

ALLEN & OVERY



Practical Guide to securitisation vehicles (Organismes de titrisation - OT)

June 2020



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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.

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IMPORTANT NOTE

This Practical Guide was developed by the French asset management association (Association Française de la Gestion financière - AFG) with the assistance of the firm Allen & Overy LLP and the members of the AFG's Securitisation and Loan Funds Commission in order to provide AFG members with a concise overview of the characteristics of securitisation vehicles after the reform introduced by the Ordinance of 4 October 2017 and its implementing decrees of 19 November 2018.

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 setting up a securitisation vehicle (Organisme de titrisation - OT). The AFG, Allen & Overy LLP and the members of the AFG's Securitisation and Loan Funds Commission cannot be held liable in any way whatsoever in connection with this Practical Guide.

Readers are invited to refer to the Glossary for definitions of certain terms used in this guide.

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GLOSSARY

2017 Ordinance refers to Ordinance No. 2017-1432 of 4 October 2017 modernising the legal framework for asset management and debt financing.

2018 Decrees refers to Decree Nos. 2018-1004 and 2018-1008 of 19 November 2018 modernising the legal framework for asset management and debt financing.

AIFM Directive refers to 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 *Code monétaire et financier*, refers to the French monetary and financial code.

EMIR Regulation means Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

FCT refers to a securitisation mutual fund (*Fonds commun de titrisation* - FCT).

FPE refers to an economy financing fund (*Fonds de prêt à l'économie* - FPE) resulting from Decree No. 2013-717 of 2 August 2013, amended by Decree No. 2014-1530 of 17 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*)).

OT refers to a securitisation vehicle (*Organisme de titrisation* - OT).

PACTE Act refers to Act No. 2019-486 of 22 May 2019 on the growth and transformation of companies (JORF No. 0119 of 23 May 2019).

Prospectus Regulation refers to 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 Regulation refers to 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.

ST refers to a securitisation company (*Société de titrisation* - ST).

1. Legal framework

1.1 Changes in the legal framework

The first legislation introducing securitisation was a Law of 23 December 1988 (No. 88-1201) supplemented by a Decree of 9 March 1989 (No. 89-158). Both these texts, which have been amended on a regular basis, have been codified within the CMF. Two substantial overhauls of the legal regime for securitisation took place under the terms of the Ordinance of 13 June 2008 (No. 2008-556) and, nearly ten years later, the 2017 Ordinance. The 2017 Ordinance was supplemented by the two 2018 Decrees, which also made major changes to the CMF's regulatory provisions. Lastly, amendments were made to the legislative texts under the terms of the PACTE Act of 2019, which postponed the entry into force of some of the provisions of the 2017 Ordinance until 1 January 2020.

Since the reform introduced by the 2017 Ordinance, the subsections and paragraphs of the CMF that are specifically devoted to financing vehicles (including OT) and which form the framework of their legal regime are now contained in Articles L. 214-166-1 to L. 214-190-3 and R. 214-217 to D. 214-240-4 of the CMF. Other provisions of the CMF or other laws and regulations also apply to them.

Initially, and until 2008, the FCT (securitisation mutual fund (*Fonds commun de titrisation* - FCT), formerly known as a receivables mutual fund (*Fonds commun de créances* - FCC)) was the only existing vehicle under French law dedicated to securitisation. It was by the Ordinance of 13 June 2008 that the option of setting up a securitisation vehicle in the form of a commercial company (the ST) was introduced into French law¹. With the 2017 Ordinance, OT were included in the new category of financing vehicles, which also includes the then newly created specialised financing vehicles (*Organismes de financement spécialisés* - OFS)². The latter broadly follows the organisation and operating procedures of OT, but differ from them, notably in that they belong to the category of alternative investment funds that fall within the scope of the AIFM Directive.

1.2 The value of a specific legal framework

A specific legislative and regulatory framework was established for several reasons.

The need for such a legal framework arose in order to remove certain obstacles that could hinder the implementation of securitisation transactions governed by French law or involving French assets:

- a specific vehicle engaged in securitisation or financing transactions must first be authorised to carry on its activity without infringing upon the monopoly of credit institutions (since, in particular, the acquisition of unmatured receivables and the granting of loans, which is now authorised to OT³ fall under the monopoly of credit institutions⁴); OT thus benefit from a derogation⁵;
- it was therefore imperative to have a vehicle that did not expose investors, other creditors and stakeholders to the risk of bankruptcy⁶, and that was sufficiently flexible and secure;

¹ This same Ordinance introduced the very concept of securitisation vehicle, bringing together FCT (formerly known as special purpose vehicles (*fonds communs de créances* - FCC) and renamed securitisation mutual funds (*Fonds commun de titrisation* - FCT)) and new securitisation companies.

² See the AFG Guide on the regime applicable to specialised financing vehicles (*Organismes de financement spécialisé* - OFS).

³ See 4.2 (Loans granted by OT).

⁴ Article L. 511-5 of the CMF.

⁵ Article L. 511-6 of the CMF.

⁶ See 3.4 (A regime largely derogating from bankruptcy law).

- a specific regime for the assignment of receivables has also proved necessary, both to ensure its flexibility and its effectiveness, including in the event of the assignor's bankruptcy⁷;
- for the risks of a securitisation transaction to be properly managed, a debt recovery regime allowing for the creation of specific rights for the OT over the recovered amounts in the debt recovery agent's account by means of the earmarked account mechanism also proved necessary⁸;
- more recently, this regime has made it possible to meet a number of regulatory requirements, in particular European ones (see in this regard 2.4 [Status of the OT under the Securitisation Regulation] and 2.5 [Status and obligations of the OT as an AIF and with regard to the **AIFM Directive**]).

⁷) See 3.2 (The “true sale”) and 4.4 (Terms and conditions for the transfer and re-transfer of receivables).

⁸) See 3.6 (An ad hoc, protective OT asset recovery regime) and 4.6 (Earmarking an account specially for the benefit of the OT).

2. Main characteristics of the OT

2.1 Definition

Securitisation vehicles (*Organismes de titrisation - OT*) are defined in Article L. 214-168 of the CMF as vehicles whose purpose is to be exposed to a certain number of risks that are listed exhaustively in Article L. 214-175-1 (in particular, evidenced by receivables or other assets, loans granted or insurance risks) and to fully finance or cover them, under the conditions laid down by the same Article (in particular, by issuing units, debt securities, shares, loans or by having recourse to other debt resources or commitments).

2.2 Legal form

OT exist either in the form of unincorporated funds, in which case they are referred to as securitisation mutual funds (*Fonds communs de titrisation - FCT*), or in the form of incorporated companies, in which case they are referred to as securitisation companies (*Sociétés de titrisation - ST*)⁹.

The OT may comprise sub-funds if the articles of association or the regulations of the OT so provide.

Each sub-fund then gives rise to the issue of units or shares and, where applicable, debt securities. Notwithstanding Article 2285 of the French civil code (*Code civil*) and unless otherwise stipulated in the articles of association or the regulations of the OT, the assets of a given sub-fund are liable only for the debts, commitments and obligations and benefit only from the rights and assets relating to that sub-fund.

In each case, an OT is managed by a portfolio management company approved by the AMF in accordance with Article L. 532-9 of the CMF and designated in the articles of association or regulations¹⁰.

As an exception, an OT may be established by a sponsor within the meaning of Article 4 of Regulation (EU) 575/2013 of 26 June 2013 if it delegates the management of its portfolio to a portfolio management company.

Safekeeping of the vehicle's assets is provided by the custodian, which also ensures the legality of the management company's decisions¹¹.

2.3 Formalities - Creation

As a matter of principle, the creation of OT is not subject to any authorisation or approval, unless its purpose is to bear insurance risks, in which case it must be authorised by the French prudential supervisory and resolution authority (*Autorité de contrôle prudentiel et de résolution*)^{12/13}.

