

COMMISSION DECISION
of 25 July 2012
on measure SA.34440 (12/C) implemented by Luxembourg concerning the sale of Dexia BIL

(notified under document C(2012) 5264)

(Only the French text is authentic)

(Text with EEA relevance)

(2012/836/EU)

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 ⁽¹⁾,

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 above Articles ⁽²⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By decision of 19 November 2008 ⁽³⁾, the Commission decided not to raise any objections to the emergency measures concerning a liquidity assistance operation (hereinafter: 'LA operation') and a guarantee for certain of Dexia's liabilities ⁽⁴⁾. The Commission considered these measures to be rescue aid to an undertaking in difficulty and therefore compatible with the internal market on the basis of Article 107(3)(b) TFEU, and authorised the measures for a period of six months from 3 October 2008, specifying that after that time the Commission would re-evaluate the aid as a structural measure.
- (2) Belgium, France and Luxembourg (hereinafter: 'the Member States concerned') notified to the Commission an initial restructuring plan for Dexia on 16, 17 and 18 February 2009 respectively.

- (3) By decision of 13 March 2009, the Commission decided to open the formal investigation procedure laid down in Article 108(2) TFEU on all the aid measures granted to Dexia SA ⁽⁵⁾.
- (4) By decision of 30 October 2009 ⁽⁶⁾, the Commission authorised the extension of the guarantee referred to in recital (1) until 28 February 2010 or until the date of the Commission decision concerning the compatibility of the aid measures and the restructuring plan for Dexia.
- (5) On 9 February 2010 the Member States concerned sent the Commission information on the additional measures planned to supplement the initial restructuring plan notified in February 2009.
- (6) By decision of 26 February 2010 ⁽⁷⁾, the Commission authorised the restructuring plan for Dexia and the conversion of the rescue aid into restructuring aid on condition that all the commitments and conditions established by the decision were complied with.
- (7) Since the summer of 2011 Dexia has encountered further difficulties and the Member States concerned have envisaged additional aid measures.
- (8) By decision of 17 October 2011 ⁽⁸⁾, the Commission decided to open a formal investigation procedure into the measure involving the sale by Dexia SA of Dexia Bank Belgium (hereinafter: 'DBB') and its acquisition by the Belgian State. In the interest of preserving financial stability, the Commission also decided to temporarily approve the measure. The measure is therefore approved for six months from the date of the decision in question or, if Belgium submits a restructuring plan within six months of that date, until such time as the Commission adopts a final decision on the measure.
- (9) On 18 October 2011 the Member States concerned informed the Commission of a set of potential new measures for a new plan for the restructuring or dismantling of Dexia. As part of the set of new

⁽¹⁾ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty, where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union', 'common market' by 'internal market' and 'Court of First Instance' by 'General Court'. The terminology of the TFEU is used throughout this Decision.

⁽²⁾ OJ C 146, 12.5.1998, p. 6, and OJ C 210, 1.9.2006, p. 12.

⁽³⁾ C(2008) 7388 final.

⁽⁴⁾ In this Decision, 'Dexia' and 'the Dexia group' refer to Dexia SA and all of its subsidiaries.

⁽⁵⁾ OJ C 181, 4.8.2009, p. 42.

⁽⁶⁾ OJ C 305, 16.12.2009, p. 3.

⁽⁷⁾ OJ L 274, 19.10.2010, p. 54.

⁽⁸⁾ OJ C 38, 11.2.2012, p. 12.

measures, on 21 October 2011 Belgium notified to the Commission a measure involving recourse by DBB to the emergency liquidity assistance (hereinafter: 'ELA') with a guarantee by the Belgian State. The measure enables DBB to grant financing to Dexia Crédit Local SA (hereinafter: 'DCL').

- (10) On 14 December 2011 France, Belgium and Luxembourg also notified to the Commission, as part of the set of new measures, a draft temporary guarantee by the Member States concerned on the refinancing of Dexia SA and DCL (hereinafter: 'temporary refinancing guarantee').
- (11) By decision of 21 December 2011 (hereinafter: 'opening decision on additional aid for the restructuring of Dexia') ⁽¹⁾, in the interest of preserving financial stability, the Commission decided to temporarily approve the temporary refinancing guarantee until 31 May 2012. However, with this Decision, the Commission opened a formal investigation procedure in relation to all the additional measures for the restructuring of Dexia (including the temporary refinancing guarantee) since the adoption of the conditional decision and asked the Member States concerned to notify to it, within three months, a restructuring plan for Dexia or, if Dexia's viability could be restored, an orderly resolution plan for Dexia.
- (12) On 21 and 22 March 2012 the Member States concerned notified to the Commission an orderly resolution plan for Dexia.
- (13) On 25 May 2012 the Member States concerned notified to the Commission a request to extend the temporary refinancing guarantee. On 31 May 2012 the Commission adopted two decisions.
- (14) In the first decision (hereinafter: 'the decision to extend the procedure'), the Commission decided to extend the formal investigation procedure relating to the Dexia group in order to examine the orderly resolution plan for the Dexia group submitted by Belgium, France and Luxembourg on 21 and 22 March 2012 ⁽²⁾.
- (15) In the second decision (hereinafter: 'the decision to extend the guarantee') ⁽³⁾, the Commission temporarily approved, until it takes a final decision on the orderly resolution plan for Dexia, an extension until 30 September 2012 of the period for issuing the temporary guarantee by the Member States concerned in relation to the refinancing of Dexia SA and DCL, while at the same time extending the formal investigation procedure to this measure.
- (16) On 5 June 2012 the Member States concerned notified to the Commission an increase in the ceiling of the temporary guarantee to the maximum amount of

principal of EUR 55 billion. In its decision of 6 June 2012 ⁽⁴⁾, the Commission temporarily approved, until it takes a final decision on the orderly resolution plan for Dexia, the increase in the guarantee ceiling.

