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# THE FRENCH LEGAL PANORAMA OF THE FINANCING VEHICLES

## SECURITISATION AND SPECIALISED FINANCING ORGANISMS

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# Contents

# Introduction

## French securitisation and debt fund legislation driven by practitioners to increase investments in France

France enacted more than 30 years ago a specific statutory framework for securitisations providing clear, unambiguous and protective rules. The implementation of the French securitisation legislation was part of a more global objective to offer diverse, modern and flexible tools for financings comparable to the best European standards complying with the criteria developed by rating agencies. The legal framework for securitisation was put into place by the Law n° 88-1201 of 23 December 1988 and its application Decree n° 98-158 of 9 March 1989 (the "**Securitisation Legislation**"). The Securitisation Legislation was codified in the French monetary and financial code (the "**Financial Code**") in 2001.

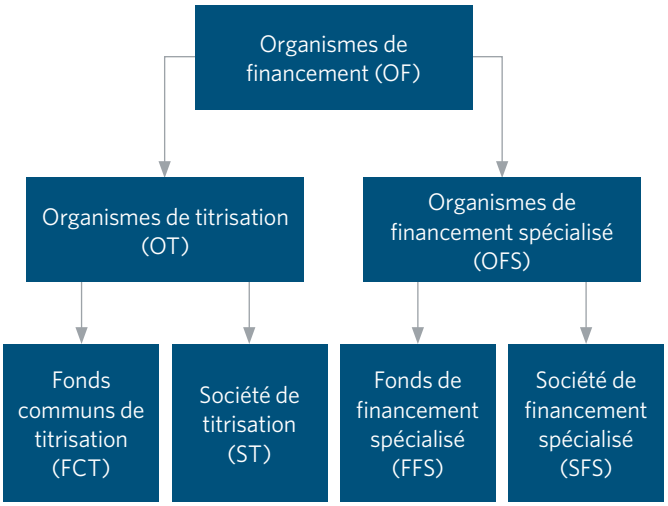
The Ordinance n° 2008-556 of 13 June 2008 introduced a new type of securitisation vehicle in the form of a company in addition to the former *fonds communs de créances* ("**FCCs**"), now called *fonds communs de titrisation* ("**FCTs**"), extended the possibility for both securitisation vehicles to cover any risk exposure through derivatives and made even more robust the bankruptcy remoteness of French securitisation vehicles to improve the security of investors.

Another milestone has been reached through the Ordinance n° 2017-1432 of 4 October 2017 (the "**Ordinance**") and its implementing Decrees n° 2018-1004 and n° 2018-1008 of 19 November 2018 (the "**Reform**" and together with the Securitisation Legislation, the "**OF Legislation**"). This reform is coupled with the introduction into French law of specialised financing vehicles, a new reform of the banking monopoly and of the assignment of professional receivables regime.

The OF Legislation has deeply reformed the French securitisation law and introduced a new category of regulated SPE named *organismes de financement* ("**OF**") which comprises both the existing securitisation vehicles and a new form of vehicles named *organismes de financement spécialisés*.

OF include the following form of vehicles:

- securitisation vehicles (*organismes de titrisation*) ("**OT**"), which can both be set up either as:
  - a fund with no legal personality, a FCT; or
  - a company, a securitisation company (*société de titrisation*) ("**ST**");
- specialised financing vehicles (*organismes de financement spécialisés*) ("**OFS**"), which can both be set up either as:
  - a fund with no legal personality, a specialised financing fund (*fonds de financement spécialisé*) ("**FFS**"); or
  - a specialised financing company (*société de financement spécialisé*) ("**SFS**").




OT and OFS share a common legal regime which is based both on the existing Securitisation Law framework and the new provisions of the Reform. They both benefit from an unrivaled creditor-friendly legal regime.

As a consequence of the French law stringent banking monopoly rules and pursuant to the Financial Code, only (i) French licensed credit institutions (*établissements de crédit*), (ii) finance companies (*sociétés de financement*) or (iii) EU (or EEA) licensed credit institutions "passported" may carry out banking transactions (*opérations de banque*) in France on a habitual basis (*à titre habituel*). French case law stated that the acquisition of non-matured receivables (ie receivables which are not yet due and payable (*créances à terme non échues*)) also constitutes a banking transaction and is therefore subject to the banking monopoly. The Financial Code provides that this prohibition does not apply to OF. Therefore, the Reform has also substantially exempted the OF from the French banking monopoly and allowed direct lending transactions with the same ease and security as the above mentioned market players (but without any regulatory capital requirement).