The creation, transformation, merger, demerger or liquidation of a securitisation vehicle falling within the scope of this section shall be reported to the AMF within one month of its completion.

Until the 2017 Ordinance, FCT were set up on the joint initiative of a management company and a custodian. The 2017 Ordinance provided for the elimination of this co-founding mechanism as of 1 January 2020¹⁴ and returned to the management company alone the initiative to set up an FCT by signing its regulations.

⁹) Article L. 214-168 of the CMF.

¹⁰) For more details see 6.1 (The Asset Management Company).

¹¹) See 6.2 (The custodian).

¹²) Article L. 214-189 of the CMF.

¹³) See, however, the prospectus approval requirement in paragraph 5.5 below.

¹⁴) Initially on 1 January 2019, postponed to 1 January 2020 by the PACTE Act.

An FCT has no legal personality and is described as a co-ownership entity by the CMF; it is represented by its management company for the purpose of its activities.

The ST is created by its founding partners as for any other company. It may take the form of a public limited company (*société anonyme - SA*) or a simplified joint-stock company (*société par actions simplifiée - SAS*). If the ST is incorporated as an SA, some of the organisational constraints provided for by the French Commercial Code (*Code de commerce*) do not apply to it¹⁵.

The FTC has the advantage of not requiring a minimum capital (apart from the issue of a minimum of two units with a nominal value of EUR 150 each) and offers great flexibility in its organisation and operation. The company form, on the other hand, makes it possible to offer a vehicle with legal personality.

2.4 Status of the OT under the Securitisation Regulation

An OT may constitute a “securitisation entity” or “SSPE” (“Securitisation Special Purpose Entity”) within the meaning of the Securitisation Regulation once it participates in a securitisation transaction and is structured to meet the other requirements of Article 2.2 of this Regulation, which includes in the definition of SSPE any “entity, other than an originator or sponsor, established for the purpose of carrying out one or more securitisations, the activities of which are limited to those appropriate to accomplishing that objective, the structure of which is intended to isolate the obligations of the SSPE from those of the originator”.

One of the key aspects of this definition is to refer to the definition of securitisation within the meaning of the Securitisation Regulation, which is as follows:

“a transaction or scheme, whereby the credit risk associated with an exposure or a pool of exposures is tranchéd, having all of the following characteristics:

- (a) payments in the transaction or scheme are dependent upon the performance of the exposure or of the pool of exposures;*
- (b) the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme;*
- (c) the transaction or scheme does not create exposures which possess all of the characteristics listed in Article 147(8) of Regulation (EU) No. 575/2013¹⁶;*”

The requirement imposed on the SSPE to have an activity limited to the completion of a securitisation is satisfied by the legal and contractual limitation (in the regulations or articles of association, as applicable) of the purpose of the OT. The isolation of the obligations of the OT from those of the originator is ensured by specific provisions protecting the “true sale” (see 3.2 (The “true sale”)) and isolating the vehicle from the risk of bankruptcy (see 3.4 (A regime largely derogating from bankruptcy law)).

¹⁵) Article L. 214-179 of the CMF, in particular as regards its share capital, rules on quorum at general meetings, concurrent holding of corporate offices, etc.

¹⁶) This paragraph states that “institutions shall separately identify as specialised lending exposures, exposures which possess the following characteristics:

- a) the exposure is to an entity which was created specifically to finance or operate physical assets or is an economically comparable exposure;*
- b) the contractual arrangements give the lender a substantial degree of control over the assets and the income that they generate;*
- c) the primary source of repayment of the obligation is the income generated by the assets being financed, rather than the independent capacity of a broader commercial enterprise.”*

These specialised lending exposures do not fall within the definition of “securitisation” specified in Article 2(1) of the Securitisation Regulation.

2.5 Status and obligations of the OT as an AIF and with regard to the AIFM Directive

Pursuant to Article L. 214-24, II, 4° of the CMF, OT are classified as so-called “AIF” investment funds under the AIFM Directive.

However, the question of the extent to which the manager of the OT should be subject to the AIFM Directive is relatively complex and is the subject of the provisions of Article L. 214-167-I of the CMF, which distinguishes between OT for which the manager benefits from a derogation from the AIFM Directive and those subject to the provisions of the AIFM Directive, as transposed into French law.

OT subject to the provisions of the AIFM Directive, as transposed into French law, must comply with the common provisions set out in Book II, Title 1, chapter IV, section 2, sub-section 1 of the CMF (Art. L. 214-24-1 to L. 214-24-23). These OT benefit from the AIFM European passport. They may only be managed by asset management companies with an AIFM authorisation. They must have a custodian whose duties comply with the AIFM Directive and Regulation.

Conversely, OT not subject to the provisions of the AIFM Directive (pursuant to Article L. 214-167 I of the CMF) and their managers are subject only to Article L. 214-24-I and II of the CMF and the specific provisions of Book II, Title 1, chapter IV, section 2, sub-section 5 relating to OT. These OT do not benefit from the AIFM European passport. They may be managed by AMC that do not benefit from an AIFM authorisation. They have a specific custodian regime (Art. L. 214-178 and L. 214-183-II of the CMF).

The criteria for distinguishing between these two categories of OT stem from the provisions of Articles D. 214-232 et seq. of the CMF (derived from Decree No. 2014-1366 of 14 November 2014, also known as the “anti-circumvention” Decree).

In essence, the AIFM regime will remain inapplicable if the purpose of the OT is not to expose more than 50% of its assets to risks in the form of either financial securities¹⁷ or any other asset that does not constitute an exposure to an insurance or credit risk managed on a discretionary basis by the management company or in the form of financial contracts entered into, managed or terminated on a discretionary basis. Also excluded from this regime are, among others, economy financing funds (*Fonds de prêt à l'économie - FPE*), SSPE and certain commercial paper issuers.

2.6 Status and obligations of the OT under the EMIR Regulation

The EMIR Regulation entered into force on 16 August 2012 and is directly applicable in all EU countries. The EMIR Regulation has been amended by a new regulation amending the EMIR Regulation (the **EMIR Refit Regulation**) prepared as part of the European Commission's Regulatory Fitness and Performance programme. The EMIR Refit Regulation came into force on 17 June 2019.

EMIR regulates derivative transactions differently depending on the nature of the counterparty:

- counterparties described as “financial”, which are listed exhaustively in the EMIR Regulation (essentially credit institutions, insurance or reinsurance companies, UCITS, central depositories, any AIF located in the EU or managed by AIFMs authorised or registered under the AIFM Directive (with the exception of special purpose vehicles and AIF created exclusively to manage employee share ownership plans), are subject to all the requirements of this Regulation (in particular, the obligation to use a central counterparty registered with ESMA for OTC derivatives that can be cleared));
- counterparties described as “non-financial”, which are defined as those that do not qualify as “financial counterparties”, are subject to lighter requirements (in particular, they are not required to use a clearing house registered with ESMA for OTC derivatives that can be cleared), subject to certain thresholds not being exceeded (see below).

¹⁷⁾ Debt securities subscribed directly with issuers are not taken into account in calculating the 50% proportion in accordance with Article D. 214-232-2-4° of the CMF.

Securitisation vehicles are AIF by definition¹⁸. Thus, the scope of the obligations applicable to OT under EMIR will depend on whether or not the OT is subject to the provisions of the AIFM Directive (pursuant to Article L. 214-167-I of the CMF).

If the OT is not subject to the provisions of the AIFM Directive, it will be classified as a “non-financial counterparty” (NFC) pursuant to the EMIR Regulation. It will then have to:

- report its derivative contracts to a central repository;¹⁹
- clear its derivative contracts subject to the clearing obligation only in the event that its positions exceed the mandatory clearing threshold (excluding hedging);²⁰ and
- apply risk mitigation techniques to OTC derivative contracts not cleared through a central counterparty.