Procedure relating to the sale of Dexia Banque Internationale à Luxembourg

- (17) On 6 October 2011 Dexia SA announced in a press release ⁽⁵⁾ that it had entered into exclusive negotiations with a group of international investors, in which the State of Luxembourg would participate, with a view to the sale of Dexia Banque Internationale à Luxembourg (hereinafter: 'Dexia BIL'). The board of the Dexia group was to express its opinion on the content of any offer at the end of the exclusivity period.
- (18) On 18 December 2011 the Commission was informed that a binding Memorandum of Understanding on the sale of Dexia SA's 99,906 % holding in Dexia BIL was about to be concluded. Under the Memorandum of Understanding, Precision Capital SA, a Qatari investment group, was to acquire 90 % of the holding, and the remaining 10 % was to be acquired by Luxembourg. Certain of Dexia BIL's assets are excluded from the scope of the sale.
- (19) The sale of Dexia BIL was not part of the measures approved by the Commission under the restructuring plan for Dexia approved on 26 February 2010. Nor was it covered by the formal investigation procedure opened by the Commission decision of 21 December 2011 concerning the restructuring measures notified to the Commission after that date.
- (20) The sale of Dexia BIL had already been brought to the Commission's attention before 21 December 2011. The sale of Dexia BIL will therefore be analysed by the Commission separately from the restructuring of Dexia, not only because of the need to establish legal certainty as quickly as possible, but also and above all because the sale of Dexia BIL is independent from the restructuring of the group in the light of the aid measures that were temporarily approved in 2011, given that the sale had already been envisaged since 2009, according to information received by the Commission, and that Dexia BIL will be legally and economically separate from Dexia.
- (21) On 23 March 2012 Luxembourg formally notified the sale of Dexia BIL to the Commission.
- (22) By decision dated 3 April 2012 ⁽⁶⁾, the Commission informed Luxembourg that it had decided to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the sale of Dexia BIL.

⁽¹⁾ Decision published on DG Competition's website: http://ec.europa.eu/competition/state_aid/cases/243124/243124_1306879_116_2.pdf

⁽²⁾ Decision of 31 May 2012 in Case SA.26653, restructuring of Dexia, not yet published.

⁽³⁾ Decision of 31 May 2012 in Cases SA.33760, SA.33764, SA.33763, additional restructuring measures for Dexia – temporary guarantee, not yet published.

⁽⁴⁾ Decision of 6 June 2012 in Cases SA.34925, SA.34927, SA.34928, increase in the temporary guarantee ceiling, not yet published.

⁽⁵⁾ The press release is available on the Dexia group website: http://www.dexia.com/FR/Journaliste/communiqués_de_presse/Pages/Entree-en-negociation-exclusive-pour-la-cession-de-Dexia-Banque-Internationale-a-Luxembourg.aspx

⁽⁶⁾ OJ C 137, 12.5.2012, p. 19.

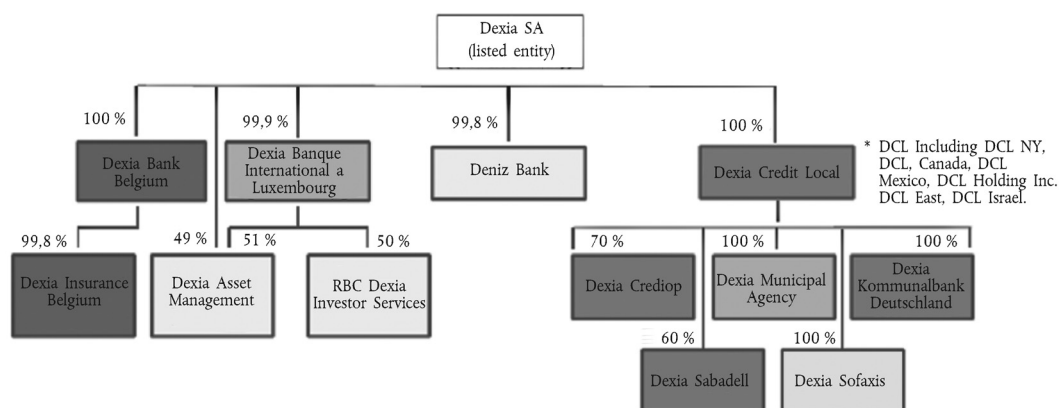
- (23) On 4 May 2012 and 12 June 2012 the Luxembourg authorities provided the Commission with additional information, including an update by Dexia SA of the fairness opinion for Dexia BIL dated 30 May 2012 (hereinafter: 'updated fairness opinion').
- (24) The Commission decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union* ⁽¹⁾. The Commission called on interested parties to submit their comments on the measure in question.
- (25) The Commission received comments from interested parties. It communicated them to Luxembourg, giving the Luxembourg authorities the opportunity to comment on them, and received their comments by letter dated 28 June 2012.

