V

(Ogłoszenia)

POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA EUROPEJSKA

POMOC PAŃSTWA – ZJEDNOCZONE KRÓLESTWO

Pomoc państwa SA.35065 (2012/FC) – Domniemana pomoc dla MMD Shipping Services Ltd.

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej

(Tekst mający znaczenie dla EOG)

(2016/C 452/02)

Pismem z dnia 19 września 2016 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Zjednoczone Królestwo o swojej decyzji w sprawie wszczęcia postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego części wyżej wspomnianych środków pomocy.

Komisja postanowiła nie zgłaszać zastrzeżeń co do pozostałych środków, zgodnie z opisem następującym po niniejszym streszczeniu.

Zainteresowane strony mogą zgłaszać uwagi na temat środka, w odniesieniu do którego Komisja wszczyna postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i następującego po nim pisma. Uwagi należy kierować do Kancelarii ds. Pomocy Państwa w Dyrekcji Generalnej ds. Konkurencji Komisji Europejskiej na następujący adres lub numer faksu:

European Commission
Directorate-General for Competition
State Aid Greffe
B-1049 Brussels
Faks: + 32 2 296 12 42
stateaidgreffe@ec.europa.eu

Otrzymane uwagi zostaną przekazane władzom Zjednoczonego Królestwa. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

Jeden z konkurentów twierdzi, że przedsiębiorstwo MMD Shipping Services Ltd. („MMD") otrzymało pomoc od Portsmouth City Council (Rada Miasta Portsmouth, „PCC"). MMD jest od 2008 r. własnością PCC i świadczy usługi w zakresie obsługi ładunków (sztauowanie, składowanie i dystrybucja głównie owoców i innych produktów świeżych) na rzecz klientów Portsmouth International Port („Port"), który również należy do PCC i jest przez nią zarządzany.

Skarga dotyczy wymienionych poniżej rzekomo nielegalnych i niezgodnych z rynkiem wewnętrznym środków pomocy udzielonych przez PCC na rzecz MMD:

— nabycie MMD przez PCC w 2008 r. (środek 1),

— coroczne dofinansowywanie dochodów zapewniane przez PCC na rzecz MMD począwszy od roku obrotowego 2008/09 na pokrycie strat handlowych (środek 2),

— długoterminowa pożyczka w łącznej wysokości 6,944 mln GBP udzielona przez PCC na rzecz MMD od 2010 r. (środek 3),

— zakup dwóch dźwigów przez PCC za kwotę 2,1 mln GBP każdy oraz ich długoterminowa dzierżawa na rzecz MMD w 2010 r. i 2011 r. (środek 4),

— udzielenie przez PCC zabezpieczenia dla kredytu w rachunku bieżącym na rzecz MMD (środek 5).

Zjednoczone Królestwo twierdzi, że wymienione środki są zgodne z testem prywatnego inwestora, a zatem nie stanowią pomocy państwa.

Jeśli chodzi o środek 1 (nabycie MMD przez PCC), Komisja jest zdania, że jego podstawą była gruntowna analiza ekonomiczna poparta ocenami niezależnych ekspertów, w których przewidywano rozsądne perspektywy zwrotu z inwestycji dokonanej przez PCC. Komisja stwierdza zatem, że środek ten nie zapewnia MMD żadnej korzyści ekonomicznej, a zatem nie stanowi pomocy państwa.

Natomiast jeśli chodzi o środki 2–5, Komisja jest zdania, że takie późniejsze stałe wsparcie finansowe ze strony PCC było udzielane na rzecz MMD bez odpowiedniej analizy potwierdzającej jego ekonomiczną zasadność. Pomimo niepowodzenia pierwotnego biznesplanu PCC w dalszym ciągu pokrywała straty MMD za pomocą środka 2 przez co najmniej siedem lat bez prób odpowiedniego zaradzenia trudnościom finansowym przedsiębiorstwa ani bez rozważenia innych scenariuszy działania. Oprócz tego PCC zapewniała różnego rodzaju finansowanie na rzecz MDD (środki 3–5) na warunkach, których MMD najprawdopodobniej nie byłoby w stanie uzyskać na rynku ani od hipotetycznej prywatnej spółki dominującej. Z powyższych względów Komisja jest zdania na obecnym etapie, że środki 2–5 zapewniały MMD korzyść ekonomiczną i w związku z tym mogą stanowić pomoc państwa.

Co więcej, Zjednoczone Królestwo nie przedstawiło żadnych podstaw do uznania zgodności z rynkiem wewnętrznym ewentualnej pomocy przekazanej w ramach środków 2–5, więc Komisja ma wątpliwości, czy środki te można uznać za zgodne w oparciu o jakąkolwiek właściwą podstawę prawną. Na obecnym etapie Komisja jest zdania, że wymienione środki nie spełniają warunków przyznania pomocy na ratowanie i restrukturyzację przedsiębiorstwa znajdującego się w trudnej sytuacji zgodnie z obowiązującymi przepisami ([1]).

W świetle powyższego Komisja podjęła decyzję o wszczęciu formalnego postępowania wyjaśniającego w odniesieniu do środków 2–5.

Zgodnie z art. 16 rozporządzenia Rady (UE) 2015/1589 wszelka niezgodna z prawem pomoc może podlegać odzyskaniu od beneficjenta.

([1]) Wytyczne dotyczące pomocy państwa na ratowanie i restrukturyzację przedsiębiorstw niefinansowych znajdujących się w trudnej sytuacji (Dz.U. C 249 z 31.7.2014, s. 1).

TEKST PISMA

The Commission wishes to inform the United Kingdom that, having examined the information supplied by your authorities, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('the Treaty') with respect to four of the measures concerned.

In relation to one remaining measure, the Commission finds that it does not constitute State aid in favour of MMD Shipping Service Ltd.

1. **PROCEDURE**

(1) On 10 April 2013, the Commission received a complaint alleging unlawful aid provided by Portsmouth City Council ('PCC') to MMD Shipping Services Ltd. ('MMD'). Submission of a formal complaint was preceded by an informal submission by the complainant of 8 June 2012 and a meeting of 29 November 2012.

(2) The Commission forwarded the complaint to the UK authorities on 8 May 2013. The UK authorities provided their comments on 1 July 2013. On 10 October 2013, the Commission sent a request for additional detailed information about the measures alleged to which the UK authorities replied on 25 November 2013 and 9 December 2013.

(3) Following a meeting with the complainant of 10 April 2014, the Commission sent on 16 April 2014 to the complainant a non-confidential version of the UK submissions for comments. The complainant provided its comments on 12 November 2014.

2. **BENEFICIARY**

(4) MMD is as of 2008 wholly-owned by PCC and provides cargo-handling services (stevedoring, warehousing and distribution of mainly fruit and other fresh produce) to customers at Portsmouth International Port ('the Port'), also owned and operated by PCC. MMD is the principal cargo handling operator in the Port with a long-term lease for the main cargo handling quays. Other operations of the Port relate to roll-on, roll-off ferry services and cruise ships.

(5) MMD has an annual turnover of around GBP 15 million and employs almost 200 members of staff. Before the acquisition by PCC, MMD had been loss-making at least since the financial year 2002/2003. After acquisition by PCC in 2008, the financial results of MMD were largely balanced only thanks to the annual revenue grants provided by PCC. Without these revenue grants by PCC, MMD would have recorded an operating loss for all the years concerned (see below Table 1).