OT subject to the clearing obligation (see above) are required to value outstanding derivative contracts daily and to exchange collateral.

If the OT is subject to the provisions of the AIFM Directive, then, to the extent that it is an AIF located in the European Union or is managed by an AIFM authorised or registered under the AIFM Directive, it will be categorised as a financial counterparty (FC) under EMIR. It will then have to comply with the following obligations:

- report its derivative contracts to a central repository;¹⁹
- clear all derivative contracts subject to the clearing obligation in the event that its positions exceed one of the mandatory clearing thresholds (see above);
- clear its derivative contracts subject to the clearing obligation only in the event that its positions exceed the mandatory clearing threshold (excluding hedging);²⁰ and
- apply risk mitigation techniques to OTC derivative contracts not cleared through a central counterparty.

2.7 The OT as FPE

The concept of economy financing funds (*Fonds de prêts à l'économie - FPE*) is of interest to insurance companies, mutual insurance companies, provident institutions and provident institution unions. It results from Decree No. 2013-717 of 2 August 2013 modifying certain investment rules for insurance companies. The concept of FPE does not in itself constitute a separate legal category but is attached to compliance with a certain number of conditions applicable to an OT²¹ which, if satisfied, enable insurance companies to obtain favourable prudential treatment for their investment.

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

¹⁸) See 2.5 (*Status and obligations of the OT as an AIF and with regard to the AIFM Directive*).

¹⁹) Note that if its counterparty is a financial counterparty and the OT is subject to the central clearing obligation, then the financial counterparty will be responsible for reporting unless the OT wishes to report itself.

²⁰) Gross notional value exceeding EUR 1 billion for credit derivatives; gross notional value exceeding EUR 1 billion for equity derivatives; gross notional value exceeding EUR 3 billion for interest rate derivatives; gross notional value exceeding EUR 3 billion for foreign exchange derivatives; and gross notional value exceeding EUR 3 billion for commodity or other derivatives.

²¹) The same applies to a specialised professional fund (*Fonds professionnel spécialisé - FPS*).

The conditions of the FPE Label are as follows²² :

Asset requirements:

- the assets must consist exclusively (in addition to cash, assets resulting from the realisation of security interests or the performance of a financial contract) of receivables or debt securities on or resulting from:
 - regional public bodies or public institutions of the Member States of the European Union (or guaranteed by them);
 - legal entities governed by private law principally engaged in a commercial, industrial, agricultural or real estate activity, excluding financial activities and undertakings for collective investment (*Organismes de placement collectif - OPC*);
 - holding companies: i.e. bank or bond financing arrangements whose borrower or issuer is a holding company or a special purpose acquisition entity, provided that their activity consists (exclusively or principally) in holding equity interests in companies established in France or private law entities established in the EU, whose main activities are commercial, industrial, agricultural, craft or real estate;
 - SPV for infrastructure and asset financing: i.e. financing granted to special-purpose entities established in the EU whose main or exclusive purpose is to finance the operation of infrastructure capital goods, for the benefit of one of the eligible entities;
 - undertakings for collective investment in real estate (*Organismes de placement collectif immobilier - OPCi*);
 - loans granted to individual entrepreneurs established in France and carrying on a craft, commercial, industrial, agricultural or real estate activity;
 - trusts, provided that their assets consist exclusively of receivables or debt securities against eligible entities (other than holding companies and SPV for infrastructure and asset financing).
- the receivables or debt securities must have a maturity of at least two years, not exceeding the maturity of the units and bonds issued by the FPE, and must be acquired within three years of the creation of the OT.

Conditions as to liabilities:

- economically, the credit risk associated with holding units, shares or bonds issued by the FPE must not be tranch²³;
- the FPE must not resort to borrowing to avoid any leverage.

Conditions regarding management rules and investor information:

- the FPE must be managed by a portfolio management company. A credit institution established in a State which is a party to the European Economic Area must be custodian of the cash, debt securities and receivables of the FPE;
- the FPE may not carry out reverse transactions in financial instruments and may only enter into financial contracts to hedge against interest rate or exchange rate risks or against timing differences between the flows generated by the securities and receivables held and the bonds and units issued;
- the management company must send investors an annual report on the management of the FPE and the monitoring of the credit risk of each and every one of the underlying assets;
- finally, the securities issued by the FPE must be subject to a quarterly valuation by the management company and an annual valuation certified by a third-party expert independent of the management company.

²²) Article R. 332-14-2 of the French insurance code (Code des assurances).

²³) The authorised liability structures were the subject of a Decree issued by the Minister of the Economy on 9 December 2013.

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 option 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”, 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, (4) securities issued by funds benefiting from the FPE Label should be able to benefit from preferential accounting treatment: the securities should be considered as “non-depreciable bonds” subject only to the calculation of the provision for long-term depreciation (known as “PDD”) and not to the calculation of the provision for liquidity risk (known as “PRE”).

3. Advantages of the vehicle

OT have a number of advantages over other vehicles, particularly those governed by foreign law, which could be used to securitise or finance assets.

3.1 Variety of OT activities and eligible assets

The articles of association (if the OT is set up as an ST) or the regulations (if the OT is set up as an FCT) of the OT specify the activities and the assets that it may acquire, subscribe for or hold. These can be very varied given the broad purpose of OT²⁴.

In particular, OT may acquire, subscribe for or hold receivables, debt securities or other assets²⁵, grant loans²⁶ or enter into contracts constituting forward financial instruments or transferring insurance risks, guarantees, security interests, or risk or cash sub-participations. The OT is the only vehicle under French law that allows the transfer of insurance risk.

The OT therefore offers the flexibility needed to be used in a wide variety of structures and underlying assets; it is thus the essential vehicle for any securitisation transaction, receivables financing requiring the establishment of a special purpose vehicle or refinancing involving a transfer of loan receivables in particular. All categories of securitisation transactions are concerned, including ABS on loans to professionals or consumers, leases with or without a purchase option, credit card receivables, CLO, CMBS or RMBS, trade receivables or synthetic securitisation.

For transactions that do not constitute securitisation transactions²⁷, the OT is also the vehicle of choice for structuring debt funds (acting both as a purchaser of loans or equity interests and as a lender) or for repackaging certain loans in bond form (e.g. in infrastructure financing).

3.2 The “true sale”

In French law, the concept of “true sale” (or *cession parfaite*) means, on the one hand, that the transaction whereby the assets are transferred by the assignor does indeed constitute a transfer of ownership of the transferred assets and, on the other hand, that the assignment of the assets to the vehicle, which were initially the property of the assignor, cannot subsequently be called into question even in the event of the latter’s bankruptcy.

The acquisition of assets, in particular receivables, by the OT is essentially carried out by means of a special advice note which, when it fulfils the conditions laid down by law, transfers full ownership of the assets concerned to the OT, together with their incidental assets (see paragraph [4.3] (Terms and conditions for the transfer and re-transfer of receivables)).

Moreover, this acquisition cannot be called into question by certain effects of French bankruptcy law, which are expressly excluded by law²⁸. These rules are important to secure the transactions made by an OT but also to meet the requirements set out in the Securitisation Regulation for a transaction to be considered “STS” (Simple, Transparent and Standardised)²⁹.

²⁴) Article L. 214-175-1, I. of the CMF.

²⁵) See 4.1 (Eligible assets).

²⁶) See 4.2 Loans granted by OT.

²⁷) See definition in 2.4 (Status of the OT under the Securitisation Regulation).

²⁸) See 4.4 (Terms and conditions for the transfer and re-transfer of receivables).

²⁹) See Articles 20.2 and 24.2 of the Securitisation Regulation.