2. THE FACTS

2.1. Description of the Dexia group

- (26) Dexia BIL is part of Dexia group. Dexia was formed in 1996 by the merger of France's Crédit Local and Belgium's Crédit Communal and was specialised in loans to local authorities, but also had some 5,5 million private customers, mainly in Belgium, Luxembourg and Turkey.
- (27) The Dexia group was organised around the parent holding company (Dexia SA) and three operational subsidiaries located in France (DCL), Belgium (DBB) and Luxembourg (Dexia BIL).

Simplified organisation chart of the group on 30 September 2011
(i.e. before execution of the transfers announced at the meeting of the Dexia board held on 9 October 2011)



- (28) On 20 October 2011 DBB was sold to the Belgian State and, on 31 December 2011, the consolidated balance-sheet total of the Dexia group (deconsolidation of DBB on 1 October 2011) was EUR 413 billion.
- (29) In addition to the sale of DBB that took place on 20 October 2011, the Dexia group announced the sale 'in the short term' of the following companies:
- Dexia BIL
 - Dexia Municipal Agency
 - DenizBank
 - Dexia Asset Management (hereinafter: 'DAM')
 - RBC Dexia Investor Services (hereinafter: 'RBCD').
- (30) The holdings of the main shareholders in Dexia SA are as follows:

Shareholder	% holding at 31 December 2011
Caisse des Dépôts et Consignations	17,6 %
Holding Communal	14,3 %
Arco Group	12,0 %
French Government	5,7 %
Belgian Government	5,7 %
Ethias	5,0 %
3 Belgian regions	5,7 %
CNP Assurances	3,0 %
Employees	0,6 %
Others	30,4 %

Source: Dexia, presentation of financial results for 2011, 23 February 2012, p. 51; included in the orderly resolution plan notified to the Commission.

⁽¹⁾ Decision of 3 April 2012 in Case SA.34440 Sale of Dexia BIL, OJ C 137, 12.5.2012, p. 19.

2.2. Description of Dexia BIL

- (31) Dexia BIL is one of the largest commercial banks in Luxembourg, with a balance-sheet total of EUR 41 billion on 30 June 2011. Dexia BIL operates not only in Luxembourg, but also in other countries such as Switzerland, the United Kingdom and some countries in Asia and the Middle East, either directly or through certain of its subsidiaries. Dexia BIL also holds a substantial portfolio of legacy securities, with an estimated market value at 30 September 2011 of approximately EUR [5-10] billion.
- (32) Dexia BIL is one of the large banks with a branch network in Luxembourg and is an essential player in the local economy as both a depositary bank for resident individuals and businesses, and a provider of consumer credit, property loans and business lending.
- (33) According to the tables provided by Luxembourg's financial supervisory authority (*Commission de surveillance du secteur financier* - CSSF), Dexia BIL is the bank of choice for [10-15] % of individual residents and [15-20] % of resident SMEs (small and medium-sized enterprises), both groups placing it in third position on the Luxembourg market. Dexia BIL's market shares in the Luxembourg banking system are approximately [10-15] % by volume of deposits, [10-15] % by volume of loans and [5-10] % of assets under management in the private banking sector.

2.3. Difficulties faced by Dexia

- (34) The difficulties faced by the Dexia group during the financial crisis in autumn 2008 were described in the decision of 26 February 2010. Dexia's more recent difficulties may be summarised as follows.
- (35) First, the worsening of the sovereign debt crisis, which many European banks are facing, has resulted in increasing mistrust on the part of investors towards bank counterparties, so the latter are unable to obtain financing in satisfactory volumes and under satisfactory conditions.
- (36) Furthermore, since the Dexia group has been particularly exposed to sovereign and quasi-sovereign risk, the level of mistrust among investors is higher. Dexia has among its assets many loans and/or bonds from countries and/or local and regional authorities in countries perceived as risky by the market.
- (37) In addition, the current crisis hit before Dexia had time to finalise implementation of its restructuring plan, which would have resulted in a much stronger liquidity risk profile. Since Dexia still had a particularly vulnerable liquidity profile and the market was well aware of that vulnerability, it is possible that Dexia faced more mistrust than other banks.

- (38) Dexia's financing requirements increased markedly for the following reasons:

- (i) the sharp fall in interest rates during the summer of 2011 increased by at least EUR [5-20] billion the need for additional collateral to cope with the margin calls linked to the variation in the market value of the portfolio of interest-rate derivatives used to hedge the balance sheet;
- (ii) many bond issues (in particular sovereign-guaranteed bonds previously issued by Dexia) matured at a time when market conditions for refinancing these bonds were not optimal;
- (iii) the substantial fall in market value and decline in the credit quality of the assets that Dexia uses by way of security to obtain financing;
- (iv) the loss in confidence by many investors following, among other things, the announcement of substantial losses in the second quarter of 2011 (almost EUR 4 billion) and downgrades by some rating agencies;
- (v) Dexia's difficulties also resulted in massive withdrawals of deposits by customers in Belgium and Luxembourg in October 2011.

- (39) Given that it was impossible for Dexia to refinance itself on the markets and [...] (*), initially it had to resort to a new ELA measure by the Banque nationale de Belgique and the Banque de France respectively. It is in these circumstances that the Member States concerned granted the temporary refinancing guarantee in favour of Dexia.