# Common features of the OT

The OF Legislation offers a flexible and robust framework for French and Pan-European securitisations which has influenced other jurisdictions in Europe (in particular in Luxemburg and Italy) and in Africa (in particular in Morocco):

- **all kinds of originators**: there are no legal limits in the OF Legislation regarding the nature of originators that can be French or foreign banks, insurance companies, businesses, individuals and even governmental bodies;
- **all kinds of credit claims and receivables**: all kinds of existing and/or future credit claims and receivables resulting from loans of any kind, operating or financial leases, commercial contracts of any kind, construction contracts, service contracts, secured or not, governed by French law or not and denominated in Euro or in a foreign currency;
- **all kinds of debtors**: there are no limits in the OF Legislation to the kind of debtors of credit claims or receivables that an OF can acquire;
- **all kinds of debt securities**: debt securities may also be acquired by an OF and such debt securities may be governed by French or foreign laws and denominated in Euro or foreign currency;
- **a simplified way of transfer and the possibility to acquire receivables under foreign law**: OF can acquire receivables under French law by the execution of a simplified transfer deed which makes it easy to obtain a French true sale and/or under any other French or foreign legal means;
- **synthetic securitisations**: OF can act as credit protection buyer under any kind of synthetic securitisation and enter into any kind of derivative instruments governed by FBF, ISDA or such other standard agreements the parties may want to use;
- **bonds, notes, unit or shares**: OF may issue all type of securities, denominated in any currency and governed by any law, privately or publicly placed on any financial market;
- **validity of the investor's consultation provisions**: since the Ordinance, the rules related to the consultation of the investors by the management company as developed by the practice are valid;
- **a bankruptcy remote vehicle and enforceability of limited recourse provisions**: OF are by law bankruptcy remote. Funds allocation rules and waterfalls are valid and enforceable against holders of securities and creditors that have accepted them including in the event of bankruptcy of the OF's counterparty (flip-clauses are valid under the OF Legislation);
- **compartments**: separate compartments within a same OF can be created. Transfers between compartments are allowed;
- **elimination of the commingling risk**: OF Legislation provides for a ring-fencing collection account mechanism which legally isolates collections belonging to the OF and held by the servicer from the risk of insolvency of the latter; and
- **protection against claw-back risk**: the assignment of receivables and the granting of guarantee or security interest to the benefit of the OF shall remain effective even if the transaction is made during the hardening period and notwithstanding any opening of any French or foreign insolvency proceedings opened against the assignor or guarantor after the transaction.

## Assets of the OF

The Financial Code[1] provides that the assets of the OF may comprise:

- receivables of any kind (either governed by French or foreign law);
- liquidities (ie, any proceed resulting from any treasury investment made by the OF);
- guarantees;
- security interests;
- sub-participations in risk or in cash;
- rights arising from loans;
- assets resulting from, *inter alia*, the enforcement of security interests (i) related to assets hold by the OF, or (ii) granted to the OF; and
- assets in relation to the forward financial instruments which the OF has entered into.

In addition, the assets of an OT may comprise:

- securities received by conversion, exchange or repayment of securities giving access to the capital in equity; and
- contracts transferring financial futures or insurance risks.

When an OT acquires future claims to be made by a fronting bank under a loan, the OT can, with the express agreement of the fronting bank and the borrower, make the advance directly to the borrower instead of the fronting bank (the mechanism of delegation of payment or any advance of payment of the purchase price made to the benefit of the fronting banks created by the practice in green field projects and construction loans will no longer be necessary).

Whereas, the assets of OFS may also comprise:

- financial instruments;

1. Article R. 214-218 of the Financial Code.

# Common features of the OT

- any kind of assets free of any security in which property right is based on registration, notarised deed or private agreement if its probative value is recognised under French law (which includes a wide range of assets); and
- contracts transferring financial futures.

## Direct lending and possibility to make an advance directly to a borrower

The OF are, since the Reform, able to lend, to enter into sub-participations (funded or unfunded), to carry out leasing activities or to grant guarantees as a principal activity to industrial and commercial companies, holding companies and natural persons acting in a professional framework. It being specified that this "direct lending" regime could not benefit to financing companies.

