



# Specialised Financing Vehicle

(Organisme de Financement Spécialisé - OFS)

June 2020



**The French Asset Management Association (Association Française de la Gestion Financière, AFG)** is the professional organisation representing

the French asset management industry. Asset management is about helping retail and professional investors to provide for their future and achieve other long-term goals. Individuals and organisations entrust their savings to asset managers, who seek to increase their value by investing in the real economy via companies' shares or bonds, government bonds, and infrastructures' assets.

The French asset management sector is the largest in continental Europe: 660 asset management companies employ directly and indirectly 85,000 people and invest on behalf of their clients up to 4, 000 billion euros in bonds, shares and other assets. More than 50% of the management companies distributes their funds abroad. More than 30% of the assets managed by our members are issued by corporates or states of the Euro zone (excluding France), which makes our industry a key source of funding for the European economy.

AFG is an active member of EFAMA and PensionsEurope.

41 rue de la Bienfaisance | 75008 Paris | Tél. +33 (0)1 44 94 94 00  
45 rue de Trèves | 1040 Bruxelles | Tél. +32 (0)2 486 02 90  
@AFG\_France | [www.afg.asso.fr](http://www.afg.asso.fr)

# Specialised Financing Vehicle

## (Organisme de Financement Spécialisé - OFS)

### Practical Guide

June 2020

#### **Important note**

This Practical Guide was developed by the French asset management association (*Association Française de la Gestion financière - AFG*) with the assistance of Kramer Levin LLP and the members of the AFG's Debt Fund and Securitisation Commission in order to familiarise AFG members with this new legal vehicle, the OFS.

This Practical Guide is intended to be concise and does not claim to be exhaustive. It should not be construed as constituting advice to AFG members and each member of the AFG is invited to form his or her own opinion on the elements contained in this Practical Guide before considering creating an OFS. The AFG, Kramer Levin LLP and the members of the AFG's Debt Fund and Securitisation Commission cannot be held liable in any way whatsoever in connection with this Practical Guide.

This Practical Guide reflects the authors' understanding of the state of the law as of April 2020. It will be periodically updated by the AFG. Nevertheless, readers are strongly advised to ensure that, subsequent to its date of publication or its updates, no legislative or regulatory changes or administrative interpretations have been made that could alter its content.

<b>General comments</b>	<b>4</b>
<b>Glossary</b>	<b>5</b>
<b>1. Founding texts of the OFS</b>	<b>6</b>
<b>2. General characteristics of the OFS</b>	<b>7</b>
2.1 Definition	7
2.2 Legal form	7
2.3 AMF formalities – Incorporation – Marketing	8
2.4 Labels	9
<b>3. Distinguishing features of the OFS in relation to FPS and OT</b>	<b>11</b>
3.1 Distinctive features of the OFS in relation to the OT	12
3.2 Distinctive features of the OFS in relation to the FPS	13
<b>4. OFS Assets</b>	<b>15</b>
4.1 Financial securities	15
4.2 Receivables	15
4.3 Loans	16
4.4 Guarantees or security interests	17
4.5 Derivative Contracts	17
4.6 Risk or cash sub-participations	18
4.7 Assets covered by Article L. 214-154 of the CMF	18
4.8 Other asset classes	18
4.9 Transactions for the temporary assignment or acquisition of financial instruments	19
4.10 Cash	19
4.11 Ancillary asset holdings	19

<b>5. OFS liabilities</b>	<b>20</b>
5.1 Issue of units, shares or debt securities	20
5.2 Derivative Contracts	23
5.3 Borrowings	23
<b>6. Management rules</b>	<b>24</b>
6.1 No diversification or concentration rules	24
6.2 General commitment rule	24
6.3 “Buy & hold” strategy	24
<b>7. Protective rules that derogate from ordinary law</b>	<b>25</b>
7.1 No liability to collective insolvency proceedings	25
7.2 Prohibition of asset seizures	25
7.3 Enforceability of payment allocation rules	25
7.4 Non-application of the rules on “optional nullity” of the suspect period	25
7.5 Simplified and enforceable assignment of receivables	25
7.6 Transfer of security interests by operation of law and without formality	26
7.7 Irrevocable commitment of the debtor	26
7.8 Option to create earmarked accounts	27
<b>8. Accounting and tax treatment</b>	<b>28</b>
8.1 Accounting treatment	28
8.2 Tax treatment	28
<b>Appendix</b>	
Summary table of financing vehicles	31

## General comments

In order to enhance the attractiveness and competitiveness of the Paris financial centre, on 3 January 2018 the legislator created a new financing vehicle under the AIFM Directive, the “Specialised financing vehicle” (*Organisme de financement spécialisé* - **OFS**).

The OFS is a vehicle under French law that can make investments in France and abroad and be subscribed to by French and foreign investors under optimal legal and tax conditions.

Its functionalities make it a safe, flexible and tax-efficient vehicle, well ahead of competing European vehicles:

- 1 It is registered (“declared”) with the French financial markets authority (*Autorité des Marchés Financiers* - *AMF*), but is not subject to its approval;
- 2 It may invest in all types of assets in France and abroad: granting loans, receivables, debt or equity securities, physical assets;
- 3 It may issue debt securities, in addition to units or shares, governed by French or foreign law pursuant to Articles L. 214-290-1 and D. 214-240-2 of the French monetary and financial code (*Code Monétaire et Financier* - *CMF*);
- 4 It may be invested by all types of French or foreign professional investors, including “professional clients” within the meaning of the MiFID II Directive;
- 5 It may not engage in “credit risk tranching”<sup>1</sup> and an investment made by an investor in an OFS is therefore not considered from a prudential perspective as an investment in a securitisation;
- 6 It benefits from exceptional methods of transferring receivables and security interests, without costs or formalities;
- 7 It is bankruptcy remote by law and may give rise to the creation of several sub-funds;
- 8 It benefits from a favourable tax regime: either partial tax transparency<sup>2</sup> (if the OFS takes the form of a co-ownership with no legal personality), or tax opacity (if the OFS takes the form of a company), which should enable it to have the status of “resident” within the meaning of the double taxation conventions concluded by France on the basis of the OECD model, and therefore to reduce or eliminate all withholding taxes on investment income from foreign sources, provided that this status of “resident” is recognised in the source State of the income;
- 9 It may benefit from the ELTIF Label or the FPE Label;
- 10 The articles of incorporation or the fund rules in addition to all information documents for investors may be written in English.

1) Except under the conditions of Article D. 214-240-3 c) of the CMF, in which case the OFS may fall within the scope of the Securitisation Regulations. Indeed, under this paragraph c), although economically every holder of debt securities also proportionally bears a loss in respect of the shares or units they hold, there is definitely a legal priority in the allocation of the losses of the holder of shares or units over the holder of debt securities.

2) The OFS is, in this case, exempt from corporation tax in France. The tax is, however, paid by the unitholders according to terms that differ according to their status. For natural persons, the “couponing” method allows income to be broken down according to its source and nature, and the taxable event in France is established, not when the fund receives the income, but when it is actually distributed. The taxable event is also postponed when the fund distributes the income to legal entities established in France if the latter can claim a corporation tax exemption on differences in net asset value, as is the case, for example, for companies operating mainly in the life insurance or capitalisation sectors. Other legal entities subject to corporation tax in France continue to be taxed on differences in net asset value (as provided for in Article 209-0 A of the French general tax code (*Code général des impôts*)).

# GLOSSARY

**Accounting Regulation:** Regulation No. 2018-04 of 12 October 2018 of the French accounting standards authority (*Autorité des normes comptables – ANC*) amending ANC Regulation No. 2014-01 relating to the accounting framework for open-ended undertakings for collective investment (*organismes de placement collectif à capital variable*), approved by order of 26 December 2018.

**AIF:** Alternative investment fund governed by the AIFM Directive.

**AIFM Directive:** Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No. 1060/2009 and (EU) No. 1095/2010.

**CMF:** French monetary and financial code.

**Daily Act:** Provisions of the Daily Act, initially dated 2 January 1981 and now codified in Articles L. 313-23 et seq. of the CMF, under the terms of which a borrower benefiting from a loan granted by a credit institution, a finance company and, since the Government Ordinance, certain AIF (including the OFS) may either assign the trade receivables it holds by way of purchase (“discount”, *escompte*) (credit and assignment of receivables are the same) or by way of guarantee or pledge (credit and assignment or pledge are different).

**ELTIF Label:** ELTIF fund approved by a competent national authority in accordance with the ELTIF Regulation.

**ELTIF Regulation:** Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds.

**FPE Label:** “Fund dedicated to lending to the economy” (*Fonds de Prêt à l'Économie – FPE*) label resulting from Decree No. 2013-717 of 2 August 2013 (JORF No. 0182 of 7 August 2013), amended by Decree No. 2014-1530 of 17 December 2014 (JORF No. 0293 of 19 December 2014) amending the investment rules of insurance companies, provident institutions, mutual insurance companies and their unions (and in particular, in the case of insurance companies, Article R. 332-14-2 of the French insurance code (*Code des assurances*)).

**MiFID II Directive:** Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

**PACTE Act:** Act No. 2019-486 of 22 May 2019 on the action plan for business growth and transformation of companies adopted on 11 April 2019 (JORF No. 0119 of 23 May 2019).

**Prospectus Regulation:** Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

**Securitisation Regulations:** (1) Regulation (EU) 2017/2401 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) No. 575/2013 on prudential requirements for credit institutions and investment firms and (2) Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No. 1060/2009 and (EU) No. 648/2012.

**VAT Directive:** Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT.

# 1. Founding texts of the OFS

Ordinance No. 2017-1432 of 4 October 2017 modernising the legal framework for asset management and debt financing (JORF No. 0233 of 5 October 2017 - incorporated into the CMF) **(Ordinance)** created a new category of alternative investment fund **(AIF)**, the specialised financing vehicle (*organisme de financement spécialisé* – **OFS**), which complements the other categories of AIF dedicated to financing, namely specialised professional funds (*fonds professionnels spécialisés* – **FPS**) and securitisation vehicles (*organismes de titrisation* – **OT**).