3. **ALLEGED STATE AID MEASURES**

(6) The complaint raises a number of measures which allegedly constitute illegal and incompatible State aid by PCC to MMD. The alleged aid measures include:

— Measure 1: Acquisition of MMD by PCC in 2008 ('Measure 1');

— Measure 2: Revenue grants provided annually by PCC to MMD ('Measure 2');

— Measure 3: Long-term loan facility provided by PCC to MMD as of 2010 ('Measure 3');

— Measure 4: Acquisition of two cranes by PCC and their subsequent long-term lease to MMD in 2010 and 2011 ('Measure 4');

— Measure: 5: Security for overdraft facility ('Measure 5').

(7) The complaint argues generally that PCC did not act in line with the market economy investor principle (MEIP) by acquiring and financially supporting a loss-making business despite its continued losses between 2008 and today. The complaint estimates that overall support provided by PCC to MMD would as of November 2014 amount to GBP 17,3 million. Without the continued support from PCC, MMD would have not been able to survive on the market. PCC's continued support from the public funds thus according to the complaint provided to MMD a significant economic advantage and allowed MMD to offer discounted cargo handling rates to its existing and potential customers. As a result, the competition in the market for handling and storage of imported fresh produce was distorted.

3.1. **Measure 1: Acquisition of MMD by PCC in 2008**

(8) PCC acquired MMD from a previous private owner for a price of GBP 2,07 million. As part of the initial investment, PCC also funded MMD with additional capital investments of GBP 2,34 million in the form of capital grants and planned to cover the losses of MMD in the first years with total funds of GBP 1,443 million.

(9) The complaint argues that the rationale of PCC for acquiring a chronically loss-making MMD was not in line with the MEIP and based on considerations that a private investor would not have taken into account (effects on employment and the local economy, securing the annual income of PCC from MMD, acquiring the possession of MMD's real estate perceived to have a strategic value to PCC as the owner of the port etc.). The complaint argues that there were significant uncertainties as to its viability without a continued support by PCC, as also highlighted by the independent auditors' report for MMD's accounting period 2007/2008. This is allegedly also confirmed by the fact that once MMD was offered for sale, PCC was the only interested acquirer. The complaint further claims that the expected return on investment was not sufficient, if at all achievable, in view of the various assumptions of the business plan. The complaint also argues that there is no justification why PCC did not choose other options for ensuring cargo-handling business in the port, such as awaiting MMD's liquidation and then acquiring relevant cargo-handling assets from the liquidator.

(10) The complaint argues that PCC's failure to act in line with MEIP is also illustrated by its own process and documentation. It argues that PCC's report to its Executive and City Council dated 26 February 2008 identified the goals of preserving PCC's annual income from MMD of approximately GBP 1,9 million and avoiding detrimental effect on employment and the local economy. However, it allegedly contains no analysis of the likely financial implications for PCC as an investor. Further, PCC's financial commentary accompanying the report concerned principally the likely value of MMD and PCC's options based on various assumptions. However, the projected level of cumulative investment amounting to GBP 5,683 million to be made by PCC over a five year period turned out to be materially inaccurate since the actual amount of PCC's support to MMD in subsequent years was GBP 17,3 million. In addition, the estimated return on investment of [5-10] (*) % p.a. was according to the complaint unacceptably low.

(11) Further, PCC's financial appraisal presented to PCC's councillors before they voted on the proposed acquisition according to the complaint also underestimates the level of investment and projected payback period. Further, it claims that acquisition of MMD '*is not a simple investment decision*' and that the '*biggest risk*' was PCC's potential annual deficit of between GBP 1 million and GBP 1,6 million if the acquisition is not pursued and PCC loses the annual revenue from MMD. According to the complaint, these considerations are again immaterial to a private investor.

(12) Finally, the complaint claims that the principal purpose of the report dated 21 February 2008 from Meridian Corporate Finance was to consider the price payable by PCC for MMD rather than expressing opinion on MMD's business plan. Even though it concludes that future profits of MMD would lead to a return on investment of around [5-10] %, this is based on PCC's own assumptions and presuming that '*PCC manage to turn around MMD*'. However, it did not provide any adequate verification of the investment decision and/or the business opportunity.

(13) The complaint thus argues that PCC failed to consider adequately the commercial factors which a private investor would have addressed before deciding whether to make such investment. In particular, no private investor would have contemplated acquiring MMD on the basis of the disclosed return on investment.

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

(14) Since the acquisition in 2008, PCC has provided MMD with annual revenue grants in the form of cash transfers recorded as 'other operating income' and thus increasing the operating profits (or reducing operating losses) of MMD. The original investment case envisaged the need to cover MMD's losses only in the first two years and for a total amount limited to GBP 1,443 million (most of which — GBP 1,353 million — to be paid already in year 2008/2009). However, MMD did not manage to return to profitability without the revenue grants and PCC thus continued to provide revenue grants even after the financial year 2009/2010 and the total amount of revenue grants provided till 2015 reached GBP 15,2 million (see table below).

Table 1

Revenue grants provided by PCC to MMD and profits/losses of MMD in case these grants are disregarded in financial years 2008/2009 — 2014/2015

Million GBP	08/09	09/10	10/11	11/12	12/13	13/14	14/15
Revenue grant	2,60	3,30	2,10	1,20	2,16	1,44	2,40

(*) Confidential information

Million GBP	08/09	09/10	10/11	11/12	12/13	13/14	14/15
Operating profit (excl. revenue grants)	- 1,84	- 2,92	- 2,03	- 1,09	- 2,04	- 1,24	- 2,18
Profit for the year (excl. revenue grants)	0,62 [1]	- 2,92	- 2,04	- 1,07	- 2,16	- 1,37	- 2,33

[1] Profit for the year 2008/2009 significantly improved due to exceptional items, in particular reversal of the impairment of fixed assets in the first year of PCC's ownership.

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

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

(16) In 2010, PCC decided to provide to MMD a long-term (up to 20-years) loan facility of GBP 6.944 million. The interest rate for the loan facility amounts to 4,81 %, corresponding to PCC's costs of borrowing plus a small administration fee of 0,25 %. The purpose of the loan facility is to support MMD's capital expenditure. The general terms of the loan facility are set out in a Commercial Loan Agreement between PCC and MMD, while for each draw-down of the loan additional documents are necessary (information on the capital expenditure intended to be covered by the loan, financial appraisal of each draw-down by MMD and PCC, appropriate collateral documents). Between 2010 and 2015, in total almost GBP 3,5 million have been drawn-down by MMD under this facility.

(17) The complaint argues that the loan facility by PCC provided MMD with long-term funding on terms which would not have been available to it from ordinary commercial lenders. It also claims that the loan agreement between PCC and MMD is not only unsigned but in particular lacks provisions which any commercial lender would routinely require (e.g. financial covenants or events of default). Finally, it argues that the financing by PCC enables MMD to invest in new operating infrastructure and assets and thus provides it with a competitive advantage. Therefore, the complaint argues that the long-term loan facility does not correspond to market economy creditor terms and, since all other criteria are also fulfilled, constitutes illegal State aid.

