

# CHAPTER V

## SUPERVISION OF SECURITISATION UNDERTAKINGS

1. Developments in the sector of securitisation undertakings in 2005
2. Developments in the regulatory framework
3. Prudential supervisory practice



### 1. DEVELOPMENTS IN THE SECTOR OF SECURITISATION UNDERTAKINGS IN 2005

In 2005, four securitisation undertakings governed by the law of 22 March 2004 on securitisation have been granted authorisation by the CSSF, namely the following multiple-compartment securitisation undertakings, which have all been incorporated in the legal form of a public limited company:

- H.E.A.T. Mezzanine I-2005 S.A.
- iStructure S.A.
- Vivaldis, Gesellschaft für strukturierte Lösungen S.A.
- GPB Credit Risk Management S.A.

The authorisation of these new securitisation undertakings brings the total number of securitisation undertakings authorised as at 31 December 2005 to six. The total balance sheet of the authorised securitisation undertakings exceeds EUR 11 billion at the end of 2005.

It should be borne in mind that only the structures that issue securities to the public on a continuous basis must apply for authorisation.

The files submitted reveal however that the securitisation undertaking seems to arouse keen interest, mainly among German initiators. The securities issued are in general bonds and subject to foreign law. In the vast majority of cases, the articles of incorporation reserve the possibility for the securitisation undertaking to securitise by means of shares. The securitisation transactions mainly consist in the securitisation of credits and other comparable assets, as well as in repackaging transactions in the form of issues of structured products.

To date, the CSSF has not received any application file for the licensing of a fiduciary representative under Luxembourg law, even though the law of 22 March 2004 on securitisation has established a specific legal framework for these independent professionals charged with representing the interests of the investors. Until now, the authorised securitisation undertakings have all appointed a trustee governed by foreign law.

The CSSF expects securitisation activities to continue their slow but ongoing pace in 2006, a trend that is confirmed by several application files that are currently being scrutinised.

### 2. DEVELOPMENTS IN THE REGULATORY FRAMEWORK

In 2005, no changes have been made to the Luxembourg legal framework governing securitisation undertakings.

Until a more sophisticated standard reporting is implemented, the CSSF has however considered it useful to specify, by means of a circular letter, both categories of information it requests from securitisation undertakings pursuant to articles 23 and 24 of the law of 22 March 2004 on securitisation. One of the categories has to be submitted on an *ad hoc* basis, and the other one on a half-yearly basis.

Thus, without prejudice to the provisions of article 20 of the law of 22 March 2004 on securitisation, the following documents shall be automatically transmitted to the CSSF as soon as they are available:

- the final issue documents relating to every issue of securities;
- a copy of the financial statements drawn up by the securitisation undertaking for its investors and rating agencies, where applicable;
- a copy of the annual reports and documents issued by the external auditor resulting from its audit of annual accounts.

As far as half-yearly reports are concerned, the CSSF requires securitisation undertakings to provide a statement on their new issues of securities, the other outstanding issues and the issues that have been redeemed during the period under review. It should be noted that the nominal amount issued, the nature of the securitisation transaction, the investor profile and, where applicable, the compartment concerned should be included “per issue”. In addition, the half-yearly report should include a brief statement of the financial situation of the securitisation undertaking and notably a breakdown (by compartment where applicable) of its assets and liabilities. At the financial year-end, a draft balance sheet and profit and loss account are also to be added.

The half-yearly information shall be submitted to the CSSF within 30 days following the reference date. They can be drawn up in a format and on a data support chosen by the securitisation undertaking.

### 3. PRUDENTIAL SUPERVISORY PRACTICE

Several decisions have been taken in particular cases submitted to the CSSF in 2005. The most important are set out hereunder.

#### 3.1. Organisation of securitisation undertakings and supervision of the CSSF

In accordance with article 19 of the law on securitisation, only the undertakings that issue securities to the public on a continuous basis must be under the CSSF’s supervision.

Since neither the law nor the parliamentary works define the notion of “public”, the administrative practice of the CSSF allowed to bring out the following criteria:

- issues to professional investors and private placements are not considered as issues to the public;
- on the other hand, the subscription of securities by an institutional investor or financial intermediary for a subsequent placement of such securities with the public constitutes a placement with the public;
- the issues whose denominations exceed EUR 125,000 are assumed not to be placed with the public, and the listing of an issue on a regulated market does not *ipso facto* entail that this issue will be placed with the public.

It should be noted that the definition of the term “public” in the field of securitisation is not in line with that of the law of 10 July 2005 on prospectuses for securities, which introduced for the first time into Luxembourg law a definition of the notion “offer to the public” and whose determining criteria is that of a proactive approach of solicitation and a specific offer adopted by the banker.

As regards the criterion of issue “on a continuous basis”, the CSSF considers that it is assumed to be fulfilled from the moment the securitisation undertaking has made at least four issues per year. However, a securitisation undertaking that makes at least four issues on an annual basis is not subject to the supervision of the CSSF if it issues denominations exceeding EUR 125,000.

In order to preserve its flexible approach, the CSSF has not drawn up an exhaustive list of the “securities” a securitisation undertaking may issue. The securities issued shall in any case fulfil the characteristics and minimum conditions of fungible securities that can be traded on the capital market.

The CSSF has been asked to decide on the possibility to appoint legal persons to the board of directors of a securitisation undertaking. While the CSSF can accept, in principle, the appointment of legal persons, the criteria of competence and professional repute of the directors, in such constellations, will be assessed by the CSSF for both the legal persons and the natural persons appointed to represent the legal persons.

As far as the accounting is concerned, the CSSF confirmed that multiple-compartment securitisation companies should present their annual accounts, as well as the relating financial notes in such a form that the financial data for each compartment are clearly stated. It is possible however to regroup the notes to the financial statements for several compartments.

In order to avoid accounting asymmetries that can result from the application of different assessment rules depending on the legal form of the securitisation undertaking, the CSSF accepts that the securitisation undertakings apply the exemption provided for in article 26(5) of the law of 19 December 2002 on the trade and companies register and the accounting and the annual accounts of the companies, under the condition that they append an appropriate explanation to their accounts.

### **3.2. Nature of the securitisation transactions**

The CSSF has accepted that some securitisations can be made through credits granted by a securitisation undertaking on condition that, on the one hand, the required funds to grant this loan are obtained via an issue of securities whose repayment is linked to the repayment of the said loan and that, on the other hand, the loan is a mode of assuming a risk linked to an underlying asset and whose repayment is linked to the value or yield of this underlying.

As regards active management activities, as well as concluding transactions on derivative instruments or forward transactions, repo-style transactions to value assets, securities lending activities and repurchase agreements, the CSSF considers that given their mainly static nature, the securitisation undertakings shall limit them to the strict minimum where these activities have been made necessary by or are an integral part of the securitisation transactions. Similarly, these activities shall be performed in accordance with article 61(1) of the law of 22 March 2004, which provides that a securitisation undertaking can only assign its assets in accordance with the provisions laid down in its articles of incorporation or its management regulations.