3.3 Enforceability of payment and allocation orders

The articles of association or the regulations of the OT determine the payment orders made by the OT to its creditors and the rules for the allocation of its assets and the amounts received by the OT.

These rules are binding on unitholders, shareholders, holders of debt securities of all classes and other creditors who have accepted these rules, notwithstanding the initiation against them, where applicable, of insolvency or difficulty prevention proceedings under Book VI of the French Commercial Code (*Code de commerce*) or equivalent proceedings under foreign law³⁰. These rules are applicable in the event of the management company's liquidation of the OT³¹.

These rules are important in that they provide a legal basis for the rules governing the allocation of sums owed by the OT and the resulting ranking of creditors. It is also important to stress that the fact that the law specifies that this effectiveness is also required in the event of insolvency proceedings against the creditor secures certain important mechanisms, such as the downgrading of the ranking of certain payments due to a creditor when it is in default as a result of its insolvency proceedings.

3.4 A regime largely derogating from bankruptcy law and protecting creditors

In addition to the derogations from bankruptcy law referred to in the preceding paragraphs, OT and their transactions are substantially exempt from ordinary bankruptcy law.

Indeed, OT, whether they are set up as FCT or ST, cannot be the subject of any collective insolvency proceedings, as Book VI of the French Commercial Code (*Code de commerce*) does not apply to them³².

In addition, each OT (and each of its sub-funds) is only liable for its debts (including to holders of debt securities) up to the amount of its assets and according to the ranking of its creditors as defined by law or as provided for in its articles of association or regulations or the contracts entered into by it.

Finally, the law expressly provides that when the receivables assigned to the OT result from a rental agreement with or without a purchase option or a leasing agreement, neither the initiation of one of the proceedings referred to in Book VI of the French Commercial Code (*Code de commerce*) or equivalent proceedings under foreign law against the lessor or leasing company, nor the assignment or transfer of the movable or immovable property subject to the contract in the context of or following such proceedings may call into question the continuation of the rental or leasing agreement³³.

3.5 Flexible and secure decision-making rules

The 2017 Ordinance introduced into the relevant CMF provisions the option for the articles of association or the regulations of the OT or of a sub-fund to provide for rules relating to the decisions of the management company; these rules and the resulting decisions are to be binding on unitholders, shareholders, holders of debt securities of all classes and creditors who have accepted them³⁴.

Consideration could be given to applying these provisions to issues such as asset recovery or OT strategy. In particular, these rules may make it possible to involve the holders of securities issued by the OT in the decisions taken and thus ensure that these decisions are binding on all parties, including minority or non-priority holders.

³⁰) Article L. 214-169, II. of the CMF.

³¹) Article L. 214-169, II. of the CMF.

³²) Article L. 214-175, III. of the CMF.

³³) Article L. 214-167, VI. of the CMF.

³⁴) Article L. 214-169, II. of the CMF.

3.6 An *ad hoc*, protective OT asset recovery regime

The OT asset recovery regime is particularly well suited to the nature of the OT and its various possible activities³⁵.

In addition, the law provides special protection for the OT in order to avoid claims on collections that have been assigned to it, by enabling the OT to make specific claims on the debt recovery agent's collection account³⁶.

³⁵) See 4.5 (*Terms and conditions for debt recovery*).

³⁶) See 4.6 (*Earmarking an account specially for the benefit of the OT*).

4. Rules governing the OT assets

4.1 Eligible assets

The regulations or the articles of association of the OT specify the assets that may be acquired, subscribed for and held by the OT concerned.

These assets essentially include³⁷ :

(a) Receivables acquired by the OT

The greatest flexibility is allowed as to the nature of the receivables that can be acquired. These receivables may be governed by French law or by a foreign law and result either from an instrument already entered into, or from an instrument to be entered into (so-called "futures"), 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 are identified, including long-term, doubtful or disputed receivables.

These receivables may therefore include receivables resulting from credit transactions (loans, leasing transactions, rental transactions with a purchase option), rent receivables of all kinds, so-called "commercial" receivables resulting from a commercial activity between traders and arising from payment terms granted by a supplier of goods or services to its customers in the context of these transactions, or debt securities, each representing a claim against the entity issuing them, which may be transferred by book entry or delivery.

Irrespective of the OT's capacity to lend, where applicable³⁸, the receivables acquired by the OT may be receivables "arising from the provision of funds to a legal entity governed by private or public law, or to a natural person in the exercise of their professional activity under a contract already entered into or to be entered into"³⁹; in such a case, the OT and the assignor may provide that the OT will be required to make the funds directly available to the debtor and that, if the debtor accepts this, the assignor will be discharged from its obligation in this respect.

The receivables referred to in Article R.214-218-1° (a), which are eligible for inclusion in the assets of an OT, include debt securities⁴⁰.

(b) Liquid assets

These liquid assets include⁴¹:

- (i) deposits made with a credit institution with its registered office in a State that is a party to the Agreement on the European Economic Area or a member of the OECD, which may be repaid or withdrawn at any time at the request of the OT;
- (ii) treasury bills or debt securities issued by a State that is a party to the Agreement on the European Economic Area or a member of the OECD;
- (iii) debt securities (provided that they are listed for trading on a regulated market located in a State that is a party to the Agreement on the European Economic Area and with the exception of securities giving direct or indirect access to a company's capital);
- (iv) negotiable debt securities;

³⁷) Article R. 214-218 of the CMF.

³⁸) See 4.2 (Loans granted by OT).

³⁹) Article L. 214-169, VI of the CMF.

⁴⁰) Article D. 214-219 of the CMF.

⁴¹) Article D. 214-232-4 of the CMF.

- (v) units or shares of certain UCITS or AIF invested mainly in the debt securities referred to in paragraphs (iii) and (iv) above; or
 - (vi) units or shares of OT or similar entities governed by foreign law, with the exception of its own units.
- (c) Equity securities** that the OT has received, in particular, 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 (without being able to subscribe for or otherwise acquire them);
- (d) Rights arising from loans⁴²**, as well as from **risk or cash sub-participations**;
- (e) Contracts** constituting forward financial instruments or transferring insurance risks, in addition to **assets** transferred to it in respect of the commitments it enters into through contracts constituting forward financial instruments (under the conditions set out in Article R. 214-224 of the CMF); and
- (f) Guarantees, security interests and 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 OT, 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.

4.2 Loans granted by OT

(a) Impossibility to grant loans prior to the 2017 Ordinance

Until the reform of the OT regime brought about by the 2017 Ordinance and the 2018 Decrees, OT could not grant loans directly. An OT could only acquire or receive receivables arising from current or future credit transactions, but could not make any commitment to make funds directly available to borrowers.

Such a limitation does not prevent an OT from acquiring receivables arising from current or future loans granted by a credit institution, including on the same day of such acquisition⁴³. This scheme of immediate acquisition remains relevant in all cases where the conditions for granting loans by OT introduced by the 2017 Ordinance and its implementing decrees are not met.

(b) Option to grant loans under certain conditions

The reform introduced by the 2017 Ordinance and the 2018 Decrees established the option for OT to grant loans under some of the conditions applicable to specialised professional funds (*Fonds professionnels spécialisés - FPS*)⁴⁴. For this purpose, the OT is likened to a specialised professional fund (*Fonds professionnel spécialisé - FPS*) and holders of debt securities are likened to unitholders or shareholders.

⁴² See 4.2 (Loans granted by OT).

⁴³ See 4.1(a) (Receivables acquired by the OT) as regards the recognition of the right of the OT to make the funds directly available to the borrower in such circumstances.

⁴⁴ Article L. 214-175-1, V. of the CMF and Articles R. 214-203-1, R. 214-203-2, R. 214-203-3 with the exception of I, R. 214-203-4, R. 214-203-5 with the exception of III and R. 214-203-6 to R. 214-203-9 of the CMF.

