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1 LUXEMBOURG AND ASSET-BACKED SECURITIES: INVOLVEMENT AND PERSPECTIVES

Introduction

In its simplest form, securitisation can be defined as a financial transaction through which relatively illiquid assets (such as mortgages, loans, bank receivables, credit card receivables) are transformed into securities that are easily tradable on financial markets. These securities are called *"asset-backed securities"* (ABS).

This financial tool – originally developed in the seventies in relation to US mortgages – has evolved in the US, and subsequently in Europe, towards much more sophisticated instruments that have achieved the securitisation of a broad range of assets, cash flows and risks.

On account of the significant benefits offered by securitisation – mainly risk transfer, diversification, lower funding costs, generation of new sources of revenues – most European countries have enacted specific statutes, in order to make this new financial instrument available to their market players. As a result, the amount of European securitised assets increased tenfold between 2000 and 2007, with an increase of 40,4% in the sole year 2006[42], Spain, the Netherlands and Italy accounting for the largest part of this market[43]. The second half of 2007 has seen, however, a dramatic drop in the issuance of ABS, as a result of global credit market re-pricing and lower market liquidity[44].

Luxembourg, eager to attract new capital, adopted on 22 March 2004 a securitisation law, intended to provide market players with a very flexible and open legal framework, admitting the most sophisticated forms of securitisation.

It is worthwhile noting, however, that as of today, the number of securitisation transactions structured, wholly or partially under Luxembourg law only represents a small portion of the asset-backed securities listed on the Luxembourg Stock Exchange and held in Clearstream Banking S.A., the asset-backed securities issued under Italian, German, Dutch, and to a lesser extent French and Spanish law being among the most represented in this respect. In addition, approximately 60% of all asset-backed securities listed on the Luxembourg stock exchange and held in Clearstream are regularly used as eligible collateral for the Eurosystem monetary policy operations on a cross-border basis via the so-called 'Correspondent Central Bank Model'.

This shows that the Luxembourg financial place is involved in the field of asset-backed securities in different respects, which we wish to investigate in this article.

For this purpose, we will summarise, in a first section, the main building blocks of securitisation transactions. We shall turn, in a second section, to the main features of the Luxembourg law of 22 March 2004 and shall review how it has been used, in practice, in the last three years. In a third section, we shall briefly introduce the ABS listed on the Luxembourg stock exchange and held in Clearstream Banking S.A., prior to examining in detail, in a fourth section, the conditions under which some of these ABS may be used as collateral for monetary policy operations and the extent of the verifications currently conducted by central banks in this respect. In this fourth section, we shall also propose some reflections on the appropriateness of the Eurosystem eligibility criteria, in their current drafting, and on possible improvements in this latter respect. We shall then conclude with the overall role played by the Luxembourg financial place in respect of ABS and how this very specific expertise could potentially be leveraged in the future.

42 Securitisation in Luxembourg, a regulatory, accounting and tax practice guide, 2007, PriceWaterhouseCoopers, p. 5, section 1.2 'Securitisation in the Euro Area', ECB Monthly Bulletin, February 2008, p. 86. 43 ESF, Securitisation Data Report, Winter 2008, p. 1.
43 'Securitisation in the Euro Area', ECB Monthly Bulletin, February 2008, p. 86.
44 ESF, Securitisation Data Report, Winter 2008, p. 1.

1.1 MAIN FEATURES OF SECURITISATION TRANSACTIONS

Securitisation does not come *ex nihilo*. It represents an evolved form of other financial instruments, which meet more satisfactorily concerns of professional investors in terms of cash flow predictability, marketability, liquidity, efficient use of collateral and credit quality.

Originally, the basic features of this instrument consisted of (1) a transfer and isolation of a pool of illiquid assets into a special purpose vehicle (SPV), (2) the application of credit enhancement and (3) the subsequent issuance of a spectrum of different securities, in terms of maturity, liquidity, risks and return.

1.1.1 The transfer of the underlying assets to the SPV

The first building block of a traditional securitisation transaction is the transfer of relatively illiquid assets to a special purpose vehicle (the so-called 'true sale') which, in principle, isolates the underlying assets from their originator. This operation is crucial in several respects. First, underlying assets are used, as exclusive collateral for the payment of interests and/or capital owed to the investors holding securities issued by the SPV, so that the entitlements of the latter should not be affected by a negative evolution of the originator[45]. This represents a very valuable protection for investors against a possible bankruptcy or filing of collective proceedings against the originator, of which unsecured claims are governed by the rule of *"pari passu"*. Second, insofar as the so-called 'true sale' effectively cuts the link between the underlying assets and the originator, the rating agencies may exclusively focus on underlying assets, thereby avoiding the cumbersome, sensitive and time-consuming process associated with the assessment of the solvability of the originator. Third, assets assessed independently from the originator may be granted a higher rating and may be the subject matter of specific credit enhancement[46]. Fourth, the transferred assets no longer appear on the balance sheet of the originator, so financial charges based on capital adequacy requirements may be commensurately alleviated.

1.1.2 Credit enhancement methods

The second building block of traditional securitisation consists of the use of *"credit enhancement"* methods, which aim at lessening the impact of potential losses on the underlying collateral, thereby increasing the likelihood that investors will receive the cash flows to which they are entitled[47]. Credit enhancement may firstly derive from the intrinsic structuring of the transaction (internal credit enhancement). Such is, for instance, the case in over collateralisation (through which the amount of pooled assets exceeds the face value of the financial assets). Subordination, which achieves the tranching of securities in a senior (or A) class of securities and one or more subordinated (or junior) classes that function as the protective layers for the A tranche, is also considered as an internal credit enhancement method. The excess spread (under which the net amount of interest payment, after bondholders and expenses have been paid, is used to cover current-period losses and may be paid into a reserve fund to increase credit enhancement, is also to be counted as third internal credit enhancement method.

Credit enhancement may secondly derive from the intervention of a third party. This may take the form of an insurance policy[48], of a commitment of a rated insurance company, a parent company of the seller to

45 *"Credit risk of assets [is] divorced from the credit risk of the originator of these assets"*. EUROPEAN SECURITISATION FORUM, A Framework for European Securitisation, May 2002, p. 3.

46 *"The originator receives better funding irrespective of its own credit worthiness on a stand-alone basis"*. W. ROSS and X. DE PAUW, Introduction to Securitisation, in Merrill Lynch & Co., Global Securities Research & Economics Group, Fixed Income Strategy, 4 September 2000, p. 14.

47 *"The role of credit enhancement is to bridge the credit quality of the assets, which may be B or BB, to the level of the desired rating of the asset-backed security, generally AAA"*.W. ROSS and X. DE PAUW, Introduction to Securitisation, in Merrill Lynch & Co., Global Securities Research & Economics Group, Fixed Income Strategy, 4 September 2000, p. 17.

48 Usually, issuances have one or more levels of credit enhancement ahead of the insurance policy. An insurance policy of securitisation transactions is a valuable credit enhancement that usually rates the issued securities equal to the claims paying rating of the insurance company; typically AAA. See on this topic EUROPEAN SECURITISATION FORUM, *European Securitisation: A resource guide*, 1999, p. 4; D; RULE, *Risk transfer between banks, insurance companies and capital markets: an overview*, in Financial Stability Review, December 2001, p. 148.

support a loss up to a stated maximum amount *(third party or parental guarantees, letter of credit)*, a borrowed deposit of cash, invested in high-rated short-term commercial paper *(cash collateral account)* or a subordinated tranche, purchased on a negotiated basis by a single third-party credit enhancer or securitised as a private placement and sold to several investors.

1.1.3 Issuance of a wide spectrum of securities classes

The third building block of traditional securitisation consists of the issuance of a wide spectrum of securities classes, of which maturity, liquidity, risks and return can vary nearly without limit. Consequently, securitisation provides for the best example of how different aspects (risks, liquidity, cash flows) of primary assets (such as loans, receivables and mortgage claims) can be unbundled and repackaged into marketable securities, which may take several forms, in order to match the preferences of a plethora of investors[49]. This way, it achieves one of the most efficient uses of collateralised assets[50].

1.1.4 From traditional to synthetic securitisation

Originally, these basic features have been applied to mortgage receivables and have achieved the so-called 'traditional securitisations'. In the last decade, these basic features have, however, been applied to other assets, including future cash flows[51], operating assets generating a predictable income stream, and more recently, collateralised loan obligations (CLOs), collateralised bond obligations (CBOs) and collateralised debt obligations (CDOs)[52].

The ultimate evolution known today in securitisation technology is the synthetic securitisation, which achieves the same credit risk transfer as a traditional securitisation, but without transferring the assets from the originator (called here, the sponsor) to the SPV. This risk transfer is achieved through a combination of physical assets and derivatives, which replicates the behaviour of traditional assets[53]. It is important to stress that in this type of transaction, the originator / sponsor seeks credit protection rather than raise

49 See in this respect P. W. FEENEY, *Securitization, Redefining the Bank*, St. Martin's Press in association with the Loughborough University Banking Centre, p. 110 – 111, addressing the specific case of the US securitised mortgage market.

50 *P. W. FEENEY, op. cit, p. 107.*

51 Such as utilisation fees for the use of a pipeline or other distribution networks, settlement payment for telecom services, credit card usage, social security contributions, taxes, lottery revenues.

52 In their simplest form, CLOs, CBOs and CDOs are securities respectively backed by a diversified pool of secured or unsecured commercial and industrial loans of one or more lending banks *(collateralised loan obligations)*, secured or unsecured senior or junior bonds issued by a variety of corporate or sovereign obligors *(collateralised bond obligations)* and a diversified pool of both corporate bonds and loans *(collateralised debt obligations)*.
Loan and bond, although achieving the same economic result, differ one from the other. Since a loan derives from a bilateral contract between a bank and a lender, its terms vary widely - entailing a total lack of standardisation in this sector - and may be restructured to accommodate the diminished or declining repayment capacity of borrowers. Loans are consequently much less liquid than bonds, which, on the contrary, are securities subject to a higher standardisation. Hence, the analysis of credit, cash flow and liquidity is totally different for CLOs and CBOs. Today, CLOs represent a very significant part in terms of volume of securitisation transactions completed, including in Europe. There are many reasons for this success. First, CLOs are the ideal structure for securitised loans, thereby achieving significant reduction of regulatory capital requirements for the selling institutions on the assets transferred into the transaction. In addition, such transactions - when involving large amounts - allow an efficient access to funding, at lower cost. In the late 'nineties, international banks have consequently used this structure extensively, placing their securities with large institutional investors. Furthermore, CLOs are also very often used in relation to synthetic securitisation, which is obviously a market on the rise. Finally, CLOs have recently evolved towards a more sophisticated form of securitisation, where the SPV issues not only multiple classes of debts but also equities.

53 More specifically, the issuer enters into a credit default swap with an SPV, in order to be protected against credit events (such as default, bankruptcy, restructuring, suspension of payment) associated to the reference portfolio, which remains on his balance sheet. In this context, the sponsor will pay insurance premiums to an SPV. In order to fund the protection of the reference portfolio, the SPV issues bonds, the proceeds of which are invested in the purchase of a portfolio of government bonds or medium term notes, which also serves as collateral for the bonds. If a credit event materialises, this portfolio will be reduced to the extent necessary in order to compensate the sponsor for losses incurred on the referenced portfolio. Note holders will therefore suffer a loss in due proportion. If no credit event materialises, bondholders will get back their full investment, plus a premium corresponding to the insurance premium paid by the sponsor for the protection. In this structure, *"the credit performance of the bonds depends on the credit performance of the referenced portfolio and the enforcement of credit events, while their cash performance is linked to the cash performance of the collateral portfolio. (...) The amortization proceeds of the referenced assets are not used to make payments under the structured bonds. Investors only have synthetic exposure to the referenced portfolio, whilst debt service is met by the yield of the collateral portfolio supplemented by insurance premiums paid by the sponsor in return for credit protection for the referenced portfolio."* See on this topic, Kothari, http://www.credit-deriv.com/syntheticCDO.htm.

finance. It impacts significantly on the holders of the securitised assets, since the value thereof is the subject matter of an additional risk associated with the possible occurrence of the credit event.

1.2 THE LUXEMBOURG SECURITISATION LAW OF 22 MARCH 2004[54]

1.2.1 The main provisions of the law

Eager to keep pace with financial technology and attract new sources of capital and revenues, the Luxembourg Legislator adopted in 2004 a very detailed and comprehensive legal framework for securitisation. Without entering into the details of this law, which has already been commented on by other authors, we wish to concentrate on the overall design of this law and its effective scope of application.

As to the overall design of this law, the Luxembourg Legislator has delivered a state-of-the-art piece of legislation, addressing all potentially relevant aspects of securitisation and creating practical and efficient solutions.

In respect of the assets which may be securitised, the Luxembourg legislator has offered maximum flexibility, admitting all types of assets, claims, risks, cash flows, be they existing or future, movable or immovable, tangible or intangible, thereby opening the door to traditional or synthetic securitisation[55].

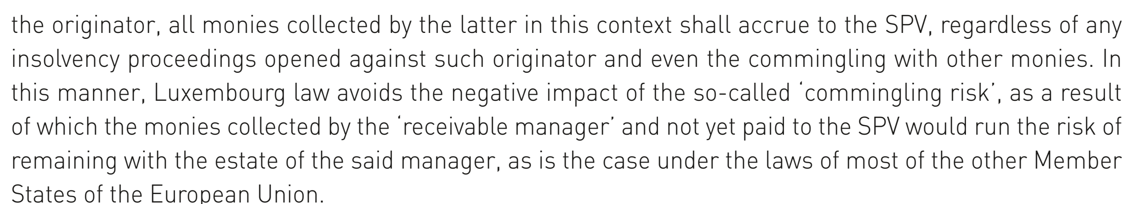
The same logic of openness has been applied for the forms of the SPV, which may indifferently be created in the form of a company[56], a securitisation fund, without legal personality, managed by a management company, with the possibility of creating different compartments within one securitisation entity, regardless of its form[57], and even to distinguish between the SPV holding the underlying securities and the SPV issuing the securities[58].

Enhancement instruments (such as over-collateralisation, subordination[59], and guarantees) are widely admitted in Luxembourg, hence setting out the optimal conditions for the rating of the issue, a key factor for its success on the primary market.

Furthermore, the Luxembourg Legislator also designed practical instruments, in order to ensure that all underlying assets (including their proceeds or replacement funds) shall exclusively benefit the securities holders, without the need for burdensome enforceability measures. When the underlying assets are governed by Luxembourg law, their mere transfer by the originator to the SPV shall be legally valid and enforceable between parties and vis-à-vis third parties, without the need of any notification. As long as the transferred debtor has not been informed of such transfer, he may nevertheless validly pay its debt to the originator. As to future claims, they may also be validly transferred to a securitisation entity, as long as they may be identified as being part of the transferred portfolio at the time they would come in existence or at the moment agreed between the parties[60]. This solution has recently been reinforced through the ratification by the Luxembourg State of the United Nations Convention on the Assignment of Receivables in International Trade.

