



RIGA
GRADUATE
SCHOOL OF
LAW

Can the assignment of a financial claim be regarded as a financial instrument?

MASTER'S THESIS

Author: Toms Andersons
LL.M 2017/2018 year student
student number M016091

SUPERVISOR: *Inese Lazdovska*
Dipl. iur., MBA Finance

DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

RIGA, 2018

SUMMARY

The main aim of this thesis is to provide with an answer to the question as to whether the assignment of financial claims should be regarded as constituting financial instruments. The question is interpreted from the perspective of the civil law legal system of Latvia, which is a part of the European Union (EU), the Eurozone, and also the common capital market of the EU. Therefore, the legislative acts of the EU relating to the subject matter are interpreted and analysed in conjunction with the substantive national law. Since the examined definition for the concept of assignment of claims has commonalities in other parts of the EU that share similar legal traditions the findings of this thesis may therefore be relevant to the potential analysis also in other countries.

The overall research is structured into three main parts, where initially the concept of assignment of a financial claim is analysed, followed by the concept of financial instruments, and concluded by the analysis that interprets the insights gained in the analysis of each separate part in light of the research question.

The key components relevant for the analysis of the concept of assignment of claims in relation to the research question are identified to be as follows (non-exhaustively):

1. Only claims can be assigned, any obligations and liabilities remain with the assignor;
2. For a claim to be assignable, the assignor must have control over the claim;
3. Any claims may be assigned – both present and future, and also claims that are uncertain, as long as they are identifiable;
4. The assignment of claims cannot worsen the position of the debtor;
5. Claims can be assigned in parts where the claim itself is divisible (e.g. money) and specific components of a claim can be assigned in isolation, if the parties agree to it (i.e., only interest, only the principal, or any combination);
6. The assignment of claims is effective for the assignee and assignor even without notification to the debtor;
7. Once a claim has been assigned, it is no longer in the possession of the assignor and the assignee is free to use the claim as needed;
8. A claim is assigned by means of signing a contract between the assignee and the assignor;
9. The assignment of a claim does not alter the claim itself as existing under the original contract between the debtor and the creditor
10. The agreement for the assignment of a claim is considered to be an ancillary agreement.

These characteristic components are then analysed in connection with their suitability to match the key traits of the definitions of various financial instruments that are set out by the EU's capital markets regulatory framework. The main definition used for this purpose is the one included in the Markets in Financial Instruments Directive of 2014 (MiFID II) and it is

supplemented with the context provided on securitisation within the Regulation on Securitisation (Regulation (EU) 2017/2402).

The types of financial instruments that are examined more closely and prove to be of greater significance for this analysis are:

- Transferable securities;
- Securitised debt
- Debt securities

Through this analysis, the key concept of negotiability of securities is defined, which is then shown to be incompatible with the characteristic traits possessed by the concept of assignment of claims. Further on, it is conclusively demonstrated that assignments of claims do not constitute securitised debt. This is done by way of analysing two key components that have to be fulfilled in order for a securitization transaction to be regarded as such. Specifically, the elements of tranching and of the issuing of new securities are not fulfilled.

Having demonstrated the incompatibility of the two concepts, a brief attempt is made to assume what would happen in case the assignment of claims were to be placed under the definition of securitised debt. From this example it is derived that such a scenario would lead to other provisions of the Regulation on Securitisation to be rendered incomprehensible, since they would require the use of the assignment of claims as one of the methods of passing exposures to a special purpose vehicle, and then subsequently prohibit the use of them for securitisation, since securitisations and transferable securities cannot be used for securitisation purposes.

Afterwards, the findings resulting from related areas of analysis are presented which support the argument that assignment of claims should not be considered as financial instruments. Among these findings, the most important implications are that it has not been the intent of the legislator to include assignments of claims under financial instruments, as evidenced by the provisions under the annotations to the Financial Collateral Directive and the subsequent transposition into national law, the exclusion of financial instruments from the Rome I regulation which includes assignments of claims, and lastly the separate treatment of assignments of claims and securities in the forthcoming regulation on third-party effects of assignments.

The paper then concludes by providing with a conclusive answer to the research question posed in the beginning in the negative which is - no, the assignment of financial claims cannot be regarded as financial securities. An attempt to do so would have crippling consequences for both of the concepts, which is why it is all the more relevant to provide with a clearer distinction between the two.

TABLE OF CONTENTS

Summary.....	1
Table of Contents	3
1. Introduction	4
1.1 Defining of the research question	5
1.2 The approach taken to answer the research question.....	5
2. Defining the concept of assignment	6
2.1 Origins of assignment as a concept in law.....	6
2.2 Definition of assignment.....	7
2.3 Legal basis for the assignment of claims	9
2.3.1 What can be assigned?.....	10
2.3.2 What cannot be assigned?.....	12
2.3.3 What are the effects of assignment?.....	15
2.3.4 Formal requirements for assignment	16
3. Defining the concept of Financial instruments.....	20
3.1 Capital markets law of the EU	21
3.2 The specific terms used in EU legislation	25
3.2.1 The importance of meaningful definitions in the field of capital markets	25
3.2.2 Definition of “financial instruments”	27
3.2.3 Definition of “transferable securities”	27
3.2.4 Definition of “securities”	28
3.2.5 Definition of “securitised debt”	30
3.3 The definitions under Latvian Law	33
3.3.1 Definition of “financial instruments” as transposed in Latvia	33
3.3.2 Definition of “transferable securities” as transposed in Latvia	34
3.3.3 Definition of “securitised debt” as transposed in Latvia	35
4. Combined analysis of the definitions financial instruments and assignment of claims	38
4.1 Could the concept of assignment of claims fit into any of the examined definitions of financial instruments?.....	38
4.2 Indications for the current the placement of assignment of claims within the legal framework.....	40
4.2.1 Insights from the addition of “credit claims” to the Financial Collateral Directive	40
4.2.2 Insights from the Latvian Civil Law and the Rome I regulation.....	41
4.2.3 Insights from the proposed directives.....	41
5. Conclusion and the Answer to the research question.....	43

1. INTRODUCTION

Just a few years ago in 2015 the Financial and Capital Markets Commission of Latvia (in Latvian: *Finanšu un kapitāla tirgus komisija*) (FKTK) issued a press release regarding the use of assignment agreements by the peer-to-peer lending service provider Mintos. In this press release the FKTK called out their activities, emphasising that the existing legal framework only allows the public offering of investment to market participants that have obtained a licence from the FKTK.

Additionally, the FKTK issued a warning to consumers and would-be clients of the service that investments made with Mintos are in no way covered by the types of protections offered to such investments as deposits in a bank. In doing so, the FKTK based its statement on the provisions included in the Financial Instrument Market Law (FITL).¹ A further inspection of the provisions contained in the law quickly revealed that the scope of the law only relates to the use of “financial instruments”.

This connection raised a certain level of curiosity since the concept of assignment dates back multiple centuries and seemingly from nowhere a new regulatory framework could be imposed on it. Therefore, an attempt was made to reach out to the FKTK for a comment. The question asked was formulated in effectively the same form as the research question that is presented within this thesis and the answer that was given provided with the the main motivation for taking on this research.

In the opinion of the FKTK, assignments of financial claims were to be regarded as falling within the scope of the definition of “financial instruments” as provided by the FITL. Specifically, they were considered to be securitised debts, which are a form of transferable securities.

The treatment of financial claims and claims in general as a financial instrument would mean that contracts and the parties which make use of this mechanism would be subject to supervision at a national and international level. This would be a significant development, since the assignment of financial claims is frequently used in the financial markets in transactions such as factoring, securitisation, and in the most basic case, the assignment of a claim of a single debt contract.

Even though the “originate-to-distribute” model of securitisation has been blamed to be part of the cause for the financial crisis of the late 2000s,² as a financing technique, securitization proves to be very useful. It allows transforming exposures that would not otherwise be tradable into tradable securities, which in turn allows for a more efficient credit risk transfer and provides

¹ “Financial Instrument Market Law” (2003), <https://likumi.lv/doc.php?id=81995>.

² “Proposal for a Regulation of the European Parliament and of the Council Laying down Common Rules on Securitisation and Creating a European Framework for Simple, Transparent and Standardised Securitisation and Amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 COM/2015/0472 Final - 2015/0226 (COD)” (2015), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:0472:FIN>.

opportunities for more access to funding for the whole economy.³ Furthermore, securitization also allows the reduction of the cost of credit, which stems from the fact that these transactions are structured to be insolvency-remote and only reflect the value of the underlying exposures, but not the financial soundness of the originator.⁴

Turning from no regulation to a form of regulation reserved for complex financial instruments that have contributed to a global financial meltdown would be a large leap to make. Therefore, it is worthwhile examining whether the key concept at the heart of the topic – the agreement for an assignment of a claim – belongs among the ranks of financial instruments or would its proper place be the same as it has been since its inception.

1.1 Defining of the research question

Taking into account the issue as described in the previous section of this introduction, the research question presented for the purpose of this thesis is as follows: **Can the assignment of a financial claim be regarded as a financial instrument?**

In order for it to be possible to reach a meaningful answer, the scope of the research question is narrowed down to their interpretation as relevant to Latvia, and by extension also the European Union (EU).

Therefore, the concept of “assignment” in this thesis is intended to refer to the civil law understanding of the term, as opposed to the common law understanding which divides assignments into “equitable” and “legal” assignments.

The concept of financial claims is meant to refer to claims that arise from financial assets, and are thus intended to mean a subset of claims, and for the purpose of this paper the claims dealt with are monetary, divisible claims. The answer to the question using the term “claims” would therefore include also the answer to the research question, along with any other claim.

At the outset of this research, the hypothesis is formulated as follows: The assignment of a financial claim cannot be regarded to be a financial instrument.

1.2 The approach taken to answer the research question

In order to answer the research question, the research will initially focus on defining what is meant by “assignment”. The origins in law of the concept of assignment are to be examined, followed by defining the term as it is currently understood in civil law legal systems, with a special focus on the interpretation in Latvia.

Further on the concept of financial instruments will be defined by examining at first the context of capital markets law of the EU, within which the concept of financial instruments exists. Afterwards, the specific terms used in the legal framework will be defined and analysed for their

³ European Banking Authority, “EBA Report on Qualifying Securitisation: Resoponse to the Commission’s Call For Advice of January 2014 on Long-Term Financing” (London, 2014), 47, <https://www.eba.europa.eu/documents/10180/950548/EBA+report+on+qualifying+securitisation.pdf>.

⁴ Steven L Schwarcz, “Chapter 51. Securitization and Structured Finance,” in *Handbook of Key Global Financial Markets, Institutions, and Infrastructure*, ed. Gerard Caprio (Academic Press, 2012), http://www.masonlec.org/site/rte_uploads/files/SCHWARCZ_Encyclopedia-of-Financial-Globalization-Elsevier.pdf.

constituent parts which in order to be able to match the characteristics of “financial instruments” with the characteristics identified for the concept of “assignment”.

Afterwards, the analysis of this potential match will be performed and the insights will be gathered which would allow answering the research question.

2. DEFINING THE CONCEPT OF ASSIGNMENT

For the purposes of this thesis, the concept of assignment as defined in civil law is examined, since the question that is raised relates to the specific interpretation of the concept under Latvian and by extension the EU law. The Common Law concepts of equitable assignment and legal assignment are therefore not examined in these parts.

In order to be able to answer the research question, it is important to examine thoroughly the concept of the assignment of claims, since the findings of this part of the research will be later used as the basis for interpreting any potential match of the identified characteristics of financial instruments. The analysis starts with providing a historical background to the concept of assignment and then moves on to provide with a definition of assignment as understood currently. The following analysis is then structured according to the defining characteristics of the assignment of claims mirroring the structure laid out by the Civil Law of Latvia in order to make it easier to follow when comparing with the provisions provided by the law.

2.1 Origins of assignment as a concept in law

When discussing the legal institution of assignment it is helpful to briefly consider the origins of the concept which dates back to ancient Roman law. As a term it originates from the latin *cessio*⁵ (from the past participle of the latin verb “*cēdere*” meaning “to yield”)⁶ and in various languages in Europe the term is used in a similar form (e.g., in Latvian the term is “*cesija*”). The terms “to cede”, “assign”, “transfer” can be used interchangeably.⁷

In its historical form under Roman law, a contract right was regarded as inseparable from the actual relationship between the creditor and the debtor. This idea conflicted with the practical necessity of having a way to perform such transfers of claims (specifically those of debts) and resulted in various attempts to circumvent this contradiction⁸.

Over time, these rules were evolved to allow for the transfer of contract rights.⁹ Initially these developments allowed for the empowerment of a transferee of the creditors choosing to pursue

⁵ Andris Grūtups, “Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.),” in *Latvijas Republikas Civillikuma komentāri: ceturtā daļa. Saistību tiesības. (Commentary to the Civil Law of the Republic of Latvia: part four. Obligations Law.)* (Rīga: Mans Īpašums, 1998), 285.

⁶ Kalvis Torgāns, *Saistību tiesības. I daļa. (Obligations law. Part I.)* (Rīga: Tiesu namu aģentūra, 2006), 156.

⁷ Hein Kötz, *European Contract Law*, trans. Gill Mertens and Tony Weir, Second Edition (Oxford: Oxford University Press, 2017), 337.

⁸ Voldemārs Kalniņš, *Romiešu civiltiesību pamati (Foundations of Roman civil law)* (Rīga: Zvaigzne, 1977), 131–32.

⁹ Kötz, *European Contract Law*, 338.

the claim in place of the creditor and retain the proceeds. However, these rights were revocable at any time by the issuer making this arrangement uncertain in regard to the transferee's position.¹⁰ Later on this developed into the granting of an *actio utilis* to the transferee pursuant to the agreement between the creditor and the transferee.

Even though in substance the transferability of a claim was accepted already by the time of the *Corpus Juris Civilis*, there was continued debate afterwards up until the late 19th century over whether the *actio utilis* truly constituted the transferring of the claim as opposed to having granted the transferee the power to collect the debt. This debate was fuelled by the simultaneous inclusion of the successive historical developments regarding the transferability of a claim in the *Corpus Juris Civilis* in a manner that created the appearance of all of these elements existing within the same time frame in Roman law.¹¹ Eventually, assignment as understood today (incorporating the free transferability of claims) was first adopted into the German Civil Code in 1896¹², followed by Switzerland in 1912.¹³ Assignment is also included into the Latvian Civil Law adopted in 1937.

The assignment of claims arising from a contract is now recognized throughout Europe, but the various aspects of it are treated differently among the national legal systems due to the complicated origins of the concept.¹⁴ For example, there are varying approaches as to whether and how should the debtor be notified that the assignment has taken place, whether and how can future receivables be assigned and other aspects. This is complicated further by the important role that assignments play in international financial transactions where each party that is involved in this transaction may have its registered office in another country. Unlike the field of international payments that has binding unitary substantive and conflict of laws rules dating back to the early 20th century (covering promissory notes, bills of exchange, cheques, etc.), intangible rights such as assignments do not.¹⁵ In the EU only conflict of laws rules relating to the contractual aspects of assignment are dealt with by the Rome I regulation and the third-party effects are not covered as of yet.¹⁶

2.2 Definition of assignment

Under the Latvian Civil Law the legal definition of assignment is the transfer of a claim from one creditor (the assignor) to another (the assignee).¹⁷ Therefore for an assignment to be possible,

¹⁰ Torgāns, *Saisību tiesības. I daļa. (Obligations law. Part I.)*, 157.

