedure constitute State aid within the meaning of Article 107(1) TFEU.

(140) Under Article 107(1) TFEU, 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.

(141) The qualification of a measure as State aid within the meaning of this provision therefore requires the following conditions to be cumulatively met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an economic advantage on an undertaking; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and must affect trade between Member States.

(142) Consequently, if any of the above criteria is not fulfilled, the measure cannot be qualified as State aid. With regard to the case at hand, the Commission considers it appropriate to assess whether any of the two measures granted an advantage to the alleged beneficiaries.

(143) An advantage, within the meaning of Article 107(1) of the Treaty, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.

(144) In order to determine, for the purpose of Article 107(1) TFEU, whether the reduction of compensations by the GHA granted an economic advantage to PSA and AG, the Commission must establish whether the GHA behaved in a way comparable to that of a private operator in a similar situation. According to the market economy operator principle, a measure carried out by the State does not entail aid where, in similar circumstances, a private investor of a comparable size to that of the bodies concerned in the public sector, operating in normal market conditions in a market economy, could have been prompted to provide to the beneficiary the same measures in question ([39]).

(145) In line with settled case-law ([40]), the Commission acknowledges that the Measures must be analysed in the context of the period during which they were taken. Furthermore, the Commission must, when assessing the measures at issue, examine all the relevant features of the measures and their context ([41]).

([39]) Judgment of the Court of Justice of 11 July 1996, *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 60-61. 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 208.

([40]) Judgment of the Court of Justice of 16 May 2002, *French Republic v Commission (Stardust Marine)*, C-482/99, ECLI:EU:C:2002:294, paragraph 71 ('… *in order to examine whether the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken* …').

([41]) Judgment of the General Court of 27 April 2017, *Germanwings* v *Commission*, T-375/15, ECLI:EU:T:2017:289, paragraph 77, and the case-law cited there.

6.1.1. *Possible advantage granted through Measure 1 — 2013 GHA Decision*

(146) The Commission notes that, as spelt out in the opening decision, the impact of the Crisis should be taken into account when assessing the market conformity of Measure 1. The Commission further notes that at the time the Crisis started, notably in the years 2008 and 2009, only PSA and AG were subject to progressive MTRs, which increased year to year, while all other concessionaires in the Port of Antwerp, including the Complainant, were subject to fixed MTRs (see recital 29). Therefore, in the context of the Crisis, the situation of PSA and AG was specific and distinct from other operators active in the Port of Antwerp.

(147) Moreover, the Commission acknowledges that the unprecedented impact of the Crisis forced undertakings in all sectors of the economy to readjust their behaviour.

(148) Furthermore, in addition to the context of the Crisis, the Commission notes that maintaining the cooperation with PSA and AG was important for the long-term interests of the port.

(149) The Commission also recalls that KN, the Complainant (see recital 21), and other operators in the Port of Antwerp (see recital 131), were granted MTRs adjustments in their favour in the context of the Crisis.

(150) The Commission therefore considers that, as a matter of principle, it is conceivable that a market economy operator in the position of the GHA would also have readjusted the contractually applicable MTRs in view of the Crisis.

(151) In the opening decision, the Commission nevertheless raised doubts as to whether the GHA acted like a market economy operator when implementing Measure 1.

Time gap between the start of the Crisis and the 2013 GHA Decision

(152) In particular, the Commission considered in the opening decision that a rational private market operator would have aimed at maximising its profits (or minimising its losses) by launching the recovery of the sums due as soon as possible. In the case at hand, there was a significant time gap between the start of the Crisis and the 2013 GHA Decision, which retroactively dealt with the issue of unpaid compensations by reducing them significantly.

(153) Moreover, as indicated in point 6.4 of the 2013 GHA Decision, the issue of the MTRs was the subject of several discussions of the GHA Board of Directors over the years ([42]). Nevertheless, during those meetings, the Board of Directors discussed issues concerning traffic data as well as the Crisis but not directly the question of sending an invoice for the compensations due to PSA and AG for failure to comply with the MTRs. This is directly indicated in point 5.3 of the 2013 GHA Decision, which states that, even if the issue of the MTRs was subject to ongoing consultations, the invoicing of the compensations due was postponed ([43]).

