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LAW REVIEW

Virtual currencies and free movement of capital in EU law: a curious intersection at the dawn of a new digital age

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1. The Human need to Establish Markets as a Metaphysical Claim[1]

The New Digital World has transformed human relations (*συμφυΐα*[2]) through rapid digitalization, shifting the very structure of social existence. Originally, ARISTOTLE spoke of the nature of humans: we are social/political animals (ζῷον πολῑτῐκόν or *zôon logikon kai politikon* in simplified Greek)[3]. This sociability – built on face-to-face interactions, communal bonds, and physical closeness – is the very foundation upon which we build our civilization. Overall, we rely on skin-to-skin interaction. But even if we consider that we do not need a corporeal interaction, and following HEIDEGGER and MERLEAU-PONTY, we are beings-in-relation (*Mitsein*, in the heideggerian sense) with the world.

The earliest evidence of markets, the epitome of human relationships, comes primarily from archaeological findings tied to the Babylonian, early Middle Eastern, and Mediterranean empires. The existence of a market inherently implies competition among its participants. Human nature, as it tends to prioritize self-interest, often involves exploiting the needs of others to further one's own material gains[4]. This drive stems from our intrinsic selfishness – a notion explored by thinkers like HOBBES and NIETZSCHE, albeit for different reasons – and is rooted in our awareness of mortality.

We strive to rise above our given circumstances because we know that, ultimately, we will face death. As a being-there (*Dasein*) oriented toward death (*Sein-zum-Tode*), death (*Tod*), for humans, is not merely a source of fear; it is a catalyst for authenticity (*Eigentlichkeit*). In contrast to other phenomena, death represents, at least according to HEIDEGGER, the boundary of existence. It functions as a horizon against which the meaning of life becomes self-evident.

As such, the original need to build a European market is subconsciously reflecting this drive toward transcendence – an effort to unify fragmented states into a cohesive entity capable of standing against the inevitability of decline and dissolution. In this existential

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[1] Cfr., GUERRA, CARVALHO; PIRES, SOFIA (2025). *Competition in the Metaverse Age: The Birth of a New Era in Economics and Legal Philosophy. In* "Navegar o Mercado: Ensaios sobre Direito e Política da Concorrência", Almedina.

[2] In ancient Greek texts, συμφυΐα can be used to describe the innate connection between two entities. This can refer to relationships between people, parts of a whole or natural phenomena where the connection is seen as essential and indivisible. This word is composed of σύν (*syn*), meaning 'together' or 'with', and φυΐα (*phuia*), which is derived from φύω (*phuō*), meaning 'to grow' or 'to produce'. Together, συμφυΐα literally conveys the idea of 'growing together', implying a natural union.

[3] ARISTÓTELES (1977). *Tratado de Política*. Europa-América, p. 8.

[4] KOTSIRIS, LAMBROS (1988). *An Antitrust Case in Ancient Greek Law. In* International Lawyer, vol. 22, no. 2, p. 451.

framework, the formation of markets – and, later, the European market – can be seen as more than an economic arrangement. It is a reflection of humanity's existential striving for betterment. On a deeper level, the European market can be seen as an expression of humanity's existential anxiety (*Angst*, following HEIDEGGER) – our collective awareness of mortality and finitude. By creating a transnational interdependent economic system, the EU has sought not only to mitigate economic vulnerability but also to embody a vision of unity that transcends the temporal boundaries of individual lifespans and national histories. It is an attempt – albeit not always easy to fulfil – to confront the fragility of existence through enduring cooperation, temporal continuity, and mutual reliance.

2. One Ring to Rule them All (And in the "Light" Bind Them)

The four fundamental freedoms – goods (Articles 28–37 TFEU), persons (Articles 45-55 TFEU), services (Articles 56-62 TFEU), and capital (Articles 63-66 TFEU) — form the backbone of today's *Single-Common* Market. Enshrined in the Treaty on the Functioning of the European Union, these freedoms stand as the very cornerstone not only of the European market itself but also of the wider Union as a political and legal project striving towards deeper forms of integration.

Taken together, the four freedoms may be seen as forming a kind of European "tetrahedron" – or, borrowing from Jungian imagery, a "quaternity" symbolising harmony, completeness, and balance, each face representing the circulation of goods, persons, services, and capital. Each freedom is indispensable in its own right, yet their true strength lies in their interdependence. The weakness or absence of one inevitably risks unsettling the equilibrium of the whole; only in concert do they generate a structure robust and stable enough to carry forward the European integration project.[5]

The free movement of capital and payments, once regarded as the "ugly duckling" (or "runt of the litter"[6]) of the four fundamental freedoms, has since grown into what might fairly be described as the "Global Swan"[7] of this celebrated quartet. Today, it occupies a place of particular prominence in the Union's legal and economic framework – not merely because it was the last of the freedoms to be formally enshrined,[8] but also because it remains the only one to have been fully realised in practice. That is not to say, of course, that its development has reached a point of finality;[9] on the contrary, ongoing initiatives such as

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[5] ALVES, JORGE DE JESUS FERREIRA (1992). *Lições de Direito Comunitário – Volume I.* (2nd edition). Coimbra Editora, p. 326.

[6] Cfr., FLYNN, LEO (2001). *Coming of Age: The Free Movement of Capital Case Law 1993-2002. In* Common Market Law Review, vol. 39, n.º 4.

[7] CUYVERS, ARMIN (2017). *Free Movement of Capital and Economic and Monetary Union in the EU. In* "East African Community Law – Institutional, Substantive and Comparative EU Aspects", eds. EMMANUEL UGIRASHEBUJA, JOHN EUDES RUHANGISA, TOM OTTERVANGER & ARMIN CUYVERS, pp. 410 e ss.

[8] "[L]iberalization took longer for capital than for persons, services, and goods. This was recognized in the original Treaty provisions on capital, which were drafted more cautious, less 'imperative' terms than the other three freedoms", BARNARD, CATHERINE (2013). *The Substantive Law of the EU: The Four Freedoms.* (4th edition). Oxford University Press, p. 580.

[9] RICCI, ILARIA (2017). *Free Movement of Capital and Payments. In* "Introduction to European Union Internal Market Law", ed. Raffaele Torino, Roma TrE-Press, p. 136.

the Commission's Capital Markets Union project, as well as the Eurogroup's statements on 11 March 2024, make plain that this freedom continues to evolve in scope and ambition.

The free movement of capital and payments, enshrined in Articles 63-66 TFEU, has, over time, consolidated itself as a genuine bedrock – and arguably *the* main bedrock – of the Single Market[10]. The free movement of payments, which now forms the common body of the free movement of capital in the broader sense,[11/12] has been singled out in the landmark case *Regina v Thompson* (Case 7/78) as potentially among the most decisive strands for bringing about a fully integrated, functioning common market. That is to say, the Court there signalled that the rules governing cross-border payments may be especially central to the realisation of the Single Market's objectives.[13/14]

Unlike the freedoms governing goods, services and persons – which typically concern tangible, physical or locational exchanges – the free movement of capital and payments embodies a more abstract and "bodyless" concept. Described in the Spaak Report as the "last freedom", it facilitates cross-border investment, barrier-free financial transactions and the integration of national financial markets. Without the unfettered flow of capital and payments, the effective operation of the other freedoms would be seriously impaired,[15] as the Court made clear in *Guerrino Casati* (Case 203/80).[16]

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[10] "Free movement of capital constitutes a necessary support for the freedoms [...]: a transaction in goods or services or establishment in another Member State will often require investment necessitating a capital movement to another Member State", LENAERTS, KOEN; NUFFEL, PIET VAN (2011). *European Union Law*. (3rd edition). Sweet & Maxwell, eds. ROBERT BRAY & NATHAN CAMBIEN, p. 285.

