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Identifying a system-neutral meaning of a title transfer financial collateral arrangement in the Financial Collateral Directive

Dr Obiora Ezike

Abstract
EU directives adopt a functional method. This implies that they are drafted on the assumptions that implementing laws are functionally equivalent and, crucially, that the concepts they contain are system-neutral without doctrinal commitment. This article primarily tests these assumptions by exploring the definition of a title transfer financial collateral arrangements (TTFCA) in the Financial Collateral Directive. It is argued that the Directive offers a stable meaning of a TTFCA which can be identified in most systems, although in some cases there are slight conceptual tensions which require a more contextual, rather than a functional, perspective.

1.1 The functional method and Collateral Directive

EU directives adopt a functional approach. First, they define legal institutions in a purposive, result-oriented way. Secondly, they operate on the assumption that implementing laws in Member States are functionally equivalent.[1] Thirdly, concepts in directives are formulated with the assumption that they are 'system-neutral (or not doctrinal).[2]

The legal structure of the EU makes it necessary to define legal institutions in a system-neutral way, since the various Member States have different doctrinal structures. As such, to define a legal institution in a doctrinal or contextual way may potentially remove it from some domestic legislative framework of some systems.

However, to test this assumption, this article will explore the meaning of a TTFCA in the Collateral Directive,[3] to identify if a stable meaning can be found that can then be used to

[1] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 377.
[2] ibid. Although Michaels does not use the word 'system-neutral', he argues that directives are not doctrinal.
[3] Council Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements [2002] OJ L168/43 (the 'Collateral Directive'). This has been amended by: a) Directive 2009/44/ EC amending Directive 98/26/EC on Settlement Finality in payment in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims [2009] OJ L146/37); and b) Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

identify functionally equivalent institutions in some systems. We will consider the Dutch, Scots and English legal systems.[4] Brief references will be made to German and Belgian law.

Although the UK has pulled out of the EU, the comparison with UK law remains relevant. First, the European Commission recently opened a consultation for the review of the Collateral Directive.[5] Therefore, some of the issues highlighted in this article in relation to the definition of TTFCA may be of relevance in the review process. Secondly, the issues raised here generally affect approaches to EU law harmonisations and therefore may be relevant to EU law integration going forward. Thirdly, the UNIDROIT Convention on Intermediated Securities explicitly adopts a system-neutral approach.[6] Crucially, the Convention also defines a TTFCA in a very similar way to the definition in the Collateral Directive.[7] Essentially, the approach adopted in the Convention, and some of its objectives, align with the objective of the Collateral Directive. Therefore the issues highlighted in the articles relating to the meaning of a TTFCA, may be of relevance at both the level of the Convention and EU law integration agenda.

1.2 The Collateral Directive: the use of ownership as a security device

Over the past decade the use of financial collateral to support cross-border payment and securities transactions has expanded.[8] This remains the trend as government debt, which is primarily issued in the form of treasury bills and bonds, continues to increase.[9] One of the features that make these instruments appealing to investors is their liquidity and the ability to use them as collateral. The use of these instruments as collateral is made possible under the various domestic laws of EU Member States which decide how proprietary interests can be taken over them.

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[4] Julie Dickson, 'Directives in EU Legal Systems: Whose Norms Are They Anyway' (2011) 17 European Law Journal 190, 192, see footnote 11. I adopt Dickson's view that the UK has more than one legal system, i.e English, Scots and Welsh. This is especially true for property law which is substantially different between English and Scots law. Scots property law is primarily Civil law based.

[5] 'Targeted Consultation on the review of the Directive on financial collateral arrangements'<https://ec.europa.eu/info/consultations/finance-2021-financial-collateral-review_en> accessed 10 March 2021.

[6] UNIDROIT, Guide on Intermediated Securities, p. xxiv.

[7] See Art 31 (3) c, UNIDROIT Convention on Intermediated Securities which defines a TTFCA as 'an agreement, including an agreement providing for the sale and repurchase of securities, between a collateral provider and a collateral taker providing (in whatever terms) for the transfer of full ownership of intermediated securities by the collateral provider to the collateral taker for the purpose of securing or otherwise covering the performance of relevant obligations'.

[8] Geoffrey Yeowart and others, *Yeowart and Parsons on the Law of Financial Collateral* (Edward Elgar Publishing Limited 2016) para 1.31.

[9] ibid 1.04-6.

Within the EU, the most favoured means of taking collateral was through the pledge.[10] Parties using a pledge had to comply with certain onerous conditions,[11] such as publicity requirements and other legal requirements which curtailed the power of secured creditors to use the assets or realise them in the event of default.[12] These restrictions, especially the publicity and/or registration requirements, make the pledge less attractive to financial market participants who may rather opt for an outright transfer of title from the collateral provider to the collateral taker. This is because the publicity requirement in a transfer of title is often less onerous.[13]

In a title transfer what was needed was for the collateral provider to transfer ownership or entitlement in the collateral to the secured creditor for the purpose of securing the debt.[14] Because ownership is transferred outright, rather than a limited real right or security interest, the secured creditor is excused from the publicity requirements.[15] As owner, the creditor can also freely deal with the collateral. This collateral arrangement therefore offered flexibility to market participants, especially by allowing custodians or investment banks to use their clients'

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[10] European Financial Markets Lawyers Group (EFMLG), 'Proposal for an EU Directive on Collateralisation' (June, 2000), 7 <http://www.efmlg.org/Docs/Documents/2000%20June%20EFMLG%20Proposal%20for%20an%20EU%20Directive%20on%20Collateralisation.pdf> accessed 20 March 2016 (EFMLG, 'Proposal). 'Pledge', within this context, does not refer to English law pledge which is a possessory security. Rather, this refers to security devices in Member States, such as Dutch and German laws, through which a limited real right is created in a moveable property. It is therefore not analogous to the pledge under both English and Scots law which are possessory securities.

[11] However, see Louise Gullifer, 'What Should We Do About Financial Collateral' (2012) 65 CLR 377,who notes that the requirements may be important to collateral takers and other third parties. For example, the publicity requirement allows other creditors to make necessary adjustments by ascertaining the security rights granted by other counterparties in relation to the collateral. Similarly, the restriction on the right of use (for a security interest) ensures the collateral provider is not exposed to the credit risk of the collateral taker.

[12] A publicity requirement is imposed to bring property rights to the notice of third parties. There are different types of publicity requirements, such as registration (under the Companies Act 2006, part 25) possession or control, although it is arguable if 'control' is a publicity requirement.

[13] EFMLG, 'Proposal, 7-10.

[14] Yeowart and others (n 9) para 6.06-6.08.

[15] In Scots law the only way in which a security device can be created over financial collateral is a *fiducia cum creditore*. Such transfers must comply with the publicity rules under the UK Companies Act 2006, part 25. A proposal has been made for a limited security. See Scottish Law Commission, *Report on Movable Transactions* (Scots law Comm No 249, 2017), vols 1-3. The position under both English law and German law may be different. Under English law, an outright transfer does not attract the publicity rules. Similarly, German law recognises a transfer of ownership for a security purpose over movables. This arrangement is not registerable and is thus 'secret'. Andreas Rahmatian, 'A Comparison of German Movable Property Law and English Personal Property Law' (2008) 3 Journal of Comparative Law 197, 238; Sjef van Erp and Jan Smits, 'Personal and Real Security', *Elgar Encyclopaedia of Comparative Law* (2nd edn, Edward Elgar Publishing Limited 2012) 652; Joanna Benjamin, *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (Oxford University Press 2000) para 6.03. (See Benjamin's text for the position in English law).

collateral in executing further transactions to generate income. However, the arrangement was not without its problems.

Other than under English law and Scots law,[16] a transfer of ownership for the purpose of temporarily securing a debt stood the chance of being recharacterised as a 'disguised pledge'. The effect was that the transaction was either treated as void [17] or that parties were made to comply with publicity requirements.[18] In systems where these effects were reached, the analysis of proprietary arrangement may start from the economic purpose of a transaction: that is, that anything entered for a security purpose is a security arrangement and should therefore be subject to the rules governing security devices. This is an example of the so-called risk 'recharacterisation'[19] which arose in some Member States wherein the transfer of ownership to secure a financial obligation was not recognised but was instead struck down.[20]

The Collateral Directive was therefore enacted primarily to stop Member States from recharacterising a TTFCA, that is, to legitimise the arrangement [21] and to disapply

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[16] Yeowart and others (n 9) 146. The risk of recharacterising a title transfer as a 'disguised pledge' does not arise in Scots law where the collateral are incorporeals.

[17] Thomas Keijser, *Financial Collateral Arrangements: The European Collateral Directive Considered from a Property and Insolvency Law Perspective* (Kluwer 2006) 124. This is seen, for example, under Dutch law where Article 3:84(3) of the Dutch Civil Code abolishes the fiduciary transfer of title for the purpose of security.

[18] European Financial Markets Lawyers Group (EFMLG), 'Statement on a Proposal for a Directive on Financial Collateral (Com (2001) 168)' (2001), 10 <http://www.efmlg.org/Docs/Documents/EFMLG%20Statement%20on%20a%20Proposal%20for%20a%20Directive%20on%20Financial%20Collateral%20Arrangements%20(COM(2001)%20168).pdf> accessed 15 August, 2016.