Furthermore, it has to be noted that since the Ordinance, when the OT acquires future claims to be made by a fronting bank under a loan, the OT can, with the express agreement of the fronting bank and the borrower, make the advance directly to the borrower instead of the fronting bank (the mechanism of delegation of payment or any advance of payment of the purchase price made to the benefit of the fronting banks created by the practice in particular for green field projects and construction loans is no longer necessary).

## Method of transfer: wide range of possibilities and legal recognition of true sale

OF can acquire receivables under French law or foreign laws. As explained in the paragraph below, the Financial Code provides a specific recognition of the true sale when receivables are acquired by OF through an assignment deed governed by specific provisions of the Financial Code (so-called "*bordereau*"). However, when receivables acquired by the OF are not governed by French law, local law or the documentation from the receivables arise (such as loan agreements for instance) may preclude the assignment of such receivable governed by a law other than such local law or oblige the parties to transfer the receivables under article 1321 to 1326 of the French civil code. This is the reason why the Financial Code expressly provides that OF can acquire receivables under any means of transfer governed by French law or foreign law.

A *bordereau* is a simplified mean of transfer of receivables and credit claims. The OF Legislation expressly provides[2] the recognition of the true sale and the neutralisation of the opening of insolvency proceedings affecting the originator when credit claims or receivables are acquired by an OF through a *bordereau*. Pursuant to the OF Legislation[3]:

- the outright transfer takes effect and becomes enforceable against third parties (including the insolvency officer of the seller) as from the date affixed on the *bordereau* upon its remittance to the OF without further formalities and regardless of the date on which the receivable comes into existence or becomes due, or of the law governing it and/or the country of residence of the obligor;
- the transfer mechanism entails an automatic transfer of the credit claims or receivables together with all security interests (including any real estate mortgages) and all other accessory/ancillary rights and interests related to the assigned receivables, without the requirement of any further formality; and
- the assignment of credit claims or receivables under a *bordereau* will remain fully valid and effective notwithstanding the originator's insolvency on the transfer date or if any insolvency proceedings is opened against the seller after such transfer took place, which includes, as stated by the Financial Code, insolvency proceedings governed by a law other than French law.

When the receivables take the form of debt securities (bonds/notes), their subscription or purchase by the OF (ie, whether on the primary or on the secondary market) must be made in accordance with the subscription or transfer formalities which apply to such instruments.

The enforcement or the granting of security interests granted to the benefit of an OF results in the possibility for such OF to acquire the possession or the property of the assets which are subject to such security interest[4].

## *Dailly* assignment

The *Dailly* assignment is no longer limited to the sole licensed credit institutions. OF are now entitled to benefit from the so-called *Dailly* assignment, a transfer of existing and future receivables/revenues by way of security, which is one of the most efficient security interests in France. OF will benefit from assignment forms (*bordereaux Dailly*) executed after the acquisition of the receivables or will directly benefit from this specific security interests if OF act as initial lender, as credit institutions are entitled to. OF are also able to benefit from the acceptance of the assigned debtor (ie the debtor could not raise against the creditor the means of defense/exception it could have raised against the borrower).Therefore, OF are now able to enter into secured financing as proper financing institutions will do.

2. Article L. 214-169 of the Financial Code.
3. Article L. 214-169 III and V of the Financial Code.
4. Article L. 214-169 III of the Financial Code.

## Financial guarantees

OF[5] can grant or benefit from any type of financial guarantee or security (ie guarantees subject to the provisions of the Financial Code[6] implementing the EC Directive 2002/47/EC of 6 June 2002 on Financial Collateral Arrangements) on their assets. OF can therefore issue secured bonds to the benefit of their investors.

## Borrowing monies from third parties

OF[7] can borrow monies from third parties or may find other sources of funding in accordance with, and subject to, the provisions of their FCT Regulations or by-laws.

## Forward financial instruments

OF[8] can enter into forward financial instruments in accordance with, and subject to the provisions of their regulations or by-laws.

## Repo transactions

OF[9] can enter into repo transactions subject to the following requirements:

- repo transactions are carried out within the limit of assets belonging to the OF;
- the repo counterparty shall be a credit institution, a financing company or an insurance company having its registered office in a State member of the EEA or the OECD or any French or foreign legal person whose undertakings are guaranteed by any of the three former entities; and
- securities eligible are, *inter alia*, treasury bonds and French commercial paper notes.