Loans (which include leasing agreements, rental agreements with a purchase option and the subscription of loan notes ("*bons de caisse*")⁴⁵) that may be granted by the OT must meet the following conditions⁴⁶ :

- (i) the beneficiaries of such loans may only be [1] sole proprietorships or private-law legal entities engaged primarily in a commercial, industrial, agricultural, craft or real estate activity, or [2] private-law legal entities whose sole or main purpose, in addition to carrying out a commercial, industrial, agricultural, craft or real estate activity, is to hold directly or indirectly one or more equity interests in the capital of legal entities referred to in paragraph (i) or to finance such legal entities⁴⁷;
- (ii) the regulations or articles of association of the OT must specify the date of its liquidation, but may provide for a right of temporary extension of its life, and the conditions for exercising such a right;
- (iii) the loans granted may not be made for a term exceeding the remaining life of the OT; and
- (iv) receivables arising from loans granted by the OT must be held by the OT until maturity, unless a specific programme of activity of the management company is approved or under certain exceptions (liquidation of the OT, "clean-up call", the units come to be held by a single shareholder, to meet its obligations under a financial instrument contract, secured loan or sub-participation, in the event of a doubtful or disputed debt or to comply with its investment rules).

In addition, an OT that engages in lending activity for more than 10% of its net assets⁴⁸ is subject to the following conditions:

- (A) it may borrow⁴⁹, but subject to certain limits (notably, in terms of the maximum amount of leverage⁵⁰, the borrowing conditions, the maturity and the repayment or refinancing terms and conditions of which must be consistent with the liquidity profile of the OT and must not exceed the remaining life of the OT, and the proportion of the assets encumbered for such liquidity borrowing which must not exceed the percentage of the OT's net assets at the time of the borrowing);
- (B) it must not use financial contracts other than for the purpose of hedging interest rate and currency risks;
- (C) it may not engage in short selling of financial instruments;

⁴⁵ As defined in Article L. 223-1 of the CMF, but excluding the interest-bearing notes (*minibons*) in Article L. 223-6 of the CMF.

⁴⁶ Article R. 214-234 of the CMF, which itself refers to the regime applicable to specialised professional funds (Fonds professionnels spécialisés - FPS) in Articles R. 214-203-1 et seq. of the CMF, but with adaptations.

⁴⁷ In all cases, eligible real estate activities exclude collective investments and financial undertakings within the meaning of Regulation (EU) No. 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds.

⁴⁸ In accordance with Article R. 214-203-7 of the CMF. By way of derogation, when it grants loans for up to 10% of its net assets, only the following conditions must be met: (a) loans may not be granted for a term exceeding the remaining life of the OT and (b) the OT shall not use financial contracts other than for the purpose of hedging interest rate and currency risks.

⁴⁹ Excluding issue of debt securities.

⁵⁰ This leverage, expressed as a ratio between the exposure of the OT and its net asset value, may not exceed 30%, in accordance with Article R. 2014-203-6, 1°, a) of the CMF and Article 2, II of the Order of 17 July 2017 approving amendments to the General Regulation of the AMF. It should be noted that for the purpose of calculating this leverage, temporary borrowing agreements that are fully covered by the contractual promises to provide capital by the investors of the OT are excluded and that the exposure is calculated using the commitment calculation method as set out in Article 8 of Commission Delegated Regulation (EU) No. 231/2013 of 19 December 2012.

- (D) it may not have recourse, in excess of 10% of its net assets, to techniques and instruments involving eligible financial securities and money market instruments, and in particular repurchase agreements and similar transactions for the temporary purchase or sale of securities; and
- (E) the maximum net loss or commitment made by the OT, 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, forward financial instruments, guarantees or risk sub-participation, may not exceed the value of its assets and, where applicable, the uncalled amount of subscriptions⁵¹.

Lastly, the management company must comply with certain obligations, such as having a risk analysis system, having a process for obtaining up-to-date information on borrowers, implementing a credit risk selection procedure, complying with anti-money laundering provisions, and providing the AMF with quarterly information on the unmatured loans granted.

4.3 Benefit of the “Daily” act

(a) Eligibility of the OT for the “Daily” assignment and pledge

The 2017 Ordinance made it possible for OT⁵² to benefit from the provisions of Articles L. 313-23 et seq. of the CMF, thereby making them eligible for the assignment of trade receivables by way of discount or as a guarantee, or for the pledging of receivables governed by these provisions⁵³. Until then, only credit institutions had been eligible.

Thus, the ability of OT to receive, as an adjunct to the receivables it acquires, the benefit of such assignments as a guarantee or pledge to secure payment of those receivables, is strengthened; but above all, OT may be directly granted such assignments as a guarantee or pledge, to secure the receivables acquired or the receivables resulting from loans granted by the OT. Assignment by way of discount is also permitted.

This opening of the Daily assignment to OT is particularly useful in the case of public infrastructure financing schemes, but will also be useful in other situations.

(b) Acceptance of assignments of receivables by the debtors concerned

The OT benefits from mechanisms whereby the debtors of assigned receivables may expressly accept the assignment of such receivables to the OT and undertake to pay them directly to the OT:

- (i) the OT automatically benefits from the deeds of acceptance referred to in Articles L. 313-29 and L. 313-29-1 of the CMF relating to the trade receivables acquired by the OT principally or assigned by way of guarantee or pledge in its favour; and
- (ii) the OT may also ask debtors, including public-law legal entities, to undertake to pay it directly, by means of a written deed of acceptance, the wording and medium of which are set by decree, under the terms provided for in Articles L. 313-29 and L. 313-29-1 of the CMF and having the same effects.

⁵¹⁾ Article L. 214-175-1, VI of the CMF.

⁵²⁾ As was the case for *Specialised Financing Vehicles* (Organismes de Financement Spécialisés - OFS).

⁵³⁾ Article L. 214-169, V, 3° of the CMF.

4.4 Terms and conditions for the transfer and re-transfer of receivables

(a) Various acquisition methods

Both the acquisition and the assignment of receivables by an OT can be done in different ways⁵⁴:

- by means of a specific advice note, the wording and medium of which are set forth in Article D. 214-227 of the CMF;
- by any other method of acquisition, assignment or transfer under French or foreign law;
- when the assets are financial instruments, in accordance with the specific rules applicable to the transfer of such instruments, where applicable, by the direct subscription of such instruments at the time of their issue; and
- when the assets are trade receivables assigned by way of discount or as a guarantee, under the terms of Articles L. 313-23 et seq. of the CMF, by issuing a “Daily advice note”⁵⁵.

When carried out by means of an advice note, the acquisition or assignment of receivables is particularly effective since it takes effect between the parties and becomes enforceable against third parties (including the assigned debtor(s) and the bodies of any collective proceedings that may be initiated against the assignor) on the date affixed to the advice note when it is submitted, irrespective of the creation, maturity or due date of the receivables, without the need for any other formality, and irrespective of the law applicable to the receivables and the law of the debtors’ country of residence.

Submission of advice notes automatically entails the transfer of the security interests, guarantees and other commitments attached to the assigned receivables, including mortgage securities and trade receivables that would have been assigned by way of guarantee or pledged under the conditions laid down by Articles L. 313-23 et seq. of the CMF, in addition to the enforceability of this transfer against third parties without the need for any other formality.

(b) Effects derogating from ordinary bankruptcy law (assignment of receivables and granting of security interests)

The OT benefits from a favourable regime that exempts its assets from the consequences of the bankruptcy of the assignor or pledgor of the assets transferred to it.