[19] Recharacterisation is where a transaction is reformulated in a way that is different from how it was presented by the parties. Alan Berg, 'Recharacterisation' (2001) 8 JIBFL 346. It is a 'process of rejecting attempts to evade the regulatory goals of a given form, such as judicially deeming certain contracts for sale of an [an asset] as mortgages'. Nestor Davidson, 'Standardisation and Pluralism in Property Law' (2008) 61 Vanderbilt L.R 1598, 164. The driver of recharacterisation may either be the court, as is often the case under English law, or may be legislation, for example under the Uniform Commercial Code of the United States. The driver of (re)characterisation will be dependent on the extent to which legislation provides clear rules on property law. For example, under English law, there is no unified rule defining what a security interest is. The meaning is often dependent on 'judicial discretion' guided by previous cases. For this reason, it has been noted that what amounts to a security interest under English law is often 'blurr[y]' and difficult to pinpoint. See Gerard McCormack, *Registration of Company Charges* (3rd edn, Jordan Publishing Limited 2009) 13. The courts therefore play a major role in matters of (re)characterisation, especially devices which functionally perform a security purpose (i.e. retention of title clauses). However, it does not mean that legislation plays no part at all under English law. Legislation, such as the UK Companies Act,2006 provides for consequences where a proprietary device does not conform to form.

[20] The UNIDROIT Convention on Intermediated Securities also recognises that recharacterisation is a global risk dealing with transfers of collateral for a security purpose. See Art 32 of the Convention which provides that TTFCA shall be recognised the way they are. This is to prevent any risk of recharacterised.

[21] George Gretton, 'Financial Collateral and the Fundamentals of Secured Transactions' (2006) 10 Edin LR 209, 211. Gretton argues that a better name for the Directive may be the 'Repo Protection Directive'. A repo, or repurchase agreement, is an example of a TTFCA. Gretton argues that the Directive was

restrictions which applied to it.[22] Importantly, this core objective is dependent on the concept of a TTFCA which is defined in Article 2 of the Directive as:

> [A]n arrangement, including a repurchase agreement, under which a collateral provider transfers full ownership of, or full entitlement to, financial collateral for the purpose of securing or otherwise covering the performance of relevant financial obligations.

Although this definition is presumed to be system-neutral, as highlighted below, in some cases there may be tensions identifying equivalent institutions in Member States which may fall within the scope of the definition.

1.3 System-neutrality: Identifying the conditions of applicability for a TTFCA

It is instructive to note that the Collateral Directive is structured in a way that contrasts a TTFCA from another security arrangement, i.e. a security financial collateral arrangement (SFCA). A classic example of an SFCA is a security right, such as a pledge or charge. However, both a TTFCA and an SFCA are entered into for the purpose of providing collateral for a debt; and therefore, this raises the question of the relationship between a transfer (TTFCA) and a security (SFCA) in the context of the Directive.

A distinction may be drawn between a 'proper security' and an 'improper security'.[23] Both devices refer to arrangements which the law recognises as performing a security function. A proper security is an arrangement such as a pledge in Civil law systems or a possessory pledge in English law, which creates a limited real right. On the other hand, an improper security refers to an arrangement, in many Civil law systems, under which ownership is used as security device to secure a debt.[24] This ordinarily should include a *fiducia cum creditore*. Importantly, the idea of an improper security, as will further be argued below, explains why a TTFCA may be seen as a security arrangement in the Directive.

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enacted to apply a uniform rule in the European repo market by requiring Member States to recognise the terms of repos, instead of striking them down.

[22] Some of the restrictions relate to publicity, some insolvency provisions, the prohibition against enforcement through appropriation, etc.

[23] These terms are borrowed from the Scottish Law Commission *Discussion Paper on Movable Transactions,* 43. Smith points out that the terms are a 'wonderful pair of terms' unique to Scots law. Lionel Smith, 'Powership and Its Objects' in Andrew Steven, Ross Anderson and John MacLeod (eds), *Nothing So Practical as a Good Theory: Festschrift For George Gretton* (Avizandum Publishing Ltd 2017) 227.

[24] For a brief history of a *fiducia cum creditore* as a security device, see: Ivan Mangatchev, 'Fiducia Cum Creditore Contracta in EU Law' (2009) 1–19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474199> accessed 13 September 2017; Donald Phillipson, 'Development of the Roman Law of Debt Security' (1968) 20 Stanford LR 1230, 1234.

Many legal systems treat a *fiducia cum creditore* differently from a simple transfer not made for a security purpose. In Netherlands, a *fiducia cum creditore* is completely prohibited.[25] In Belgium, it is a valid transfer but does not have any third-party effects.[26] German law treats it like other transfers but subject to restrictions — for example, during insolvency, the arrangement is treated as a pledge, with the effect that the assets are still within the transferor's patrimony.[27] Scots law, as further discussed below, recognises it as a valid transfer, although it is subject to the publicity requirement under Part 25, Companies Act 2006 as a charge.[28]

Given the distinction between proper and improper securities, it might seem obvious that the distinction in the Directive between a security arrangement and a TTFCA indeed mirrors this distinction in many Civil law systems between a *fiducia cum creditore* and a pledge.[29] Essentially, the nature of an *fiducia cum creditore*, i.e. as a transfer of ownership for a security purpose, draws it closer to a TTFCA in the Directive.

Keijser disagrees. He argues that a TTFCA is not a *fiducia cum creditore* because the collateral taker in a *fiducia cum creditore* does not have the right to use the collateral and generally has a duty of good care in relation to the collateral. He further notes that the overall keyword to characterise the relationship between the collateral taker and collateral provider is 'fiduciary' meaning, among other things, that the relationship is one of 'trust' and 'confidence'. This implies the secured party's rights in the assets can only be exercised in line with strict procedures: For example, the secured party must ensure any possible surplus value upon enforcement is paid to the collateral provider.[30]He contends that a TTFCA in the Directive is instead an outright transfer of collateral which confers a right of use on a collateral taker.

It is important to note that Keijser's views are based on Dutch law which historically has taken a mixed approach to the *fiducia cum creditore*. Under Dutch law before 1992, a *fiducia cum creditore* was recognised as a transfer. However, subsequent changes brought about by judicial decisions,[31] under pre-1992 Dutch law, limited the rights of the collateral

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[25] Article 3.84(3) of the Dutch Civil Code.

[26] *Vanden Avenne-Ooigem v Landbouwkrediet, Flemmish Community, Insolvency Administrator of RB* [2010] Nieuw Jurid Weekbl 834, 834; see also Sjef van Erp and Bram Akkermans (eds), *Cases, Materials and Text on Property Law* (Hart Publishing 2012) 510.

[27] On the restrictions in German law, see Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia 2008) 186–190; see also Erp and Akkermans (n 27) 518.

[28] This is not a tidy categorisation as there is a clear conceptual difference between a charge and a *fiducia cum creditore*, as discussed below.

[29] Gretton, 'Financial Collateral' (n 22) 213–214.

[30] Thomas Keijser, 'Transactions in Securities' in Roy Goode, Herbert Kronke and Ewan McKendrick (eds), *Transnational commercial law : text, cases, and materials* (2nd edn, OUP 2015) 440.

[31] On the Dutch law and the limitations placed by the Dutch Supreme Court (*Hoge Raad*), see: Keijser (n 18) 117–119; see also the useful discussion in Akkermans (n 28) 263–269.

taker and functionally converted it into a proper security by applying, by analogy, the rules applicable to a pledge to such devices. First, the assets which were transferred automatically fell back into the assets of the collateral provider upon the discharge of the secured transaction. Secondly, the fiduciary also had a limited right of disposal because he could not, for example, transfer full title to a third party. Furthermore, pre-1992 Dutch law extended the pledge rules which applied to limited real rights in the event of default to the *fiducia cum creditore*. This meant that where the collateral taker sold the collateral in the event of default, any surplus would be returned to the collateral provider based on mandatory pledge rules. Furthermore, the rights of the collateral taker were not always enforceable against other creditors, especially where the collateral was transferred by constructive possession (*constitutum possessorium*). These limitations were extended under Dutch law to the *fiducia cum creditore* to bring it closer to proper securities. However, in 1992, the *fiducia cum creditore* was completely prohibited under Dutch law. This prohibition, as Keijser notes, was based on the ground *inter alia* that the transaction was a secured transaction and distorted the balance which is fundamental to such transactions: the transaction transferred ownership and therefore had the potential to give the creditor more benefits at the expense of the debtor.

The pre-1992 Dutch law approach to the *fiducia cum creditore* therefore forms the background to Keijser's views who argues that a TTFCA under the Directive is not a *fiducia cum creditore*. According to Keijser, a TTFCA under the Directive performs two functions tradability and recoverability. [32] While a *fiducia cum creditore* performed the latter function of recoverability, it did not perform a tradability function because the collateral taker, under the limitations in the pre-1992 Dutch law, had a limited right of disposal.[33] Keijser therefore observes that based on the pre-1992 Dutch law limitations, a fiduciary transfer could not qualify as a TTFCA because it was functionally seen as a security interest which had limitations unlike a TTFCA which transferred ownership unconditionally. Keijser adds that if a *fiducia cum creditore* was to be recognised as a TTFCA in accordance with its terms, as provided by the

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[32]Recovery function means that the financial collateral is used by the collateral taker to safeguard against the collateral provider's default. Primarily, TTFCAs are used for 'recourse' reasons. On the other hand, the tradability function primarily refers to the right of the collateral taker to use the collateral. In legal terms, the right refers generally to the unlimited right of the collateral taker to dispose of the collateral or create a further security right for his own benefit in the collateral. See Keijser (n 18) 16–9; Philip Wood, *Comparative Law of Security Interest and Title Finance* (2nd edn, Sweet & Maxwell Ltd 2007) 673–5, 684; Benjamin (n 16) para 6.10-13; Edward Murray, 'Financial Collateral and the Financial Markets' in Frederique Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions* (Edward Elgar 2015) 158,163. Erica Johansson, 'Reuse of Financial Collateral Revisited' in Louise Gullifer and Jennifer Payne (eds), *Intermediated Securities: Legal Problems and Practical Issues* (Hart Publishing 2010) 153.