## Servicing

Servicing of the credit claims or receivables acquired by an OF is generally made by the originator itself (or the entity which was in charge of such servicing for the account of the originator before the transfer of such receivables to the OF), duly appointed to do so by the Management Company (as defined below) of the OF.

Since the Ordinance, the Management Company can be in charge of the servicing of the assets of the OF.

Other entities may also be appointed by the Management Company (upon the occurrence of specific events). If the servicer appointed *ab initio* by the Management Company is not the originator itself or the entity which was in charge of such servicing for the account of the originator, the Financial Code provides that the debtors are to be informed by post. The same would apply if the Management Company substitutes the originator or the entity which is in charge of such servicing for the account of the originator by a new servicer. If debtors do not pay the servicer after having received such notification by post and still pay the originator, they will be liable to pay twice.

## Treasury investment

In accordance with the guidelines developed by the rating agencies, the Financial Code[10] provides that OF may invest their treasury in, *inter alia*, (i) deposits made next to credit institutions which registered office is located in a State which is member of the EEA or the OECD that may be, at any time, repaid to, or withdrawn by the OF, (ii) treasury bonds (*bons du Trésor*), (iii) debt instruments listed on a regulated market located in a State which is member of the EEA (excluding debt instruments giving access, directly or indirectly, to the share capital of a company), (iv) commercial paper notes (*titres de créances négociables*) and (v) units or shares of OF or similar entities governed by foreign law, with the exception of their own units.

## Possibility to create compartments

Both types of OF may have separate compartments. Unless otherwise provided in the OF regulations or by-laws, each compartment is liable for its debts (*n'est tenu de ses dettes*) only to the extent of its assets (*qu'à concurrence de son actif*). Since the Ordinance, it is possible to transfer assets from one compartment to another.

## Bankruptcy remoteness

### OF are not subject to insolvency proceedings by operation of law

The provisions of Book VI of the French Commercial Code (which govern insolvency proceedings in France) are not applicable to OF[11]. In other words, OF are by law bankruptcy remote which gives the highest level of comfort that investors could obtain.

5. Articles L. 214-169 and R. 214-222 of the Financial Code.
6. Articles L. 211-36 et *seq.* of the Financial Code.
7. Article R. 214-223 of the Financial Code.
8. Article R. 214-224 of the Financial Code.
9. Article R. 214-225 of the Financial Code.
10. Article D. 214-232-4 of the Financial Code.
11. Article L. 214-175-III of the Financial Code.

# Common features of the OT

## Validity of funds allocation rules, waterfall and limited recourse provisions

The OF Legislation[12] provides that the contractual payment allocation rules and creditor rights subordination (ie waterfall) are valid and enforceable against holders of securities issued by an OF and creditors of such OF having accepted them (including in the event of bankruptcy of the OF's counterparty (*flip-clauses* are valid under French law)). The Financial Code further provides that payment allocations are valid and enforceable even in the event of the liquidation of the OF[13].

The Financial Code also provides the legal validity of the provisions limiting creditors' recourse to the assets of the OF[14].

## Protection against civil proceedings (*mesures civiles d'exécution*)

The assets of an OF may only be subject to civil proceedings (*mesures civiles d'exécution*) to the extent of the applicable priority of payments and the fund allocation rules as set out in its FCT Regulations or by-laws[15]. A challenging creditor could not "undo" such allocation rules or to obtain access to assets which are not allocated to it under the FCT Regulations or by-laws.

## Claw back risk, alignment with the collateral directive regime

The OF Legislation provides that the effects of a transfer to an OF are to be maintained further to the opening of insolvency proceedings against the originator. In particular, the Financial Code provides that (i) the assignment of receivables to an OF will remain fully valid and effective notwithstanding the originator's insolvency (including insolvency proceedings governed by a law other than French law) and (ii) when the receivable transferred to the OF arises from a lease agreement, the opening of insolvency proceedings (including insolvency proceedings governed by a law other than French law) against the lessor shall not affect the performance of such lease[16].

## Rent receivables and leasing

Neither the opening of any French insolvency proceedings (nor its equivalent in a foreign law) against the tenant or the lessor, nor the assignment or the transfer of movables or real property (objects of the contract) in the context of the said insolvency proceedings or on its completion, can challenge the continuation of the lease and the leasing. Thus, the tenant will continue to pay the OF even though the identity of the owner or the lessor has changed.

