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Case Note

OXFORD

Capacity in derivatives with public bodies after *Dexia credit local S.A. v Patrimonio del Trentino S.p.A.* [2024] EWHC 2717 (Comm) (‘*Dexia v Trentino*’)

Omotola Ariyo[1,*]

[1]OTC Derivatives and Financial Law, London School of Economics, London, UK

*Corresponding author. PhD Candidate in OTC Derivatives and Financial Law, London School of Economics, London, UK. Email: Tolaariyo@gmail.com

Abstract

This case note examines *Dexia v Trentino*, a key case on capacity in derivative transactions involving public or quasi-public entities. The comment suggests that the case is consistent with the distinction between hedging and speculation being determined objectively by reference to the entity’s financial exposure and economic purpose. It is also consistent with the leading authority, particularly that in *Banca Intesa Sanpaolo Spa & Anor v Comune Di Venezia* [2023] EWCA Civ 1482. The comment illustrates a judicial movement towards objective assessments of capacity in light of the distinction between hedging and speculation. The note, however, critiques reliance on legal form and argues that hybrid entities like Trentino, though private in structure, are publicly accountable. Unlike private entities, the public impact of decisions involving their capacity has ramifications that extend beyond those applicable to private companies. The comment argues that courts should look past legal form to the public accountability common to entities emanating from public law and those utilizing private structures.

‘*History repeats itself, at least with variations*’. Aikens LJ[1]

1. Introduction

This case comment examines *Dexia v Trentino*. The case represents a significant development in the treatment of capacity in derivative transactions involving public or quasi-public entities. The decision is notable not only for its treatment of exclusive jurisdiction clauses under the International Swaps and Derivatives Association (‘ISDA’) Master Agreement (‘MA’) and post-Brexit service gateways, but more fundamentally for how it frames the legal distinction between hedging and speculation.[2] This commentary makes two principal arguments.

First, determination of whether a transaction is a hedge or a speculation should rest on an objective analysis of the transaction’s purpose and the exposure of the entity trading the derivative. This is an approach that fosters both legal certainty and systemic stability (see Section 4).

Second, that formal corporate structures are, on their own, an inadequate basis for assessing capacity. Here, the commentary departs from Bryan J’s approach in *Dexia v Trentino* and suggests that courts should adopt a functional approach to capacity grounded in the public

[1] *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579 (‘‘Haugesund’), [1].
[2] For a detailed analysis of English law in this respect, see Omotola Ariyo, ‘The “Hedging or Speculation” Question in Determining the Capacity of Public Bodies to Trade Derivative Transactions’ (2025) 20 Capital Markets Law Journal.

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accountability that is common to such entities. In making this second point in Section 5, the case comment draws on the '*exercise of ambiguous forms of authority*' that remains the reality of various types of entities exercising public power on behalf of states,[3] placing cases involving the capacity of public bodies in derivatives within the ever-shifting public and private divide.[4]

The comment is structured as follows. Section 2 outlines the transactional structure in *Dexia v Trentino*. Section 3 analyses Bryan J's reasoning in distinguishing between hedging and speculation. Section 4 situates the analysis on hedging and speculation within the broader judicial treatment of capacity in English law. Section 5 advances a normative argument that capacity should be assessed by reference to the public character and effect of derivative transactions. Critically, the comment does not suggest that an entity's formal legal status is irrelevant. Rather, and as Section 5 shows, the argument is that formal legal status should not obscure the reality that such entities exercise state power in ambiguous forms. This is the case even where they use derivatives to mitigate what might seem like standard market risk, with such use translating into real implications for the public sector. Section 6 concludes.