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

(18) In order to support the operations of MMD, PCC decided in 2010 and 2011 to buy two mobile harbour cranes for around GBP 2,1 million each and to lease them to MMD under an operating lease agreement valid for 7 years. The monthly rent of GBP 16 thousand (more than GBP 190 thousand per year) for each crane has been calculated so that the investment made by PCC is repaid over the expected lifetime of the cranes of 15 years while covering also PCC's own cost of capital (in total leading to effective interest rates of [2-7] % and [2-7] %).

(19) Even though the complaint does not contain any specific arguments with respect to this particular measure, the acquisition and lease of cranes belongs among the various financing measures included in the complaint by which PCC supports MMD's investment in new equipment in a manner not consistent with market conditions.

3.5. **Measure: 5: Security for overdraft facility**

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

(21) The deposit and subsequently also the guarantee were required by the bank as to cover MMD's normal commercial transactions and serve as a security for payments that the bank makes on behalf of MMD (such as CHAPS [1]) payments, BACS [2] payments, customs indemnity facility and Corporate Charge cards). The bank is able to call upon the deposit or guarantee in the event that these payments made by the bank are subsequently not honoured by MMD.

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[1] Clearing House Automated Payment System — an automated payment system used to make payments on the same day in the UK.
[2] Bacs Payment Schemes Limited (Bacs), formerly known as Bankers' Automated Clearing Services, is the organisation with responsibility for the schemes behind the clearing and settlement of UK automated payment methods Direct Debit and Bacs Direct Credit, as well as the provision of managed services for third parties.

(22) The complaint includes the security for overdraft facility among the measures representing continued financial support by PCC to MMD giving it an undue economic advantage.

4. COMMENTS OF THE UK AUTHORITIES

(23) The UK authorities argue that all these measures are in line with MEIP since PCC invested in MMD on the basis of a business plan and valuations prepared by independent consultants. Further, they argue that all the financing measures provided to MMD by PCC were in line with market terms. They provided a number of arguments and documents to support their claims.

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

(24) The UK authorities argue that the PCC acquired MMD in line with MEIP and based on a careful analysis of the economic rationale of the transaction based on both internal and external valuations and analysis.

(25) Indeed they note that, in order to make a full assessment of possible consequences, PCC modelled expected financial effects in seven different scenarios for the next 10 years:

(1) MMD business goes into administration and subsequent liquidation and is not acquired by PCC (expected net annual loss to PCC due to the loss of income of GBP 1,855 thousand for the first two financial years and GBP 1,629 thousand as of 2010/11);

(2) PCC taking over the business from administration (expected net annual loss to PCC decreasing from GBP 1,532 thousand in 2008/09 to GBP 702 thousand in 2012/13 and subsequently an average annual loss of GBP 633 thousand for the period from 2013/14 to 2017/18);

(3) PCC taking over the business at its current level (expected net financial impact on PCC negative in 2008/09 (GBP 1,353 thousand) and 2009/10 (GBP 10 thousand) and then positive as of 2010/11 growing gradually from GBP 146 thousand to on average more than GBP 360 thousand per year in the period from 2013/14 to 2017/18);

(4) PCC taking over the business with loss of one important customer (expected net financial impact on PCC negative in 2008/09 (GBP 1,611 thousand), 2009/10 (GBP 26 thousand) and 2010/11 (GBP 113 thousand) and then positive as of 2011/12 growing gradually from GBP 60 thousand to on average more than GBP 330 thousand per year in the period from 2013/14 to 2017/18);

(5) PCC taking over the business at current level and developing income streams through flexible use of the Port (expected net financial impact on PCC negative in 2008/09 (GBP 1,313 thousand) and then positive as of 2009/10 growing gradually from GBP 71 thousand to on average more than GBP 440 thousand per year in the period from 2013/14 to 2017/18);

(6) PCC taking over the business assuming that some of the extra income identified by the current MMD management team is realised (expected net financial impact on PCC negative in 2008/09 (GBP 753 thousand) and then positive as of 2009/10 growing gradually from GBP 1,090 thousand to on average more than GBP 1,460 thousand per year in the period from 2013/14 to 2017/18);

(7) PCC taking over the business on the basis of all extra income predicted by the current MMD management team (expected net financial impact on PCC negative in 2008/09 (GBP 680 thousand) and then positive as of 2009/10 growing gradually from GBP 163 thousand to on average more than GBP 1,430 thousand per year in the period from 2013/14 to 2017/18).

(26) The UK authorities informed the Commission that, having analysed the financial effects for PCC of all these options, scenario (3) was chosen by PCC as the option that was the most economically advantageous to it while at the same time being based on realistic assumptions. The financial forecasts of the various options were based on a business plan prepared by MMD management team. However, for the purpose of the analysis, PCC has revised some of the assumptions of the MMD business plan considered as overly optimistic (e.g. expected high revenue growth considered as not in line with market trends). In addition, a sensitivity analysis of the business plan was carried out by recalculating the business plan assuming the loss of one of the largest customers of MMD. Even under these less favourable conditions, the acquisition of MMD under scenario (3) was still considered as economically most advantageous for PCC.

(27) The business plan for MMD included several measures aimed at turning around the loss-making business. These included cost reductions through a number of measures (staff reductions, reduction of the fleet of hired trucks and trailers, reduction of administration costs by combining staff functions with the Port operations), restructuring of the MMD management staff, improvements to MMD's facilities and IT systems and improvements in the performance of the quay operations and services provided to customers. These improvements were expected to attract new customers to MMD and also allow MMD to expand its business in other services (e.g. customs clearance agency). On this basis, the financial forecasts expected MMD's return to profitability as of 2010 and PCC considered that there was a significant opportunity to restructure the business, reduce costs, target new customers and improve financial performance.

(28) In order to thoroughly analyse the acquisition, PCC also appointed corporate finance advisers Meridian Corporate Finance LLP. The advisor prepared detailed financial forecasts for MMD using the assumptions of PCC and findings from their own historical analysis of the business. The report of the advisor indicates that assuming PCC manages to turn around MMD in line with the business plan, the return on PCC's overall investment (sales price as well as expected additional losses to be covered by PCC) would represent around [5-10] %. The report also evaluated the MMD business on a discounted net asset basis (using a valuation report for the property occupied by MMD prepared for the purpose of the acquisition by an independent property consultancy Lambert Smith Hampton). It concluded that the value of the revaluated assets less current liabilities amounted to more than GBP 5 million, leading to a discounted net value of MMD's assets of more than GBP 3,3 million. Finally, the report confirmed that a commercial price was paid for the business and that a full and commercial process has been entered into in arriving at the sales price.

(29) On this basis, the UK authorities argue that the net value of MMD's assets amounting to more than GBP 5 million thus significantly exceeded the price paid for the company as a whole. The acquisition would thus be valuable to PCC even if MMD were to cease operations in case the turn-around to profitability would not be successful. The UK authorities in this respect claimed that the acquisition and provision of key assets by PCC was on such terms that as a priority creditor, PCC could retain and recover the value of those assets should MMD cease operations.

(30) In addition, the UK authorities claim that the company had a strategic value to the Port going beyond a narrow assessment of the short-term profitability of the core MMD business. In particular, MMD had a leasehold interest over the commercial quays and surrounding land potentially extending to 2038. Acquiring MMD thus allowed PCC to regain the full property interest over those assets, to develop the site and exploit synergies with the adjoining ferry port operations.