Indeed, the acquisition or assignment of receivables or the creation of any security interest or guarantee for the benefit of the OT retains its effectiveness notwithstanding the insolvency of the assignor or the pledgor at the time of such acquisition, assignment or creation or the initiation of one of the proceedings referred to in Book VI of the French Commercial Code (*Code de commerce*) or equivalent proceedings under foreign law against the assignor or the pledgor following such acquisition, assignment or creation⁵⁶.

Furthermore, neither payments made by the OT (in particular, payment of the purchase price of the receivables), nor acts for valuable consideration performed by or for the benefit of the OT - provided that such contracts or acts are directly related to its object - may be cancelled on the basis of Article L. 632-2 of the French Commercial Code (*Code de commerce*)⁵⁷.

⁵⁴) Article L. 214-169, V of the CMF.

⁵⁵) See 4.3 (Benefit of the “Daily” act).

⁵⁶) Article L. 214-167, V., 4° of the CMF.

⁵⁷) *Allowing the cancellation of payments for matured debts made as of the date of insolvency and acts for valuable consideration performed as of the same date if those who dealt with the insolvent party/debtors were aware of the insolvency and cancellation of any administrative seizure, attachment or enforcement issued or carried out as of the date of insolvency and with knowledge thereof.*

4.5 Terms and conditions for debt recovery

When debts, other than financial instruments, are transferred to the OT, they usually continue to be recovered by the assignor or by the entity entrusted with their recovery prior to their transfer under conditions defined either by an agreement with the undertaking's management company, or by the instrument from which the transferred debts arise when the undertaking becomes a party to that instrument as a result of the transfer of such debts (e.g. the credit officer appointed under the credit agreement giving rise to the loan receivables transferred to an OT)⁵⁸.

The management company may also recover all or part of the debts (including those resulting from loans granted by the OT), either directly, or by entrusting such recovery to another entity, by way of agreement. Similarly, the management company may entrust - by way of agreement - to any entity designated for that purpose, the management and recovery of any other assets held by the OT.

Debts that constitute financial instruments shall be managed and recovered in accordance with the rules applicable to the financial instruments concerned.

In the event of a change in the entity responsible for recovery⁵⁹, each relevant debtor concerned must be informed of the change by any means, including by judicial or extrajudicial means⁶⁰.

By derogation from the first paragraph of the Article L. 214-183 of the CMF, whenever the management or recovery of any asset is not carried out in whole or in part directly by the management company but by a third entity, that entity may represent the undertaking directly in all legal actions related to the management and recovery of the asset, including any statement of claim and any enforcement measure, without the need for it to obtain a special mandate to that effect or to refer to the management company in the instruments. The management company, in its capacity as legal representative of the OT, retains the right to act in the name and on behalf of the OT, as claimant or defendant, in respect of such actions or to perform any act or sign any document with any third party, including debtors or borrowers, in connection with the management or recovery, without it being necessary to terminate or dispute the management or recovery mandate in advance or to inform any third party thereof.

The conditions of ordinary law applicable to entities responsible for out-of-court debt recovery on behalf of third parties⁶¹, as well as, where appropriate, those relating to payment services, are expressly excluded.

4.6 Earmarking an account specially for the benefit of the OT

Where the entity responsible for recovering the sums due to or benefiting directly or indirectly the OT is the assignor and the assignor receives such sums in a bank account opened in its name, before paying them to the OT, such sums may be commingled with sums credited to that bank account which are due to the assignor or its other creditors and which do not correspond to the receivables transferred to the OT. There is then a risk that these sums could be considered by an administrator or a court-appointed liquidator as part of the assignor's assets in the event of the assignor's bankruptcy.

⁵⁸) Article L. 214-172 of the CMF.

⁵⁹) At the time of the acquisition of the relevant asset by the OT or while it is held by the OT.

⁶⁰) Article L. 214-172-3 of the CMF.

⁶¹) See, in particular, Articles L. 124-1 and R. 124-1 to R. 124-7 of the French code of civil enforcement proceedings (Code des procédures civiles d'exécution), which require entities that carry out out-of-court debt recovery on behalf of third parties when they do not do so by virtue of their professional status or in the context of the regulation of their profession to satisfy certain conditions (in particular, taking out a professional civil liability insurance policy, opening a bank account exclusively earmarked for receiving funds collected on behalf of creditors, prior written declaration to the public prosecutor of the Regional Court (Tribunal de Grande Instance - TGI) within the jurisdiction of their registered office, entering into a written agreement with the creditor, the content of which is determined by the said articles, sending a letter to the debtor(s) concerned, the content of which is also imposed by the said articles, etc.).

In order to reduce this so-called “commingling” risk, the law⁶² provides that the OT’s management company and the entity responsible for collection may agree for the bank account in which the sums are (or will be) received to be specially earmarked for the benefit of one or more OT or, where applicable, sub-funds.

This account must be held by a credit institution with its registered office in a State that is a party to the Agreement on the European Economic Area or a member of the OECD and may be an existing account opened in the name of any entity responsible for collecting sums due to or benefiting directly or indirectly the OT or a new account to be opened.

The specially earmarked nature of this account shall take effect upon the signature of an account agreement between the OT’s management company, the OT’s custodian, the entity responsible for collecting sums due to or benefiting directly or indirectly the OT and the account-holding institution, without the need for any other formality.

There are several advantages to specially earmarking one or more bank accounts for the benefit of the OT:

- (a)** the sums credited to the account are exclusively for the benefit of the OT, and the OT’s management company (acting in the name and for the benefit of the latter) may only dispose of these sums under the conditions laid down in the account agreement;
- (b)** the creditors of the entity responsible for collection may not take action for the settlement of their receivables against this account, even in the event of proceedings initiated against this entity on the basis of Book VI of the French commercial code (*Code de commerce*) or equivalent proceedings under foreign law⁶³ ;
- (c)** the initiation of one of the proceedings referred to in Book VI of the French commercial code (*Code de commerce*) or equivalent proceedings under foreign law against the assignor or, where applicable, the entity responsible for recovering or collecting the sums due to or benefiting directly or indirectly the OT may not result in either the termination of the earmarking agreement or the closure of the specially earmarked account; and
- (d)** the account-holding institution is subject to certain obligations or prohibitions, including:
 - (i)** the obligation to inform any third party that attempts to seize the account that the account is specially earmarked for the benefit of the OT, making the account and the sums held in it unavailable;
 - (ii)** the prohibition on merging the account with another account; and
 - (iii)** the obligation to comply solely with the instructions of the OT’s management company (acting in the name and for the benefit of the latter), for account debit transactions, unless the account agreement authorises the entity responsible for collecting sums due to or benefiting directly or indirectly the OT to debit the account under conditions defined by it.

⁶²) Articles L. 214-173 and D. 214-228 of the CMF.

⁶³) Article L. 214-173 of the CMF.

4.7 Management of the OT's assets

The management company manages the OT's assets.

(a) Assignment of unmatured or lapsed loans, debt securities or receivables

The OT's management company may actively manage these assets and, if authorised by the OT's articles of association or regulations, assign unmatured or lapsed receivables or loans.

Unless the assignment by the OT of unmatured or lapsed receivables or loans occurs in certain cases provided for by the CMF⁶⁴, the OT's management company must first submit a specific programme of activity to the AMF for approval⁶⁵.

The cases provided for by the CMF correspond to cases of liquidation (cases of liquidation in the interest of holders, "clean-up call" cases, the units or shares and securities come to be held by a single shareholder on request) or to meet commitments under a forward financial instrument, loan, guarantee or sub-participation, in the event of a deterioration in the financial health of a debtor company leading to the holding of doubtful or disputed debts, or to enable the OT to comply with its investment rules.

The OT may also:

- freely dispose of the debt securities it holds as liquid assets⁶⁶; and
- engage in, within the limits of its assets, repurchase agreements or any other transaction for the temporary purchase and sale of securities, under the conditions laid down in Article R. 214-225 of the CMF.