(154) In view of the above, the Commission raised doubts as to whether a rational private market operator would have waited with a decision concerning the reduction of the due compensations for four years, that is from 2009 until 2013.

(155) Addressing these doubts, Belgium submitted correspondence between the GHA and PSA respectively AG, showing that as of December 2009, discussions took place with regard to the lowering of the original MTRs. In that context, the GHA initially suggested to lower the original MTRs by the decline rate observed in the Hamburg-Le Havre range in that year (i.e.: – 15,8 %) ([44]). As of then, the GHA repeatedly reminded PSA and AG of the unachieved MTRs and asked for their position. PSA and AG pointed in several answers to their importance for the development of the port, hinted at their possible move to other ports, and to the impact of the Crisis. In addition, both PSA and AG also submitted legal opinions by their counsels, setting out why the penalty clauses were not applicable or non-enforceable. These arguments were later used by both PSA and AG in arbitration disputes against the GHA.

([42]) The topic was on the agenda of the Board of Directors meetings on 12 May and 1 September 2009, 29 June and 5 October 2010, 1 February, 11 October and 8 November 2011 and 3 July, 4 September, 6 November and 18 November 2012.

([43]) In addition with reference to PSA Antwerp point 4.3 of the Decision of 2013 states that the decision was made to put the invoice on hold for further investigation.

([44]) See e.g. email of GHA to AG of 14 January 2011, referring to a letter of 3 December 2010. Note that the concession contracts foresaw that in case of reduction of transhipment capacity during the concession, not attributable to the concessionaire, the volumes to be achieved should also be reduced on a pro rata basis.

(156) The Commission concludes that in the context of the Crisis and in view of the extensive correspondence exchanged between the GHA on the one hand and PSA and AG on the other hand, one could not accuse the GHA of inaction as regards the non-payment of the penalties. Furthermore, the Commission notes that the situation of PSA and AG seemed particularly delicate because their MTRs were progressive (whereas those of other concessionaires were linear) and the DGD was still in the start-up phase (so its operations could have been affected differently than operations in other terminals). Therefore, the fact that the GHA only took a final decision in 2013 does not constitute in itself an indication that the MEO test is not complied with, as a market economy operator might have taken such a decision at a similar point in time.

Size of the adjustment

(157) As to the reduction of the compensation itself, the Commission expressed doubts as to whether a rational private market operator would have granted PSA and AG a reduction of the size granted by the GHA. In this regard, the opening decision compared a downfall of the traffic in the DGD of – 38,6 % in 2009 against a total reduction of the compensation in the order of ca. – 80 %.

(158) It should be clarified that the 80 % reduction refers not to 2009 alone but to the entire four-year-period from 2009 to 2012. When looking at the year 2009 only, the total weighted average reduction of the MTRs applicable to PSA and AG was – 38,6 %, i.e. equal to the downfall of the traffic in the DGD referred to in recital 157. The total reduction applied was ca. – 80 % because it additionally covered the years 2010 to 2012.

(159) The Commission recalls that it is conceivable that a market economy operator in the position of the GHA would have reduced the MTRs in the context of a crisis and in view of maintaining long-term cooperation, as indicated in recital 150 of the present decision. However, this does not lead to the automatic conclusion that any reduction of MTRs is market-conform. Therefore, the Commission has raised doubts as to the size of the MTRs reductions applied by the GHA, and it must assess whether the size of these reductions mirrors the behaviour of a prudent market operator.

(160) The Complainant has alleged that it would be circular to use the DGD performance as a basis for adjusting the MTRs of PSA and AG. Instead, so the Complainant has argued, the overall traffic downfall in the entire Port (– 16 %) should be used.

(161) From the point of view of the GHA several factors are *a priori* at hand for the sake of adjusting MTRs in the Crisis context. The Commission notes that the GHA applied a combination of two factors. One is the traffic evolution in the Hamburg-Le Havre range and the other one is the downfall in traffic in the DGD.

(162) The first factor is defined as the sum of container traffic volumes of all ports in that range. It lies in the nature of a range comprising several ports that some ports perform better, others worse than the range. Each individual dock in each port also typically performs differently than the port average. As a consequence, comparing the performance of an individual dock to the performance of the whole Hamburg-Le Havre range, which is based on the compilation of a relatively big data set, may often lead to inappropriate conclusions. Furthermore, each dock may be affected to a different extent by the Crisis. This speaks in favour of comparing each individual dock against data stemming from a comparable data set.