This Ordinance was supplemented by:

- Decree No. 2018-1004 of 19 November 2018 (JORF No. 0269 of 21 November 2018 - incorporated into the CMF);
- Decree No. 2018-1008 of 19 November 2018 (JORF No. 0270 of 22 November 2018 - incorporated into the CMF);
- the Order of 12 February 2019 (JORF No. 0044 of 21 February 2019) approving amendments to the General Regulation of the French financial markets authority (*Autorité des marchés financiers* - AMF).
- Act No. 2019-486 of 22 May 2019 (JORF No. 0119 of 23 May 2019) on the action plan for business growth and transformation of companies (PACTE);
- Decree No. 2019-1296 of 4 December 2019 (JORF No. 0283 of 6 December 2019) specifying the operating rules of financing vehicles pursuant to the Act of 22 May 2019.

The OFS is a vehicle that allows all investments of a vehicle wishing to use the ELTIF Label to be made under French law.

The OFS may invest in a wide range of assets (loans, receivables, plain vanilla debt securities or debt securities giving access to the issuer's capital, equity securities, property) and finance itself from a broad base of European investors, including private (retail) investors, provided they invest a minimum amount of EUR 100,000 or, if the OFS is ELTIF-approved by the AMF, EUR 10,000<sup>3</sup>.

In order to promote the OFS, the legislator allows the transformation without dissolution of existing OT and FPS into OFS.

In the interests of simplifying the wording, the legislator wished to define common rules applicable to OFS and OT, which are defined as "Financing Vehicles".

The FPS regime has not been changed by the Ordinance. On the other hand, several regulatory provisions concerning FPS were amended by the decrees implementing the Ordinance of 19 November 2018.

<sup>3</sup>) Under the conditions of the ELTIF Regulation.



## 2. General characteristics of the OFS

### 2.1 Definition

The purpose of the OFS is:

- on the one hand, to invest directly or indirectly in one or more of the following assets: financial instruments, receivables or any other asset within the meaning of Article L. 214-154 of the CMF, risk or cash sub-participations; and
- on the other hand, to ensure the financing thereof by issuing units, shares or debt securities, concluding derivative contracts, having recourse to borrowing or to any other form of resources, debts or commitments.

“Financial instruments” refers to financial securities (equity securities, debt securities and units or shares in undertakings for collective investment (*organismes de placement collectif* – OPC) and derivative financial contracts.

“Assets within the meaning of Article L. 214-154 of the CMF” must comply with the following rules: (1) ownership of the asset is based either on a registration, an authenticated deed, or a private deed whose probative value is recognised by French law<sup>4</sup>; (2) the asset is not subject to any security interests other than those that may be created for the fulfilment of the fund’s management purpose, (3) the asset is reliably valued in the form of a price calculated precisely and established regularly, which is either a market price, or a price provided by a valuation system that makes it possible to determine the value at which the asset could be exchanged between informed and contracting parties in an arm’s length transaction and (4) the liquidity of the asset enables the fund to meet its redemption obligations to its holders and shareholders as defined in its articles of incorporation or fund rules. It should be noted that the PACTE Act deems the 1<sup>st</sup> condition to be met for assets that are the subject of an entry in a shared electronic registration system (blockchain).

### 2.2 Legal form

The OFS can take two legal forms:

- a specialised financing fund set up in the form of a co-ownership with no legal personality (*fonds de financement spécialisé* – **FFS**) ;
- a specialised finance company set up in the form of a public limited company or a simplified joint stock company (*société de financement spécialisé* – **SFS**).

The OFS may comprise sub-funds if the regulations or the articles of incorporation so provide. Each sub-fund is by law impervious to the other sub-funds and is considered as a fund in itself, even if the asset management company and the depositary are shared.

The OFS is an AIF under the AIFM Directive. As such:

- Units, shares or debt securities issued by the OFS may be distributed to French or European Union investors within the framework of the “marketing passport” of the AIFM Directive<sup>5</sup>;

4) Since the PACTE Act, this condition is deemed to be met for assets that are the subject of an entry in a shared electronic registration system.

5) Unless the OFS uses a liability structure of the type referred to in Article D. 214-240-3 c) of the CMF, in which case it cannot be ruled out that foreign market authorities may deny the right to use the “marketing passport” for debt securities issued by the OFS on the basis of c) of the said Article. On the possibility of marketing debt securities on the basis of the “marketing passport” of the AIFM Directive, see Section 5.1 § “Distribution”.

- The OFS may be managed by an AIFM-authorized asset management company in France or in another European Union Member State under the “management passport” of the AIFM Directive;
- The depositary of the OFS is subject to the ordinary law regime of a depositary of a vehicle covered by the AIFM Directive, as transposed into French law in Articles L. 214-24-3 et seq. of the CMF. It must have its registered office or a branch in France.

Under the terms of Article L. 214-163-III of the CMF, OFS are managed by an asset management company referred to in Article L. 532-9 of the CMF. This company is designated, as the case may be, in the regulations or articles of incorporation of the OFS. In practice, FFS will be managed by the asset management company authorised to make the planned investments. For SFS, either the legal agent (within the meaning of company law) is an asset management company authorised to make the planned investments or it is not and, in this case, it must designate as delegated financial management agent an asset management company authorised to make the planned investments.

### 2.3 AMF formalities – Incorporation – Marketing

Like the FPS, the OFS is a fund registered with, and not approved by, the AMF.

The drafting of the OFS prospectus and the rules (FFS) or articles of incorporation (SFS) must comply with the provisions of the standard template prospectus and, as the case may be, the standard template rules or the standard template articles of incorporation set out in the appendix to AMF Instruction DOC 2012-06, which has been amended to take into account the specific features of the OFS. This instruction provides for the possibility of adjusting the order and content of the prospectus provided that such adjustments comply with the legal, regulatory and ethical provisions applicable to OFS. These documents are very similar to those applicable to the FPS.

Marketing of OFS securities may only begin once the OFS has received authorisation from the AMF to market securities in France or confirmation from the AMF that the application to market securities in the host jurisdiction has been forwarded to the competent national authority<sup>6</sup>.

It is possible to “pre-market”<sup>7</sup> the OFS securities by approaching a maximum of 50 investors (professionals or those with an initial subscription of EUR 100,000 or more) in order to estimate their appetite prior to the launch of an OFS on condition that this pre-marketing is not accompanied by the submission of a subscription form and/or the submission of documentation presenting definitive information on the characteristics of the OFS.

The certificate of deposit of funds must be sent to the AMF within one month of its issue.

Any marketing of OFS securities to investors eligible under Article 425-19 of the AMF General Regulation, who are not “professional clients” within the meaning of Article D. 533-11 of the CMF (itself transposing the MiFID II Directive and its Annex II in particular), requires the preparation and submission to such investors, prior to the subscription or acquisition of securities, of a PRIIPS KIID in accordance with Regulation (EU) No. 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products. In addition, the eligibility of the investors mentioned in Article 425-19 of the AMF General Regulation, who are not “professional clients” within the meaning of Article D. 533-11 of the CMF, will have to be verified with regard to the law of any foreign jurisdiction in which the OFS plans to market the securities it issues.

<sup>6</sup> If the asset management company is approved in accordance with the AIFM Directive.

<sup>7</sup> In France, under the terms of AMF Position DOC-2014-04. It should be noted that this special “pre-marketing” regime is likely to be modified by the draft European Regulation on Cross-border distribution of funds (CBDF).

## 2.4 Labels

### FPE Label (*Fonds de Prêt à l'Économie* - Fund dedicated to lending to the economy)

The OFS may benefit from the FPE Label if (1) its investment strategy consists of investing in receivables or debt securities on individual companies with a SIREN (French business registration) number or legal entities governed by private law of a European Union Member State primarily engaged in a commercial, industrial, agricultural, craft or real estate activity, excluding financial activities and undertakings for collective investment other than undertakings for collective investment in real estate (*organismes de placement collectifs immobilier* – OPCVI) (holding companies holding interests in such legal entities are also eligible), (2) it does not borrow, (3) it only conducts repurchase agreements in its capacity as assignee, (4) it only enters into derivative contracts for the purpose of hedging interest rate or exchange rate risk, and (5) it does not engage in “credit risk tranching”.

The asset management company must be authorised by the AMF, which excludes OFS managed by asset management companies on the basis of the AIFM Directive’s “management passport”.

The FPE Label is the result of a self-declaration by the asset management company and investors are personally responsible for ensuring that the fund complies with the conditions of the FPE Label. It requires the asset management company to establish quarterly realisation values for the securities issued by the fund, which must be certified annually by an independent expert.

Since the entry into force of Solvency II on 1 January 2016 (which abolished the percentages per asset class for insurance companies and similar entities and replaced them with the “prudent person” principle), the FPE Label has lost part of its interest from a prudential standpoint: the possibility for insurance companies and similar entities to invest 5% of their balance sheet in securities issued by funds benefiting from the FPE Label.

However, the FPE Label retains some interest for investors. The following advantages should be mentioned, but are not exhaustive: (1) it is a guarantee for investors that the fund will invest in the “real economy”<sup>8</sup>, without recourse to leverage or “credit risk tranching”, (2) for the few insurance companies and similar entities that have not migrated to Solvency II, it allows the investor to benefit from the 5% ratio, (3) for insurance companies and similar entities that have migrated to Solvency II, the investor should, in all likelihood, be presumed to be a “prudent person” if they invest 5% of their balance sheet in funds benefiting from the FPE Label<sup>9</sup>.

The FPE label may also allow insurance companies and similar entities to benefit, under certain conditions, from preferential accounting treatment when they invest in securities issued by funds benefiting from this label.

It may be recalled that FPE<sup>10</sup> are subject to Article R. 343-10 of the French insurance code (*Code des assurances*) for their inclusion in the balance sheet of insurance companies and similar entities. In this respect, as stipulated in Article R. 345-5 of the same Code, securities issued by an FPE that can be classified as “depreciable values” are not subject to the calculation of the liability risk provision (known as “PRE” “*provision pour risque d'exigibilité*”).