2. The transactions in *Dexia v Trentino*

Trentino is an Italian private company, wholly owned and controlled by the Autonomous Province of Trento ('the Province').[5] In 2008, the Province wished to purchase land for a science museum costing EUR 75,592,336.[6] This was to be funded by grants to be provided by the Province to Trentino. Bonds were to be issued by Trentino to provide the initial funding in advance of Trentino receiving the grants.[7] Accordingly, Trentino's board passed a resolution to issue bonds up to a total of EUR 75 million. Thereafter, the Province also passed a resolution authorizing Trentino, in addition to issuing bonds, to enter '*swap contracts to … manage the interest rate risk*'.[8] Subsequently, in September 2010, Trentino's board invited Dexia Crediop S.p.A[9] ('Dexia') and other financial institutions to sign ISDA documentation with a view to concluding derivative transactions.[10] Following discussions, this led to the execution by Dexia and Trentino on 7 October 2010 of a 2002 ISDA MA which included an associated Schedule, by which the standard form governing law and jurisdiction clause contained in clause 13 of the ISDA MA was replaced with a bespoke provision in Part 4(h) of the Schedule (ie the Governing Law Clause and the Jurisdiction Clause). At this stage, particular derivative transactions had not been agreed upon.[11]

The rationale for the eventual transaction was the management of what is typically referred to as 'basis risk'. This is the risk that the correlation between the prices of two financial products may change.[12] This can occur in two forms: (i) mismatch between two financial products, such as in the case of *Dexia v Trentino*, the grants provided by the Province and the bonds to be issued[13] and (ii) mismatch between two derivative transactions.

Trentino had now issued two bonds ('the Bonds'). The first involves a 2-year variable rate bond with a principal amount of EUR 47 million, maturing on 31 March 2012, with interest payable at Euribor 3M plus a spread of 0.9 per cent.[14] The second involves a 10-year variable rate bond with a principal amount of EUR 15 million, maturing on 31 March 2020, with interest payable at Euribor 3M plus a spread of 1.34 per cent.[15] The result of the variable interest rates

[3] Carol Harlow and Richard Rawlings, *Law and Administration*, 3rd edn, Law in Context Series (CUP 2009) 21.

[4] ibid 392. As Harlow and Rawlings note, in a world of mixed administrations where the modern state contracts out its public duties, heavy reliance on the creative interaction of public and private power in service provision, mixtures of law are called for, transcending the public/private divide.

[5] *Dexia v Trentino*, [22].

[6] *Dexia v Trentino*, [23].

[7] ibid.

[8] ibid.

[9] *Dexia v Trentino*, [22], Dexia is a French company, resulting out of a cross-border merger between Dexia Crediop S.p.A. and Dexia Crédit Local S.A. which occurred on 1 October 2023. At the time of the Transaction, the company was an Italian bank known as Dexia Crediop S.p.A. Dexia changed its corporate name to Dexia S.A. with effect from 1 January 2024, without any change to the legal entity bringing the claims in the English Proceedings.

[10] *Dexia v Trentino*, [24].

[11] *Dexia v Trentino*, [25].

[12] Comptroller of the Currency Administrator of National Banks, 'Risk Management of Financial Derivatives: Comptroller's Handbook' (1997), updated as of 2012 to apply to federal savings associations, p 20.

[13] This can also occur where the derivative is misaligned with the underlying asset which the derivative is based upon, such as loans, equities or a basket of securities.

[14] *Dexia v Trentino*, [28].

[15] ibid.

under the Bonds meant that Trentino was exposed to the basis risk that the interest cost of its borrowing might exceed the interest component of the grants it was due to receive from the Province (fixed annually at 6.17 per cent).[16] This explains the various resolutions from 2009 to 2011 discussed above.[17] In this respect, Bryan J was satisfied that it was this mismatch between the grants and the Bonds that was the object of the derivative transaction, not the variable rate borrowing under the Bonds themselves.[18] As such, the basis risk involved the scenario above in (i), that is, a mismatch between two financial products: the grants and the bonds.

As a result, Trentino largely eliminated the risk of its borrowing costs under the Bonds exceeding the amount of the grants.[19] However, on 17 February 2021, Trentino made a complaint about the transaction. In the course of this complaint, Dexia pointed out, and the Province conceded, that Trentino had instigated and determined the structure of the transaction itself and put it out to an open and transparent tender, selecting Dexia because it offered the best price.[20] The basis of this complaint became the subject of litigation, and it is considered next.