(31) Further, acquiring MMD would secure PCC's annual revenue stream from MMD amounting to GBP 1,5-2 million (lease rentals, tonnage dues, pilotage fees). The UK authorities claim that finding alternative providers offering similar cargo-handling service to secure the Port's position as a leading importer of fresh fruit and vegetables was unlikely.

(32) In view of the above, the UK authorities claim that PCC took the decision to acquire MMD and provide short-term support to its business because it believed that even under a more pessimistic scenario, it would derive a stronger commercial benefit from purchasing the business and turning its operations around, rather than to allow it going into administration. The acquisition was thus considered in line with MEIP and not involving any State aid.

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

(33) The UK authorities argue that in similar circumstances a private operator would have funded the business of MMD in the same way, having regard to MMD's trading position, the strategic value of the land (including the return received on the lease of that land) and its synergies with the ferry port, and the future prospects for the business.

(34) They claim that since its acquisition in 2008, MMD has faced a series of challenges which have affected its financial performance. In particular, in April 2008, shortly after the acquisition, a key profitable customer (Huelin Renouf with a contract worth around GBP 1 million) unexpectedly terminated its use of the port and switched to Southampton with six month notice permissible only due to the change of ownership clause in the agreement. This was particularly unexpected as the Port Manager as well as MMD directors had been in discussion with that particular customer before and during the purchase. This led to a significant change to the business plan since, even with some better than expected volumes from other customers, the overall volume handled by MMD in 2009 was 15 % down compared with 2008. In addition, other customers (Fyfes, Seatrade) also moved at least part of their cargo away from MMD in 2011 and 2012. Further, MMD's infrastructure was in a worse condition than originally assessed and thus required more capital investment.

(35) The UK authorities argued that PCC has taken a series of measures since 2008 to restructure the business, reduce costs and place it on a firmer financial footing. They argued that the business is moving to a position of sustainable growth and is well positioned to improve performance and profitability.

(36) Internal documents of PCC indicate that the annual revenue grants covering MMD's trading losses were provided with the aim to ensure its continued operations and thus also the annual revenue stream from MMD to PCC from the land lease, tonnage dues and pilotage fees of around GBP 1.9 million. PCC expected that MMD would become profitable in the near future (within 2-3 years) and considered its support in the form of revenue grants as temporary. These predictions were based on the updates of the financial situation of MMD and of its business plan ([3]).

(37) The UK thus argues that a private investor in PCC's position would have been motivated to provide short-term financial support while reorganising the business and put it on a profitable footing on the long term. According to the UK authorities, the revenue grants were thus provided in line with MEIP and do not constitute State aid.

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

(38) The UK authorities claim that the loan facility of in total GBP 6,944 million was available to PCC on commercial terms. Its aim was to support capital expenditures of MMD outlined in its revised business plan of November 2010. According to the Commercial Loan Agreement between PCC and MMD, the repayment period of each loan drawdown was 18 years and the interest rate amounts to 4,81 %. According to the UK authorities, this interest rate corresponds to PCC's costs of borrowing plus a small administration fee (0,25 %).

(39) Each actual draw down of the loan is conditional upon fulfilment of the following investment criteria:

(a) It meets the statutory definition of capital expenditure (thus increasing the value of the business and therefore PCC's overall investment);

(b) It is properly secured on the total assets of MMD;

(c) It is supported by a robust financial appraisal approved by the MMD Board and PCC's Chief Financial Officer;

(d) The financial appraisal must have proper regard for the return from the investment, the payback period and the impact on the net worth, i.e. value of MMD).

(40) Further, the UK authorities note that even though the Commercial Loan Agreement was by mistake never signed by a representative of PCC, both PCC and MMD have confirmed its validity and PCC has actually advanced sums to MMD under its terms.

(41) In view of the above, the UK authorities claim that the long-term loan facility is provided by PCC to MMD on commercial terms and does not provide any economic advantage. They thus consider that it does not constitute State aid.

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

(42) The UK authorities claim that the purchase and lease of the cranes is in line with what a parent company would do in a similar situation. Two new cranes were necessary in order to secure the continued operation of MMD. The acquisition of the cranes was approved by PCC on the basis of an internal report analysing the financial implications of different options for securing the necessary cranes for MMD. The acquisition by PCC and subsequent lease to MMD was considered overall as economically the most advantageous option as compared to its alternatives (e.g. leasing of the cranes from a third party).

(43) In addition, the terms of the 7-year-lease agreements concluded between PCC and MMD for each crane ensure that the lease payments by MMD repay the investment made by PCC over the 15-years expected lifetime of the cranes while covering also PCC's own cost of capital. These terms thus lead to an effective interest rate of [2-7] % and [2-7] % paid by MMD to PCC for the financing of the two cranes, respectively.

([3]) The UK authorities submitted (i) updated MMD's financial forecasts for financial years 2010/11 — 2012/13 of 2 November 2010 (indicating that despite originally expected return to profitability as of 2009/10, MMD would in fact not be profitable without PCC's support till [year X]), (ii) 3-Year Business Plan of MMD for 2013/14 — 2016/17 of 17 April 2013 (expecting return to profitability without any PCC revenue grants as of financial [year X+2]), and (iii) its revised version of 30 August 2013 (expecting return to profitability without any PCC revenue grants as of financial [year X+3]).

(44) In addition, the internal report of PCC also indicates that there is a strong second-hand market for such cranes enabling the sale of the cranes by PCC without any major loss in case the situation changes and the cranes are no longer necessary.

(45) Therefore, given the underlying analysis of available options and in view of the conditions of the lease contracts covering related PCC's costs, the UK authorities claim that the measure does not provide any economic advantage to MMD and thus does not constitute State aid.

4.5. **Measure: 5: Security for overdraft facility**

(46) The UK authorities claim that even though not mentioned in the report analysing the acquisition of MMD by PCC, the fact that MMD would need to be brought under the umbrella of PCC's banking relationships with Lloyds TSB Bank was implicitly included already in the decision to approve the acquisition. This meant that PCC provided the GBP 1 million security deposit to MMD to be passed on to Lloyds TSB.

(47) Further, as regards the addition of the guarantee by PCC, the internal document serving as a basis for PCC's decision comes to the conclusion that such guarantee is more beneficial than a cash deposit for both MMD and PCC. An extension of the existing security was necessary in view of the increased level of customs duty deposits made by MMD on behalf of various foreign suppliers. MMD offer its customers a service of dealing with the duty on imported goods on an agency basis. MMD received a fee for these services that constitute an important part of its business.

(48) Therefore, the UK authorities consider the security for overdraft facilities provided by PCC to MMD as standard relationship between parent and daughter companies not providing any undue economic advantage to PCC and thus not constituting State aid.

5. **ASSESSMENT**

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

5.1. **Existence of State aid**

(50) In view of the definition of the notion of State aid in Article 107(1) of the Treaty, the constituent elements of State aid are: (i) the existence of an undertaking, (ii) the imputability of the measure to the State and its financing from the State resources, (iii) the granting of an economic advantage, (iv) the selectivity of the measure, and (v) its effect on competition and trade between Member States.