## Full protection against the insolvency of the servicer

The Management Company and, if different, the servicer, may agree to open a "specially dedicated account" (*compte d'affectation spécial* or "**CAS**") or to convert an existing account into a CAS to collect all amounts due by the assigned debtors. CAS are opened in the name of the servicer but to the sole benefit of the OF which benefits from a specific legal protection in case of insolvency proceedings against the servicer. The conversion is made by the execution of a specific agreement to be entered into between the servicer, the management company and the account bank. Pursuant to the OF Legislation[17], the creditors of the servicer are not entitled to claim payment over the sums credited to the specially dedicated account, even if the servicer becomes subject to French insolvency proceedings or any equivalent proceeding governed by any foreign law.

12. Article L. 214-169-II of the Financial Code.
13. Article L. 214-169-II of the Financial Code.
14. Article L. 214-169-I of the Financial Code.
15. Article L. 214-169-II of the Financial Code.
16. Article L. 214-169 V, 4° and L. 214-169 VI of the Financial Code.
17. Article L. 214-173 of the Financial Code.

# Specific features

## FCT and FFS

### Set-up of a FCT and FFS

FCT and FFS do not have separate legal personality and are not companies. FCT and FFS have no shareholders, no share capital, no board of directors, no employees and are not owned by any entity. FCT and FFS are co-ownerships (*copropriétés*).

A FCT or an FFS is only established by the issue of at least two units of €150 each[18]. Payments of any sums due by the FCT or the FFS under the units are subordinated to the payment of any other sums by the FCT or the FFS to noteholders, sums due under any facility agreements entered into by the FCT or the FFS and sums due under any financial instruments entered into by the FCT or the FFS[19].

### Management Company, Custodian and sponsor

Before the Ordinance, FCTs were jointly created by a *société de gestion* (a "**Management Company**") and a *dépositaire* (a "**Custodian**") acting together without any need to obtain regulatory authorisation or registration. As a consequence of the Ordinance and as from 1 January 2020[20], FCT and FFS will be set-up on the sole initiative of the asset management company or a sponsor within the meaning of CRD which will transfer the management of the portfolio to a portfolio management company. Custodians will no longer be co-founders of the FCT and FFS (and cease to bear liability in this respect). Custodian will be solely designated by the Fund.

Management Companies and Custodians are regulated entities. Management Companies are licensed by the French *Autorité des Marchés Financiers* as portfolio management companies and Custodians are credit institutions licensed in France or in an EEA Member State with a branch in France, or institutions (French or with a branch in France) selected from a list established by the Ministry of Finance. No such list exists on the date of this publication. If they do not comply with their duties, they can be subject to disciplinary sanctions (fines, withdraw of the licences).

The Management Company manages the FCT and the FFS and takes all strategic decisions in accordance with their Regulations (as defined below). The Management Company shall represent the FCT and the FFS against third parties, in particular in legal actions or proceedings (both as plaintiff or defendant). Under the control of the Custodian, it shall take all measures it considers necessary for the defence of the rights of the FCT and the FFS and its unitholders and noteholders. The Management Company shall, in all circumstances, act in the best interest of the unitholders and noteholders.

The Custodian holds the assets of the FCT and the FFS (mainly receivables and cash) in custody. It holds the contractual documents relating to the receivables acquired by the FCT and the FFS (and related ancillary rights) and monitors that the Management Company operates in accordance with the Regulations and applicable laws. The Custodian may delegate to entities in charge of the servicing, by entering into an agreement with such entity and the Management Company, the custody of the receivables acquired by the FCT and the FFS and ancillary rights attached thereto (the documents evidencing the receivables and ancillary rights, such as contracts, invoices, security agreements, etc.)[21]. An auditor and other entities may also be involved (cash manager, paying agent, investment advisor).

However, since the Ordinance, to avoid conflicts of interests, the Custodian cannot be the sponsor or the management company. Besides he cannot exercise any activities concerning the FCT unless the Custodian has separated "the execution of its mission on a functional and hierarchical level" which include that originators, which generally act as servicers of the FCT or the FFS may no longer be able to assume the role of Custodian.

### Regulations of the FCT and FFS

FCT and FFS are governed by statutory provisions set out in the Financial Code and their constitutive documents called "fund regulations" (the "**Regulations**") entered into between the Management Company and, as the case may be, a sponsor. The Regulations which may be drafted in any language is the key document in relation to a FCT or a FFS. The Regulations have comparable functions to articles of association for a company. Unlike the articles of association of a company, the Regulations do not need to be registered with any French authority or regulator and therefore remain confidential.