Another illustration of this quest for legal certainty in the transfer of the underlying assets to the SPV is the rule according to which, when the underlying assets consist of claims which continue to be managed by

54 The full title of this law is 'the Law of 22 March 2004 relating to the securitisation and amending the amended law of 5 April 1993 on the financial sector, the amended law of 23 December 1998 setting up the Financial Commission of the Financial Sector, the law of 27 July 2003 on trusts and fiduciary contracts, the amended law of 4 December 1967 relating to the income tax, the amended law of 16 October 1934 on the wealth tax, the amended law of 12 February 1979 on VAT.
55 See Article 43 of the Law.
56 See Article 4 of the Law.
57 See Article 5 of the Law, for the compartments of a corporate entity and Article 8 of the Law for the compartment of a securitisation fund.
58 See in Article 1(2) between the acquiring entities ('organismes d'acquisition') and the issuing entities ('organismes d'émission').
59 See Article 63 of the Law.
60 Article 55 of the Law.



the originator, all monies collected by the latter in this context shall accrue to the SPV, regardless of any insolvency proceedings opened against such originator and even the commingling with other monies. In this manner, Luxembourg law avoids the negative impact of the so-called 'commingling risk', as a result of which the monies collected by the 'receivable manager' and not yet paid to the SPV would run the risk of remaining with the estate of the said manager, as is the case under the laws of most of the other Member States of the European Union.

The Luxembourg law has also formally organized the function of trustee or representative of the note holders, who may be granted collateral in respect of the underlying assets or proceeds thereof, on behalf of the note holders.

As to the effective scope of application of the Luxembourg law on securitisation, it should be stressed that, unlike the specific legislation adopted in this field in other Member States (namely, France, Italy, Portugal, Spain, Belgium, Greece, Poland[61]) and due to the very small size of the traditional pool assets which may effectively be securitised in Luxembourg (such as the residential or commercial mortgages, the lease or loan receivables), the said Law mainly applies to cross-border transactions, under which SPVs, incorporated under Luxembourg law, acquire underlying assets often located outside Luxembourg and/or issue securities, usually under foreign law. From the viewpoint of Luxembourg international private law, what matters is that the securitisation entity is located in Luxembourg, i.e., that the statutory seat of the securitisation company or of the management company (in case of a securitisation fund) is located in Luxembourg[62] and, in case of securitisation conduits issuing in a continuous manner securities intended for the public, that such entities have their cash and securities held in custody with a credit institution established or with statutory seat in Luxembourg.

1.2.2 Practical implementation of the Luxembourg Law

Although it is difficult to obtain, and complete, accurate data on the securitisation market in Luxembourg, it seems that this market has grown significantly in the last three years. As of the end of April 2007, 311 securitisation vehicles had been set up, nearly 2000 compartments had been created and 12 regulated securitisation vehicles had been licensed by the CSSF, with an amount of assets securitised totalling approximately Euros 14 billion[63]. Underlying assets of such issuance encompass assets as different as claims, repackaging operations, mezzanine capital, life insurance claims, etc[64]. As of today, the number of regulated securitisation vehicles has increased up to 17.

1.3 ABS LISTED ON THE LUXEMBOURG STOCK EXCHANGE AND HELD IN CLEARSTREAM BANKING S.A.

Beside the assets-backed securities governed, partially or wholly by Luxembourg law, there are also the assets-backed securities issued by European companies, listed on the Luxembourg Stock Exchange and held in Clearstream Banking S.A. As far as these securities are issued in the form of debt instruments by European issuers in a jurisdiction different from the latter's country of incorporation, they fall within the category of 'Eurobonds' and are, since 30 June 2006, issued in the form of 'new look global notes'.

May be counted among such Eurobonds traditional assets-backed securities relating to underlying assets located in Italy (residential or commercial mortgages, receivables derived from consumer loans), Germany (receivables derived from consumer loans for the acquisition of vehicles), the Netherlands (residential

61 For a detailed review of the regulatory framework applicable at the national level, see "Legal Obstacles to Cross-Border Securitisation in the EU", EFMLG, Working Group on Securitisation, 7 May 2007.
62 Article 3 of the Law.
63 This specific number of Euros 14 billion was computed as at 31 December 2006.
64 'Securitisation in Luxembourg, a regulatory, accounting and tax practice guide, 2007', PriceWaterhouseCoopers.

mortgage claims), Portugal, Spain, Greece, France (loans associated with the financing of large real estate projects) and the Netherlands (commercial or residential mortgage securities).

May also be counted among such Eurobonds synthetic securitisation transactions, which often relate to portfolio of securities held in the UK or the Netherlands and/or governed by UK law.

1.4 THE USE OF THE ASSETS-BACKED SECURITIES LISTED AND HELD IN LUXEMBOURG AS ELIGIBLE COLLATERAL FOR MONETARY POLICY OPERATIONS

1.4.1 The concept of monetary policy operations

By virtue of the Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank, all credit operations conducted by the Eurosystem need to be based on adequate collateral. In practice, monetary policy operations (be they in the form of weekly main refinancing operations or intra-day credit extension within large value payment systems) are carried out by national central banks in a decentralised manner but common rules, for the definition and identification of such 'adequate collateral' are adopted at the Eurosystem level, in the form of the 'General Documentation on Eurosystem Monetary Policy Instrument and Procedures'. This 'General Documentation', which has been adopted as an annex to a guideline of the European Central Bank[65], is implemented by each of the central banks of the euro zone, in relations with their domestic counterparties. In Luxembourg, for instance, this takes the form of the 'Conditions Générales des Opérations'[66].

1.4.2 The standard criteria of eligible assets for monetary policy operations

The General Documentation contains precise criteria as to the assets which are deemed 'adequate' to serve as collateral for monetary policy operations. As of today, in order to enhance the level playing field in the euro area, increase transparency and promote equal treatment, these criteria are the same throughout the whole euro zone[67]. Although the Eurosystem has recently admitted new categories of eligible collateral – we think especially of bank loans – in order to avoid a shortage of collateral in the banking sector, we shall concentrate here on the eligibility criteria applicable to the financial instruments.

As a rule, and in order to minimise the risks of loss, adequate collateral only encompasses debt instruments, excluding equities, which are considered as intrinsically more risky than debt instruments. Besides, it was considered that equities possess legal and operational features that make their use as collateral by the Eurosystem more complex than debt instruments[68].

Such debt instruments must, in addition, present certain characteristics intended to guarantee, as much as possible, the reimbursement of the principal, including in case of insolvency of the issuer. They must, therefore, have a fixed, unconditional and principal amount which, in principle, may not result in a negative cash flow[69]. In this perspective, eligible debt instruments may not afford rights to the principal and/or the interest that are subordinated to the rights of holders of other debt instruments of the same issuer.

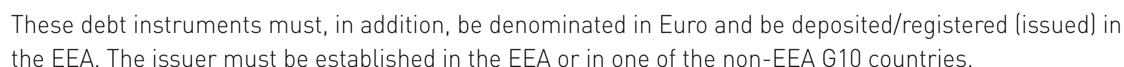
65 Initially, this text has been adopted as an annex of the Guideline ECB/2000/7 on monetary policy instruments and procedures of the Eurosystem. Since then, this guideline has been amended several times, the last time being by the Guideline of the ECB 2007/10.

66 Available on www.bcl.lu; for the criteria applicable to the eligible collateral, see more particularly section 8, p. 38 – 42.

67 This was not the case before January 2007. In order to ensure a smooth transition to the euro, the ECB had set up a 'two-tier collateral framework', where tier one assets consisted of marketable debt instruments fulfilling euro area-wide eligibility criteria, while tier two assets comprised assets deemed to be of particular importance for certain national financial markets and banking system, which only fulfilled national eligibility criteria. See on this topic, "The single List in the Collateral Framework of the Eurosystem', ECB Monthly Bulletin, May 2006.

68 See 'The Single List in the Collateral Framework of the Eurosystem', ECB Monthly Bulletin, May 2006, p. 81.

69 See for the exact requirements, the General Documentation, 6.2.1. 'It must be a debt instrument having (a) a fixed, unconditional principal amount, and (b) a coupon that cannot result in a negative cash flow. In addition, the coupon should be one of the following: (i) a zero coupon, (ii) a fixed rate coupon or (iii) a floating rate coupon lined to an interest rate reference. The coupon may be linked to a change in the rating of the issuer itself. Furthermore, inflation-indexed bonds are also eligible. These features must be maintained until the redemption of the obligation'.



These debt instruments must, in addition, be denominated in Euro and be deposited/registered (issued) in the EEA. The issuer must be established in the EEA or in one of the non-EEA G10 countries.

Furthermore, in order to ensure that the transactions in respect of such eligible assets are enforceable and that the price formation is transparent, the eligible assets must be traded on regulated markets or on non-regulated markets, provided that a yearly assessment of the latter demonstrate the acceptability of such markets for Eurosystem credit operations.

Finally, the credit standard of the eligible assets is assessed based on the characteristics of the issuer, the existence of guarantees and the availability of rating of the issuers.

Irrespective of the fact that a debt instrument would meet all these criteria, a counterparty may not submit as collateral any assets issued or guaranteed by itself or by any other entity with which it has 'close links'[70]. The rationale of this rule is to avoid a central bank suffering cases of 'double default', i.e., the default of its counterparty for the reimbursement of the credit and the default of its counterparty as issuer/guarantor/ debtor of the debt instrument used as collateral.

This prohibition of 'close links' is, however waived in certain cases[71], especially when the eligible debt instruments are structured in such a manner that the rights of the note holders are particularly well protected by special legal safeguards, such as the criteria set out in Article 22(4) of the UCITS Directive. This latter provision, which purports, in the specific context of the investment funds, to release limitations as to the proportion in which certain categories of underlying assets may be held by such investment firms, defines the concept of 'covered bank bonds' based on the two following features. Firstly, these debt securities must be issued by a credit institution which has its head office in a Member State and is subject by law to special official supervision designed to protect the holders of those debt securities. Secondly, sums deriving from the issue of such debt securities must be invested in accordance with the law in assets which, during the whole period of validity of the debt securities, are capable of covering claims attaching to the debt securities and which, in the event of failure of the issues, would be used on a priority basis for the reimbursement of the principal and payment of the accrued interest.

1.4.3 The specific criteria of eligible assets for monetary policy operations for ABS

1.4.3.1 From general to specific eligibility criteria for ABS

Since assets-backed securities have always been issued in the form of debt instruments, they have naturally been proposed as collateral for monetary policy operations and, initially, assessed against the traditional criteria of the 'adequate collateral'. At a time the Eurosystem was precisely seeking to diversify its sources of eligible collateral in view of the increasing collateralisation in private wholesale markets and relatively high consumption of collateral by the Eurosystem[72], these new financial instruments were particularly welcome. In addition, the Eurosystem wanted to be responsive to market innovation and to focus on the objective qualities of the assets and the issuer, so as to ensure that the various risks to the central banks are sufficiently low[73].

In 2006, the Eurosystem has, however, felt that the general requirement, according to which the debt instruments had to have a 'fixed, unconditional and principal amount' was insufficient to appropriately

70 For a definition of 'close links', see the General Documentation, 6.2.3. This is broadly defined as the cases where (a) the counterparty itself owns 20% or more of the capital of the issuer/debtor/guarantor, (b) the issuer/debtor/guarantor owns 20% or more of the capital of the counterparty or (c) a third party owns both the majority of the capital of the counterparty and the majority of the capital of the issuer/ debtor/guarantor.

71 For instance, when the close links exist between the counterparty and the public authority of EEA country.

72 See in this respect, 'The Single List in the Collateral Framework of the Eurosystem', ECB Monthly Bulletin, May 2006, p. 76.

73 See in this respect, 'Securitisation in the euro area', ECB Monthly Bulletin, February 2008, p. 92.

capture the risks of loss derived from some ABS transactions, such as the synthetic CDOs and cash CDOs containing other synthetic tranches of ABS [74].

In line with the objectives of level playing field, equal treatment and transparency underlying the Single List (then in preparation), the Eurosystem adopted a set of common criteria, applicable to all ABS, without (at least direct) consideration for the fragmentation of the European securitisation market and the ensuing variety of instruments, using rather different legal techniques depending on the laws applicable to the transactions. These specific criteria, which replace the 'fixed, unconditional and principal amount' requirement and which do not apply to the covered bonds falling under Article 22 (4) of the UCITS Directive, currently read as follows in the General Documentation:

'The cash flow generating assets backing the assets-backed securities must:

- *be legally acquired in accordance with the laws of a Member State from the originator or an intermediary by the securitization special vehicle in a manner which the Eurosystem considers to be a 'true sale' that is enforceable against any third party, and be beyond the reach of the originator and its creditors, including in the event of insolvency of the originator, and*
- *not consist, in whole or in part, actually or potentially, of credit-linked notes or similar claims resulting from the transfer of credit risk by means of credit derivatives.*

Within a structured issue, in order to be eligible, a tranche (or sub-tranche) may not be subordinated to other tranches of the same issue. A tranche (or sub-tranche) is considered to be non-subordinated vis-à-vis other tranches (or sub-tranches) of the same issue, and is 'senior' if, in accordance with the priority of payment applicable after the delivery of an enforcement notice, as set out in the offering circular, that tranche (or sub-tranche) is given priority over other tranches or sub-tranches in respect of receving payment (principal and interest), or is last in incurring losses in relation to underlying assets.'

The General Documentation also requires that the issuer of ABS is established in the EEA.

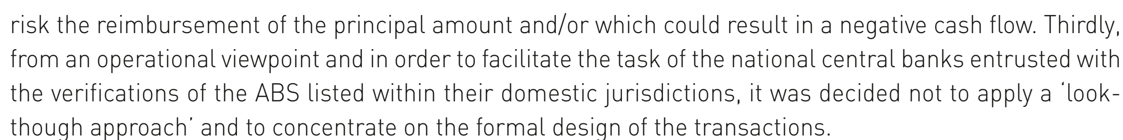
1.4.3.2 Analysis of the specific criteria in the light of the objectives pursued by the Eurosystem

In order to ponder on the appropriateness of these criteria, it is worthwhile analysing carefully the objectives pursued by the Eurosystem at the time of the drafting of these new rules, how such objectives have been reflected in the General Documentation and how these criteria are currently implemented through the day-to-day verifications conducted by the national central banks.

1.4.3.2.1 Objectives of the specific criteria

Several objectives were taken into consideration, while drafting the new criteria specifically applicable to the ABS. Firstly, from a policy point of view, as already hinted before, there was a clear willingness of the Eurosystem to accept these instruments, which represented a growing part of the European financial markets and which were in any event already admissible under the previous two-tier collateral framework, applicable between 1999 and 2007. They were accepted not only in the context of the euro area-wide eligibility criteria of tier one but also in the context of the tier two assets comprising assets deemed of particular importance for certain national financial markets and banking system. Such was, for instance, the case of the units issued by the French '*Fonds Communs de Créance*', which, although not strictly meeting the definition of 'debt instrument', benefited until 31 December 2008 from a regime of exception. Secondly, from a risk point of view, the Eurosystem intended to adapt the wording of the general eligibility criteria to the specificities of the ABS, so to be able to exclude those instruments, of which intrinsic structures put at

74 See in this respect, 'Securitisation in the euro area', ECB Monthly Bulletin, February 2008, p. 92.



risk the reimbursement of the principal amount and/or which could result in a negative cash flow. Thirdly, from an operational viewpoint and in order to facilitate the task of the national central banks entrusted with the verifications of the ABS listed within their domestic jurisdictions, it was decided not to apply a 'look-though approach' and to concentrate on the formal design of the transactions.