[11] BIAŁEK, NATALIA; BAZYLKO, ARKADIUSZ (2011). *Free movement of money in the European Union: The role of European Court of Justice in the formation of free movement of capital and payments. In* E-Finanse: Financial Internet Quarterly, University of Information Technology and Management, Rzeszów, vol. 7, issue 2, p. 60. | "Since the Maastricht Treaty came into effect, we may speak of one freedom with two subcategories. Free movement of capital and payments are now significantly closer to one another. Both freedoms have parallel regime within the Union, they are subject to uniform legal regulation and one group of exceptions", HAMULÁK, ONDREJ (2012). *Unveiling the Overlooked Freedom – The Context of Free Movement of Capital and Payments in the EU Law. In* ICLR, vol. 12, issue 2, p. 133.

[12] "The provisions of the Treaty of Lisbon provide for unitary regulation of capital and payment issues. The legal basis for the free movement of capital within the European Union is the provisions of Articles 63-66 TFEU on Capital and payments", DIACONU, NICOLETA (2018). *Legal Framework concerning the Exercise of Free Circulation Capital in the European Union. In* Journal of Law and Administrative Sciences, n.º 9/2018, p. 129.

[13] Cfr., BARNARD, CATHERINE (2013). *The Substantive Law of the EU: The Four Freedoms.* (4th edition). Oxford University Press, p. 582.

[14] RICCI, ILARIA (2017). *Free Movement of Capital and Payments. In* "Introduction to European Union Internal Market Law", ed. Raffaele Torino, Roma TrE-Press, p. 141.

[15] "Free movement of capital constitutes a necessary support for the freedoms [...]: a transaction in goods or services or establishment in another Member State will often require investment necessitating a capital movement to another Member State", LENAERTS, KOEN; NUFFEL, PIET VAN (2011). *European Union Law*. (3rd edition). Sweet & Maxwell, eds. ROBERT BRAY & NATHAN CAMBIEN, p. 285.

[16] "Thus the free movement of capital constitutes, alongside that of persons and services, one of the fundamental freedoms of the community. Furthermore, freedom to move certain types of capital is, in practice, a pre-condition for the effective exercise of other freedoms guaranteed by the treaty, in

For example, free movement of goods would be hollow if businesses and consumers could not transfer funds across borders to settle transactions;[17/18] likewise, free movement of services and of persons would encounter insurmountable practical obstacles if the necessary financial resources did not follow people or accompany cross-border service provision. In short, the free movement of payments functions as an ancillary – indeed a linchpin – to the other freedoms, occupying the very centre of the proverbial tetrahedron that represents the architecture of European integration.[19/20]

Overall, the free movement of capital stands as the proverbial J.R.R. TOLKIEN ring, one to rule all other freedoms. Its importance lies not just in practical applications like cross-border investments or monetary policy coordination but in its symbolic embodiment of the EU's initial vision: a unified, prosperous economic space. While each fundamental freedom is vital to the European project, the free movement of capital almost holds a mythical position, binding the others into an interdependent system.

Much like TOLKIEN's Ring, free movement of capital wields immense influence, and without it, goods, people, and services would falter under the weight of inter-border transaction costs and fragmented external financial systems. Just like MERLEAU-PONTY's concept of *flesh*, it serves as the metaphysical connective tissue, enabling the other freedoms to reach their full potential.[21] It is not merely a foundation; rather, it constitutes the essence – in the Aristotelian sense of that which actualises potential – that propels the European system forward and secures the realisation of a genuinely integrated Single Market. Without this animating principle, formal guarantees and institutional arrangements risk remaining inert: the free movement of capital and payments supplies the operative force that transforms legal architecture into lived economic integration.

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particular the right of establishment", *Guerrino Casati*, 203/80.

[17] "Liberalization of the market for goods and services and free movement of persons is necessarily required liberalization of transfer of payments between the Member States", HAMULÁK, ONDREJ (2012). *Unveiling the Overlooked Freedom – The Context of Free Movement of Capital and Payments in the EU Law. In* ICLR, vol. 12, issue 2, p. 132.

[18] CAMPOS, MANUEL FONTAINE (2018). *Livre Circulação de Capitais: Acórdão do Tribunal de Justiça de 8 de julho de 2010 – Processo C-171/08 Comissão Europeia c. República Portuguesa. In* "Princípios Fundamentais de Direito da União Europeia: Uma Abordagem Jurisprudencial", ed. SOFIA OLIVEIRA PAIS, Almedina, p. 382.

[19] BIAŁEK, NATALIA; BAZYLKO, ARKADIUSZ (2011). *Free movement of money in the European Union: The role of European Court of Justice in the formation of free movement of capital and payments. In* E-Finanse: Financial Internet Quarterly, University of Information Technology and Management, Rzeszów, vol. 7, issue 2, p. 59.

[20] CAMPOS, MANUEL FONTAINE (2018). *Livre Circulação de Capitais: Acórdão do Tribunal de Justiça de 8 de julho de 2010 – Processo C-171/08 Comissão Europeia c. República Portuguesa. In* "Princípios Fundamentais de Direito da União Europeia: Uma Abordagem Jurisprudencial", ed. SOFIA OLIVEIRA PAIS, Almedina, p. 382.

[21] "Every sharp boundary between a body and another disappears because the body is common to all beings, it is the 'flesh of the world'. The flesh is a chiasm, an entanglement between touching and being touched, seeing and being seen, subject and object [...]", FERRO, FLORIANA (2021). *Merleau-Ponty and the Digital Era: Flesh, Hybridization, and Posthuman. In* Scenari, vol. 15, year 3, 2/2021, p. 192.

3. Understanding Article 63 TFEU

Article 63 TFEU – which was held to have direct effect in the *Sanz de Lera* judgment (C-163, 165 and 250/94) – clearly states that all restrictions on the movement of capital and payments between Member States and between Member States and third countries shall be prohibited (giving, however, the wrong impression that capital movements within the EU and with non-member States are treated always exactly the same[22]).

In the early stages of European economic integration, the concepts of free movement of payments and free movement of capital *per se* were regarded as discrete legal freedoms (the fourth and the fifth freedom, respectively). The free movement of capital was formally recognized in Article 67 TEC, while the free movement of payments was addressed in Article 106 of the same treaty. However, this separation gave rise to certain complications, primarily since these two concepts are akin to JANUS, united by one body but with two different faces. As such, since Maastricht, we no longer have this (framework) separation.[23]

As we can see, Article 63 TFEU ends up referring to two sub-freedoms belonging to the major free movement of capital category: free movement of capital *per se* and free movement of payments (together, free movement of capital). On the one hand, under the *Luisi and Carbone* judgment (286/82 and 26/83), "current payments" are transfers of foreign exchange which constitute the consideration within the context of an underlying transaction, whilst "movements of capital" are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service.

It is evident that the concepts of "capital" and "payment" are autonomous European concepts that are not synonymous. An induced financial transaction, which does not possess the characteristics of an economic activity and is instead akin to remuneration, is, in principle, encompassed by the free movement of payments and not by the free movement of capital *per se*.[24]Bottom line, they are different (national-autonomous) concepts.