The possible classification of securities issued by an FPE as “depreciable values” requires an in-depth analysis given (i) the absence of a definition of the concept of “depreciable” in the French insurance code (*Code des assurances*) and (ii) the possibility for FPE to have two different liability structures (issue of units only or issue of bonds with units or shares)<sup>11</sup>.

8) “Real economy” is understood to mean companies that are neither collective investments nor financial undertakings within the meaning of the ELTIF Regulation.

9) In fact, the percentage of 5% was the percentage applicable to insurance companies and similar entities before the entry into force of Solvency II on 1 January 2016 (which abolished the percentages per asset class for insurance companies and similar entities and replaced them with the “prudent person” principle).

10) Defined in Article R. 332-14-2 of the French insurance code (Code des assurances).

11) Article A. 332-3 of the French insurance code (Code des assurances).

A “depreciable” security may be defined as a security issued for a contractually limited period that is irrevocably defined at the time of issue. When the security reaches maturity, the investor obtains in return for the security a redemption value fixed at the time of issue, possibly supplemented by a contractually determinable indexation based on market indices. The redemption value may be paid in cash or in kind. The first two elements of this proposed definition are made necessary by Article 122-1 of the chart of accounts of insurance companies, which states that the difference between the purchase price and the redemption value of a depreciable value is subject to depreciation.

FPE only issuing units do not allow a redemption value to be defined for them at the time of their subscription. These FPE are therefore, with regard to the previous paragraph, non-depreciable securities and are therefore subject to the PRE.

For FPE consisting of bonds with units or shares, the bonds issued could be classified as depreciable and therefore not subject to the PRE if the FPE is created for a limited period. This period corresponds to the contractual term of the bonds, it being specified that the nominal amount of the units or shares may not represent in value more than 0.5% of the nominal amount of the bonds issued. If the FPE is created for an unlimited period, the bonds would be considered as perpetual and thus subject to the PRE.

## ELTIF Label

All the eligible assets provided for in the ELTIF Regulation are also eligible for an OFS.

The OFS may benefit from the ELTIF Label if (1) its investment strategy consists in investing in equity securities, debt securities giving access to the issuer’s capital, debt securities, receivables, loans or physical assets, issued by a company, whether or not it belongs to a European Union Member State and, if this company is listed, whose market capitalisation does not exceed EUR 500 million, provided, however, that this company is neither a financial undertaking nor an undertaking for collective investment (the eligible asset classes are broader than those of the FPE Label), (2) it does not engage in short selling of assets, (3) it carries out repurchase agreements only up to a limit of 10% of the fund’s assets, and (4) it enters into derivative contracts for the purpose of hedging interest rate or exchange rate risk. It may, however, have recourse to borrowing (provided that the borrowing is not used to finance loans granted by the fund).

The ELTIF Label has a certain number of restrictions, in particular compliance with diversification and concentration rules which do not exist for the FPE label. One of them stipulates that a fund benefiting from the ELTIF Label must invest at least 70% of its capital in the aforementioned categories with a limit of 10% per company. This limit may be increased up to 20% provided that the total amount of investments exceeding the 10% limit does not exceed 40% of the fund’s assets.

The asset management company may be approved by the AMF or be an asset management company established in another European Union Member State acting on the basis of the “management passport” of the AIFM Directive.

The ELTIF Label is obtained by obtaining a specific approval for the fund from the competent national authority (in France, the AMF). A fund is approved within two months from the date of submission of a complete application for approval.

Obtaining the ELTIF Label has a number of advantages. The following advantages should be mentioned, but are not exhaustive: (1) it is a guarantee for investors that the fund will invest in the “real economy”<sup>13</sup>, (2) it allows loans to be granted directly in all European Union Member States, without worrying about possible national constraints in terms of banking monopoly (this is the result of the direct effect of the ELTIF Regulation in the law of each of the Member States) and (3) it allows the securities to be marketed to private (retail) investors, provided they invest a minimum amount of EUR 10,000<sup>14</sup>.

<sup>12)</sup> ANC Regulation No. 2015-11 of 26 November 2015.

<sup>13)</sup> “Real economy” is understood to mean companies that are neither collective investments nor financial undertakings within the meaning of the ELTIF Regulation.

<sup>14)</sup> Under the conditions of the ELTIF Regulation.

# 3. Distinguishing features of the OFS in relation to FPS and OT

## 3.1 Distinctive features of the OFS in relation to the OT

The OFS has the following distinctive features in relation to the OT:

### 1. Name

The name OT expressly refers to the concept of “securitisation” with the negative connotation that continues to attach to it since the 2008 subprime crisis, even though the OT in question would not perform any “credit risk tranching” and therefore would not constitute a “securitisation” within the meaning of the Securitisation Regulations.

### 2. Benefits of the AIFM Directive

The OFS is subject to the AIFM Directive and therefore benefits from the “management passport” and the “marketing passport” provided for by this Directive, provided that the asset management company is approved as a “full AIFM” and the OFS is not likely to fall within the scope of the Securitisation Regulations<sup>15</sup>.

The OT is a vehicle under French law that is not covered by the AIFM Directive and does not benefit from either of these two passports<sup>16</sup>. This has two consequences in particular: (1) the OT can only be managed by an asset management company approved by the AMF, and not an AIFM asset management company from a European Union Member State, although it can delegate the financial management of the OT to an AIFM asset management company from France or another European Union Member State in compliance with the provisions of the applicable AMF General Regulation on delegated management (no “letter-box” asset management company, the asset management company’s ability to oversee the delegatee’s proper performance of its duties, etc.), and (2) the securities issued by the OT are placed under the conditions set out in the Prospectus Regulation.

Some foreign investors (notably European institutional investors) may be required to invest only in vehicles covered by the AIFM Directive. In their view, these vehicles have the advantage of being regulated by harmonised European rules in terms of investor information, asset valuation, publication of net asset values and depositary regime.

Conversely, the OT requires foreign investors to be familiar with the French legal system and will, in most cases, require more in-depth due diligence.

Lastly, several European Union Member States have adapted their national legislation to allow AIF covered by the AIFM Directive (whether established in their national jurisdiction or in that of another Member State) to be able to grant loans directly in their jurisdiction. This is the case for Italy in February 2016, Germany in March 2016 and France in November 2016 (for FPS and FPCI only) and November 2018 (for OT and OFS). These national regulations are based on the ESMA recommendations entitled “Key principles for a European framework on loan origination by funds” dated 11 April 2016. These national regulations do not benefit foreign-law vehicles that are not covered by the AIFM Directive.

<sup>15)</sup> See footnote 6.

<sup>16)</sup> Excluding the so-called “circumvention” OT.

### 3. Broader asset classes

The OFS may invest in all types of asset classes: granting loans, acquisition of receivables, plain vanilla debt securities or debt securities giving access to the issuer's capital, equity securities, risk or cash sub-participations, and all other assets within the meaning of Article L. 214-154 of the CMF.

Conversely, the OT is the debt vehicle par excellence. It can invest in the following asset classes: granting loans, acquisition of receivables, debt securities, risk or cash sub-participations, derivative contracts and guarantees.

### 4. Chart of accounts of open-ended OPC

The OFS, like any other vehicle falling within the scope of the AIFM Directive, is subject to the chart of accounts of open-ended undertakings for collective investment (*organismes de placement collectif* – OPC) based on the concept of “fair value”. The OFS must publish a net asset value on a periodic basis and at least on a half-yearly basis.

Conversely, the OT is subject to a specific chart of accounts based on the concept of “historical cost”. As investors in an OT (close-ended fund) are prohibited from making redemption requests, the OT is not subject to the calculation of a net asset value. If it claims the benefit of the FPE Label, it is however required to establish a quarterly realisation value.

### 5. No “credit risk tranching”

The OFS, unlike the OT, cannot engage in “credit risk tranching”<sup>17</sup> by issuing senior/subordinated classes of securities where the subordinated securities bear the first capital losses on the assets it holds. That being said, the OFS may issue securities giving rise to different rights to capital and interest provided that, in the event of capital losses on the assets held by the OFS, these losses are allocated *pari passu* between the different classes of securities. It may be recalled that “credit risk tranching” constitutes an investment in “a securitisation position” within the meaning of the Securitisation Regulations. An investment in a securitisation position has a negative impact on the prudential treatment of the investment and obliges the originator, sponsor or original lender to retain on an ongoing basis a material net economic interest of at least 5%.

### 6. Benefit of double taxation conventions

SFS are fiscally opaque and are therefore subject to corporation tax in France.

This tax opacity should enable SFS to claim the status of “resident” within the meaning of the double taxation conventions concluded by France on the basis of the OECD model<sup>18</sup> and therefore to benefit from the convention provisions that reduce or even eliminate possible withholding taxes on foreign-source income paid to SFS.

The tax authorities have indicated to us that they are prepared to issue certificates of tax residency for SFS and that the absence of a taxable corporation tax margin for SFS does not constitute an abnormal act of management since, as in the case of OT on which the tax authorities have had to rule in the past, it is established that SFS (like OT) were designed as such by regulation.

The question remains as to what interpretation source States will give to the concept of “resident” in the light of the double taxation conventions they have concluded with France, and in particular whether the fact that the SFS is “subject” to corporation tax in France, but is not an “effective taxpayer”, is liable to call into question the “resident” status of the SFS from their point of view. A case-by-case verification of the interpretation of the concept of “resident” in the source States where the SFS is intended to invest is therefore desirable.

<sup>17</sup>) See footnote 6.

<sup>18</sup>) The OECD model double taxation conventions require two conditions to be met in order to qualify as a “resident”: to have legal personality and to be subject to tax in the State of registration.