3. Bryan J's approach to hedging versus speculation

The hedging and speculation issue arose from a dispute about the Governing Law Clause and the Jurisdiction Clause.[21] In particular, Trentino sought to attack the Jurisdiction Clause on two grounds: (i) that it was void due to lack of capacity on the part of Trentino to enter into speculative derivatives (the 'Speculation Ground'); and (ii) that Article 4 of Law No. 218/1995 (Law 218), which applies following the Brexit transition period, prohibits agreements involving 'non-disposable rights' from ousting the jurisdiction of the Italian courts (the 'Non-Disposable Rights Ground').[22] The latter ground was abandoned, leaving the Speculation Ground,[23] the focus of this piece. At this juncture, it is important to outline that in order to determine whether the Speculation Ground was valid, Bryan J had to determine what a speculation was, such that he could meaningfully distinguish it from a hedge.[24] Bryan J's approach was as follows.

The Speculation Ground was judged as irrelevant to the validity of Trentino's capacity to enter the MA. Fatal to Trentino's argument was the point by Bryan J that the Speculation Ground does not go to, and cannot be suggested as going to, whether Trentino had the capacity to enter into the MA, which contained the Jurisdiction Clause.[25] This was because Trentino requested that Dexia enter into the MA on 7 October 2010, which was long before the structure and terms of the derivative transaction had been proposed. It was thus common ground that the MA was entered into in expectation that its terms would govern future derivative transactions anticipated between the parties.[26] Bryan J noted that while the Speculation Ground was irrelevant in light of his findings, it was important to nonetheless address it and the alleged absolute ban of derivative trading in circumstances where he had not heard argument on it.[27] It is in this respect that Bryan J was satisfied that Dexia had at least a good arguable case that the derivatives were not speculative under Italian law.[28] Trentino had previously argued successfully in front of the Tax Court of First Instance of Trentino that the derivative was a hedge and that the conclusion of the swaps had no speculative purpose, but were aimed at guaranteeing Trentino from the risk of fluctuations in market rates.[29]

[16] *Dexia v Trentino*, [30].
[17] *Dexia v Trentino*, [31], on 27 November 2009, 26 November 2010, 14 January 2011 and 24 January 2011.
[18] *Dexia v Trentino*, [32].
[19] *Dexia v Trentino*, [37].
[20] *Dexia v Trentino*, [38].
[21] *Dexia v Trentino*, [50]–[51].
[22] *Dexia v Trentino*, [53].
[23] *Dexia v Trentino*, [54].
[24] Ariyo (n 2), see 9–10 for an outline of the conceptual difference between hedging and speculation.
[25] Bryan J stated the law correctly as the capacity of a foreign corporation to enter into any legal transaction being governed by the law of the country of incorporation of the entity in question (in this case, Italian law), relying on *Haugesund*, where Aikens LJ noted that 'for the purposes of English conflicts of laws, a lack of substantive power to conclude a contract of a particular type is equivalent to a lack of "capacity", … ' at [47].
[26] *Dexia v Trentino*, [58].
[27] *Dexia v Trentino*, [72].
[28] *Dexia v Trentino*, [73].
[29] ibid.

Bryan J concluded that it was thus hardly credible for Trentino to argue the exact opposite in the present case, as the purpose of the derivative was to hedge the interest rate risk that Trentino was exposed to by financing the variable rate payments under the Bonds through fixed interest rate grants from the Province.[30] Applying the test determining whether a derivative is speculative under Italian law, the transaction was both (i) expressly carried out in order to reduce exposure and (ii) highly correlated with the financial characteristics of that particular interest rate risk exposure.[31] Trentino's submission that it was speculative to swap a fixed-rate inflow for a variable Euribor 3M inflow in order to hedge a Euribor 3M outflow, and do so at a much higher spread than the prevailing market, was not considered to have any merit, both from a market[32] and Italian law perspective.[33] Following this, it was judged that the rules on speculative derivatives did not apply to Trentino because it is a joint-stock company and because the Province is a Region, with greater autonomy in such matters than local authorities.[34] Trentino's powers under these Regional Laws are the powers referred to in Article 1(c) of the foundational Convention between Trentino and the Province dated 27 July 2006, which identified one of Trentino's authorized purposes as entering into '*financial transactions provided for in Provincial Law No. 7 of September 14, 1979*' and '*other innovative finance transactions*'. It was clear, therefore, that Trentino's power to enter into derivative transactions did not derive from the various national laws referred to by Trentino.[35] This significant distinction between local authorities and private law entities, which Trentino, due to its joint-stock company status, was judged to be, is assessed in more detail in Section 4.