Finally, it's worth mentioning that free movement of capital (encompassing free movement of payments and free movement of capital *per se*) uniquely extends beyond the EU's internal geographical market to include non-EU States. As such, third-member states generally benefit from access to the EU's free movement of capital as a whole.[25]

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[22] CRAIG, PAUL; BÚRCA, GRÁINNE DE (2015). *EU Law: Text, Cases and Materials*. (6th edition). Oxford University Press, p. 723.

[23] "[...] Maastricht reform removed existing problematic differentiation between free movement of capital and free movement of payments in a fundamental way. Since the Maastricht Treaty came into effect, we may speak of one freedom with two subcategories. Both freedoms have parallel regime within the Union, they are subject to uniform legal regulation and one group of exceptions", HAMULÁK, ONDREJ (2012). *Unveiling the Overlooked Freedom – The Context of Free Movement of Capital and Payments in the EU Law. In* ICLR, vol. 12, issue 2, p. 133.

[24] ANDRADE, PAULO GUERRA E (2012). *Artigo 63.º TFEU. In* "Tratado de Lisboa: Anotado e Comentado", eds. LOPES PORTO & GONÇALO ANASTÁCIO, Almedina, p. 366 (our translation).

[25] About this, with interest, SNELL, JUKKA (2011). *Free Movement of Capital: Evolution as a Non-*

Given the constraints of limited space, this paper will focus on a concise discussion of the free movement of payments, omitting the intricate details of capital movement *per se*.

B. Understanding the Economic and Legal Concepts Behind (Virtual) Currencies and Legal Tender

The concept of "virtual currencies" is frequently employed referring to electronic money that is utilized for direct payments between individuals, "[...] without the involvement of intermediaries or financial institutions, operating using decentralized blockchain technology".[26] These currencies are autonomous of state or banking entities, operating on a network where "[...] a group of people or machines participate in a completely decentralized manner" (*peer-to-peer*)[27].

As such, crypto is stateless and without owner. In addition, as previously mentioned, these currencies do not possess a "physical substrate". In essence, cryptocurrency can be defined as a set of sequences of digital information (often referred to as strings of data[28]), a nature clearly denounced in the very name of Bitcoin ("coin" made out of bits)[29]. It is important to note that virtual currencies are classified as a type of crypto assets (which are the subject of the Markets in Crypto Assets Regulation 2023/1114), encompassing both virtual currency, also known as cryptocurrency, and tokens.

It is interesting (and relevant to the case at hand) to consider whether a cryptocurrency, namely Bitcoin, can be classified as "money". Historically, for something to count as **money** it has had to perform three functions. First, a **medium of exchange and payment** (*Tausch- und Zahlungsmittel*) – an intermediary instrument that is widely accepted in return for goods or services (the *tertium permutationis* of commercial dealings). Second, a **unit of account** (*Rechnungseinheit*) – a standard measure in which the value of goods and services is expressed (the *tertium comparationis*). Third, a **store of value** (*Wertaufbewahrung*) – a repository of purchasing power to be used at a later date (what in German is called *Kaufkraft*).

As a rule, anything that functions in practice as a medium of exchange will, in time or by convention, also serve as a unit of account and as a store of value. But these functions are analytically distinct: an asset may fulfil one role more readily than another (for example, a highly volatile token may be accepted as payment but fare poorly as a reliable store of value). In short, to be classified as "money" an asset typically must be exchangeable for

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linear Process. In "The Evolution of EU Law", eds. PAUL CRAIG & GRÁINNE DE BÚRCA, Oxford University Press, pp. 564 e ss. |"Second, the free movement of capital is the only freedom that benefits movements within the EU and to and from third countries, and both EU and third-country nationals", DOURADO, ANA PAULA (2017). *The EU Free Movement of Capital and Third Countries: Recent Developments. In* Intertax, vol. 45, issue 3, p. 194.

[26] SENA, IRINA (2022). *A Tributação da Moeda Virtual em Portugal*. Almedina, p. 15 (our translation).

[27] RODRIGUES, ANDRÉ ALFAR (2023). *Manual de Inovação Financeira*. AAFDL Editora, p. 73 (our translation).

[28] ANTUNES, ENGRÁCIA (2021). *As Criptomoedas*. *In* Revista da Ordem dos Advogados, year 81, january/june, p. 143.

[29] LELOUP, LAURENT (2017). *Blockchain: La Révolution de La Confiance*. Eyrolles, 33.

goods and services and must operate, in practice, both as a measure of value and as a means of preserving purchasing power (*Wertaufbewahrung*)[30].

There are now well over 10,000 different cryptocurrencies in existence, although only a fraction of these are actively traded or materially significant. Representative examples include: Bitcoin (BTC), Ethereum (ETH), Tether (USDT), Solana (SOL), Dogecoin (DOGE), Cardano (ADA), TRON (TRX), Chainlink (LINK), Avalanche (AVAX), Stellar (XLM), Litecoin (LTC), Polkadot (DOT), Bitcoin Cash (BCH), Monero (XMR), Aptos (APT), Cronos (CRO), Jupiter (JUP), Arbitrum (ARB), Ethena (ENA), EarthMeta (EMT), Quant (QNT), Tezos (XTZ), Maker (MKR), Bitcoin SV (BSV), Tether Gold (XAUt), Polygon (MATIC), ApeCoin (APE), Wormhole (W), Axelar (AXL), Kusama (KSM), Zilliqa (ZIL) and Ravencoin (RVN). The market is highly concentrated: the top twenty tokens account for the lion's share of total market capitalisation – commonly estimated at around 90%. Bitcoin and Ethereum together represent roughly three quarters of the market by capitalisation, underscoring how dominant the two leading networks remain[31].

Although they have not supplanted fiat currency, b-money or e-money, cryptocurrencies are undeniably, at least, a (potential) means of payment – albeit one that lacks mandatory legal acceptance[32]. By way of illustration, a number of well-known undertakings have at various times accepted cryptocurrencies for goods and services – examples frequently cited include Subway, Newegg, Amazon, Microsoft, Bloomberg, Tesla and PayPal; even the Dallas Mavericks have accepted Bitcoin for match tickets.

That said, acceptance is far from universal. Use remains quite uncommon and contingent: merchants, platforms and jurisdictions differ in their willingness to accept tokens, and commercial adoption can ebb and flow with regulatory and market conditions. Nevertheless, the use of Bitcoin for transactions has risen markedly over the years. To gauge the potential of any digital currency as a genuine medium of exchange, it is essential to monitor transaction volumes and patterns over time — frequency, geographic spread, average value, and conversion behaviour all matter[33].

At face value, the claim that cryptocurrencies can perform the unit-of-account function is at least arguable. In principle, a digital token may be denominated in its own monetary units (for example, "bitcoin") and, insofar as prices and accounts are reckoned in those units, it can be said to fulfil the computational role of a unit of account[34]. In practice, however, reality is markedly different. The extreme price volatility that afflicts many tokens renders them unsuitable for routine price-setting and accounting: merchants would

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[30] MISHKIN, FREDERIC (2007). *The Economis of Money, Banking, and Financial Markets*. Addison Wesley, p. 8, and OH, SEONGHWAN (1989). *A Theory of a Generally Acceptable Medium of Exchnage and Barter. In* Journal of Monetary Economics, vol. 23, issue 1, pp. 101-119.

[31] Cfr., https://www.statista.com/statistics/863917/number-crypto-coins-tokens/.