18. Article R. 214-234-1 of the Financial Code.
19. Article R. 214-235 of the Financial Code.
20. That specific aspect of the Ordinance regarding the Custodian was to come into effect on 1 January 2019, however the French law named "Loi PACTE" which has been adopted on 11 April 2019 by the French parliament shall postpone to 1 January 2020 the entry into force of the Ordinance on this specific aspect. Some members of parliament have referred the Pacte law before the French Constitutional Court which shall give a ruling on the law. To eliminate the uncertainty on the applicability or not of the Ordinance in 2019, the French Autorité des Marchés Financiers has confirmed that this aspect of the Ordinance shall only enter into force on 1 January 2020.
21. Article D. 214-229 of the Financial Code.

# Specific features

The Regulations constitute the FCT and the FFS and set out the purpose of the FCT and the FFS. The Regulations shall provide, *inter alia*[22]:

- the purpose of the FCT and the FFS;
- the description of the risks to which the FCT and the FFS shall be exposed to;
- the funding strategy of the FCT and the FFS;
- the operating periods;
- the guarantees granted to and/or by the FCT and the FFS (if any);
- the possibility (or not) for the FCT and the FFS to borrow monies from a third party and other sources of funding;
- the possibility (or not) for the FCT and the FFS to enter into swap and derivatives contracts;
- the possibility (or not) for the FCT and the FFS to grant loans, guarantees or security interests;
- the possibility (or not) for the FCT and the FFS to enter into insurance contracts or risk or cash sub-participation agreements;
- the possibility (or not) for the FCT and the FFS to enter into repurchase agreements (repo); and
- the possibility (or not) for the FCT and the FFS to have an active asset management.

The Regulations also set out (i) the fund allocation rules and the priorities of payments, (ii) the roles of the Management Company and the Custodian and (iii) how the FCT or the FFS is funded by the issue of debt instruments and the nature and term and conditions of those securities. The Regulations are tailor-made for each transaction and can be freely negotiated. In practice, Regulations are more and more standardised.

### Tax regime

There are no registration tax, stamp duty, documentary tax or similar tax or duty payable in France in connection with (i) the transfer of receivables by a seller to a FCT or FFS, (ii) the establishment of a FCT and/or FFS or (iii) the subscription by the investors and the issue of units and/or other type of securities by a FCT and/or FFS.

FCT and FFS are not liable for value added tax in France.

Profits and gains realised by a FCT or FFS within their legal object are exempt from any corporate income tax according to Article 208-3 *octies* of the French *Code général des impôts*[23].

FCT and FFS cannot be considered as tax resident in France. As a result, FCT and FFS may not be entitled to benefit from provisions of some double tax treaties (aiming at avoiding or reducing withholding taxes or other taxes) to which France is a party, which may be a drawback in international securitisations. However, the fact that they fall into the category of the AIFs may allow them to benefit from some of these double tax treaties. It may also be possible to look through the FCT or FFS to benefit to some of these treaties.

## ST and SFS: a vehicle rarely used

Unlike the FCT and FFS, the ST and SFS have a legal corporate personality and take the form of either a *société anonyme* ("**SA**") or a *société par actions simplifiée* ("**SAS**"). SAs and SASs are limited liability companies. A SA must be constituted with a minimum of two shareholders (and seven is the SA is used to make a public offer) while a SAS only requires one shareholder. SA must have a share capital of at least €37,000 whereas there is no minimum for the SAS.

ST and SFS take the form of SAs when it is intended that securities issued by such SA be subject to a public offer (by opposition to a private placement) since SASs are prohibited to do so under the French commercial code (the "**Commercial Code**")[24].

ST and SFS are subject to the provisions of French general company law set out in the Commercial Code but the OF Legislation provides for some derogations. For instance, no *quorum* is required for the purpose of shareholders' general meetings[25] and a ST or a SFS can issue bonds within the first two years of its establishment without the need for a verification of its assets and liabilities.

ST and SFS remain rare in practice[26] (only three ST have been set-up since 2008). In addition to the burdensome of the constitution of a company in comparison to those of an FCT or an FFS, the legislation requires some adjustments for ST and SFS that are still waited by practitioners.