Ultimately, Bryan J held that Trentino had mischaracterized the object of the hedge. Trentino was required to hedge the exposure created by the mismatch of fixed-rate inflows under the grants and variable-rate outflows under the Bonds, to comply with the Province's requirement that Trentino's borrowing costs did not exceed the grants.[36] To de-risk Trentino's exposure to variable interest rates, the fixed-rate inflows under the grants needed to be transformed into variable Euribor 3M inflows to meet the Euribor 3M outflows to bondholders.[37] The hedge achieved its goal if Trentino received a Euribor 3M indexed rate from Dexia at least equal to that it paid to the bondholders (which is what happened). There was nothing speculative in this,[38] held Bryan J. Trentino had effectively suggested that the transaction was speculative because it did not guarantee that Trentino would not suffer an interest rate loss.[39] The fact that risk would not be eliminated did not mean that the hedge was speculative, and even in a scenario where spreads over Euribor 3M doubled or tripled from the rates under the Bonds in future re-financings, the hedge would still limit Trentino's interest rate losses.[40] The above was supplemented with Bryan J conducting a detailed analysis under Italian law in relation to Trentino's later argument that there was an '*absolute ban*' on public entities entering into financial derivatives after 25 June 2008 pursuant to Law Decree No. 112/2008 (Law 112) and that in any event, Trentino had not considered that the ban applied to it.[41]

Below, Bryan J's approach is placed in a wider jurisprudential context. As will be suggested, this approach is consistent with leading authorities in this area.

4. *Dexia v Trentino* in context

Bryan J's approach to the Speculation Ground converges on three important points.

First, determining whether an entity has capacity requires the determination of hedging and speculation on objective grounds.[42] This remains in contrast to *Standard Chartered Bank v*

[30] *Dexia v Trentino*, [79].
[31] *Dexia v Trentino*, [79].
[32] *Dexia v Trentino*, [80].
[33] *Dexia v Trentino*, [73].
[34] *Dexia v Trentino*, [74].
[35] *Dexia v Trentino*, [75].
[36] *Dexia v Trentino*, [81].
[37] ibid.
[38] *Dexia v Trentino*, [81].
[39] *Dexia v Trentino*, [82].
[40] ibid.
[41] *Dexia v Trentino*, [83]–[87].
[42] Ariyo (n 2) 13.

Ceylon Petroleum Corporation [2012] EWCA Civ 1049 (CA) ('*Standard Chartered*'), where the Court of Appeal was troubled by the distinction being decided objectively.[43] In the case of *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) ('*Credit Suisse*'), however, affirmed in *Dexia v Trentino*, it was shown that the test can be objective, with the court in *Credit Suisse* holding that certain derivatives were regarded as hedging transactions, while others were not.[44] This approach further tallies with the English law approach of determining the general powers of an authority and seeking to establish capacity through its competence and function, as well as what is conducive or incidental to its objects.[45] The objective test is also beneficial because of the regulatory context in which derivatives sit.[46] Consequently, if participants know that courts have specific ways of objectively determining the distinction, this assists in achieving market stability and minimizes systemic risk.

Second, the approach in *Dexia v Trentino* is consistent with the Court of Appeal in *Banca Intesa Sanpaolo Spa & Anor v Comune Di Venezia* [2023] EWCA Civ 1482 ('*Comune Di Venezia*'). In *Comune Di Venezia*, the Court of Appeal allowed an appeal against the finding of the High Court that interest rate swaps were impermissible speculation contrary to Article 119 (6) of the Italian Constitution.[47] The objectivity in distinguishing between hedging and speculation is reflected in Flaux LJ's finding that the disputed swap in *Comune di Venezia* was a valid hedge. Similar to Bryan J, Flaux LJ's judgment that the swap in issue was a hedge and therefore valid meant that the Italian Supreme Court would have concluded on the same lines.[48] Much the same way in which the derivative achieved the intention of Trentino, in *Comune di Venezia*, the swap gave Venice the benefit of an extended maturity period and other terms to correlate with issued bonds, without altering the economic effect of the initial swap used to hedge the risk from those bonds.[49] On this basis, there was no reason to conclude that the transactions were anything other than hedging transactions, and as such, the appeal in *Comune di Venezia* succeeded.[50] The approach of Flaux LJ therefore corresponds to that of Bryan J in properly considering what a speculation is and analysing the transactions in direct light of what is prohibited, that is, speculation.