[32] ANTUNES, ENGRÁCIA (2021). *A Moeda: Estatuto Jurídico e Económico*. Almedina, p. 201.

[33] GERBA, EDDIE; RUBIO, MARGARITA (2019). *How Much do Cryptocurrencies alter the Fundamental Functions of Money*. Monetary Dialogue Papers, Policy Department for Economic, Scientific and Quality of Life Policies, Directorate-General for Internal Policies, p. 20.

[34] ROCHA, FRANCISCO CHILÃO (2022). *Regime Jurídico dos Non-Fungible Tokens*. Almedina, p. 44, and ANTUNES, ENGRÁCIA (2021). *A Moeda: Estatuto Jurídico e Económico*. Almedina, p. 202.

be forced to list prices with several additional decimal places, and consumers would face needless complexity and uncertainty – a practical impediment that is not merely aesthetic but goes to the very usability of the currency in everyday exchange[35].

It follows that volatility is the Achilles' heel of conventional cryptocurrencies when judged against the unit-of-account criterion. This is precisely the problem that stablecoins seek to address. Designed to dampen or eliminate the pronounced short-term swings characteristic of assets such as Bitcoin or Ethereum, stablecoins aim to provide a more constant store of value and, by extension, a more reliable basis for pricing and accounting.

Stablecoins are usefully divided into two broad families. First, there are **backed stablecoins**: tokens whose value is supported by underlying assets. When those assets are fiat currencies held in reserve, we speak of fiat-backed stablecoins (Tether is a paradigmatic example); where the backing consists of other cryptocurrencies, the token is crypto-collateralised. Second, there are **seigniorage (or algorithmic) stablecoins**, which rely on protocol rules to expand or contract supply in order to stabilise price rather than on explicit asset reserves[36].

Thirdly, and above all, they operate as **stores of value**, despite being highly volatile and – often – of limited liquidity; that qualification, however, does not deny their abstract capacity to perform the store-of-value function[37]. In the short term, and for transactional purposes, many cryptocurrencies fare poorly as reliable stores of value; in the long run, though, at least in the cases of Bitcoin and Ethereum, they have acted as potent vehicles for wealth creation, having made a noticeable number of early holders millionaires.

Bitcoin, for example, might be able to abstractly fulfil these three functions,[38] although, at least in the EU, the function of "medium of exchange" is dependent on acceptance by both parties. Furthermore, under the terms of Regulation (EC) No. 974/98, only banknotes and coins (e.g., collector's coins have legal tender in Portugal, Article 7, No. 3, Decree-Law No. 246/2007) can have legal tender in Member-States.

It is important to stress that the term "legal tender" (*Zahlungsmittel*, *cours légal*, *legal tender*, *wettig betaalmiddel*, *corso legale*, *środki pieniężne*, *curso legal*)[39], whose historical rationale (*ratio*) is bound up with the emergence in the twentieth century of the inconvertibility of banknotes and coins – after which they came to circulate as fiduciary

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[35] GERBA, EDDIE; RUBIO, MARGARITA (2019). *How Much do Cryptocurrencies alter the Fundamental Functions of Money*. Monetary Dialogue Papers, Policy Department for Economic, Scientific and Quality of Life Policies, Directorate-General for Internal Policies, p. 21.
[36] RODRIGUES, ANDRÉ ALFAR (2023). *Manual de Inovação Financeira*. AAFDL Editora, p. 65.
[37] ROCHA, FRANCISCO CHILÃO (2022). *Regime Jurídico dos Non-Fungible Tokens*. Almedina, p. 44, and ANTUNES, ENGRÁCIA (2021). *A Moeda: Estatuto Jurídico e Económico*. Almedina, p. 204.
[38] ROCHA, FRANCISCO CHILÃO (2022). *Regime Jurídico dos Non-Fungible Tokens*. Almedina, p. 45.
[39] "One way to understand legal tender is through example. In a first example, a driver pulls up to a gas station and pumps twenty dollars' worth of gas into his car. When he offers to pay in cash, the attendant must accept it because the driver owes twenty dollars for the gas. Now, to repeat the scenario, the driver pulls up to the gas station, but this time the attendant says it costs twenty dollars to pump the gas. In this version, the gas station can choose to reject cash and turn away business because the driver is not yet indebted to the gas station", ERLANGER, SAMUEL (2019). *A Cashless Economy: How to Protect the Low-Income. In* Cardozo Law Review, p. 170.

(*i.e.*, fiat) money[40] – comprises two distinct dimensions: "tender" (*curso*, *cours*, *corso*) and "legal" (*legale*, *légal*). Accordingly, one may envisage a means of payment that enjoys "tender" without the attached "legal" component – that is, a means that circulates by convention rather than by virtue of legal status.

Dissecting the dichotomy implicit in the expression "legal tender", one may at once assert that "tender" denotes the medium in which a debtor may validly discharge an obligation and the sole medium that the creditor is bound to accept. If that obligation to accept derives from statute, then the "tender" becomes "legal tender"; if it stems from the parties' agreement, then the course is "conventional". Strictly speaking, under the principle of contractual autonomy[41], almost anything may be employed by way of conventional course – even things that do not fit the usual notion of "money"[42]. Consequently, it is incorrect to maintain that the expression "legal tender" simply denotes the currency that benefits from mandatory acceptance in the performance of pecuniary obligations, since that description can equally encompass conventional course. Thus, "tender" is best understood as the situation in which a means of payment gives rise to an obligation on the part of the creditor to accept it and, by virtue of that means with liberatory effect, enables the debtor to extinguish the encumbering obligation.

Conversely, "legal" is to be understood as a statutory stipulation enacted within a particular legal order whereby, *ipso facto*, a specified form of money acquires liberatory value and obligatory acceptance for the purpose of fulfilling obligations (for example: the Brazilian real, the euro, the Japanese yen, the Czech koruna, the Danish krone, the Swiss franc, the Turkish lira, the Canadian dollar, etc.)[43]. By contrast, "conventional" refers to a method of performance that possesses the power to discharge and release obligations by virtue of the parties' agreement (for example: electronic money and virtual currencies)[44].

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[40] ANTUNES, ENGRÁCIA (2021). *A Moeda: Estatuto Jurídico e Económico*. Almedina, p. 323.

[41] "The legal dichotomy between compulsory acceptance and contractual freedom can also be found in the Member States' differing approaches as to whether retailers have to inform customers in advance (i.e., on the shop window, at the counter) of the payment modalities. In some Member States no statutory provision exists, but a common understanding on the elements of the contract is a prerequisite for its conclusion. It is customary that retailers provide information on payment modalities in advance (for example in the Terms and Conditions) as a 'pre-contractual information duty' (AT, BE, DE, IE, PT, LV, LT). Member States also point to the obligation (GR, IE, NL, LT) for a retailer to have a label at the entrance door/inside the shop stating the payment modalities that are accepted", Report of the Euro Legal Tender Expert Group 2022, p. 2.

[42] "Examples include: Ten one-dollar bills, a check, peso bills according to some exchange rate, or a watch which the seller estimates as worth at least ten dollars. This is just one aspect of the freedom of contracts, which is a fundamental building block of capitalism. Legislatures have outlawed very few media of payment, such as gold (in post Great Depression legislation), or illegal drugs (which could conflict with the public interest). It does not matter if the agreement regarding the medium of payment is part of the contract, or made separately after the contract is created", GOLDBERG, DROR (2009). *Legal Tender*. Working Paper, n.º 2009-04, Bar-Ilan University, Departamento de Economia, p. 3.