22. Article R. 214-217 of the Financial Code.
23. As interpreted by the French tax authorities in their official guidelines issued under reference BOI-RPPM-RCM-40-40-20160711, dated 11 July 2016, no. 20.
24. Article L.227-2 of the Commercial Code.
25. Article L. 214-179 of the Financial Code.
26. Only three ST have been set up since 2008.

# Differences between the OT and the OFS

## AIFM regime

OT fall under the generic definition of collective investments (*placements collectifs*). They are qualified under the Financial Code as Alternative Investments Funds (AIF or FIA), ie funds governed by the EC Directive 2011/61/EU on Alternative Fund Managers as implemented in France (the "**AIFM Regime**"). The AIFM Directive provides that it shall not apply to "securitisation special purpose vehicles" unless if they have been structured in such a way so as to circumvent the application of the AIFM Regime. Besides, *fonds de prêts à l'économie* (FPEs), OT structured as ABCP conduit and OT which represent one or more securitisations as defined in the Capital Requirement Regulation[27] shall not be subject to the provisions of the AIFM Directive[28]. However, AIFM Regime shall apply to OT in the event where strict conditions provided by Decree n° 2014-1366 of 14 November 2014[29] are met. Pursuant to such Decree, an OT shall be subject to the AIFM Regime if:

- it is exposed to risks resulting from securities or other assets which do not constitute an exposure to a credit or an insurance risk in a proportion higher than 50% of its assets[30]; and
- such risks are managed on a discretionary basis by the management company or take the form of financial agreements entered into, managed and terminated on a discretionary basis by such management company, it being specified that there is no active management if the management is (i) made in accordance with strict conditions and selection criteria set out in the by-laws or regulations of the OT or made following a "change of circumstances" and (ii) if such management is not driven by the willing to make a capital gain.

OFSs, on the other hand, fall, by nature, within the scope of the AIFM Regime and are subject to specific provisions.

## Purpose and eligible liabilities

OT and OFS differ in their object. The purpose of:

- an OT is to (i) be exposed to risks, including insurance risks and (ii) ensure full funding or coverage under the conditions provided under the law; and
- an OFS is to (i) directly or indirectly invest in eligible assets as those in which professional specialised funds can invest and (ii) ensure the full financing or hedging of the above exposure under the conditions provided by law.

The financing or coverage of an OT is made through the issuance of debt securities, the entering into of derivatives, sub-participation in risk or cash, or external facilities or other forms of resources, debts or commitments. Whereas, the financing or coverage of a OFS is made through the issuance of shares, stocks, securities, conclusion of financial futures (derivatives), borrowing facilities or any form of resources, debts or commitments

## Use of tranching

Tranching is possible with an OT whereas it is not for an OFS. Therefore, an OT only can issue different categories of securities which gives rise to tranching and/or subordination.

## Buying out

The holders of securities issued by an OFS can request the buying out of their securities whereas, in an OT, such buying out option remains not possible[31].

## Location of the Management Company

An OT must be managed by a French Management Company duly licensed by the French *Autorité des Marchés Financiers* as portfolio management company whereas an OFS could be managed by a non-French Management Company if such Management Company is established within the European Union and is duly licensed by the local relevant authorities to manage alternative investment funds.

## Benefit of the ELTIF regime

As a difference with an OT, an OFS can benefit from the "European Long Term Investment Fund" label provided pursuant to the terms of Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (the "**ELTIF Regulation**"), which implies that they have the