[33] Keijser (n 18) 94.

Directive, this means the arrangement favours collateral takers who are in a stronger position, as earlier noted.

In essence, Keijser's argument is that a TTFCA, as understood in the Directive, i should notbe a *fiducia cum creditore*. Instead, it should be seen simply as an outright transfer of ownership. Keijser therefore sees a clear distinction between a TTFCA and an improper security (*fiducia cum creditore*) because of the restrictions in the old Dutch law. There is therefore, as his view will suggest, a clear conceptual difference which makes it unnecessary to have the provisions of the Directive on recharacterisation of TTFCA. In other words, the provisions of the Directive on a TTFCA provides a situation where a *fiducia cum creditore* is not needed.

In considering both Keijser's views and the alternative views below by Gretton and under English law, it is important to note that there is no dispute as to what counts as a TTFCA. Keijser, as well as Gretton below, all seem to agree that a TTFCA in the Directive a) transfers ownership and b) for a security purpose. This mirrors the position under English law. However, the dispute arises in relation to the scope of a *fiducia cum creditore* and whether it is a TTFCA.

Keijser's conclusion can be argued to be too narrow since his focus is Dutch law. Thus, because there was no tradability function in a *fiducia cum creditore*, Keijser takes the view that such an arrangement is not a TTFCA in the Directive. Apparently, this conclusion is premised on peculiarities under the pre-1992 Dutch law, as well as on the ground that disapplying the fiduciary features in a *fiducia cum creditore* may put the collateral provider in a vulnerable situation.[34] Therefore, any conclusions based on that can only have a narrow application to Dutch law. It offers little guidance in determining whether a *fiducia cum creditore* is a TTFCA at the wider European level. As will be seen below, some legal systems, such as English and Scots law, essentially adopt a broader approach to this issue. For this reason, the provisions of the Directive on the TTFCA is primarily aimed at such systems, though it will further be contended below that the Directive indeed applies to Dutch law regardless of its narrow approach to a *fiducia cum creditore*.

As mentioned, English law is an example of a system which takes a broader approach. Goode and Gullifer note that a transaction will be a TTFCA in so far as the parties genuinely intend to transfer ownership, even if for a security purpose.[35] According to Goode and Gullifer, provided that the transaction transfers 'full ownership on the transferee, as opposed to a mere security

[34] ibid 72. This is further elaborated below.

[35] Louise Gullifer (ed), *Goode and Gullifer on Legal Problems of Credit and Security* (6th edn, Sweet & Maxwell Ltd 2017) para 1.41.

interest, the transaction will be characterised according to its description and will not be recharacterised as a security agreement'.[36] The economic or functional effects of a transaction does not matter. What matters is the genuine intention to transfer ownership.[37] English law therefore contrasts with Dutch law before 1992 when regardless of whether ownership is genuinely transferred, a *fiducia cum creditore* was still recharacterised as a security right.

Scots law, as further discussed in the next section, adopts a broader approach to a *fiducia cum creditore*. Gretton, arguing from the perspective of Scots law, points out that a *fiducia cum creditore* is a TTFCA in the Directive. He notes that in a *fiducia cum creditore*, 'the grant of "full ownership" is the whole basis of [the] secured transaction', and that the collateral provider retains some personal rights.[38] According to Gretton, the whole purpose of the Directive was to legitimise a repurchase agreement which is a secured transaction in the form of a *fiducia cum creditore*.[39] Although repo agreements are normally expressed in terms

[36] ibid.
[37] See *Re George Inglefield Ltd* [1933] Ch 1, 27–8 on the key factors which demonstrate when ownership is transferred.
[38] Gretton, 'Financial Collateral' (n 22) 217.
[39] There is a question regarding whether repos are secured transactions. For instance, the Collateral Directive, as seen in the definition of a TTFCA above, uses the phrases 'to secure' or 'to cover' which suggest that while some may be secured transactions (i.e to secure), others are not (i.e to cover). See also Yeowart and others (n 9) para 1.38 – 1.40. One argument in support of this is that in a standard repo, there is normally a personal obligation on the collateral taker to transfer equivalent assets (as opposed to the same assets). This aligns with the parties' intent to transfer an title, rather than to create a security.
However, before responding to this debate, it is important to highlight that the phrase 'secured transaction', the way it is used by Gretton, does not technically refer to a 'security interest' (like a charge) or a limited real right' (like a Civil law pledge). Rather, it is used to express the purpose behind the transfer of collateral in a repo. However, as discussed below, some systems (the functional systems) have conflated the purpose behind the repo with the rights created by the parties (outright ownership transfer). The implication of this has been mentioned at the start of this section; and as further argued below, the Directive adopts a formal approach which contrasts with the functional approach adopted by these systems. In fact, as discussed subsequently, Gretton's definition of a security interest is formal rather than functional, meaning the repo is not included in that definition.
Nonetheless, there remains a question regarding whether repos perform a security function. Gretton argues that the use of the words 'to secure' leads inexorably to the conclusion that at least some types of repos are secured transactions. See Gretton, 'Financial Collateral (n 22) 219. Moreover, it may be argued that the provisions of the Directive on TTFCA would not have been necessary if repos are not secured transactions. In other words, why focus on recharacterization risk if the arrangement, in fact, does not perform a security function? Also, as Gullifer notes, one of the purposes behind the repo transaction is either to borrow money using securities as collateral or to borrow securities using money as collateral. See Gullifer, What Should We Do About Financial Collateral (n 11), 384. The collateral therefore acts as a security to mitigate the credit risk which the collateral taker has on the collateral provider. Because the collateral is primarily used to reduce the collateral taker's exposure, an argument can be made that the transaction is indeed a secured transaction based on its overall purpose of the transaction.
Furthermore, in relation to the argument that the obligation to transfer equivalent assets demonstrates that the repo is not a secured transaction, the argument can be made that this obligation is closely tied to the right of use. This means that, hypothetically, where there is a restraint on the right of use (as seen under old Dutch law for example), such a clause to transfer equivalent assets will effectively be

of sale and repurchase, Gretton notes this approach is often adopted 'precisely because the markets do not want the transactions to be subject to mandatory rules of national laws about secured transactions'.[40] In Gretton's view, this is what the Directive sought to achieve: to ensure that such transactions (*fiducia cum creditore*) are recognised as such without applying the mandatory rules that apply to proper securities.

The definition of a TTFCA in the Directive, as provided earlier, does not state whether or not a *fiducia cum creditore* is a TTFCA. A question then arises as to whether based on the above definition in the Directive, a *fiducia cum creditore* may be said to be a TTFCA. Gretton notes that the words 'for the *purpose of securing* or otherwise covering' in the definition seems to 'lead inexorably to the conclusion that at least some type of TTFCAs are secured transactions' in the form of a *fiducia cum creditore.* [41] Recital 13 also seems to support this position. The Recital states that one of the aims of the Directive is to ensure the protection of financial collateral arrangements that 'are based upon the transfer of the full ownership of the financial collateral, such as by eliminating the so-called recharacterisation of such financial instruments (including repurchase agreements) as security interests'.

It is difficult to understand this Recital if it is accepted that a *fiducia cum creditore* is not a TTFCA, as Keijser suggests for Dutch law. As earlier noted, legal systems give different responses to a *fiducia cum creditore*. There is often a risk of recharacterisation because of the compound nature of the arrangement: on the one hand, it transfers ownership; on the other hand, parties often wish to use the ownership as security. The transaction may therefore be seen as a disguise.[42] Because systems take different approaches to this issue, Article 6 of the Directive, in giving effect to Recital 13, provides that 'Member State shall ensure that an

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unlawful, since the collateral taker will be under an obligation to transfer the same assets. Why does this matter? As the analysis below demonstrates, the obligation to transfer equivalent assets (or the right of use which is its corollary) is not one of the 'conditions of applicability' used to identify what amounts to a TTFCA. This obligation (or rather the right of use) is merely a consequence of an outright transfer. As argued below, the Directive primarily adopts a formal approach which is focused on whether there has been a transfer of ownership, not on the purpose of a transaction. Essentially, the obligation to transfer equivalent asset is superfluous in systems which adopt a functional approach since the key focus is on the purpose of the transaction. The right of use (and obligation to transfer equivalent assets) are all consequences of the transfer of ownership. One implication of this is that a TTFCA, under the Directive, may perform a security function, but still impose an obligation to transfer equivalent assets.

[40] Gretton, 'Financial Collateral' (n 22) 218–219.

[41] ibid 219.

[42] Keijser (n 31) 441. In practice, market participants prevent this by granting the collateral taker the right to freely dispose the collateral and an obligation on the collateral taker to transfer 'equivalent' assets in the second leg of the repo transaction. Keijser notes that although this minimised the risk of recharacterisation, the market nevertheless felt a legislative action (the Collateral Directive) was preferable.

arrangement shall take effect in accordance with its terms'. This requires that such transactions are not to be recharacterised as a pledge.

It may be said that the Directive by this provision is targeted at systems which adopt a functional, rather than a formal approach, to the recharacterisation of a *fiducia cum creditore*. Generally, a functional approach is an approach which defines what constitutes a security right based on the effect of the transaction to secure the performance of a transaction. In a formal approach the key consideration is whether ownership is genuinely transferred as seen in English law. Therefore, in a formal approach, where the transaction transfers ownership, for example, in a *fiducia cum creditore,* such a transaction ought not to be treated as a security.