1.4.3.2.2 Design of the specific criteria – the 'true sale' concept

The combination of these objectives led the Eurosystem to design the specific criteria for the admission of ABS as eligible collateral for monetary policy operations on the basis of two main elements: on the one hand, the concept of 'true sale' and on the other hand, the exclusion, from the underlying assets, of any synthetic instruments. While the second element is rather straightforward and relies on a proper identification of the synthetic instruments, usually qualified as such in the issuance documents, the first element deserves to be examined more closely.

As this has been highlighted above (see section 1.1.1.), the transfer and isolation of the underlying assets in a separate vehicle plays a pivotal role in securitisation not only from the viewpoint of the note holders (since the underlying assets shall be used solely for their benefit, especially in case of insolvency proceedings opened against the originator), but also the originator (whose balance sheet encompasses such underlying assets no more) and the rating agencies (which can limit their credit assessment to the portfolio of the underlying assets). In addition, credit enhancement methods may only be efficient if they are exclusively stipulated for the benefit of the note holders and relate only to the underlying assets.

Furthermore, the fact that such transfer takes the form of an effective 'true sale' to a separate vehicle had been presented, at least at a certain point in time and prior to the recent financial innovations, as a differentiating factor between the so-called 'traditional' securitisations (hence based on the effective transfer of a portfolio of underlying assets) and the synthetic securitisations (based on the transfer of credit risks associated to a reference portfolio, without the necessary transfer of such portfolio).

Very naturally, the Eurosystem has therefore incorporated in its first criterion this concept of 'true sale', which it has further developed, providing that such 'true sale', which may take place between the originator or an intermediary to the securitisation special vehicle, must be verified in the light of the laws of a Member State[75] and must be enforceable against all, including the insolvency of the originator.

It is worth noting that the General Documentation offers great flexibility as to the contracting parties to such 'true sale' agreement, which may not only be the originator and the SPV, but also an intermediary. This allows the inclusion of special cases where the originator transfers the underlying assets to an intermediary fund, issuing units, which, in their turn, are acquired by another SPV issuing subsequently the assets-backed securities in the form of debt instruments.

It should also be emphasised that, in the absence of legal harmonisation for securitisation transactions, the verification of compliance with the 'true sale' requirement has to be conducted in the domestic legal environment by the national central banks, when verifying whether assets proposed as collateral for particular monetary policy operations comply with the eligibility criteria.

1.4.3.2.3 The verification of the eligibility criteria by the national central banks

In this section, we shall briefly describe how the verification of the eligibility criteria is organised within the Eurosystem. Many ABS being listed on the Luxembourg Stock Exchange, the Central Bank of Luxembourg

75 If read in the light of the definitions contained in the General Documentation, this reference to the 'laws of a Member State' should be strictly construed as referring only to the laws of a Member State of the euro zone.

has been conducting during the last two years extensive verifications in respect of Italian, Dutch, German, French and Portuguese ABS against the criteria. In a second part of this section, we shall therefore present a few examples of the verifications usually conducted by the Central Bank of Luxembourg in respect of the cross-border securitisation transactions.

1.4.3.2.3.1 Organization of verifications at the level of the Eurosystem

As already hinted above, although they are subject to common rules contained in the General Documentation, the monetary policy operations are effectively conducted on a decentralised basis by central banks, which therefore enter into direct contractual relationships with their counterparties. Each central bank verifies whether the assets, proposed by one of its counterparties as collateral, comply with the eligibility criteria contained in the General Documentation. There is, however, a rule of sharing of competences according to which each central bank shall conduct the verification for the financial instruments listed on its domestic market, regardless of whether such instruments shall be used on a domestic basis by its own counterparties or on a cross-border basis by counterparties located in another jurisdiction. To the extent that such verification may lead a national central bank to address issues falling within the laws of another Member State, the latter may request support from the central bank of the former.

Moreover, the national central bank is entitled to request from any relevant third party (such as the issuer, the originator or the arranger) any clarification and/or legal confirmation that it considers necessary to assess the eligibility of ABS[76]. In any event, the national central bank does not provide pre-issuance assessments.

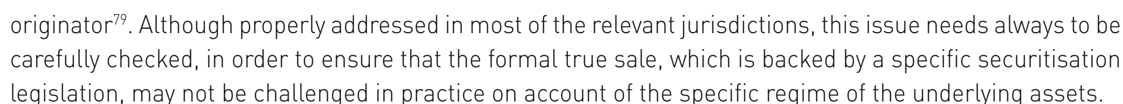
1.4.3.2.3.2 Examples of verifications conducted by the Central Bank of Luxembourg in respect of cross-border securi-tisation transactions

Generally, the verification of the 'true sale' requirement is facilitated in the countries (such as, for instance, Italy[77] or Portugal[78]), which have adopted special legislation expressly stipulating the conditions under which a portfolio of assets is deemed to have been definitively transferred to a separate vehicle. Such is not the case in countries where securitisation transactions take place, without the support of a specific legal framework (such as in the Netherlands or Germany), although rather stable jurisprudence seems to have been developed in order to set aside objections which may theoretically be raised, for instance in Germany, in respect of the overall qualification of the transaction, the restrictions derived from the data protection of the transferred debtors or from contractual provisions prohibiting the transfer of the underlying claims.

In order to properly verify whether such 'true sale' of the underlying assets has effectively been achieved, close attention may need to be paid to the underlying assets, of whose specific legal regime may impact on the effectiveness of such 'true sale'.

Reference should be made in this respect to the securitisation of claim receivables deriving from the leasing of vehicles or machines, under which the SPV exclusively acquires the said claim receivables, the leased machines or vehicles remaining on the balance sheet of the originator. Despite the effective legal transfer of the sole claim receivables to the SPV, thereby achieving a legal isolation of the latter receivables, in practice, the due payment of such receivables remains intrinsically dependent upon the availability of the leased vehicles or machines, including the eventual insolvency of the originator. In most of the jurisdictions within which claim receivables derived from leasing agreements are commonly securitised, specific laws have been adopted in order to cater for the maintenance of the leasing agreements despite the insolvency of the

76 Chapter 6 of the General Documentation.
77 Securitisation law No. 130 of 30 April 1999, as amended from time to time (Disposizioni sulla cartolarizzazione dei crediti).
78 Decree-Law 453/99 of 5 November 1999 as amended by Decree Law 82/2002 of 5 April 2002, Decree Law 303/2003 of 5 December 2003 and Decree Law 52/2006 of 15 March 2006.



originator[79]. Although properly addressed in most of the relevant jurisdictions, this issue needs always to be carefully checked, in order to ensure that the formal true sale, which is backed by a specific securitisation legislation, may not be challenged in practice on account of the specific regime of the underlying assets.

In the same vein, securitisation transactions sometimes relate to assets belonging to the State or public bodies which, according to common principles of administrative law, are usually qualified as being *'res extra commercio'* or belonging to the so-called *'domaine public'*. In order to deviate from these principles, under which such assets may in principle not be transferred to private entities (including an SPV in the context of a securitisation), specific laws have been enacted in order to formally organize administrative procedures (including requirements of express authorisation and/or special measures of publicity), to be complied with in case of securitisation. In some exceptional cases, additional verifications may be needed in order to check the due compliance of such transactions with some budgetary or constitutional limitations. Once again, although these issues, which derive specifically from the nature of the underlying assets, have been, in most cases, properly addressed by the domestic legislators, they always must be carefully verified in the context of the 'true sale' requirement.

When a central bank starts looking at the nature of the underlying assets, it may then face cases in which, although properly transferred by means of a legal 'true sale' to an SPV, such assets raise issues as to the overall appropriateness of the transactions for monetary policy operations in the light of the General Documentation, taken as a whole. The Central Bank of Luxembourg has, for instance, encountered on a number of occasions cases where the underlying assets consisted of ABS. In order to abide to the overall philosophy of the General Documentation, the Central Bank of Luxembourg has, in these cases, verified the compliance of the underlying ABS with the Eurosystem eligibility criteria, so to avoid assets, which are not, as such eligible for monetary policy operations, becoming so through their repackaging within an SPV.

The same approach has been followed for underlying assets in the form of subordinated debts, which would not be acceptable as such as eligible collateral. In such cases, it has been considered that, although the transaction achieved a 'true sale' to an SPV, the enforceability of such transfer would not be guaranteed in case of insolvency, since the underlying assets were subordinated debts.

This reasoning, if pushed to its logical extreme, could, however, lead to the delicate question of whether bank loans not strictly complying with the new criteria set out in the Single List may (or not) be rendered indirectly eligible through their repackaging within an SPV. In this respect, due consideration should be given to the rating of such repackaging substantially influenced by credit enhancement methods, be these in the form of guarantees, over-collateralisation or credit lines granted by the originator itself or a third party, which could materially improve the overall credit assessment of the transaction.

As set out earlier (1.4.2 in fine), a central bank does not verify *in abstracto* the due compliance with the eligibility criteria but in connection with a request introduced by a specific counterparty. In case of close links between the counterparty, on the one hand, and the issuer/debtor or guarantor of the financial instruments in question, the national central bank shall refuse to take such financial instrument as collateral for the said monetary policy operations. Insofar as the SPV, issuing the securities, is, by definition, a separate and distinct corporate entity, without a formal corporate link with the originator or even the counterparty, the 'close links' verification, as currently designed for standard debt instruments in the General Documentation has no vocation to apply to the ABSs.

A close examination of the effective relations between the originator, the SPV and the counterparty may, however, lead to interesting discoveries. Recently, the Central Bank of Luxembourg has faced cases where the

79 See for instance in Italy Article 7 of the Italian Law Decree No. 354 of 24 December 2003 (as converted by Law No 45 of 26 February 2004 and the new Article 72-quarter of the Insolvency Law)

underlying assets are, partially or wholly, composed of bonds held by the originator, which was, besides, the exclusive underwriter of the whole issuance (this implying no de-recognition of the bonds under the International Accounting Standards principles). Such cases echo a trend, recently described in the international press, where banks repackage part of their balance sheet into financial instruments totally subscribed by themselves, with the very and exclusive purpose of creating eligible collateral for monetary policy operations. One may question whether the absence of a deep and liquid secondary market for such instruments, although formally listed on a regulated stock exchange, does not contradict the overall philosophy of the General Documentation, under which the Eurosystem should be able, easily and quickly, to enforce the collateral, in case of default by its counterparty.

1.4.3.2.4 Possible improvements of the criteria

While examining the eligibility criteria applicable to the ABS, we have identified that, without prejudice to the very specific verification as to the presence of credit-linked notes or similar claims resulting from the transfer of credit risk by means of credit derivatives in the securitised portfolio, the Eurosystem very much focuses on the 'true sale' of the underlying assets to the SPV, without having particular regard to the nature of the underlying assets.

We have shown, however, that, in the day-to-day verification of ABS by the Central Bank of Luxembourg, it is not uncommon to conduct in-depth analysis of the underlying assets, in order to verify that their specific regime would not contradict the effect of the true sale or that their nature is not incompatible with the common rules applicable to the standard debt instruments.

With the increasing complexity and creativity in the ABS segment, accentuated by the quest of credit institutions for new sources of collateral in a rather illiquid market, the Central Bank of Luxembourg faces a growing number of cases where the eligibility criteria specifically set out in the General Documentation not capture the specific features of the new ABS in appropriate fashion.

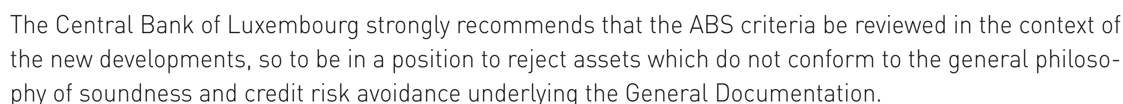
For this reason, the Central Bank of Luxembourg strongly recommends that the said criteria be reviewed in the context of the new developments, so to be in a position to reject assets which do not conform to the general philosophy of soundness and credit risk avoidance underlying the General Documentation.

Several directions could be pursued in this respect. A selection could firstly be made in respect of the underlying assets, privileging, for instance, mortgage-backed securities over less standard transactions relating to social security contributions, lottery, airport cash flows, repackaging of public debts for the refinancing of the health sector, etc. Alternatively, or cumulatively, a ceiling could be imposed to each counterparty, which could, for instance, not use more than 15% of all its collateral in the form of ABS. More stringent control could also be conducted as to the factual links between the originator, the SPV, the counterparty and the guarantor.

1.5 CONCLUSIONS

This article has demonstrated that the Luxembourg financial place is involved in the ABS sector in several respects: as a place of acquisition of the underlying assets and/or issuance of the ABS; as a place of listing and holding of such ABS, as well as a place of verification of the compliance with the Eurosystem eligibility criteria for monetary policy operations.

Through all these activities, the Luxembourg financial place concentrates and further develops a very specific expertise in the field of ABS, which could appropriately be leveraged in the private and public sectors, in order to contribute to the smooth and sound development of this industry, without unduly challenging financial stability.



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The Central Bank of Luxembourg is, however, confident that the proper communication and cooperation within the Eurosystem, not only for the design and adoption of such eligibility criteria but also for their day-to-day implementation, shall cater for the proper alignment of the eligibility criteria for ABS with the overall philosophy of credit avoidance spelled out in the General Documentation.

2 LEGAL ASPECTS OF THE DEPOSIT GUARANTEE SCHEME

2.1 PURPOSE OF DEPOSIT GUARANTEE SCHEME

This contribution attempts to present a brief description of the deposit guarantee schemes established in the European Union (EU) with a particular emphasis on the Luxembourg situation.

The deposit guarantee scheme is a mechanism aimed to cover up to a certain limit the deposits held within a credit institution in the event of failure of the latter.

The purpose of this mechanism is to foster financial stability, to strengthen the resistance of the banking sector to shocks by promoting public confidence in the banking sector, for instance in cases of insolvency problems and to prevent a run on a bank by large number of depositors.

The administrative and financial burden of a deposit guarantee scheme is usually borne by the credit institutions but, as put by 7th recital of the Preamble to the Deposit Guarantee Schemes (DGS) Directive[80] (hereinafter the DGS Directive), *"[...] the cost to credit institutions of participating in a guarantee scheme bears no relation to the cost that would result from a massive withdrawal of bank deposits not only from a credit institution in difficulties but also from healthy institutions following a loss of depositor confidence in the soundness of the banking system."*

The guarantee is dressed by the establishment of a scheme that should permit a repayment of a major part (coinsurance) or a totality (full coverage) of deposits up to a certain level (limit) shall the bank fail to meet its obligations. The objective of the deposit guarantee scheme is therefore to protect depositors.[81]

Following the turmoil on the financial markets caused by the *subprime* crisis that arose in mid-2007 and with respect to the liquidity problems followed by financial problems of one of the major British banks[82],

80 Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, as mended by the Directive 2005/1/EC of the European Parliament and of the Council of 9 March 2005.