- (40) Although Dexia BIL was not the source of the Dexia group's problems, [...], it faced substantial deposit outflows, in particular between 30 September 2012 and 10 October 2011, a period during which deposits fell by EUR [1-5] billion (from EUR [5-15] billion to EUR [5-15] billion). The deposit outflows subsequently stabilised following the announcement of a series of measures intended to dismantle the Dexia group and secure certain of the group's subsidiaries (including Dexia BIL). In particular, on 6 October 2011 Dexia announced that it had entered into negotiations with a group of investors and the State of Luxembourg with a view to selling Dexia BIL. Since bottoming at EUR [5-15] billion on 22 November 2011, Dexia BIL's deposits showed a slight improvement to EUR [5-15] billion EUR on 14 December 2011.

2.4. Description of the sale of Dexia BIL

- (41) On 23 March 2012 Luxembourg notified the sale of Dexia BIL. Closure of the sale is subject to the prior approval of the Commission.

(*) Confidential information [...].

- (42) The measure of the sale of Dexia BIL notified to the Commission was not the subject of a formal call for tenders. According to the Luxembourg authorities, the sale of Dexia BIL had apparently been envisaged for a long time by Dexia, which contacted a series of operators in that regard between 2009 and 2011, in particular [...]. [...]. The discussions had made some progress but none of the operators had submitted a tangible plan to acquire Dexia BIL.
- (43) Finally, contacts with Precision Capital resulted in the start of exclusive negotiations, which was announced on 6 October 2011. A binding draft agreement on the sale of Dexia's 99,906 % holding in Dexia BIL was concluded by a Memorandum of Understanding (hereinafter: 'MoU') on 20 December 2011. Under the Memorandum of Understanding, Precision Capital will acquire 90 % of the holding, the remaining 10 % being acquired by Luxembourg under the same terms and conditions as Precision Capital.
- (44) Certain of Dexia BIL's assets are excluded from the scope of the sale, which relates only to part of Dexia BIL, i.e. its retail and private banking businesses (hereinafter: 'the sold businesses'). More specifically, the following are excluded from the scope of the sale: Dexia BIL's 51 % holding in DAM, its 50 % holding in RBCD, its 40 % holding in Popular Banca Privada, its portfolio of legacy securities (and certain derivative and associated products) and its holdings in Dexia LDG Banque and Parifpar. The above businesses will be transferred to Dexia before the transaction is completed, with a clause for the recovery of the net proceeds from the transfers by Dexia BIL. Furthermore, the MoU provides as a precondition for the sale the elimination of all the unsecured borrowing and lending with companies in the Dexia group and the elimination of much of the secured borrowing and lending with companies in the Dexia group. On 10 February 2012 the financing granted to the other companies in the group was approximately EUR [0-5] billion, of which less than EUR [500-800] million was secured. The exclusion of all these assets will make it possible to reduce Dexia BIL's total assets by approximately EUR 16,9 billion in relation to total assets of EUR 41 billion on 30 June 2011 (i.e. a 40 % reduction in total assets and a 50 % reduction in risk-weighted assets).
- (45) The notified measure stipulates that, when the sale is completed, Dexia BIL will have a Common Equity Tier 1 ratio under Basel III of exactly 9 %.
- (46) The sale price is set at EUR 730 million, with Dexia BIL having a Common Equity Tier 1 ratio of exactly 9 % when the sale is completed. In the event that the capital at the time of completion exceeds the 9 % Common Equity Tier 1 ratio under Basel III, the sale price will be adjusted by the excess capital available at the time of completion. If there is a shortfall of capital in relation to the 9 % Common Equity Tier 1 ratio, the shortfall will be offset by Dexia SA.
- (47) The measure notified on 23 March 2012 included a clause stipulating that, if Dexia SA or a company in the Dexia group obtained a sovereign guarantee in favour of a buyer in relation to its indemnification obligations towards that buyer under contractual guarantees specific to the sale, and if the buyer is a private entity (not controlled directly or indirectly by public entities), then Dexia undertakes to ensure that a guarantee on similar terms and for similar contractual obligations is granted by the same guarantor (or an alternative guarantor with the same credit rating) to the buyers under the sale contracts. This obligation was to have applied until 1 January 2017 (hereinafter: 'clause 3.3.5'). However, the clause was subsequently dropped and was not included in the final contracts for transfer of shares that replaced the MoU.
- (48) Before the MoU was finalised, various scenarios under the preliminary draft of the sale of Dexia BIL were subject to a fairness opinion by a third party⁽¹⁾. The evaluation dated 10 December 2011 was carried out using three different methods⁽²⁾ and resulted in a valuation of between EUR [600-700] and [800-900] million. The updated evaluation dated 30 May 2012 comes to the same conclusions.

2.5. Grounds for initiating the formal investigation procedure

- (49) In the opening decision, the Commission took the view that it could not, at that stage, conclude that the transaction did not involve any aid.
- (50) The Commission took the view that clause 3.3.5 might contain state aid.
- (51) It also took the view that the sale process for Dexia BIL had not been open, transparent and non-discriminatory. The sale process had been restricted to bilateral negotiations with a number of potential buyers without a call for tenders. The Commission could not, therefore, conclude that the sale process had been such as to ensure the setting of a market price and, consequently, that it did not contain any state aid.
- (52) According to the Commission's understanding, the fairness opinion by a third party⁽³⁾ had been established during the negotiations and before the setting of the

⁽¹⁾ *Équité du prix de cession de BIL à Precision Capital/Éléments préliminaires en l'état actuel des négociations* dated 10 December 2011.