The argument may be made that the Directive adopts both a functional and formal approach. The Directive adopts a functional approach in identifying what transactions amount to a TTFCA. However, it adopts a formal approach in focusing on the rights of the parties to apply certain consequences. By implication, a formal approach is applied for the purpose of disapplying the rules highlighted earlier, such as the rule on publicity or other restrictions placed on such a transfer by a system. But a functional approach is adopted to identify the transaction, i.e. whether a) ownership is transferred? b) , and is it for a security purpose? A transaction must have these two effects to come within the scope of the Directive. Thus, once the purpose of the transaction is functionally identified, a formal approach is applied to treat such a transaction as actually creating the right which it purports to create.

In the case of a *fiducia cum creditore,* this means that once it is identified that ownership is transferred for a security purpose, the Directive, by Article 6, mandates Member States to give effect to the right created by the parties.

The above may be applied to Keijser's argument regarding the *fiducia cum creditore*. If, as Keijser argues, a *fiducia cum creditore* is to be seen narrowly because of the restrictions under the pre-1992 Dutch law, even that narrow interpretation may qualify as a TTFCA in terms of the Directive. The reason for this is that Keijser may be mistaken, because he takes what may be called the 'consequences of applicability' (i.e. tradability function) as a 'condition of applicability' of the provisions of the Directive. The tradability function is a consequence and not a condition of applicability. It arises only when it is identified that ownership is actually transferred – this is one of the conditions of applicability of the Directive. As argued above, there are primarily two conditions of applicability in the Directive, i.e. a) a transfer of ownership b) made for a security purpose. Once these two requirements are met, then the consequences in the Directive ought to apply. These consequences include disapplying the

restrictions on the *fiducia cum creditore* placed by old Dutch law, such as the pledge rules on publicity or restrictions on tradability. Thus, once a transaction meets the conditions for applicability, the consequences of disapplication follow.

1.4 THE UK REGULATIONS: TTFCA AS LEGAL AND BENEFICIAL OWNERSHIP

The primary question below is whether the definition of a TTFCA, based on the two conditions of applicability in the Directive, matches that in the UK Regulations. Although the UK has just withdrawn from the EU, the Regulations remain law in the UK as retained EU law.[43] Crucially, the issues highlighted in the article, as mentioned, are still relevant to highlight the difficulties in adopting a system-neutral approach to harmonisation.

First, we will consider the Scots law understanding of the Directive, to confirm the argument made earlier that a TTFCA is a *fiducia cum creditore*. However, even within Scots law, there are controversies regarding whether a fiducia cum creditore is a TTFCA or an SFCA. The UK Implementing legislation suggests that this is an SFCA, although this is not accurate in anyway. Subsequently, we will consider some minor tensions of applying the conditions of applicability, in the way it is mentioned in the Directive, under English law.

The Collateral Directive was implemented in the United Kingdom by the Financial Collateral Arrangements Regulations (FCAR). The UK Regulation, similar to the Directive, structures itself by contrasting between a TTFCA and an SFCA. The definition of these two arrangements is important to consider what amounts to a TTFCA under Scots and English law. The Regulation defines a TTFCA as:

> An agreement or arrangement, including a repurchase agreement, evidenced in writing where a) the purpose of the agreement or arrangement is to secure or otherwise cover the relevant financial obligation owed to the collateral taker, b) the collateral provider transfers legal and beneficial ownership in the financial collateral to a collateral taker on terms that when the relevant financial obligations are discharged the collateral taker must transfer legal and beneficial ownership of equivalent financial collateral to the collateral provider.[44]

[43] See European Union (Withdrawal) Act 2018, ss 2,3,6.

[44] Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226), as amended by the Financial Collateral Arrangements (Amendment) Regulations 2009 (SI 2009/2462) and the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amendment) Regulations 2010 (SI 2010/2993) ('FCAR').,Regulation 3.

The Regulations further define an SFCA) as:

> An agreement or arrangement evidenced in writing where a) the purpose of the agreement or arrangement is to secure the relevant financial obligations owed to the collateral taker, b) the collateral provider creates or there arises a security interest in financial collateral to secure those obligations, c) the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker [….][45]

As seen above, the term 'security interest' appears in the definition of SFCA above. This term is further defined in the Regulations as:

> Any legal or equitable interest or any right in security, other than a title transfer financial collateral arrangement, created or otherwise arising by way of security, including a pledge, a mortgage, a fixed charge and a charge created as a floating charge. [46]

As will be argued, in English law, the consensus is that the distinction between the two types of arrangements reflects the distinction between an absolute interest (a TTFCA) and a security interest (SFCA).[47] An absolute interest is the residue interest out of which security rights are carved out. [48] In English law, this may be 'ownership' (legal or equitable) or possession. On the other hand, a limited right is vested in one 'who enjoys merely a specific right':[49] for example, a pledge, lien, mortgage (equitable) or a charge.[50]

The distinction between these two arrangements is uncontroversial in English law. However, as will be discussed, Beale notes, though very briefly, that it is unclear whether a legal mortgage is indeed a TTFCA or an SFCA in relation to the Directive.[51] Indeed Akkermans falls into the trap of confusing a TTFCA as a legal mortgage in English law. According to him, a *fiducia cum creditore* is a TTFCA which is equivalent to a legal mortgage in English law.[52] It is not difficult to identify why he holds this view: a legal mortgage, on the drafting of the Directive, fulfils the two system-neutral conditions of applicability above. Therefore, the arrangement may supposedly be a TTFCA in the Directive. Nonetheless, it has been argued that this conclusion is contrary to the objective of the Directive because the Directive applies

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[45] ibid.
[46] Ibid.
[47] Gullifer (n 12) 384.
[48] Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin 2016) 34.
[49] ibid.
[50] Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, Oxford University Press 2018) para 4.04, 5.62.
[51] ibid 3.17.
[52] Bram Akkermans, 'The European Union Development of European Property Law' (2011) 30 Maastricht European Private Law Institute Working Paper 1, 5 <available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888294> accessed 30 October 2018.

to outright transfers.[53] However, as argued below, although this may be accurate, there are reasons to agree with Akkermans based on the actual drafting in the Directive, or even when an outsider perspective is taken to understand the Directive.

In relation to Scots law, which forms the focus of this section, the question is: how are the Regulations to be understood? First, the reference to 'legal and beneficial ownership' may not apply to Scots law. Secondly, and more importantly, in Scots law the only way in which a TTFCA can be taken over financial collateral is by way of an assignation in security (*fiducia cum creditore).*[54] It has been suggested that this is a 'right in security'[55] which, if accepted, puts the transaction in the category of an SFCA based indeed on the definition in the UK Regulations. The issue below, then, is whether this position is accurate.

1.4.1 Scots law: use of ownership (*fiducia cum creditore*) as improper security?

In the earlier discussion on the Directive, it was mentioned that the distinction between a TTFCA and an SFCA reflects the distinction in many Civil law systems between a *fiducia cum creditore* and *pignus*.[56] Scots property law is Civilian and shares this distinction, although for financial collateral a *fiducia cum creditore* is the only security device available. However, in Scots law, the distinction between both types of arrangement generally matches the distinction between improper and proper securities. A *fiducia cum creditore* is an example of an improper security whereby 'a debtor transfers to a creditor ownership of assets as security for whatever claim the transferee might have against the transferor'.[57] There is a personal obligation on the transferee to reassign the property once the debt is discharged. [58]

In Scots law, it has been argued that a *fiducia cum creditore* is a right in security. Commenting on this, Gretton argues that 'a right in security can be created either by a *fiducia cum creditore* or by *pignus* or *hypotheca'*.[59] This suggests that a *fiducia cum creditore* is a right in security (SFCA). This will align with the provisions of the implementing regulations. Similarly, Yeowart and Parsons also endorse this position. They note that although assignation

[53] Beale and others (n 51) para 3.17.
[54] *Enviroco Ltd v Farstad Supply A/S* [2011] UKSC 16.
[55] Yeowart and others (n 9) 684.
[56] Erp and Akkermans (n 27) 505–518.
[57] ibid 505. In Scots law, an assignation may either be in security or may be made ex facie absolute. They both operate by way of transfer, and it is difficult to differentiate between them; see Alisdair MacPherson, 'Registration of Companies Charges Revisited: New and Familiar Problems' (2019) 23 Edin LR 154, 159.
[58] MacPherson argues that this requirement indicates the transaction is an assignation in security rather than *ex facie* absolute. MacPherson (n 58) 160.
[59] Gretton, 'Financial Collateral' (n 22) 213.

takes effect by 'way of ownership transfer, such fixed securities are nevertheless considered "rights in security"' in Scots law. [60]

It is easy to identify what influences these views. Yeowart and Parsons, in arriving at this conclusion, refer to the registration requirement in Part 25 of the Companies Act. They suggest that since an assignation is registrable under the Companies Act as a 'charge', it is therefore a right in security.[61] However, MacPherson offers an alternative approach which accommodates the opinion of Yeowart and Parsons and the contrary argument to be made below. According to MacPherson, the term 'charge', as used in the UK Companies Act, may be interpreted in two ways: first, in a broad way which extends the meaning of a right in security from its narrow meaning as a limited real right to include functional securities. In this sense, a *fiducia cum creditore* under the Companies Act 2006 regime is considered to be a right in security. MacPherson further notes that the term 'charge' may be interpreted narrowly in a way that stays true to the meaning of rights in security in Scots law as a limited real right.[62] In this second sense, MacPherson points out that the inclusion of an assignation in security as a 'charge' does not imply it is a right in security, but may have been expressly included to bring it within the regime of charge registration.[63]

Essentially, MacPherson's first interpretation accommodates the views of Yeowart and Parsons because they define a *fiducia cum creditore* as a functional security because it is registerable. However, the second interpretation affirms the view below which treats the Scots law *fiducia cum creditore* as a transfer (TTFCA), rather than a security (SFCA). As will be argued below, this second interpretation, unlike the first, aligns with the position in the Directive.