¹¹ Kötz, *European Contract Law*, 338.

¹² "German Civil Code (BGB)," para. 398, accessed May 17, 2018, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1459.

¹³ Torgāns, *Saisību tiesības. I daļa. (Obligations law. Part I.)*, 158.

¹⁴ Kötz, *European Contract Law*, 338.

¹⁵ Wolf-Georg Ringe, "The Law of Assignment in European Contract Law," in *English and European Perspectives on Contract and Commercial Law*, ed. Louise Gullifer and Stefan Vogenauer (United Kingdom: Hart Publishing Ltd, 2014), 276.

¹⁶ "Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to the Third-Party Effects of Assignments of Claims COM/2018/096 Final - 2018/044 (COD)," Pub. L. No. COM/2018/096 final-2018/044 (COD) (2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A96%3AFIN>.

¹⁷ Torgāns, *Saisību tiesības. I daļa. (Obligations law. Part I.)*, 155.

there have to be at least three parties involved – the assignor, the assignee, and the debtor. However, the debtor does not have to know of the assignment taking place and no consent of the debtor is necessary for the assignment to be effective. The lack of a need for consent of the debtor is one of the defining characteristics of assignment.

Assignment is different from subrogation, novation, and a sale-purchase agreement. Subrogation, as opposed to assignment, is when the creditor replaces their position in the original agreement with another person (without the consent of the debtor). The Latvian Civil Law does not allow for subrogation.¹⁸

Novation (in Latvian “*pārjaunojums*”) is when the original agreement between the debtor and the creditor is altered, and a new creditor is entered instead of the original creditor¹⁹. Novation thus involves at least three parties consenting to change the initial deal between the debtor and the creditor and then signing this changed agreement. Novation is therefore not possible without the explicit consent of the debtor, which means that the circumstances in which novation can be used will be different from the cases where assignment is used. Because novation effectively replaces the contracting parties of the agreement, novation allows for the original creditor to end their obligations towards the debtor. In comparison, through assignment it would not be possible to achieve such a result, since obligations to perform cannot be assigned. Novation also enables for the changing or adding new obligations to perform in the contract, which is also not possible in assignment. Delegation is the transfer of one debtor to another, effectively giving the creditor a new debtor in place of the original debtor.²⁰ Delegation is also performed through a novation agreement, since it requires the explicit consent of the creditor; however, delegation is not specifically regulated under the Latvian Civil Law and is possible through the virtue of freedom of contract.

It is important to emphasize that no new claims or rights are created through assignment, as it is a transfer of an existing claim from the assignor to the assignee.²¹ Furthermore, an assignment transfers only the claims, but not the obligations or the entirety of the contractual relationship between the parties from which the claim arises. This is what separates assignment from subrogation, since in subrogation not only the claim is transferred, but also the contractual relationship between the contracting parties.

Assignment should also not be confused with the concept of agency, especially in cases where the creditor authorises somebody else to collect a claim on their behalf (e.g. for debt collection). In an assignment, the claim passes to the assignee and the assignor relinquishes their claim. In the case of, e.g., debt collection under agency, the assignor retains the original claim the whole time. Interestingly, research in the area of Roman law has revealed that the concept of agency was not recognised at all in Roman society, from which the concept of institution of assignment has originated from. In Roman law there is no mention of the possibility of direct representation and

¹⁸ Grūtups, “Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.)” 282.

¹⁹ Grūtups, 283.

²⁰ Voldemārs Kalniņš, *Romiesu civiltiesību pamati (Foundations of Roman civil law)* (Rīga: Zvaigzne, 1977), 132, [https://egramatas.com/arhivs/FILOSOFIJA%20UN%20PSIHOLOGIJA/Politika/juridisko%20tiesibu%20macibu%20lidzekli%20no%20gramataselektroniski/Romiesu%20civiltiesibu%20pamati\(V.Kalnins\).pdf](https://egramatas.com/arhivs/FILOSOFIJA%20UN%20PSIHOLOGIJA/Politika/juridisko%20tiesibu%20macibu%20lidzekli%20no%20gramataselektroniski/Romiesu%20civiltiesibu%20pamati(V.Kalnins).pdf).

²¹ Torgāns, *Saistību tiesības. 1 daļa. (Obligations law. Part I).*

the concept of one person originating an obligation on behalf of another person was not possible.²²

2.3 Legal basis for the assignment of claims

Provisions for assignment are included into the civil codes of various countries, e.g. in the German Civil Code²³ under section 398, in the French Civil Code²⁴. It is also present in common law countries such as the USA and is even further codified in the USA under the Uniform commercial code § 2-210²⁵. In the UK assignment takes on a more different form [Kotz, argues that it is archaic and redundant] , but it nevertheless still exists and is present under section 136 of the Law of Property Act 1925.²⁶ Under the Latvian Civil Law, assignment is provided under Part 4, Chapter 9.

The Latvian Civil Law provides for three possible grounds for the assignment of claims:

1. Pursuant to law;
2. Pursuant to a judgment of a court;
3. Pursuant to a lawful transaction.²⁷

Assignments of claims that arise from the first two grounds are relatively infrequent will not be examined in detail, but only the key differences will be provided in order to gain a better perspective on the institution of assignments as a whole. The most common form for assignments of claims are those that arise pursuant to lawful transactions or agreements. Such agreements play a vital role in the global economy by facilitating various types of financial transactions and enhancing the market for risk.²⁸ This role of assignments of claims will be examined in greater detail in further sections.

A key difference between the assignments which arise pursuant to law or to a judgement of a court and those assignments that arise pursuant to a lawful transaction is that the latter require the consent of the creditor. Nevertheless, there are assignments that have to be entered into a contract because it is required by the law, as prescribed in Article 1795 of the Latvian Civil Law. This Article provides that “if a person has the duty to relinquish a certain property, then they shall also assign all claims pertaining to such property.” In his commentary to the Article 1793 of the Latvian Civil Law, A. Grūtups illustrates²⁹ how an assignment pursuant to a judgement of a court may arise. He writes that this could easily happen in case one of the parties in the case

²² Kötzt, *European Contract Law*, 294.

²³ German Civil Code (BGB), sec. 398.

²⁴ “Civil Code of France (Consolidated Version 02.03.2017),” secs. 1321–1326, accessed May 17, 2018, <http://www.wipo.int/wipolex/en/text.jsp>.

²⁵ American Law Institute, and National Conference of Commissioners on Uniform State Laws, “Uniform Commercial Code” (2012), <https://www.law.cornell.edu/ucc/2/2-210>.

²⁶ “Law of Property Act 1925,” sec. 136, accessed May 21, 2018, <https://www.legislation.gov.uk/ukpga/Geo5/15-16/20/section/136>.

²⁷ “Civil Law of Latvia” (1937), sec. 1793, <https://likumi.lv/doc.php?id=225418>.

²⁸ Angelos Delivorias, European Parliament, and Directorate-General for Parliamentary Research Services, *Understanding Securitisation: Background - Benefits - Risks : In-Depth Analysis*. (Brussels: European Parliamentary Research Service, 2016), <http://bookshop.europa.eu/uri?target=EUB:NOTICE:QA0415658:EN:HTML>.

²⁹ Grūtups, “Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.)” 285.

prescribed by the law refuses to assign the claims/rights. That party may then sue and the assignment would be granted pursuant to the judgment of a court.

The logical prerequisite for an assignment that arises pursuant to a lawful transaction is the the existence of an agreement upon which the assignment is based. This means that the assignments for claims are also dependant on the agreement or contract to be valid. Under the Latvian Civil Law, these conditions are regulated under, e.g., Chapters 1 and 2 under Part 4. The reasons include from the contracting parties being incapable of action, improper representation and others.

An agreement for the assignment of claims is considered to be an abstract transaction, as opposed to causal.³⁰

The agreement for the assignment of a claim is considered to be an ancilliary agreement.³¹

Assuming that the other conditions as required by the general validity of an agreement are fulfilled, the assignment agreement is valid if these key characteristics can be satisfied:

1. the claim can be defined
2. the assignee has ownership over the claim
3. the assignee has the freedom to act with the claim³²

2.3.1 What can be assigned?

Only claims can be subject to assignment. The Latvian Civil Law gives a broad range of claims that can be the subject matter of assignment³³, since it includes any claims that exist in the present and claims that are only yet to come into existence. Futhermore, claims that are uncertain may also be assigned. The key element in determining whether a claim is assignable is that the particular claims must be possible to be identified.

Because of the broad scope of the assignable subject matter, it is also possible to assign claims that are only expected to become actionable in the future.³⁴ This would include claims which still have to meet certain conditions to come into force and claims for undetermined amounts. An example of such an assignment could be the assignment for income from a rent agreement³⁵ where the tenant may move out unexpectedly and cancel the agreement. Therefore, these conditions do not actually have to ever be met in order for the assignment to be considered to be valid since the assignor does not assume the responsibility for any losses that the assignee may incur due to the claim not materialising (unless there is a specific provision included in the

³⁰ Vita Nemenova, "Cesijas tiesiskā regulējuma modernizācijas virzieni Latvijā (Modernization tendencies for cession's legal regulation in Latvia)" (Rīgas Stradiņa universitāte, 2015), 70, https://www.rsu.lv/sites/default/files/dissertations/Vita_Nemenova_promocijas_darbs.pdf; Torgāns, *Saistību tiesības. I daļa. (Obligations law. Part I.)*, 158.

³¹ Grūtups, "Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.)," 285.

³² Nemenova, "Cesijas tiesiskā regulējuma modernizācijas virzieni Latvijā (Modernization tendencies for cession's legal regulation in Latvia)," 144.

³³ Civil Law of Latvia, sec. 1798.

³⁴ Kötz, *European Contract Law*, 344.

³⁵ Latvijas Republikas Augstākās tiesas Civillietu departamenta 2017.gada 30.jūnija spriedums Lieta Nr.C28409813 SKC-221/2017 (Ruling of the Supreme Court of Latvia on case Nr.C28409813 SKC-221/2017), No. C28409813 SKC-221/2017 (Latvijas Republikas Augstākās tiesas Civillietu departaments June 30, 2017).

assignment contract that states otherwise). The assignor is only responsible for the assigned claim to be authentic, meaning that the claim has to be in the possession of the assignor, must not be previously claimed, and originates from a valid source.³⁶ Furthermore, a claim which has not materialised would not render the assignment invalid, even if the parties have agreed that the assignor assumes responsibility for this risk. The assignor would only be liable for the losses as specified under the contract.³⁷ However, this does not mean that the assignor can knowingly assign claims of an insolvent debtor.

Debt claims for which the due date has already passed are also assignable under the Latvian Civil Law.³⁸ For debts that have become late, it is important to emphasize that only the claim itself is assignable, but not the contractual relationship as a whole. Furthermore, the assignment of rent income is different from the assignment of a rent agreement as a whole, the latter of which is not possible since contractual relationships are not assignable.³⁹

The assignment of separate parts of debt claims is also possible.⁴⁰ There are no specific provisions regarding this in the Latvian Civil Law, but there are no obstacles to it either. For comparison, the Estonian⁴¹ and Lithuanian⁴² civil codes both allow assignments of partial claims in an explicit way.

One could object to the possibility of the assignment of parts of debts if the provision that prevents the debtor from acquiring a worsened position due to the assignment of a claim is interpreted in a very specific way.⁴³ To illustrate this hypothetical point, an assignor could choose to assign the debt either in whole to one assignee or choose to split the claim into smaller pieces and assign only parts of the claim to one or more assignees or to assign the entirety of the claim, but into smaller pieces to multiple assignees. In the case where the claim is left undivided there is no potential for the worsening of the debtors' position; however, in cases where the claim is increasingly divided, the debtor may face a challenge posed by a multitude of claimants. This difficulty may be further compounded in case the debtor faces difficulties servicing the claim and legal action must be taken against the debtor by the claimants (the assignees).

In the hypothetical situation as noted above the debtor may be placed in a worse-off position than under the original contract due to the assignment of parts of claims. This effect on the debtor's position arises from having to deal with multiple creditors and experiencing increased legal and transaction costs, thus overstepping the provision in Article 1807. However, the assignment of parts of claims is generally accepted in cases where the claim in question (such as a monetary

³⁶ Grūtups, "Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.)," 291.

³⁷ Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2007. gada 28. marta spriedums Lietā Nr. SKC – 192 (Supreme Court ruling on the case no. SKC – 192), No. SKC – 192 (Latvijas Republikas Augstākās tiesas Senāta Civillietu departaments March 28, 2007).

³⁸ Torgāns, *Saistību tiesības. I daļa. (Obligations law. Part I.)*, 162.

³⁹ Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2012. gada 25. janvāra spriedums Lietā Nr. SKC-18/2012, No. SKC-18/2012 (Latvijas Republikas Augstākās tiesas Senāta Civillietu departaments January 25, 2012).

⁴⁰ Torgāns, *Saistību tiesības. I daļa. (Obligations law. Part I.)*, 169.

⁴¹ "Law of Obligations Act of the Republic of Estonia," Pub. L. No. RT I 2001, 81, 487 (2001), para. 164, <https://www.riigiteataja.ee/en/eli/506112013011/consolide>.

⁴² "Civil Code of the Republic of Lithuania," Pub. L. No. VIII–1864 (2000), para. 6.101, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495>.

⁴³ Civil Law of Latvia, sec. 1807.

debt claim) is divisible.⁴⁴ This acceptance occurs due to a multitude of reasons, as illustrated further on.

One of these reasons is that the theoretical worsening of the debtor's position can be offset in part by the fact that the debtor may raise objections and counterclaims that they have had against both the assignor and the assignee.⁴⁵ This means that with each new claimant, the debtor could gain new forms of defense for their position. In Common law, this is addressed by allowing the debtor to request for a joint legal action, while in the various soft law proposals⁴⁶ that have attempted to unify the way assignments are handled across the EU and also on a broader scale there is a proposed requirement for the assignor to bear these increased costs that arise from such partial assignments.⁴⁷ Furthermore, the existing legal framework⁴⁸ in the EU requires the assignor to continue servicing the original credit claim in special cases relating to the assignment of consumer credit claims. From this provision it can be clearly inferred that the parties involved in such a divided assignment claim have the option to keep the servicing of the claim to a single assignee and thus spare the cost of redundantly duplicating the same function.

Similarly to the possibility to assign parts of debts, it is also possible to make contracts where only parts of the debtor's obligation towards the creditor are assigned. For example, it is possible to assign only the claim for the interest part of a debt or only for the principal part of a debt claim. Assigning the interest part of a debt could allow for a creditor to hedge their exposure to interest rate risks.

Therefore, assignments play an important role as tools for the parties seeking to assign claims in the extent and amount that they deem to be necessary, as opposed to having to assign a claim in full. This ensures the accessibility of liquidity for what could otherwise be illiquid assets and furthermore allows the contracting parties to achieve a more specific result than would be possible if the ability to divide the claim would be prohibited.

