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II

(Non-legislative acts)

REGULATIONS

COUNCIL IMPLEMENTING REGULATION (EU) No 1269/2012

of 21 December 2012

amending Implementing Regulation (EU) No 585/2012 imposing a definitive anti-dumping duty on imports of certain seamless steel pipes, of iron or steel, originating, inter alia, in Russia, following a partial interim review pursuant to Article 11(3) of Regulation (EC) No 1225/2009

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ⁽¹⁾ ('the basic Regulation'), and in particular Article 9(4) and Article 11(3), (5) and (6) thereof,

Having regard to the proposal submitted by the European Commission ('the Commission') after consulting the Advisory Committee,

Whereas:

(2) By Regulation (EC) No 812/2008 ⁽²⁾ the Council, following the initiation of an interim review requested by the TMK Group pursuant to Article 11(3) of the basic Regulation ('the review investigation'), amended the definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel, to 27,2 % for the TMK Group.

(3) By Implementing Regulation (EU) No 585/2012 ⁽⁴⁾ the Council, following an expiry review ('the expiry review investigation'), maintained the measures imposed by Regulation (EC) No 954/2006 on imports of seamless pipes and tubes, of iron or steel, originating in Russia and Ukraine.

(4) Accordingly, the measures currently in force are those imposed by Implementing Regulation (EU) No 585/2012. The TMK Group composed of OAO Volzhsky Pipe Plant, OAO Taganrog Metallurgical Works, OAO Sinarsky Pipe Plant and OAO Seversky Tube Works is subject to an anti-dumping duty of 27,2 %.

1. PROCEDURE

1.1. Measures in force

(1) By Regulation (EC) No 954/2006 ⁽²⁾ the Council, following an investigation ('the original investigation'), imposed a definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel, originating in Croatia, Romania, Russia and Ukraine. The measures consisted of an *ad valorem* anti-dumping duty of 24,1 % imposed on imports from individually named exporting producers in Russia, with a residual duty rate of 35,8 % on imports from all other companies in Russia. The definitive anti-dumping duty imposed on the group subject to the current review investigation, OAO TMK ('the TMK Group' or 'the applicant') composed of OAO Volzhsky Pipe Plant, OAO Taganrog Metallurgical Works, OAO Sinarsky Pipe Plant and OAO Seversky Tube Works was 35,8 %, i.e. the residual duty.

1.2. Initiation of a partial interim review

(5) On 14 October 2011, the Commission announced by a notice published in the *Official Journal of the European Union* ('notice of initiation') ⁽⁵⁾ the initiation of a partial interim review pursuant to Article 11(3) of the basic Regulation of the anti-dumping measures applicable to imports of certain seamless pipes and tubes, of iron or steel, originating in Russia.

(6) The review, which is limited in scope to the examination of dumping, was initiated following a substantiated request lodged by the TMK Group. In the request the applicant provided *prima facie* evidence that the continued imposition of the measures at the current level is no longer necessary to offset injurious dumping.

⁽¹⁾ OJ L 343, 22.12.2009, p. 51.

⁽²⁾ OJ L 175, 29.6.2006, p. 4.

⁽³⁾ OJ L 220, 15.8.2008, p. 1.

⁽⁴⁾ OJ L 174, 4.7.2012, p. 5.

⁽⁵⁾ OJ C 303, 14.10.2011, p. 11.

1.3. Parties concerned

- (7) The Commission officially informed the applicant, the authorities of the exporting country and the Union industry of the initiation of the partial interim review. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set out in the notice of initiation.
- (8) In order to obtain the information necessary for its investigation the Commission sent a questionnaire to the applicant, which responded within the given deadline.
- (9) The Commission sought and verified all information it deemed necessary for the purpose of determining the level of dumping. Verification visits were carried out at the premises of the applicant and at its related trading companies ZAO TMK Trade House (Moscow), TMK Warehouse Complex LLC (Lytkaryno), TMK Europe GmbH (Cologne), TMK Italia s.r.l. (Lecco) and TMK Global S.A. (Geneva).

1.4. Review investigation period

- (10) The investigation of the level of dumping covered the period from 1 October 2010 to 30 September 2011 ('the review investigation period' or 'RIP').

2. PRODUCT CONCERNED AND LIKE PRODUCT

2.1. Product concerned

- (11) The product concerned is the same as that defined in Implementing Regulation (EU) No 585/2012 which imposed the measures currently in force, i.e. seamless pipes and tubes of iron or steel, of circular cross-section, of an external diameter not exceeding 406,4 mm with a Carbon Equivalent Value (CEV) not exceeding 0,86 according to the International Institute of Welding (IIW) formula and chemical analysis⁽¹⁾, currently falling within CN codes ex 7304 11 00, ex 7304 19 10, ex 7304 19 30, ex 7304 22 00, ex 7304 23 00, ex 7304 24 00, ex 7304 29 10, ex 7304 29 30, ex 7304 31 80, ex 7304 39 58, ex 7304 39 92, ex 7304 39 93, ex 7304 51 89, ex 7304 59 92 and ex 7304 59 93, originating in Russia ('the product concerned' or 'SPT').

2.2. Like product

- (12) As established in the original investigation as well as in the expiry review investigation, the current investigation confirmed that the product produced in Russia and exported to the Union, the product produced and sold on the domestic market of Russia, and the product produced and sold in the Union by the Union producers have the same basic physical and technical characteristics and end uses. These products are therefore considered to be alike within the meaning of Article 1(4) of the basic Regulation.

⁽¹⁾ The CEV is determined in accordance with Technical Report, 1967, IIW doc. IX-555-67, published by the International Institute of Welding (IIW).