The point may be made that if Yeowart and Parsons, as well as MacPherson's first interpretation, are correct, the obvious conclusion will be that a *fiducia cum creditore*, based on the definition in the Regulations, is a SFCA. This is because, in the Regulations, such an arrangement is synonymous with a security interest defined as including a right in security.[64] However, within the context of the Directive, this position is questionable given that the

[60] Yeowart and others (n 9) 684.
[61] ibid.
[62] MacPherson (n 58) 159.
[63] ibid 159–161. MacPherson favours a broad meaning of security to include functional securities, such as sale and leaseback arrangements, retention of title arrangements. In his view, this gives a 'complete picture' in terms of publicity to those dealing with a company.
[64] The Regulations are drafted to align more with the position under English law, than with Scots law. Interestingly, the UK 'mixed property law' system, made up of English and Scots property law, is an ideal platform to test how two distinct systems can mix to provide a coherent outcome.

position defines a *fiducia cum creditore* based on the registration requirement, rather than the actual rights created, i.e. ownership. In other words, similar to the approach adopted by Keijser above, Yeowart and Parsons define a *fiducia cum creditore* by the consequences of applicability (publicity rule) rather than the conditions of applicability (transfer of ownership) earlier identified. As already argued, both requirements do not conflate in identifying what amounts to a TTFCA in the Directive.

In contrast to his earlier argument above contained in a more recent articles, Gretton puts forward a different argument in an earlier article.[65] In the article he draws a distinction between security in the 'narrow or strict sense'[66] which is the 'true' security corresponding to a right in security,[67] and 'rights of retention'[68] which have similarities with a right in security, because the creditor has a right 'which he can avail himself of in the event of the failure of the debtor to meet his obligations'.[69] According to Gretton, a right in security in its narrow sense refers to a 'real right in the property of another person which secures the performance of an obligation'.[70] Expanding on this definition, Gretton argues that a right in security has certain characteristics: first, the collateral in question belongs to another person other than the creditor; secondly, the security exists only in relation to a secured obligation, that is, it is an accessory right which follows the debt; thirdly, when the right is realized, it produces money to fulfil a money obligation.

Importantly, a key factor for a right in security, according to Gretton, is that it creates a second (limited) real right in the asset, in addition to the real right of ownership which the debtor retains in the asset. This means that there are two real rights in the asset: the subordinate real right[71], and the right of ownership.

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[65] George Gretton, 'The Concept of Security' in Douglas J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (W Green 1987) 126.
[66] ibid 127.
[67] ibid 130.
[68] ibid. The term 'retention' is used in a wide sense by Gretton to refer to arrangements under which ownership is retained or transferred.
[69] ibid.
[70] ibid 127.
[71] The subordinate real right or limited real right is not totally synonymous with the idea of security interest in English law. This is because, as discussed below, there are security interests in English law which operate as a transfer (that is, a legal mortgage).However, there are similarities between the two concepts.

Although there are several requirements for a right in security, we will consider two: the first, which relates to the broader issue is, whether a transfer can be a security because it is for a security purpose? Secondly, does a *fiducia cum creditore* give rise to two real rights?

1.4.1.1 Can a transfer be a security?

As Gretton admits, one feature which draws a *fiducia cum creditore* closer to a proper security is that it is made for the purpose of securing an obligation. [72] This importantly is what distinguishes it from a normal transfer and makes it susceptible to the risk of recharacterisation. However, this feature is equally what makes it an improper security.

However, it would be inaccurate to conclude that a *fiducia cum creditore* is a right in security simply because it performs a security function. In Scots law, the *ex facie* absolute disposition was a device which closely resembled the *fiducia cum creditore* .[73] Commenting on the accessoriness principle in relation to the *ex facie* absolute disposition, Steven points out that the disposition was an exception to the accessoriness principle, because it was a transfer and not an arrangement which created a subordinate real right.[74] Steven concludes that the accessoriness principle had been 'removed altogether' from the *ex facie* disposition because it was a transfer rather than a security device.[75]

Although an *ex facie* absolute disposition was different from a *fiducia cum creditore*, it had the same 'patrimonial effect': it transferred title outright. [76] By analogy, it follows that since it was considered a transfer though it performed a security function, the same conclusion may be applied to a *fiducia cum creditore*. This implies that although a *fiducia cum creditore* performs a security function, it is simply a transfer and not a right in security which creates a limited real right in the collateral.

1.4.1.2 Only one real right in *fiducia cum creditore*

As mentioned above, Gretton further notes that a right in security creates a second limited real right in addition to the debtor's real right of ownership already in the asset. However, in a *fiducia cum creditore*, there is only one real right: the creditor's right of ownership. The debtor has purely a personal right. This personal right is the right to reacquire the asset on payment of the debt, and it is not accessory. From the creditor's perspective, the

[72] Gretton, 'The Concept of Security' (n 66) 130.
[73] Since 1970, an *ex facie* absolute disposition is no longer valid for security over land in Scots law as a result of the Conveyancing and Feudal Reform (Scotland) Act, 1970.
[74] Andrew Steven, 'Accessoriness and Security Over Land' (2009) 13 Edin LR 387, 397.
[75] ibid.
[76] Ross Anderson and Jan Biemans, 'Reform of Assignation in Security: Lessons from the Netherlands' (2012) 16 Edin LR 24, 28.

creditor's right of ownership in the collateral means that it can transfer the asset free from the debtor's right which is a right to retrocession.

Based on the above analysis, a *fiducia cum creditore*, in Scots law, is not a right in security (i.e. SFCA). It transfers ownership although it is made for a security purpose and is subject to the publicity rule. As also argued, it would be wrong to define the arrangement based simply on the publicity rule, as suggested by Yeowart and Parsons. Secondly, there is only one real right in the asset: i.e. the right of the collateral taker. This is unlike a right in security which creates an additional real right in the collateral over the debtor's real right of ownership.

The above discussion indicates that the approach in Scots law in relation to *fiducia cum creditore* is similar to the Directive's approach to a TTFCA, i.e. once ownership is transferred for a security purpose, the transaction is effective as a transfer. This interpretation will accord with the conditions of applicability in the Directive for identifying a TTFCA. As discussed above, the key consideration in identifying what amounts to a *fiducia cum creditore* is whether it transfers ownership, and whether it is for a security purpose. A *fiducia cum creditore* in Scots law satisfies these two conditions. *Contra* Keijser and Yeowart and Parsons above, it would be inappropriate to identify the transaction based on the publicity requirements or on other restrictions which a system may impose on it.

A secondary question arises whether anything in Scots law therefore qualifies as an SFCA. Currently, nothing in Scots law qualifies as such for financial collateral. However, the Scottish Law Commission has prepared a Report which proposes such a device.[77] A proposal is made in the report for a fixed security (i.e. a 'statutory pledge') which may be created over shares and incorporeal movables other than receivables and money claims.

Lastly, in the Regulations, as noted, a TTFCA is defined as the transfer of 'legal and beneficial ownership'. Apparently, these terms reflect the interests in English law. In Scots law ownership is unitary similar to Civil law systems. However, for the purpose of giving effect to the Regulations, the argument may be made that we can interpret those terminologies functionally to refer to all rights and interests in collateral. This way they appropriately capture an assignation in security in Scots law under which the full entitlement is transferred.[78]

1.4.2 *Fiducia cum creditore* as TTFCA in Directive

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[77] The device will be called a 'Statutory Pledge'; see Scottish Law Commission, *Report on Movable Transactions* (Scot Law Comm No 249, 2017) volume 2, Chapters 19-22.

[78] This provides a support for the definition in the Regulations.

The argument above is that a TTFCA, in the Directive, is an improper security (e.g. *fiducia cum creditore*). As noted, different legal systems respond to it in different ways. In some systems, the rules on publicity are applied to a *fiducia cum creditore*, as is the case in Scots law. In other legal systems, such as Dutch law, the *fiducia cum creditore* is prohibited. However, the Collateral Directive mandates Member States to recognise a *fiducia cum creditore* so that it takes effect the way it is. [79]

In defining a TTFCA, the Directive use words such as 'securing' to refer to the effect of the transaction. Yeowart and Parsons argue that this term is not to be given 'a technical meaning' but refers to any arrangement whereby financial collateral is provided to reduce the exposure of the collateral taker. [80] This argument is questionable. It still shows that the primary purpose for such a collateral transaction is to reduce any losses in the event of default of a counterparty – this is a security purpose. However, the effect of such a transaction may only matter in identifying the transaction. It does not matter regarding the consequences to be placed on the transactions.

In the next section, we will consider the application of these 'conditions of applicability' in English law and the possible effects, or tensions, that may arise in particular relation to a legal mortgage.

[79] Admittedly, one adverse consequence of recognising a *fiducia cum creditore* as a TTFCA is that the former is stripped of all its fiduciary features. This therefore distorts the balance which is fundamental to such transactions and confers more benefits on the creditor at the expense of the debtor. However, as argued below, this issue may not be vital.
[80] Yeowart and others (n 9) 153.