2.3.2 What cannot be assigned?

The Latvian Civil Law contains two explicit provisions as to what claims cannot be assigned⁴⁹. The first is that one cannot assign claims that are closely associated with the person of the creditor, and the second is that one cannot assign claims for which the substance would be significantly altered if performed by another person. Thus, this article essentially provides with a mechanism that allows keeping claims with a specific creditor as opposed to anyone else⁵⁰.

The first provision regarding claims that are closely linked to the creditor include such claims as wages, social security payments, alimentation rights, claims pursuant to a divorce etc.⁵¹

⁴⁴ Kötz, *European Contract Law*, 343.

⁴⁵ Civil Law of Latvia, sec. 1808.

⁴⁶ See e.g., partial assignment under Article 11:103 in the Principles of European Contract Law or Obligor's additional costs under Article 9.1.8 of the Principles of International Commercial Contracts

⁴⁷ Kötz, *European Contract Law*, 343.

⁴⁸ "Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC," Pub. L. No. 32008L0048, OJ L 133 (2008), <http://data.europa.eu/eli/dir/2008/48/oj/eng>.

⁴⁹ Civil Law of Latvia, sec. 1799.

⁵⁰ Grūtups, "Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights)," 294.

⁵¹ Grūtups, 292.

Furthermore, this provision also allows for the exemption of assignability for those claims that are related to the creditor by way of agreement. The logic behind this concept of exemption by choice is that a debtor could have a preference for having a particular creditor.⁵² Such a preference may have various personal or professional reasons, but must be stated in the contract in order to take force. This provision effectively allows the contracting parties to explicitly exclude the ability to assign a claim to another person in the original contract between the creditor and the debtor, therefore allowing the debtor to prevent assignment if they wish to do so. Any assignment of a claim that is made despite the existence of such a provision would render the assignment invalid, since such claims cannot become the subject matter for assignment.

However, as noted under Article 470 of the Commercial Law of Latvia, such non-assignment provisions are regarded as invalid in the special case where the claim is assigned to a factoring services provider.⁵³ Similar provisions also exist in the Ottawa Convention of International Factoring⁵⁴, of which Latvia is also a signatory state⁵⁵, and e.g. the commercial codes of France⁵⁶ and Germany.⁵⁷ Such exemptions from non-assignment are included on the grounds that it may affect the interests of third parties, and impair the free circulation of and also negatively affect the accessibility of credit to the potential assignors.⁵⁸

The second provision of this article, while being closely related to the first provision, supplements the article's aim of retaining the claim with the original creditor.⁵⁹ Drawing a very clear distinction between cases where this provision prevails over the first provision proves itself difficult, but reference to this provision in court is most often made in cases involving insolvent companies.⁶⁰

Lastly, it should be noted that the exact limitations for assignment are still being defined, as evidenced by a first instance court ruling in the case of SIA ExpressCredit vs PTAC, which regards a possible prohibition on assignments of consumer credit claims.⁶¹ In this case, the court upheld the prohibition on assigning the claim originating from a consumer credit where the assignee was not licensed to issue credits. The argumentation for this judgement was based on the interpreting the assignment of the claim as placing the debtor in a worse position. However, as will be shown in the next section of this paper, an assignment of a claim cannot worsen the debtors position, as this would render the assignment invalid. Furthermore, in cases where situations of similar nature have been examined by legal scholars in Latvia, the worsening of the debtor's position was not considered to have taken place even when the assignment of a claim is made of to an assignee that is very strict on enforcing the claim and unyielding as regards the

⁵² Kötz, *European Contract Law*, 342.

⁵³ Saeima, "Commercial Law" (2000), sec. 470, <https://likumi.lv/doc.php?id=5490>.

⁵⁴ International Institute for the Unification of Private Law, "UNIDROIT Convention on International Factoring" (1988), chaps. II, Article 6, <http://www.unidroit.org/instruments/factoring>.

⁵⁵ Saeima, "Law on the UNIDROIT convention on international factoring" (1997), <https://likumi.lv/doc.php?id=44298>.

⁵⁶ "Commercial Code of France," Pub. L. No. LOI n°2008-3 (2008), bks. II, title IV, chapter II, Article 442-6 II, <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005634379&dateTexte=20130701>.

⁵⁷ "Commercial Code of Germany" (1994), para. 354a, http://www.gesetze-im-internet.de/hgb/_354a.html.

⁵⁸ Kötz, *European Contract Law*, 347.

⁵⁹ Grūtups, "Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.)," 294.

⁶⁰ Torgāns, *Saistību tiesības. I daļa. (Obligations law. Part I.)*, 164.

⁶¹ First instance court ruling SIA ExpressCredit v PTAC (Administratīvā rajona tiesa December 22, 2017).

possibility to renegotiate the claim. In such situations, the terms as specified in the contract were considered to be strictly binding. Because this judgement is currently being appealed, a definite answer as to whether this constitutes a limit of assignments in general cannot be inferred, but it is a process that may be of a defining nature for the treatment of assignments in Latvia.

2.3.3 What are the effects of assignment?

Assignments may have effects on all of the parties involved, but the time at which these effects take place may vary depending on the party in question.

The main effect of an assignment is the transfer of a claim from the assignee to the assignor.

The assignment generally becomes effective once the agreement has been signed, but the parties may agree for the assignment to become effective at a another time.⁶² Therefore, the parties may agree upon conditions that defer the assignment. By being able to defer the assignment the parties have the freedom to make arrangements in advance for the possible necessity to make an assignment of a claim. This may be useful, e.g., where an assignor wishes to reduce their exposure to late payments by debtors to a certain amount of days after a payment is due, but may want to keep the claim if the payment falls within an acceptable timeframe.

For the debtor, the assignment causes effects only from the moment when the debtor has been notified that the assignment has taken place.⁶³ Until a formal notification has been made, the debtor may continue to make payments to the original creditor. However, after the formal notification has been made, the debtor must make payments to the assignee.⁶⁴

Once the assignment agreement becomes effective, the assignee becomes the new creditor to the debtor. In case of an assignment of an entire claim the assignor is no longer a creditor to the debtor, but their contractual relationship still continues, especially regarding any obligations that may not be assigned. However, here it should be emphasized that the assignor continues to be the creditor until the assignee has properly notified the debtor of the assignment.

A distinction between the status of the original creditor and the creditor that arises through way of assignment is sometimes made. The assignee is not regarded to be a “true” creditor, but a claimant in place of the original creditor.⁶⁵ This distinction occurs because the assignee may have been assigned only part of the rights relating to the claim, and may therefore not be able to use all of the rights over the claim as the original creditor. In any case, through assignment the assignee is not able to sign a novation agreement, which is a right that is reserved to only the original creditor due to the contractual relationship that cannot be passed through assignment.

In the assignment of a part of a claim, the debtor would be presented with the effect of having multiple creditors. Besides potentially having to service the claim to more parties than before, the assignment has the effect of providing the debtor with more grounds for defense regarding the claim than before the assignment took place, since the debtor may raise any objections that it may have had against the assignor until the moment of assignment, and from the moment the assignment becomes effective - any objections that it may have against the assignee.⁶⁶

There should be no adverse effect to the debtor due to the assignment taking place. This is a key element of the concept of assignment which allows it to be possible in the first place. To understand why the prohibition to adversely affect the debtor due to an assignment is important,

⁶² Torgāns, *Saistību tiesības. I daļa. (Obligations law. Part I.)*, 168.

⁶³ Grūtups, “Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.)” 308.

⁶⁴ Civil Law of Latvia, sec. 1804.

⁶⁵ Torgāns, *Saistību tiesības. I daļa. (Obligations law. Part I.)*, 169.

⁶⁶ Civil Law of Latvia, para. 1808.

it is helpful to note that the assignment as such does not require the consent of the debtor. If the parties were to seek the consent of the debtor, they could choose to use novation instead of assignment.

Thus, even if the assignee has any particular advantages against the debtor, they may not use any of these. In contrast, as noted previously, the debtor may now use any objections and defences against the assignee that they had against the assignor and the assignor.⁶⁷ This effectively means that the debtor should now have larger set of defences than prior to the assignment. However, the assignee may be more keen on enforcing the claim as it has been formally agreed upon (i.e., being very punctual with respect to following the contract) and may treat the debtor more strictly than the assignor when it comes to re-negotiating the debt. There are no particular provisions against this in the Latvian Civil Law and is regarded to be an acceptable effect of assignment that does not fall under the provision that prohibits the worsening of the debtor's position.⁶⁸

Furthermore regarding the prohibition to worsen the debtors' position it should be noted that the debtor cannot be required to change the place of performance of the claim to a place where it is considered to be disadvantageous for the debtor.⁶⁹ This concept is also developed further in the Principles of European Contract Law⁷⁰ regarding the non-monetary performance of claims, while under the UN Convention on the assignment of receivables in international trade contains a provision for debtor protection that limits the changing of the performance of the debt to the original currency and prohibits changing the state in which the payment has to be made to a state other than what is mentioned in the original contract or to the location of the debtor.⁷¹ Even though the convention is in force as of yet and PECL is only "soft law", they help indicate the overall direction of such provisions that aim to grant some level of debtor protection.

2.3.4 Formal requirements for assignment

Formal requirements for assignments overall fulfil two main functions – proving that the assignment exists and allowing the assignee to check whether anybody else has been assigned the same claim.⁷² Both purposes allow avoiding probable disputes that may otherwise arise in the future.

Despite there being no explicit requirements in Latvian law for the form in which all assignments must take place, it is generally regarded that the assignment should be made in writing,⁷³ and a written agreement is even a requirement in some European countries⁷⁴. This arises from the basic interests of the assignee, since the debtor will need some sort of proof in order to begin payments

⁶⁷ Grūtups, "Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.)," 307.

⁶⁸ Torgāns, *Saistību tiesības. I daļa. (Obligations law. Part I.)*, 166.

⁶⁹ Torgāns, 166.

⁷⁰ "Principles of European Contract Law (PECL)," para. 11:306, accessed May 16, 2018, https://www.trans-lex.org/400200/_pecl/.

⁷¹ "United Nations Convention on the Assignment of Receivables in International Trade" (2001), secs. II, Article 15, http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables.html.

⁷² Kötz, *European Contract Law*, 349.

⁷³ Grūtups, "Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.)," 297; Torgāns, *Saistību tiesības. I daļa. (Obligations law. Part I.)*, 167.

⁷⁴ Civil Code of France (consolidated version 02.03.2017), chaps. II, Section 1, Article 1322.

to the assignee instead of the original creditor.⁷⁵ Additionally, an assignment made in written form may allow the assignor to protect itself in case a dispute arises over the existence of the assignment and also in disputes where the assignor has assigned the same claim to multiple assignees. The most basic cases do not require a specific form for how the contract for assignment should be written and the parties may specify the contract as they wish.⁷⁶

More specific cases, such as those under Article 1802 of the Civil Law of Latvia, do require for there to be a written agreement. This article covers cases where the claim that is subject to assignment originates from any written act (e.g., loan agreement). Here the law offers the parties involved in the assignment transaction to either write the confirmation of the assignment on the original agreement, or to create another agreement that sets out the assignment of the claim.⁷⁷ There are no further specifications as to what has to be included in the written assignment agreement beyond what is required by the general provisions of Civil Law on contracts, but it is clear that a notarisation is unnecessary in Latvia.⁷⁸

One of the common elements regarding assignment is the concept of notifying the debtor of the assignment. Under the Latvian Civil Law, there are no formal requirements regarding how the notification should be made. Similarly, in Germany there is also no requirement for how the notification of an assignment should take place. Here the key element is that this notification should be adequate.⁷⁹ Furthermore, there is no formal requirement in general cases for the notification to even be made in order for the assignment to be effective.

A special case is made for assignments of consumer loans regarding notification requirements. In cases where a claim arising from a consumer credit agreement is assigned, the consumer must be notified of the assignment. This requirement arises from Article 17 (2) of Directive 2008/48/EC⁸⁰, which is currently adopted in Latvia through the Consumer Protection Law under Article 8 (4) (1) and subsequently specified under the Regulation 691 of the Cabinet of Ministers of 25 October 2016 under Article 98⁸¹. This measure had to be transposed into national law of the EU member states by June 11 2010, therefore this is a measure that is present across the EU.

The assignor and the assignee may agree to withhold the notification of the assignment taking place. This would mean that the debtor never knows of the assignment existing and would continue servicing the claim to the original creditor. This may be a desired result in particular cases where both the assignor and the assignee can agree that the claim is serviced to the original account. The mere fact that the debtor has not been informed of the assignment taking place does not mean that the assignment is not valid as regards the assignor and assignee⁸². Under such an arrangement, the debtor can continue performing their obligations to the original creditor and the

⁷⁵ Kötzt, *European Contract Law*, 349.

⁷⁶ Civil Law of Latvia, sec. 1492.

⁷⁷ Grūtups, “Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.)” 298.

⁷⁸ Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2007.gada 3.janvāra lēmums Lietā Nr. SPC – 16 (Supreme Court ruling on the case Nr. SPC – 16), No. SPC – 16 (Latvijas Republikas Augstākās tiesas Senāta Civillietu departaments January 3, 2007).

⁷⁹ Torgāns, *Saistību tiesības. I daļa. (Obligations law. Part I.)*, 167.

⁸⁰ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

⁸¹ Cabinet of Ministers, “Rules of consumer credit,” Pub. L. No. 691 (2016), <https://likumi.lv/doc.php?id=285975>.

⁸² Civil Law of Latvia, sec. 1801.

assignee cannot raise any objections to the debtor for not having made the payments directly to the assignee.

This form of “silent” assignment could occur, for example, in cases where only a part of a debt claim is assigned and the original creditor does not wish to require the debtor to experience a multitude of creditors asking for payments to be made. Furthermore, this may prove useful in cases where the assignor only wishes to remove a certain part of their risk exposure, but the assignee does not wish to undertake the regular servicing of payments and maintaining regular contact with the debtor. This arrangement may also be beneficial for the public appearance of the assignee, since this form of “silent” assignment allows the assignee to avoid the public introduction of a third party to the initial agreement.

Additionally, refraining from notifying the debtor of the assignment taking place is also allowed in cases where a claim arising from a consumer credit agreement is being assigned. This is provided by a special provision under Article 17 (2) of the Directive 2008/48/EC⁸³ and is permitted when the original creditor continues to service the credit agreement instead of the assignee. For this to be allowed, there must be an agreement present between the assignor and the assignee. The directive does not specify the requirements for such an agreement, and neither does the law in force in Latvia presently, therefore the parties are free to determine the specifics of such a contract. Furthermore, the lack of specificity in this matter means that the contracting parties are free to decide if such a servicing of the credit would or wouldn't require some form of remuneration by the assignee to the assignor. However, there is currently a proposal for a regulation in the EU regarding credit servicers, credit purchasers and the recovery of collateral⁸⁴ which may affect this particular field, since it includes definitions for such credit servicers and furthermore seeks to amend the Mortgage Credit Directive⁸⁵ to include a similar requirement for informing the debtor of the assignment taking place for assignments of claims arising from mortgage credit agreements. As this proposed directive has not yet been adopted, its effect is not yet entirely clear. In its current form the proposed directive specifies a scope applying only to credit servicers of credit agreements originating from credit institutions (e.g. banks), but the level of harmonisation of this directive would allow member states to enforce stricter rules if they wish to do so.