## 3.2 Distinctive features of the OFS in relation to the FPS

The OFS has the following distinctive features in relation to the FPS:

### 1. Ability to issue debt securities

Although falling within the scope of the AIFM Directive (which only refers to the issue of units or shares), the French legislator has provided that the OFS may also issue debt securities. Pursuant to Article D. 214-240-2 of the CMF, debt securities are defined as “*negotiable debt securities or bonds or debt securities issued on the basis of a foreign law*”. This is important for several reasons.

The following should be mentioned, without attempting to be exhaustive: (1) some institutional investors (particularly foreign ones) only invest in debt securities because of their asset allocation rules: investing in shares can be costly from a prudential standpoint; they are unfamiliar with units because of their hybrid legal nature (half share, half debt), (2) if the OFS is set up in the form of an SFS, the issue of debt securities will make it possible to reduce the taxable base for corporation tax by deducting from the financial income of the SFS the amount of the financial expenses related to the debt securities; if the SFS only issues shares, the financial income liable to corporation tax is not subject to any deductible expenses other than the operating expenses of the OFS (dividends not being tax deductible), (3) if one wishes to make a private placement on the US market on the basis of Rule 144-A, only debt securities are eligible, not units or shares.

### 2. Benefit of protective rules that derogate from ordinary law

The OFS benefits from protective rules that derogate from ordinary law, which were hitherto the prerogative of OT until the Ordinance, which led some asset management companies to choose the OT for this reason alone.

These include (1) the simplified method of assigning receivables in a way that is enforceable against third parties and the automatic transfer of security interests without any guarantee formality (mortgages and Dailly assignments act as a guarantee for a loan), (2) the fact that the OFS is not subject to collective insolvency proceedings, (3) the prohibition of asset seizures, (4) the non-application of the “optional nullity” of the suspect period, (5) the enforceability against third parties of the payment allocation rules, (6) the possibility of benefiting from the acceptance of the assignment by the assigned debtor (outside any credit and therefore outside the scope of the Dailly Act) with the same legal effects as the acceptance provided for by the Dailly Act.

The legislator has significantly improved these exceptional protective rules for both the OFS and the OT. The FPS does not benefit from any of these rules. In particular, if the FPS is intended to acquire loan receivables, they must be acquired in accordance with the rules of ordinary law. However, the following two instalments should be noted in French law:

- since the reform of the French law of obligations that came into force on 1 October 2016, the ordinary law of assignment has been simplified: the assignment of the receivable is enforceable against third parties as of the deed of assignment, and no longer as was previously the case as of the notification of the assignment of receivables by a bailiff (former Article 1690 of the French civil code (*Code civil*)). The FPS may therefore acquire receivables on the basis of ordinary French law. Nevertheless, where the assigned receivable includes security interests whose transferability to third parties is subject to the fulfilment of formalities (e.g., registration amending the mortgage registry), these formalities must be carried out with the related costs. The special method of assignment available to the OFS allows for the automatic transferability of security interests governed by French law, without formalities or costs;

- the FPS may acquire loan receivables that are accompanied, where appropriate, by a Dailly pledge or a Dailly assignment by way of guarantee granted under the terms of the Dailly Act: the Dailly security interests will be transferred by operation of law to the FPS at the same time as the acquisition of the loan receivables. In addition, the FPS may, primarily, in the context of its loan granting activity, be the beneficiary of a Dailly pledge, an assignment by way of guarantee or an assignment by way of discount (*escompte*) under the terms of the Dailly Act<sup>19</sup>.

### 3. Benefit of double taxation conventions

The corporate versions of FPS (Sicav or SLP) cannot claim the status of “resident” within the meaning of the double taxation conventions concluded by France. On the other hand, the SFS may, as indicated in § 3.1 - 6 above, claim the status of “resident” and therefore avail itself of these conventions in order to reduce or even eliminate any withholding taxes on foreign-source income paid to the SFS, provided that this status of “resident” is recognised in the source State of the income.

---

<sup>19)</sup> The provisions of the Dailly Act apply to any AIF authorised to grant loans directly, which is the case of the FPS.



## 4. OFS Assets

The OFS may invest in financial instruments (which include financial securities and financial contracts), receivables or any other asset within the meaning of Article L. 214-154 of the CMF, and risk or cash sub-participations.

The law further specifies that the OFS may, under the conditions provided for in its regulations or articles of incorporation, subscribe to, acquire or hold equity type instruments, own-equity or partial own-equity instruments (OT may only hold equity securities, but may not subscribe to or acquire them, received through the conversion, exchange or redemption of debt securities or securities giving access to the capital, or through the exercise of the rights attached to such securities).

Finally, the law stipulates that the OFS may grant loans (1) under the conditions of the ELTIF Regulation provided that it benefits from the ELTIF approval granted by the AMF or (2) under the conditions set by the French regulatory provisions.

### 4.1 Financial securities

Financial securities are a sub-category of financial instruments defined in Article L. 211-1 of the CMF. The OFS may subscribe to or acquire:

- equity securities (in particular, but not exclusively, those received through the conversion, exchange or redemption of debt securities or securities giving access to the capital, or through the exercise of the rights attached to such securities);
- securities giving access to the issuer's capital;
- debt securities;
- units or shares of undertakings for collective investment (*organismes de placement collectif – OPC*) (it being specified, however, that the subscription to or acquisition of such units or shares will not allow the OFS to apply for an ELTIF approval, unless the target OPC are themselves ELTIF, EuVECA or EuSEF<sup>20</sup>, or to use the FPE Label unless the undertakings in question are OPC).

### 4.2 Receivables

#### General rules

Eligible receivables are receivables resulting either from an act that has already taken place or from an act yet to take place, whether or not the amount and due date of these receivables have yet to be determined and whether or not the debtors of these receivables have been identified (this applies to future receivables as long as they are determinable at their acquisition date), including long-term, doubtful or disputed receivables.

Receivables may be governed by French or foreign law, and they may be acquired by way of an assignment form (*bordereau de cession*) under French law (see Section 7.5), or by any other transfer method under French or foreign law.

<sup>20</sup> Under the conditions of Regulation (EU) 2015/760.

## Receivables resulting from rental or leasing contracts

The acquisition by the OFS of receivables resulting from a rental contract with or without a purchase or leasing option benefits from a particularly protective regime in order to prevent the OFS, which acquires and finances such receivables, from being exposed to the risk of termination of rental or leasing contracts by the official receiver of a bankrupt lessor or assignor-lessor. If the receiver had such a right of termination, the OFS, which would have financed the future rent receivables, would have no chance of being paid rent receivables from tenants whose contracts had been terminated.

In order to avoid such a situation, neither the opening of collective insolvency proceedings under French law (Book VI of the French commercial code (*Code de commerce*)) or under foreign law against the lessor or the assignor-lessor, nor the assignment or transfer of the movable or immovable property subject to the contract in the context of such proceedings may call into question the continuation of the rental or leasing contract whose receivables have been assigned to the OFS.

### 4.3 Loans

The OFS may grant loans on the basis of three legal grounds:

- the provisions of the ELTIF Regulation, provided that the OFS has obtained the ELTIF Label from the AMF, in which case the conditions for granting loans are governed by the provisions of the said Regulation, not by the French regulatory provisions;
- the French regulatory provisions arising from the decree implementing the Ordinance of 19 November 2018;
- where applicable, the legal and regulatory provisions (excluding ELTIF) of a third country that would allow a French OFS to grant loans within its jurisdiction.

Regardless of the ground used, the asset management company must have a specific authorisation for the activity of “Granting loans” (ie loan origination) from the AMF or the competent national authority if the OFS is managed by an asset management company established in another European Union Member State (the “management passport” of the AIFM Directive).

Loans granted by an OFS can only be granted to sole proprietorships or legal entities governed by private law primarily engaged in a commercial, industrial, agricultural, craft or real estate activity, whether or not they belong to a European Union Member State (unlike the FPE Label, which requires such legal entities to belong to a European Union Member State), with the exception of “financial undertakings” (as defined in the ELTIF Regulation) and undertakings for collective investment (*organismes de placement collectifs* – OPC). Holding companies holding interests in such legal entities are also eligible.

When an OFS grants loans on the basis of French regulatory provisions for more than 10% of its net assets, the following rules apply to it:

- a) loans may not be granted for a period exceeding the remaining life of the fund;
- b) the fund rules or the articles of incorporation provide that redemptions of units or shares are not possible during the life of the fund, unless the funds rules or the articles of incorporation define a redemption policy whose objective is to avoid an imbalance between redemption requests and the fund's assets that would prevent the fund from honouring redemption requests under conditions that safeguard the interests of investors and their equal treatment;
- c) the OFS may have recourse to cash borrowings, including to finance the loans it grants (which is not possible if the fund wishes to use the ELTIF Label) on condition, in particular, that (1) the total amount borrowed does not exceed 30% of the net assets of the fund (it being specified that loans of a temporary nature and fully covered by contractual promises to provide capital on the

part of investors are not taken into account for this 30% calculation) and (2) the loans have a maturity shorter than the remaining life of the fund;

- d)** it does not use financial contracts other than for the purpose of hedging interest rate or exchange rate risk;
- e)** it does not engage in short selling of financial instruments;
- f)** it may enter into repurchase agreements or similar transactions up to a limit of 10% of its net assets;

If the loans do not exceed 10% of the fund's net assets, only conditions a) and d) above are applicable.

Since the entry into force of the Ordinance on 3 January 2018, loans granted by an OFS (the same applies to loans granted by an FPS or an OT) may benefit from the provisions of the Dailly Act and, in particular, from the assignment of receivables by way of guarantee by the borrower or the acceptance by the assigned debtor of the assignment of the receivables for which it is liable.

The assignment of receivables by way of guarantee is one of the most effective security interests with regard to flows under French law. This effectiveness has been confirmed by the most recent French case law: as of the date affixed to the receivables assignment form, the receivables are transferred from the assignor-borrower's assets to the assignee lender's assets, notwithstanding the opening of subsequent collective insolvency proceedings against the assignor-borrower.

An AIF governed by foreign law and benefiting from the ELTIF Label, and therefore authorised to grant loans in France, cannot avail itself of the provisions of the Dailly Act and therefore cannot be an assignee of receivables as security for the loans it grants.