1.5 TTFCA AS A LEGAL MORTGAGE ENGLISH LAW

. The key arguments in this section are these: first, functionally applying the aforementioned 'conditions of applicability' in English law, there is the potential risk of defining a TTFCA as a legal mortgage. This is because a legal mortgage in English law can similarly be defined based on those conditions of applicability as: a) a transfer of ownership b) for a security purpose. This raises a potential risk that a legal mortgage may be 're-characterised' as a TTFCA based on the system-neutral provisions of the Directive. However, as argued below, to avoid these unintended consequences, an insider/contextual approach needs to be adopted, as opposed to an observer/functional perspective regarding the legal mortgage.[81] This requires an evaluation of an TTFCA using English law doctrinal principles, particularly the equity of redemption, to circumvent the unintended consequences in the Directive. Thus, this suggests that a) the provisions of the Directive, although are system-neutral, cannot be understood simply in terms of the specific effects or conditions of applicability. The doctrinal context, to an extent, matters indeed in reconstructing an institution into specific functional effects (i.e. the 'conditions of applicability'), as done by the Directive.

To elaborate on these points, we will first consider the relationship between legal ownership and beneficial ownership. This is considered to provide some brief context for a later discussion on the meaning of the 'equity of redemption'. It is also to clarify the views of some (for example, Akkermans) who treats the legal mortgage as a TTFCA

1.5.1 Are both legal *and* beneficial ownership required for full ownership?

An argument might be made that where a party has the legal title to an asset, without any beneficial ownership, he may be deemed to have full ownership. This implies that in the absence of any other party having an equitable interest in the collateral, the party has full

[81] Samuel notes that an insider/internal perspective is one which attempts to understand a concept from the perspective of the 'participants' themselves: for example, an English lawyer attempting to understand a concept of English law. On the other hand, an outsider/external perspective involves a foreigner attempting to understand a foreign concept: for example, a French lawyer attempting to understand an English law concept. See Geoffrey Samuel, *An Introduction to Comparative Law: Theory and Method* (Hart Publishing 2014) 61–62.

ownership. However, this view cannot be extended to beneficial ownership, since the idea of beneficial ownership is premised on the idea of a divided ownership.

Some endorsement of this view may be found with Goode who argues that: 'if both legal and beneficial ownership are vested in the same person, there is no scope for equity to operate on the asset, and no separate equitable interest can be said to exist'.[82] By implication, in the absence of beneficial ownership, a party with only a legal title may be said to have full ownership, that is, while divided ownership is the essence of an equitable title,[83] a party with only a legal title has full ownership. The question is whether this means that legal ownership is the primary and residual right, while equitable ownership is merely subordinate, since it is dependent on the legal title?

The trust is a classic example [84] of divided ownership in English law and as such it is a good reference point to determine the nature of the relationship between these two rights.[85] In a trust, while legal title is vested in the trustee, the beneficiary has beneficial title. Importantly, the beneficiary's right is considered to be 'parasitic' to the trustee's right. This suggests that the legal title is the 'primary right'[86], while the beneficiary's right is subordinate. Thus, that the beneficiary's interest is parasitic, or derivative suggests that there is another party with a legal title out of which the beneficial interest is 'carved out'. It implies that the legal title is the primary title.

Goode seems to endorse this view. He points out that 'though an equitable interest can be **carved out** of the legal title, the converse is not true'.[87] In essence, while it is possible to derive an equitable title from a legal title, it is not possible to derive a legal title from an equitable title; we can only derive another equitable title from an earlier equitable title. This suggests that a legal title enjoys some primacy as the dominant right out of which an equitable right is created. This will be equivalent to what happens in a security arrangement where a party with ownership

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[82] McKendrick (n 49) 42.
[83] ibid.
[84] ibid. As will be seen below, division of ownership may also occur without a trust relationship, namely when A holds the legal title primarily for his own interest, as in the case of a mortgage.
[85] William Swadling, 'Trusts and Ownership: A Common Law Perspective' (2016) 24 ERPL 951, 966. Swadling argues that there are trusts without beneficiaries, for example, in the case of the public trust.
[86] I intentionally use the word 'primary right' to refer to the way a Civil lawyer will qualify ownership as the 'primary right'. The terminologies and discussions in this section are for emphasis, to draw out the fact that the drafting of the Directive is based on the language of Civil law.
[87] McKendrick (n 49) 43. (Emphasis mine).

creates other limited rights from his interest. In this sense, the owner's right is residual. However, Swadling, as discussed below, essentially disagrees with this.

1.5.2 Beneficial rights as 'engrafted' right

According to Swadling, it is wrong to state that a trust splits ownership between a trustee and a beneficiary.[88] To maintain this view, according to Swadling, suggests that the trustees had rights in the property which were then split into two after the trust was created. However, Swadling argues that the trustee is the 'owner' of the rights with respect to the thing, since the rights in the property are vested in him. He points out that both prior to, and after the trust is declared, the total number of rights in the trustee remain the same. In his view, this only suggests that the beneficiary's right, rather than having been carved out of the trustee's right, is only engrafted on it. The beneficiary's right is a new right. It does not arise from the splitting of pre-existing rights.[89] Essentially, the beneficiary's right, in Swadling's view, is a right to compel the trustee to use his right in a particular way. It is a personal right against the trustee and therefore cannot be carved out.

In considering why, during insolvency, the trust assets are removed from the trustee's estate, Swadling argues that the trustee's right does not receive insolvency protection because of a 'statutory regime and the legislature has exempted rights held on trusts from being available to satisfy the debts of an insolvent trustee'.[90] Essentially, Swadling argues that the trustee's right does not receive protection because it is a legislative choice. This statement focuses on the trustee's right, but has implications for the beneficiary's right. In relation to the beneficiary, it equally suggests that that the insolvency protection of beneficial interest is based on a legislative choice.

However, Swadling's statement suggests that prior to the statutory protection, the beneficiary's right was not protected. However, Lau points out that historically the Chancery Court started off protecting the beneficiary's right against the trustee alone, but subsequently extended the protection to third parties.[91] The protection afforded the beneficiary therefore is

[88] Swadling, 'Trust and Ownership' (n 86) 951.
[89] ibid 970.
[90] ibid 971.
[91] Ming Wai Lau, 'The Nature of the Beneficial Interest: Historical and Economic Perspectives' 1, 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213055> accessed 1 March 2017.

not just based on legislative interventions, as Swadling suggests, but on the remedies historically developed by the Chancery to protect beneficiaries.

Secondly, Swadling seems to focus exclusively on the legislative act/Act itself, rather than on the reasons behind the act/Act. Although it may be a legislative choice to remove the trust assets from the estate of the trustee, this can only be based on the fact that the beneficiary has a property right. Why protect an asset where there is no property right?

Importantly, Swadling's view above privileges the legal owner as having the primary right in the asset. As earlier noted, he argues that the trustee is the 'owner' of the rights, since the rights in the assets are vested in him. On the other hand, the beneficiary's right, as seen above, is a personal right. If this is the case, it means that the legal title holder, since he has title to the asset, may be said to have 'ownership' of the asset.[92] The beneficiary's right is not carved out, neither is it an ownership right. It is merely a right vested in the beneficiary to compel the trustee to use his rights in a particular way.[93] It is a personal right.

There is some similarity between both Swadling and Goode: they both acknowledge the primacy of legal title. However, while Goode accepts that beneficial interest is carved out of legal title and is a real right (and an ownership right in the sense of English law), Swadling rejects the idea that beneficial interest is carved out of the legal interest. He also rejects any notion of beneficial interest as 'ownership' and appears to accept that the legal title holder 'owns' the asset because it has the direct rights to the asset. Like Goode, Swadling gives preference to the legal title holder.

As earlier stated, the UK Regulations define a TTFCA as an arrangement under which *legal and beneficial ownership* is transferred. Swadling's analysis above therefore renders this definition questionable. First, the term 'ownership' may strictly not refer to any concept in English law, based on Swadling's analysis. At the level of the Directive, Swadling may reject the claim that anything in English law qualifies as full ownership, since English law has no such concept. However, in line with Swadling's analysis, the functional equivalents will be legal title[94] or the beneficiary (personal) right. Importantly, Swadling may reject that legal and

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[92] Swadling, 'Trust and Ownership' (n 86) 971. Swadling uses similar words, though in inverted commas to describe the trustee's right.
[93] ibid 970.
[94] It is debateable if Swadling would use the term 'title' in reference to securities which are choses in action and cannot be possessed. Swadling seems to restrict the term 'title' to title to possess, which may only apply to tangible assets: William Swadling, 'Rescission, Property and the Common Law' (2005)

beneficial ownership can be vested in the same person. (i.e. collateral provider). However, as earlier mentioned, the beneficiary's right is a personal right to compel the legal title holder. This means that the right is vested in another party other than the legal title holder: a person cannot have a personal right against himself or herself to act in a certain way. In essence, the nature of a right or a personal right is that it imposes a corresponding duty on another, who in this case is the legal title holder, to perform an obligation or to refrain from carrying out certain actions. Therefore, both legal title and beneficial personal right, based on Swadling's analysis, necessarily are vested in different persons. Consequently, since a party cannot have both legal title and beneficial right in the asset, there can only be a transfer of either legal title or beneficial (personal) rights, not legal and beneficial ownership as suggested by the UK Regulations

However, the language of the Regulations presuppose that Swadling is wrong. The Regulations indeed endorse the view that there can be legal and beneficial ownership in financial collateral. In taking this position, the Regulations support Goode's view, which is the conventional one in English law. Thus, a party may have legal ownership out of which is carved out beneficial ownership. The Regulations will also seem to endorse that beneficial ownership is a proprietary right based on the drafting. On this note, the Regulations may be criticised as taking sides in an ongoing academic debate on the nature of beneficial interests.[95]

Having set out this conceptual context, we will consider below how, within the context of a legal mortgage, English law takes a different approach in relation to legal ownership. Although the above suggests legal ownership is the dominant, residual right, it does not operate as such in all situations. From the discussion below, although a legal mortgage transfers legal ownership, however, the equity of redemption (an equitable right) is said to be a 'residual right' which trumps the legal ownership.[96]

1.5.3 English law: TTFCA and legal mortgage as the transfer of ownership

As previously stated, a TTFCA in the Directive is defined as an arrangement under which the collateral provider transfers full ownership of financial collateral to the collateral

121 LQR 124, 135; William Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 Oxford J Legal Stud 627, 640–1.

[95] George Gretton, 'Ownership and Its Objects' (2007) 71 Rabels Zeitschrift für ausländisches und internationales Privatrecht 802, 804.