(b) Management of the OT's liquid assets and cash position

The OT's cash position consists of the sums generated by the assets acquired by the OT, the liquidity generated by the build-up of its liabilities (proceeds from the units, shares and/or debt securities issued by the OT, execution of borrowing transactions and/or resulting from off-balance sheet transactions) and the proceeds from the investment of the OT's cash.

This cash may be invested by the management company in assets eligible for the OT (in particular, the cash described above⁶⁷) and in accordance with the investment rules provided for in the OT's articles of association or regulations.

The management company may delegate this investment right to a cash management officer who must have the status or authorisation to conduct such management (in particular, if the OT is intended to hold securities).

⁶⁴) Article R. 214-226 of the CMF for the assignment of receivables and Article R. 214-203-2 of the CMF for the assignment of loans.

⁶⁵) Articles L. 214-177 and L. 214-183 of the CMF.

⁶⁶) i.e. the debt securities referred to in 3° and 4° of Article D. 214-232-4 of the CMF.

⁶⁷) See 4.1(b) (Liquid assets).

5. Rules governing the OT's liabilities

5.1 Issue of securities by an OT

When an OT is set up as an FCT, it issues units that constitute financial securities within the meaning of Article L. 211-1 of the CMF. The liabilities of an FCT must at all times include at least two units in order to establish the co-ownership of the fund. The initial nominal unit amount of a unit is at least €150 or its equivalent in the monetary unit of the issue.

When an OT is set up as an ST (SA or SAS), it issues shares.

An OT may issue (in addition to units or shares) bonds, negotiable debt securities or debt securities issued on the basis of a foreign law.

5.2 Rights conferred by the securities

In accordance with Article L. 214-175-1 of the CMF, units or shares and debt securities issued by the securitisation vehicle may give rise to different rights, in particular to capital or interest. The regulations or articles of association of the vehicle and any contract entered into by it may provide that the rights of certain classes of unitholders, shareholders, holders of debt securities or certain creditors of the vehicle are subordinated to the rights or interests of other classes of unitholders, shareholders, holders of debt securities or other creditors of the vehicle.

Holders of securities issued by an OT are liable only to the extent of their investment. Holders are therefore not liable for the OT's debts beyond the amounts they have invested.

5.3 Subordination

The payment of sums due in respect of units issued by an FCT is subordinated to the payment of sums due to holders of debt securities or to persons with whom loans have been taken out or commitments resulting from contracts constituting forward financial instruments⁶⁸.

5.4 Exclusion of the redemption option

Pursuant to Article L. 214-169 of the CMF, the units or shares of an OT may not give rise to a request, by their holders, for redemption by the OT.

5.5 Rules governing marketing

Units, shares or debt securities issued by an OT may be the subject of a public offering or an admission to trading on a regulated market.

Units and debt securities issued by an OT are marketed, where applicable, under the rules set out in the Prospectus Regulation⁶⁹. Each completion of a public offering or an admission to trading of the securities issued on a regulated market that takes place in France is therefore subject to obtaining an approval, in accordance with AMF Instruction DOC-2011-01, issued by the regulator and affixed to the OT's prospectus.

⁶⁸) Article R. 214-235 of the CMF.

⁶⁹) 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.

The marketing of securities issued by an OT falls under the Prospectus Regulation.

The units, shares and debt securities that the vehicle is called upon to issue may not be marketed directly save to qualified investors referred to in Article L. 411-2⁷⁰.

5.6 Recourse to borrowing by the OT

The OT has the option of borrowing⁷¹. However, when it grants loans for more than 10% of its net assets, an OT may only resort to borrowing under the following conditions (Article R. 214-203-6 of the CMF):

- (a) the fund's maximum leverage, expressed as a ratio between the fund's exposure and its net asset value, is laid down in the fund's articles of association or regulations, within the limits defined by order of the Minister of the Economy (i.e. 30% pursuant to the Order of 17 July 2017 approving amendments to the General Regulation of the AMF (*Règlement général de l'Autorité des marchés financiers - RGAMF*)). For the purpose of calculating this leverage, temporary borrowing agreements that are fully covered by the contractual promises to provide capital by the fund's investors are excluded. Exposure shall be calculated in accordance with the commitment calculation method as set out in Article 8 of Commission Delegated Regulation (EU) No. 231/2013 of 19 December 2012;
- (b) the fund's regulations or articles of association shall define the conditions under which recourse may be had to cash borrowing;
- (c) the objectives pursued by cash borrowing and the terms and conditions of such borrowing, in particular its duration and the terms and conditions for its repayment or refinancing, shall be compatible with the fund's liquidity profile;
- (d) the management company shall carry out stress tests to ensure that the liquidity of the assets, in particular the loans granted, enables the fund to meet redemption requests and the commitments resulting from loans taken out;
- (e) the loans shall have a maturity shorter than the residual life of the fund;
- (f) the assets encumbered for such cash borrowing shall not represent more than the percentage of the net assets of the fund defined in (a), at the time of borrowing.

5.7 Rules governing the issue of securities

Proceeds from units, shares and debt securities issued by the vehicle or from loans taken out by it may be used to repay or remunerate its units, shares, debt securities or loans⁷².

The articles of association of an ST or the regulations of an FTC or a sub-fund may provide that the subscription price of the units, shares or bonds issued by the OT will be called from investors in a partial manner according to the needs of the OT.

⁷⁰) Article L. 214-175-1 of the CMF.

⁷¹) Article R. 214-223 of the CMF.

⁷²) Article R. 214-221 of the CMF.

6. Management rules and custodian regime

The OT is managed by a portfolio management company and its assets are held by a custodian. The management company and the custodian must act within their respective roles “*honestly, fairly, professionally, independently and in the best interests of the securitisation vehicle and the holders of units, shares or debt securities issued by the vehicle*”⁷³.

6.1 The Management Company

An OT must be managed by a portfolio management company referred to in Article L. 532-9 of the CMF.

The management company responsible for managing an OT may delegate financial management to a third-party entity under the conditions laid down in the RGAMF. The management company's liability in respect of the OT shall not be affected by the fact that it has delegated financial management to a third party.

There are certain special constraints on the management company in certain specific cases, including:

- in the case of an OT granting loans, it must also have certain specific schemes in place, such as systems for analysing, measuring and selecting credit risks⁷⁴ ;
- if forward financial instruments are used to expose the company, or in the event of the assignment of unmatured or lapsed receivables (including those arising from loans granted by the OT), it must have a specific programme of activity⁷⁵; or
- if certain conditions are met, the provisions of the AIFM Directive will apply to it with regard to the management of the OT concerned.⁷⁶

6.2 The Custodian

(a) Amendment to the custodian regime

The custodian is a credit institution established in a State that is a party to the European Economic Area, or any other institution chosen from a list of entities drawn up by the Minister of the Economy⁷⁷.

The 2017 Ordinance introduced a new set of rules applicable to OT Depositaries. These new rules came into force on 1 January 2020. This reform aims to modernise the regime applicable to OT Depositaries and bring it closer to the custodian regime defined by the AIFM Directive.

This reform provides in particular for:

- putting an end to the concept of “co-founding” OT at the joint initiative of the asset management company and the Custodian. The OT will then be set up by its asset management company alone, and the Custodian will therefore no longer be responsible for creating the OT; and
- new rules to prevent potential conflicts of interest between the Custodian, the asset management company, the sponsor of the OT, the OT and the holders of securities issued by the OT⁷⁸.

The conditions of application of the custodian's new duties have yet to be specified by the RGAMF.

⁷³) Article L. 214-175-2, II of the CMF, in force on 1 January 2020.

⁷⁴) See 4.7(a) (Assignment of unmatured or lapsed loans, debt securities or receivables).