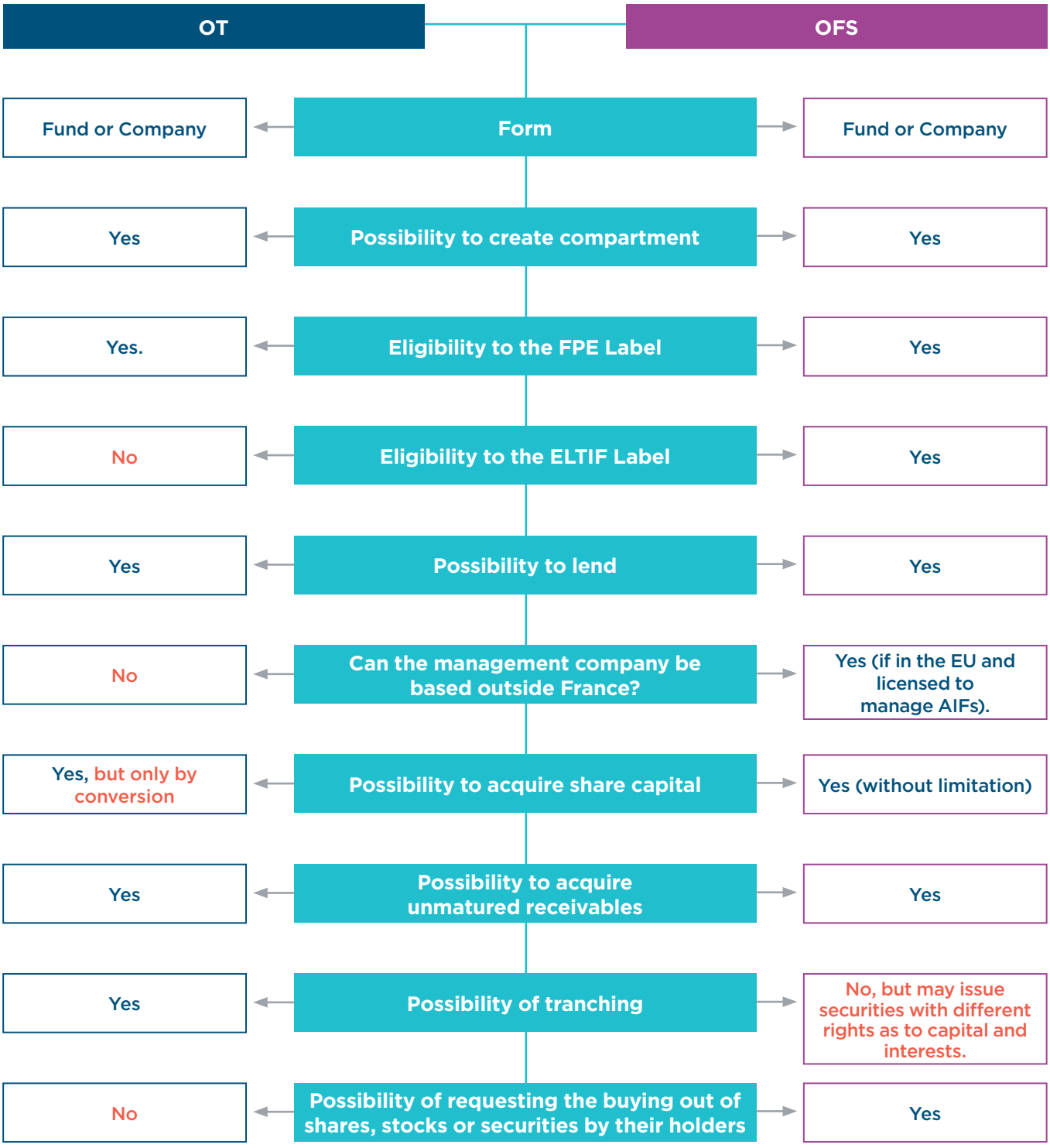
27. CRD regulations n°575/2013 of 26 June 2013.
28. Article D. 214-232-1 of the Financial Code.
29. Decree "*anti-contournement*" as implemented at article D.214-216-1 of the Financial Code and transferred to article D. 214-232 of the Financial Code under Decree n° 2018-1008 of 19 November 2018.
30. To calculate this 50% threshold, all exposures shall be taken into account excluding however (i) authorised deposits or certificates of deposit made with or issued by credit institutions established in any EEA or OECD member state that can be reimbursed or withdrawn at any time, (ii) temporary holding of debt securities in accordance with, in particular, repurchase or securities lending transactions or equivalent and (iii) financial instruments entered into to hedge the risks to which the OT is exposed to or expose the OT to insurance or credit risk.
31. There is still a doubt for OT due to the clumsy drafting and contradiction between several articles of the OF Legislation

# Differences between the ot and the OFS

possibility to grant loans to eligible non-financial companies in the meaning of the ELTIF Regulation when the OFS is duly authorised to act as ELTIF fund.

The ELTIF label would entitle French OFS to, in accordance with EU legislation, provide loans to borrowers located in EU jurisdictions including in jurisdictions equivalent to France which prevent entities that are not credit institutions to lend to and/or purchase unmatured receivables from professionals located in these jurisdictions. In the event where a duly authorised OFS will grant loans according to ELTIF Regulation, such loans shall be granted under the conditions set out for the specialised professional funds.

# Comparison table between OT and OFS



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