In case of a “silent” assignment, it is especially important for the assignee to have a written agreement, since it would be very difficult to prove that the assignment even exists. This exists as a requirement in, e.g., Austria and the Netherlands.⁸⁶ Furthermore, in case the assignee wishes to use the assigned claim as a collateral for another transaction, the assignee would surely need to have the assigned claim in a written form.

⁸³ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

⁸⁴ “Proposal for a Directive of the European Parliament and of the Council on Credit Servicers, Credit Purchasers and the Recovery of Collateral COM/2018/0135 Final - 2018/063 (COD),” Pub. L. No. COM/2018/0135 final-2018/063 (COD) (2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A135%3AFIN>.

⁸⁵ “Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on Credit Agreements for Consumers Relating to Residential Immovable Property and Amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010,” Pub. L. No. 32014L0017, OJ L 060 (2014), <http://data.europa.eu/eli/dir/2014/17/oj/eng>.

⁸⁶ Kötz, *European Contract Law*, 348–49.

A special form of assignment is provided by the law in cases regarding promissory notes.⁸⁷ In these cases the law provides for the possibility to assign a promissory note to a specific creditor, any bearer, or with a blank endorsement. An interesting aspect of blank endorsement and an assignment in the name of any bearer is that this is the only type of assignment that allows for the underlying claim to be subjected to a different set of rules regarding its circulation. If a promissory note is assigned through this type of assignment, then the law likens their circulation to that of bearer instruments (also - bearer paper) in accordance with Article 1527 of the Civil Law of Latvia. However, as it is emphasised in legal literature, this does not result in the promissory note being regarded as a bearer paper.⁸⁸ These different rules relating to the circulation of such deeds relate to the necessity of having to transfer the document that confirms the existence of the assignment in a physical form, since very nature of this assignment taking place is the physical ownership of the document.

⁸⁷ Civil Law of Latvia, sec. 1803.

⁸⁸ Grūtups, "Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.)," 299.

3. DEFINING THE CONCEPT OF FINANCIAL INSTRUMENTS

In order to enable tackling the research question posed in this paper, it is important to define what is meant by the concept of financial instruments. Examining the legislation that is in force in Latvia quickly leads to the conclusion that the definition originates from EU legislative proposals, as opposed to internally sourced definitions. This is not overly surprising, given that the capital markets laws in Latvia have had the chance to be thoroughly developed because of to the historical heritage of the planned economy of the Soviet Union. There have been many financial innovations in the middle of the 20th century that have not been gradually adopted into the Latvian laws, but have been adopted in bulk form after the return to free trade. While it cannot be said that these laws have been enacted without consideration for their content, it is more helpful to examine the background and intent of the legislation that has been originally devised and has been adopted into national law only afterwards.

Insights may therefore best be gathered from the rules common to the EU. This is not only because the directives and regulations are binding to the Member States, but also because, as will be shown further on, in the creation of these rules the EC has used its own interpretation for how the regulatory framework should appear. Thus, the definitions it uses also reflect its own separate way of understanding. Furthermore, the process of developing the regulatory framework in the Western Europe was not interrupted by a such a drastic change in economic and political systems.

Since the definition of financial instruments can be found in the regulatory framework for capital markets in the EU, following sections begin with outlining how this regulatory framework has originated and evolved into the rules that are in use currently. Afterwards, the key definitions used in these rules are highlighted and examined together with the context of the rules and overall regulatory framework in order to provide with the possibility to answer the research question. In the last section of this part the possible fit of the concept of assignment of claims within the definition of financial instruments is analysed.

3.1 Capital markets law of the EU

The origin of EU capital markets law dates back to the years immediately following the Treaty establishing the European Community in 1957. The aim pursued by the legislation developed by the European Commission in this regard has been mainly concerned with establishing the internal market and the free movement of services and capital.⁸⁹ The initial step was taken in 1966 with the Segre report⁹⁰ which provided with suggestions for how to develop a European capital market. This process that has led to the present day legislative framework can be distinguished in five phases⁹¹, which will be briefly summarised in the following paragraphs to provide with a context for interpreting the legislation that has been adopted by the EU in more recent years.

Specific steps in the first phase were related to the harmonisation of national laws of the EU member states occurred in 1979 with the Directive 79/279/EEC⁹² and the Directive 80/390/EEC⁹³ regarding the coordination of stock exchange and prospectus laws. The next key step⁹⁴ was the release of the 1985 White Paper on “Completing the Internal Market”⁹⁵ which highlighted the importance of the liberalisation of financial services towards financial integration and the stronger internal market.

The second phase dealt with the harmonisation of the laws on securities markets, which provided with a greater amount of legislative action from the EC. Action taken here included directives on transparency regarding transferrable securities⁹⁶ (both listed and unlisted), issue prospectuses for transferrable securities,⁹⁷ insider dealing,⁹⁸ and securities investment services.⁹⁹ This phase was concluded with the Financial Services Action Plan of 1999 (FSAP¹⁰⁰) which was concerned

⁸⁹ Rüdiger Veil, *European Capital Markets Law*, trans. Rebecca Ahmling, 1st ed. (United Kingdom: Hart Publishing Ltd, 2013), 3.

⁹⁰ Claudio Segre, “The Development of a European Capital Market. Report of a Group of Experts Appointed by the EEC Commission.” EU Commission - Working Document (Brussels, November 1966), <http://aei.pitt.edu/31823/>.

⁹¹ Veil, *European Capital Markets Law*, 3.

⁹² “Council Directive 79/279/EEC of 5 March 1979 Coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listing” (1979), <https://publications.europa.eu/en/publication-detail/-/publication/8fda4aab-a1a2-42ba-ada6-337c938a1984/language-en>.

⁹³ “Council Directive 80/390/EEC of 17 March 1980 Coordinating the Requirements for the Drawing up, Scrutiny and Distribution of the Listing Particulars to Be Published for the Admission of Securities to Official Stock Exchange Listing,” Pub. L. No. 31980L0390 (1980), <http://data.europa.eu/eli/dir/1980/390/oj>.

⁹⁴ Veil, *European Capital Markets Law*, 4.

⁹⁵ “Completing the Internal Market. White Paper from the Commission to the European Council. COM (85) 310 Final.” EU Commission - COM Document (Milan: European Commission, June 14, 1985), <http://aei.pitt.edu/1113/>.

⁹⁶ “Council Directive 88/627/EEC of 12 December 1988 on the Information to Be Published When a Major Holding in a Listed Company Is Acquired or Disposed Of,” Pub. L. No. 31988L0627, OJ L 348 (1988), 88, <http://data.europa.eu/eli/dir/1988/627/oj/eng>.

⁹⁷ “Council Directive 89/298/EEC of 17 April 1989 Coordinating the Requirements for the Drawing-up, Scrutiny and Distribution of the Prospectus to Be Published When Transferable Securities Are Offered to the Public,” Pub. L. No. 31989L0298, OJ L 124 (1989), <http://data.europa.eu/eli/dir/1989/298/oj/eng>.

⁹⁸ “Council Directive 89/592/EEC of 13 November 1989 Coordinating Regulations on Insider Dealing,” Pub. L. No. 31989L0592, OJ L 334 (1989), 89, <http://data.europa.eu/eli/dir/1989/592/oj/eng>.

⁹⁹ “Council Directive 93/22/EEC of 10 May 1993 on Investment Services in the Securities Field,” Pub. L. No. 31993L0022, OJ L 141 (1993), 93, <http://data.europa.eu/eli/dir/1993/22/oj/eng>.

¹⁰⁰ European Commission, “Communication from the Commission - Implementing the Framework for Financial Markets: Action Plan COM/99/0232 Final,” Communication (European Commission, May 11, 1999), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:51999DC0232>.

with the use of the euro in the EU's capital market and the reduction of the costs of capital and financial intermediation,¹⁰¹ and the subsequent so called Lamfalussy Report¹⁰² which paved way for new directives and recommended an improved regulatory process for financial services. It is through these suggestions that the EU-level supervisory bodies and key directives such as the Markets in Financial Instruments Directive of 2004 (MiFID I)¹⁰³ was later created.

The third phase was concerned with correcting the perplexing legal structure created by various amendments to the previously enacted directives¹⁰⁴ and to implement the suggestions set out by the Lamfalussy Report and the FSAP. The landmarks of this phase were the Market Abuse Directive¹⁰⁵, the Prospectus Directive¹⁰⁶ that deals with the public offering of securities and admission to trading on regulated markets, the MiFID I, the Transparency directive¹⁰⁷, and the Takeover Directive,¹⁰⁸ most of which were followed by further implementing measures. Furthermore, the Committee of European Securities Regulators (CESR) was formed in this stage with advisory functions and a facilitative role in the communication between national supervisory authorities. Later on in this phase, the EC published the White Paper on Financial Services Policy¹⁰⁹ which was aimed at additional improvements to the regulatory framework.

The fourth phase was marked by the effects of the financial crisis of the late 2000s which called for a revision of the regulatory and supervisory frameworks of the financial markets.¹¹⁰ In response to these events the Larosiere Report¹¹¹ was published following the request by the EC, containing recommendations to turn the previously facilitative authorities such as CESR to public

¹⁰¹ Veil, *European Capital Markets Law*, 6.

¹⁰² The Committee of Wise Men, "Final Report of the Committee of Wise Men on the Regulation of European Securities Markets" (Brussels, February 15, 2001),

http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf.

¹⁰³ "Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments Amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and Repealing Council Directive 93/22/EEC," Pub. L. No. 32004L0039, OJ L 145 (2004), <http://data.europa.eu/eli/dir/2004/39/oj/eng>.

¹⁰⁴ Veil, *European Capital Markets Law*, 7.

¹⁰⁵ "Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on Insider Dealing and Market Manipulation (Market Abuse)," Pub. L. No. 32003L0006, OJ L 096 (2003),

<http://data.europa.eu/eli/dir/2003/6/oj/eng>.

¹⁰⁶ "Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the Prospectus to Be Published When Securities Are Offered to the Public or Admitted to Trading and Amending Directive 2001/34/EC (Text with EEA Relevance)," Pub. L. No. 32003L0071, OJ L 345 (2003),

<http://data.europa.eu/eli/dir/2003/71/oj/eng>.

¹⁰⁷ "Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the Harmonisation of Transparency Requirements in Relation to Information about Issuers Whose Securities Are Admitted to Trading on a Regulated Market and Amending Directive 2001/34/EC," Pub. L. No. 32004L0109, OJ L 390 (2004), <http://data.europa.eu/eli/dir/2004/109/oj/eng>.

¹⁰⁸ "Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids (Text with EEA Relevance)," Pub. L. No. 32004L0025, OJ L 142 (2004), <http://data.europa.eu/eli/dir/2004/25/oj/eng>.

¹⁰⁹ "White Paper on Financial Services Policy 2005-2010 (COM/2005/0629 Final)" (Brussels: European Commission, December 1, 2005), <http://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52005DC0629>.

¹¹⁰ Veil, *European Capital Markets Law*, 12.

¹¹¹ "The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere," Report (Brussels: The High-Level Group on Financial Supervision in the EU, February 25, 2009),

http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.

authorities and also broader measures for financial stability. Based on the report, the EU created new supervisory and monitoring authorities:¹¹²

- the European Systemic Risk Board for monitoring macroprudential risks;
- and three European supervisory authorities (ESAs) which replaced the previously advisory committees:
 - the European Banking Authority (EBA), replacing the Committee of European Banking Supervisors (CEBS)
 - the European Insurance and Occupational Pensions Authority (EIOPA) replacing the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS)
 - and the European Securities and Markets Authority (ESMA) replacing CESR.

The beginning of the fifth phase has been previously noted¹¹³ to be the introduction of the regulation on credit rating agencies¹¹⁴, which introduced civil liability for incorrect credit ratings and toughened disclosure requirements for the credit rating agencies. However, it seems to be more reasonable to attach a greater significance to the EC's plan for the Capital Markets Union (CMU)¹¹⁵ which was announced in November 2014 together with the Juncker Plan and adopted in September 2015 that aims to foster growth in the EU in response to the economic slowdown of the late 2000s.

Pursuant to the Action Plan for the CMU, the EU has adopted numerous directives and regulations and further implementing regulations. The main goal of this legislation is to move towards a capital market that is more resilient to financial downturns, able to mobilise capital to all participants of the market, including small and medium enterprises. Furthermore, the CMU aims to enable the potential to connect financing with investment projects in the EU, especially from Member States with more developed capital markets to those Member States whose markets are smaller and less developed. The Action Plan for the CMU specifically targets “opening up a wider range of funding sources”, including the innovative forms of financing such as private placement of securities and crowdfunding.

This phase has thus introduced multiple revisions to the key legislation introduced in the previous years and also the introduction of new regulations and directives. This includes the amendment to MiFID which is known as the MiFID II¹¹⁶, the new Markets in Financial Instruments Regulation

¹¹² “Regulatory Process in Financial Services. Post-Crisis Reform: The European Supervisory Authorities.” Text, European Commission, accessed May 19, 2018, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-reforms-and-their-progress/regulatory-process-financial-services_en.

¹¹³ Veil, *European Capital Markets Law*, 13.

¹¹⁴ “Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 Amending Regulation (EC) No 1060/2009 on Credit Rating Agencies Text with EEA Relevance,” Pub. L. No. 32013R0462, 146 OJ L (2013), <http://data.europa.eu/eli/reg/2013/462/oj/eng>.

¹¹⁵ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan on Building a Capital Markets Union” (Brussels: European Commission, September 30, 2015), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0468>.

¹¹⁶ “Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA Relevance,” Pub. L. No. 32014L0065, OJ L 173 (2014), <http://data.europa.eu/eli/dir/2014/65/oj/eng>.

(MiFIR),¹¹⁷ a regulation on short sales and credit default swaps,¹¹⁸ a regulation on over-the-counter derivatives (EMIR),¹¹⁹ a new Markets Abuse Directive¹²⁰ together with a Markets Abuse Regulation¹²¹ and other acts.

The overall structure of the regulatory framework can be further summarized into seven general areas:

- 1) Rules relating to financial supervision and risk management;
- 2) Rules relating to the Banking Union;
- 3) Consumer financial services regulation;
- 4) Payment services regulation;
- 5) Financial markets regulation, which can be divided into rules regarding:
 - a. Securities markets;
 - b. Investment funds;
 - c. Post trade services.
- 6) Insurance and pensions;
- 7) Company reporting and auditing;

From these, the rules relating to the regulation of financial markets are of the highest importance for the purposes for this paper, as they contain the key definitions for financial instruments that are at the core of the research question posed by this paper.

¹¹⁷ “Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Regulation (EU) No 648/2012 Text with EEA Relevance,” Pub. L. No. 32014R0600, 173 OJ L (2014), <http://data.europa.eu/eli/reg/2014/600/oj/eng>.

¹¹⁸ “Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on Short Selling and Certain Aspects of Credit Default Swaps Text with EEA Relevance,” Pub. L. No. 32012R0236, 086 OJ L (2012), <http://data.europa.eu/eli/reg/2012/236/oj/eng>.

¹¹⁹ “Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, Central Counterparties and Trade Repositories Text with EEA Relevance,” Pub. L. No. 32012R0648, 201 OJ L (2012), <http://data.europa.eu/eli/reg/2012/648/oj/eng>.