Third, in determining what a public body is doing with a derivative, it remains critical that this is considered in light of the exposure held by the public body.[51] In aligning with this idea in *Dexia v Trentino*, Bryan J specifically considered the mismatch between the Province's grants, costs of borrowing, and the use of the derivative to provide transactional alignment. As I have pointed out in previous work, this determination depends on the type of exposure and a decision by the counterparty to choose which derivative product best suits its desire to achieve an effective hedge.[52] In *Comune di Venezia*, because one swap was not aligned with an issued bond, it needed to be restructured with an extended maturity date.[53] As a result and in that context, the existing exposure of the public entity was relevant to determining the validity of the hedge and what it had achieved.[54] Likewise, in *Dexia v Trentino*, it was acknowledged that Trentino itself had instigated and determined the structure of the transaction,[55] as it would have been the best judge of its own exposure and the use of derivatives to provide alignment.

While I note in previous work that there has been a reluctance in some cases, emanating from the House of Lords decision in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC, to engage in a distinction between hedging and speculation when determining capacity, these recent cases demonstrate a renewed judicial willingness to analyse transactions according to their economic function.[56] They correctly acknowledge that determination of the

[43] *Standard Chartered Bank v Ceylon Petroleum Corporation* [2012] EWCA Civ 1049 (CA), Moore-Bick LJ at [16].
[44] *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm), Andrew Smith J at [232]–[241].
[45] Ariyo (n 2) 7–9.
[46] Ariyo (n 2) 5–6.
[47] *Banca Intesa Sanpaolo Spa & Anor v Comune Di Venezia* [2023] EWCA Civ 1482 ('Comune Di Venezia'), Flaux LJ, [175].
[48] *Comune Di Venezia*, Flaux LJ, [168].
[49] *Comune Di Venezia*, Flaux LJ, [168].
[50] *Comune Di Venezia*, Flaux LJ, [168].
[51] Ariyo (n 2) 15–16.
[52] ibid.
[53] *Comune Di Venezia*, Flaux LJ, [158].
[54] ibid.
[55] *Dexia v Trentino*, [38].

distinction between a hedge and speculation, while objective, does depend on a subjective assessment of what the relevant entity's exposure says about the derivative transaction it has entered into. It is post-execution of such transactions that the courts then objectively determine whether the transactions are within the entity's capacity, thus necessitating a distinction between hedging and speculation in line with the law and instruments that establish the relevant entity. Exposure is inherently subjective in that it arises from the entity's internal financial structure and obligations. However, once that subjective exposure is identified, the court must assess the derivative's economic function against it using objective criteria. Doing so avoids ex post rationalizations that may obscure the real purpose of the derivative. In *Dexia v Trentino*, for example, it would have seemed that the basis risk was between the Bonds, but on closer examination of what Trentino was trying to achieve, it became clear that it was actually the basis risk between the Bonds and the grants that was the objective purpose of using the derivative.

With alignment of Bryan J's judgment in the context of other cases in this area, the case comment moves on to a specific aspect of *Dexia v Trentino*, where Bryan J's judgment is further aligned with another important case: *Standard Chartered*. Below, this further alignment of the case law is challenged on the basis that the formal legal structure of the relevant entity is inadequate, on its own, to determine capacity for public bodies in derivative transactions.

5. Moving from form to substance

In various aspects of Bryan J's judgment, Trentino's status as a private company was critical to Trentino losing the argument on the Speculation Ground. In the majority of cases involving capacity, the entity type is usually a local authority with its powers limited to hedging only. This tends to be why a determination on whether the relevant transaction is a hedge or speculation arises.