81 See L. Dubois, Cl. Blumann, Droit matériel de l'Union européenne, 4. éd., par.705.

82 See tripartite statement of HM Treasury, Bank of England and Financial Services Authority on Northern Rock plc available at: http://www.bankofengland.co.uk/publications/news/2007/103.htm and HM Treasury notice on Northern Rock plc available at: http://www.hm-treasury.gov.uk/newsroom_and_speeches/press/2007/press_107_07.cfm

the Bank of England, HM Treasury and Financial Services Authority published a report entitled Financial Stability and Depositor Protection: Strengthening the Framework, which describes the utility of deposit guarantee scheme and emphasises consumer protection as follows:

"Effective compensation arrangements are an essential part of the system for protecting consumers who have deposited money in banks, ... This protection is important in its own right and, by giving consumers confidence that their deposits are safe and accessible, effective compensation arrangements also reduces the likelihood of a run on a bank and supports confidence in the financial system as a whole." [83]

Whichever of the two mentioned arguments takes advantage in the legal environment of the respective EU Member States (be it the mitigation of the vulnerability of financial systems to shocks or consumer protection), the European legislator by adopting the DGS Directive recognised the importance of establishing deposit guarantee schemes as well as need of harmonisation of national legislations in this field. While it can be observed that the DGS Directive establishes a certain number of criteria, e.g. coverage or a limit, it should also be noted that it leaves a rather large margin of manoeuvre to the national legislators in its implementation, e.g. coverage can be limited by multiple exclusions and the limit is a type of minimum harmonisation (under Point 2.2). In Luxembourg, the DGS Directive was implemented by the Law of 11 June 1997 (under Point 2.3).

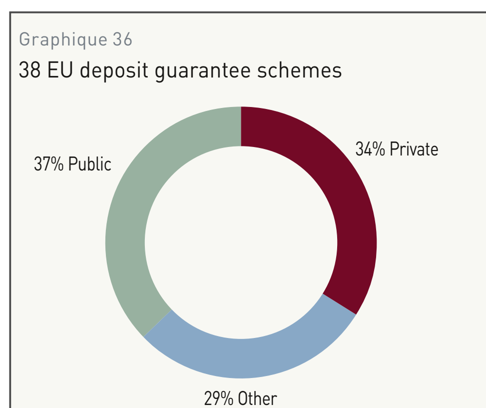
2.2 EU PERSPECTIVE

The progressive realisation of the internal market in the financial field raised the issue of protection of the European depositors, especially in relation to the expansion of branches and free provision of services[84]. This issue imposed the introduction of a EU-wide harmonised concept of compensation for depositors in case of a bank failure by the DGS Directive.

The rule is that the participation of deposit taking institutions is mandatory, as Article 3(1) imposes an obligation on Member States to ensure that one or more deposit guarantee schemes be introduced and officially recognised, and that no credit institution is authorised to take deposits unless it participates in such a scheme.

However the DGS Directive allows for two exceptions: (i) according to Article 3(1)[85] an exemption may be granted, under certain conditions, if the credit institution participates in a comparable system prior to the adoption of the DGS Directive and (ii) according to Article 3(4)[86] a credit institution excluded from the deposit guarantee scheme may, under certain conditions, continue to take deposits.

Graphique 36
38 EU deposit guarantee schemes



Source: European Commission – Scenario Analysis, page 68 et seq.[87]

83 *Bank of England, HM Treasury, Financial Services Authority - Financial stability and depositor protection: strengthening the framework, January 2008, Crown copyright 2008, page 67.*

84 *See Christian Gavalda et Gilbert Parleani, Droit des affaires de l'Union européenne, 4ème éd. Litec, par.327.*

85 "A Member State may, however, exempt a credit institution from the obligation to belong to a deposit guarantee scheme where that credit institution belongs to a system which protects the credit institution itself and in particular ensures its liquidity and solvency, thus guaranteeing protection for depositors at least equivalent to that provided by a deposit guarantee scheme, and which, in the opinion of the competent authorities, fulfils the following conditions:
- the system must be in existence and have been officially recognized when this Directive is adopted,
- the system must be designed to prevent deposits with credit institutions belonging to the system from becoming unavailable and have the resources necessary for that purpose at its disposal,
- the system must not consist of a guarantee granted to a credit institution by a Member State itself or by any of its local or regional authorities,
- the system must ensure that depositors are informed in accordance with the terms and conditions laid down in Article 9.
Those Member States which make use of this option shall inform the Commission accordingly; in particular, they shall notify the Commission of the characteristics of any such protective systems and the credit institutions covered by them and of any subsequent changes in the information supplied. The Commission shall inform the European Banking Committee thereof."

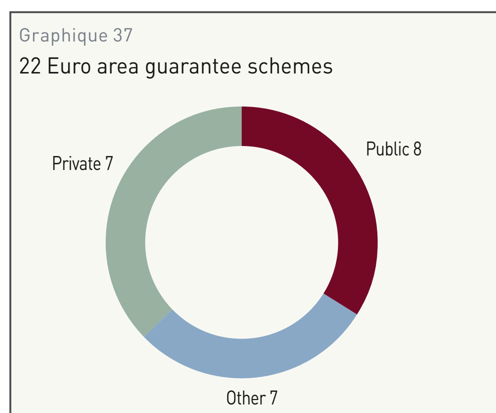
86 "Where national law permits, and with the express consent of the competent authorities which issued its authorization, a credit institution excluded from a deposit-guarantee scheme may continue to take deposits if, before its exclusion, it has made alternative guarantee arrangements which ensure that depositors will enjoy a level and scope of protection at least equivalent to that offered by the officially recognized scheme."

87 In several euro area Member States, there exist more schemes: three in Germany and Spain; two in Italy, Cyprus and Portugal (European Commission – Scenario Analysis, page 69 et seq.).

a) Nature of the deposit guarantee scheme

The deposit guarantee schemes may be classified in three categories according to their nature of management: public, private and other. Public schemes in the EU slightly prevail over private ones (Graphique 36).

Graphique 37
22 Euro area guarantee schemes



Source: European Commission – Scenario Analysis, page 68 et seq.[86]

Interestingly, all of the private deposit guarantee schemes operate in EU15[88]: in Denmark, Germany, France, Italy, Luxembourg, Austria and Finland.[89]

When comparing the nature of the schemes in the euro area, it can be observed that similarly to the situation at EU level, there is a minor predominance of public deposit guarantee schemes over the private ones (Graphique 37).

In the light of these comparisons, it can be observed that the approach of the Luxembourg legislator to not establish a public deposit guarantee scheme corresponds to the approach of another five euro area legislators, more precisely, that of two of its neighbouring states – Germany and France. Indeed, if the national legislator implements the DGS Directive but does not decide to establish a public deposit guarantee scheme, the implemented obligation under Article 3 (mandatory participation of all deposit taking credit institutions in a deposit guarantee scheme) compels the banking sector to set up a private deposit guarantee scheme.

Deposit guarantee schemes diverge across the EU also as regards their powers of intervention. Whereas in some Member States the schemes are exclusively established in order to indemnify depositors of a failed bank (see point 3.1), in other Member States the schemes are also entrusted with additional tasks[90]. For instance the Belgian guarantee scheme may intervene preventively for the settlement, financial reorganisation or take over of a participant in deficiency[91].The French guarantee scheme (*Fonds de garantie des dépôts*) may intervene preventively upon opinion of the Banking Commission (*Commission bancaire*) in order to protect the depositors if there are risks of a bank's failure. Moreover, it may institute legal proceedings against the directors of such bank[92].

With respect to the functioning of deposit guarantee schemes it should be noted that central banks may play an important role. In some EU Member States, the central bank intervenes in case of bank's default in order to temporarily advance funds either directly to the depositors or to the deposit guarantee scheme[93]. However, as expressed by the European Central Bank (ECB), the possibility of attribution of funds by a central bank should be strictly limited to cases with impact on systemic stability[94].

88 EU before the enlargement on 1 May 2004.

89 Scenario Analysis: Estimating the effects of changing the funding mechanisms of EU Deposit Guarantee Schemes, European Commission, Joint Research Centre, Unit G09, Ispra (Italy) 2007, page 58 (European Commission – Scenario Analysis).

90 Belgium, Bulgaria, Spain, France, Italy, Austria, Poland and Portugal (European Commission – Scenario Analysis, p.24)

91 European Commission - Scenario Analysis, page 24, footnote 31.

92 The fund intervened preventively in order to « rescue » the French bank Crédit Martiniquais by financing it up to EUR 244 millions and the French Supreme Court acknowledged his right to act against the ex-directors even for their misconduct committed before the setting up of the fund. (Decision of the Cour de Cassation, commented in Recueil Dalloz 2006 p.136, V. Avena-Robardet).

93 In the Netherlands, Poland, Portugal, Slovakia and Slovenia (see p.93, 96, 97, 100 and 101 of European Commission Scenario Analysis). For example, the Law on the National Bank of Slovakia (Law N° 566/1992, as amended) provides in its Article 24(2) that "The National Bank of Slovakia may grant a short-term loan to the Deposit Protection Fund or the Investment Guarantee Fund in order to cover the fund's urgent and unforeseen needs for supply of liquidity, if aspects of the systemic stability are threatened and provided that it is in compliance with the prohibition on monetary financing. Any such loan shall be sufficiently secured by adequate collateral pursuant to Article 23."

94 Opinion of the European Central Bank at the Request of the Portuguese Ministry of Finance on a draft decree law amending the legal framework of credit institutions and financial companies (CON/2001/32): "[…] the ECB considers the possibility that the Banco de Portugal grants financial resources to the Fund should in practice have a narrow scope, namel where systemic stability considerations are involved […]." See also Opinion of the European Central Bank at the Request of the Polish Minister of Finance on a draft law amending the Law on Bank Guarantee Fund (CON/2008/5), par.2.5.

Central banks may also intervene in the decision-making process of a deposit guarantee scheme which manages a crisis situation. The ECB has for instance welcomed the cooperation between Banco de Portugal and the Deposit Guarantee Fund as follows:[95]

"[…] the Deposit Guarantee Fund may have, in certain situations, a prominent role in crisis management of credit institutions in Portugal. The ECB welcomes in this regard that the execution of any support operation by the Deposit Guarantee Fund is made dependent upon an opinion of Banco de Portugal that the operation is adequate to the resolution of the situation in question. This provision is appropriate taking into account the competencies of Banco de Portugal as overseer of financial stability […]."

The ECB has also welcomed the competences of the President of the National Bank of Poland with respect to the Bank Guarantee Fund[96].

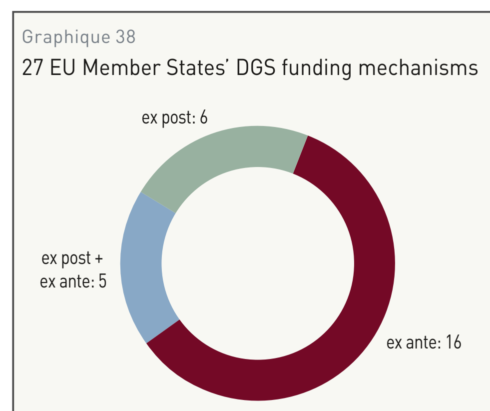
In Slovakia the central bank takes part in the decision-making process of the Deposit Protection Fund directly, as it appoints two out of seven members of its Board[97].

b) Funding

A majority of EU Member States[98] have opted for an ex-ante funding, i.e. a collection of contributions from the members of the deposit guarantee schemes already before any unavailability of deposits occurs (Graphique 38).

Graphique 38

27 EU Member States' DGS funding mechanisms



Source: European Commission – Scenario Analysis, page 68 et seq.[86]

Luxembourg is one of the five euro area Member States that opted for ex-post financing[99]; it means that, in case of a need, the deposits would have to be repaid by the banks by portion counted on the basis of the volume of deposits covered by the scheme,[100] on basis very close to the volume of covered deposits,[101] or by other means.[102]The reimbursement might turn problematic, time constraints in particular, seem to favour the ex-ante financing as in such case the funds are readily available and can be used immediately. Indeed, Article 10 of the DGS Directive establishes a rule that the unavailable deposits shall be, in principle, reimbursed by the deposit guarantee scheme within three months of the date on which the relevant competent authorities or the judicial authorities make the determination of unavailability according to Article 1(3). This period can be however, in wholly exceptional circumstances, prolonged according to Article 10(2) of the DGS Directive up to three times with each prolongation lasting up to three months. That said, it would be reasonable to organise the deposit guarantee scheme in a way that would allow to avoid the infliction

95 Opinion of the European Central Bank at the Request of the Portuguese Ministry of Finance on two draft legislative provisions amending (i) the legal framework of credit institutions and financial companies concerning the Deposit Guarantee Fund and (ii) the executive order governing the activities of the Deposit Guarantee Fund (CON/99/15).

96 See ECB Opinion CON/2008/5: "Under the provisions of the Law on the Bank Guarantee Fund, as amended by the current version of the draft law, the President of NBP will: (1) agree with the Minister for Finance on the regulatory proposals submitted to the Council of Ministers for: (i) changes to the Fund Statute, (ii) additional tasks of the Fund concerning the provision of assistance to commercial banks, and (iii) emergency rates for commercial banks' financial contributions to the Fund; (2) submit a non binding opinion on draft regulations by the Minister for Finance relating to the conditions for the Fund's trading in loans acquired from commercial banks threatened with insolvency; (3) set the remuneration of the Fund Council's members in agreement with the Minister for Finance; and (4) establish the commercial banks' reporting obligations to the Fund (Article 3(4), Articles 4(2a) and 34(4) (as amended by Article 1(5) and (12) of the draft law) and Articles 4(3), 6(4) and 38(7) of the Law on the Bank Guarantee Fund)."

97 According to Article 16 of the Deposit Protection Act (Law N° 118/1996, as amended): "the Board of the Fund is the Fund's supreme governing body. […] Two members of the Board are representatives of the National Bank of Slovakia, who are appointed and dismissed by the Governor of the National Bank of Slovakia."

98 Ex-ante 59%, ex-post 22%, other 19%, (European Commission - Scenario Analysis, page 20).

99 Italy, Luxembourg, the Netherlands, Austria, Slovenia (European Commission - Scenario Analysis, page 63-67).

100 Amount of eligible deposits serves as a basis for contributions in ex-ante deposit guarantee scheme in e.g. Belgium, Czech Rep., one Germany scheme or Luxembourg. (European Commission – Scenario Analysis, page 69 et seq.).