¹²⁰ “Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on Criminal Sanctions for Market Abuse (Market Abuse Directive),” Pub. L. No. 32014L0057, OJ L 173 (2014), 57, <http://data.europa.eu/eli/dir/2014/57/oj/eng>.

¹²¹ “Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on Market Abuse (Market Abuse Regulation) and Repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA Relevance,” Pub. L. No. 32014R0596, 173 OJ L (2014), <http://data.europa.eu/eli/reg/2014/596/oj/eng>.

3.2 The specific terms used in EU legislation

In regard to the main purpose of this paper, the key interest lies in the elements that could allow for the interpretation of what is and what is not to be considered a “financial instrument”. In order to provide with a more comprehensive analysis, several specific types of financial instruments will also be looked into in detail. The specific concepts of “transferable securities”, “securitised debt”, and “debt securities” will be examined, since these definitions are the ones that are most closely related to the definition proposed by the national financial supervisory authority. Furthermore, the term “securities” shall also be looked into in order to provide with a perspective on the overall extent of the legal framework. Lastly, in order to fully define the concept that is being juxtaposed with the definition of financial instruments, the term “credit claims” shall also be examined. This will also help in providing with a link between the concept of assignment discussed in the first part of this paper with the attempt to provide with an answer to the main research question.

As identified through examining the EU’s overall legal framework for capital markets, the most relevant source for understanding the definitions that are presented in this paper is the MiFID II, read together with MiFIR (which in turn mostly links to the definitions provided in MiFID II). Therefore, the definitions provided in MiFID II will be examined first, followed by the relevant sector specific directives that have built upon, expanded or potentially clarified what is meant by those concepts.

3.2.1 The importance of meaningful definitions in the field of capital markets

As experience elsewhere in the EU has shown, the lack of meaningful definitions for such legal terms as listed in the scope of this section can have unforeseen side-effects.

The specific example of the so-called “real estate investment cooperatives” in Hungary provides with valuable insights as to what can go wrong in such cases.

The facts referred to in this case¹²² date to Hungary from 2003 to 2004, coinciding with the time the country was joining the EU. During this time companies were set up offering to buy an interest in “real estate investment cooperatives” through way of “membership shares” and the willing investors into the cooperatives were then promised to have these “membership shares” repurchased these shares on fixed predetermined conditions, which typically included rates of return well above twice of that offered by the banking sector which at that time offered rates of around 6% annually. The core issue in this case, aside from the whole operation being a Ponzi scheme, was the fact that these “membership shares” were structured in a way that was not recognized by the laws in force at the time.

In this case the Hungarian Financial Supervisory Authority (HFSA) was not able to act on these investments since they were not perceived to be “securities” under the prevailing legal definition. Even more so, the HFSA did not have the duty to supervise these cooperatives and the

¹²² Tibor Tajti, “Central European Contribution to the American Debate on the Definition of ‘Securities’ or Why Does the Definition of ‘Security’ Matter?: The Fiasco of the Hungarian Real Estate Investment Cooperatives, Pyramiding, and Why Emerging Capital Markets Should Be Equipped to ‘Act’ Rather than ‘React,’” *Transnational Law & Contemporary Problems* 15 (October 1, 2005): 111–216.

cooperatives did not have to make any disclosures. This meant that the cooperatives did not disclose the details of the investments that the investors were participating in and the contracts for the transactions were not made available in any form. Due to the lack of any action by the HFSA, the scheme was allowed to continue and investors continued putting their funds into these schemes. In their advertisements the cooperatives claimed more than double the interest rates compared to those offered by the local banks, which was the obvious object of interest for those who decided to invest.

A further aspect of this particular case was that those investors which had bought the “membership shares” were not considered to be creditors in the eventual default of the cooperative, but as actual owners and thus placed last in the pecking order of the liquidation process. Furthermore, it should be emphasised here that these cooperatives were actual Ponzi schemes meaning that they did not conduct any actual economic activity aside from redistributing the income from the newest investors to the more senior participants, therefore relying on an exponentially increasing inflow of capital to continue operations.¹²³

A distinguishing characteristic that makes this particular case noteworthy in comparison with other Ponzi schemes that have occurred in the EU is the inability of the local supervisory authorities to take any action whatsoever. The FSHA was not able to intervene even after it had become apparent as to what was happening and neither was any action possible during the eventual collapse of these cooperatives. If the definition provided for the concept of “securities” had been broader so as to include the case in question, the problem might have been avoided in the first place due to timely action by the supervisory authority.¹²⁴

In the provided example, the issue of a running Ponzi scheme was further complicated specifically due to the reason of unhelpful legal definitions of the terms used in the law. Better clarity regarding the definitions would have been helpful in preventing the problem, since it was the very definition of the term “securities” which prevented the authorities from intervention. Since the prevention of such harmful activities is essential to the proper functioning of capital markets, the protection of investors, consumers and the overall economy, it is important for effective safeguards to be in place that prevent this. Therefore, this defining characteristic of the Hungarian example highlights the relevance of the search for the proper definitions of the legal terms used in laws relating to capital markets in order for these laws to be effective at all.

Taken to a broader level, an incomplete definition may present with the problem of regulatory arbitrage when market participants create products that by their design are made to circumvent the rules. This is of particular concern for legislators¹²⁵, since, as illustrated by the Hungarian example, it may carry severe negative consequences. Furthermore, instruments may be made to prefer certain jurisdictions which are more favourable for the issuing party. Such concerns are also relevant for the EU in its quest for the CMU, since such possibilities to circumvent the rules are indicative of inefficient markets and are eventually harmful for the investors and the overall economy.

¹²³ Tajti, 118.

¹²⁴ Tajti, 193.

¹²⁵ Daniele Nouy, “Gaming the Rules or Ruling the Game? – How to Deal with Regulatory Arbitrage” (33rd SUERF Colloquium, Helsinki, September 15, 2017), <https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp170915.en.html>.

One of the ways that the EU attempts to limit these problems is by creating harmonised substantive law. As noted in the opening sections of this paper, the EU does not base its capital markets law on a set of pre-existing conceptual considerations, but instead is creating a new set of rules based on the specific needs of the markets and effectively creating the regulatory system as it deems to be necessary and suitable for the existing market needs.

In light of this, it should therefore be noted that the definitions contained in the legislation adopted in the EU are also the EC's own attempt at crafting a proper framework.¹²⁶ Thus, these definitions, including those that relate to the research question of this paper, should be interpreted primarily from the EU's own perspective, as opposed to any pre-existing concepts in the national legislation of its members. The national definitions are helpful for gaining a perspective on the concepts as such, but the EU's interpretation will nevertheless prevail as regards their application towards the capital markets.

The topic of regulatory arbitrage is also addressed by MiFID II, which was enacted with one of the main objectives being to limit the possibility to circumvent the rules set forth by the law. For this reason, provisions that aim to limit jurisdiction shopping for the purpose of regulatory arbitrage can be found in MiFID II. Furthermore, as a directive aimed at harmonizing national law in the financial markets, MiFID II minimizes the potential for the rules being interpreted differently across the EU by setting out a common understanding of the concepts that it relates to. Furthermore, MiFID II contains a broad list of definitions and covers multiple types of provisions which other directives base their provisions upon. Therefore, the MiFID II is a good starting point for understanding the main definitions of the EU's current framework for capital markets.

3.2.2 Definition of “financial instruments”

The broadest definition for specific items that are at the core of financial markets is the definition that EU has set out for the concept of “financial instruments”. This definition is set out in the MiFID II and built upon in the other related directives.

The definition of the concept “financial instrument” is provided under Article 4 (1) (15) of MiFID II. This article does not provide with any definition of the term that is based in its economic or financial characteristics. Instead, this provision contains a redirection to the Section C of the Annex I of MiFID II that gives the list of financial instruments defined for the purposes of this directive. Through this list it can also be inferred that any of those items listed under Section C can be regarded to be “financial instruments”. A positive answer under any of these provisions in relation to the assignment of claims may therefore provide with the answer to the research question posed within this paper.

3.2.3 Definition of “transferable securities”

Examining Section C of MiFID II provides with multiple items, of which the first listed item “Transferable securities” raises the most relevance to this analysis. However, no explanation of this term is immediately given within this list for this term, but it is possible to locate the

¹²⁶ Veil, *European Capital Markets Law*, 16–17.

meaning of the term elsewhere in this directive. MiFID II provides with the following definition of the term “transferable securities” under Article 4 (1) (44):

‘transferable securities’ means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:

- (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
- (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
- (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;¹²⁷

Here the concept is described in a way that corresponds to that of the way the term “securities” are commonly understood in the field of finance and economics, namely that of equity and debt securities that include shares and bonds in the most basic form, together with other broader types of securities. This article, however, does not further explicitly explain what is meant by securities or the other items included in it.

3.2.4 Definition of “securities”

While on first glance it would seem that the term “securities” should be very straightforward and having a clear definition, it has been found to be of a complex nature, lacking one common definition across the EU.¹²⁸ The reason for this comes from the fact that this term has a longer history than the more recent concepts that have been introduced into the national legal systems by the EC’s attempts to create a regulatory framework for capital markets. Thus, a harmonised use of the concept of “securities” across the EU in a way that encompasses different variations of the term becomes increasingly challenging since national systems each have their own interpretation of what is meant by the term. It has been further noted¹²⁹ that in its directives, the EU uses a broader term instead, i.e. that of “transferable securities”, which helps avoiding confusion when the specific items that relate to the the regulated concepts are referred to.

Nevertheless, finding a useful definition for this term is important for understanding the scope of the term “transferable securities” as provided by the MiFID II, since “securities” is also used throughout the text of both MiFID II and MiFIR without specifically defining it.

Therefore, in order to define what should be understood by this term, the context in which it is used should be examined. Such context can be provided, for example, by looking into the other directives and regulations that use the MiFID II as the foundation for the definitions that they use. Examining the directives and regulations that relate to the definitions of MiFID II reveals that the Markets Abuse Regulation under Article 3 (2) (a) provides with a more specific definition of

¹²⁷ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance.

¹²⁸ Giuliano Castellano, “Towards a General Framework for a Common Definition of ‘Securities’: Financial Markets Regulation in Multilingual Contexts,” *Uniform Law Review (Revue de Droit Uniforme)* 17, no. 3 (August 1, 2012): 449, <https://doi.org/10.1093/ulr/17.3.449>.

¹²⁹ Castellano, 466.

“securities” for the specific purpose of financial stabilisation transactions and buy-back programmes, as provided below¹³⁰:

2. For the purposes of Article 5, the following definitions apply:

- (a) ‘securities’ means:
 - (i) shares and other securities equivalent to shares;
 - (ii) bonds and other forms of securitised debt; or
 - (iii) securitised debt convertible or exchangeable into shares or into other securities equivalent to shares.
- (...)

The definition provided here thus relates to the common understanding of shares, share equivalents, bonds, securitised debt and convertible debt in the economic sense. Otherwise, this regulation uses the same definition of “transferable securities” as in the MiFID II by making an explicit link to the definition contained within it. The examination of the Directive 2004/109/EC¹³¹ and Directive 2003/71/EC¹³² together with their amending Prospectus Regulation¹³³ also yields a result where the broader definition of “transferable securities” as set out by MiFID II is narrowed down for specific purposes.

The use of the contextual interpretation approach in this matter would therefore yield the result that the term of “securities” could be used when referring to the more basic forms of securities, i.e., when the scope is being narrowed down from the concept of “transferable securities” which in turn includes such items as depositary receipts.

A further perspective on what is meant by the term “securities” in the EU can also be gained when comparing this term on an international level across various languages. Such a study had been conducted in 2012 and published by the UINDROIT Law Review, and resulted with the identification of the following key traits:

- ‘securities’ and its different linguistic declinations encompass three fundamental features:
- (i) securities are investments, made to satisfy financing needs and return profits, in the form of either equity or debt;
 - (ii) such investments are negotiable, both in the primary and the secondary market;
 - (iii) they are valuable, meaning that monetary appreciation is always possible.¹³⁴

¹³⁰ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance, chaps. I, Article 3 (2) (a).

¹³¹ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

¹³² Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (Text with EEA relevance).

¹³³ “Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the Prospectus to Be Published When Securities Are Offered to the Public or Admitted to Trading on a Regulated Market, and Repealing Directive 2003/71/EC Text with EEA Relevance.” Pub. L. No. 32017R1129, 168 OJ L (2017), chaps. 1, Article 2 (a), <http://data.europa.eu/eli/reg/2017/1129/oj/eng>.

¹³⁴ Castellano, “Towards a General Framework for a Common Definition of ‘Securities’: Financial Markets Regulation in Multilingual Contexts,” 480.

This definition of “securities” thus fits with both the economic sense of the word, and also is consistent with most uses of the term in the laws relating to capital markets of the EU. The key element that is uncovered here is the aspect of negotiability that the securities have to be able to meet.

3.2.5 Definition of “securitised debt”

The definition of “transferable securities” in MiFID II includes under point (b) that these transferable securities include: “bonds or other forms of securitised debt”. This means that the definition of “securitised debt” should also be examined in order to determine whether the assignment of claims could fall under this particular point. Searching within the text of the directive does not provide with an exact definition of securitised debt, therefore, other legal acts should be examined to provide a contextual interpretation.

Looking at the related legislation regarding capital markets reveals that a clear definition of what is can be understood by securitisation is provided under the Article 2 (1) of the Regulation on Securitisation and is provided as follows: ¹³⁵

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

- (a) payments in the transaction or scheme are dependent upon the performance of the exposure or of the pool of exposures;
- (b) the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme;
- (c) the transaction or scheme does not create exposures which possess all of the characteristics listed in Article 147(8) of Regulation (EU) No 575/2013. [emphasis added]

Examining the definition contained in the regulation reveals that the key element regarding a securitisation transaction is that the exposure has to be (1) tranchéd and (2) meet all of the listed characteristics.

Tranching is further defined under Article (2) (6) of the same directive. The key provision for defining what is meant by a tranche in the legal sense is as follows:

‘tranche’ means a contractually established segment of the credit risk associated with an exposure or a pool of exposures, where a position in the segment entails a risk of credit loss greater than or less than a position of the same amount in another segment, (...) ¹³⁶

Here the explanation is provided in a general way that fits with the economic understanding of securitisation transactions, and incorporates the key element of the adjustment of risk according to the subordination of each tranche. In the special case where only one exposure is securitised

¹³⁵ “Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 Laying down a General Framework for Securitisation and Creating a Specific Framework for Simple, Transparent and Standardised Securitisation, and Amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012,” Pub. L. No. 32017R2402, 347 OJ L (2017), <http://data.europa.eu/eli/reg/2017/2402/oj/eng>.

¹³⁶ Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012, chaps. 1, Article 2, paragraph 6.

the regulation provides with an explanation that this is intended so that also especially large exposures could be securitised.

While securitisation transactions may make use of special purpose vehicles to which the assets are assigned to, this is not regarded as a requirement for the securitisation to be regarded as such for the purpose of this regulation. Furthermore, the definition does not require for pooling – the collection of multiple assets into one entity – in order for it to be possible to regard the transaction as a securitisation. Therefore, the definition provides with a broad framework that makes it possible to fit various forms of securitisation transactions within its scope.