[43] "This means that government services and private businesses must accept the banknotes for payment of debt", ERLANGER, SAMUEL (2019). *A Cashless Economy: How to Protect the Low-Income. In* Cardozo Law Review, p. 170.

[44] ANTUNES, ENGRÁCIA (2021). *A Moeda: Estatuto Jurídico e Económico*. Almedina, p. 323.

According to the 2010 Euro Legal Tender Expert Group Report, the *Dietrick and Haïring* ruling (joint cases C-423/19 and C-423/19), and the Proposal for a Regulation on the Legal Tender of Euro Coins and Banknotes[45], to evaluate legal tender we must check if: (i) it has mandatory acceptance; (ii) at full face value and (iii) it has the effect of discharging payment obligations. Overall, Bitcoin (and other cryptocurrencies) cannot be said to have legal tender (mainly because they lack mandatory acceptance and full face value), but only conventional tender.[46]

Finally, it is important to underline that cryptocurrencies are not considered to be "electronic coins" or "credit money". Although they are all grouped together in the broad category of "electronic money", "credit money" refers precisely to credit balances, and "electronic money" means electronically stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions, and which is accepted by a natural or legal person other than the electronic money issuer (*e.g.*, Article 2(2), Directive 2009/110/EC).

II. Crypto *vs.* Free Movement of Capital

At this juncture, it is fitting to pose the following question: if an undertaking from State **A** (Portugal, for example) seeks to purchase goods from an undertaking from State **B** (Spain, for example) and facilitates the payment for this transaction using 5 Bitcoins (roughly € 500.000,00), would such a transfer of funds fall within the scope of application of free movement of payments? It should be stated, however, that *our purpose here is not to delve into potential restrictions that may arise from this transaction*. Rather, the objective is to consider, *prima facie*, whether, in abstract terms, the principle of the free movement of capital – specifically the free movement of payments – can be interpreted in a way that encompasses scenarios of this nature.

III. Case Law Developments

C. The *Regina/Thompson* Judgement

ERNEST GEORGE THOMPSON, BRIAN ALBERT JOHNSON and COLIN ALEX NORMAN WOODIWISS were charged before the Crown Court at Canterbury with participating in an evasion of the prohibition on importation imposed by the *Import of Goods (Control) Order 1954* – adopted by the Board of Trade in the exercise of powers conferred upon it by the *Import, Export and Customs Powers (Defence) Act 1939* – contrary to section 304(b) of the *Customs and Excise Act 1954*, in relation to certain "goods", namely 1,500 Krugerrand gold coins (a gold coin possessing legal tender status in South Africa, first minted in 1967).

The appellants brought into the United Kingdom, between 24 April 1975 and 30 June

[45] Cfr., https://economy-finance.ec.europa.eu/document/download/36ae89be-2cf1-4b7c-a804-93a4ba460ded_en?filename=COM_2023_364_1_EN_ACT_part1_v6.pdf.
[46] Cfr., ANTUNES, ENGRÁCIA (2021). *As Criptomoedas*. *In* Revista da Ordem dos Advogados, year 81, january/june.

1975, a total of 3,400 Krugerrands sourced from the firm Agosi of Pforzheim, in the Federal Republic of Germany; and, moreover, between 7 August 1974 and 26 May 1975, they exported to that same German company some 40.39 tonnes of silver-alloy coins minted in the United Kingdom prior to 1947 – that is to say, coins of sixpence, shilling, florin and half-crown denominations.

It should be noted that, under the *Export of Goods (Control) Order 1970*, adopted in the exercise of the powers conferred by the aforementioned *Import, Export and Customs Powers (Defence) Act 1939*, it was prohibited – save under the grant of a licence – to export, in quantities exceeding ten at a time, silver-alloy coins of the United Kingdom minted prior to 1947 and which, at the date of their export, were less than one hundred years old.

By virtue of an *Open General Licence* issued by the Secretary of State for Trade and Industry on 5 July 1973 (which revoked and replaced an earlier *Open General Licence* granted by the Secretary of State on 20 December 1972), the importation of all goods was authorised, subject to certain exceptions which did not at that time include gold coins. However, pursuant to an amendment to the said licence – *Amendment No. 10*, dated 15 April 1975 – gold coins were expressly added to the schedule of goods the importation of which was prohibited, save under a licence granted by the Board of Trade.

This second *Open General Licence* was itself revoked by a further *Open General Licence* of 5 July 1974, which came into force on 15 July 1974. Its effect was to exclude such coins from the scope of the general authorisation, with the consequence that, from 15 July 1974 onwards, they could be exported only under the authority of a specific licence.

At an early stage of the proceedings, WOODIWISS entered a plea of guilty to the charge of conspiracy to evade the prohibition imposed by the *Export of Goods (Control) Order 1970* in respect of the export of 40.39 tonnes of silver-alloy coins minted in the United Kingdom. Subsequently, all three defendants contended that the relevant prohibitions on import and export were invalid on the ground that they conflicted with the Treaty of Rome. The trial judge, however, rejected this submission and declined to refer the matter to the Court of Justice by way of a preliminary ruling.

Subsequently, THOMPSON, JOHNSON and WOODIWISS appealed to the Court of Appeal (Criminal Division). By order of 15 December 1977, lodged with the Registry of the Court of Justice on 16 January 1978, the Court of Appeal of England and Wales referred to the Court, pursuant to Article 177 of the EEC Treaty (now Article 267 TFEU), a number of questions concerning the free movement of goods and the free movement of capital.

The Court of Appeal asked whether gold coins produced in a third country, such as Krugerrands, but circulating freely within a Member State; silver-alloy coins possessing legal tender status in a Member State; and silver-alloy coins of a Member State which formerly, though no longer, had legal tender status there but which remain protected as coinage against destruction in that State – whether such coins constitute "capital" within

the meaning of Part II, Title III, Chapter 4 of the Treaty of Rome.

If the answer were to be in the affirmative, the further question arose whether the quantity of such coins, the manner in which they are traded, and the purposes for which they are traded, might have the effect of excluding them from the notion of "capital" under Chapter 4, Title III, Part II. Finally, the Court of Appeal sought clarification as to whether the provisions of Part II, Title III, Chapter 4 of the Treaty of Rome apply to such coins regarded as "capital", to the exclusion of the provisions of Part II, Title I, Chapter 2 of the Treaty.

Lastly – and although this already follows from what has been set out above – it is worth underlining that we are here concerned with three categories of coin: (a) gold coins, such as Krugerrands, minted outside the European Union but circulating freely within a Member State; (b) silver-alloy coins possessing legal tender status in a Member State; and (c) silver-alloy coins of a Member State which formerly had legal tender status but which, nonetheless, remain protected against destruction in that State in their capacity as coinage.

The *Reina v. Thompson* case (Case 7/78) ended up addressing the classification of certain coins under European Community law, particularly whether they were "goods" or "means of payment": "[e]xamination of the questions asked shows that, even if these questions have been formulated so as to lay emphasis on the description of the coins in question as "capital", their actual purpose is to find out whether these coins are goods falling within the provisions of articles 30 to 37 of the treaty or constitute a means of payment falling within the scope of other provisions", §19.

As regards silver-alloy coins possessing legal tender status in a Member State, the Court swiftly held that, by their very nature, they must be regarded as "means of payment", which entails, *ipso facto*, that their transfer does not fall within the scope of the free movement of goods (§26, *Regina v Thompson*).