(163) However, the limit of narrowing the data set should be reached at the point where the latter becomes circular (see in this regard the Complainant's allegation; recital 160). Circularity would result in eliminating the incentive for the concession-holder to achieve certain MTRs because the MTRs would — owing to the circular effect — be retroactively aligned to the Concession-holder's actual performance.

(164) However, the Commission notes that the adjustment applied by the GHA is not circular since it is based on a combination of two factors. One is the Hamburg-Le Havre range and the other is the downfall in traffic in the DGD. The Commission notes that using the Hamburg-Le Havre range as a component of the MTRs adjustment matrix is appropriate as it forms the most likely widest possible data set at hand with regard to operators in the port of Antwerp. In terms of container traffic volume, the Port of Antwerp represents a significant share in the Hamburg-Le Havre range, as it ranks second to the Port of Rotterdam. Moreover, the Hamburg-Le Havre range performance is in any event adjusted to the disadvantage of PSA and AG under the 75/125-rule (see recital 21). In fact, the rule implies that PSA and AG must perform 25 % better than the Hamburg-Le Havre range. As a matter of fact, the 25 % correction factor is also based on real (historic) data as it mirrors the outperformance of the Port of Antwerp when compared to the Hamburg-Le Havre range.

(165) The second factor that formed part of the MTRs adjustment formula was the actual traffic of PSA and AG in the DGD in the year 2008. In that year a 6,3 % year-to-year growth of container traffic was observed in the Port of Antwerp. By contrast, from 2008 to 2009, container traffic fell by an unprecedented – 16,3 %. Under the at that time only year-on-year increasing MTRs applicable in the Port of Antwerp, PSA and AG were each held to meet an MTRs in 2009 significantly higher than in 2008 ([45]), which, when overall container traffic sharply decreased, turned out to be impossible. The Commission holds that it was appropriate to use the realised traffic of each concession-holder in the DGD as the other component of the matrix because otherwise the use of the realised overall port traffic in Antwerp (being the next bigger available example of a narrow range) could have led to inaccurate results. This is so, because the situation in the DGD was very specific since the DGD was still in a start-up phase when the Crisis began.

(166) The Commission further notes that the adjustment applied by the GHA resulted in MTRs that in the period 2009-2012 exceeded the tonnages realised by PSA and AG (with the one exception of AG in 2011, when AG performed slightly better than the readjusted MTRs required). Hence the GHA did not waive the penalties due altogether. Also, it is demonstrated that the MTRs adjustment under Measure 1 was not circular, contrary to the Complainant's allegation. If Measure 1 had been circular, PSA and AG would not have been liable to pay any compensation in the period from 2009 to 2012.

(167) Measure 1 remains therefore in line with the ultimate aim of charging penalties for unachieved MTRs, which is not to transform the penalties into a genuine source of income, a return on investment or a payment for services/goods provided by the GHA, but rather to incentivise the concessionaires to perform as well as possible under the given circumstances.

(168) The Commission therefore concludes that the methodology used by the GHA for adjusting the MTRs appears to be reasonable.

Possible relocation of traffic to other ports

(169) Regarding the doubt expressed in the opening decision and the corresponding allegation by the Complainant that the 2013 GHA Decision would have prompted PSA and AG to relocate their traffic to ports in which compliance with the MTRs was strictly enforced, the Commission notes that PSA and AG, when considering where to handle their traffic in the years from 2009 to 2012, could not yet know how the GHA would decide on the matter of compensations for MTRs not achieved in these years. In fact, the GHA dealt only retroactively with this issue under the 2013 GHA Decision. Moreover, the 2013 GHA Decision, albeit adjusting downwards the original MTRs applicable to PSA and AG, still provided for MTRs beyond the actual performances of PSA and AG in the years from 2009 to 2012 (with the one exception of AG in 2011, when AG performed slightly better than the readjusted MTRs required). Furthermore, although the GHA was engaged in discussions with PSA and AG with regard to the lowering of the original MTRs (see in this regards recital 20), the content of this communication shows that the GHA never intended to reduce MTRs to the effect that compensation for the unachieved MTRs would be waived in full. Therefore, the Commission concludes that the 2013 GHA Decision provided no incentive for PSA and AG to relocate traffic to other ports in which compliance with the MTRs was strictly enforced.