The regulation classifies securitisation into two further types under Articles 2 (8) and 2 (9), respectively: “traditional securitisation”, and “synthetic securitisation”. The two are distinguished by both the form by which the risk transfer takes place and by the subsequent ownership of the exposures. The “traditional” form of securitisation takes place when the exposures are moved away from the originator, while the “synthetic” form of securitisation takes place through the use of credit derivatives or guarantees instead of a special purpose vehicle and the exposures remain with the originator.¹³⁷ In an economic sense, the concept of “synthetic” securitisation relies on investors that are indifferent as to whether the underlying exposures are in fact in possession of a special purpose vehicle, but are only concerned with the cash flows that they are to receive.¹³⁸ In contrast, in the traditional form of securitisation the use of a special purpose vehicle allows the transaction to be structured in a insolvency-remote form that has simpler unwinding of the positions in case of liquidation.

The term “securitised debt” therefore can be best explained as meaning the securities that are issued by the special purpose vehicle which are backed by the cash flows of the underlying securities/exposures which in turn have been transferred to the special purpose vehicle by the originator. For the case of synthetic securitisation, this effect would be replicated through the use of credit default swaps and other derivative instruments.

An important characteristic of securitised debt is that it can be issued to match a specific credit risk profile, since these securities can be issued to fit any risk tranche as necessary. Therefore, even if the pool consists of multiple identical assets, the tranches could be structured for various risks by adjusting their seniority and through changing the ratio of collateral that is pledged for a specific amount of issued securities.¹³⁹

Furthermore, regarding securitisation and securitised debt it should be emphasised that securitised debt in essence contains a newly issued security. In the traditional form of securitisation, the special purpose vehicle issues its own securities according to the level of risk exposure required, while in the synthetic form derivatives are issued to achieve a matching exposure.

Lastly, it should be noted from the context and specific provisions of the Regulation on Securitisation that assignments of claims as such are used and referred to a legal mechanism by

¹³⁷ Ian Bell and Petrina Dawson, “Synthetic Securitization: Use of Derivative Technology for Credit Transfer,” *Duke Journal of Comparative & International Law* 12 (June 4, 2002): 21.

¹³⁸ Delivorias, European Parliament, and Directorate-General for Parliamentary Research Services, *Understanding Securitisation*, 7.

¹³⁹ Delivorias, European Parliament, and Directorate-General for Parliamentary Research Services, 8.

which the transfer of the relevant exposures can be performed to the special purpose vehicles. Furthermore, the Regulation on Securitisation makes a note on credit claims under Article 7 (1) (a), indicating that they are used as part of a portfolio of assets in asset-backed commercial paper (ABCP). It further notes that such ABCP transactions are by exemption permitted to be re-securitised, provided that no additional tranching occurs. Importantly the concept of assignment of claims or assigned claims is not used in any meaning that could lead to the interpretation that they should be treated as transferable securities. On the contrary, it notes that underlying exposures in securitisation transactions *should not* include transferable securities, with the exception of Member States that use bonds instead of loan agreements to issue credit to non-financial firms.¹⁴⁰ Therefore, a few key notes can be made that will be useful in the further analysis:

1. Transferable securities are not permitted in securitisation transactions falling under the scope of the regulation;
2. Loan agreements and the underlying credit claims are permitted to be securitised;
3. Assignment agreements are acknowledged as one of the means that can be used to transfer exposures to be securitised.

¹⁴⁰ Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012, para. 27 of the preamble.

3.3 The definitions under Latvian Law

Having examined the scope of the definitions as provided in the laws of the EU, it is worthwhile looking also at the provisions included in the national laws, since they may include provisions that have been transposed differently than in the directives and regulations. Since the aim of MiFID is to achieve a high level of harmonisation, such differences should therefore be minimal or non-existent. The most relevant laws here are thus the Financial Instruments Market Law (FIML), which transposed MiFID II.

Under this law, the relevant terms of interest are:

- Article 1 (1) (1) – “financial instruments”;
- Article 1 (1) (32) – “transferrable securities”;
- Article 1 (1) (52) – “securitised debt”.

3.3.1 Definition of “financial instruments” as transposed in Latvia

Looking at the definition of a “financial instrument” contained in the FIML, we can find the definition for the term “financial instruments” under Article 1 (1) (1), and it states that financial instruments are agreements that concurrently create financial assets for one party and financial liabilities or equity securities to the other party. This definition has been unchanged since when the law was enacted in November 2003.¹⁴¹

This definition as provided in the law is much broader than the definition proposed by MiFID II which immediately gave a more definite list of what could be regarded as a financial instrument. However, under Article 3 (2) the law defines its scope as applying only to only a specific list of financial instruments, which coincides with those that are set out under MiFID II. This effectively renders the broader definition proposed under Article 1 (1) (1) redundant and means that the law provides with a definition of a “financial instrument” that is consistent with MiFID II if the underlying provisions are also consistent.

This difference in approach could perhaps be explained by looking at the law in force prior to the current one. The FIML replaced the previously existing Law on Securities that was enacted in 1995, which did not contain the concept of financial instruments. Instead, the law was based on the approach in use by the USA which use the term “securities” instead. This is not only evident from comparing the language used in the Securities Act of 1933 and the Securities Exchange Act of 1934 with the repealed Law on Securities, but also by looking at the historical development of capital markets law in Europe. In the USA, the enacted laws speak of securities regulation, not capital markets; however, their regulatory scope is overall the same.¹⁴² Furthermore, by examining the annotation of the FIML of Latvia published by the legislator together with the law,¹⁴³ it can be observed that the previous law was in fact based on the laws present in the USA.

¹⁴¹ Financial Instrument Market Law.

¹⁴² Veil, *European Capital Markets Law*, 17.

¹⁴³ Cabinet of Ministers, “Annotation to the proposed Financial Instrument Market Law,” June 25, 2003, http://www.saeima.lv/L_Saeima8/lasa-dd=LP0376_0.htm.

The legislator notes that the way financial markets are handled by regulators has evolved and that the newer version of the law was being adopted in order to meet these changing requirements and in order to harmonise the the law to the requirements of EU directives. A broader perspective on the use of the term “securities” on an international and multilingual level was provided in the previous chapter.

In the repealed Law on Securities, there is no mention of the term “financial instrument” at all. This is consistent with the finding that the particular law was based on a different set of legislation which did not feature the use of such a term. Instead, the repealed Law on Securities of 1995 focuses only on securities (in Latvian – *vērtspapīri*) and the aspects on their circulation.

The repealed Law on Securities also makes mentions of particular types of securities, such as bearer securities (bearer instruments/bearer paper) that are also mentioned in the Civil Law of Latvia under the Articles dealing with the concept of assignment. Specifically, Article 1803 mentions that promissory notes may be made subject to the same rules as bearer paper to the degree or extent that concerns their circulation, if they are assigned to any bearer or with a blank endorsement. This is interesting to note since the current law does not have this type of connection. However, the relationship between the two concepts in this law ends with this point and no further elaboration is made. From older commentary of this particular topic,¹⁴⁴ it can be inferred that this provision in the repealed Law on Securities simply provided with an extension to the parties which were permitted to issue such securities to include also legal persons registered outside of Latvia.

3.3.2 Definition of “transferable securities” as transposed in Latvia

Article 1 (1) (32) of the FIML provides the definition of transferrable securities (quoted from the official English translation):

Transferable securities - securities, the disposal rights of which are not restricted, except for payment means. Such securities are: (a) capital securities (b) debt securities (c) other securities, to which the right to acquire or dispose of transferable securities are attached or which intend cash settlements determined by transferable securities, currency, interest rate, commodities, or other base asset.¹⁴⁵

The immediately visible difference arises mainly in the form how it has been transposed, since in the FIML the components that constitute transferrable securities have been described in under separate definitions. It should be also noted that in this translated version of the the law the definition under point (a) would be better to be read as “equity” securities instead of “capital” securities, as this would be more consistent with both the terms used in other parts of the law and in MiFID II, especially since only the term equity securites are provided with a definition in the directive. Otherwise this definition as such is consistent with the one set out in the MiFID II.

Another difference in form is made with the addition of the term “debt securities” under point (b). The definition for “debt securities” is given further under Article 1 (1) (45) as follows: “debt

¹⁴⁴ Kalvis Torgāns et al., *Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. (Commentary on the Civil Law of Latvia: Part four. Obligations law.)*, ed. Kalvis Torgāns (Rīga: Mans Īpašums, 1998), 87.

¹⁴⁵ Financial Instrument Market Law, secs. 1, Article 1 (32).

securities - bonds or other forms of transferable securitised debts, except securities that are equivalent to equity securities.”¹⁴⁶

Combining these definitions therefore yields effectively the same definition as under MiFID II, and a consolidated version of the definition would read as follows:

“transferable securities: securities, the disposal rights of which are not restricted, except for payment means. Such securities are (...) (b) bonds or other forms of transferable securitised debts, except securities that are equivalent to equity securities (...).”

3.3.3 Definition of “securitised debt” as transposed in Latvia

The law includes a definition of “securitised debt” which is given as follows:

securitised debt - a set of assets (assets included in the asset book) that is transferred or sold to a commercial company established for a special purpose, which has modified it into securities;¹⁴⁷

Examining the entire definition present in the adopted law, the immediately noticeable difference is that the part in MiFID II that states “which are negotiable on the capital market” is replaced with the phrase “the disposal rights of which are not restricted” in the Latvian transposition. These differences persist when comparing the English language and Latvian language versions of the directive. Even though one could dismiss the difference on the grounds that the directive should have direct effect and the passage as included in the MiFID II could be generally used and relied upon, it is worthwhile examining the two provisions to check if there are any hidden concepts that might have been lost in the process of adopting the directive.

As transposed in the law in Latvia, the provision seems to be explaining what had been originally meant by MiFID II, since the language used is overall more specific than in the directive. To verify such an assumption, the terms that are used by the directive should be examined. Since it is clear from the directive itself as to what is meant by the capital market, the key remaining terms to explain are “negotiable” and “securites”.

Negotiability as such is not defined in the directive, therefore clues for the proper interpretation may be searched for in the context of the directive, the other directives passed by the legislator, and through looking at the meaning of the particular word in other languages. Furthermore, it is helpful to examine the meaning of the language used through the means of legal dictionaries.

To begin with, the legal dictionaries are examined. Checking the translation for the term “negotiable” to Latvian turns back a term very similar (*apgrozības spējīgs*) to the one used in the Latvian language version of MiFID (*tirgojams*)¹⁴⁸. In the Merriam-Webster Law Dictionary, the term “negotiable” is explained in the following way:

¹⁴⁶ Financial Instrument Market Law, secs. 1, Article 1 (45).

¹⁴⁷ Financial Instrument Market Law, secs. 1, Article 1 (52).

¹⁴⁸ Valentīna Skujiņa, ed., *Angļu-Latviešu Mūitas Terminu Vārdnīca. (English-Latvian Customs Term Dictionary)* (Rīga: Jāņa sēta, 1997), s.v. negotiable, <http://termini.lza.lv/term.php?term=negotiable&lang=EN>.

capable of being negotiated; *especially* : transferable from one party to another by delivery with or without endorsement so that title passes to the transferee¹⁴⁹

Here the concept of endorsement arises again that was examined in the first part of this paper regarding assignments, but will be examined here in light of possible other meanings. The definition of “endorse” provided by the Merriam-Webster Law Dictionary clearly points to the same concept as the endorsement contained both under the Civil Law of Latvia under Article 1803 as regards the blank endorsement of promissory notes and the general mechanism of transfer of rights relating to the law on bills of exchange¹⁵⁰:

1 : to write on the back of; *especially* : to sign one's name as payee on the back of (an instrument) in order to receive the cash or credit represented on the face
- endorse a check

2 : to inscribe (as one's signature or a notation accompanied by one's signature) on an instrument (as a note or bill) especially to transfer or guarantee it

3 : to transfer (an instrument) to another by inscribing one's signature
- assume that payee *endorses* a note to creditor as security for a debt —*Uniform Commercial Code*

4 : to inscribe (as an official document) with a notation (as of date or title)
— endorse in blank: to inscribe (an instrument) with a blank endorsement¹⁵¹

A further explanation regarding the concept of negotiability and negotiable instruments is provided by D.P. Whiting, noting that the concept of negotiability makes the particular instrument an acceptable alternative to cash and includes instruments such as cheques and promissory notes. This is definition also is supported by the treatment under the EU’s “Cash-control Regulation”, which treats bearer-negotiable instruments, negotiable instruments in bearer form or endorsed without restriction and signed cheques, promissory notes and money orders that have the payee’s name omitted as cash.¹⁵² Further, four key traits of negotiable instruments are identified¹⁵³:

1. The transfer of the legal title to the instrument is possible through the delivery of the instrument, or in cases where the instrument is payable to order it should be possible by endorsement and delivery
2. The bearer of the instrument is free to raise legal action on the instrument on their own name
3. The bearer of the instrument obtains a good title to the instrument regardless if the transferor had a defective title, provided the bearer takes it in good faith
4. There is no need to notify the debtor of the transfer taking place and the instrument (in cases of cheques or bills of exchange).

¹⁴⁹ Merriam-Webster, Incorporated, “Definition of Negotiable,” *Merriam-Webster Online Law Dictionary*, May 17, 2018, <https://www.merriam-webster.com/dictionary/negotiable>.

¹⁵⁰ Cabinet of Ministers, “Law on Bills of Exchange” (1938), <https://likumi.lv/doc.php?id=90972>.

¹⁵¹ Merriam-Webster, Incorporated, “Definition of Endorse,” *Merriam-Webster Online Law Dictionary*, May 13, 2018, <https://www.merriam-webster.com/dictionary/endorse>.

¹⁵² “Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on Controls of Cash Entering or Leaving the Community,” Pub. L. No. 32005R1889, 309 OJ L (2005), para. Article 2 (2), <http://data.europa.eu/eli/reg/2005/1889/oj/eng>.

¹⁵³ Desomind Percival Whiting, “The Concept of Negotiability,” in *Mastering Banking*, ed. Desomind Percival Whiting (London: Macmillan Education UK, 1985), 122–34, https://doi.org/10.1007/978-1-349-17757-8_9.

Using these definitions for negotiability, it can be thus concluded that the definition as transposed into the Latvian law is consistent with the one included in MiFID II. Furthermore, this definition for negotiability is helpful for understanding the difference between assignments of claims and financial instruments, as will be provided for in the following section of this paper.

4. COMBINED ANALYSIS OF THE DEFINITIONS FINANCIAL INSTRUMENTS AND ASSIGNMENT OF CLAIMS

In the previous sections, various potential terms were examined that could potentially include the concept of assignment of claims into the definition of financial instruments and therefore subject them to the same rules as those of MiFID II. The terms that were considered were included into consideration were as follows:

- Financial instruments;
- Transferable securities;
- Securities;
 - Negotiable securities;
 - Negotiability;
- Securitised debt;
 - Securitisation;
 - Debt securities.

4.1 Could the concept of assignment of claims fit into any of the examined definitions of financial instruments?

In the immediate definitions of the terms, it was not possible to find direct links between the concept of the assignment of claims with that of financial instruments. However, several conceptual relationships were observable as regards to the assignment of claims being used as a legal mechanism as a step in the creation of financial instruments. Therefore, some further analysis is required in order to arrive to make sure that all effects of the assignment of claims and all of the provisions of the examined definitions have been taken into consideration before establishing a conclusive answer to the research question.