101 E.g. Estonia, Greece of Spain (European Commission – Scenario Analysis, page 69 et seq.).

102 E.g. set by the Regulation of Federal Ministry of Finance for one German scheme or based on the parts of the consolidated company balance sheet in the Netherlands (European Commission – Scenario Analysis, page 69 et seq.).

of these exceptional circumstances by the sole unavailability of funds in case of a need. The latter might be the reason that led twenty-one EU legislators to set up an ex-ante[103] or a combination of ex-ante and ex-post[104] funding schemes whereas only six EU legislators opted for ex-post schemes.[105] This might also be assumed to be a major drive behind the ECB President Jean-Claude Trichet's recommendation to banks for the prefunded schemes participation. [106]

c) Exclusions

Article 2 of the DGS Directive lists three types of deposits that are generally excluded from the repayment of the scheme: deposits between credit institutions on their own behalf and for their own account, own funds, and deposits arising from money laundering. Since this article does not leave any margin of manoeuvre to the national legislator, its effects are comparable to the effects of a regulation provision.[107]

By contrast to the exclusions under Article 2, the exclusions under Article 7(2), and listed in the Annex 1 of the DGS Directive, are optional so that the national legislator is allowed to apply, if any, one or more exclusions.[108] Considering this discretion left to the Member States, it can be observed that the application of these exclusions is quite large and divergent. On the one hand, there is no Member State that would not permit the application of at least one exclusion and there is only one Member State where only one exclusion is applied.[109] On the other hand, there are four Member States having schemes that apply all the possible exclusions[110] and seven Member States that apply all exclusions but one.[111]

List of exclusions referred to in Article 7 (2) (Annex I of the DGS Directive)

1. Deposits by financial institutions as defined in Article 1 (6) of Directive 89/646/EEC.
2. Deposits by insurance undertakings.
3. Deposits by government and central administrative authorities.
4. Deposits by provincial, regional, local and municipal authorities.
5. Deposits by collective investment undertakings.
6. Deposits by pension and retirement funds.
7. Deposits by a credit institution's own directors, managers, members personally liable, holders of at least 5 % of the credit institution's capital, persons responsible for carrying out the statutory audits of the credit institution's accounting documents and depositors of similar status in other companies in the same group.
8. Deposits by close relatives and third parties acting on behalf of the depositors referred to in 7.
9. Deposits by other companies in the same group.
10. Non-nominative deposits.
11. Deposits for which the depositor has, on an individual basis, obtained from the same credit institution rates and financial concessions which have helped to aggravate its financial situation.

103 Belgium, Bulgaria, Czech Rep,, Germany, Estonia, Greece, Spain, France, Ireland, Latvia, Lithuania, Hungary, Portugal, Slovakia, Finland and Sweden (European Commission – Scenario Analysis, page 69 et seq.).

104 Denmark, Cyprus, Malta, Poland and Romania (European Commission – Scenario Analysis, page 69 et seq.).

105 Italy, Luxembourg, Netherlands, Austria, Slovenia and the United Kingdom (European Commission – Scenario Analysis, page 69 et seq.).

106 "He [Mr. Trichet] also encouraged European banks to move toward prefunded deposit plans, rather than systems that collect funds for depositors only after a bank's failure. 'Prefunded schemes would also permit to mobilize very rapidly the guarantee which might be a decisive advantage to avoid bank runs', he said." in Trichet defends ECB, The Wall Street Journal, 14 February 2008.

107 According to Article 249 of the EC Treaty, a regulation is of general application, binding in its entirety and directly applicable in all Member States. The effect of a directive provision that leaves no margin of manoeuvre to national legislator is in practice close to effect of a regulation provision, since the text of the directive will be practically the same in all of the Member States.

108 This provision leaves to the national legislator a possibility to choose any option between none and all and means that the transposition in the respective EU Member States might differ substantially.

109 Finland (European Commission – Scenario Analysis, page 69 et seq.).

110 Belgium, one of the German schemes, Malta, Austria (European Commission – Scenario Analysis, page 69 et seq.).

111 Bulgaria, Estonia, France, Ireland, the Netherlands, Romania and the United Kingdom (UK is listed in this group, as its deposit guarantee scheme applies all exclusions except for 13 and exclusion 6 is applied in some circumstances) (European Commission – Scenario Analysis, page 69 et seq.).

12. Debt securities issued by the same institution and liabilities arising out of own acceptances and promissory notes.
13. Deposits in currencies other than:
    - those of the Member States,
    - ecus.
14. Deposits by companies which are of such a size that they are not permitted to draw up abridged balance sheets pursuant to Article 11 of the Fourth Council Directive (78/660/EEC) of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies.

It should be noted, that the implementation of the DGS Directive does not necessarily correspond to the current application of exclusions. In this respect, Luxembourg can be listed as an example – the Law of 11 June 1997 implementing the DGS Directive leaves the application of all exceptions but 13 to the deposit guarantee scheme. Therefore, even if the Luxembourg deposit guarantee scheme applies all exclusions except 10 and 13, it is free to decide to apply even exclusion 10 or not to apply any from the list under Annex I of the DGS Directive (see Point 2.3 d).

Tableau 23

Exclusions applied

Member State	Exclusions applied	Member State	Exclusions applied
Belgium	all	Lithuania	2,5,6,7,8,9,10,11,12,13
Bulgaria	1,2,3,4,5,6,7,8,9,10,11,12,14	Luxembourg	1,2,3,4,5,6,7,8,9,11,12,14
Czech Republic	1,2,5,6,7,8,9,10,12	Hungary	1,2,3,4,5,6,7,8,10,11
Denmark	7,9,10,12	Malta	all
Germany (1)	1,2,3,4,5,7,8,9,11,12,13,14	Netherlands	1,2,3,4,5,6,7,8,9,10,11,12,14
Germany (2)	all	Austria	all
Estonia	1,2,3,4,5,6,7,8,9,10,11,12,14	Poland	1,2,3,5,6,7,10,12,14
Greece	1,2,3,5,7,8,9,12	Portugal (1)(2)	1,2,3,4,5,6,7,8,9,11,12
Spain (1)(2)(3)	1,2,3,4,5,6,7,8,9,10,11,12	Romania	1,2,3,4,5,6,7,8,9,10,11,12,14
France[112]	1,2,3,4,5,6,7,8,9,10,11,12,13	Slovenia	1,2,3,4,5,6,7,8,9,10,12,14
Ireland	1,2,3,4,5,6,7,8,9,10,11,12,14	Slovakia	1,2,3,4,5,6,7,8,9,10,12,14
Italy (1)(2)	1,2,3,4,5,6,7,8,9,10,11,12	Finland	1
Cyprus (1)	2,3,4,5,6,11,13	Sweden	1,6,10
Cyprus (2)	2,3,4,5,6,13	United Kingdom	1,2,3,4,5,6,7,8,9,10,11,12,14
Latvia	1,2,3,4,5,6,7,8,9,11,14		

Source: European Commission – Scenario Analysis, page 69 et seq.[113]

112 With respect to the exclusion 13 that is applied, it should be noted, that the EEA currencies are guaranteed (European Commission – Scenario Analysis, page 81).

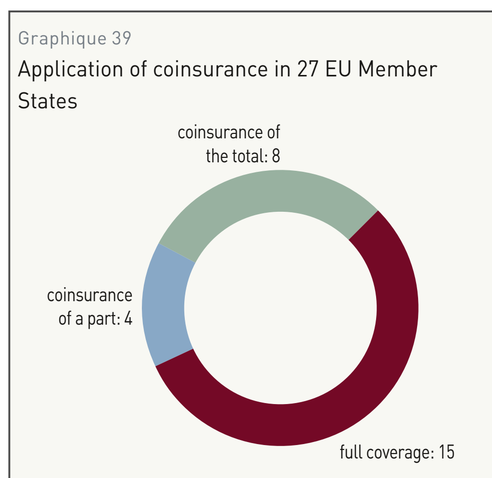
113 Note that with respect to the third German scheme (Protective Scheme of National Association of German Cooperative Banks), the criterion of exclusions was listed as not appropriate (European Commission – Scenario Analysis, page 75).

d) Full coverage or coinsurance

According to Article 7(4), the DGS Directive allows the Member States to apply a coinsurance, i.e. grant the deposit guarantee scheme a possibility to deduct up to 10% from the amount to be reimbursed [114]. The reason for adoption of coinsurance may be certain lightening of a possible burden that would need to be borne by the deposit guarantee fund in case of ex-ante system or other credit institutions (other members of the deposit guarantee scheme) in case of ex-post system. The coinsurance can also be an incentive for the depositors to be careful when choosing a credit institution where they will deposit their savings, similarly to how it is done by the insurance companies e.g. in the marked of motor hull insurance.

Graphique 39

Application of coinsurance in 27 EU Member States



Source: European Commission – Scenario Analysis, page 69 et seq.

While this approach is common in the insurance market, the question could be posed why most of the EU Member States do not apply the coinsurance with respect to the deposit guarantee schemes, i.e. banking sector[115]. One of the reasons might be that in case of a financial crisis, there would be a risk of run on banks not only by the people who have deposited sums well above the guaranteed limit, but also by the people who have deposited an amount lower than the limit, fearing to loose the amount of coinsurance[116]. Obviously, most of the national legislators seem to be convinced by the second group of arguments and the recent case that appeared in the British financial market might serve as an example that their approach is correct, especially if it turns out that the guarantees granted by the scheme as such might turn out to be insufficient[117]. Having said that, it should be noted that the United Kingdom is one of the twelve Member States[118] that apply coinsurance; however, it is also one of the four Member States applying coinsurance that guarantee a full coverage up to a certain level[119].This is the reason why one could further distinguish between the Member States that apply coinsurance in two different ways: where the coinsurance covers the total of the deposit and where the coinsurance applies only from certain level (Graphique 39). This is a possibility that is not explicitly granted by the DGS Directive but seems to comply with it as long as the criterion of Article 7(4) of coverage up to at least 90% of the guaranteed limit is fulfilled.

e) Limits

According to Article 7(1) of the DGS Directive, the deposits are to be covered by the deposit guarantee schemes at least to a minimum of EUR 20.000. However, as already stated, the Member States can exclude

114 Article 7(4) of the DGS Directive: "Member States may limit the guarantee provided for in paragraph 1 [minimum of EUR 20.000] or that referred to in paragraph 3 [higher than a minimum] to a specified percentage of deposits. The percentage guaranteed must, however, be equal to or exceed 90% of aggregate deposits until the amount to be paid under the guarantee reaches the amount referred to in paragraph 1."

115 *Fifteen Member States do not apply the coinsurance: Belgium, Bulgaria, Denmark, Greece, Spain, France, Italy, Latvia Luxembourg,, the Netherlands, Portugal, Romania, Slovenia, Finland and Sweden (European Commission – Scenario Analysis, page 69 et seq.).*

116 *As ECB President Jean-Claude Trichet stated:* "Partial insurance plans – in which only a portion small depositors' funds are guaranteed – could spark runs [...]" and further "Inadequate depositor protection was one factor behind the run on U.K. mortgage lender Northern Rock PLC in September. Then only the first £2,000 ($3,900) of savings were fully guaranteed, a shortfall that helped prompt the U.K.'s first bank run in over a century. British authorities have since boosted deposit coverage to £35,000" in Trichet defends ECB, The Wall Street Journal,, 14 February 2008.

117 "At the request of Northern Rock, new guarantee arrangements were put in place from Tuesday to extend 100% cover to all new retail accounts opened with the company from the date of the original guarantee arrangements, 19 September, for as long as the current period of financial market instability lasts. As under the original arrangements, these extended guarantee arrangements will supplement, and not replace, any compensation provided by the Financial Services Compensation Scheme, which the Financial Services Authority has recently extended to cover 100% of the first £35000 of deposits." [empasis added] available at: http://www.hm-treasury.gov.uk/newsroom_and_speeches/press/2007/press_107_07.cfm

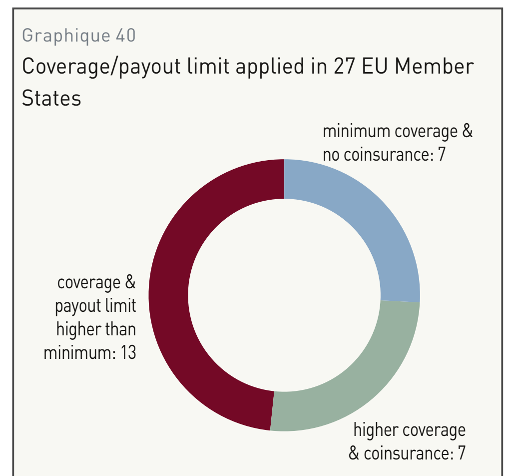
118 *Further eleven EU Member States are: Czech Rep., Germany, Estonia, Ireland, Cyprus, Lithuania, Hungary, Malta, Austria, Poland and Slovakia, but in Austria, the coinsurance of 10% applies only with respect to the deposits of legal entities (European Commission – Scenario Analysis, page 11).*

119 *The level of coverage not affected by the coinsurance in Lithuania, Hungary, Poland and United Kingdom is of EUR 2.986, EUR 3.995, EUR 1.000 and EUR 2.918 respectively (European Commission – Scenario Analysis, page 11).*

certain types of depositors or deposits from the coverage, as well as adjust the payout limit by coinsurance that can amount up to 10% of the covered amount until it reaches the coverage limit.

On the one hand, one could observe that Luxembourg is one of five euro area Member States that establishes for the Deposit Guarantee scheme the minimum coverage level of EUR 20.000[120]. However, it should be noted, that five EU Member States adopted a higher coverage level, but apply a coinsurance and a maximum payout limit that is of EUR 20.000[121].Finally, the Baltic States benefited from the transitional period in view of approaching the minimum guarantee limit of EUR 20.000 gradually[122]. Assuming the three latter Member States already apply the minimum limit, the number of Member States establishing the very minimum of coverage level and/or payout limit according to the DGS Directive is set to a total of fourteen.

Graphique 40
Coverage/payout limit applied in 27 EU Member States



Source: European Commission – Scenario Analysis, page 69 et seq.[126]

On the other hand, the DGS Directive is, with respect to a guarantee limit, a type of Community legal act that provides for minimum harmonisation; according to Article 7(3) the Member States are free to establish a higher level of guarantee for certain or all types of deposits. This possibility was taken into consideration by thirteen Member States' legislators but as the DGS Directive does not provide for a cap, the coverage limits differ substantially. This is the reason why we can observe that on the one side, Luxembourg together with thirteen other Member States could set the minimum coverage and/or payout limit of EUR 20.000, and on the other side France and Italy could set the coverage and payout limit of EUR 70.000 and EUR 103.291 respectively.