3. DUMPING

3.1. Dumping of imports during the RIP

3.1.1. Normal value

- (13) Sales on the domestic market were made via the related companies, ZAO TMK Trade House and TMK Warehouse, which resold SPT to independent customers in Russia.
- (14) In accordance with Article 2(2) of the basic Regulation it was first examined whether each of the exporting producers' total volume of domestic sales of the like product to independent customers was representative in comparison with its total volume of export sales to the Union, i.e. whether the total volume of such sales represented at least 5 % of the total volume of export sales of the product concerned to the Union. The examination established that the domestic sales were representative for all exporting producers.
- (15) It was further examined whether each product type of the like product sold by the exporting producers on its domestic market were sufficiently representative for the purposes of Article 2(2) of the basic Regulation. Domestic sales of a particular product type were considered sufficiently representative when the total volume of that product type sold by the applicant on the domestic market to independent customers during the RIP represented at least 5 % of its total sales volume of the comparable product type exported to the Union.
- (16) In accordance with Article 2(4) of the basic Regulation it was subsequently examined whether the domestic sales of each product type that had been sold in representative quantities could be regarded as being made in the ordinary course of trade. This was done by establishing the proportion of profitable domestic sales to independent customers on the domestic market for each exported type of the product concerned during the RIP.
- (17) For those product types where more than 80 % by volume of sales on the domestic market of the product type were above cost and the weighted average sales price of that type was equal to or above the unit cost of production, normal value, by product type, was calculated as the weighted average of the actual domestic prices of all sales of the type in question, irrespective of whether those sales were profitable or not.
- (18) Where the volume of profitable sales of a product type represented 80 % or less of the total sales volume of that type, or where the weighted average price of that type was below the unit cost of production, normal value was based on the actual domestic price, which was calculated as a weighted average price of only the profitable domestic sales of that type made during the RIP.
- (19) The normal value for the non-representative types (i.e. those of which domestic sales constituted less than 5 % of export sales to the Union or were not sold at all in the domestic market) was calculated on the basis of the cost

of manufacturing per product type plus an amount for selling, general and administrative costs and for profits. In case of existing domestic sales, the profit of transactions in the ordinary course of trade on the domestic market per product type for the product types concerned was used. In case of no domestic sales, an average profit was used.

(20) With regard to manufacturing costs, and in particular energy costs, as far as gas is concerned, it was examined whether the gas prices paid by the exporting producers reasonably reflected the costs associated with the production and distribution of gas.

(21) It was found that the domestic gas price paid by the exporting producers was around one third of the export price of natural gas from Russia. In this regard, all available data indicates that domestic gas prices in Russia are regulated prices, which are far below market prices paid in unregulated markets for natural gas. Therefore, since gas costs were not reasonably reflected in the exporting producers' records as provided for in Article 2(5) of the basic Regulation, they had to be adjusted accordingly. In the absence of any sufficiently representative, undistorted gas prices relating to the Russian domestic market, it was considered appropriate to base the adjustment, in accordance with Article 2(5), on the basis of information from other representative markets. The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), adjusted for local distribution costs. Waidhaus, being the main hub for Russian gas sales to the EU, which is both the largest market for Russian gas and has prices reasonably reflecting costs, can be considered a representative market within the meaning of Article 2(5) of the basic Regulation.

(22) After disclosure, the TMK Group argued that the gas price adjustment was contrary to Article 2(5) of the Basic Regulation and 2.2.1.1 of the WTO AD Agreement. As mentioned in recital (21), it was found that the domestic gas price paid by the TMK Group was around one third of the export price of natural gas from Russia. Therefore, since gas costs were not reasonably reflected in the exporting producers' records as provided for in Article 2(5) of the basic Regulation, they had to be adjusted accordingly. The claim made by the TMK Group was considered to be unsubstantiated and in the absence of any evidence, it was rejected.

3.1.2. Export price

(23) It should be noted that some export quantities of the product concerned had not been reported by the TMK Group as they considered that these SPT did not fall within the scope of the investigation. Samples in the form of cross-sections cuts of the product allegedly falling outside the product scope before and after further processing were shown to the Commission services during the on spot verification visits which however cannot be regarded as conclusive evidence.

(24) Having examined the issue, it was considered that these SPT fall within the product scope. The corresponding export transactions were therefore taken into account in the dumping calculation.

(25) During a hearing chaired by the Hearing Officer on November 9, 2012, the TMK group stated that it wished to address mainly the classification issue, raised in the disclosure document, which in their view resulted in an increase of their dumping margin from circa 13-14 %. The TMK group expressed some surprise regarding the fact that these products were considered as falling within the scope of the investigation and reiterated that these exported quantities had not been reported on the grounds that these products were 'blanks' (also named 'hollows') and not pipes, and thus, in their opinion, did not fall within the product scope. They further indicated that in fact, this matter had been addressed very concisely by the Commission services in the course of the verification visit. In this regard, it should be noted that the TMK Group itself indicated in one submission dated 31 August 2012, that 'the question of whether or not "hollows" falling under CN code 7304 59 10 should be included within the scope of the investigation has been extensively addressed in the course of the investigation'. In fact, both the European Steel Tube Association ('ESTA') and the TMK group have had ample opportunity to comment on this issue on several occasions. Furthermore, it should be noted that the Commission services requested TMK's related importers to fill in the Annex to the questionnaire and verified the information received during an on-spot verification visit in order to collect all relevant information. The statement that this matter was very 'concisely' addressed by the Commission services during the investigation and these products had been considered to be part of the product scope was incorrect and was therefore rejected.

(26) The TMK Group further indicated that the inclusion of these export quantities was illegal and unjustified as the Commission services failed to demonstrate that the pipes were not 'unworked' and the conclusions that these 'blanks' were 'semi-finished' (or partially worked) products were ill-founded.