Looking at the concept of securitisation and securitised debt revealed that the institution of assignment is used in order to make securitisation possible. This occurs in the cases where the exposures have to be transferred to the special purpose vehicle. There are several legal mechanisms that can be used in order to achieve this goal. These include sales agreements, assignment, and novation agreements. Here it is clearly indicated the assignment of these claims is simply the legal mechanism by which the exposures are moved to the special purpose vehicle. Securities are then issued by the special purpose vehicle that allow the investors to gain exposure as pooled. In contrast, the assignment of claims does not involve the issuing of any security. Additionally, the assignment of claims does not involve any changes of the underlying claims. This means that the key requirement for the securitisation transaction to be regarded as such, i.e., the concept of tranching, cannot be done by the assignment alone. This is because the assignment of a claim does not permit the altering of the claim itself or the parts which are assigned (the assignment of parts of claims is permitted, but no changes can effectively be made).

Therefore it is impossible to create a securitised debt as defined by the regulation through the means of assignment of a claim alone. This is because, as it was just possible to identify, two of the key cumulative criteria for the transaction to be regarded as a securitisation cannot be fulfilled:

- 1) no tranches are made,
- 2) no securities are issued in the process. (i.e, there is no *securitisation* of debts).

Furthermore, an attempt to forcefully include the assignment of claims into the definition of financial instruments would result in having to create “financial instruments” of financial instruments in order to pass any exposure into a special purpose vehicle – a concept that not only does not make sense, but would also contradict the provision in the Regulation on Securitisation whereby financial instruments are not permitted to form the underlying exposure for securitisation purposes.

For the sake of clarity, the possibility to fit the assignment of claims into the definition of securities was also examined. Using the definition of “transferable securities” as provided in MiFID II and using the insights provided by the cases where this scope is narrowed down by the Markets Abuse Regulation to just “securities” and also in other legislative acts, it is possible to derive a key component of these transferable securities. The key component of negotiability is present within all of the transferable securities. Using the definition and key aspects of negotiability as provided previously the key differences between the assignment of claims and securities can be highlighted. For the sake of this argument it is sufficient to consider only a few of those aspects. For example, one key element is the lack of the notification requirement, which is necessary for the assignment of a claim in order for it to produce a legal effect to the debtor. Additionally, the passing of the title happens by way of delivering the document or through endorsement, not as in the case of assignment, as was discussed in the part defining an assignment. It is clear already from these key traits that the assignment of claims would not be considered to match the definition of transferable securities.

It should be further emphasised that in the transfer of any of the financial instruments examined previously the whole instrument is passed on to the new owner. That is, including any rights and obligations that arise from the instrument. By contrast, the assignment of claims only permits the claim to be assigned from one party to another, meaning that no obligations can be assigned through way of assignment. Additionally, assignment of claims only passes on a claim that already exists or that can be determined to come to existence. Securities, however, are issued, thus adding value to the circulation. Assignments of claims only operate on the value that exists in the market and cannot influence its amount. This can be further seen (e.g.) when a credit claim arising from a loan agreement is assigned – here only the claim (i.e. the rights to the money to be owed) is assigned and the contracting parties to the loan agreement stay the same.

Having examined these definitions for the potential to fit the assignment of claims into any of them, it can be therefore concluded that none of them provide with a proper fit for the concept of assignment of claims. Therefore in the following section the analysis turns to examining what could explicitly suggest that these should be treated as separate concepts.

4.2 Indications for the current the placement of assignment of claims within the legal framework

In the process of analysing whether the assignment of claims should be placed under the definition of financial instruments as defined under MiFID II it was possible to identify several convincing arguments that showed that this should not be done. These arguments arise through both the use of contextual interpretation and teleological interpretation. The contextual interpretation is useful since at the core of the research question effectively a definition of a term that is not explicitly mentioned within the directive. Furthermore, examining the intent of the legislator as included in the annotation and recitals accompanying the law provides for convincing arguments that it has not been the intent to include assignments of claims into the definition of a financial instrument.

4.2.1 Insights from the addition of “credit claims” to the Financial Collateral Directive

Perhaps the most convincing argument for this can be identified when the assignment of claims is examined together with the way the credit claims are treated. In 2009 the amendment to the financial collateral directive was enacted, which allowed the admission of financial claims as collateral.¹⁵⁴ In Latvia this directive was transposed into the Financial Collateral Law (FCL)¹⁵⁵. In the previous version of the law, the list of admissible financial collateral included financial instruments, but “credit claims” were not mentioned in this list. Similarly to the Financial Collateral Directive, also in the FCL the definition as to what constituted financial instruments could be provided through interpreting what this meant in the FIML.

Examining the annotation to the Financial Collateral Directive shows that the credit claims were a new addition as regards to them being regarded as being admissible for securitisation. This is evidenced both by the fact that credit claims were not mentioned previously and that the accompanying explanatory memorandum clearly indicates that the main purpose of the amendment is to include credit claims as potential admissible financial collateral. The directive then goes on to define credit claims as the claims arising from loans issued by credit institutions as specified in the directive.

The language used in this regard in Latvian for the transposed term of the directive is “*kreditprasības*”. Examining the annotation of the amendment of the Financial Collateral law, a very straightforward answer could be found. Here, the lawmaker explicitly states that the reason that the Financial Collateral Law is being amended is in order to include “credit claims” into the scope of the law. A further note is added that explains that “credit claims” are being added because previously only financial instruments could have been used as collateral aside from from money. Interpreting the context of this comment indicates that the lawmaker itself does not consider that “credit claims” fall into the scope of financial instruments. The term “credit claims”

¹⁵⁴ “Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 Amending Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems and Directive 2002/47/EC on Financial Collateral Arrangements as Regards Linked Systems and Credit Claims (Text with EEA Relevance),” Pub. L. No. 32009L0044, OJ L 146 (2009), 44, <http://data.europa.eu/eli/dir/2009/44/oj/eng>.

¹⁵⁵ “Financial Collateral Law” (2005), <https://likumi.lv/doc.php?id=107799>.

are then subsequently added into a separate article in the law next to financial instruments, as opposed to being included as a broadening of the scope or a clarification of the concept of the definition of financial instruments.

Therefore, this choice of placement in the law, read together with the annotation indicates convincingly that these are intended as separate concepts and should be treated as such.

4.2.2 Insights from the Latvian Civil Law and the Rome I regulation

Because the concept of assignment of claims itself does not originate from EU legislation, but rather from Roman law, the national legislation of the Member States are an important source for insights as to how should the assignment of claims be interpreted. However, the insights provided by the regulations that do touch upon this area allow for interpreting any topics that the Member States have been able to agree upon. With this in mind, the Rome I regulation shows a key concept that has further been shown to exist in the national way of how assignments of claims are interpreted.

The examination of the Rome I regulation does not have to be too extensive. The immediate insights reveal that the Rome I regulation does deal with conflict of laws aspects of contractual rights, including those arising from the assignment of claims. What is explicitly mentioned to not be covered are the aspects relating to financial instruments.¹⁵⁶ This indicates that the two are in fact treated differently by intention.

Since the Rome I regulation leaves the substantive provisions of the interpretation of assignments to the Member States, the interpretation of the concept in national law plays a key role. Based on the analysis conducted in the part of this paper that dealt with examining the concept of assignment including the effects that they may produce, the limitations of assignment, and their historical origin, it can be convincingly said that assignments serve a very specific purpose in that they provide with the function of transferring rights. This is also supported by the research of legal scholars in Latvia examining the concept of the assignment of claims. Furthermore, their research within the areas of Latvian Civil Law that intersect with the trade in securities has found key differences as to how both should be exchanged between parties.¹⁵⁷

It would therefore counterproductive to the consistency of the interpretation of European treaties and the provisions derived from them to consider that in some regulations the assignment of claims is a financial instrument and in others it is not. The consistent way of interpreting is therefore one where the assignments of claims is treated as a separate concept.

4.2.3 Insights from the proposed directives

Additional insights regarding the EU's vision in respect to financial markets and the question of the treatment of assignment of claims is provided in the EU's future legislative plans. Here there are two key legislative initiatives relating to the topic in hand. One is the proposed directive on

¹⁵⁶ Francisco J. Garcimartin Alferez, "The Rome I Regulation: Exceptions to the Rule on Consumer Contracts and Financial Instruments," *Journal of Private International Law* 5, no. 1 (2009): 90.

¹⁵⁷ Grūtups, "Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.)," 298.

Credit servicers, credit purchasers and the recovery of collateral, and the other is the proposed regulation on the law applicable to the third-party effects of assignments of claims.

The proposed regulation on third party effects on assignments of claims¹⁵⁸ further confirms the findings of other parts of this section, which is that the assignment of claims is an entirely separate concept from financial instruments. This proposal discusses in detail the various aspects of the importance and use of assignment in enabling various transactions also in financial markets. The role of assignment in securitisation transactions is also examined in great detail in the accompanying impact assessment¹⁵⁹ and the proposed regulation sets out the possible approach as to how this role could be strengthened. It also makes direct links to the commercial usage for such assignments of claims for remuneration and fails to make the link to a definition of either this being a security or a financial instrument. Furthermore, as explicitly stated in the introductory statements to the proposed regulation, credit claims are referred to as a subset of a broader category of financial claims,¹⁶⁰ as opposed to being as subset of financial instruments. Additionally this regulation deals with securities separately, which is again consistent with the proposed view.

Furthermore, the proposed directive on Credit servicers, credit purchasers and the recovery of collateral¹⁶¹ also allows to conclude that assignments of claims are treated as a separate subject from financial instruments since these are dealt with separately. Furthermore, as identified in the proposal, currently non-performing loans can be traded freely, since there is no legislation that would place these loans within their scope of application. Thus, the lack of a strict regulatory framework and supervision for every type of financial transaction is not by itself a unique situation in the area of EU capital markets. Since these non-performing loans can also be freely traded, it can be inferred that the lack of supervision does not translate to a prohibition on such transactions.

The emergence of such rules in parallel as offered by both of these legislative proposals allows to infer that not every transaction is intended to be placed under the scope of MiFID, and that the legislator is aware of the separation between these concepts reflects it into the proposals.

Finally, after having examined the areas of the legislative framework where the concept of assignment of claims is described and comparing these insights against the constituent parts of the definition of financial instruments the answer to the research question becomes clear.

¹⁵⁸ Proposal for a regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims COM/2018/096 final - 2018/044 (COD).

¹⁵⁹ “Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Regulation on the Law Applicable to the Third-Party Effects of the Assignment of Claims Communication on the Applicable Law to the Proprietary Effects of Transactions in Securities,” Working document (European Commission, 2018), https://ec.europa.eu/info/sites/info/files/ia_claims_en.pdf.

¹⁶⁰ Proposal for a regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims COM/2018/096 final - 2018/044 (COD).

¹⁶¹ Proposal for a directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral COM/2018/0135 final - 2018/063 (COD).

5. CONCLUSION AND THE ANSWER TO THE RESEARCH QUESTION

At the onset of this paper, the following research question was presented: Can the assignment of a financial claim be regarded as a financial instrument?

In brief, the answer to the research question is negative. The assignment of a financial claim as understood by the civil law legal system of Latvia cannot be interpreted to mean that it is a financial instrument as defined by the legislative framework of the EU's capital markets. Therefore, the hypothesis as stated in the opening of this paper can be confirmed.

Furthermore, it was found that an attempt to equate the assignment of a financial claim to the concept of a financial instrument would have consequences which would effectively render the legislative framework incapable of performing its stated aims.

Specifically, the concept of securitisation was identified to be the potentially most affected area, should such an attempt be made. Such an action was identified to be a direct contradiction of the current approach of the legislator, which is to promote the use of simple, transparent, and standardised securitisation for the purposes of providing additional sources of financing to the economy.

In the process of deriving the answer it was determined on several occasions that the current placement of the concept of "assignment of claims" as not falling within the scope of the framework for "financial instruments" is an intentional decision. Furthermore, as shown by the hypothetical situation in which this division between the two concepts is not observed, this division exists for a valid reason.

Additionally, the analytical process contained within this paper helped to achieve a clearer distinction between the concepts. Specifically, it was identified that the assignment of a claim refers to the legal mechanism by which particular claims (or exposures as they are referred to for securitisation purposes) can be reassigned to another entity. A clear distinction was also made between the two concepts by distinguishing the fact that assignments of claims cannot be regarded to be negotiable instruments, due to the requirement of notification in the case of assignments and the physical passing of the document (or by means of a secured register for digital versions) in the case of negotiable instruments.

This distinction between the two was also made by highlighting the inability of the assignment of a claim to create any value. The transfer of a claim only shifts a claim that belongs to the assignor to the assignee, which was shown to be in direct contrast to the concept of securities where new claims can be created.

Contrasting the lack of existing regulation in the area of assignment of claims to that of the function and role of the supervisory authorities, the following findings of this paper have to be emphasised. As it was found in the main part of the paper, the assignment of claims operate as a separate legal tool that can be made use of within the regulated capital markets and also outside the scope of the regulated capital markets. The goal of the regulatory framework is to ensure a resilient and functioning market, but the concept of assignment of claims does not interfere with the this aim of the market in the sense that it does not pose any new risks to the market or to its

participants. These risks and claims are created by the issuing of financial instruments, whereas the assignment of claims can only pass on the claim to the assignee. Furthermore, the assignor is left with any liabilities that they may have pursuant to the claim, including any obligations to the original debtor.

Lastly, as regards to any potential risk that may be assumed to exist by way of making analogies to the concepts of securitisation, the following has to be highlighted. Unlike in the trading of securitised assets that led to the financial crisis of the late 2000s, in the case of assignment of claims there is no securitisation happening. In fact, the very nature of assigning a claim prohibits any alteration to the form in which the claim was first contracted upon. Any deviation from this would mean that the debtor has to be involved in the transaction and this would no longer be characterisable as an assignment. Assignments permit re-use of claims and this can be done only to the extent that does not result in negative effects towards the debtor. Therefore, the concept of assignment allows increasing the liquidity of otherwise illiquid assets. Even if the infrastructure that is necessary to carry out efficient assignments may appear to be similar to that of the regulated markets, it should simply be seen as an indication of the regulated markets being structured so efficiently so as to be worthy of replicating and should rather be treated as a success of the regulatory framework, not as an indication that the assignment of claims should be treated as financial instruments.

This paper also highlights the need for continued research on the topic of assignment of claims regarding the potential limitations to assignments that could arise in Latvia in relation to the case of *Express Credit v PTAC* on consumer protection grounds, and also in relation to exploring the scope and limitations of conditional provisions that can be added to agreements relating to the assignment of claims.