(51) All the measures described above have been selectively granted to MMD that is a commercial company active on the market of port cargo-handling services and thus constitutes an undertaking engaged in economic activities. These measures were granted by PCC, the local authority of the City of Portsmouth. State resources include all resources of the public sector, including resources of intra-state entities such as local authorities ([4]). The measures are thus all imputable to the State and provided from State resources. The measures were granted specifically to MMD only and are thus selective in nature. All the measures are capable to affect competition of MMD with other cargo-handling companies in other ports since customers do switch between different ports and cargo-handling companies (see recital (34) above). Finally, the measures are likely to affect trade between Member States as the cargo-handling companies in ports deal with internationally traded goods.

(52) Therefore, except for the condition that an economic advantage needs to be granted all other conditions for existence of State aid are clearly fulfilled for all the above alleged aid measures. This has not been disputed by the UK authorities.

(53) However, the UK authorities claim that these measures do not provide any economic advantage to MMD since they are in line with a market economy operator principle. According to this principle, economic transactions carried out by public bodies do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions ([5]).

([4]) See Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, OJ C 262, 19.7.2016, p. 1–50, recital 48.
([5]) See Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, OJ C 262, 19.7.2016, p. 1–50, recital 74.

(54) Therefore, in order to establish whether the alleged aid measures constitute State aid, the Commission will in the following analyse the fulfilment of the market economy operator principle for each of the measures.

5.1.1. *Measure 1: Acquisition of MMD by PCC in 2008*

(55) This measure involved the acquisition of MMD by PCC in 2008 for a sales price of GBP 2.07 million, funding of additional capital investment by PCC of GBP 2.34 million in the form of capital grants and additional financing by PCC to cover the losses of MMD in the first years totalling GBP 1.443 million. Therefore, the total investment by PCC involved in acquiring MMD amounted to GBP 5.853 million. The following analysis covers the totality of this investment since all its elements were included in the investment case considered by PCC at the time the acquisition was approved.

(56) The UK authorities submitted substantial evidence demonstrating that before acquiring MMD business, PCC seriously analysed available options and their economic consequences. This evidence demonstrates that PCC took into account all possible options including not acquiring MMD at all or acquiring only its assets from administration.

(57) Contrary to the claims by the complaint, the Commission found no evidence that PCC would have taken into account in its economic analysis of the different options considerations which would not be relevant for a hypothetical private investor in a similar position as PCC. The complaint claims that such considerations include in particular effect on employment and local economy, securing the annual income to PCC from MMD and the strategic value of the real estate occupied by MMD.

(58) The Commission notes that even though the effect on employment and local economy was mentioned several times in the documents for the City Council, there are no indications that this consideration would have been in any way included in the economic analysis of the various options. The decision of PCC to invest was exclusively made on the basis of economic considerations taking into account solely the financial forecasts for MMD and its strategic value for PCC ([6]). Therefore, the fact that the acquisition of MMD was economically the best available option to PCC was not influenced by these public policy considerations. The mere fact that the best option from a purely economic point of view involved also positive effects relevant from a public policy perspective does not invalidate the MEIP analysis.

(59) As regards the two other considerations, the Commission does not agree that they would be irrelevant for a private investor in a situation similar to that of PCC. The annual income to PCC concerns payments for services (fees for pilotage services or fess for the use of the Port in the form of tonnage dues) or payments for the lease of real estate and thus does not relate to PCC's role as public authority but rather to its role as an economic operator (Port operator and landowner) ([7]). Therefore, preserving the annual income would have been a valid consideration for any hypothetical private investor with similar business relationship with the undertaking to be acquired. Similarly, the strategic value of MMD's leasehold interest over the commercial quays and surrounding land again relates to PCC's economic activities in the Port and it would have been equally relevant for any private investor in a similar position. Therefore, the Commission considers that these two considerations can be validly taken into account in an MEIP analysis.

(60) As regards the business plan underlying the financial analysis of the acquisition scenario, the Commission considers that it was based on assumptions that at the time of acquisition could be considered as reasonable and sufficiently conservative. The Commission notes in particular that PCC has refused a number of more ambitious assumptions proposed at that time by MMD's management and revised the business plan accordingly in order to ensure that it represents a sufficiently conservative basis for its assessment. The plan proposed reasonable restructuring measures including appropriate cost-cutting actions (staff reduction of around 20 members of staff out of 200 in total, reduction of the fleet of hired trucks and trailers, reduction of administration costs by combining staff functions with the Port operations), restructuring of the MMD management staff, improvements to MMD's facilities and IT systems and improvements in the performance of the quay operations and services provided to customers.

(61) Further, the business plan was based on rather conservative growth forecasts with expected turnover of GBP 14,4 million for 2008/09 (corresponding largely to the level of turnover in 2007/08) and then an increased turnover of GBP 16,4 million from 2009/10 onwards, without any additional growth in the next 20 years. The expected rise in turnover in 2009/10 was due to expectations that previously lost banana trade would be won back as a result of the restructuring and new investments in MMD's facilities. As this turnover largely corresponded to MMD's previous turnover in 2005/06, it cannot be considered as unduly optimistic. The fact that the actual development of MMD's business in the subsequent years did not correspond to the forecasts is as such irrelevant since a compliance of the public intervention with MEIP needs to be examined on an *ex ante* basis, having regard to the information available at the time the intervention was decided upon ([8]). The Commission notes in particular that

([6]) The document '*Financial Commentary — Proposal to Purchase MMD*' for the Council Meeting of 26 February 2008 (Annex 2 to the UK submission of 25 November 2013) in its conclusions recommends proceeding with the investment '*[g]iven the strength of the financial grounds for the purchase of MMD and strategic opportunities that acquiring MMD could offer*'.

([7]) See in this respect Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, OJ C 262, 19.7.2016, p. 1–50, recital 77.

([8]) See Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, OJ C 262, 19.7.2016, p. 1–50, recital 78.

at the time the decision to acquire MMD was taken by PCC in February 2008, the gravity and extent of the economic crisis in Europe as of 2009 was unknown.

(62) In addition, the validity of the valuation of MMD and its future prospects were reviewed by several external consultant companies. PCC in particular commissioned a full due diligence exercise to provide assurance that the company's balance sheet could be relied upon as a means of establishing its value and to minimise PCC's exposure to risk of future liabilities. The due diligence covered a full asset valuation, a financial review and a legal review. Further, PCC sought the advice of a corporate finance consultancy company Meridian Corporate Finance ('Meridian') which confirmed that the price paid by PCC is a commercial price reached by means of a standard commercial process. Meridian also prepared detailed financial forecasts, which were based not only on PCC's assumptions, as claimed by the complaint, but also on Meridian's own findings from historical analysis of the business ([9]).

(63) This expected return to profitability is not put in doubt by the auditors' report for MMD's accounting period 2007/2008 referred to by the complaint. The auditor only noted that in mid-2008, i.e. shortly after MMD is acquired by PCC in February 2008, the validity of its going concern basis was dependent upon the continued support from the parent company. Indeed, MMD was loss-making and its continued operation at that time required additional support by PCC in the form of the capital and revenue grants approved as part of the investment case. However, the auditor only pointed to an existing situation and did not provide any evaluation of MMD's business plan or its likelihood of returning to profitability by 2010 as expected by PCC. This statement by the auditor thus provides no basis for assessment of the business plan of MMD and the overall PCC's investment case.