[96] An English lawyer may not express these terms this way. However, the terms are expressed in a way that a Civil lawyer will conceive of these issues to emphasis, as seen below, the functional similarity between a *fiducia cum creditore* (in Civil law) and a legal mortgage (in English law),

taker for the purpose of securing an obligation. This definition, as argued below, is not different from how a legal mortgage operates in English law.

Historically, interest loans were prohibited in England.[97] To circumvent this prohibition, parties executed a legal mortgage which was a loan disguised as a sale of land with a reversionary right. The borrower conveyed the property in fee simple in consideration of a sum. The lender, by the agreement, agreed to reconvey the property once the sum had been repaid. The agreement operated as an outright transfer, with the lender becoming the absolute owner. However, this had several disadvantages. The lender could refuse to reconvey the property leaving the borrower with minimal protection under the common law. The borrower also forfeited the property even where he was in default by a single day. Because of the scant protection offered under the common law, equity intervened to mandate the lender to reconvey the property. Equity imposed an obligation on the lender which could not be contracted out of. In arriving at this result, equity can be said to have taken a 'functional approach': it focused on the purpose of the transaction, bypassing the fact that it was a transfer. It took the transaction as effectively creating a security right, with the borrower retaining a right in the asset.

This historical development has contributed to how a legal mortgage is defined. In English law, several definitions have been offered for a legal mortgage. Benjamin defines it as the transfer of 'full legal and equitable title (subject only to the equity of redemption)'.[98] It has also been defined as the transfer of ownership in collateral subject to a right of redemption.[99] Goode and Gullifer similarly define it as a 'transfer of ownership of the asset […] by way of security upon the express or implied condition that ownership will be re-transferred to the debtor on discharge of his obligation'.[100]

Both Beale and Goode simply refer to ownership, while Benjamin refers to 'full legal and equitable title'. It is unclear whether by 'ownership' Beale and Goode refer to the transfer of full interest (both legal and beneficial) in the collateral, or rather the legal ownership. Benjamin's definition suggests that what is transferred is both the legal and beneficial ownership. However, the collateral provider, as Benjamin states, retains the 'equity of redemption'.

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[97] Leonard Jones, *A Treatise on the Law of Mortgages of Real Property*, vol 1 (6th edn, 1904) 178.
[98] Benjamin (n 16) para 5.07.
[99] Beale and others (n 51) para 6.01; Beale refers to *Santley v Wilde* (1899) 2 Ch 474 (CA).
[100] Gullifer (n 36) para 1.54; McKendrick (n 49) 632.

The question arises as to the nature of the equity of redemption: is it synonymous with beneficial ownership or does it refer to an equitable right to ask for a re-transfer of the collateral? The security nature of the transaction implies that the equity of redemption is a 'right of ownership', as discussed below. A person retains his ownership right even after a security right is granted. As discussed below, this thinking is likely behind the authors which treat the equity of redemption as a residual right.

The definitions of a TTFCA in the Directive and a legal mortgage have a close resemblance, especially if it is taken, as Benjamin does, that a legal mortgage transfers full legal and equitable title. As earlier mentioned, where a party has both legal and beneficial ownership, he has full ownership. Additionally, both a TTFCA and a legal mortgage operate by way of a transfer, and both are made for the purpose of securing a relevant obligation. Given this similarity, there is a potential risk that a legal mortgage could be seen as a TTFCA in the Directive. Akkermans' indeed falls into this trap. According to him, a *fiducia cum creditore* is a TTFCA which under English law is equivalent to a legal mortgage. Thus, he suggests that a TTFCA is a legal mortgage in English law.[101] The implication of this is that the consequences provided in the Directive ought to apply to such transactions. For example, the rules which will apply once a TTFCA is identified may apply to a legal mortgage with the effect that the legal mortgage might be given effect as it is (i.e. be seen as a transfer). Additionally, the rules normally applicable to such security devices, e.g. publicity rules, may be disapplied. If these consequences were to arise, it may be argued that the legal mortgage may cease to be a security device in English law, since it is given effect as it is (a transfer). It is therefore recharacterised as a TTFCA since it fulfils the conditions of applicability for such transactions under the Directive.

Comparatively, it may be said that the features of a *fiducia cum creditore* are similar to a legal mortgage. Therefore, both institutions are functionally equivalent. In both arrangements ownership is transferred and for a security purpose. As such, if the Directive applies to a *fiducia cum creditore*, why should it not equally apply to a legal mortgage? In this respect, it is important to note that the response to the *fiducia cum creditore* in the pre-1992 Dutch law, as earlier discussed, was almost the same with the sceptical response of English law (equity) to the legal mortgage. In both systems, there were attempts to apply, by analogy, rules applicable to proper securities to purported transfers. Although this historical response in both

[101] Akkermans (n 53) 5.

systems is less important here, it reveals similar scepticism under both Dutch law and English law to arrangements which operate as a transfer but have a security purpose. The similarity in the characteristics of both transactions, coupled with the scepticism in both systems against such purported transfers, indicate that the transactions are in fact similar and thus the institutions are functionally equivalent. Therefore, if a *fiducia cum creditore* in Dutch law is recognised as it is regardless of the historical scepticism, why should not the same rule be extended to the legal mortgage which, like the *fiducia cum creditore*, is a transfer, though with restrictions imposed by equity?

The potential risks discussed above shows a gap in the logic of the Directive. On the one hand, the Directive assumes that recharacterisation is something the parties never desire — it is an external event. This thinking informs the provisions of the Directive that Member States are to recognise TTFCAs as they are, that is, not to impose a term contrary to that desired by the parties, but to give effect to their agreement. However, in the case of a legal mortgage, it may be argued that what effectively happens is that a transaction which is a transfer is subsequently 'recharacterised' as a security device. This functionally is 'recharacterisation', although it is anticipated by the parties. Thus, the law recognises the transaction as a security device on the assumption that the parties intended to create such a device by transferring ownership, although for a security purpose

1.5.3.1 Is the equity of redemption beneficial ownership?

As earlier stated, a TTFCA is defined in the Regulations as an arrangement under which a collateral provider transfers legal and beneficial ownership in collateral to the collateral taker.

Pursuant to the Regulations, for there to be a TTFCA both legal and beneficial ownership need be transferred. This provision may be interpreted in two ways. The first interpretation is based on Benjamin's definition above. As seen above, Benjamin defines a legal mortgage as the transfer of 'full legal and equitable title' (i.e. legal and beneficial ownership) subject to the equity of redemption. If this definition is accepted, it means that the Regulations do not in fact provide a solution to the problem above. Similar to the definition in the Regulations, a legal mortgage also transfers full legal and equitable title, which is full ownership. This therefore puts a legal mortgage within the scope of the definition of a TTFCA in both the Directive and the Regulations.

A likely objection may be that in a legal mortgage, the transfer is made subject to the equity of redemption. However, this objection may not matter. Where an owner creates a security right in Civil law, it is normal to still refer to the person as having the ownership right. Similarly, based on the drafting of the Regulations, we may nonetheless refer to a legal mortgagee as having the 'legal and beneficial ownership', even though the equity of redemption remains in the collateral provider.

Regardless of the transfer in a legal mortgage, the collateral provider retains the equity of redemption in the collateral. This right will normally trump the legal and beneficial ownership right of the collateral taker in the asset. Because of this, the question arises as to the nature of the equity of redemption: is it an ownership right or simply a limited real right in Civil law language? The answer to this question, as seen below, links back to our earlier discussion of the relationship between legal and beneficial ownership.

The nature of the equity of redemption is not 'entirely clear'.[102] Beale *et al* point out that although it is clearly a proprietary interest in an asset, it may mean different things. According to Beale, the equity of redemption may refer to the security giver's residual interest in the asset after the security holder's right is 'carved out'. It may also refer to an equitable right to redeem or recover the property.

In Civil law [103] and even in Common law [104] it is normal to define ownership as a residual right out of which lesser rights may be carved out. It is a residual right in that it refers to the 'legal rights remaining in a person, or in persons concurrently, after specific rights over the asset has been granted to others'.[105] Such rights which may be 'carved out' are myriad, but they include security rights. In a security transaction, ownership is retained by the security giver, who may burden the property by granting a limited right. In this sense the ownership right of the security giver is described as a residual right, i.e. what is remaining after the limited real right is created.

The equity of redemption is described in similar terms by Beale *et al* as a residual right. This suggests that it is an ownership right which is then 'burdened' by the legal ownership transferred to the collateral taker. The equity of redemption is enforceable against successors

[102] Beale and others (n 51) para 6.02.
[103] Gretton, 'Ownership and Its Objects' (n 96) 834. Gretton suggests that residuarity is not an exclusive feature of ownership, since primary personal rights are residual.
[104] Tony Honoré, 'Ownership' in Anthony Gordon Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 126; McKendrick (n 49) 34.
[105] McKendrick (n 49) 34.

who unlawfully purchase the asset and thus has a proprietary effect. This may indicate that it is indeed a real right and may be referred to as 'beneficial ownership' which the collateral provider retains.[106]

Swadling may reject the above analysis. Based on his analysis, seen earlier, equitable interests are personal rights. Therefore, the equity of redemption, which is an equitable right, qualifies as a personal right in the mortgagor after the property is transferred. The mortgagor by this personal right can personally mandate the mortgagee to reconvey the property once the obligation is discharged.