BIBLIOGRAPHY

Primary sources

- American Law Institute, and National Conference of Commissioners on Uniform State Laws. Uniform Commercial Code (2012). <https://www.law.cornell.edu/ucc/2/2-210>.
- Cabinet of Ministers. “Annotation to the proposed Financial Instrument Market Law,” June 25, 2003. http://www.saeima.lv/L_Saeima8/lasa-dd=LP0376_0.htm.
- . Law on Bills of Exchange (1938). <https://likumi.lv/doc.php?id=90972>.
- . Rules of consumer credit, Pub. L. No. 691 (2016). <https://likumi.lv/doc.php?id=285975>.
- Civil Code of France (consolidated version 02.03.2017). Accessed May 17, 2018. <http://www.wipo.int/wipolex/en/text.jsp>.
- Civil Code of the Republic of Lithuania, Pub. L. No. VIII–1864 (2000). <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495>.
- Civil Law of Latvia (1937). <https://likumi.lv/doc.php?id=225418>.
- Commercial Code of France, Pub. L. No. LOI n°2008-3 (2008). <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005634379&dateTexte=20130701>.
- Commercial Code of Germany (1994). http://www.gesetze-im-internet.de/hgb/_354a.html.
- Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing (1979). <https://publications.europa.eu/en/publication-detail/-/publication/8fda4aab-a1a2-42ba-ada6-337c938a1984/language-en>.
- Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing, Pub. L. No. 31980L0390 (1980). <http://data.europa.eu/eli/dir/1980/390/oj>.
- Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of, Pub. L. No. 31988L0627, OJ L 348 (1988). <http://data.europa.eu/eli/dir/1988/627/oj/eng>.
- Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public, Pub. L. No. 31989L0298, OJ L 124 (1989). <http://data.europa.eu/eli/dir/1989/298/oj/eng>.
- Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, Pub. L. No. 31989L0592, OJ L 334 (1989). <http://data.europa.eu/eli/dir/1989/592/oj/eng>.
- Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, Pub. L. No. 31993L0022, OJ L 141 (1993). <http://data.europa.eu/eli/dir/1993/22/oj/eng>.
- Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), Pub. L. No. 32003L0006, OJ L 096 (2003). <http://data.europa.eu/eli/dir/2003/6/oj/eng>.
- Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (Text with EEA relevance), Pub. L. No. 32003L0071, OJ L 345 (2003). <http://data.europa.eu/eli/dir/2003/71/oj/eng>.

- Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (Text with EEA relevance), Pub. L. No. 32004L0025, OJ L 142 (2004).
<http://data.europa.eu/eli/dir/2004/25/oj/eng>.
- Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, Pub. L. No. 32004L0039, OJ L 145 (2004).
<http://data.europa.eu/eli/dir/2004/39/oj/eng>.
- Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, Pub. L. No. 32004L0109, OJ L 390 (2004).
<http://data.europa.eu/eli/dir/2004/109/oj/eng>.
- Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, Pub. L. No. 32008L0048, OJ L 133 (2008). <http://data.europa.eu/eli/dir/2008/48/oj/eng>.
- Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (Text with EEA relevance), Pub. L. No. 32009L0044, OJ L 146 (2009).
<http://data.europa.eu/eli/dir/2009/44/oj/eng>.
- Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, Pub. L. No. 32014L0017, OJ L 060 (2014). <http://data.europa.eu/eli/dir/2014/17/oj/eng>.
- Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), Pub. L. No. 32014L0057, OJ L 173 (2014). <http://data.europa.eu/eli/dir/2014/57/oj/eng>.
- Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance, Pub. L. No. 32014L0065, OJ L 173 (2014).
<http://data.europa.eu/eli/dir/2014/65/oj/eng>.
- Financial Collateral Law (2005). <https://likumi.lv/doc.php?id=107799>.
- Financial Instrument Market Law (2003). <https://likumi.lv/doc.php?id=81995>.
- First instance court ruling SIA ExpressCredit v PTAC. 2017. Administratīvā rajona tiesa.
Available at:
<https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:ADRJRIT:2017:1222.A420186317.1.S>
- German Civil Code (BGB). Accessed May 17, 2018. https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1459.
- International Institute for the Unification of Private Law. UNIDROIT Convention on International Factoring (1988). <http://www.unidroit.org/instruments/factoring>.
- Latvijas Republikas Augstākās tiesas Civillietu departamenta 2017. gada 30. jūnija spriedums Lieta Nr.C28409813 SKC-221/2017 (Ruling of the Supreme Court of Latvia on case Nr.C28409813 SKC-221/2017), No. C28409813 SKC-221/2017 (Latvijas Republikas Augstākās tiesas Civillietu departaments June 30, 2017).

Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2007.gada 3.janvāra lēmums Lietā Nr. SPC – 16 (Supreme Court ruling on the case Nr. SPC – 16), No. SPC – 16 (Latvijas Republikas Augstākās tiesas Senāta Civillietu departaments January 3, 2007).

Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2007.gada 28.marta spriedums Lietā Nr. SKC – 192 (Supreme Court ruling on the case no. SKC – 192), No. SKC – 192 (Latvijas Republikas Augstākās tiesas Senāta Civillietu departaments March 28, 2007).

Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2012. gada 25.janvāra spriedums Lietā Nr. SKC-18/2012, No. SKC-18/2012 (Latvijas Republikas Augstākās tiesas Senāta Civillietu departaments January 25, 2012).

Law of Obligations Act of the Republic of Estonia, Pub. L. No. RT I 2001, 81, 487 (2001). <https://www.riigiteataja.ee/en/eli/506112013011/consolide>.

Law of Property Act 1925. Accessed May 21, 2018. <https://www.legislation.gov.uk/ukpga/Geo5/15-16/20/section/136>.

Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community, Pub. L. No. 32005R1889, 309 OJ L (2005). <http://data.europa.eu/eli/reg/2005/1889/oj/eng>.

Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/ECText with EEA relevance., Pub. L. No. 32017R1129, 168 OJ L (2017). <http://data.europa.eu/eli/reg/2017/1129/oj/eng>.

Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012, Pub. L. No. 32017R2402, 347 OJ L (2017). <http://data.europa.eu/eli/reg/2017/2402/oj/eng>.

Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps Text with EEA relevance, Pub. L. No. 32012R0236, 086 OJ L (2012). <http://data.europa.eu/eli/reg/2012/236/oj/eng>.

Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies Text with EEA relevance, Pub. L. No. 32013R0462, 146 OJ L (2013). <http://data.europa.eu/eli/reg/2013/462/oj/eng>.

Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance, Pub. L. No. 32014R0596, 173 OJ L (2014). <http://data.europa.eu/eli/reg/2014/596/oj/eng>.

Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 Text with EEA relevance, Pub. L. No. 32014R0600, 173 OJ L (2014). <http://data.europa.eu/eli/reg/2014/600/oj/eng>.

Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories Text with EEA relevance, Pub. L. No. 32012R0648, 201 OJ L (2012). <http://data.europa.eu/eli/reg/2012/648/oj/eng>.

Saeima. Commercial Law (2000). <https://likumi.lv/doc.php?id=5490>.

———. Law on the UNIDROIT convention on international factoring (1997).
<https://likumi.lv/doc.php?id=44298>.

United Nations Convention on the Assignment of Receivables in International Trade (2001).
http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables.html.

Communications and working documents of the EU, soft law and reports commissioned by the EU

- “Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Regulation on the Law Applicable to the Third-Party Effects of the Assignment of Claims Communication on the Applicable Law to the Proprietary Effects of Transactions in Securities.” Working document. European Commission, 2018.
https://ec.europa.eu/info/sites/info/files/ia_claims_en.pdf.
- “Completing the Internal Market. White Paper from the Commission to the European Council. COM (85) 310 Final.” EU Commission - COM Document. Milan: European Commission, June 14, 1985. <http://aei.pitt.edu/1113/>.
- European Banking Authority. “EBA Report on Qualifying Securitisation: Resoponse to the Commission’s Call For Advice of January 2014 on Long-Term Financing.” London, 2014.
<https://www.eba.europa.eu/documents/10180/950548/EBA+report+on+qualifying+securitisation.pdf>.
- European Commission. “Communication from the Commission - Implementing the Framework for Financial Markets: Action Plan COM/99/0232 Final.” Communication. European Commission, May 11, 1999. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:51999DC0232>.
- . “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan on Building a Capital Markets Union.” Brussels: European Commission, September 30, 2015. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0468>.
- Principles of European Contract Law (PECL). Accessed May 16, 2018. https://www.trans-lex.org/400200/_/pecl/.
- Proposal for a directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral COM/2018/0135 final - 2018/063 (COD), Pub. L. No. COM/2018/0135 final-2018/063 (COD) (2018). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A135%3AFIN>.
- Proposal for a regulation of the European Parliament and of the Council laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation and amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 COM/2015/0472 final - 2015/0226 (COD) (2015). <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:0472:FIN>.
- Proposal for a regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims COM/2018/096 final - 2018/044 (COD), Pub. L. No. COM/2018/096 final-2018/044 (COD) (2018). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A96%3AFIN>.

- Ringe, Wolf-Georg. "The Law of Assignment in European Contract Law." In *English and European Perspectives on Contract and Commercial Law*, edited by Louise Gullifer and Stefan Vogenauer, 251–78. United Kingdom: Hart Publishing Ltd, 2014.
- Segre, Claudio. "The Development of a European Capital Market. Report of a Group of Experts Appointed by the EEC Commission." EU Commission - Working Document. Brussels, November 1966. <http://aei.pitt.edu/31823/>.
- The Committee of Wise Men. "Final Report of the Committee of Wise Men on the Regulation of European Securities Markets." Brussels, February 15, 2001. http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wisemen_en.pdf.
- "The High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosiere." Report. Brussels: The High-Level Group on Financial Supervision in the EU, February 25, 2009. http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.
- "White Paper on Financial Services Policy 2005-2010 (COM/2005/0629 Final)." Brussels: European Commission, December 1, 2005. <http://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52005DC0629>.

Secondary sources

- Alferez, Francisco J. Garcimartin. "The Rome I Regulation: Exceptions to the Rule on Consumer Contracts and Financial Instruments." *Journal of Private International Law* 5, no. 1 (2009): 85–104.
- Bell, Ian, and Petrina Dawson. "Synthetic Securitization: Use of Derivative Technology for Credit Transfer." *Duke Journal of Comparative & International Law* 12 (June 4, 2002): 541–62.
- Castellano, Giuliano. "Towards a General Framework for a Common Definition of 'Securities': Financial Markets Regulation in Multilingual Contexts." *Uniform Law Review (Revue de Droit Uniforme)* 17, no. 3 (August 1, 2012): 448–81. <https://doi.org/10.1093/ulr/17.3.449>.
- Delivorias, Angelos, European Parliament, and Directorate-General for Parliamentary Research Services. *Understanding Securitisation: Background - Benefits - Risks : In-Depth Analysis*. Brussels: European Parliamentary Research Service, 2016. <http://bookshop.europa.eu/uri?target=EUB:NOTICE:QA0415658:EN:HTML>.
- Grūtups, Andris. "Devītā nodaļa. Prasījumu tiesību cesija. (Chapter nine. Assignment of claim rights.)" In *Latvijas Republikas Civillikuma komentāri: ceturtā daļa. Saistību tiesības. (Commentary to the Civil Law of the Republic of Latvia: part four. Obligations Law.)*, 281–312. Rīga: Mans Īpašums, 1998.
- Kalniņš, Voldemārs. *Romiešu civiltiesību pamati (Foundations of Roman civil law)*. Rīga: Zvaigzne, 1977.
- . *Romiesu civiltiesību pamati (Foundations of Roman civil law)*. Rīga: Zvaigzne, 1977. [https://egramatas.com/arhivs/FILOSOFIJA%20UN%20PSIHOLOGIJA/Politika/juridisko%20tiesibu%20macibu%20lidzekli%20no%20gramataselektroniski/Romiesu%20civiltiesibu%20pamati\(V.Kalnins\).pdf](https://egramatas.com/arhivs/FILOSOFIJA%20UN%20PSIHOLOGIJA/Politika/juridisko%20tiesibu%20macibu%20lidzekli%20no%20gramataselektroniski/Romiesu%20civiltiesibu%20pamati(V.Kalnins).pdf).
- Kötz, Hein. *European Contract Law*. Translated by Gill Mertens and Tony Weir. Second Edition. Oxford: Oxford University Press, 2017.
- Merriam-Webster, Incorporated. "Definition of Endorse." *Merriam-Webster Online Law Dictionary*, May 13, 2018. <https://www.merriam-webster.com/dictionary/endorse>.

- . “Definition of Negotiable.” *Merriam-Webster Online Law Dictionary*, May 17, 2018. <https://www.merriam-webster.com/dictionary/negotiable>.
- Nemenova, Vita. “Cesijas tiesiskā regulējuma modernizācijas virzieni Latvijā (Modernization tendencies for cession’s legal regulation in Latvia).” Doctoral thesis, Rīgas Stradiņa universitāte, 2015. https://www.rsu.lv/sites/default/files/dissertations/Vita_Nemenova_promocijas_darbs.pdf.
- Nouy, Daniele. “Gaming the Rules or Ruling the Game? – How to Deal with Regulatory Arbitrage.” Speech presented at the 33rd SUERF Colloquium, Helsinki, September 15, 2017. <https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp170915.en.html>.
- “Regulatory Process in Financial Services. Post-Crisis Reform: The European Supervisory Authorities.” n.d. Text. European Commission. Accessed May 19, 2018. https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-reforms-and-their-progress/regulatory-process-financial-services/regulatory-process-financial-services_en.
- Ringe, Wolf-Georg. “The Law of Assignment in European Contract Law.” In *English and European Perspectives on Contract and Commercial Law*, edited by Louise Gullifer and Stefan Vogenauer, 251–78. United Kingdom: Hart Publishing Ltd, 2014.
- Schwarcz, Steven L. “Chapter 51. Securitization and Structured Finance.” In *Handbook of Key Global Financial Markets, Institutions, and Infrastructure*, edited by Gerard Caprio. Academic Press, 2012. http://www.masonlec.org/site/rte_uploads/files/SCHWARCZ_Encyclopedia-of-Financial-Globalization-Elsevier.pdf.
- Skujiņa, Valentīna, ed. *Angļu-Latviešu Muitas Terminu Vārdnīca. (English-Latvian Customs Term Dictionary)*. Rīga: Jāņa sēta, 1997. <http://termini.lza.lv/term.php?term=negotiable&lang=EN>.
- Tajti, Tibor. “Central European Contribution to the American Debate on the Definition of ‘Securities’ or Why Does the Definition of ‘Security’ Matter?: The Fiasco of the Hungarian Real Estate Investment Cooperatives, Pyramiding, and Why Emerging Capital Markets Should Be Equipped to ‘Act’ Rather than ‘React.’” *Transnational Law & Contemporary Problems* 15 (October 1, 2005): 111–216.
- Torgāns, Kalvis. *Saistību tiesības. I daļa. (Obligations law. Part I.)*. Rīga: Tiesu namu aģentūra, 2006.
- Torgāns, Kalvis, Andris Grūtups, Gunta Višņakova, Sandis Petrovičs, Erlens Kalniņš, Kaspars Balodis, and Agris Bitāns. *Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. (Commentary on the Civil Law of Latvia: Part four. Obligations law.)*. Edited by Kalvis Torgāns. Rīga: Mans Īpašums, 1998.
- Veil, Rüdiger. *European Capital Markets Law*. Translated by Rebecca Ahmeling. 1st ed. United Kingdom: Hart Publishing Ltd, 2013.
- Whiting, Desomind Percival. “The Concept of Negotiability.” In *Mastering Banking*, edited by Desomind Percival Whiting, 122–34. London: Macmillan Education UK, 1985. https://doi.org/10.1007/978-1-349-17757-8_9.