#### **4.4 Guarantees or security interests**

The OFS may grant any type of guarantee (e.g. endorsement, surety or first-demand guarantee) or security interest under the conditions laid down in its rules or articles of incorporation.

When the OFS grants security interests, the deed creating these security interests must define the nature of the assets or rights that the beneficiary of the security interests may use or dispose of. In the absence of such an indication, the beneficiary may only use or dispose of deposits or cash.

The issue of guarantees is not governed by the provisions of Articles R. 214-203-1 to R. 214-203-9 of the CMF. One consequence of this is that the asset management company is not required to have a specific approval for the activity of "Granting loans" but only a "Acquisition of receivables" approval.

#### **4.5 Derivative contracts**

Financial contracts are a sub-category of financial instruments defined in Article L. 211-1 of the CMF. The OFS may therefore enter into any type of derivative contract for the purpose of hedging exchange rate or interest rate risk (they are the only authorised forward financial instruments if the OFS wishes to use the FPE Label, the ELTIF Label or to grant loans) but also for the purpose of hedging credit risk (credit derivatives, e.g. CDS) either as buyer or seller of credit risk.

The fund rules or articles of incorporation of the OFS must specify the conditions for the conclusion of derivative contracts.

## 4.6 Risk or cash sub-participations

Risk or cash sub-participation transactions where the OFS acts as a “sub-participant” of a “fronting bank” may be an appropriate solution in jurisdictions where the granting of loans by a fund is not permitted or the acquisition by the fund of loan receivables raises legal and tax issues, particularly in terms of the enforceability against third parties of the assignment of the receivable, the cost of transferring security interests and any withholding tax on interest owed by the foreign borrower to the OFS.

Since the “sub-participant” has no legal relationship with the borrower, it is at risk with regard to the fronting bank, which may default, even though the borrower is performing all of its obligations under the loan. In order to reduce this counterparty risk, in whole or in part, the sub-participant may require the fronting bank to provide it with financial collateral (within the meaning of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements), which has the distinctive feature of being enforceable even in the event of the bankruptcy of the fronting bank.

The execution of risk or cash sub-participation transactions is not governed by the provisions of Articles R. 214-203-1 to R. 214-203-9 of the CMF. One consequence of this is that the asset management company is not required to have a specific approval for the activity of “Granting loans” but only an “Acquisition of receivables” approval.

## 4.7 Assets covered by Article L. 214-154 of the CMF

The OFS may hold assets if they comply with the conditions set out in Article L. 214-154 of the CMF. The PACTE Act specified that the condition of legal ownership of the asset by the OFS is deemed to be met for assets that are the subject of an entry in a shared electronic registration system (blockchain).

The definition of “assets” under the French civil code (*Code civil*) is broad and covers both movable and immovable property. Movable property may include tangible assets (physical assets), intangible assets (patents, trademarks) or inventories.

The OFS will thus be able to acquire physical assets that it may lease, possibly within the framework of a leasing or rental transaction with a purchase option. In fact, Article R. 214-203-1 of the CMF equates loans with the credit transactions mentioned in Article L. 313-1 of the CMF, which covers leasing transactions and, more generally, any rental transaction with a purchase option.

In order to carry out leasing transactions and, in general, any rental transaction with a purchase option, the asset management company must have a specific authorisation for the activity of “Granting loans” from the AMF or the competent national authority if the OFS is managed by an asset management company established in another European Union Member State (“management passport” of the AIFM Directive).

## 4.8 Other asset classes

### Current account advances:

The OFS may grant current account advances to companies in which it holds an interest for the duration of the investment, provided that this interest is equal to at least 5% of the capital. The granting of current account advances is not governed by the provisions of Articles R. 214-203-1 to R. 214-203-9 of the CMF. One consequence of this is that the asset management company is not required to have a specific approval for the activity of “Granting loans” but only an “Acquisition of receivables” authorisation.

### Future provisioning commitments

The OFS which has acquired or has undertaken to acquire a receivable arising from the provision of funds (this covers, in particular, confirmed credit facilities which have not yet been drawn down in full but

also signature commitments which result in a deferred provision of funds in the event of default by the debtor of the guaranteed obligation) to a legal entity under private or public law or to a natural person acting in the exercise of his or her professional activity may, by express, written agreement and with the debtor's acceptance, take over the future commitment to make available the funds originally provided by the assignor to the debtor by releasing the debtor - the assignor in the future - from its obligations. Since the OFS, by taking over the commitment to make funds available in the future, is required to grant loans in the future instead of the assignor, it seems (subject to an assessment on a case-by-case basis) that the asset management company managing it must have a specific approval for the activity of "Granting loans".

## Factoring

The OFS may acquire trade receivables by way of purchase / discount (*escompte*) from companies by using the assignment form provided for in the Dailly Act, as is currently the case for a number of factors. This existing trade receivables acquisition only needs authorisation for the activity of "Acquisition of receivables" (as of AMF "position-recommandation DOC-2012-19" and AMF "instruction DOC-2016-02").

## 4.9 Transactions for the temporary sale or purchase of financial instruments

Within the limits of its assets, the OFS may enter into repurchase agreements or similar transactions (including securities lending and borrowing transactions) with certain eligible counterparties and provided that these transactions involve debt instruments or cash.

However, repurchase agreements or similar transactions are limited if the OFS wishes to benefit from the FPE Label (*see Section 2.4 § "FPE Label"*), the ELTIF Label (*see Section 2.4 § "ELTIF Label"*) or to grant loans (*see Section 4.3*).

## 4.10 Cash

In contrast to OT, the OFS may invest the sums currently available for allocation without any particular constraints in terms of investment rules.

## 4.11 Ancillary asset holdings

The OFS may hold the assets transferred to it in connection with the realisation or creation of security interests, guarantees and other commitments attached to the assets held by the OFS, or in connection with security interests and guarantees granted to it or in connection with rights attached to or relating to receivables transferred to it arising from leasing or rental agreements with a purchase option.

It may also hold the assets that are transferred in connection with commitments it makes through derivative contracts.

## 5. OFS liabilities

The OFS finances its assets by issuing units, shares or debt securities, concluding derivative contracts, having recourse to borrowing or to any other form of resources, debts or commitments.

### 5.1 Issue of units, shares or debt securities

#### Legal nature

The OFS may issue units (FFS), shares (SFS) and, where applicable, debt securities that constitute financial securities within the meaning of Article L. 211-1 of the CMF.

Units have a minimum nominal amount at the time of issue of EUR 150 (or its equivalent in the monetary unit at the time of issue). The FFS must at all times include a minimum number of two units.

The OFS, like the OT, may issue debt securities, in addition to units or shares, i.e. negotiable debt securities, bonds or debt securities issued on the basis of a foreign law pursuant to Articles L. 214-290-1 and D. 214-240-2 of the CMF.

The practice that has developed with regard to the issue of debt securities by OT can be transposed to issues of debt securities by OFS. While debt securities take the form of bonds governed by French law, the issue of bonds by the SFS (which is legally either a public limited company or a simplified joint stock company) is governed by the provisions of the French commercial code (*Code de commerce*) applicable to securities issued by joint stock companies. On the other hand, the issue of bonds by the FFS is not subject to any of these provisions, although it may draw on them in practice in order to correspond to investor habits.

It should be noted that the PACTE Act has brought the OFS into line with the regime of other AIF by providing that the OFS may interrupt, partially or totally, temporarily or definitively, the issue of units, shares or debt securities under the conditions laid down in the articles of incorporation or fund rules of the OFS, in the cases and under the conditions laid down by the AMF General Regulation.

#### Redemption

In contrast to OT, which are closed-ended funds by law, units, shares and debt securities issued by an OFS may be redeemed by the OFS at the request of the holders if the fund rules or the articles of incorporation so provide.

The fund rules or the articles of incorporation must adjust, or even prohibit, this option depending on the liquidity of the assets held by the OFS, even if this means that a lockup period and, after the end of this lockup period, a ceiling on redemption requests (gates) must be provided for. If the OFS plans to grant loans, the establishment of such mechanisms is a regulatory obligation (*see Section 4.3*).

Regarding the possibility for holders of debt securities to request redemption of their securities, Article D. 214-240-4 of the CMF specifies that “redemption request” means the possibility for holders to request early redemption of debt securities. Early redemption of bonds by holders is not market practice in the bond market. The OFS may exclude this option in its rules or articles of incorporation. From a legal standpoint, however, there is nothing to prevent an issuer from issuing bonds that incorporate in the terms of issue an option for early redemption by the bondholders.

It should be noted that the PACTE Act has brought the OFS into line with the regime of other AIF by providing that the OFS may suspend redemption requests, on a provisional basis, when exceptional

circumstances so require and if the interest of investors or the public so requires, under the conditions laid down in the articles of incorporation or fund rules of the OFS, or even provisionally cap redemption requests for units, shares or debt securities under the conditions laid down by the AMF General Regulation.

## Distribution

As for FPS, pursuant to Article 425-19 of the AMF General Regulation, units, shares or debt securities may only be subscribed to or acquired by:

- a)** professional clients mentioned in Article L. 533-16 of the CMF and foreign investors belonging to an equivalent category under the law of the country to which they belong;
- b)** investors making an initial subscription of EUR 100,000 or more;
- c)** investors, whether natural persons or legal entities, whose initial subscription is at least EUR 30,000 and who meet one of the following three conditions: (1) they provide assistance in the technical or financial field to unlisted companies falling within the scope of the OFS with a view to their creation or development, or (2) they assist the asset management company in its search for potential investors or contribute to the objectives pursued by the asset management company in connection with the research, selection, monitoring and disposal of investments, or (3) they possess knowledge of private equity acquired as a direct provider of equity capital to unlisted companies or as a subscriber either in a public venture capital fund (*Fonds Public de Capital-Risque* – FPCR) that is not advertised or marketed directly, or in a professional private equity fund (*Fonds Professionnel de Capital Investissement* – FPCI), an FPS or an unlisted venture capital company;
- d)** investors where the subscription or acquisition is made in their name and on their behalf by an investment service provider acting within the framework of a portfolio management investment service;
- e)** retail investors within the meaning of the ELTIF Regulation if the OFS benefits from the ELTIF Label.