(27) First it is recalled that the products covered by CN codes 7304 39 10 and 7304 59 10 are 'Tubes, pipes and hollow profiles' seamless, of iron (other than cast iron) or steel, 'Unworked, straight and of uniform wall thickness, for use solely in the manufacture of tubes and pipes with other cross-sections and wall thicknesses'. The Explanatory Note to subheadings 7304 39 10 and 7304 59 10 states that they include 'seamless steel tubes usually obtained by piercing and hot-rolling or by piercing and hot drawing; they are usually called "blanks". They are intended to be transformed into tubes of other shapes and wall thickness with more reduced dimensional tolerances. They are presented with the ends roughly cut off and deburred but are otherwise unfinished. Their exterior and interior surfaces are rough and not descaled. They are not oiled, zinc-coated or painted'. After consideration of the

arguments put forward by the TMK Group and ESTA, it is considered that based on the various documents collected during the on-spot verification visits (customer purchase order and specifications, intercompany contracts, invoices issued by related importers, description of the standard ISO 9809-1) these tubes are indeed 'semi-finished' in the sense that they have to correspond to certain requirements and specifications such as 'top quality SS hot finished tubes for cylinders, in steel type 34CrMo4 subject to UNI EN 10083-1 and DIN 1629 "annealed coarse" and "smooth at ends", of the dimensions specified in the purchase order.' Furthermore, other requirements which are listed in the customer purchase order and specifications such as 'ultrasonic testing for feasible defects, thickness control, ovalization and straightness' also point to further processing of these tubes, which is not the case for so-called 'blanks'.

- (28) The TMK Group claimed that the features of 'annealed coarse' and 'smooth at ends' are not among the criteria listed in the text of the relevant CN codes and the Explanatory Note to determine whether a pipe is 'unworked'. In this respect, it must be noted that heading texts and relevant Explanatory notes do not always contain an exhaustive list of all the features of the products covered. In relation to products such as those in question, which partake of the characteristics of different kinds of goods, classification depends on the most important features of the imported goods. Therefore, while noting that these features are not among the criteria listed in the text of the relevant CN codes and the Explanatory Note, they remain important elements in assessing whether or not product types can be considered to be 'unworked' and thus within the scope of CN codes 7304 39 10. and 7304 59 10.
- (29) The TMK group also claimed that these tubes were not annealed as they were not heat treated as indicated in the mill test certificates. In this regard, it should be noted that the purchase specifications of the customer contain contradictory information as they mention heat treatment of the product. Reference to these purchase specifications is made on other documents such as the manufacturer declaration issued by the TMK Group and the specification to the contracts signed by the TMK Group and its unrelated customer.
- (30) It was further noted that in the above-mentioned inter-company contracts provided by the TMK Group during the on-spot verification, these products were initially classified in a different CN code (under measures) and were changed to a CN code not under measures (including during the IP), although, based on the information available, there were no changes to the customer purchase order and product specifications. The TMK Group argued that this change in the CN code was irrelevant as what matters under the applicable customs

classification rules are the objective characteristics of the goods at the time of their importation to the Union. While the objective characteristics of the goods at the time of their importation to the Union are an important element, it is not denied by the TMK Group that they classified the product types as falling under measures before changing that classification even without any change in the product specifications. This is considered to be one of the elements that leads to the conclusion that the concerned product types fall within the scope of the investigation.

- (31) It was also noted that the unrelated customer's purchase specifications clearly referred to 'semi finished' products rather than 'blanks' or 'hollows'. On this latter point, TMK argued that it is totally irrelevant for customs classification purposes how the product is described by a purchaser. In reply to this, it must be stated that the description of the product by the purchaser has some value in the sense that the purchaser is obviously aware of the product requirements at the time of order. To say, therefore, that the purchaser's description is 'totally irrelevant' is doubtful.
- (32) In conclusion, the semi-finished seamless steel tubes produced with heat treatment purchased for the purpose of producing such cylinders have to correspond to very detailed technical/quality/dimensional requirements. These features are clearly not corresponding with the notion of 'unworked' as mentioned in the Explanatory Notes to CN 7304 39 10 and 7304 59 10 and therefore, the comments made by the TMK Group regarding the alleged wrong interpretation of the term 'unworked' by the Commission had to be rejected.
- (33) Contrary to several previous statements, the TMK group also argued that these products sold to an unrelated customer were not solely destined for the same application i.e. the production of cylinders, but could also be transformed in so-called 'precision pipes'. The group stated that the unrelated customer first transforms blanks into cold rolled pipes (or precision pipes) which are then processed into gas cylinders. It should be noted that this element is not only contradictory to what was stated by the TMK group in previous submissions and to what was found in the documents collected during the verification visits. Notwithstanding the above, it should be noted that this additional allegation was new, was submitted at a late stage and was not substantiated by evidence. In addition, the group submitted evidence that allegedly showed that the unrelated customer also sold precision pipes. While noting that this evidence was submitted very late in the investigation, it was also noted that the evidence related to a period long after the end of the RIP and that the documents related to possible sales of any types (or sections) of cold rolled products (pipes). These arguments were therefore rejected.

(34) The majority of exports of the product concerned by the exporting producers to the Union were made to independent customers in the Union through two related trading companies, i.e. TMK Europe GmbH located in Germany and TMK Italia s.r.l. located in Italy. The export price for the above-mentioned exports was established on the basis of export prices actually paid or payable in accordance with Article 2(9) of the basic Regulation, i.e. using the resale prices actually paid or payable to the related company by the first independent buyer in the Union in the RIP, adjusted for all costs incurred between importation and resale and for profits.

(35) Some limited quantities were exported directly to independent customers in the Union. The export price for these quantities was established on the basis of export prices actually paid or payable in accordance with Article 2(8) of the basic Regulation.