(64) Based on the revised and rather conservative business plan, PCC expected MMD to be profitable as of 2010. Having regard to the expected profits, the expected return on investment was calculated as around [5-10] % by the Meridian report. An internal financial commentary of PCC for the council meeting of 26 February 2008 expects an annual rate of return on investment of [5-10] % by the year 2012/13 (after having financed all borrowing costs associated with acquisition and capital investment) and a payback period of 34 years. The complaint argues that such return on investment and payback period would not have been accepted by any private investor, however without providing any relevant benchmark. The Commission considers, however, that even though the return on investment is not very high, it assures a respectable reward for PCC's investment while fully covering its costs of borrowing. In view of MMD's cost of borrowing ([2-7] % according to recital 38) and cost of capital (max. [2-7] % according to recital 43), leading to WACC of around [2-7] %, accepting an expected return on investment of [5-10] % is not unjustified.

(65) In addition, PCC when approving the transaction took into account, apart from the simple return on its investment, also further considerations that would indeed be relevant for any private investor in a similar situation and which further increased the attractiveness of the investment case for PCC.

(66) These considerations include in particular the fact that MMD fitted well with the existing businesses of PCC as the Port operator and landowner. In addition, the long-term leasehold of MMD over the commercial quays and surrounding land was itself of a significant strategic value to the Port. Acquiring MMD thus allowed PCC to regain the full property interest, to develop the site and exploit synergies with other Port operations. While these benefits of the acquisition are not all reflected in a simple return on investment calculations, they are indeed relevant for PCC as an economic operator.

(67) Further, even though these considerations would be valid also for scenario 2 involving acquisition of the MMD business from administration (see recital (25) above), this scenario was considered by PCC in their analysis as involving a very high risk of losing at least one or more of MMD's customers. Given the uncertainty of continued operations of MMD in administration, the fresh produce shippers would be likely to search alternative ports to secure handling for their cargo. Winning back such customers would be rather difficult even once the future of the company was secured. This scenario thus involved significantly worse financial forecasts with no prospect for profitability of MMD over a number of years.

(68) In addition, the valuation of MMD's assets by an external consultant indicated that the net value of the assets acquired by the acquisition of MMD (GBP 5 million) significantly exceeded the price paid by PCC (GBP 2.07 million). This remains to be the case even if the expected covering of future losses of MMD in the amount of GBP 1,443 million is added to the price ([10]). Therefore, even in case the turn-around of MMD is not successful and the business ends up in liquidation, PCC would profit from valuable assets of MMD which may well be used profitably by its other port activities. By securing a position of a priority creditor, PCC would be able to retain and recover the value of those assets.

([9]) See Meridian Corporate Finance report of 26 February 2008, page 3.

([10]) The capital grants by PCC of GBP 2,34 million are not taken into account in the comparison with the net value of the assets at the time of acquisition. Even though the capital grants constitute additional cost for PCC, they at the same time represent additional capital investments in MMD's assets, increasing thus correspondingly the net value of its assets.

(69) Finally, the fact that the acquisition would secure uninterrupted annual revenue stream of GBP 1,5-2 million from MMD to PCC from lease rentals, tonnage dues and pilotage fees is also relevant for PCC as an economic operator and investor. Even though the Commission doubts that in case of MMD's liquidation these revenues would be lost forever, it would certainly involve a period of lost revenues before any other operator using the assets and bringing back cargo volume can be found and thus renew the revenue stream to PCC. At the time of acquisition, PCC considered that even though it would be still possible that another company could acquire MMD business or assets from administration, it was considered unlikely since (i) PCC was the sole bidder when the company was put up for sale, (ii) the attractiveness of MMD to another company was reduced because the vast majority of the site is leasehold land owned by PCC, and (iii) any acquirer would need to respect the leasehold constraints and planning constraints of the site which dictate that it can only be used for Port related activities.

(70) The Commission also notes that in view of these additional considerations relevant for PCC's analysis under MEIP, the argument of the complaint that no other investor was interested in acquiring MMD is irrelevant. It is clear that potential 'external' investors in MMD with no interest in the Port activities and no existing business relations with MMD would have not found these additional considerations as relevant and could thus consider the attractiveness of the investment differently. However, the underlying principle of the MEIP is not that a public authority needs to behave in the same way as any potential private investor, but rather as a hypothetical private investor in a similar situation.

(71) Finally, the UK authorities argued that Measure 5 (security for overdraft facility) was implicitly included in the decision to approve the acquisition of MMD. However, apart from this simple statement of the UK authorities, there is no indication that those facilities were indeed taken into account during the analysis of the acquisition. In particular, the documents analysing the costs of acquisition for PCC never included the costs or risks connected to Measure 5. For that reason, Measure 5 is analysed separately. However, as regards the analysis of Measure 1, the Commission considers that even a hypothetical inclusion of Measure 5 as implemented after the acquisition (i.e. a security cash deposit of GBP 1 million) would not change the MEIP-assessment of Measure 1. The incremental cost attributable to the security would be insignificant, amounting to the opportunity cost of investing GBP 1 million in operating activities, i.e. around GBP [50-100] thousand, assuming MMD's return on investment at around [5-10] %. Further, the risk for PCC at the time of the acquisition that the security would be called upon by the bank was rather minimal in view of the financing to be provided by PCC to MMD as part of the acquisition package and the expected return for profitability within 2 years.

(72) In view of the above and taking an overall view of PCC's investment case, the Commission considers that PCC acted in line MEIP by acquiring MMD for GBP 2,07 million and agreeing to provide additional funding of in total GBP 2,34 million in the form of capital grants and GBP 1,443 million in the form of revenue grants to cover losses in the first years of MMD's restructuring.

(73) The Commission thus concludes that Measure 1 does not provide any economic advantage to MMD and does not constitute State aid.

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

(74) The Commission notes that the revenue grants provided in cash as of the financial year 2008/09 in order to '*cover trading loss*' of MMD are going well beyond the amount planned in the initial business case. At the time of acquisition of MMD, PCC agreed as part of the agreed investment case to cover losses of MMD in the first two years in the amount of GBP 1,443 million (of which GBP 1,353 million already in year 2008/09). This covering of losses was considered as necessary temporary support to MMD enabling its restructuring and return to profitability as of 2010. It was thus taken into account as additional cost to PCC in its analysis of the profitability of the acquisition and it is therefore covered by the Commission analysis in previous section 5.1.1.

(75) However, already after the first financial year 2008/09 it became clear that the initial financial forecasts would not materialise. The revenue grant paid to MMD only in 2008/09 amounted to GBP 2,6 million and thus already in the very first year significantly exceeded the total revenue grants forecasted at the time of the acquisition. This practice that the losses of MMD were every year covered by revenue grants from PCC then continued till present ([11]), for in total seven years so far (see Table 1 above). The total amount of the revenue grants granted in addition to the originally planned amount thus reached GBP 13,757 million.

(76) The Commission cannot accept the claim of the UK authorities that the revenue grants only provided short-term financial support to MMD in order to enable it to reorganise its business and put it on a profitable footing on the long term. Annual operating support by gash grants provided for at least seven years cannot be considered as short-term and temporary.