In three cases involving Ceylon Petroleum Corporation (CPC), a Sri Lankan state-owned entity that traded commodity derivatives with three banks,[57] the question of how that entity should be treated was central to various findings on capacity. In the *Standard Chartered* case, Moore-Bick LJ held that parallels could not be drawn between English authorities, whose functions and powers are defined by statute, and a body such as CPC, which was incorporated for a different purpose, and that there was no authority reflecting this approach.[58] Moore-Bick LJ observed that although CPC was formed to act in the public interest, the legislature intended it to act as a commercial entity for the purposes of engaging in international and domestic trade.[59] The impact of this distinction, for Moore-Bick LJ, was that CPC had the capacity to enter into any transaction that could be incidental or conducive to its statutory objects,[60] as opposed to distinct transactions that were either hedging or speculative. As a result, Bryan J's formal distinction between Trentino as a private company and local authorities aligns with Moore-Bick LJ's view in *Standard Chartered* that local authorities must be distinguished from commercial companies run by the state.[61]

At this juncture, there are two arguable reasons for departing from Moore-Bick LJ in *Standard Chartered* and Bryan J in *Dexia v Trentino*.

First, public accountability is common to both local authorities (English or otherwise) and any entity that is an extension of public law in private transactions. In *Dexia v Trentino*, Trentino was described as the equivalent to a PLC in English law, established in Italy in accordance with Article 14 of Provincial Law No 1 of 10 February 2005 and wholly owned and controlled by the Province, with its sole business as management of the Province's assets.[62] While companies owned

[56] I address reluctance as the dominant approach and in the academic scholarship here: Ariyo (n 2) 10.
[57] *Deutsche Bank v Democratic Socialist Republic of Sri Lanka* [2012] ICSID Case No ARB/09/2, Award, 31 October 2012; ICSID Case No ARB/09/2, Dissenting Opinion. <https://www.italaw.com/cases/1745>; last accessed on 12 December 2025; see *Standard Chartered* (n 43). See also the High Court case from which the appeal emanated from: *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm). LCIA No 81215, First Partial Award, 31 July 2011 ('Citibank').
[58] *Standard Chartered* (n 43), [28].
[59] *Standard Chartered* (n 43), [31].
[60] ibid.
[61] *Standard Chartered* (n 43), [28]–[31].
[62] *Dexia v Trentino*, [22].

by a public body may be directed towards commercial purposes, their public law origins require them to be treated like local authorities. This is because the implications of judgments in this area are public in their effect. In *Dexia v Trentino*, any impact from the judgment (enforcement or otherwise) is to be borne directly by the Province, as the judgment is logically against the Province's assets. Similarly, in *Standard Chartered*, the impact of the decision was to be borne by the state of Sri Lanka as again, judgment was against the nation's assets. As a result, equating Trentino's private company status with a PLC under English law undermines these public effects, which cascade into real financial burdens on taxpayers. This is not the case with a private company or English law PLC that does not emanate from public law. Moore-Bick LJ pointed out in *Standard Chartered* that CPC was given extensive powers to enter into transactions that a commercial organization would undertake.[63] However, Moore-Bick LJ notes that ultimately, the Minister of Petroleum could control its activities,[64] much the same way in which the Province would control Trentino's activities. In *Standard Chartered*, the Minister was publicly accountable, making CPC an extension of the Sri Lankan state and therefore an entity of public law. The only difference between CPC, Trentino, and a local authority under English law is jurisdictional and even on this point, the Court of Appeal in *Standard Chartered* accepted that the principles in determining capacity under English and Sri Lankan law were similar.[65] This, with respect, makes the idea of equating commercial entities set up by states with private parties, such as a PLC, unrealistic.

The point of difference, however, is that although CPC could enter into any transaction, its ability to do so was restricted to a specific type: hedges. In the case of Trentino, there was no restriction to a certain type of transaction, which is why Bryan J's judgment stands on a firm footing. Indeed, one of Trentino's authorized purposes was to enter into '*financial transactions provided for in Provincial Law No. 7 of September 14, 1979*' and '*other innovative finance transactions*'.[66] The word '*innovative*' can clearly encompass both hedging and speculation, such that it was clear Trentino had the capacity to enter into both the MA and the underlying transactions. Similarly, Article 31 of the Province Accounting Regulation authorized entry into the derivative transactions set out in Article 3(2) of Ministerial Decree 389/2003 (Decree 389) as well as '*further transactions … on the basis of evaluations of convenience in relation to particular opportunities offered by the financial markets*'.[67] This was determinative of the issue for Trentino, as these various provisions provided significant leeway to trade derivatives in a way that did not restrict Trentino to hedging trades, unlike the situation with CPC. This divergence between CPC and Trentino is telling. Whereas CPC's statutory mandate limited it to hedging, Trentino's regulatory framework conferred broader discretion, including entry into '*innovative*' transactions. While these two entities share the common denominator of public accountability, this reiterates the third point in Section 4 above on the need for a substantive assessment of the entity's functions in order to objectively determine their capacity.