3.1.3. Comparison

(36) The normal value and the export price of the exporting producers were compared on an ex-works basis. For the purpose of ensuring a fair comparison between the normal value and export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation. On this basis, adjustments were made in respect of packaging, transport costs, credit costs and anti-dumping duties.

(37) The TMK Group requested that certain characteristics pertaining to steel grade, threading type and coating of SPT be taken into account in order to ensure a fair comparison between SPT sold domestically and for export.

(38) The Defence Committee of the Seamless Steel Tube Industry of the European Union ('ESTA') claimed that any request to change the product definition or the methodology used in the original investigation or subsequent review was in breach of Article 11(9) of the basic Regulation and should be disregarded.

(39) In this regard, the investigation revealed that the request made by the TMK Group did not affect the product definition but rather allowed the identification of additional characteristics which ensure a fair comparison of SPT sharing the same features. Further, it was found that these additional characteristics affected prices and price comparability.

(40) On the basis of the above, it was considered that the request was warranted and the above mentioned characteristics were therefore taken into account.

(41) The TMK Group claimed that, in accordance with Article 11(10) of the basic Regulation, the duties paid on DDP ('delivered duty paid') transactions should not be deducted in order to construct export price. It

claims that, in comparison with the last full 12-month period prior to the imposition of anti-dumping duties on TMK's exports of SPT to the Union (1 July 2005-30 June 2006 or 'reference period'), the duty was duly reflected in the prices charged in the RIP and the subsequent selling prices in the Union.

(42) In this regard, it was found that the DDP prices charged to the first unrelated customers did not cover costs let alone the anti-dumping duties; i.e. these transactions were overall loss making. It is further noted that, even though prices for similar products increased by ca. 30 % since the reference period, the price of raw materials which account on average for more than 50 % of the cost of manufacturing increased by more than 70 % over the same period. On the basis of the above, it is considered that no conclusive evidence was provided to show that the duty is duly reflected in the prices charged.

(43) It is also noted that, even if one were to accept that the duty is reflected in the subsequent selling prices (*quod non*), Article 11(10) of the basic Regulation requires that resale prices and subsequent selling prices both reflect the duty.

(44) After disclosure, the TMK Group continued to object to the deduction of the duties from the export prices and further argued that the gas cost adjustment made resulted in losses, which in its view, were certainly of a lower magnitude, without providing however any further evidence. The TMK Group maintained its view that the fact that ex-works export prices should be above the costs of production was legally flawed and reiterated that the criteria to be examined was only whether anti-dumping duties paid were duly reflected in the resale price charged by its unrelated customers which purchased on a DDP basis. However, since the DDP prices charged to the first unrelated customers did not cover the costs, let alone the anti-dumping duties, even without the gas adjustment and since the price of raw materials which account on average for more than 50 % of the cost of manufacturing increased by more than 70 % over the same period as mentioned in recital (42) above, it is considered that the TMK Group has not provided conclusive evidence showing that the duty was duly reflected in the prices charged or subsequent selling prices.

(45) On the basis of the above, this claim had to be rejected.

3.1.4. Dumping margin

(46) Pursuant to Article 2(11) and (12) of the basic Regulation, the weighted average normal value was compared with the weighted average export price per product type on an ex-work basis separately for each of the exporting producers. One common dumping margin is established for the TMK Group by calculating a single weighted average rate of dumping for the exporting producers within the TMK Group.

- (47) On this basis the dumping margin, expressed as an percentage of the CIF Union frontier price, duty unpaid, was 29,6 %. Following disclosure, the TMK group pointed to some clerical errors in the dumping calculations for two of its production entities. These clerical errors were corrected and the weighted average dumping margin found for the TMK Group is 28,7 % instead of 29,6 %.
- (48) It is noted that this dumping margin is, contrary to the prima facie evidence provided in the review request, higher than the existing duty applicable to imports from the TMK Group. The increase results from a number of factors: firstly, the evidence provided in the review request only related to certain transactions of one of the three exporting producers. Some of these transactions were found not to relate to the product concerned. Secondly, during the course of the investigation, as mentioned in recital (23) above, some export transactions of the product concerned had not been reported by the group. Finally, the group's claim in regard to duty as a cost (see recitals (41) to (45)) was rejected. The combination of these elements, together with other elements verified during the course of the investigation, resulted in an increase in the dumping margin.

4. LASTING NATURE OF CHANGED CIRCUMSTANCES

- (49) In accordance with Article 11(3) of the basic Regulation, it was examined whether the changed circumstances regarding dumping could reasonably be considered to be of a lasting nature.
- (50) TMK Group indicated in its review request that there were changed circumstances of a lasting nature as it had made significant changes in its internal structure and substantial improvements to its production equipment which had a direct impact on its cost structure.
- (51) The investigation revealed that the TMK Group had indeed made significant investments that lead to efficiency gains and increased capacity. However, given the increase in raw material prices and the evolution of the product mix towards more added-value products, a decrease of production cost could not be ascertained. The improvements referred to in recital (50) were found to be of structural nature and to be unlikely to change in the near future.
- (52) In addition, the development of export prices to non-EU countries in the RIP and to the EU after the RIP was also

considered. It was found that exports to non-EU countries of identical products were made at comparable price levels as the export sales to the EU in the same period. As far as the period after the RIP is concerned, it was found they were made at slightly higher prices than in the RIP, which is in line with international price level evolution. There was thus no indication that the export prices would fluctuate considerably in the foreseeable future.