With respect to gold coins, such as Krugerrands, minted outside the European Union but circulating freely within a Member State, the Court observed that, although doubts may arise as to whether they should properly be regarded as "means of legal payment" (*medios legales de pago*, *moyens de paiement légal*, *mezzi legali di pagamento*), it could nevertheless be concluded that, in the monetary markets of the Member States where they are traded, Krugerrands are treated as "equivalent to money" (§27, *Regina v Thompson*). Accordingly, their transfer must, from the outset, be classified as a monetary transfer, which likewise does not fall under the heading of the free movement of goods (§28, *Regina v Thompson*).

As for silver-alloy coins of a Member State which once had legal tender status there but which, although no longer enjoying such status, remain protected as coinage against destruction, the Court held that they cannot be regarded as "means of payment" within the meaning set out above. They may, therefore, properly be classified as goods (§31, *Regina v Thompson*).

Here one may begin by noting, as PETER OLIVER has done, that the Court's terminological definition is far from clear, for it ends up introducing new concepts without ever defining them or, at the very least, providing clarification: "Presumably the notion of 'means of payment' is wider than that of legal tender, but how wide is it? Is 'means of legal payment' the same as 'means of payment'? And what is meant by being 'treated as being equivalent to currency'? The only clear proposition that can be distilled from this judgment is that coins which are legal tender in a Member State are not goods."[47].

In light of the foregoing, it must be stated clearly that the Court, at no point, sought to delineate in a categorical or exhaustive manner the criteria distinguishing (or constituting) "capital" from "payment". Indeed, the judgment expressly states that it is not necessary to examine the question of the conditions under which the transfer of these two categories of coins could eventually be classified, either as a movement of capital or as a current payment (§29, *Regina v Thompson*). The distinction between "capital" and "payment" was, rather, addressed in the *Luisi and Carbone* judgment.

Although part of the literature places particular emphasis on the distinction between the free movement of goods and the free movement of capital – notably in the specific context of the free movement of payments, as addressed in the aforementioned judgment – we venture, with all due respect, to disagree with this interpretation, insofar as it does not, in our view, reflect the precise formulation adopted by the Court. Moreover, it should be noted that "legal tender" constitutes the only solid foundation established by the Court, as observed by PETER OLIVER.

Firstly, at §25, the Court clarifies that only "money" falling within the concept of "means of payment" (*medios de pago*, *moyens de paiement*, *mezzi di pagamento*) is excluded from the definition of "goods": as such, it must be concluded that, within the system of the Treaty, means of payment are not to be regarded as goods falling within the scope of Articles 30 to 37 of the Treaty, §25, *Regina v Thompson*.

The Court, however, never states that only coins with legal tender status can be considered "means of payment"[48]. In our view, this reasoning alone demonstrates a conceptual delimitation that goes beyond a mere reference to legal tender, giving primacy to the functionality of money as an instrument of payment.

Secondly, it is important to underline that, when the Court refers to "legal tender" in the context of silver-alloy coins, it does so in conjunction with the designation "means of payment". This connection, however, should not be interpreted to imply that all "means of payment" must necessarily possess legal tender status. On the contrary, the formulation

[47] OLIVER, PETER (1983). *Free Movement of Goods in the E.E.C under Articles 30 to 36 of the Rome Treaty*. (2nd edition). Eastern Press, p. 13.
[48] OLIVER, PETER (1983). *Free Movement of Goods in the E.E.C under Articles 30 to 36 of the Rome Treaty*. (2nd edition). Eastern Press, p. 13.

adopted allows one to infer that all money with legal tender status is, by definition, included within the category of "means of payment". In other words, as PETER OLIVER has observed, the notion of "means of payment" is broader than that of "legal tender" (or "means of legal payment"), although the Court has not specified the extent of this broader scope. This conclusion is supported by §27, where the Court uses the term "means of legal payment" only to emphasise that it will not address whether Krugerrands are in fact "means of legal payment" – that is, means of payment with legal tender status (hence the term "legal means", *i.e.*, means imposed by the State as payment; which, it should be noted, is the standard designation of "legal tender", primarily applicable to fiat money).

Thus, the Court uses the expression "means of legal payment" to stress that it does not intend to examine whether Krugerrands may be classified as "means of legal payment", that is, whether such coins in fact possess legal tender status – understood in its technical sense as the State-imposed normative power that confers upon currency the status of a compulsory medium for discharging pecuniary obligations. As such, not all monetary means of payment constitute means of legal payment. It is also worth recalling that, while the Italian, Spanish, French, English and Portuguese versions of §27 explicitly employ the term "means of legal payment" (*means of payment*, *medios de pago*, *moyens de paiement*, *mezzi di pagamento*), the Danish, German and Finnish versions refer only to "legal tender" (*lovligt betalingsmiddel*, *gesetzliches Zahlungsmittel*, *laillisina maksuvälineinä*).

Thirdly, after stating that it will not examine whether Krugerrands may be classified as means of payment with legal tender status (more precisely, "means of legal payment"), the Court nonetheless concludes that these gold coins cannot be regarded as goods. This conclusion is based on the fact that, in the monetary markets of Member States where they are traded, Krugerrands are treated as "equivalent to money". Such a comparison and extension only make sense if one understands "equivalent to money" to mean, in fact, "equivalent to money with legal tender status". It is noteworthy that, in using the term "equivalent to currency", the English version of the judgment does not employ the literal translation "equivalent to money", which is closer to the term "coin", but rather "equivalent to currency". This linguistic nuance is crucial, as the concepts of "currency" and "money" are not synonymous. *Currency*, in its technical-legal sense, presupposes the existence of legal tender, whereas the term "money" does not necessarily carry this implication.

Consequently, it is important to emphasise that the Court seeks to establish a comparison between money used in a manner equivalent to money with legal tender status and money that in fact possess legal tender (*i.e.*, "means of legal payment"). By establishing this equivalence, the Court effectively broadens the notion of "means of payment" relevant to the distinction between the free movement of goods and the free movement of payments. In other words, if the Court recognises, on the one hand, silver-alloy coins with legal tender status as "(legal) means of payment", and, on the other hand, states that whether Krugerrands qualify as "means of legal payment" (or, more precisely, money with legal tender status) is irrelevant, provided that they are accepted in economic circulation as money, then the decisive factor is not strictly the existence of legal tender – even though

this constitutes an essential metric for evaluating a "means of payment", insofar as any money with legal tender is necessarily considered a "means of payment". However, not all money lacking legal tender status is excluded from this designation. What is relevant, based on our interpretation of the Court's reasoning, is the conventional quality of the money as a "means of payment". It should be recalled that at no point does the Court assert that "legal tender" is what constitutes a "means of payment", but only that all money with legal tender is a "means of payment" (whereas not every "means of payment" is a "means of legal payment").

In conclusion, what is truly pertinent is to classify something as a "means of payment" equivalent to a "means of payment" with legal tender status, rather than focusing primarily on the legal tender status of that "means of payment" itself (otherwise, the Court would have clearly considered it necessary to assess whether Krugerrands were indeed means of legal payment) – although legal tender does serve as an important and determinative benchmark for this purpose (*i.e.*, all money with legal tender is a means of payment, but not all means of payment possess legal tender).