Second, the insistence on form over function in both Bryan J and Moore-Bick LJ's reasoning can be said to be opposite to the contemporary reality of governance. Harlow and Rawlings note that outside the boundaries of the nation-state, fragmentation is pronounced, with states, agencies, international institutions, and multinational corporations exercising '*ambiguous forms of authority*'.[68] This exercise of authority is based on states contracting out their public functions to the private sector,[69] such as the Province using Trentino, a joint stock company, for the management of public assets. As a result, separate public and private law principles are hard to apply in the post-modern world of fragmented governmental structures.[70] The common denominator is that in each of these instances, the entities, per Harlow and Rawlings, exercise '*ambiguous forms of authority*' in their trading of derivatives. This fragmentation is further reflected in the practice of trading derivatives, where the distinction between local authorities and private

[63] *Standard Chartered* (n 43), [32].
[64] ibid.
[65] *Standard Chartered* (n 43), [24].
[66] *Dexia v Trentino*, [75].
[67] *Dexia v Trentino*, [74].
[68] Harlow and Rawlings (n 3) 21.
[69] Harlow and Rawlings (n 3). See Chapter 8 on 'Contractual Revolution' and Chapter 9 on 'Contract, contract, contract', with both chapters containing detailed analysis of modern administration through contract and the risks inherent in this mode of regulation.
[70] Harlow and Rawlings (n 3) 21.

companies controlled or owned by a state is irrelevant at the deal-making stage. The entity, whether a bank, company, or fund set up by the government, is generally seen as synonymous with the state. Of course, there are legal differences that establish the relevant entity. For example, there is a difference in entering a transaction with a central bank and local authority. But this difference is one of purpose. The central bank may be entering the transaction to manage country's debt while the local authority may be managing its borrowing from the central bank. Absent this, they are emanations of public law and the bank providing the derivative will likely treat them as such. Further, in *Dexia v Trentino*, it is likely that Trentino, as a joint stock company, was covered under the ISDA industry opinion on capacity. This would have meant that, preceding entry into the transaction, the bank would have had to satisfy itself that Trentino had legal capacity. However, this would not be the end of the line for any diligent bank, as Trentino's link to the Province would immediately raise a flag that a 'top-up' opinion was necessary. As seen in *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, the Norwegian local authority in that case claimed damages against a law firm for losses as a result of what it claimed was the firm's negligent advice in relation to the capacity and power of the entity to enter derivative contracts.[71]

As a result, we see that there is much more to simply confirming an entity as having capacity. Rather, there is typically a detailed assessment of not just what they are doing with the derivative, but also their capacity beyond the legal form that the relevant entity takes. In this respect, form is not dispositive of the matter, as seemed to be the case in *Dexia v Trentino*. Rather, the entity's purpose and its linkage to public accountability represent the substance of what should be considered in determining capacity in line with whether the relevant entity is hedging or speculating in derivatives.

6. Conclusion

Per Aikens LJ, where history repeats itself with variations, courts should look past form to both function and public accountability to ensure that capacity rules reflect the realities of public finance. *Dexia v Trentino* demonstrates that courts are increasingly willing to assess the capacity of public or quasi-public entities to enter into derivative transactions by drawing a clear and objective distinction between hedging and speculation. Bryan J's judgment reaffirms that such assessments must be grounded in the economic substance and purpose of the transaction, not merely formalistic arguments about capacity. This is consistent with the leading authority and affirms that the correct legal standard is one that prioritizes functional exposure in an objective determination of whether hedging or speculation has occurred. Beyond doctrinal clarity, *Dexia v Trentino* raises a more fundamental point. Entities like Trentino, while structured as private companies, are publicly owned, publicly accountable, and perform functions that are almost indistinguishable from local authorities. As such, a rigid public and private law divide is inadequate. As suggested, courts should instead account for the commonality of public accountability and the public implications of their decisions in this area.

[71] *Haugesund* (n 1), [9].

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