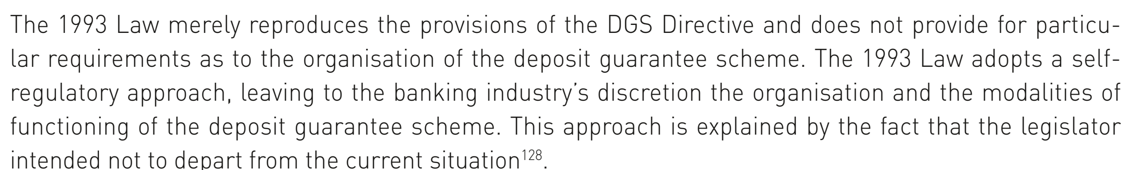
To sum up, three types of limits can be distinguished, the minimum coverage of EUR 20.000 with no coinsurance[123], the coverage higher than the minimum, but with coinsurance and payout limit of EUR 20.000[124], and coverage and payout limit up to an amount higher than the minimum (Graphique 40)[125].

2.3 LUXEMBOURG PERSPECTIVE

Prior to the implementation of the DGS Directive, Luxembourg banks had already established the Deposit Guarantee Association, Luxembourg *(Association pour la Garantie des Dépôts, Luxembourg, hereinafter the "AGDL")* on 25 September 1989. This initiative followed the EC Recommendation of 22 December 1986 concerning the introduction of deposit guarantee schemes in the Community[127].

Luxembourg implemented the Directive 94/19/EC by the Law of 11 June 1997 which inserted Articles 62-1 to 62-10 in the Law of 5 April 1993 on the financial sector, as amended (hereinafter the "1993 Law").

120 *Together with Belgium, Greece, Spain and Austria (European Commission – Scenario Analysis, page* 69 et seq.).
121 E.g. Cyprus and Malta apply the coverage level of EUR 22.222, but with 10% coinsurance and with payout limit of EUR 20.000, (European Commission – Scenario Analysis, pages 85 and 92).
122 *Estonia shall apply the limit of EUR 20.000 by 31 December 2007, Latvia and Lithuania by 1 January 2008. They applied at the time of data collection the limits of EUR 14.203, EUR 15.000 and 17.337 respectively (European Commission – Scenario Analysis, page 11).*
123 *Belgium, Greece, Spain, Latvia [expectation], Luxembourg, Austria (10% of coinsurance for legal persons) and Romania (European Commission – Scenario Analysis, page 63 et seq.).*
124 *Germany, Estonia [expectation], Ireland, Cyprus, Lithuania [expectation], Malta and Slovakia (European Commission – Scenario Analysis, page 63 et seq.).*
125 *Bulgaria, Czech Rep., Denmark, France, Italy, Hungary, the Netherlands, Poland, Portugal, Slovenia, Finland, Sweden and the United Kingdom (European Commission – Scenario Analysis, page 63 et seq.).*
126 *In several euro area Member States, there exist more schemes: three in Germany, Spain and Italy; two in Cyprus and Portugal.*
127 *87/63/EEC Commission Recommendation of 22 December 1986 concerning the introduction of deposit-guarantee schemes in the Community.*



The 1993 Law merely reproduces the provisions of the DGS Directive and does not provide for particular requirements as to the organisation of the deposit guarantee scheme. The 1993 Law adopts a self-regulatory approach, leaving to the banking industry's discretion the organisation and the modalities of functioning of the deposit guarantee scheme. This approach is explained by the fact that the legislator intended not to depart from the current situation[128].

a) Nature of the deposit guarantee scheme

The AGDL is established under the form of a non-profit making association (*association sans but lucratif*). It is governed by the law of 21 April 1928 on the non-profit making associations and foundations and by its Statutes adopted by its members.

The sole purpose of the AGDL is to set up a mutual guarantee system. The AGDL does not have any other preventive functions[129].

The mutual guarantee system covers cash deposits in accordance with the DGS Directive as well as claims arising out of investment transactions[130].

The AGDL is a private association not subject to public intervention, neither as to its constitution nor as to its management. The intervention of the Commission for the Supervision of the Financial Sector (*Commission de Surveillance du Secteur Financier*, hereinafter the "CSSF") is limited to the areas prescribed by the DGS Directive: the competence to determine the unavailability of the deposits[131], the sanction regime[132].

The AGDL is managed by a Board of Directors elected by its members at the general assembly[133]. The Board carries out the administrative and executive actions relating to the AGDL[134] and determines the internal Rules of Procedure of the AGDL[135].

b) Membership

Institutions subject to membership

(i) Compulsory membership

The following institutions are required to be members of the AGDL and become automatically members at their request:

- credit institutions governed by Luxembourg law[136]. E-money institutions are qualified under Luxembourg law[137] as credit institutions and are subject to the same requirement to join the deposit guarantee scheme[138];
- the financial services of the Post Office and Telecommunications[139];

128 *See projet de loi n°4093 portant 1. transposition de la directive 94/19/CE relative aux systèmes de garantie des dépôts dans la loi modifiée du 5 avril 1993 relative au secteur financier et 2. modification de la loi modifiée du 24 mars 1989 sur la Banque et Caisse d'Epargne de l'Etat, Luxembourg, Exposé des motifs [Explanatory Memorandum], p.2.*
129 Deposit guarantee schemes have other functions in various countries, e.g. in Belgium, France, Poland. See above, point 2.2.a).
130 The latter is not a subject in the present contribution.
131 Article 1.3 of the DGS Directive and Article 62-3 of the 1993 Law.
132 Article 3 of the DGS Directive and Article 62-5 of the 1993 Law.
133 Article 16 of the AGDL Statutes.
134 Article 18 of the AGDL Statutes.
135 Article 2.2 of the AGDL Statutes.
136 Article 10-1 of the1993 Law and Article 3-1.1 of the AGDL Statutes.
137 Law which implements the EC directive on e-money.
138 Article 12-11.1 of the1993 Law.
139 Article 3-3.1 of the AGDL Statutes.

- branches of credit institutions governed by Luxembourg law established in other EU Member States[140]. These branches may benefit from the topping-up principle according to Article 62-6 of the 1993 Law: they may join voluntary the deposit guarantee scheme of the host Member State in order to supplement the coverage provided by the AGDL;
- branches of credit institutions having their head office outside the EU[141].

(ii) Voluntary membership
In accordance with Article 4 of the DGS Directive, branches of credit institutions governed by the law of other EU Member States established in Luxembourg may join voluntary the Luxembourg deposit guarantee scheme in order to supplement the guarantee of their home State scheme[142].

Sanctions applied to members

If the credit institutions governed by Luxembourg law or the branches of credit institutions having their head office outside the EU do not comply with their obligations as members of the deposit guarantee scheme, the CSSF may intervene following the information received by the deposit guarantee itself. The intervention may include:
- a letter sent by the CSSF following the information received from the guarantee scheme and requesting the non compliant institution to remedy the situation;
- administrative fines imposed by the CSSF in case the institution has not regularized its situation following the CSSF's letter;
- suspension measures imposed by the CSSF in case the institution has not regularized its situation following the CSSF's letter;
- an exclusion from the deposit guarantee scheme by the deposit guarantee scheme with the prior written consent of the CSSF, in case the institution has not rectified the situation following the above described measures taken by the CSSF[143].

Auxiliary obligations of the members

Despite the direct obligation to participate in the deposit guarantee scheme, credit institutions and their branches are obliged, at the request of the depositors, to supply information on the deposit guarantee scheme, as well as to inform the actual depositors each time they join another deposit guarantee scheme[144].

c) Funding

The 1993 Law does not specify whether the deposit guarantee scheme should be funded ex-ante or ex-post. Article 62-3.11 merely limits the amount of the annual contribution to the deposit guarantee scheme to five per cent of the institution's own funds as defined by the CSSF.

According to Article 9 of the AGDL Statutes the AGDL is funded exclusively ex-post, following a failure of an AGDL member. The amount of the ex-post contribution is fixed in proportion to the amount of the guarantee accruing to the own guaranteed cash deposits of each member in relation to the total amount of the guarantee pertaining to all the guaranteed cash deposits set up with all the members who contribute to the payment. If the AGDL obtains reimbursement of the sums paid out, it shall redistribute the benefits to its members after deduction of the expenses.

140 Article 62-1.1 of the1993 Law and Article 3-1.2 of the AGDL Statutes.
141 Article 62-1.1 of the1993 Law and Article 3-1.4 of the AGDL Statutes.
142 Articles 62-7 and 62-8 of the1993 Law and Article 3-1.3 of the AGDL Statutes.
143 Article 62-5 of the1993 Law.
144 Article 62-4 of the1993 Law.

In addition to the ex-post contribution, the members are required to pay annual subscription, which amount cannot exceed EUR 1.250[145].

d) Coverage

Covered deposits

The 1993 Law provides for two types of exclusion from the eligible deposits:

(i) Compulsory exclusions[146]

In compliance with the DGS Directive[147] the following deposits are excluded:
- deposits made by other credit institutions on their own behalf and on their account;
- own funds of the credit institutions as defined by the CSSF;
- deposits arising out of transactions in connection with money laundering.

(ii) Optional exclusions[148]

Article 62-1.4 of the 1993 Law allows the deposit guarantee scheme to exclude from cover or to apply a lower level of cover with respect to the deposits as defined by Annex I of the DGS Directive, except exclusion n°13.

On the basis of this provision, the AGDL Statutes exclude from the guaranteed deposits all the deposits listed in the Annex I of the Directive (enumerated above point 2.2.c), to the exception of exclusions n°10 (non-nominative deposits) and n°13 (deposits in foreign currency).

Level of coverage

For the calculation of the amount of compensation, account is taken of the aggregate deposits of each depositor, regardless of the number of accounts, their currency or their location within the EU.

The level of coverage is of EUR 20.000 [149].

Article 62-2.3 of the 1993 Law grants the deposit guarantee scheme an option of coinsurance, but it is neither applied by the AGDL nor listed as an option in its Statutes. The effective payout limit is therefore EUR 20.000.

Reimbursement of deposits

The CSSF determines the unavailability of the deposits i.e. that a credit institution is no longer in a position to repay the deposits which are due and payable and that there is no early prospect of the institution being able to do so.

The deposit guarantee scheme is required to pay the depositor the duly verified claims within three months of the date on which the CSSF has determined the unavailability of the deposits or the Court[150] has pronounced the opening of insolvency procedure.

145 Article 27 of the AGDL Statutes.
146 Article 62-3 of the 1993 Law.
147 See above point 2.2.c).
148 Article 62-1.4 of the 1993 Law.
149 Articles 62-2.2 of the1993 Law and Article 8.1 of the AGDL Statutes.
150 *Tribunal d'Arrondissement de Luxembourg siégeant en matière commerciale.*

The CSSF may grant maximum three extensions of this time limit, none of which can exceed three months.

The deposit guarantee scheme is subrogated to the rights of the depositors who have obtained payment and shall be reimbursed in priority to such depositors.

The deposits are guaranteed neither by the Luxembourg State nor by the CSSF.

This provision is in line with the case law of the Court of Justice of the European Communities, which has considered that the DGS Directive and the banking directives 77/80, 89/299 and 89/646 *"do not confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities, if the compensation of depositors prescribed by the Directive 94/19 is ensured".* [151]

2.4 A WAY FORWARD

The approach of national legislators with respect to the deposit guarantee schemes across the EU differs in three substantial fields: concerning both the coverage and the deposits excluded from the scheme, the level of the guarantee and the application of coinsurance, and finally, the functioning of the deposit guarantee scheme with respect to the funding intervention. It can be observed that Luxembourg, in comparison to other euro area countries, finds itself in several minorities: establishment of an ex-post system, private character of the deposit guarantee scheme, and finally application of the minimal guarantee limit[152].

The recent financial turmoil and the subsequent growing global interest in the financial stability raise the issue of strengthening the deposit guarantee schemes on both European and national level.

With respect to the Luxembourg legal system, the following elements should be analysed when envisaging improvements to the deposit guarantee scheme legislation:

(i) funding of the deposit guarantee scheme:

The Luxembourg legislator could inspire himself from the legal systems of France or the Scandinavian countries and establish an ex-ante (prefunded) system. Such system could be combined with different elements in order to minimise the costs for the industry:

- a part of the ex-ante contribution may be excluded from immediate payment from the members but organised in the form of pledges given by the members in order to guarantee repayment of deposits if the need arises[153];
- alternative revenues may be provided for, such as the "association certificates" issued in France which may be remunerated;
- the contributions to be paid by the members may be evaluated on the basis of the risk profile of each member[154].

151 2CJ, Case C-222/02 of 12 October 2004, par. 50,

152 Luxembourg is one of five euro area Member States with ex-post system, one of six euro area Member States with private scheme, one of five euro area Member States that apply the minimum coverage level of EUR 20.000 with no coinsurance (European Commission – Scenario Analysis, page 63 et seq.).

153 Similarly to the Danish system (European Commission – Scenario Analysis, page 72).

154 It is the case in Finland, France, Germany, Italy, Portugal and Sweden. The Commission has declared itself favorable to this type of contributions in its 2006 communication.

(ii) the coverage:

A higher limit of deposits than the minimum established by the DGS Directive could be foreseen, following the French and Italian examples[155].

(iii) the coinsurance:

As for the application of coinsurance, it seems that the approach of the Luxembourg deposit guarantee scheme is correct. In the light of the already mentioned U.K. case of a run on a major bank, it seems that the coinsurance might turn to a spark that lights a fire[156]. With this respect, it would be reasonable to revoke the possibility of introduction of coinsurance granted by Article 62-2(3) of the Law on the financial sector.

(iv) the intervention powers of the deposit guarantee scheme:

In order to play a more active role before and after the failure of an institution, the following functions of the deposit guarantee scheme may be envisaged:
- intervention in crisis management by delivering liquidities;
- preventive intervention in the event of difficulties encountered by a credit institution;
- access to additional information in insolvency procedures;
- priority of the deposit guarantee's claims in the insolvency procedure.

Finally, it should be noted that the differences in the deposit guarantee schemes and their possible implications are not overlooked by the ECB, especially taking into consideration that the financial markets experience rather busy times since summer of 2007. That is probably the reason why the ECB President Jean-Claude Trichet calls for further harmonisation of EU deposit-protection that should prevent bank runs[157].

2.5 SOURCES

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L. Dubois, Cl. Blumann, D*roit matériel de l'Union européenne, ed. Montchrestien*, 4th ed.2006

Christian Gavalda et Gilbert Parleani, Droit des affaires de l'Union européenne, ed. Litec, 4th ed.

V. Avena-Robardet, *La Cour de Cassation se prononce dans l'affaire du "Crédit Martiniquais"*, in Recueil Dalloz 2006, ed. Dalloz

155 The amount of covered deposits in Luxembourg represents only 15 % of the amount of eligible deposits (approximately EUR 13 millions versus EUR 86millions). E.g. in Italy, the amount of covered deposits represents 76 % and 84 % of the amount of eligible assets in the respective schemes (EUR 360.6 millions vs EUR 477 millions; EUR 41.5 millions vs 49.6 millions). (European Commission – Scenario Analysis, page 14).

156 "'Partial insurance… for smaller deposits could be removed where it still exists, as recent experience seems to suggest that it may reintroduce incentives for retail depositors to run a bank' Mr. Trichet said." In Trichet defends ECB, The Wall Street Journal, 14 February 2008.