Land-use planning, mobility and long-term employment

(170) In the opening decision, the Commission noted that compliance of Measure 1 with the MEO test was also put into question by the fact that the 2013 GHA Decision took into account elements such as land-use planning, mobility and long-term employment.

(171) The Commission considers, however, that the GHA, when taking the 2013 GHA Decision, was mainly driven by economic considerations. The GHA considered the overall impact of the Crisis on PSA and AG but also on other terminal operators holding concessions in the Port of Antwerp. Moreover, the GHA considered that it managed a major port (the second biggest in the Hamburg-Le Havre range in terms of container traffic), in strong competition with other ports and in particular with the other ports in the Hamburg-Le Havre range, and the risk that the long-term cooperation with PSA and AG would be compromised if the MTRs were not reduced (see recitals 148 and 159 above).

([45]) Original MTRs: 2008: PSA: 1 010 183 TEU; AG: 665 208 TEU; 2009: PSA: 1 522 103 TEU; AG: 1 023 583 TEU.

(172) Therefore, the Commission concludes that elements such as land-use planning, mobility and long-term employment only played a secondary role in the GHA's considerations when it took the 2013 GHA Decision.

Threats to leave the Port and risk of litigation

(173) In the opening decision the Commission also noted that PSA and AG could not credibly threaten to leave the Port of Antwerp in case the MTRs were not reduced or the compensation was not waived (recital 75 of the opening decision). The container terminal operators could not unilaterally terminate their relationship with the GHA, while the GHA could completely or partly revoke the concession in case of manifest underuse on the terminal.

(174) Moreover, the opening decision further expressed doubts as to whether a serious risk of litigation from PSA and AG existed (recital 78 of the opening decision). PSA and AG had sent letters explaining their legal standpoints to the GHA on 19 February 2013 and 23 February 2013, i.e. after the complaint was forwarded to Belgium for comments on 29 January 2013. In other words, the risk would have been more credible if PSA and AG had sent these letters before the existence of the complaint was known to them.

(175) Because of the contextual links, these issues are jointly assessed in the following recitals.

(176) Having analysed Belgium's submissions following the opening decision and in particular the correspondence between the GHA on the one hand and PSA and AG on the other hand, the Commission holds that there was indeed a serious risk of PSA and AG challenging the enforcement of penalties by the GHA for non-achievement of the original MTRs in litigation or arbitration, as well as a credible risk that such enforcement of penalties by the GHA would be refused by the arbitration panel or by the court under Belgian civil law due to the abuse of law doctrine ([46]) or due to a penalty clause being qualified as punitive ([47]).

(177) Based on the contemporary evidence available, the Commission takes the view that Belgian civil law indeed provides the basis to challenge the enforcement of penalties in full for non-achievement of contractual MTRs if such enforcement amounted to abuse of law or the penalty clause were to be qualified as punitive. That is confirmed by the fact that both AG and PSA used arguments related to abuse of law and punitive penalty clause when communicating with the GHA prior to the 2013 GHA Decision ([48]), including legal memoranda by their respective legal advisors ([49]). While it is not for the Commission to prejudge how effective those claims could be, they proved to be admissible and sufficiently credible, which shows that the risk of litigation could have been perceived by the GHA as real.

(178) In addition (albeit from a retrospective point of view), the seriousness of these arguments by AG and PSA is further confirmed not only by the contents of the […] ([50]), but also by the fact that both AG ([51]) and PSA ([52]) actually challenged even the penalties charged by the GHA on the basis of the adjusted MTRs, claiming, inter alia, the abuse of law by the GHA and that the penalties for non-achievement of adjusted MTRs were punitive and exorbitant.