⁽²⁾ (i) The discounted cash flows to equity method on the basis of the cash flow distributable to shareholders, subject to compliance with the core tier 1 regulatory ratios. (ii) The price to book ratio method, on the basis of excess profitability in relation to the cost of capital. (iii) The comparable listed companies method.

⁽³⁾ *Équité du prix de cession de BIL à Precision Capital/Éléments préliminaires en l'état actuel des négociations* dated 10 December 2011.

precise conditions in the MoU dated 20 December 2011, which was notified on 23 March 2012. The Commission therefore had doubts about whether the fairness opinion had taken into account the exact scope of the sold businesses and the conditions of the notified measure, including the clause for the recovery of the net proceeds from the transfers by Dexia BIL and clause 3.3.5.

- (53) The Commission could not conclude, therefore, that the conditions of sale of Dexia BIL resulted in a sale at the market price, given the combined effects of the absence of an open call for tenders and the lack of precise information about the appropriate valuation of the transaction, having regard in particular to the scope of the sold businesses and the potential clause 3.3.5.

3. COMMENTS BY THIRD PARTIES

- (54) Following the publication of the formal investigation procedure on 3 April 2012, the Commission received comments from two third parties.
- (55) One of the comments received (hereinafter: 'comment A') from an investors' association concerns the level of the purchase price. The association takes the view that the sale price for Dexia BIL is too low, in particular in the light of Dexia BIL's good results in the past.
- (56) The comments (hereinafter: 'comment B') by the other third party, a shareholder in Dexia SA, expressed doubts about the behaviour of Dexia SA, Dexia BIL and the individuals and bodies supposed to supervise these companies since 1998. The shareholder also believes that Dexia SA does not provide sufficient information to its shareholders. The shareholder also takes the view that the minutes of the Annual General Meetings since 1999, the annexes relating to its own statements at those meetings, and all the correspondence between itself, Dexia SA, Dexia BIL and its managers should have been sent by Dexia SA to the potential buyers of Dexia BIL.

4. COMMENTS BY DEXIA SA

- (57) Dexia SA stresses that the sale of Dexia BIL is an important stage in the stabilisation of Dexia BIL after the outflows of deposits that took place at the beginning of October 2011. It is essential to provide confirmation as soon as possible to the parties to the transaction that the sale of Dexia BIL contains no aid.
- (58) Since clause 3.3.5 has not been included in the final contracts for the transfer of shares that replaced the MoU, these concerns are groundless.

- (59) The many contacts between Dexia SA and potential buyers since 2009, in conjunction with the official announcement on 6 October 2011 of the potential sale of Dexia BIL to an international group of investors, had made public the planned sale of Dexia BIL. Exclusive negotiations were not formally opened until more than two weeks later, so any other serious candidates interested in buying Dexia BIL would have had more than enough time to express their interest. Moreover, the conditions of sale of Dexia BIL were determined by Dexia SA with Precision Capital during arm's length negotiations between private operators, under their own liability and without committing state resources. Furthermore, it was urgent to find a buyer for Dexia BIL in order to protect the bank's depositors and customers, to preserve the bank's value, and to reduce the risks of contagion to the rest of the financial system. Under these circumstances, the sale process for Dexia BIL may be regarded as an open, transparent and non-discriminatory process, such as to ensure the formation of a market price. It does not, therefore, contain any state aid.

- (60) The fairness opinion dating from December 2011 related to the new scope of Dexia BIL (sold businesses), which is confirmed by the updated fairness opinion dated 30 May 2012.

- (61) The sale price is based on a Core Equity Tier 1 capital ratio under Basel III of 9 % at the time the sale was completed. If there is a difference between this level and the level of capital when the transfer is completed, the adjustment clause guarantees that the difference will be repaid by the buyers or the seller and/or that the sale price will be adjusted. Under these conditions, Dexia SA takes the view that the valuation of shareholdings or assets excluded from the transaction should not be taken into account when determining the market price.

- (62) Dexia BIL did not benefit directly from the previous aid received by the Dexia group. On the contrary, since the end of 2008, Dexia BIL has constantly been a net provider of liquidity to the Dexia group. In addition, the Commission cannot presume that, because a company belongs to a group of companies, the company has benefited from aid received by the group, in particular where, as in this case, the transfer mechanisms existing in the group have been used solely to the detriment of the company and not for its benefit⁽¹⁾. Likewise, the Commission cannot presume that the transaction is imputable to the State or commits state resources when it is carried out at arm's length between Dexia and the buyer without involving state resources.

⁽¹⁾ See in particular the judgment of 19 October 2005 in Case T-324/00 *CDA Datentraeger Albrecht v Commission* [2005] ECR II-4309, paragraph 93: '... the Commission's argument that the scope of the recovery order in Article 2 of the contested decision is justified on the ground that the joint venture and its successors belong to a group of linked undertakings within which there are internal mechanisms for transferring assets must be rejected. It is clear from the findings set out in the contested decision that, in this case, the transfer mechanisms existing within that group were used only to the detriment of that venture and not for its benefit. It cannot therefore be claimed that, on the ground that it belonged to that group, the joint venture actually benefited from aid of which it was not the recipient.'