It should be recalled that the marketing of OFS securities may only begin once the OFS has received authorisation from the AMF to market securities in France if the asset management company is approved as a “full AIFM” or confirmation from the AMF that the application to market securities in the host jurisdiction has been forwarded to the competent national authority.

OFS units or shares may be marketed under the “marketing passport” of the AIFM Directive if the asset management company is approved as a “full AIFM”.

Although debt securities are not expressly mentioned in the AIFM Directive, there is no reason to deny them the benefit of the “marketing passport” since (1) like units or shares, the return on, and the repayment of, the capital from debt securities depend exclusively on the return on, and the repayment of, the capital from the assets held by the OFS, (2) the asset management company is approved as a “full AIFM” and the OFS is not likely to fall within the scope of the Securitisation Regulations (*see footnote 6*).

In fact, the European Commission stated in a document entitled “*Questions on Single Market Legislation/ Internal Market; General question on Directive 2011/61/EU; ID 1169, Scope and exemptions*”, that “*as a matter of principle, the Commission considers the term “units and shares” to be generic and inclusive of other forms of equity of the fund, i.e. a stock or any other security representing an ownership interest in the fund*”.<sup>21</sup>

<sup>21)</sup> Similarly, the FCA in a document entitled “*The Perimeter Guidance Manual*”, Chapter 16, “Scope of the Alternative Investment Fund Managers Directive”, specified that “Profits and income from the assets are channelled back to the holders of the debt securities through interest on the debt securities and a payment on redemption. In principle, such a scheme could be a CIU if the investors invested through shares in the SPV. If the SPV has no equity shareholders (or no significant equity shareholders) and if all the profits and losses flow through to the investors via the return on their debt securities there is an argument that it should make no difference that the investors hold their interest through debt securities rather than through shares”.

However, if a foreign market authority were to deny the OFS the right to avail itself of the “marketing passport” for debt securities issued by the OFS (in particular, if the OFS were to use a liability structure of the type referred to in Article D. 214-240-3 c) of the CMF), OFS debt securities could still be marketed under the Prospectus Regulation.

Pursuant to the Prospectus Regulation, debt securities may be the subject of a public offer exempted from the obligation to provide a prospectus, in particular when such offer is made (1) to qualified investors, (2) to fewer than 150 natural or legal persons per Member State, (3) to investors who acquire such securities for a total amount of at least EUR 100,000 per investor and separate offer. There will also be no obligation to provide a prospectus if the public offer concerns securities with a denomination per unit of at least EUR 100,000.

However, it should be recalled that debt securities may only be marketed to the investors referred to in Article 425-19 of the AMF General Regulation (*see § “Distribution” above*). In practice, this means, for example, that the public offer of securities issued by the OFS may only be addressed to a “restricted circle” of investors (maximum 150) if the members of this “restricted circle” belong to at least one of the categories of investors referred to in Article 425-19 of the AMF General Regulation.

## Direct Marketing

Units, shares and debt securities may not be marketed directly, except to qualified investors mentioned in Article L. 411-2-II of the CMF.

## PRIIPS KIID

The European PRIIPS Regulation requires investors who are not “professional clients” within the meaning of the MiFID II Directive (a European concept transposed into French law in Articles L. 533-16 and D. 533-11 of the CMF) to submit a KIID. Insofar as OFS are not exclusively reserved for “professional clients” but may be distributed to the investors referred to in Article 425-19 of the AMF General Regulation (*see § “Distribution” above points b) to e)*), the OFS may be required to produce such a document for the benefit of these investors.

## Different classes

Units, shares or debt securities may give rise to different rights to capital and interest if the associated credit risk is not subject to any subordination rule (no “credit risk tranching”).

The decree implementing the Ordinance of 19 November 2018 specifies what is meant by “no subordination rule”:

- a)** either the amount of the units issued by the FFS does not represent more than 0.5% in value of the nominal amount of the debt securities or EUR 300 (or its equivalent in the monetary unit of the issue) or the amount of the shares issued by the SFS does not represent more than 0.5% in value of the nominal amount of the debt securities;
- b)** or the fund rules or the articles of incorporation of the OFS provide, in the event of a capital loss on the assets, that such loss shall be allocated equally among all investors in proportion to their respective rights;
- c)** or each OFS investor holds at all times an identical proportion of the amount of each class of units, shares and debt securities issued by it.



In other words, there is nothing to prevent an OFS from issuing units, shares and debt securities conferring different rights to capital and interest (differentiated management fees depending on the amount or date of the investment, affiliation to the group of the asset management company or reference investor; differentiated remuneration; differentiated repayment schedule) provided that no capital loss on the assets of the OFS occurs. If a capital loss arises, it must be allocated equally among investors of all classes of securities in proportion to their rights.

If the fund promoter's wish is to use "credit risk tranching", the OT and, if applicable, the FPS must be preferred to the OFS and the prudential implications of an investment in what is then a "securitisation position" must be taken into account.

"Tracing" units, shares or debt securities, i.e. those that "trace" or reflect the performance of an asset or a class of assets determined among those that make up the fund's assets and whose distributions to holders correspond solely and exclusively to the flows generated by these source assets, appear incompatible in their structure and operation with the regulatory and accounting principles in force with regard to OFS. The legal basis for this prohibition of a form of "contractual compartmentalisation" is to be found in Article D. 214-240-3 of the CMF, according to which *"the payment of interest and repayment of principal to debt security holders is dependent on the performance of the assets held by the OFS"* and thus not on the performance of any particular class of them.

## 5.2 Derivative contracts

The OFS may hedge the financing of its assets by entering into derivative contracts under the conditions provided for in its rules or articles of incorporation.

## 5.3 Borrowings

The OFS may hedge the financing of its assets through borrowing or other forms of resources under the conditions laid down in its rules or articles of incorporation.

It should be noted that recourse to borrowing is prohibited if the OFS wishes to benefit from the FPE Label (see Section 2.4 § "FPE Label"). It is limited to 30% if the OFS wishes to benefit from the ELTIF Label (see Section 2.4 § "ELTIF Label") or to grant loans (see Section 4.3).

## 6. Management rules

The OFS is subject to the following management rules:

### 6.1 No diversification or concentration rules

Like FPS and OT, the OFS is not subject to any regulatory constraints in terms of diversification or concentration rules. In practice, however, in the vast majority of cases the fund rules or the articles of incorporation provide for eligibility criteria that must be met for any investment and diversification rules that must be respected at the end of the investment period.

If the OFS wishes to use the ELTIF Label, it must at least comply with the diversification and concentration rules provided for in the ELTIF Regulation.

### 6.2 General commitment rule

The maximum net loss or commitment made by an OFS, valued at any time by taking into account the hedges it benefits from, in respect of drawdowns of a loan granted or the acquisition of receivables arising from drawdowns of loans, derivatives, guarantees or risk or cash sub-participation, may not exceed the value of its assets and, where applicable, the uncalled amount of subscriptions.

### 6.3 “Buy & hold” strategy

The OFS is subject to specific regulatory constraints if it wishes to assign, before maturity, the loans it has granted or receivables it holds. Different regulatory constraints apply to debt securities held by the OFS.

The AMF’s approval of a specific programme of operations is required for the assignment of loans that have not matured or fallen due or of receivables that have not matured or fallen due. However, such approval is not required in the following cases:

- a)** when the fund is being wound up in the interest of the holders of previously issued units, shares or debt securities;
- b)** for a loan receivable granted by the fund: when the outstanding capital of an unmatured receivable of the fund is less than a percentage of the maximum amount of the outstanding capital of that receivable as defined in the fund rules or the articles of incorporation (which may not exceed 10%); *for receivables held by the fund*: when the outstanding capital of the fund's unmatured receivables is less than a percentage of the maximum amount of the outstanding capital of those receivables as defined in the fund rules or the articles of incorporation (which may not exceed 10%);
- c)** when the units, shares or debt securities are no longer held by more than one holder and at their request;
- d)** when the fund has to meet its commitments arising, in particular, from a derivative contract, a loan, a guarantee or a risk sub-participation;
- e)** in the event of a deterioration in the debtor's financial situation leading to the holding of doubtful or disputed receivables;
- f)** when the assignment is made in order to enable the fund to comply with the investment rules specified in its rules or articles of incorporation.

## 7. Protective rules that derogate from ordinary law

The OFS benefits from all the protective rules that derogate from ordinary law, which were hitherto the prerogative of OT and which led some asset management companies to choose the OT for this reason alone. The FPS does not benefit from any of these protective rules.

### 7.1 No liability to collective insolvency proceedings

The OFS is not subject to the provisions of Book VI of the French commercial code (*Code de commerce*) (in particular, safeguarding, receivership or compulsory liquidation procedures). This rule is necessary for OFS set up in the form of SFS which might otherwise, as a legal entity under private law, be subject to these provisions.

This provision legally establishes the “bankruptcy remoteness” of the OFS.

### 7.2 Prohibition of asset seizures

The assets of the OFS may be subject to civil enforcement measures only in accordance with the payment allocation rules laid down in its rules or articles of incorporation.

This provision ensures that a creditor or an investor, who has not been paid a debt owed thereto, will not be able to seize an OFS asset in order to pay their debt in breach of the payment allocation rules and their ranking under these rules.

Conversely, this seizure is possible if the OFS fails to pay a debt owed to a creditor or an investor when it has the resources available to pay it in view of its ranking under the payment allocation rules.

### 7.3 Enforceability of payment allocation rules

The payment allocation rules are binding on all investors as well as on creditors that have accepted them, notwithstanding the opening of collective insolvency proceedings against them (Book VI of the French commercial code (*Code de commerce*) under French law or any equivalent proceedings under foreign law). They are applicable even in the event of liquidation of the OFS.