5. AMENDMENT OF THE ANTI-DUMPING MEASURES

- (53) In the light of the results of the investigation, it is considered appropriate to amend the anti-dumping duty applicable to imports of the product concerned from the TMK Group to 28,7 %. The amended anti-dumping duty should be set at the level of the dumping margin found, as it is lower than the injury margin established in the original investigation.
- (54) Interested parties were informed of the essential facts and considerations on the basis of which it was intended to recommend an amendment of Implementing Regulation (EU) No 585/2012 and were given an opportunity to comment,

HAS ADOPTED THIS REGULATION:

Article 1

The entry concerning OAO Volzhsky Pipe Plant, OAO Taganrog Metallurgical Works,

OAO Sinarsky Pipe Plant and OAO Seversky Tube Works in the table of Article 1(2) of Implementing Regulation (EU) No 585/2012 is hereby replaced by the following:

'OAO Volzhsky Pipe Plant, OAO Taganrog Metallurgical Works, OAO Sinarsky Pipe Plant and OAO Seversky Tube Works	28,7 %	A859'
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Article 2

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21 December 2012.

For the Council

The President

A. D. MAVROYIANNIS

**COMMISSION IMPLEMENTING REGULATION (EU) No 1270/2012
of 21 December 2012**

derogating from Council Regulation (EC) No 73/2009 as regards the deadline for reviewing the decision on specific support for 2012 in Portugal, from Regulation (EC) No 1120/2009 as regards the deadline for notification of such a review and as regards the conditions applicable to specific agricultural activities entailing additional agri-environment benefits and from Regulation (EC) No 1122/2009 as regards the information contained in the aid application

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003 ⁽¹⁾, and in particular Article 142 (c), (l) and (r) thereof,

Whereas:

(1) Portugal has informed the Commission about the aggravation of the situation of farmers in the Portuguese dairy sector in 2012. This aggravation is the consequence of both a continuous increase of feed prices due to the combined effects of adverse climatic conditions affecting some of the most important Union and world suppliers of grains, and of the decrease of prices resulting from the reduction of the internal demand in the context of the economic crisis affecting Portugal. The increase of the feed prices which represent a significant part of the production costs has immediate consequences on the Portuguese dairy sector in particular by squeezing the margins and putting holdings in financial difficulties at the end of the year 2012. This in turn has led to an emergency for the dairy sector, resulting in serious practical and specific problems for farmers of dairy cows that could not have been foreseen at the time when decisions, for the year 2012, for support pursuant to Article 68 of Council Regulation (EC) No 73/2009 could be reviewed in accordance with Article 68(8) of that Regulation.

(2) Portugal wishes to increase the level of support foreseen in the framework of the dairy specific support measure

currently implemented under Article 68(1)(b) of Regulation (EC) No 73/2009 in order to help farmers concerned to face this situation in the short term. Accordingly, Portugal has requested to be authorised to revise its decision on the implementation of specific support for 2012 in view of introducing support under Article 68(1)(a)(v) of Regulation (EC) No 73/2009 in substitution to support currently implemented under Article 68(1)(a)(i) of that Regulation. Portugal intends to use the resulting available amounts for increasing the level of support to dairy farmers within the measure implemented under Article 68(1)(b) of Regulation (EC) No 73/2009.

(3) Therefore, and given that a review of the decision on the implementation of specific support for 2012 is no longer possible under Article 68(8) of Regulation (EC) No 73/2009, it is appropriate to derogate from that provision to allow Portugal to amend the scheme implemented for that year.

(4) For the same reasons, it is appropriate to derogate from the deadline laid down in Article 50(3) of Commission Regulation (EC) No 1120/2009 laying down detailed rules for the implementation of the single payment scheme provided for in Title III of Council Regulation (EC) No 73/2009 ⁽²⁾ for notification of such a review to the Commission.

(5) According to Article 44 of Regulation (EC) No 1120/2009, Article 27(4) of Commission Regulation (EC) No 1974/2006 of 15 December 2006 laying down detailed rules for the application of Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) ⁽³⁾ applies mutatis mutandis to support under Article 68(1)(a)(v) of Regulation (EC) No 73/2009. Article 27(4) of Regulation (EC) No 1974/2006, in conjunction with Annex IV of that Regulation, sets out the criteria for determining the threshold of loss to farming of local breeds indigenous to the area and in danger of being lost to farming.

⁽¹⁾ OJ L 30, 19.1.2009, p. 16.

⁽²⁾ OJ L 316, 2.12.2009, p. 1.

⁽³⁾ OJ L 368, 23.12.2006, p. 15.