([11]) Last available annual accounts of MMD concern the financial year 2014/15. As regards the financial year 2015/16, the annual accounts are not yet available. The Commission thus invites the UK authorities to provide financial information of MMD for year 2015/16 and indicate any revenue grants and other support granted to MMD till now.

(77) In addition, the Commission notes that unlike in the case of the acquisition of MMD, there was hardly any analysis of whether such continued support made any economic sense. PCC was regularly informed about the financial situation of MMD and the fact that the return to profitability without a continued cash support by PCC did not materialise ([12]). Each time, PCC seemed to accept without sufficient in-depth analysis the claims of MMD's management that, due to unexpected 'challenges' and 'changed circumstances' (including such standard business events as customers switching from MMD to competitors), the return to profitability of MMD on its own is simply moved forward by a year or two. While at the time of acquisition in 2008 MMD was expected to be profitable as of 2010, the financial update in November 2010 expected return to profitability as of financial [year X], the business plan of 17 April 2013 as of [year X+2] and the revised business plan of August 2013 as of [year X+3].

(78) Apart from the continued promises of profitability within [1-5] years, the internal documents of PCC also argued that the revenue grants ensure the annual revenue stream from MMD to PCC from the land lease, tonnage dues and pilotage fees of around GBP 1,9 million. However, this argument as such is not sufficient to justify continued operating support for 7 years. The revenue grants were in most years significantly higher than this income. In addition, it seems unlikely that in case of MMD's liquidation, the relevant port quays and land leased by PCC would for years stay idle, not generating any income to PCC. Even though PCC considered it unlikely that another acquirer would be found for MMD's business or assets in case of its administration (see recital (69) above), this does not exclude a possibility of finding another acquirer of the assets or lessee of the quays in the longer term. In addition, the documents analysing the initial acquisition claiming among others that in case the turn-around of MMD is not successful, its assets would still be valuable for PCC and could be used for instance for expansion of its own ferry port activities (see in particular recitals (29)-(30) above).

(79) A market economy investor would not have continued to provide revenue grants to a constantly loss-making company, unless it would be more advantageous than a liquidation scenario, which seems to be the most likely counter-factual to the continued support by PCC. However, according to the available evidence PCC did not conduct any such economic analysis comparing the continued revenue grants with such counter-factual. The preliminary investigation has also not brought evidence that such counter-factual would indeed be less advantageous, justifying thus the continued support of MMD. The Commission thus invites the UK authorities to develop such counter-factual demonstrating that the continued operating support to MMD was indeed economically the most advantageous option during the whole period since 2008/09.

(80) In view of the above, the Commission doubts that the revenue grants by PCC to MMD provided as of 2008/09 (excluding the originally planned GBP 1,443 million included in the acquisition plan) were provided in line with MEIP and thus comes to a preliminary conclusion that these revenue grants are likely to constitute State aid.

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

(81) The Commission notes that PCC finances all draw-downs by MMD from the long-term facility by borrowing the same amount from its commercial bank. PCC thus effectively acts as an intermediary allowing MMD to benefit from the loan terms (interest rate, length of the repayment period etc.) comparable to those that PCC is able to obtain on the market. In this respect, the small fee of 0,25 % meant to cover administration costs of PCC does not lead to any material difference in the interest rate of the loans.

(82) However, the UK authorities have not provided any details on the security required for the long-term facility to MMD on the one hand and for the underlying borrowings by PCC on the other hand. Without evidence that the required level of security for both borrowings is comparable, it is not possible to draw any conclusions on the comparability of the terms for MMD with the commercial terms of the PCC borrowing.

(83) In addition, the Commission doubts that MMD can be considered to have the same credit worthiness as PCC and thus that it would be able to obtain loans on such terms without PCC's support. The financial situation of MMD was for years preserved only thanks to the revenue grants by PCC which are likely to constitute illegal State aid. Without the grants by PCC, which are in their total amount already almost as high as one annual turnover of MMD, the company would have been loss-making for a number of years and would thus have constituted an undertaking in difficulty (see in this respect also recital (102) below). In view of such financial situation of MMD, it is thus doubtful that it would be able to obtain long-term loans on similar terms by itself, without the backing by PCC.

(84) These doubts are supported also by the Reference Rate Communication of 2008 ([13]), according to which a proxy for the market rate for an undertaking in difficulty even presuming a normal level of collateral (for which the UK authorities have so far not provided any evidence) would in the relevant years amount at least to 7,5 %. In case of low collateral, the rate would have been more than 11 %. The interest rate of 4,81 % charged by PPC to MMD is thus well below the reference rates according to the Reference Rate Communication.

([12]) Financial updates for MMD were presented to the PCC bodies rather regularly, e.g. on 9 March 2009, in June 2009, on 22 November 2010, in June 2011, on 5 October 2012 and in April and August 2013.

([13]) See Communication of the Commission on the revision of the method for setting the reference and discount rates, OJ L 14, 19.1.2008, p. 6.

(85) In addition, having regard to the financial situation of MMD, it is doubtful that a private creditor, even in a position of a parent company, would have granted such significant long-term financing without adequately addressing the financial difficulties of its subsidiary. As demonstrated in Table 1 above, MMD has without the PCC's revenue grants so far not achieved any positive operating profit which could be used for payment of interests on the loan. This means that MMD's interest payments for the loan draw-downs have so far been effectively financed by PCC's revenue grants to MMD. Such situation continuing for at least seven years would hardly be acceptable for a private lender, even in a position of a parent company.

(86) Finally, the Commission notes that the Commercial Loan Agreement submitted by the UK authorities is relatively general and indeed lacks some standard provisions normally found in such agreements (such as financial covenants or events of default) ([14]). In addition, the UK authorities have not provided any of the documents which are allegedly required for each draw-down from the loan facility (e.g. security for the relevant draw-down, financial appraisal of the relevant investment financed etc. — see recital (39) above). The Commission thus invites the UK authorities to provide the relevant documents and evidence for each draw-down from the long-term loan facility.

(87) In view of the above, the Commission has doubts whether the terms of the long-term loan facility provided by PCC to MMD comply with the market economy operator principle, i.e. whether MMD would be able to obtain such loan facility on similar terms on the market or from a hypothetical private parent company. The Commission thus comes to a preliminary conclusion that the long-term loan facility is likely to constitute State aid.

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

(88) The acquisition of the two cranes by PCC with the sole purpose to lease them to MMD and thus ensure that it has the equipment necessary for its operations is in its economic effect largely similar to the provision of the long-term loan facility analysed above. Also in this case PCC obtains the underlying financing from its commercial bank and then transfers the acquired equipment to MMD for a lease effectively repaying its own costs of the borrowing.

(89) For this reason, the measure raises the same doubts as the long-term loan facility. In view of its chronic losses without PCC's revenue grants, MMD would most likely not be able to secure financing on the market for acquiring the two cranes on similar terms. In addition, the effective interest rates of [2-7] % and [2-7] % are also […] below the reference rates according to the Commission Reference Rate Communication of 2008 amounting to at least 7,5 % in case of normal collateral.

(90) In addition, for the same reasons as in case of the long-term loan facility, it is doubtful that a private operator, even in a position of a parent company, would have provided such significant long-term financing without adequately addressing the financial difficulties of its subsidiary.