This provision puts an end to any debate on the validity and enforceability against the procedural bodies of a bankrupt creditor or investor of the payment allocation rules establishing different payment ranks and which have their legal basis in the concept of assignment of priority or provision in favour of a third party.

### 7.4 Non-application of the rules on “optional nullity” of the suspect period

This is an important innovation of the Ordinance.

The provisions of Article L. 632-2 of the French commercial code (*Code de commerce*) are not applicable to payments made by an OFS or to acts for valuable consideration performed by or for the benefit of an OFS if these acts are directly related to the purpose of the OFS. Article L. 632-2 refers to the so-called “optional nullity” of the suspect period, which makes it possible to cancel payments for overdue debts and acts for valuable consideration carried out or concluded up to 18 months prior to the date of cessation of payments.

Unlike “*de jure nullity*”, which is objective and easy to protect against, “optional nullity” is a source of uncertainty for investors and its non-application is an important element of protection.

## **7.5 Simplified and enforceable assignment of receivables**

Receivables may be assigned to the OFS by simply submitting an assignment form (the details and medium of which are specified in Article D. 214-227 of the CMF), or by any other method of acquisition, assignment or transfer under French or foreign law.

The method of assignment by means of an assignment form, which until now has only been available to the OT, is applicable to the OFS. It is not applicable to the FPS.

The assignment of receivables by means of an assignment form has extremely powerful legal effects: it takes effect between the parties and becomes enforceable against third parties on the date affixed to the assignment form when it is submitted, regardless of the origination, maturity or due date of the receivable, without the need for any other formality, and this regardless of the law applicable to the receivables and the law of the debtors' country of residence. This assignment retains its full effects notwithstanding the assignor's state of cessation of payments and notwithstanding the opening of collective insolvency proceedings (Book VI of the French commercial code (*Code de commerce*) under French law or any equivalent proceedings under foreign law) subsequent to this assignment.

## **7.6 Transfer of security interests by operation of law and without formality**

As with the OT, the assignment of receivables by way of an assignment form automatically entails the transfer of the security interests, guarantees and other commitments attached to each receivable, including mortgage collateral, trade receivables assigned by way of guarantee or pledged in accordance with the Dailly Act and the benefit of the deeds of acceptance by the debtors of the trade receivables assigned or pledged in accordance with the Dailly Act, in addition to the enforceability of this transfer against third parties without the need for any other formality.

When the security interests relate to assets located in France, the assignment form again has extremely powerful legal effects: it entails the automatic transfer, without cost or formality, of these security interests and this in a manner that is enforceable against third parties. In the particular case of mortgage-backed securities, there is therefore no need to make an amending entry in the Mortgage Registry, which gives rise to a land registration tax.

## **7.7 Irrevocable commitment of the debtor**

This is an important innovation of the Ordinance.

Apart from any credit and distinct from the deed of acceptance by the debtor of the assignment or pledge of trade receivables provided for in the Dailly Act, the law creates a new deed of acceptance under the terms of which the debtor of a trade receivable (including a legal entity governed by public law) assigned (in full ownership or by way of guarantee) or pledged to an OFS may undertake to pay it directly to the OFS, without being able to raise exceptions based on their personal relationship with their original creditor.

This deed of acceptance may prove extremely useful in project financing where the project leader will seek to monetise the flows to be received from the project beneficiary in order to pre-finance the investment cost of carrying out the project. Investors may be inclined to take a credit risk on the project beneficiary, but not a performance risk on the project leader.

## 7.8 Option to create earmarked accounts

As for the OT, Article L. 214-173 of the CMF provides that any entity entrusted with the collection of sums due to or benefiting the OFS directly or indirectly must place such sums in an account specially allocated for the benefit of one or more OFS, in respect of which the entity's creditors may not pursue payment of their receivables, even in the event of the opening of collective insolvency proceedings (Book VI of the French commercial code (*Code de commerce*) under French law or any equivalent proceedings under foreign law) against that entity.

This provision replicates the equivalent of the Anglo-American trust account. It assures investors that the sums due directly or indirectly to the OFS and credited to this account may not be "parasitised" by the bankruptcy of the entity receiving them and that these sums will not be commingled with the other sums belonging to the entity itself, obliging the OFS to produce its claim for restitution of the sums due to it as a simple unsecured creditor (commingling risk).

The earmarked account may primarily concern the entity responsible for recovering the assigned receivables but its scope is very broad and may, for example, apply to sums received by the OFS's swap counterparty, by the agent of a syndicated loan or by a sub-debt recovery agent of receivables assigned to the OFS in two stages (assignment of trade receivables held by a subsidiary to its parent company, which then assigns them to the OFS, where the subsidiary acts as a sub-debt recovery agent of the parent company, itself a debt recovery agent).

## 8. Accounting and tax treatment

### 8.1 Accounting treatment

Like the FPS, the OFS is a legal vehicle under the AIFM Directive. The Accounting Regulation therefore very naturally provides for the OFS to be subject to the chart of accounts for open-ended undertakings for collective investment (*organismes de placement collectif à capital variable*), which provides for a valuation of assets and liabilities at “fair value”, and not at “historical cost” as is the case for OT under their specific chart of accounts.

Units, shares and debt securities are subject to net asset values calculated periodically.

### 8.2 Tax treatment

#### Provisions common to all OFS

**VAT exemption:** In a letter from the French tax legislation department (*Direction de la législation fiscale*) to the AFG dated 23 January 2019, the tax authorities confirmed that the management of OFS benefits from the VAT exemption provided for by Article 135-1-g of the VAT Directive, as transposed into French law at Article 261 C-1-f of the French general tax code (*Code général des impôts*).

**No withholding tax on interest on debt securities issued by the OFS:** If debt securities are issued, no withholding tax on interest paid by the OFS, except in the case of payment in a non-cooperative State or territory (Article 125 A, III of the French general tax code (*Code général des impôts*)).

#### Provisions specific to the FFS

The tax regime of the FFS (in force as of the date of this Practical Guide) can be summarised as follows:

- 1 No taxation of income received at the level of the FFS.
- 2 Taxation of income in the hands of investors when it is distributed by the FFS (“partial tax transparency”) vs. when it is collected by the FFS (true “tax transparency”).

In a letter from the French tax legislation department (*Direction de la législation fiscale*) to the AFG dated 21 March 2019, the tax authorities confirmed that, by analogy with the solution adopted for FCP and FCT mutual funds, the taxable event for income tax and social security contributions in the hands of a natural person unitholder, who is a French tax resident, of income earned by the FFS is deferred to the date of payment of the income from the units. This income constitutes income from movable capital and is subject, where applicable, to the compulsory flat-rate withholding tax under the conditions of ordinary law.

- 3 Absence of the benefit of double taxation conventions in the case of income from foreign sources: failing this, it is often possible to openly apply the conventions between the source State of the income and the States of tax residence of the investors, provided that the various States concerned recognise the partial tax transparency of the FFS.
- 4 Couponing: the income distributed by the FFS retains for the investors the tax status it has when it is received by the FFS. This does not affect investors that are legal entities under French law and are subject to corporation tax. On the other hand, couponing may have an impact for French investors who are natural persons. For example, flat tax at 30% on income from movable capital vs. progressive scale tax for other categories of income.

- 5 Taxation of investors, i.e. legal entities subject to corporation tax on unrealised capital gains on assets held by the FFS when they have not yet received the capital gains proceeds (Article 209-0 A of the French general tax code (*Code général des impôts*)) with, however, the adjustment of the cost price in the event of the subsequent assignment of the units (accelerated corporation tax but not double taxation).

## Provisions specific to the SFS

The tax regime of the SFS (in force as of the date of this Practical Guide) can be summarised as follows:

- 1 The SFS is subject to corporation tax on a basis adjusted by the 2019 Finance Act (Article 38, 2 ter of the French general tax code (*Code général des impôts*)) which corresponds to: income on financial transactions and other contingent income + net realised capital gains (recorded in equity under liabilities) + unrealised foreign exchange gains – expenses on financial transactions and other contingent expenses – net realised capital losses – unrealised foreign exchange losses. Unrealised gains and losses (other than in respect of unrealised foreign exchange gains or losses) are not included in the taxable base for corporation tax purposes.
- 2 Benefit of double taxation conventions in the case of foreign-source income (*see as indicated in Section 3.1 § 6 above*): the SFS could claim the status of “resident” provided it is liable to corporation tax whenever the applicable bilateral tax convention defines “resident” as the person liable to tax due to their domicile, residence, headquarters or any other criterion of a similar nature (the case of most tax conventions).
- 3 The mechanism for taxing differences in net asset values provided for in Article 209-0 A of the French general tax code (*Code général des impôts*) does not apply to legal entities subject to corporation tax that have invested in an SFS.

- 4 The SFS is not subject to the contribution based on the value added produced (*contribution sur la valeur ajoutée des entreprises* – CVAE).

In a letter from the French tax legislation department (Direction de la législation fiscale) to the AFG dated 23 January 2019, the tax authorities confirmed that since the SFS does not carry on a professional activity itself (this being carried out by the asset management company), it is not subject to the CVAE.

- 5 Despite the requests expressed by the AFG, there is currently no exemption from French social solidarity contributions (*contribution sociale de solidarité des sociétés* – C3S): the rate of C3S is 0.16% of “turnover excluding tax” with an annual allowance of EUR 19 million. In the specific case of the SFS, the concept of “turnover excluding tax” must undoubtedly be interpreted with reference to the Accounting Regulation, which provides for a section entitled “Income from financial transactions”. This section should only include interest and similar income (e.g. fees for early repayment of a loan) and not any capital gains on disposals.

This means in practice that an SFS with an invested capital of EUR 760 million at an interest rate of 2.50% p.a. will not pay C3S, taking into account the EUR 19 million allowance.