157 "Amid Europe's fragmented supervisory regime, Mr. Trichet highlighted scattershot depositor-protection plans as a problem." Trichet defends ECB, in The Wall Street Journal, 14 February 2008.

Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, as mended by the Directive 2005/1/EC of the European Parliament and of the Council of 9 March 2005 (OJ L 135, 31.5.1994, p. 1)

Loi du 11 juin 1997 portant 1. transposition de la directive 94/19/CE relative aux systèmes de garantie des dépôts dans la loi modifiée du 5 avril 1993 relative au secteur financier et 2. modification de la loi modifiée du 24 mars 1989 sur la Banque et Caisse d'Epargne de l'Etat, Luxembourg (Mémorial, A – No 47, 7 juillet 1997, page 1557), telle qu'elle a été modifiée

Loi du 5 avril 1993 relative au secteur financier (Mémorial, A – No 27, 10 avril1993, page 461) telle qu'elle a été modifiée

Law on the National Bank of Slovakia (Law N° 566/1992, as amended available at www.nbs.sk

Deposit Protection Act N° 118/1996, as amended available at www.nbs.sk

Opinion of the European Central Bank at the Request of the Portuguese Ministry of Finance on a draft decree law amending the legal framework of credit institutions and financial companies (CON/2001/32) available at www.ecb.int

Opinion of the European Central Bank at the Request of the Polish Minister of Finance on a draft law amending the Law on Bank Guarantee Fund (CON/2008/5) available at www.ecb.int

Opinion of the European Central Bank at the Request of the Portuguese Ministry of Finance on two draft legislative provisions amending (i) the legal framework of credit institutions and financial companies concerning the Deposit Guarantee Fund and (ii) the executive order governing the activities of the Deposit Guarantee Fund (CON/99/15) available at www.ecb.int

Official web site of Bank of England http://www.bankofengland.co.uk

Official web site of HM Treasury http://www.hm-treasury.gov.uk

Official web site of *Chambre des deputés du Grand-Duché de Luxembourg* http://www.chd.lu

3 LA COOPÉRATION INTERINSTITUTIONNELLE ENTRE BANQUES CENTRALES ET AUTORITÉS DE SURVEILLANCE EN MATIÈRE DE STABILITÉ FINANCIÈRE : QUELLES PERSPECTIVES POUR LA BCL ?

Introduction

« L'objectif principal du SEBC est de maintenir la stabilité des prix ». Telle est la tâche primaire que l'article 105 (1) du Traité instituant la Communauté européenne (ci-après le Traité), assigne au Système européen de banques centrales (ci-après le SEBC). Pour réaliser cet objectif le SEBC assure les missions suivantes *« définir et mettre en œuvre la politique monétaire de la Communauté ; conduire les opérations de change… ; détenir et gérer les réserves officielles de change des Etats membres ; promouvoir le bon fonctionnement des systèmes de paiement »*[158].

Le lecteur l'aura constaté, parmi ces missions ne figure pas le maintien de la stabilité financière en tant que telle. Mais, l'article 105 (5) du Traité vise à assurer une implication des banques centrales nationales en matière de stabilité financière en prévoyant que *« Le SEBC contribue à la bonne conduite des politiques menées par les autorités compétentes en ce qui concerne le contrôle prudentiel des établissements de crédit et la stabilité du système financier »*. L'article 105 (6) du Traité permet au Conseil de l'Union de conférer à la Banque centrale européenne (ci-après la BCE) *« …des missions spécifiques ayant trait aux politiques en matière de contrôle prudentiel des établissements de crédit et autres établissements financiers… »*. Ces dispositions témoignent de la volonté des rédacteurs du Traité d'associer les banques centrales au maintien de la stabilité du secteur financier.

Or, quel peut bien être le rôle des banques centrales en matière de stabilité financière ?

La stabilité financière se définit comme étant *« une situation dans laquelle le fonctionnement des différentes composantes du système financier et surtout leurs relations réciproques s'effectuent de manière saine et sans à-coup brutaux »*[159]. La stabilité financière se mesure en la capacité du système financier d'absorber des chocs économiques et financiers. La contribution des banques centrales au maintien de la stabilité financière s'articule autour de deux axes : la surveillance macro prudentielle d'une part et la sécurité des systèmes de paiement d'autre part.

Les raisons principales qui motivent l'attribution aux banques centrales d'une responsabilité en matière de surveillance du secteur financier sont leur rôle de conception et de régulation des systèmes de paiement, leur indépendance garantie par le Traité[160], leur crédibilité ainsi que leur expérience[161]. Pour la BCE *« … central banks are in general in the best position to take on responsibility for financial stability, given their insight into money and financial market developments and their involvement in payment systems and monetary policy operations. This applies both to the normal conduct of business and in crisis situations. The central banks' remit on systemic stability means that they concentrate on the potential impact of macroeconomic shocks or disturbances and other factors influencing the stability of the financial system as a whole"*[162].

158 Article 105 (2) du Traité.
159 PATAT Jean-Pierre, La stabilité financière, nouvelle urgence pour les banques centrales, in Bulletin de la Banque de France, n°84, décembre 2000, p.50.
160 Article 108 du Traité.
161 Voir, BCE, Recent developments in supervisory structures in EU and acceding countries, octobre 2006, p.3; voir également Communiqué de la BCE, « Le rôle des banques centrales en matière de contrôle prudentiel », 22 mars 2001.
162 ECB opinion, at the request of the Austrian Ministry of Finance on a draft law amending the Law on banking, the Law on savings banks, the Law on the Financial Market Supervisory Authority and the Law on the Oesterreichische Nationalbank (CON/2007/33), 5 November 2007

Dans certains Etats membres la Banque centrale constitue l'autorité de surveillance unique. Dans d'autres pays, la Banque centrale partage les responsabilités de surveillance prudentielle du secteur financier avec une autorité distincte et selon une clé de répartition des compétences bien définie. Dans les Etats où la Banque centrale n'assume aucun rôle direct en matière de surveillance prudentielle, des liens organiques étroits garantissent une coopération entre les deux autorités.

Seulement au Luxembourg, il n'existe « ... *aucune relation institutionnelle, ni d'accords officiels régissant la coopération bilatérale...* »[163] entre la banque centrale et l'autorité de surveillance. L'expérience des autres Etats membres a montré qu'une participation efficace des banques centrales au maintien de la stabilité financière ne peut passer que par une répartition claire des compétences entre les deux autorités.

Au Luxembourg, deux lois du 23 décembre 1998[164] créent respectivement la BCL et la Commission de surveillance du secteur financier (ci-après la CSSF). L'article 26 de la loi portant création de la CSSF affirme que *« La Commission reprend et exerce toutes les compétences que les textes légaux et réglementaires ont conférées à la Banque centrale du Luxembourg dans le domaine de la surveillance prudentielle ainsi qu'au Commissariat aux Bourses, dont elle prend la succession juridique ».*

3.1 LA COOPÉRATION INTERINSTITUTIONNELLE AU LUXEMBOURG

Les dispositions actuellement en vigueur ne confèrent à la BCL aucun rôle en matière de surveillance prudentielle du secteur financier.

Une **possibilité** de coopérer découle timidement des lois organiques de la BCL et de la CSSF. L'article 33 (2) de la loi organique de la BCL[165] prévoit que *« Sans préjudice des dispositions relatives au secret professionnel applicables au SEBC, le paragraphe précédent ne s'oppose ni aux échanges d'informations imposés dans le cadre du SEBC ni à ce que la Banque centrale échange des informations avec la Commission de surveillance du secteur financier, le Commissariat aux assurances et le Service central de la statistique et des études économiques (STATEC), sous réserve de réciprocité, dans la mesure nécessaire à l'accomplissement de ses missions ».*

D'une manière analogue l'article 16 de la section 7 intitulée « *Secret* » de la loi du 23 décembre 1998 portant création de la CSSF, prévoit que *« L'alinéa précédent ne s'applique pas aux échanges d'informations entre la Commission de surveillance du secteur financier et la Banque centrale ainsi qu'aux cas où les personnes y visées sont appelées à rendre témoignage en justice ou à l'occasion d'un recours contre une décision prise dans l'accomplissement de la mission de la Commission, et aux cas où la loi les autorise ou les oblige à révéler certains faits, notamment sur base des lois et règlements régissant la surveillance »*[166].

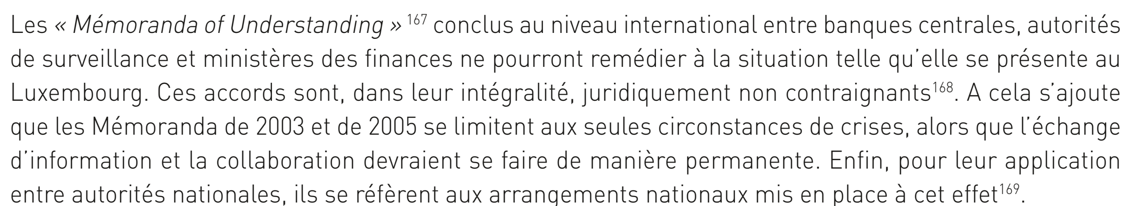
La coopération n'est ainsi prévue que de manière exceptionnelle, comme dérogation à l'obligation générale au secret professionnel. L'article 105 (5) du Traité renferme cependant une mission de banque centrale qui va bien au-delà d'une simple dérogation au secret professionnel. Loin d'être une exception, la contribution des banques centrales à la surveillance prudentielle et au maintien de la stabilité financière, devrait être la règle.

163 BCE, « Le rôle des banques centrales en matière de contrôle prudentiel », communiqué de presse, 22 mars 2001.

164 Loi du 23 décembre 1998 portant création d'une Commission de surveillance du secteur financier et la loi du 23 décembre 1998 relative au statut monétaire et à la Banque centrale du Luxembourg.

165 Loi du 23 décembre 1998 relative au statut monétaire et à la Banque centrale du Luxembourg.

166 Voir également l'article 79-19 (1) de la loi modifiée du 6 décembre 1991 sur le secteur des assurances selon lequel « *...Pour les besoins de l'exercice de leurs fonctions respectives, le Commissariat peut aussi échanger, conformément à la présente loi, de telles informations sur les entités réglementées appartenant à un conglomérat financier avec les banques centrales des Etats membres, le système européen de banques centrales et la Banque centrale européenne* » .



Les *« Mémoranda of Understanding »* [167] conclus au niveau international entre banques centrales, autorités de surveillance et ministères des finances ne pourront remédier à la situation telle qu'elle se présente au Luxembourg. Ces accords sont, dans leur intégralité, juridiquement non contraignants[168]. A cela s'ajoute que les Mémoranda de 2003 et de 2005 se limitent aux seules circonstances de crises, alors que l'échange d'information et la collaboration devraient se faire de manière permanente. Enfin, pour leur application entre autorités nationales, ils se réfèrent aux arrangements nationaux mis en place à cet effet[169].

Or, comme nous venons de le voir, au Luxembourg il n'existe pas d'arrangements qui serviraient de base à une coopération interinstitutionnelle en dehors des situations de crise, ni en cas de crise.

En maintenant cet état des faits, le Luxembourg est un cas isolé des autres membres du SEBC qui, en vue de garantir la coopération interinstitutionnelle, ont procédé à un nouvel agencement des compétences entre banques centrales et autorités de surveillance.

3.2 UNE COOPÉRATION QUI NE PEUT PASSER QUE PAR UNE RÉPARTITION CLAIRE DES COMPÉTENCES

En vue de garantir une coopération efficace entre banque centrale d'un côté et autorité de surveillance de l'autre côté, la loi néerlandaise distingue entre la surveillance prudentielle du secteur financier en général et la surveillance de la conduite des opérations financières en particulier.

La section 1:24 de la loi néerlandaise prévoit que *"Prudential supervision shall focus on the solidity of financial undertakings and contributing to the stability of the financial sector. Under this Act, the Netherlands Central Bank shall be required to exercise the prudential supervision of financial undertakings and to decide on the admission of financial undertakings to the financial markets"*.

Conformément à la section 1:25 *"Supervision of conduct shall focus on orderly and transparent financial market processes, clear relations between market parties and due care in the treatment of clients. Under this Act, the Netherlands Authority for the Financial Markets shall be required to exercise the supervision of conduct of the financial markets and to decide on the admission of financial undertakings to those markets"*.

Il s'ensuit que la Banque centrale est chargée de la surveillance macro prudentielle du secteur financier tandis que l'autorité de surveillance est en charge de la surveillance micro prudentielle du secteur financier. Le législateur néerlandais a ainsi opté pour une approche fonctionnelle qui répartit les missions de surveillance en fonction des objectifs qu'elles poursuivent. Afin d'assurer la coopération entre les deux institutions, la section 1:46 du *"Financial Supervision Act"* du 28 Septembre 2006[170], prévoit que *"The supervisors* ***shall collaborate closely*** *(our underline) with a view to laying down generally binding regulations and policy rules to ensure they are equivalent wherever possible in so far as they relate to matters that are both subject to prudential supervision and supervision of conduct"*. La section 1:47 prévoit que *"The supervisor*

167 *Voir, Memorandum of understanding on cooperation between payment system overseers and banking supervisors, April 2002; Memorandum of understanding between banking supervisors and central banks on crisis management, March 2003; Memorandum of understanding on cooperation between the banking supervisors, central banks and finance ministries of the European Union in financial crisis situations, May 2005.*

168 *Voir point 8 du memorandum de 2001; point 9 du Memorandum de 2003 et point 11.1 du Memorandum de 2005.*

169 *Ainsi le Mémorandum de janvier 2001 « On cooperation between payment systems overseers and banking supervisors in stage three of the economic and monetary union », prévoit au point 5.2* "At the national level, the exchange of information between overseer will be carried out in accordance with the arrangements in place, or that might be established in the future, between these authorities. The Parties will endeavor to arrange their relationships in a manner appropriate to an efficient implementation of this Memorandum"; voir également le point 5.1 du Memorandum of understanding de mars 2003 *"on high level principles of cooperation between the banking supervisors and central banks of the European Union in crises management situations" ; voir également le point 6.1 du Memorandum of understanding de juillet 2005 "on cooperation between the banking supervisors, central banks and finance ministries of the European union in financial crises situations".*

170 *Voir*, "Unofficial draft translation of Financial Supervision Act of 28th September 2006", *publiée par le ministère des finances néerlandais sur son site Internet, http://www.minfin.nl/binaries/minfin/assets/pdf/engelse-site/financial-supervision-act---wft--per-1-1-2007-.pdf.*

shall provide the other supervisor with a reasonable term to submit its view before taking any of the measures mentioned in the second subsection"[171].

Ce qui au Luxembourg est une exception, devient aux Pays-Bas une obligation : la coopération entre banque centrale et autorité de surveillance est obligatoire à chaque fois qu'une des autorités de surveillance envisage d'entreprendre une des mesures suivantes : *« the appointment of a liquidator under Section 1:76; the withdrawal of an authorization under Section 1:104, opening words and under b, c, d, e, f or j; imposing a prohibition, meant in Section 1:58, 1:59 (2), 1:67 (1) or 4:4; and the designation under Section 1:75 intended to dismiss a person who (co-)determines the policies of a financial undertaking or intended to dismiss a person who forms part of a body entrusted with the supervision of the policies and the general course of events of a financial undertaking"*[172]. Ces mesures correspondent aux pouvoirs conférés par l'article 53 de la loi du 5 avril 1993 relative au secteur financier à la CSSF.