- (6) According to Portugal, there is a decline in the population of the bovine breeds 'Alentejana' and 'Mertolenga', of the sheep breeds 'Serra de Estrela' and 'Churros' and of the 'Serrana' goat breed due to the increasing trend in crossing or substituting local breeds with exotic breeds, putting them under threat of being lost for farming. Even so, given their great capacity of adaptation to the environment without producing an excessive pressure on the natural resources, those local breeds are part of agricultural and pasture systems with high natural value. For the purpose of granting support under Article 68(1)(a)(v) of Regulation (EC) No 73/2009 in view of maintaining the population of such animals at an appropriate level for preserving the genetic heritage they represent, while protecting the legitimate expectations of farmers having applied for support under Article 68(1)(a)(i) for the year 2012, it is necessary to derogate from Article 44(2) of Regulation (EC) No 1120/2009 as regards the criteria for determining the threshold of loss to farming of local breeds indigenous to the area and in danger of being lost to farming.
- (7) Pursuant to Article 12(1)(a) and (e) of Commission Regulation (EC) No 1122/2009 of 30 November 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 73/2009 as regards cross-compliance, modulation and the integrated administration and control system, under the direct support schemes for farmers provided for that Regulation, as well as for the implementation of Council Regulation (EC) No 1234/2007 as regards cross-compliance under the support scheme provided for the wine sector⁽¹⁾, the single application is to contain all information necessary to establish eligibility for the aid, in particular the aid scheme concerned and a statement by the farmer that he is aware of the conditions pertaining to the aid scheme in question.
- (8) Given that specific support under Article 68 of Regulation (EC) No 73/2009 consists of several measures with different eligibility conditions, farmers are required to indicate in the single application for which specific measure they apply. In order to address the situation in the dairy sector still in 2012, Portugal intends to consider applications lodged in the calendar year 2012 for support under Article 68(1)(a)(i) of Regulation (EC) No 73/2009 as applications for the envisaged support under Article 68(1)(a)(v) of that Regulation for the same calendar year, taking into account the legitimate expectations of farmers concerned. In this respect, it is therefore appropriate to derogate from Article 12(1) of Regulation (EC) No 1122/2009.
- (9) As the derogations concern the year 2012, this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*.
- (10) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Direct Payments,
- HAS ADOPTED THIS REGULATION:
- Article 1*
- Derogation from Regulation (EC) No 73/2009**
- By way of derogation from Article 68(8) of Regulation (EC) No 73/2009, Portugal may, by [the day after the day of publication in the OJ, Office of Publications please insert the date], review the decision taken pursuant to Article 69(1) of that Regulation and modify, with effect for the year 2012, the specific support under Article 68(1)(a)(i) and Article 68(1)(a)(v) of that Regulation.
- Article 2*
- Derogations from Regulation (EC) No 1120/2009**
1. By way of derogation from the first subparagraph of Article 50(3) of Commission Regulation (EC) No 1120/2009, Portugal shall inform the Commission by [the fifth working day after the day of publication in the OJ, Office of Publications please insert the date] of the specific support measure they intend to apply under Article 68(1)(a)(v) pursuant to Article 1 of this Regulation.
2. By way of derogation from Article 44(2) of Regulation (EC) No 1120/2009, the thresholds referred to in Article 27(4) of Regulation (EC) No 1974/2006 shall not apply for the year 2012 in relation to support under Article 68(1)(a)(v) of Regulation (EC) No 73/2009 for the cattle breeds 'Alentejana' and 'Mertolenga', the sheep breeds 'Serra de Estrela' and 'Churros' and the goat breed 'Serrana'.
- Article 3*
- Derogation from Regulation (EC) No 1122/2009**
- By way of derogation from Article 12(1) of Regulation (EC) No 1122/2009, applications lodged in the calendar year 2012 for support under Article 68(1)(a)(i) of Regulation (EC) No 73/2009 in respect of the breeds referred to in Article 2(2) may be considered as applications for support under Article 68(1)(a)(v) of the Regulation for the same calendar year.
- Article 4*
- Entry into force**
- This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

⁽¹⁾ OJ L 316, 2.12.2009, p. 65.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21 December 2012.

For the Commission
The President
José Manuel BARROSO

COMMISSION IMPLEMENTING REGULATION (EU) No 1271/2012

of 21 December 2012

derogating from certain provisions of Regulation (EC) No 1122/2009 as regards the possibilities for lodging applications for aid under the single payment scheme for 2012 and for allocation of payment entitlements, or increase of their unit value, from the national reserve in 2012, and as regards contents of the single application, of Regulation (EC) No 1120/2009 as regards the declaration of payment entitlements in 2012 and of Council Regulation (EC) No 73/2009 as regards the verification of eligibility conditions before payments and the date at which parcels need to be at the disposal of farmers

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003 ⁽¹⁾, and in particular Article 142 (c) and (r) thereof,

Whereas:

- (1) Article 41(3) of Regulation (EC) No 73/2009 provides for the possibility of Member States not applying Article 68(1)(c) of that Regulation to use the national reserve under certain conditions. When applying that Article, Member States may increase the unit value and/or the number of payment entitlements allocated to farmers. According to Article 15(1) of Commission Regulation (EC) No 1122/2009 ⁽²⁾ applications for allocation or increase of payment entitlements under the single payment scheme for the purpose of Article 41 of Regulation (EC) No 73/2009 have to be submitted by a date to be fixed by the Member States. This date has not to be later than 15 May or, in the case of Estonia, Latvia, Lithuania, Finland and Sweden, not later than 15 June.
- (2) According to Article 11(1) of Regulation (EC) No 1122/2009 the farmer applying for aid under any of the area-related aid schemes may only submit one single application per year.
- (3) According to Article 11(2) of Regulation (EC) No 1122/2009 the single application has to be submitted by a date to be fixed by the Member States which has not to be later than 15 May or, in the case of Estonia, Latvia, Lithuania, Finland and Sweden, not later than 15 June.
- (4) As a result of a continuous increase of feed prices due to adverse climatic conditions affecting some of the most

important suppliers of grains, several Member States are facing an aggravation of the economic situation of agricultural holdings which, at the end of the year 2012, are encountering severe financial difficulties. Considering that the aggravation of the economic situation of the agricultural holdings could also have long-term and broader consequences, it should be allowed for the Member States to apply, for the year 2012, Article 41(3) of Regulation (EC) No 73/2009.

- (5) Since the deadline for allocation, or increase of the unit value, of payment entitlements from the national reserve under Article 15(1) of Regulation (EC) No 1122/2009 for the year 2012 has already expired, it is appropriate to allow those Member States who wish to apply Article 41(3) of Regulation (EC) No 73/2009 for the year 2012 to set a new deadline for lodging an application for the allocation, or increase of the unit value, of payment entitlements from the national reserve.
- (6) Furthermore, it is appropriate to derogate for farmers in these Member States from the requirement under Article 11(1) of Regulation (EC) No 1122/2009 to submit one single application per year.
- (7) In addition, a derogation from the deadline under Article 11(2) of Regulation (EC) No 1122/2009 is necessary in respect of those farmers who wish to benefit from Article 41(3) of Regulation (EC) No 73/2009.
- (8) According to Article 12(5) of Regulation (EC) No 1122/2009, in the first year of the single payment scheme or of the year of integration of new sectors into the single payment scheme, Member States may derogate from Article 12 of Regulation (EC) No 1122/2009 concerning payment entitlements if those are not yet definitively established at the latest date fixed for the submission of the single application. It is necessary to provide for a similar derogation concerning payment entitlements which will be allocated, or increased in their unit value, on the basis of Article 41(3) of Regulation (EC) No 73/2009 where such allocation or increase are not yet definitively established.