⁷⁵) See 2.5 (Status and obligations of the OT as an AIF and with regard to the AIFM Directive).

⁷⁶) Article L. 214-175-2 of the CMF as of 1 January 2020.

⁷⁷) Article L. 214-175-2 of the CMF as of 1 January 2020.

⁷⁸) Article L. 214-175-3 of the CMF.

(b) Safekeeping of the OT's assets

The OT's custodian shall ensure the safekeeping of the OT's cash and receivables in accordance with the terms and conditions laid down in the OT's articles of association or regulations.

However, the assignor or the entity responsible for recovering the receivables assigned to the OT may ensure, in accordance with the terms and conditions defined in an agreement with the custodian and the management company, the safekeeping, under its responsibility, of the contracts and other media relating to these receivables and the security interests, guarantees and other commitments attached thereto, for which it shall set up documented safekeeping procedures and regular and independent internal control of compliance with these procedures. However, the custodian shall remain responsible for the safekeeping of the advice notes for the receivables.⁷⁹

The custodian shall keep a register of the OT's assets (other than the OT's financial instruments and receivables) and shall carry out checks on the reality of the assets assigned or acquired and the security interests, guarantees and other commitments attached thereto.

The OT's assets held by the OT's custodian may not be used by the custodian⁸⁰.

The custodian shall also ensure that payments made by holders of securities issued by the OT have been received at the time of the subscriptions or calls for funds and, more generally, shall monitor the OT's cash flows.

(c) Monitoring the legality of the management company's decisions

The custodian shall ensure that the asset management company makes its decisions lawfully⁸¹.

This control shall be carried out in accordance with the terms and conditions laid down in the RGAMF. The custodian shall thereby ensure compliance with the legislative and regulatory provisions applicable to the OT⁸². In addition, as part of this duty, the custodian shall:

- set up a procedure for entering into relations and monitoring enabling it, in particular, to familiarise itself with and assess the organisation and internal procedures of the OT and the asset management company, the OT's accounting system, and to ensure compliance with the terms and conditions for exchanging information with the asset management company⁸³;
- establish and implement a control plan which defines the purpose, nature and frequency of the controls carried out in this respect⁸⁴; and
- set up an alert procedure relating to anomalies noted in the exercise of its control⁸⁵.

The custodian's control shall be carried out retroactively and shall exclude any control of appropriateness⁸⁶.

The custodian may not delegate to a third party its duty of monitoring the decisions of the OT's management company.

⁷⁹) Article D. 214-229 of the CMF and, as of 1 January 2020, Article D. 214-233 of the CMF.

⁸⁰) Article L. 214-175-3, 4° of the CMF, which is part of the provisions applicable from 2020.

⁸¹) Article L. 214-175-2 of the CMF.

⁸²) Article 323-47 of the RGAMF.

⁸³) Article 323-60 of the RGAMF.

⁸⁴) Article 323-61 of the RGAMF.

⁸⁵) Article 323-63 of the RGAMF.

⁸⁶) Article 323-47 of the RGAMF.

7. Accounting and tax treatment

7.1 Overview of the accounting regime

Unless adaptations provided for in a Regulation of the French accounting standards authority (*Autorité des normes comptables - ANC*) are specifically applicable to them⁸⁷, securitisation vehicles shall apply the general chart of accounts, as opposed to the general chart of accounts for open-ended undertakings for collective investment (*Organismes de placement collectif à capital variable - OPCCV*) applicable to OFS in particular.

At the time of their acquisition, acquired receivables are recorded at their nominal value.

After they are acquired, receivables (including loans granted by the OT and fixed-income financial securities held by the OT) are valued according to the securitisation vehicle's intention to hold them until maturity or otherwise. If the securitisation vehicle intends to hold them to maturity, the impairment is analysed solely with respect to credit risk and, where applicable, specific recovery costs. Otherwise, an impairment is recognised when the probable sale value of the asset is less than its book value. The securitisation vehicle must be able to demonstrate its intention and ability to hold these securitisation assets until maturity.

7.2 Overview of the tax regime

ST are not subject, as they stand, to specific tax provisions and are therefore subject to tax under the conditions of ordinary law.

On the other hand, the FCT is not subject to a certain number of taxes, in particular corporation tax⁸⁸, local business tax (*contribution économique territoriale*) and the social solidarity contribution (*contribution sociale de solidarité*) payable by companies. The transactions carried out by the FCT also benefit from a number of favourable provisions: no registration duties on the issue of units or bonds or on the acquisition of receivables, exemption from VAT applicable to the acquisition of receivables.

A large number of services rendered to the OT are in principle exempt from VAT (management of the fund, management of receivables, intermediation in the acquisition of receivables or the investment of units or bonds). However, certain services are subject to VAT (debt recovery, administrative services, any services rendered by the custodian). The OT has no right to deduct VAT, so that the VAT charged on its expenses constitutes a net expense for it.

Holders of FTC units and bonds issued by FCT and ST are subject to income tax (*impôt sur le revenu - IR*) or corporation tax (*impôt sur les sociétés - IS*), as the case may be, when they receive income from such units or bonds. They are subject to the ordinary tax regime for natural or legal persons receiving interest.

Interest paid to non-residents is not subject to any withholding tax, except, in principle, if it is paid to a domiciled person or into an account opened in a non-cooperative state or territory within the meaning of Article 238-0 A of the French general tax code (*Code général des impôts*).

⁸⁷) ANC Regulation No. 2016-02 of 11 March 2016 relating to the annual accounts of securitisation vehicles (Regulation approved by Order of 7 July 2016 published in the Official Gazette of 19 July 2016) as amended.

⁸⁸) Article 208, 3 octies of the French general tax code (Code général des impôts).

Appendix

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
Legal form	Fund and company	Fund (primarily) and company	Fund and company, including French limited partnership (<i>société de libre partenariat</i> - SLP)
Incorporating documents	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)
Sub-funds	Possible	Possible	Possible
Approval for incorporation	No	No	No
Securitisation Regulation	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)
AIFM	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
EMIR	Financial counterparty as AIF	Non-financial counterparty with some exceptions	Financial counterparty as AIF
Eligibility for the ELTIF label	Eligible	Not eligible in principle	Eligible
Economy financing fund (<i>Fonds de Prêt à l'Économie</i> - FPE)	Eligible	Eligible	Eligible
Activities	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
Non-application of bankruptcy law to the vehicle	Yes	Yes	No
Tax regime	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
Accounting regime	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)

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Appendix: Summary table of financing vehicles

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	OFS	OT	FPS
Eligible assets – intangible assets (excluding equity securities)	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
Eligible assets – Equity securities	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
Eligible assets – Tangible assets	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
Granting of loans	Yes (subject to conditions)	Yes (subject to conditions)	Yes (subject to conditions)
Benefit of the “Daily” act	Yes	Yes	Yes
Methods of acquiring receivables	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
Recovery	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
Earmarked account	Yes	Yes	No
Active management	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)
Issue of securities	Shares (company), units (fund) and/or debt securities	Shares (company), units (fund) and/or debt securities	Shares (company), units (fund)
Tranching	No (with some exceptions in the cases provided for in Article D. 214-240-3 of the CMF)	Possible	Possible
Redemption right	Possible	No	Possible
Marketing	As AIF	Pursuant to the Prospectus Regulation	As AIF
Borrowing	Yes (subject to conditions)	Yes (subject to conditions)	Yes (subject to conditions)
Leverage	Limited (in the case of granting loans)	Limited (in the case of granting loans)	Limited (in the case of granting loans)
Asset management company	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
Depository regime	AIF regime	<i>Ad hoc</i> regime (similar to the AIF depository regime as from 1 January 2020) ²³	AIF regime

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

The AFG would like to thank **Fabrice FAURE-DAUPHIN**, Allen & Overy 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.

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