- (63) In any event, Dexia SA stresses the fact that the acquisition of Dexia BIL at the market price is enough to eliminate the possibility of a potential transfer of previous aid received by the Dexia group to the buyer or to the sold company, Dexia BIL ⁽¹⁾.
- (64) The sale of Dexia BIL cannot include new aid because the acquisition by the State of Luxembourg is taking place without it injecting new capital into Dexia BIL. In that context, Dexia SA emphasises that, in the absence of additional aid, the sale of Dexia BIL does not distort competition, so it is not necessary to impose additional measures to limit distortions of competition. In any event, the reduction in the size of Dexia BIL through the businesses excluded from the sale is sufficiently large not to require additional measures.

5. COMMENTS BY LUXEMBOURG

- (65) Luxembourg takes the view that the sale of Dexia BIL is a private-market solution that does not contain any state aid.
- (66) Luxembourg points out that the planned sale of Dexia BIL was officially announced on 6 October 2011, i.e. before the announcement of the additional guarantees on new refinancing granted by the Member States concerned to Dexia SA and DCL.
- (67) Luxembourg stresses that Dexia BIL is one of the large banks with a branch network in Luxembourg and is an essential player in the local economy as both a depositary bank for resident individuals and businesses, and a provider of consumer credit, property loans and business lending. Dexia BIL plays a systemic role in the Luxembourg economy ⁽²⁾ and a failure of this bank (or even merely uncertainty as to its fate) would have extremely serious effects on the stability of Luxembourg's financial system and economy in general, which could also be felt in neighbouring countries.
- (68) The Luxembourg authorities maintain that there is no advantage for Dexia SA or Dexia BIL arising from the acquisition by the Luxembourg State of a 10 % holding in Dexia BIL because the acquisition took place under market conditions, and the price paid and the terms were the same as for Precision Capital.
- (69) Luxembourg also points out that the sale of Dexia BIL had been envisaged for a long time by Dexia SA, which to that end had contacted a series of operators between 2009 and 2011, in particular [...]. The discussions undertaken had made some progress but none of the operators had expressed an interest in Dexia BIL. Although the Luxembourg authorities acknowledge that the process did not constitute a formal call for tenders, they point out that it is unlikely that a formal invitation to tender would have produced a different result. It was impossible to organise such an invitation to tender within the shortened deadline dictated by the accelerating erosion of Dexia BIL's deposits at the end of September 2011 because of the rumours concerning the difficulties of the Dexia group and the downgrade of Dexia SA's rating by the rating agency Moody's on 3 October 2011, which added to the rumours swirling around the European banking system, the sovereign debt crisis and the difficulties in the euro area. This urgent situation resulted in the announcement on 6 October 2011 of the planned sale of Dexia BIL and the entry into negotiations with Precision Capital. Between that date and the opening of exclusive negotiations ⁽³⁾, no other serious expression of interest or offer was received, despite [...] enquiries by other potential investors ⁽⁴⁾.
- (70) In the opinion of the Luxembourg authorities, an informal tender process, organised to a tight deadline and using specific procedures dictated by the circumstances, could be regarded as an open, transparent and non-discriminatory procedure which ensures the formation of a market price. The Luxembourg authorities also point out that a fairness opinion dated 10 December 2011 and the update of 30 May 2012 conclude that the price is fair in the current market context and that the Commission had already accepted that the valuation of a company may be in line with a market price on the basis of a fairness opinion carried out by an independent expert.
- (71) Since the end of 2008, Dexia BIL has constantly been a net provider of liquidity to the other companies in the group. As for the new temporary guarantee approved provisionally by the Commission on 21 December 2011, Dexia BIL was not a guaranteed company and does not benefit from this temporary guarantee.
- (72) Furthermore, the Luxembourg authorities point out that Dexia BIL will have a strong liquidity position after the sale, will focus on retail banking and private banking, and will have cut its ties to the residual Dexia group by disposing of the legacy portfolio and Dexia LDG and selling its holdings in RBCD and DAM. Likewise, the MoU is based on an absence of financing by Dexia BIL of Dexia SA or other companies in the residual group post-sale.

⁽¹⁾ See in particular the judgment of 20 September 2001 in Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 78: '...where a company which has benefited from aid has been sold at the market price, the purchase price reflects the consequences of the previous aid, and it is the seller of that company that keeps the benefit of the aid. In that case, the previous situation is to be restored primarily through repayment of the aid by the seller.'

⁽²⁾ Dexia BIL, with almost 40 branches in the Grand Duchy, is the third largest bank in the Luxembourg market, and holds approximately [5-15] % of deposits, [5-15] % of loans and some [5-15] % of assets under management in the private banking sector.

⁽³⁾ Even though the board had ratified exclusive negotiations with Precision Capital on 9 and 10 October 2011, the formal period of exclusivity did not begin until 23 October 2011 with the signing of a letter of intent.

⁽⁴⁾ [...].