⁽¹⁾ OJ L 30, 31.1.2009, p. 16.

⁽²⁾ OJ L 316, 2.12.2009, p. 65.

- (9) According to Article 8(1) of Commission Regulation (EC) No 1120/2009 ⁽¹⁾ payment entitlements may only be declared for payment once per year by the farmer who holds them at the latest date for lodging the single application. It is appropriate to derogate from this requirement.
- (10) According to Article 35(1) of Regulation (EC) No 73/2009, parcels corresponding to the eligible hectares, which are declared for accompanying any payment entitlement, have to be at the farmer's disposal on a date fixed by the Member State. This date has not to be later than the date fixed in that Member State for amending the aid application.
- (11) As regards the payment entitlements that will be allocated, or the unit value of which will be increased, following the application of Article 41(3) of Regulation (EC) No 73/2009, it is necessary to derogate from the farmers' obligation in respect of the date laid down in Article 35(1) of that Regulation.
- (12) Pursuant to Article 29(3) of Regulation (EC) No 73/2009, payments under support schemes listed in Annex I to that Regulation have not to be made before the verification of eligibility conditions, to be carried out by the Member State according to Article 20 of that Regulation, has been finalised.
- (13) The eligibility conditions to be verified by the Member States, which are related to the allocation, or increase of the unit value of payment entitlements under Article 41(3) of Regulation (EC) No 73/2009 on the basis of one or several of the derogations set out in this Regulation, may differ from the eligibility conditions for the support currently implemented under the Single Payment Scheme. In that case, the verification of the new eligibility conditions would, pursuant to Article 29(3) of Regulation (EC) No 73/2009, hinder payments for support schemes not related to the application of Article 41(3) of that Regulation to be made before these new eligibility conditions have been verified. In order to avoid such a situation, a derogation from Article 29(3) of Regulation (EC) No 73/2009 related to the allocation, or increase of the unit value, of payment entitlements under Article 41(3) of that Regulation is necessary.
- (14) Furthermore, according to Article 29(2) of Regulation (EC) No 73/2009 payments have to be made within the period from 1 December to 30 June of the following calendar year. By derogation from this provision, the Commission may provide for advances before 1 December. Such a derogation is granted in Commission Implementing Regulation (EU) No 776/2012 ⁽²⁾, according to which Member States may pay, from 16 October 2012, advances up to a certain limit of direct payments in respect of applications made in 2012. The derogation from Article 29(3) of Regulation (EC) No 73/2009 should therefore be granted retroactively, from 16 October 2012 in order to allow payment, subject to finalisation of the verification of the eligibility conditions, for those support schemes which are not related to the application of Article 41(3) of that Regulation.
- (15) The derogations provided for in this Regulation relate to the calendar year 2012. Therefore, this Regulation should enter into force on the day following that of its publication in the *Official Journal of the European Union*.
- (16) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Direct Payments,

HAS ADOPTED THIS REGULATION:

Article 1

Derogations from Regulation (EC) No 1122/2009

1. By way of derogation from Article 15(1) of Regulation (EC) No 1122/2009, for the year 2012, Member States may authorise farmers to submit an application for the allocation, or increase of the unit value, of payment entitlements in accordance with Article 41(3) of Regulation (EC) No 73/2009 before 31 January 2013 at the latest.
2. By way of derogation from the first subparagraph of Article 11(1) of Regulation (EC) No 1122/2009, for the year 2012, farmers who submitted the single application for aid under any of the area-related aid schemes by a date fixed by the Member States in accordance with Article 11(2) of that Regulation and who, pursuant to paragraph 1 of this Article, submitted an application for allocation, or increase of the unit value, of payment entitlements, may submit a separate application for aid for the purpose of Article 41(3) of Regulation (EC) No 73/2009, before 31 January 2013 at the latest.
3. By way of derogation from the first subparagraph of Article 11(2) of Regulation (EC) No 1122/2009, for the year 2012, Member States may authorise farmers, who pursuant to paragraph 1 of this Article submitted an application for allocation, or increase of the unit value, of payment entitlements and who have not submitted the single application referred to in the second paragraph of this Article, to submit a single application for aid under Article 41(3) of Regulation (EC) No 73/2009 before 31 January 2013 at the latest.

⁽¹⁾ OJ L 316, 2.12.2009, p. 1.

⁽²⁾ OJ L 231, 28.8.2012, p. 8.

4. The application for allocation, or increase of the unit value, of payment entitlements submitted pursuant to paragraph 1 shall be considered as a separate application for aid or a single application for aid pursuant to paragraphs 2 and 3.

5. Where paragraph 1 of this Article is applied, Member States may derogate from the provisions of Article 12 of Regulation (EC) No 1122/2009 concerning payment entitlements if their allocation, or the increases of their unit values, are not yet definitively established at the latest date fixed in paragraph 2 and 3 of this Article.

Article 2

Derogation from Regulation (EC) No 1120/2009

By way of derogation from the first subparagraph of Article 8(1) of Regulation (EC) No 1120/2009, for the year 2012, payment entitlements, whose unit value is subject to an increase pursuant to Article 1 of this Regulation, may be declared for payment of the respective increase of their unit value by the farmer who holds them at 31 January 2013.

Payment entitlements newly allocated to farmers and increases of payment entitlements whose unit value is subject to an increase, pursuant to Article 1 of this Regulation, shall be considered declared for the calendar year 2012.