([46]) Belgian civil law endorses the principle of '*pacta sunt servanda*', but at the same time provides for boundaries and exceptions to this principle. One of such boundaries is that contractual rights are to be executed 'in good faith' pursuant to Article 1134, paragraph 3 of the Belgian Civil Code. i.e. the abuse of law ('*rechtsmisbruik*') is not allowed. Abuse of law may occur where a party exercises his rights in a manner which clearly goes beyond the limits of the normal exercise of that right by a reasonable and prudent person. See Stijns, S., Verbintenissenrecht, die Keure, 2005, Book I, p. 62 et seq., with reference to the case-law of the Hof van Cassatie.

([47]) The purpose of the contractual penalties for the breach of contractual obligations is to compensate the aggrieved party for its losses incurred due to such breach by another party. The penalties are punitive when their purpose is to punish the breaching party for the benefit of the aggrieved party in the absence of damages suffered by the aggrieved party. Punitive penalties run against the public order of the Belgian state and constitute grounds for unenforceability of such penalties.

([48]) E.g. 19 December 2011 PSA letter to GHA (19 August 2016 submission by Belgium, annex 7.44); also 19 February 2013 PSA letter to GHA (15 March 2016 submission by Belgium, Annex 15).

([49]) 15 February 2012 memo by AG's counsels (15 March 2016 submission by Belgium, Annex 10); 11 February 2013 memo by PSA's external counsels (20 March 2017 submission by Belgium, Annex 7.2).

([50]) […] (20 March 2017 submission by Belgium, Annex 7.3).

([51]) On 20 June 2014, GHA requested arbitration for non-payment of penalties by AG for non-achievement of adjusted MTRs and AG challenged the penalties on the grounds of abuse of law and excessive penalty clause (18 April 2016 submission by AG with AG's summary memorandum in the arbitration proceedings).

([52]) PSA initiated arbitration proceedings against GHA on 2 May 2016 and asked the arbitral tribunal to order GHA to repay the PSA the penalties for non-achievement of the adjusted MTRs. See Annex 6 to 2 May 2016 PSA's comments on the Opening decision, as well as Annex 7.1(a) and 7.1(b) of Belgium's 1 December 2017 submission.

(179) Furthermore, the Commission notes that the credibility of arguments used by AG in the arbitration procedure against the GHA is confirmed by the arbitration decision in that case ([53]). The arbitral tribunal took the view that the enforcement of penalties for non-achievement of the adjusted MTRs under the 2013 GHA Decision did not to amount to abuse of law under Belgian Civil Law. In doing so, the arbitral tribunal took account of the fact that the GHA adjusted the MTRs in its 2013 GHA Decision after taking into account the Crisis, the situation in the Hamburg-Le Havre range and the situation of Antwerp in a historic perspective, and that such behaviour was in conformity to what could be expected from the reasonable and prudent port authority.

(180) In addition, contrary to AG, PSA itself has initiated the arbitration proceedings against the GHA claiming the repayment of penalties for non-achievement of adjusted MTRs.

(181) As regards the risk of litigation, and in particular the risk of unsuccessful litigation for the GHA, the Commission concludes that the proceedings actually initiated by PSA and AG show that this risk was real, and that a prudent market operator would have considered such risk when taking business decisions.

Conclusion regarding Measure 1

(182) It results from the preceding considerations that, as a matter of principle, it is conceivable that a market economy operator in the position of the GHA would also have readjusted the contractually applicable MTRs in view of the Crisis. With respect to the reductions granted by the GHA under Measure 1, the Commission found that (i) the time elapsed between the start of the Crisis and the moment when the GHA took its decision does not constitute an indication that the MEO test is not complied with; (ii) the methodology used by the GHA to determine the size of the adjustment of MTRs appears to be reasonable; (iii) the decision by the GHA did not provide an incentive for PSA and AG to relocate traffic to other ports in which compliance with the MTRs was strictly enforced; (iv) elements such as land-use planning, mobility and long-term employment seemed to have played only secondary role; and (v) that if the MTRs were not adjusted, there was a real risk of unsuccessful litigation that a prudent market economy operator would have taken into account.

(183) Taking all these elements into account, the Commission finds, on balance, that Measure 1 must be considered to comply with the MEO test.

(184) As a consequence, the Commission concludes that Measure 1 constitutes no economic advantage, neither in favour of PSA nor of AG. Given that the criteria of Article 107(1) TFEU must be cumulatively for a measure to constitute State aid within the meaning of that Article, the lack of economic advantage not otherwise available at market conditions is sufficient to conclude that the measure complained of does not constitute State aid.