Because a legal mortgage is a transfer and not a trust, a legal mortgage, based on Swadling's analysis, will operate as a full transfer of legal title. The collateral provider, as already mentioned, only retains a personal right in the collateral. This analysis, which is based on Swadling's position, draws the legal mortgage closer to a TTFCA. It does not help to resolve the potential trap already mentioned.

However, one problem with Swadling's analysis,[107] within the context of a legal mortgage, is that it does not provide any answer why the equity of redemption trumps the legal ownership. As a personal right, the mortgagor's right ought not to be enforceable against third party successors.[108] However, this is generally not the case. As seen below, the answer to this may be that the legal mortgage is one example where an equitable right trumps a legal right because the transaction is not outright.

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[106] The existence of two real rights in a legal mortgage draws the arrangement closer to a 'trust': the mortgagee has legal ownership, while the mortgagor has an equitable interest. The mortgagee, like a trustee, is under an obligation in favour of the mortgagor, or beneficiary, in relation to the asset. He cannot dispose of them free from the trust. Regardless of this similarity, the content of the obligation is different in both transactions. On the one hand, a legal mortgagee takes the asset for its own benefit. Where the debtor fails to perform his obligation, the mortgagee may sell the property and keep the proceeds. This essentially indicates that the rights in the property are for his own benefit. On the other hand, in a trust, a trustee is normally under a duty to use the asset for the benefit of a beneficiary, and where the assets are unlawfully sold, the beneficiary may claim the proceeds. This close resemblance of a trust to a mortgage potentially makes it risky to use a trust as a TTFCA. A TTFCA gives rise to an absolute interest. However, where a collateral provider transfers the collateral on trust for the collateral taker, there is the risk that the arrangement may be seen as a security interest. First, the beneficiary still retains some interest in the collateral, and secondly, this may be treated as a security transaction for recourse purpose. This arose in *Gray v GTP Group Ltd , Re F2G Realisation (Ltd) (In Liquidation)* [2010] EWHC 1772 (Ch); see Gullifer (n 36) para 6.38 who note that in a TTFCA the collateral taker must not hold the collateral on trust for the collateral taker.

[107] This is a broader issue for Swadling regarding the third-party effects of beneficial rights.

[108] The idea that a right may have third-party effects does not mean it is a real right.

As discussed earlier, legal ownership is treated as the primary right. However, the nature of the equity of redemption in a legal mortgage appears contrary to this. The court will normally mandate the legal mortgagee to return the asset once the debt is paid.[109] This suggests that the legal mortgage may be one of the exceptions to the primacy of legal ownership.

On a practical note, English law treats the legal mortgage as creating a limited interest (SFCA), as opposed to an absolute or outright interest (TTFCA). [110] The reason for this is that the right of the collateral taker is not outright; it is burdened by the equity of redemption which is enforceable as a property right against the mortgagee and his successors.

In arriving at the above result, English law (equity), as already noted, historically took a 'functional approach'. It focused on the purpose of the transaction, bypassing the fact that it was a transfer. It is for this reason that the equitable right becomes the primary and residual right, which trumps the legal ownership. Equity functionally converted the legal ownership into the lesser right. It took the transaction as effectively creating a limited interest and therefore 'recharacterised' it as a security device, without having regard to the transfer. Therefore, having recharacterised it as a security device, the rules applicable to security arrangements were applied to it.

This 'functional approach' adopted by equity to a legal mortgage counters the approach of the Directive. As earlier noted, the Directive adopts a functional approach to identify a TTFCA and then a formal approach to give effect to the rights created. On the other hand, equity adopts a functional approach to identify the transaction as well as to apply consequences of security rules. Thus, in equity, because the purpose of the transaction was to create a security right, the transaction was to take effect as such regardless of the transfer.

On the one hand, the outcome reached under equity runs counter to the provisions of the Directive. Based on the arguments made in relation to the Directive, although a legal mortgage is a transfer for a security purpose, it ought to be given effect without treating it as a security device. This is the same outcome reached in the application of the 'conditions of applicability' to a *fiducia cum creditore* in Dutch law. However, it is presumed that the above outcome is not what is desired under the Directive for English law. The Directive cannot

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[109] *Kreglinger v New Patagonia Meat & Cold Storage Company Ltd* [1914] AC 25; *Johnson v Diprose [1893] 1 QB 512* (1893) 1 QB 512.

[110] Swadling, 'Trust and Ownership' (n 86) 953. Another name for an absolute interest is outright interest.

impose an impossible requirement on English law not to recognise the legal mortgage, since the purpose of such an institution, within an insider context, is that the device is to be used as a security device. The above may indicate that there are indeed doctrinal presuppositions in the Directive. The functional definition in the Directive only makes sense within the context of these doctrinal principles.

The above discussion implies that the effects reached under English law in relation to a legal mortgage is functionally the same as that under a *fiducia cum creditore*. Although both institutions are transfers, they are defined as TTFCAs depending on whether the interest was transferred outright. While on the one hand, a legal mortgage is not an outright transfer and thus not a TTFCA, a *fiducia cum creditore* is an outright transfer and as such is a TTFCA.

On a final note, a question may arise as to why the conclusion on a legal mortgage is different from the conclusion on the *fiducia cum creditore* . As earlier mentioned, in both institutions, the secured party is under fiduciary obligations. Consequently, if this is the case, should not both institutions be characterised as security devices to protect the debtor. Indeed, Steven acknowledges that in a *fiducia cum creditore*, there is the risk that the secured party may convey the debtor's estate from him forever.[111] Similarly, Keijser argues that the rights of the fiduciary should be confined to recovery and not tradability. This is intended to protect collateral providers against collateral takers, who are often in much powerful position.[112]

These arguments are convincing but may be rebutted on different grounds. First, it is apparent from earlier discussions that the development of the legal mortgage has been different from the *fiducia cum creditore*. As noted, although the scepticism against both institutions have been similar, for a legal mortgage, English law has affirmatively repurposed the institution into a proper security using the equity of redemption to hold the creditor to account. In other words, the law itself has repurposed the legal mortgage into a security device. On the contrary, it may be argued that in Dutch and Scots law, there is a clear difference between a transfer and a security, which these systems have taken steps to rigidly maintain. Thus, the law's purpose for a transfer, in these systems, is for it to operate that way: strictly as a transfer. Therefore, the law does not look favourable at situations where parties attempt to repurpose a transfer (i.e a *fiducia cum creditore)* into a security. As such, in abolishing a *fiducia cum creditore*, Dutch law arguably did not repurpose the institution into a proper security like a pledge, but rather

[111] Steven (n 75) 397.
[112] Keijser (n 18) 72.

abolished it for the purpose of maintaining the clear distinction between transfers and security devices. Scots law also maintains this distinction. However, rather than abolish the *fiducia cum creditore*, Scots law recognises it as it is (i.e. as a transfer) therefore still maintaining the distinction between a transfer and a security. Essentially, these systems acknowledge that the legal consequences between these legal devices are different and that parties who adopt any of these devices adopt them together with their separate legal consequences.

One implication of the above analysis is that these systems have provided options to contracting parties: parties may use either a *fiducia cum creditore* or a pledge. In adopting any of these institutions, the parties are deemed to accept the legal consequences as well. One implication of a transfer, as earlier noted by Steven, is that the collateral may be conveyed out of the debtor's estate forever. This implication is a necessary element of a transfer. It is therefore not convincing to want to apply the fiduciary rules to an institution which is not meant to have those rules, especially for systems which take a very rigid differentiation between transfers and security devices.[113] The availability of a pledge or security device means parties may instead adopt that device if they desire the benefits of the fiduciary rules

1.6 .CONCLUSION

In reconstructing institutions, directives, particularly the Collateral Directive, adopt an outsider perspective. The analysis above demonstrates that the functional definition of a TTFCA in the Directive, based on the two system-neutral conditions of applicability, may give rise to some tensions where an outsider perspective is only adopted to understand the Directive. In a practical sense, Akkermans' opinion mentioned earlier that a legal mortgage is a TTFCA shows the risk of taking such an outsider perspective. However, this is understandable if for example we consider that a *fiducia cum creditore* has the same characteristics as a legal mortgage. Thus, if the Directive applies to it as argued in this article, the expectation is that it should also apply to a legal mortgage.

[113] This links to the earlier argument about how the Scots and Dutch law systems take a more rigid approach to differentiate a transfer from a security compared to English law, which takes a more flexible approach in essentially repurposing the institution as a security device. Furthermore, within the context of the financial markets, it is debatable if there will be much challenge against the loss of the fiduciary rules for a *fiducia cum creditore*. This is because a right of use can now be granted to a collateral taker under a Security Financial Collateral Arrangement (SFCA) in the Collateral Directive. See Art 5 of the Collateral Directive. This provision has raised controversy as it exposes the collateral taker to the risk of the collateral taker's insolvency. There are also questions whether it fits well with the security laws in most systems which prohibit such a right because of the accessory nature of security rights. See Keijser (n 18) 199 – 227.

However, as demonstrated in this article, to avoid this risk, there is need to have recourse to contextual legal doctrines from the standpoint Scots and English law. The arguments here do not necessarily mean that institutions cannot be defined in a 'system-neutral' way, but rather that in some cases, an insider and outsider perspective is needed, and that more attention needs to be paid to contextual peculiarities.