With regard to the determination of the tax base for corporation tax, two main options can be considered:

**1** A “full share” option in the sense that the SFS only issues shares, not debt securities.

In this case, the tax base for corporation tax will correspond to the financial income without any possible deduction of financial expenses. Such an option is hardly viable from a tax perspective since investors will also be taxed themselves, unless they can avail themselves of the parent-subsidary regime (which assumes that investors hold at least 5% of the SFS shares and hold them for more than 2 years).

If the parent-subsidary regime can be applied (Article 216 of the French general tax code (*Code général des impôts*)), dividends received by shareholders established in France (i.e. income that will have been fully taxed for corporation tax purposes at the level of the SFS) will not be subject to corporation tax again, with the exception of a 5% share of costs and expenses of the dividends paid.

Natural person investors who are tax resident in France will be subject to the 30% flat tax.

In the event of payment of dividends to a non-resident shareholder, a withholding tax<sup>22</sup> may be levied in France (Article 119 bis of the French general tax code (*Code général des impôts*)), subject however to the possible application of European Directive 2011/96/EU of 30 November 2011, known as the “parent-subsidary” directive, which offers an exemption from withholding tax, as well as any applicable bilateral tax conventions that may reduce or even eliminate such withholding tax.

**2** A “full debt” option in the sense that the SFS issues shares for the minimum legal amount required by the legal form of the chosen SFS (public limited company or simplified joint stock company), and issues debt securities for the balance.

In this case, the tax base for corporation tax will correspond to the financial income after deducting the financial expenses due on the debt securities (on the question of determining the minimum amount of corporation tax required at the level of the SFS, see *Section 3.1 § 6 above*).

In order to avoid the application of the limit on the tax deductibility of interest provided for in Article 39-1-3° of the French general tax code (*Code général des impôts*) (a rate equal to the annual average of the average effective rates charged by credit institutions and finance companies for variable-rate loans to companies with an initial term of more than 2 years), it will be essential to ensure that the shareholder(s) of the SFS are not “companies linked” to bond investors.

The new regime for the deduction of financial expenses which entered into force on 1 January 2019, which limits the deductibility of “net financial expenses” to the higher of the following two amounts: (i) EUR 3 million and (ii) 30% of taxable EBITDA in the absence of under-capitalisation (these thresholds change respectively to EUR 1 million and 10% of taxable EBITDA in the event of under-capitalisation), should in principle not apply. The SFS should not, by nature, be structured to bear “net financial expenses” understood as the difference between interest received and interest paid.

As for investors domiciled or established in France for tax purposes, they will be taxed under the conditions of ordinary law: at the standard rate of corporation tax in the case of legal entities or at the flat tax rate of 30% in the case of natural persons. It should be noted that no withholding tax will be levied on interest on debt securities issued by the SFS, except in the case of payment in a non-cooperative State or territory (Article 125 A, III of the French general tax code (*Code général des impôts*)).

<sup>22)</sup> This domestic withholding tax is currently levied at a rate of 30% or 12.8% depending on whether the non-resident shareholder is a legal entity or a natural person,



# APPENDIX

Summary table of specialised financing vehicles (*Organismes de financement spécialisés* – OFS), securitisation vehicles (*Organismes de titrisation* – OT) and specialised professional funds (*Fonds professionnels spécialisés* – FPS)

	OFS	OT	FPS
<b>Legal form</b>	Fund and company	Fund (primarily) and company	Fund and company, including French limited partnership ( <i>société de libre partenariat</i> - SLP)
<b>Incorporating documents</b>	Fund rules and/or articles of incorporation and prospectus	Fund rules and/or articles of incorporation	Fund rules and/or articles of incorporation and prospectus (articles of incorporation only for the SLP)
<b>Sub-funds</b>	Possible	Possible	Possible
<b>Approval for incorporation</b>	No	No	No
<b>Securitisation Regulation</b>	Not applicable (except, if subordination is possible, in specific cases - see "Tranching" below)	Applicable in case of "credit risk tranching" (including STS)	Applicable in case of "credit risk tranching" (including STS)
<b>AIFM</b>	Yes	No except for so-called "circumvention" OT (if, in particular, a majority of the assets are debt securities and are subject to discretionary management)	Yes
<b>EMIR</b>	Financial counterparty as AIF	Non-financial counterparty with some exceptions	Financial counterparty as AIF
<b>Eligibility for the ELTIF label</b>	Eligible	Not eligible in principle	Eligible
<b>Economy financing fund (<i>Fonds de Prêt à l'Économie</i> - FPE)</b>	Eligible	Eligible	Eligible
<b>Activities</b>	Investments in assets covered by Article L. 214-190-1	Exposure to risks under Article L. 214-175-1, including insurance risks	Investment in "assets" within the meaning of Article L. 214-254
<b>Non-application of bankruptcy law to the vehicle</b>	Yes	Yes	No
<b>Tax regime</b>	Fund: exceptional tax neutrality regime; company: tax regime derogating from specific ordinary law which makes it possible to claim the status of "tax resident" within the meaning of double taxation conventions	Fund: exceptional tax neutrality regime; company: ordinary law; tax resident status for a company only	Fund: exceptional tax neutrality regime
<b>Accounting regime</b>	Chart of accounts of undertakings for collective investment ( <i>organismes de placement collectif</i> – OPC) as supplemented and amended (French accounting standards authority (Autorité des normes comptables – ANC) Regulation No. 2018-04 of 12/10/2018)	Specific chart of accounts provided for in ANC Regulation No. 2015-06 of 23/11/2015 ("Historical Cost")	Chart of accounts of undertakings for collective investment ( <i>organismes de placement collectif</i> – OPC) as supplemented and amended (French accounting standards authority (Autorité des normes comptables – ANC) Regulation No. 2018-04 of 12/10/2018)

Specialised Financing Vehicle (*Organisme de Financement Spécialisé* – OFS)

Appendix: Summary table of financing vehicles

June 2020

	OFS	OT	FPS
<b>Eligible assets – intangible assets (excluding equity securities)</b>	Yes, (intangible) assets meeting the conditions of Article L. 214-154 of the French monetary and financial code ( <i>Code Monétaire et Financier</i> – CMF), financial instruments (including debt securities), receivables, cash, derivative contracts, guarantees, security interests, sub-participations	Yes, receivables, debt securities, cash, derivative contracts or transferring insurance risks, guarantees, security interests, sub-participations	Yes, (intangible) assets meeting the conditions of Article L. 214-154 of the CMF, including financial instruments (including debt securities), receivables, cash, derivative contracts, guarantees, security interests, sub-participations
<b>Eligible assets – Equity securities</b>	Yes on a primary or secondary basis	No on a primary basis. Yes on a secondary basis in the event of conversion, exchange or redemption of debt securities, or exercise of rights attached to debt securities	Yes on a primary or secondary basis
<b>Eligible assets – Tangible assets</b>	Yes, including the realisation of security interests under the terms of Article L. 214-154 of the CMF	No (except for realisation of security interests)	Yes, including the realisation of security interests under the terms of Article L. 214-154 of the CMF
<b>Granting of loans</b>	Yes (subject to conditions)	Yes (subject to conditions)	Yes (subject to conditions)
<b>Benefit of the “Daily” act</b>	Yes	Yes	Yes
<b>Methods of acquiring receivables</b>	Specific form, Dailly form or assignment under ordinary law	Specific form, Dailly form or assignment under ordinary law	Dailly form or assignment under ordinary law
<b>Recovery</b>	Assignor, debt recovery agent at the time of assignment, AM company or designated third party	Assignor, debt recovery agent at the time of assignment, AM company or designated third party	AM company
<b>Earmarked account</b>	Yes	Yes	No
<b>Active management</b>	Yes (subject to approval of a specific programme of operations by the AMF)	Yes (subject to approval of a specific programme of operations by the AMF)	Yes (subject to approval of a specific programme of operations by the AMF)
<b>Issue of securities</b>	Shares (company), units (fund) and/or debt securities	Shares (company), units (fund) and/or debt securities	Shares (company), units (fund)
<b>Tranching</b>	No (with some exceptions in the cases provided for in Article D. 214-240-3 of the CMF)	Possible	Possible
<b>Redemption right</b>	Possible	No	Possible
<b>Marketing</b>	As AIF	Pursuant to the Prospectus Regulation	As AIF
<b>Borrowing</b>	Yes (subject to conditions)	Yes (subject to conditions)	Yes (subject to conditions)
<b>Leverage</b>	Limited (in the case of granting loans)	Limited (in the case of granting loans)	Limited (in the case of granting loans)
<b>Asset management company</b>	AIFM AM company or below thresholds	AM company (exceptional regime), or AIFM AM company or below thresholds for “circumvention” OT	AIFM AM company or below thresholds
<b>Depository regime</b>	AIF regime	<i>Ad hoc</i> regime (similar to the AIF depository regime as from 1 January 2020) <sup>23</sup>	AIF regime

<sup>23</sup> So-called “circumvention” OT are subject to the general AIF regime. Their depositaries are AIFM depositaries.

## Specialised Financing Vehicle (Organisme de Financement Spécialisé – OFS)

### Appendix: Summary table of financing vehicles

June 2020

The AFG would like to thank **Gilles SAINT MARC**, Kramer Levin Naftalis & Frankel LLP, who supervised the drafting of this Guide, in addition to all the members of the AFG's Securitisation and Loan Fund Commission, chaired by **Thibault de SAINT PRIEST**, Acofi Gestion.

Publication produced by the Asset Management division of the AFG, headed by **Adina GURAU AUDIBERT**.


41 rue de la Bienfaisance | 75008 Paris | Tel. +33 (0)1 44 94 94 00  
45 rue de Trèves | 1040 Bruxelles | Tel. +32 (0)2 486 02 90  
@AFG\_France | www.afg.asso.fr

AFG

41 rue de la Bienfaisance

75008 Paris

T: +33 (0)1 44 94 94 00

 @AFG\_France

45 rue de Trèves

1040 Bruxelles

T: +32 (0)2 486 02 90

[www.afg.asso.fr](http://www.afg.asso.fr)



  
association française  
de la gestion financière