6.1.2. *Possible advantage granted by Measure 2*

(185) The assessment whether the GHA, when adopting Measure 2, acted as an MEO, and whether, as a consequence, Measure 2 did not amount to an advantage within the meaning of Article 107(1) TFEU in favour of AG, requires establishing whether maintaining the 75/125 rule with regard to AG resulted in an advantage that AG would not have obtained in case the original MTRs had been reinstated.

(186) This question has to be assessed in the light of the fact that in 2014 ca. 30 % of AG's concession area was transferred to PSA. When the GHA reinstated the MTRs for AG in 2015, it deducted an amount corresponding to the 30 % concession area loss from the original MTRs to arrive at MTRs of 1 247 630 TEU.

(187) The Commission notes that AG was already performing at a level beyond the reinstated MTRs in 2014. In 2015, AG was again performing beyond that level. The question whether a prudent market economy investor would have reinstated the MTRs for AG already in 2014 or only in 2015 (as the GHA did) is therefore not relevant for establishing whether the GHA granted any advantage in favour of AG. No penalties would have been in any event due by AG to the GHA for 2014 and 2015. Under a re-instatement of the original MTRs (duly adjusted by the loss of ca. 30 % of the concession area) as well as under the continued application of the 75/125-rule (in line with Measure 2) AG would not have been liable to pay the GHA any compensation.

([53]) 16 September 2016 arbitration decision (Annex to 5 October 2016 submission by Belgium).

(188) With regard to the doubt raised in the opening decision that AG's loss of the transferred area did not justify maintaining the reduced compensation with regard to AG because AG was in any case not using the area (recitals 82 and 83 of the opening decision), the Commission refers to above recital 184 and also notes that by 2016 the GHA re-introduced the sum of PSA's and AG's original MTRs, with the only difference that PSA's MTRs were now higher as compared to its original one whereas AG's was correspondingly lower. The Commission holds that applying a grand total MTRs higher than the previous ones, as the Complainant seems to invoke, would not be appropriate since the total concession area available to PSA and AG (taken together) did not become larger as compared to the total area attributed under the original concession agreements.

(189) Therefore, the Commission concludes that Measure 2 did not result in an economic advantage in favour of AG. Given that the criteria of Article 107(1) TFEU must be cumulatively fulfilled for a measure to constitute State aid within the meaning of that Article, the lack of economic advantage not otherwise available at market conditions is sufficient to conclude that the measure complained of does not constitute State aid.

6.1.3. *Other allegations by the Complainant*

(190) With regard to the Complainant's allegation that the advantage granted to PSA until 2012 continued in the period from 2013 to 2016, the Commission refers to recital 85 of the opening decision, which stated that Measure 2 put an end to any possible advantage for PSA insofar as it only gradually, and not immediately, reinstated the original MTRs. Moreover, it is the scope of the present decision to assess Measures 1 and 2, as described in recital 22, and as initially described in recital 49(i) and (ii) of the opening decision. This notwithstanding, the Commission holds that the GHA acted in a market-conform manner when it decided to gradually reinstate the MTRs applicable to PSA. An immediate reinstatement with effect in 2014 (as claimed by the Complainant) would have led to a year-on-year increase (from 2013 to 2014) bigger than foreseen under the original MTRs (see also the comments made by Belgium; recital 153). Therefore, an immediate reinstatement with regard to PSA would have been inconsistent with the previous administrative practice established by the GHA in setting up MTRs contracts applicable to terminal operators active in the Port.

7. **CONCLUSION**

(191) As set out under recitals 180 and 185, Measures 1 and 2 do not constitute State aid within the meaning of Article 107(1) of the TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The measures which Belgium implemented and which consisted, first, in the reduction of contractual minimum tonnage requirements and the subsequent reduction of compensation payments due by two terminal concessionaires in the Port of Antwerp with a retroactive effect from 2009, and, second, in maintaining the reduced minimum tonnage requirements with regard to one of those concessionaires beyond 2013 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 Kingdom of Belgium.

Done at Brussels, 23 November 2018.

For the Commission
Margrethe VESTAGER
Member of the Commission