Furthermore, it is incorrect – or, more precisely, incomplete – to assert that the free movement of capital and payments applies solely to "means of legal payment" or "equivalent means of payment" within European territory. A more nuanced approach, grounded in the "golden rule" of *Regina v Thompson*, recognises that the concept of "goods" excludes not only "means of legal payment" or "equivalent means of payment" within European territory, but also "means of legal payment" or "equivalent means of payment" from third countries that may circulate freely within the EU[49].

This landmark case sharply defines the boundary between the free movement of goods and the free movement of capital. The Court of Justice clarified that, under the Treaty framework, means of payment cannot be treated as goods subject to the rules governing the free movement of goods. Notably, in cross-border transactions, banknotes and coins are classified as goods only when they lack legal tender status; when they do possess legal tender, they are unequivocally recognized as means of payment.[50]

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[49] "Finally, in the conclusion of a judgment, the Court stated that the movement of coins which are a means of payment anywhere in the world, is a movement of capital according to the Treaty. If these coins are 'exported' or 'imported' in order to pay for the goods or services, this can be classified as the movement of payment. In the subject matter, the Krugerrands, which were still a legal means of payment, could not be treated as goods", BIAŁEK, NATALIA; BAZYLKO, ARKADIUSZ (2011). *Free movement of money in the European Union: The role of European Court of Justice in the formation of free movement of capital and payments. In* E-Finanse: Financial Internet Quarterly, University of Information Technology and Management, Rzeszów, vol. 7, issue 2, p. 63.

[50] Cfr., OLIVER, PETER (1982). *Free Movement of Good in the EEC.* (1st edition). European Law Centre, Eastern Press, p. 12, CAMPOS, MANUEL FONTAINE (2018). *Livre Circulação de Capitais: Acórdão do Tribunal de Justiça de 8 de julho de 2010 – Processo C-171/08 Comissão Europeia c. República Portuguesa. In* "Princípios Fundamentais de Direito da União Europeia: Uma Abordagem Jurisprudencial", ed. SOFIA OLIVEIRA PAIS, Almedina, p. 383, and HENRIQUES-GORJÃO, MIGUEL (2020). *Direito da União: História, Direito, Cidadania, Mercado Interno e Concorrência.* (9th edition). Almedina, p. 521.

The debate over Bitcoin's legality and acceptance in the European Union is emblematic of the broader struggle to reconcile innovation with established legal norms. However, while Bitcoin lacks recognition as legal tender within the EU, it can legally – and freely circulate and operate within EU territory.

Yet, Bitcoin defies easy categorization. It is challenging to categorize cryptocurrencies as "goods" under EU law – because they actually hold transactional value and can be accepted as payment (e.g., article 3(18), Directive EU/2015/849, and article 2(d), Directive EU/2019/713; Germany also recognized that virtual currencies could be used as a form of payment, based on an agreement, *Vereinbarung*, or in commercial practice, *tatsächlichen Übung*) – , and they do not fully align with the conventional understanding of a "means of payment" (however, in Japan, Bitcoin, and other virtual currencies, are legally classified as "means of payment", Act No. 59 of 2009 and Order for Enforcement of the Income Tax Act[51]).

In a world where digital currencies transcend borders and state control, Bitcoin embodies the proverbial philosophical shift: it is not just a medium of transaction but a symbol of decentralized "trustlessness" and a reimagination of monetary sovereignty, maybe even the first step in the direction of PLATO's *polis*. Its future legal *status*, therefore, should no longer be viewed as a merely technical question but a reflection of the evolving relationship between Law, Technology, and the ever-going process of *becoming* (*devenire*, in Latin).[52]

However, the answer, we believe, remains anchored in the foundational principles established by the *Reina v. Thompson* ruling. This case elegantly delineates the legal treatment of three distinct types of coins: (a) gold coins, such as *Krugerrands*, minted outside the EU but circulating freely within a member state (considered to be under the free movement of capital framework); (b) silver alloy coins with legal tender status within a member state (considered to be under the free movement of capital framework); and (c) silver alloy coins from a member state that once held legal tender status, yet remained protected from destruction in that state as coins (considered to be under the free movement of goods framework).

We propose that the solution lies in drawing an analogy with the *Krugerrand* coin. It is incorrect – or, more precisely, incomplete – to claim that the free movement of capital solely applies to currencies with legal tender status within European territory. A more refined approach is to recognize – based on the *Reina v. Thompson* "rule of thumb" – that the concept of "goods" excludes not only coins with legal tender status in a Member State but also those originating from third countries that circulate freely within the EU.[53] As

[51] Cfr., BANA, ANURAG; PATRICK, GABRIELLE (2017). *Rule of Law Versus Rule of Code: A Blockchain-Driven Legal World*. International Bar Association.

[52] *Becoming* is not about arriving at a fixed state of being; it is the art of movement through the currents of life. Imagine it as a perpetual dance with time, possibility, and freedom—a dynamic process through which humans confront the weight and wonder of existence itself. *Becoming* is less a destination and more a journey. Cfr., GUERRA, CARVALHO (2025). *A Very Short Introduction to Digital Law Philosophy*. Forthcoming.

[53] "Finally, in the conclusion of a judgment, the Court stated that the movement of coins which are a means of payment anywhere in the world, is a movement of capital according to the Treaty. If these coins are 'exported' or 'imported' in order to pay for the goods or services, this can be classified as the movement of payment. In the subject matter, the Krugerrands, which were still a legal

the Court eloquently observed: "Although doubts may be entertained on the question whether krugerrands are to be regarded as means of legal payment it can nevertheless be noted that on the money markets of those member states which permit dealings in these coins they are treated as being equivalent to currency. Their transfer must consequently be designated as a monetary transfer which does not fall within the provisions of the said articles 30 to 37" (§§27-28, Case 7/78). Therefore, the main *standard* is "means of payment", and not legal tender itself.

Nevertheless, it is crucial to emphasize that the Court refrains from categorizing *Krugerrands* as means of payment. However, it unequivocally stipulates that if a coin bearing legal tender from a third state (in this instance, South Africa) can seamlessly circulate within the EU (as can Bitcoin), it cannot be classified under the provisions of the free movement of goods. So, at least it can be said that Bitcoin cannot be classified as "goods".

D. The Skatteverket/David Hedqvist judgment

The *Skatteverket v. David Hedqvist* ruling (C-264/14) stands as a pivotal decision by the Court of Justice of the European Union ("CJEU") concerning the taxation of Bitcoin and other cryptocurrencies.

Mr. Hedqvist's company provides services for exchanging traditional currencies for Bitcoin, and vice versa. It purchases Bitcoins directly and sells them on the same exchange platform, or stores them. The company also sells Bitcoins to people or companies that place an order on its website. The customer accepts the proposed price in SEK and makes the payment. Then the Bitcoins are sent to the given address.

Bitcoins sold by the company are either bought directly from an international exchange platform after the customer places an order, or they are drawn from the company's existing stock. The company's pricing strategy is based on the current exchange rate on a specific platform, with a margin added for profit. No additional costs are incurred by the company, and Mr. Hedqvist's operations are limited to exchanging Bitcoin for traditional currencies like the Swedish krona, and vice versa.

The CJEU concluded that Bitcoin and other cryptocurrencies should be treated as (contractual) means of payment (but should not be considered coins, however), similar to traditional currencies, at least for VAT purposes. The Court ruled that the transactions in question are exempt from VAT under the provision concerning transactions related to "currency, banknotes, and coins used as legal tender". The Court emphasized that excluding transactions like those carried out by Mr. Hedqvist's company from this exemption would undermine its purpose, which is to simplify the determination of taxable

means of payment, could not be treated as goods", BIAŁEK, NATALIA; BAZYLKO, ARKADIUSZ (2011). *Free movement of money in the European Union: The role of European Court of Justice in the formation of free movement of capital and payments. In* E-Finanse: Financial Internet Quarterly, University of Information Technology and Management, Rzeszów, vol. 7, issue 2, p. 63.

amounts and VAT deductions in the context of financial transactions.