- (73) Luxembourg is also requesting that Dexia BIL no longer be subject to the conditions and commitments laid down in the Decision of 26 February 2010, or to the new restructuring and orderly resolution plan for Dexia to be drawn up under the Decision of 21 December 2011. Being subject to the restructuring plan approved by the Decision of 26 February 2010 and to the conditions and commitments provided for by the plan is linked to Dexia BIL belonging to the Dexia group, which is identified as the sole beneficiary of the aid granted in previous decisions. Moreover, this point is evident in most of the commitments under the restructuring plan for Dexia, which apply to Dexia or Dexia SA and concern Dexia BIL only to the extent that it is a subsidiary of the group and forms a single economic unit with Dexia SA. In any event, the sale of Dexia BIL does not contain any state aid and is carried out at a market price.
- (74) Luxembourg, in its observations on the opening decision, confirms that clause 3.3.5 has not been included in the final share purchase contracts that replaced the MoU, and that these concerns are groundless.
- (75) The Luxembourg authorities also confirm that the scope of the fairness opinion coincides exactly with the scope of the sold businesses. In addition, the adjustment mechanism in relation to the exact level of 9 % Common Equity Tier 1 under Basel III ensures that the value of the businesses excluded from the transaction (recital (36)) does not have any positive or negative financial impact for the buyer. The Luxembourg authorities also refer to the fairness opinion updated at the end of May 2012, which reached the same conclusions. The sale price for Dexia BIL may therefore be regarded as a market price, which excludes any transfer of aid.
- (76) Finally, the Luxembourg authorities agree with the comments by Dexia SA. (section 4 above).

Observations by the Luxembourg authorities on the comments by third parties

- (77) The Luxembourg authorities take the view that the statements in comment A are based on limited data and do not fully analyse the situation. In particular, they do not take account of the exact terms of the transaction. In this regard, the Luxembourg authorities would refer to the various documents submitted to the Commission by themselves and Dexia SA, in particular the fairness opinions by third parties, which conclude that the price paid is a fair price in the light of the terms of the transaction. This is clear from the evaluation by a third party dated 10 December 2011 and was confirmed on 30 May 2012 by the same consultant, namely [...].
- (78) Moreover, it is clear from the file in the Commission's possession that the Luxembourg State neither offered nor granted guarantees to the buyer.
- (79) The Luxembourg authorities therefore note that comment A appears to be based on incomplete

information and contains mistaken assertions, without the slightest piece of evidence, with the result that they would ask the Commission not to take it into account in its final decision but rather to refer to the explanations by the Luxembourg authorities and Dexia SA in their exchanges with the Commission, which fully answer the questions raised and dispel the criticisms levelled.

- (80) The Luxembourg authorities note that comment B consists of a series of exchanges of correspondence by the third party in question with the management of Dexia SA and Dexia BIL, and with the supervisory authorities, between 2005 and the end of 2011, with no direct bearing on the sale of Dexia BIL. The correspondence relates to different requests to and criticisms of Dexia SA concerning the failure to take into account certain questions about events well before the sale of Dexia BIL, which is the only subject of this Decision on the sale of Dexia BIL. The Luxembourg authorities therefore call on the Commission to set aside the documents as irrelevant.
- (81) The Luxembourg authorities note that Dexia SA concludes (see section 4 above) that the Dexia BIL transaction is being carried out at a market price without any aid. This conclusion is consistent with the conclusions of the Luxembourg authorities, and so does not require further comment by them.
- (82) In conclusion, the Luxembourg authorities note that none of the comments received from third parties is such as to call into question the developments set out in their notification and in their comments. The Luxembourg authorities further note that none of the comments by third parties is likely to call into question the argument that the process of the sale of Dexia BIL must be regarded, in accordance with the Commission's decision-making practice, as an open, transparent and non-discriminatory process capable of guaranteeing that the transaction took place at the market price. The Luxembourg authorities therefore maintain that the transaction took place without any aid.

6. EXISTENCE OF AID

- (83) Article 107(1) TFEU lays down that 'Save as otherwise provided in this 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 enterprises or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (84) Dexia BIL is active at European level and therefore clearly competes with other foreign market operators. The Commission therefore takes the view that any potential aid contained in the sale of Dexia BIL would affect trade between Member States and distort or threaten to distort competition.