(91) Furthermore, given that the UK authorities argued that the acquisition by PCC and subsequent lease to MMD was economically more advantageous compared to a leasing of the cranes from a third party (recital 42), it appears that the lease price for MMD was below market rates.

(92) In view of the above, the Commission has doubts whether the terms of the acquisition of the two cranes by PCC and their subsequent lease to MMD correspond to a market economy operator principle, i.e. whether MMD would be able to obtain such loan facility on similar terms from a private operator or from a hypothetical private parent company. The Commission thus comes to a preliminary conclusion that the measure is likely to constitute State aid.

5.1.5. *Measure 5: Security for overdraft facility*

(93) The UK authorities argue that even though not explicitly stated in the report on the acquisition of MMD in 2008, the fact that MMD would need to be brought under the umbrella of PCC's relations with its bank was implicit in the decision approving the transaction. However, the documents analysing the acquisition of MMD provided by the UK authorities do not seem to take into account the costs of the increased cash deposit by PCC which was necessary in order to extend its bank overdraft facility to MMD. At the same time, it is not evident from the available documents that the investment case would in any way take into account the benefits of the security deposit for MMD. The provision of the security for overdraft facility thus seems to be independent from the investment decision and does not seem to be covered by the approved investment case of 2008.

([14]) The Commission also points to the fact that the Commercial Loan Agreement submitted by the UK authorities as Annex 29 to their submission of 25 November 2013 seems to be incomplete and invites the UK authorities to provide a full version of the document.

(94) However, even accepting the argument that such deposit was implicitly envisaged, there is no evidence that PCC would have later analysed its continued exposure in view of the ongoing losses of MMD. This is clearly demonstrated by the internal document of November 2011 proposing the establishment of the GBP 1 million guarantee supplementing the existing cash deposit and thus further increasing the potential exposure of PCC in case MMD is not able to honour its payments. While it explains why such guarantee is beneficial to MMD and more cost-efficient to PCC than a cash deposit, it does not include any analysis of the risk for PCC that the guarantee is called upon by the bank.

(95) Therefore, despite the continued losses of MMD, PCC simply continued to provide the security for MMD overdraft facility and even increased it in 2009 and 2011. In addition, the UK authorities have not provided any evidence of a fee paid by MMD for the provision of the security by PCC. On the contrary, an internal PCC report of 7 November 2011 proposing to the City Council to approve the additional guarantee of GBP 1 million even explicitly indicates that the agreement to provide this guarantee would be '*on non-commercial terms for the benefit of MMD*'. The report in this connection states that by approving the guarantee on such terms the City Council would not be breaching state aid rules but provides no supporting arguments for this claim.

(96) Therefore, based on the available evidence, the Commission doubts that such security could be acquired by MMD without PCC's support and at the same time it seems unlikely that a private parent company in the same situation would have continued such financial support for free and without adequately addressing the financial difficulties of its subsidiary.

(97) In view of the above, the Commission thus considers at this stage that MMD received an undue economic advantage due to this measure which is not in line with a market economy operator principle. The Commission thus comes to a preliminary conclusion that the measure is likely to constitute State aid.

5.2. **Unlawful aid**

(98) Article 108(3) of the Treaty states that a Member State shall not put an aid measure into effect before the Commission has adopted a decision authorising the measure.

(99) The Commission notes that, if the relevant measures (i.e. Measures 2, 3, 4 and 5) were to constitute State aid, they would have been granted in breach of the notification and stand-still obligations laid down in Article 108(3) TFEU. Thus, the Commission considers at this stage that measures 2, 3, 4 and 5 granted to MMD appear to constitute unlawful State aid.

5.3. **Compatibility**

(100) Inasmuch as the measures under assessment entail State aid within the meaning of Article 107(1) of the Treaty, their compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article.

(101) The UK authorities have provided no compatibility arguments for the alleged aid measures.

(102) The UK authorities claim that MMD was not a company in difficulty since it received shareholder funding on a normal, commercial basis and in line with MEIP. However, in view of the doubts as to the MEIP compliance of the Measures 2-5 above, this argument cannot be accepted. Based on the financial data from the annual reports of MMD, the Commission notes that without the continued public support by PCC, MMD would have constituted an undertaking in difficulty during the whole period as of 2008 ([15]). The company would thus in principle be eligible only for rescue or restructuring aid.

(103) According to recital 137 of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ([16]) ('the Guidelines'), the Commission will examine the compatibility with the internal market of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 108(3) of the Treaty on the basis of these guidelines if some or all of the aid is granted after their publication, i.e. after 31 July 2014. Since in the case at hand the potential aid was granted in breach of Article 108(3) of the Treaty and at least some of the potential aid measure were granted after 31 July 2014 (e.g. the revenue grant for the period 2014/15), the compatibility of such rescue or restructuring aid would need to be established according to the Guidelines.

(104) However, the Commission has doubts that the conditions of the Guidelines would be fulfilled. The UK authorities have not provided any evidence that the aid would be necessary for attaining an objective of common interest.

([15]) According to MMD's annual balance sheets, even taking into account the revenue grants by PCC more than half of MMD's share capital (including share premium) has disappeared as a result of accumulated losses for most of the years under assessment (namely financial years 2007/08, 2008/09, 2011/12, 2012/13, 2013/14 and 2014/15). For the years 2009/10 and 2010/11, the level of MMD's share capital was slightly above the level of 50 % of its original value only thanks to the revenue grants by PCC (and a revaluation reserve added to the reserves for these two financial years).

([16]) OJ C 248, 31.7.2014, p. 1.

(105) Further, as regards possible rescue aid, the measures at hand do not provide a temporary liquidity support in line with the conditions of recital 55 of the Guidelines. In particular, the revenue grants as non-repayable subsidies are not an acceptable form of rescue aid and the duration of all the measures significantly exceeds 6 months.

(106) As far as restructuring aid is concerned, the UK authorities have not submitted any comprehensive restructuring plan underpinning the continued support to MMD (beyond the initial support approved by the 2008 investment case) and ensuring its return to viability within a reasonable period. In addition, there is no evidence of any appropriate own contribution by MMD or of any measures to limit distortion of competition.

(107) Finally, in view of the repetitive character of the various measures continued to be granted over a period of at least seven years, the one-time last-time principle is also not fulfilled.

(108) Therefore, the Commission at this stage has doubts about the compatibility of the Measures 2–5 under the Guidelines and invites the UK authorities to provide comments and evidence in this respect.

6. **CONCLUSION**

(109) The Commission thus concludes, on the one hand, that Measure 1 (Acquisition of MMD by PCC in 2008) does not constitute State aid within the meaning of Article 107(1) of the Treaty.

(110) On the other hand, the Commission has doubts as to the State aid character of the remaining Measures 2–5 as well as of their possible compatibility with the internal market.

7. **DECISION**

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests that the United Kingdom submit its comments and provide all such information as may help to assess the Measures 2–5, within one month of the date of receipt of this letter. It requests that your authorities forward a copy of this letter to the potential recipient of the aid immediately.

Further, with respect to Measure 1 (Acquisition of MMD by PCC in 2008) the Commission concludes that it does not constitute State aid within the meaning of Article 107(1) of the Treaty.

The Commission wishes to remind the United Kingdom that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 16 of Council Regulation (EC) No 1589/2015, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns the United Kingdom that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.