En Autriche, l'autorité de surveillance (FMA) est depuis 2002 compétente pour la surveillance du secteur bancaire, du secteur des assurances et du marché des valeurs. Une récente réforme entrée en vigueur le 1er janvier 2008 confère également des compétences étendues en la matière à l'Österreichische Nationalbank (OeNB). L'article 44 b du "Nationalbankgesetz 1984" investit la OeNB d'une compétence en matière de stabilité financière. Sur base des paragraphes 70 et 70a[173] du *Bundesgesetz über das Bankwesen* (BWG), l'OeNB devient l'autorité compétente pour toutes les vérifications sur place qui couvrent tous les risques relevant et en particulier les risques opérationnels. L'OeNB vérifiera également le respect des dispositions relatives au blanchiment d'argent. Pour des raisons macroéconomiques, l'OeNB peut décider de sa propre initiative d'effectuer des inspections sur place. Pour ce faire elle doit immédiatement informer la FMA et motiver l'opération[174].

Les inspections conduites par la FMA et l'OeNB obéissent à un plan annuel élaboré au préalable par les deux autorités de surveillance[175].

La FMA doit approuver chaque changement affectant la structure d'un établissement de crédit. Mais, avant d'autoriser un tel changement, le paragraphe 21 du BWG enjoint à la FMA de solliciter l'avis de l'OeNB. La même obligation s'impose lorsque la FMA est appelée à déterminer le seuil du risque opérationnel[176].

L'article 79 du BWG organise la coopération entre les deux autorités qui doivent à cet effet entretenir une base de données commune. L'article 79 (4a) exige que la FMA introduise toutes les informations qu'elle a collectées, dans cette base de données[177]. L'OeNB peut, à tout moment demander à la FMA de lui communiquer les informations qu'elle nécessite pour l'accomplissement de ses tâches. Ces informations peuvent concerner l'ensemble des entreprises du secteur financier et les fonds de pension. L'OeNB introduira ces informations dans la base de données commune dans la mesure où la FMA ne les y a pas encore insérées. Au cas où la FMA ne disposerait pas des informations sollicitées, elle doit les procurer[178].

171 *Section 1:46 (2)*, "Unofficial draft translation of Financial Supervision Act of 28th September 2006", *publiée par le ministère des finances néerlandais sur son site Internet, http://www.minfin.nl/binaries/minfin/assets/pdf/engelse-site/financial-supervision-act---wft--per-1-1-2007-.pdf.*

172 *Idem., Section 1:46 (2).*

173 „Unbeschadet der auf Grund anderer Bestimmungen dieses Bundesgesetzes bestehenden Befugnisse kann die FMA gemäß § 70 Abs. 1 Z 3 die Oesterreichische Nationalbank beauftragen, alle gemäß Abs. 1 vom Kreditinstitut zu erteilenden Auskünfte vor Ort einzuholen und erteilte Auskünfte nachzuprüfen".

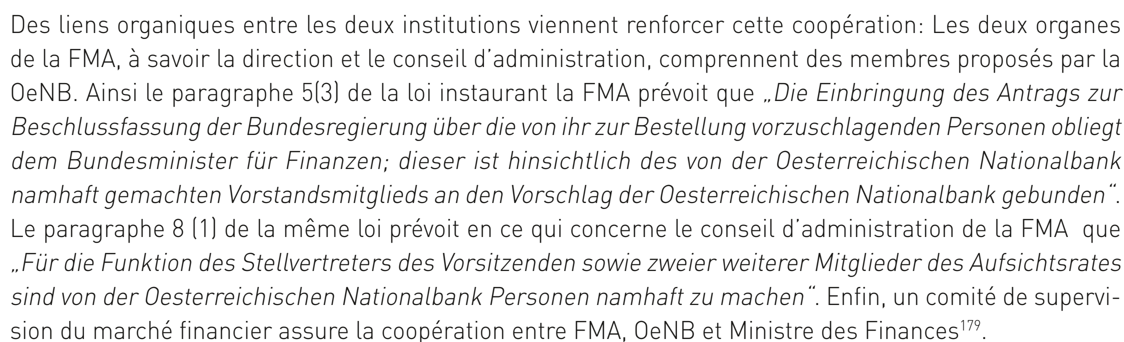
174 *Article 70 1c du BWG.*

175 *§70 (1b) Die FMA und die OeNB haben für das jeweils folgende Kalenderjahr ein Prüfungsprogramm gemeinsam festzulegen.*

176 *Voir § 21 d BWG.*

177 *§ 79(4a) „Die FMA hat alle relevanten Informationen aus ihrer bankaufsichtlichen Tätigkeit in die gemeinsame Datenbank einzustellen ».*

178 Voir, § 44b du Bundesgesetz über die Oestreichische Nationalbank (Nationalbankgesetz 1984 – NBG) BGBl. Nr. 50/1984 i. d. F. BGBl. I Nr. 108/2007, „Die FMA hat Daten aller Unternehmen der Finanzbranche (§ 2 Z 7 Finanzkonglomerategesetz – FKG, BGBl. I Nr. 70/2004) sowie der Pensionskassen, die die Oesterreichische Nationalbank zur Wahrnehmung der Aufgabe gemäß Abs. 1 benötigt, dieser auf ihr Verlangen zur Verfügung zu stellen. Die Oesterreichische Nationalbank hat diese Daten in die Datenbank gemäß § 79 Abs. 4 a BWG einzustellen und kann diese auch verarbeiten. Soweit dies zweckmäßig ist, können diese Daten seitens der FMA auch direkt in die Datenbank aufgenommen werden. Sind die von der Oesterreichischen Nationalbank angeforderten Daten bei der FMA nicht verfügbar, so sind sie von der FMA zu erheben, in die Datenbank gemäß § 79 Abs. 4 a BWG einzustellen und ist die Oesterreichische Nationalbank hievon zu verständigen. Liegen benötigte Daten bei der FMA nicht vor, so können sie von Kreditinstituten auch durch die Oesterreichische Nationalbank direkt erhoben werden und sind diese Daten in die Datenbank gemäß § 79 Abs. 4 a BWG einzustellen".



Des liens organiques entre les deux institutions viennent renforcer cette coopération: Les deux organes de la FMA, à savoir la direction et le conseil d'administration, comprennent des membres proposés par la OeNB. Ainsi le paragraphe 5(3) de la loi instaurant la FMA prévoit que *„Die Einbringung des Antrags zur Beschlussfassung der Bundesregierung über die von ihr zur Bestellung vorzuschlagenden Personen obliegt dem Bundesminister für Finanzen; dieser ist hinsichtlich des von der Oesterreichischen Nationalbank namhaft gemachten Vorstandsmitglieds an den Vorschlag der Oesterreichischen Nationalbank gebunden"*. Le paragraphe 8 (1) de la même loi prévoit en ce qui concerne le conseil d'administration de la FMA que *„Für die Funktion des Stellvertreters des Vorsitzenden sowie zweier weiterer Mitglieder des Aufsichtsrates sind von der Oesterreichischen Nationalbank Personen namhaft zu machen"*. Enfin, un comité de supervision du marché financier assure la coopération entre FMA, OeNB et Ministre des Finances[179].

Aucune disposition des statuts de la Banque de France ne lui attribue une compétence en matière de surveillance prudentielle du secteur financier. L'article L 613-1 du Code monétaire et financier confère cette tâche à la Commission bancaire chargée de contrôler le respect, par les établissements de crédit et par les entreprises d'investissement (hors sociétés de gestion de portefeuille), des dispositions législatives et règlementaires qui leur sont applicables et de sanctionner les manquements constatés. La Commission participe activement au développement et au respect des règles prudentielles. D'un point de vue institutionnel, la Commission bancaire est présidée par le gouverneur de la Banque de France ce qui intègre le contrôle prudentiel du secteur financier dans le cadre des fonctions assurées par la Banque de France.

Le Comité des établissements de crédit et des entreprises d'investissement (CECEI) est chargé par la législation bancaire et financière figurant dans le Code monétaire et financier de *« prendre les décisions ou d'accorder les autorisations ou dérogations individuelles prévues par les dispositions législatives et réglementaires applicables aux établissements de crédit et aux entreprises d'investissement, à l'exception de celles relevant de la Commission bancaire »*. Ce comité accorde et retire les agréments. Il apprécie, tout au long de la vie de l'établissement de crédit, les modifications pouvant affecter les conditions d'octroi de l'agrément. Le CECEI est également présidé par le gouverneur de la Banque de France. Dès lors les constats faits au sujet de la Commission bancaire s'imposent aussi au niveau du CECEI.

En Belgique, l'article 12 des statuts de la Banque nationale de Belgique (BNB) prévoit que *« La Banque contribue à la stabilité du système financier »*. Mais il revient à la Commission bancaire financière et des assurances (CBFA) *« d'assurer le contrôle des établissements de crédit, des entreprises d'investissement, des sociétés de gestion d'organismes de placement collectif, des conseillers en placement, et des bureaux de change »*[180]. L'article 44 de la loi du 2 août 2002 érige la CBFA en organisme « autonome ayant la personnalité juridique ». Mais la composition de cette commission est garante d'une collaboration étendue et permanente avec la Banque nationale de Belgique. L'article 48§2 de la loi du 2 août 2002 prévoit que le conseil de la Commission est composé en autres de trois régents de la Banque nationale de Belgique. La moitié des membres du comité de direction est composée de membres de la direction de la BNB[181].

179 *Selon § 13 du* « Bundesgesetz über die Errichtung und Organisation der Finanzmarktaufsichtsbehörde (Finanzmarktaufsichtsbehördengesetz – FMABG) » „(1) Zur Förderung der Zusammenarbeit und des Meinungsaustausches ist beim Bundesminister für Finanzen ein Finanzmarktkomitee als Plattform der für die Finanzmarktstabilität mitverantwortlichen Institutionen einzurichten. Dieses Komitee besteht aus je einem Vertreter der FMA, der Oesterreichischen Nationalbank sowie einem Vertreter des Bundesministers für Finanzen aus dem Bereich der Finanzmarktaufsichtslegistik des Bundesministeriums für Finanzen. Für jeden Vertreter ist von den genannten Institutionen auch ein Stellvertreter zu bestellen. (2) Empfehlungen zu Finanzmarktfragen können vom Finanzmarktkomitee mit Stimmenmehrheit beschlossen werden. Das Finanzmarktkomitee hat sich nach seiner Konstituierung einstimmig eine Geschäftsordnung zu geben. Der Bundesminister für Finanzen hat aus dem Kreis der Mitglieder einen Vorsitzenden (Stellvertreter) für die Dauer von drei Jahren zu bestellen; die Wiederbestellung ist zulässig."

180 Voir article 224 de la loi du 20 juillet 2004 – Moniteur Belge (MB) 9 mars 2005.

181 *Voir article 49§6 de la loi du 2 août 2002 relative à la surveillance du secteur financier et aux services financiers.*

3.3 CONCLUSION

En ce qui concerne le cadre institutionnel national en matière de stabilité financière et plus particulièrement en matière de prévention et de gestion de crises affectant le secteur financier, il s'avère que, contrairement à la situation qui prévaut dans tous les autres pays membres de l'Eurosystème, le dispositif institutionnel au Luxembourg fait exception en ce que la Banque centrale ne se voit pas dotée de responsabilités ou de tâches spécifiques en matière de surveillance prudentielle et que, par ailleurs, il n'existe ni relation institutionnelle, ni accord officiel régissant une coopération bilatérale avec l'autorité de surveillance. Afin de permettre à la Banque centrale d'assumer ses tâches, il s'avère que l'accès à des informations prudentielles, en particulier celles relatives aux intermédiaires à envergure systémique, est indispensable pour la mise en œuvre de la surveillance macro-prudentielle, pour la surveillance des systèmes de paiement et la sécurité d'autres infrastructures de marché, qui revêtent une importance particulière pour la bonne conduite de la politique monétaire. En cas de crise, des informations d'origine prudentielle sont indispensables pour déterminer si, par exemple, une banque à court de liquidités et sollicitant la fourniture de liquidités d'urgence, est solvable. La disponibilité de ces informations est essentielle aussi bien en temps normal qu'en situation de crise. Cet état de fait vient d'être illustré par les turbulences sur les marchés financiers qui ont eu lieu récemment. La capacité d'interpréter ces informations ne pourrait être garantie si elles n'étaient disponibles qu'au moment du déclenchement d'un problème ou d'une crise.

Il est dès lors urgent d'envisager certaines modifications législatives pour assurer la préparation adéquate des autorités luxembourgeoises confrontées à une crise financière.

C'est ainsi que nous suggérons la mise en place d'une structure de coopération directe et formelle entre la Banque centrale et la Commission de surveillance, par la création d'un Comité de stabilité financière permettant un échange d'informations prudentielles, en temps normal et en cas de crise. Celles-ci devraient entre autres concerner des établissements individuels à envergure systémique ainsi que des produits de marché. En effet, une crise financière d'envergure systémique demande l'engagement des banques centrales, des superviseurs et des ministres des finances à des degrés différents selon la nature de la crise, autant sur le plan national que sur le plan transfrontalier. Ce Comité se transformera, sous la coordination de la Banque centrale, en cas de crise de liquidité ou en cas de crise affectant potentiellement la performance des fonctions de banque centrale, en Comité de gestion de crise. Il pourra, selon la nature de la crise, être élargi par la participation du Ministre des Finances, qui coordonnera le Comité en cas de crise d'insolvabilité avec implications potentielles systémiques susceptibles de conduire à l'utilisation de fonds publics.

Une telle structure correspondrait également à l'esprit du projet d'arrangement de coopération élargi entre les autorités de surveillance financière, les banques centrales et les ministres des finances de l'Union européenne en situation de crise financière à dimension transfrontalière, qui, suite à la demande du Conseil Ecofin du 9 octobre 2007, est prévu d'être mis en place en 2008, et qui prévoit différents coordinateurs selon les différents degrés d'une crise.

Par ailleurs, en considérant la stabilité du secteur financier et la coopération internationale, il faut relever la lacune systémique qui consiste en ce que la Banque centrale ne soit pas légalement investie de compétence relative à la gestion, y compris en période de crise, des besoins en liquidité du système financier national. Cette situation est susceptible d'exposer la place financière à un risque accru en cas d'instabilité financière.

Nous estimons par conséquent nécessaire d'envisager, sans tarder, une réforme du cadre institutionnel en matière de stabilité financière du Luxembourg en vue d'une coordination structurée entre les autorités concernées. Dans cet ordre d'idées, il faudrait mettre en mesure la Banque centrale du Luxembourg d'assumer ses tâches en matière de stabilité financière et de remédier aux défaillances relevées ci-dessus.