- (85) The Commission, in its Decision of 26 February 2010, has already established that the aid received by Dexia in the form of capital, financing guarantees, ELA backed by a sovereign guarantee and support for impaired assets (FSA measure) did constitute state aid (granted by Belgium, Luxembourg and France). It is therefore necessary to verify that the sold business does not retain the benefit of the aid previously received by Dexia.
- (86) According to the judgment of the Court of Justice in *Italie et SIM 2 v Commission* ⁽¹⁾, which the Commission relied on for its decisions in *Olympic Airlines* ⁽²⁾ and *Alitalia* ⁽³⁾, examination of the economic continuity between the old firm and the new structures is based on a number of factors. These factors include, in particular, the subject of the transfer, the transfer price, and the identity of the shareholders or owners of the acquiring firm or the acquired firm. This was reiterated by the Court of First Instance in its judgment in *Ryanair v Commission* ⁽⁴⁾, which confirmed the *Alitalia* decision.
- (87) With regard to the subject of the sale, the scope of the sold businesses is limited to the retail and private banking businesses, which do not appear to have been the cause of the Dexia group's problems requiring state aid to be granted. The Commission also notes that the part of the portfolio of legacy securities held by Dexia BIL, which was linked to the group's refinancing problems that contributed to the need for state aid authorised by the Decision of 26 February 2010, is not included in the sold businesses. From a quantitative perspective, the scope of the sold businesses accounts for approximately 60 % of Dexia BIL's balance-sheet total and [0-10] % of the Dexia group's balance-sheet total.
- (88) There is no link between the private buyer Precision Capital and the current shareholders in Dexia SA, which therefore means that the private buyer is independent in relation to Dexia SA when it takes decisions and implements its strategy in relation to the sold businesses of Dexia BIL.
- (89) Moreover, an acquisition at the market price for the sold businesses would ensure that the buyer pays an adequate price for the aid which this part of Dexia BIL could have benefited from as a company in the Dexia group and that the transaction price for the sale of Dexia BIL does not, therefore, contain any aid.
- (90) Following the opening decision, the Commission received additional information about the evaluation of the market price.
- (91) The Commission notes that the sale of Dexia BIL was subject to a first fairness opinion by a third party on 10 December 2011, which was updated on 30 May 2012. The evaluations were carried out using three different methods: (i) discounted cash flows to equity on the basis of the cash flow distributable to shareholders, subject to compliance with the Core Tier 1 regulatory ratios; (ii) price-to-book ratio, on the basis of excess profitability in relation to the cost of capital; (iii) comparable listed companies. The first fairness opinion by a third party, dated 10 December 2011, resulted in a price in a band between EUR [600-700] and [800-900] million. The updated assessment, dated 30 May 2012, confirms that the assessment took into account exactly the scope of the sold businesses and comes to the same conclusions, namely that the fair price lies within a range of between EUR [600-700] and [800-900] million. The Commission has examined these fairness opinions. It notes that the evaluations are based on standard methods generally applicable in this field and take into account the precise conditions and scope of the transaction.
- (92) The price of the transaction, EUR 730 million, lies within the range of the fairness opinions. There is therefore no indication that the price paid is below or above the market price. The sale price for Dexia BIL may therefore be regarded as a market price, which also excludes any transfer on the sale of any potential aid previously granted to Dexia.
- (93) Certain of Dexia BIL's activities are excluded from the scope of the sale (recital (36)). These activities will be transferred to Dexia before the transaction is completed, with a clause for the recovery of the net proceeds from the transfers by Dexia BIL. The Commission notes that the additional information received subsequent to the opening decision confirms that the valuation of the activities excluded from the transaction has no bearing on establishing the market price. The sale price is based on a Common Equity Tier 1 capital ratio under Basel III of exactly 9 % at the time the sale is completed. If there is a difference between this level and the level of capital when the transfer is completed, the adjustment clause guarantees that the difference will be repaid by the buyers or the seller and/or that the sale price will be adjusted. The valuation of shareholdings or assets excluded from the scope of the transaction should not, therefore, be taken into account when establishing the market price. The adjustment clause was also taken into account in the fairness opinions.
- (94) In the opening decision, the Commission noted that the Luxembourg State was participating in the sale of Dexia BIL as a buyer of a 10 % holding under the same conditions as Precision Capital. It is clear, therefore, that the holding by Luxembourg involves state resources. Given that Luxembourg is participating on the same conditions as Precision Capital, the Commission takes

⁽¹⁾ Joined Cases C-328/99 and C-399/00 [2003] ECR I-4035.

⁽²⁾ Commission Decision of 17 September 2008, State Aid N 321/2008, N 322/2008 and N 323/2008 – Greece – Sale of certain assets of Olympic Airlines/Olympic Airways Services. OJ C 18, 23.1.2010, p. 9. Judgment in Joined Cases T-415/05, T-416/05 and T-423/05 *Olympic Airlines v Commission*, paragraph 135.

⁽³⁾ Commission Decision of 12 November 2008, State Aid N 510/2008. Sale of assets of the airline Alitalia, OJ C 46, 25.2.2009, p. 6.

⁽⁴⁾ Case T-123/09 *Ryanair v Commission*, paragraphs 155 and 156, not yet reported.

the view that in principle Luxembourg is acting as a private investor, which excludes any aid in relation to Luxembourg's 10 % holding.

not constitute aid within the meaning of Article 107(1) TFEU. In particular, it does not constitute new aid for Dexia SA or for Dexia BIL,

HAS ADOPTED THIS DECISION:

Article 1

The measure comprising the sale of Dexia BIL does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Implementation of the measure is therefore authorised.

Article 2

This Decision is addressed to the Grand Duchy of Luxembourg.

Done at Brussels, 25 July 2012.

7. CONCLUSION

For the Commission

Joaquín ALMUNIA

Vice-President

- (95) In the opening decision, the Commission also noted that Precision Capital and the Luxembourg State planned to remove clause 3.3.5. The Commission has noted that under this clause, Dexia SA would undertake to obtain sovereign guarantees in favour of the buyer of Dexia BIL. Activation of the clause would potentially call on state resources in the form of guarantees. Moreover, the very existence of the clause would be likely to grant benefits to the buyer of Dexia BIL. Following the opening decision, the Commission received additional information confirming that clause 3.3.5 had not been included in the final share purchase contracts that replaced the MoU. The Commission therefore concludes that, since the clause was not implemented and has been abandoned, there is no aid in this regard.

- (96) For the reasons set out above, the Commission concludes that the measure comprising the sale of Dexia BIL does
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