In other words, the Court explicitly stated that Bitcoin is a direct means of payment between operators who accept it ("[...] it is common ground that the 'bitcoin' virtual currency has no other purpose than to be a means of payment and that it is accepted for that purpose by certain operators", § 52, C-264/14).

It is clear that the Court treats, at least for VAT purposes, cryptocurrencies as a means of payment. In a manner similar to its reasoning in the *Reina v. Thompson* judgment concerning the *Krugerrand* coins, the Court even drew a parallel between currency, banknotes, and coins used as legal tender, and cryptocurrency. In fact, the Court even applied to Bitcoin a legal provision that covers transactions related to "currency, banknotes, and coins used as legal tender" (despite the implicit rejection that Bitcoin could be regarded as a "money").

IV. Case Study: El Salvador

In September 2021, El Salvador became the first country in the world to adopt Bitcoin as currency with legal tender, alongside the U.S. dollar. This initiative led by President NAYIB BUKELE aimed to enhance financial inclusion, attract foreign investment, and reduce remittance fees for Salvadorans. The legal framework for this initiative was established by the enactment of the Bitcoin Law (*Ley Bitcoin*, *Decreto* No. 57[54]) by the *Asamblea Legislativa* of El Salvador on 8 June 2021, which was approved by a majority vote of 62 out of 84, thereby conferring the status of legal tender to the cryptocurrency Bitcoin within El Salvador (taking effect on 7 September 2021), Article 1 *Ley Bitcoin*.

Article 1, which inaugurates the *Ley Bitcoin*, provides that: "[t]he purpose of this law is to regulate Bitcoin as a currency with legal tender status, without restrictions and with unlimited liberatory power in any transaction and for any purpose that natural or legal persons, public or private, may need to carry out."

The following articles set out a series of interconnected rules relating to the functional aspects of this new regime, including the reference currency, the concept of money, the principle of nominalism, and more: (a) the exchange rate between Bitcoin and the US dollar is freely determined by the market (Article 2); (b) all prices may be expressed in Bitcoin (Article 3); (c) all tax contributions may be paid in Bitcoin (Article 4); (d) Bitcoin transactions are exempt from capital gains taxation, as with any currency possessing legal tender status (Article 5); (e) for accounting purposes, the US dollar shall be used as the reference currency (Article 6); (g) All economic agents are obliged to accept Bitcoin as a means of payment when presented by a purchaser of goods or services (Article 7); (h) Without prejudice to private-sector activity, the State shall provide alternatives enabling users to carry out transactions in Bitcoin, as well as automatic and instantaneous convertibility of Bitcoin into US dollars, if desired, and shall promote the necessary training and mechanisms to ensure public access to Bitcoin transactions (Article 8).

[54] The document can be found in its original language at the following *online* location: https://www.jurisprudencia.gob.sv/DocumentosBoveda/D/2/2020-2029/2021/06/E75F3.PDF.

It is therefore incumbent upon us to return to the following question: if an undertaking from State **A** (Portugal, for example) seeks to purchase goods from an undertaking from State **B** (El Salvador, for example) and facilitates the payment for this transaction using 5 Bitcoins (roughly € 500.000,00), might this scenario be considered to fall within the remit of the free movement of payments framework?

Bitcoin, which is regarded as a legitimate "currency" in El Salvador, appears to align with the first component ("coins originating from third countries") of the second scenario ("coins originating from third countries that circulate freely within the Union") established through the dichotomous framework (number one, coins with legal tender status in a Member State; number two, coins originating from third countries that circulate freely within the Union) outlined in the *Reina v. Thompson* ruling. We must recall that this ruling stipulates that a currency originating from a third-party state can be designated as a "payment"[55].

While it's true that Bitcoin does not strictly "originate" from a third country, given its decentralized nature, the intent behind the phrase "originating from a third country" used in *Reina v. Thompson* seems, at least from our point of view, is less concerned with the technical definition of origin and more with the broader idea of a currency emerging from an external non-EU territory, beyond European borders. As such, while Bitcoin's decentralized nature defies the traditional notion of state-backed origin, this very decentralization positions it as an intriguing outlier – a currency that exists outside any territorial jurisdiction, yet functionally operates as an external source. Bitcoin exists everywhere and nowhere.

The phrase "originating from a third country" in the *Reina v. Thompson* decision is best understood not through a narrow technical lens, but as a conceptual framework. It signifies any method of payment that arises beyond European borders. Bitcoin, despite lacking a fixed territorial anchor, fits this description because it operates outside the European regulatory or monetary system (it's, once more, a decentralized system). Its global, decentralized network effectively places it in the category of "external", thus creating a conceptual equivalence between being outside Europe and existing as a borderless digital entity. It represents a new kind of "external source": not tied to a single geographic territory but undeniably distinct from the European "territory". Its "otherness" is rooted in its design – a currency native to the digital realm, governed by algorithms and consensus rather than central banks or nation-states.

A payment made within the context of an underlying transaction between El Salvador and Portugal using Bitcoin – recognized in the *Skatteverket v. David Hedqvist* ruling as a valid

[55] "Finally, in the conclusion of a judgment, the Court stated that the movement of coins which are a means of payment anywhere in the world, is a movement of capital according to the Treaty. If these coins are 'exported' or 'imported' in order to pay for the goods or services, this can be classified as the movement of payment. In the subject matter, the Krugerrands, which were still a legal means of payment, could not be treated as goods", BIAŁEK, NATALIA; BAZYLKO, ARKADIUSZ (2011). *Free movement of money in the European Union: The role of European Court of Justice in the formation of free movement of capital and payments. In* E-Finanse: Financial Internet Quarterly, University of Information Technology and Management, Rzeszów, vol. 7, issue 2, p. 63.

method of payment – must therefore necessarily fall under the scope of the free movement of payments.

V. Final Thoughts

Bitcoin (and cryptocurrencies in general) emerges as a bridge between legal systems, supporting safer transactions that, by their nature, span borders. However, it is important to recognize that these transactions must adhere, inside the EU territory, to fundamental freedoms such as the free movement of capital.

In our view, the *David Hedqvist* ruling serves to reinforce the status of Bitcoin as a legitimate instrument for facilitating transactions within the legal financial market. By establishing Bitcoin as a recognized "method of payment", the ruling ensures that payments conducted via Bitcoin are not regarded as anomalies or exceptions, but as integral components of modern economic exchanges. In this sense, and following the precedent set by the *Reina v. Thompson* ruling, the use of Bitcoin as a medium of exchange serves to underscore the global nature of decentralized currencies and reinforces their compatibility with existing EU legal principles related to the EU internal market.

Furthermore, this perspective brings to light the evolving nature of financial freedom in a digital world. Payments involving Bitcoin challenge the notion of "coins" being tied to physical borders or traditional banking infrastructures. Instead, they demonstrate how currency, in its purest form (as a transactional value attributed to something), transcends geographic and institutional boundaries. In this context, the restriction of such transactions would not only be at odds with the EU's commitment to free movement but also risk the stifling of financial innovation.