Article 3

Derogation from Regulation (EC) No 73/2009

1. No payment related to the allocation, or increase of the unit value, of payment entitlements under Article 41(3) of

Regulation (EC) No 73/2009 may be made for the calendar year 2012 before finalising the verification of the eligibility conditions applicable to that support carried out by the Member State concerned, where recourse has been had to one or several of the derogations set out in Articles 1 and 2 of this Regulation.

2. By way of derogation from Article 29(3) of Regulation (EC) No 73/2009, payments under support schemes listed in Annex I thereto, other than the support referred to in paragraph 1 of this Article, may be made for the calendar year 2012 irrespective of finalising the verification of the eligibility conditions applicable to the support referred to in paragraph 1 of this Article.

3. By way of derogation from Article 35(1) of Regulation (EC) No 73/2009, the parcels corresponding to the eligible hectares accompanying any payment entitlements newly allocated, or whose unit value has been increased, in accordance with Article 41(3) of that Regulation on the basis of one or several of the derogations set out in Articles 1 and 2 of this Regulation, shall be at the relevant farmers' disposal on 31 January 2013.

Article 4

Entry into force and application

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 3(1) and (2) shall apply from 16 October 2012.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21 December 2012.

For the Commission
The President
José Manuel BARROSO

DECISIONS

COUNCIL DECISION 2012/835/CFSP

of 21 December 2012

extending Decision 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces

THE COUNCIL OF THE EUROPEAN UNION,

(1) Article 10 is replaced by the following:

Having regard to the Treaty on European Union, and in particular Articles 42(4) and 43(2) thereof,

"Article 10

Having regard to the proposal by the High Representative of the Union for Foreign Affairs and Security Policy,

Financial arrangements

Whereas:

1. The common costs of the EU military mission shall be administered in accordance with Council Decision 2011/871/CFSP of 19 December 2011 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena) (*) ("ATHENA").

(1) On 15 February 2010, the Council adopted Decision 2010/96/CFSP ⁽¹⁾.

2. The financial reference amount for the common costs of the EU military mission for the period until 9 August 2011 shall be EUR 4,8 million. The percentage of the reference amount referred to in Article 25(1) of ATHENA shall be 60 %.

(2) On 28 July 2011, the Council adopted Decision 2011/483/CFSP ⁽²⁾ amending Decision 2010/96 CFSP and extending it for a further period of one year.

3. The financial reference amount for the common costs of the EU military mission for the period from 9 August 2011 until 31 December 2012 shall be EUR 4,8 million. The percentage of this reference amount referred to in Article 25(1) of ATHENA shall be 30 %.

(3) Due to a delay in the adoption of a new Council Decision amending and extending Decision 2010/96/CFSP, it is necessary to extend the validity of the latter with a view to covering the presence of the EU training mission EUTM Somalia in Uganda as from 1 January 2013.

4. The financial reference amount for the common costs of the EU military mission for the period starting on 1 January 2013 shall be EUR 0,05 million. The percentage of this reference amount referred to in Article 25(1) of ATHENA shall be 100 %.

(4) In accordance with Article 5 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark does not participate in the elaboration and implementation of decisions and actions of the Union which have defence implications. Denmark does not participate in the implementation of this Decision and therefore does not participate in the financing of this mission.

(5) The EU military mission should be further extended,

(*) OJ L 343, 23.12.2011, p. 35."

HAS ADOPTED THIS DECISION:

Article 1

(2) In Article 12, paragraph 2 is replaced by the following:

Decision 2010/96/CFSP is hereby amended as follows:

⁽¹⁾ OJ L 44, 19.2.2010, p. 16.

⁽²⁾ OJ L 198, 30.7.2011, p. 37.

"2. The mandate of the EU military mission shall end on 31 January 2013."

Article 2

This Decision shall enter into force on the date of its adoption.

It shall apply from 1 January 2013.

Done at Brussels, 21 December 2012.

For the Council
The President
A. D. MAVROYIANNIS

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.

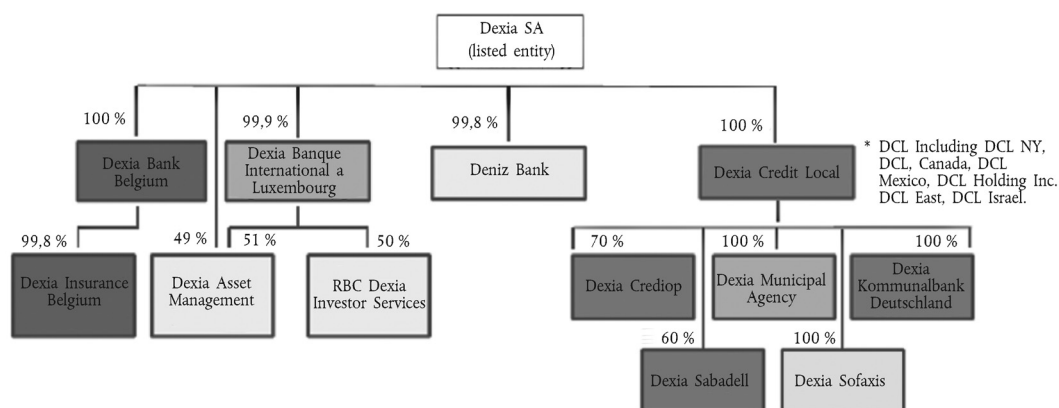
- (23) On 4 May 2012 and 12 June 2012 the Luxembourg authorities provided the Commission with additional information, including an update by Dexia SA of the fairness opinion for Dexia BIL dated 30 May 2012 (hereinafter: 'updated fairness opinion').
- (24) The Commission decision to initiate the formal 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,

- (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.

7. CONCLUSION

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

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.

For the Commission

Joaquín ALMUNIA

Vice-President

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