

## DISSERTATION SUMMARY

### “Taxing cryptocurrencies.

### The VAT treatment of Bitcoin as a case-study”

Dr. Luisa Scarcella

Doctoral Dissertation, defended on the 6<sup>th</sup> of October 2020

University of Graz

*“Even when laws have been written down, they ought not always to remain unaltered. As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal but actions are concerned with particular. Hence we infer that sometimes and in certain cases laws may be changed, but when look at the matter from another point of view great caution would seem to be required.”*

Aristotle, Politics, book 2, part VIII<sup>1</sup>

### Introduction

Humankind has always strived for innovation, whether it was the invention of the wheel in 3500 b.C. or the first mechanical computer in 1822 a.D. However, never as nowadays, new technologies and inventions have been flourishing. Nonetheless, as social scientists, we need to assess how our legal systems will react to new degrees of technological disruption and how their reaction might impact on our society as a whole.

In this everchanging society, this dissertation aims at addressing the challenges posed by cryptocurrencies, especially focusing on Bitcoin as a case study. The impact of this technology has been analysed by looking at the application of the VAT provisions in the activities involving cryptocurrencies. As it will emerge from this summary as well, differently from the position taken by the CJEU in the *Hedqvist* decision of 2015<sup>2</sup>, the author of this dissertation argues that the exemption contained in Article 135 (1) (e) VAT Directive shall not be applicable in the case of Bitcoin and similar cryptocurrencies. Through a more careful comparative and historically contextualized analysis of the different translations of the Directive, it can be demonstrated how Art. 135 (1) (e) exclusively refers to legal tenders. Thus, the linguistic discrepancies highlighted by the Court do not represent a matter of concern. Indeed, Bitcoin is not comparable to legal tenders covered by this exemption. Bitcoin is not issued by a public authority like a Central Bank neither is it recognized as legal tender by any State. Moreover, even by considering the purpose behind financial exemptions, i.e. technical difficulties in the determination of the taxable base, other legislative proposals at European level seem to demonstrate that these difficulties have and can be overcome. Furthermore, according to the Court, under the fiscal neutrality principle, Bitcoin shall be included under Art. 135 (1) (e) because it is used as a means of payment and fulfils the same functions of legal tenders. However, empirical studies show how Bitcoin

---

<sup>1</sup> English version by S. Everson (ed.), *Aristotle. The politics and the constitution of Athens*, 1996, Cambridge.

<sup>2</sup> CJEU, 22 October 2015, Case C-264/14, *Skatteverket v David Hedqvist*, ECLI:EU:C:2015:718.

has been mainly purchased as a speculative asset. Consequently, Bitcoin's primary function does not seem to be being exchanged as a pure means of payment. Lastly, even if the means of payment function was predominant, it is disputable whether the legislator would want to extend the application of this exemption to non-legal tenders, which are an expression of public sovereignty. Deciding whether cryptocurrencies shall be exempted or not represents a political decision which shall be taken by the European legislator (as it happened in the case of the 5th AML Directive) and which shall take into account the role that VAT can play in fostering or discouraging the use of such technology.

This summary aims at providing a short overview of the dissertation, the main underlying research questions and conclusions.

## **1. Status quo of the taxation of cryptocurrencies related activities**

Tax law represents a great playground for addressing the challenges arising from new technologies. Research questions in tax law are always at a crossroad between private, public, administrative and criminal law. Moreover, due to our globalized economy, tax law - one of the last resorts for nation-states' sovereignty – has become more and more influenced by European and international law. The same global dimension of new technologies can once again put to the test traditional tax systems on a national, European and international level. Consequently, pioneering research on the impact of new technologies in the field of taxation allows addressing, within a specific subject, the need to balance the public interest with civil, political, social and economic rights from a new perspective.

Among the many challenges which arise from Bitcoin and similar cryptocurrencies from a tax law viewpoint, the most significant ones are related to the legal qualification of cryptocurrencies and the enforcement of the relevant tax provisions. Bitcoin is certainly the most famous cryptocurrency but during the last two years, thousands of different tokens, also deriving from Initial Coin Offerings (ICOs), have started to appear. Indeed, the blockchain technology can be included in the broader spectrum of digital innovations which are putting to the test our traditional tax systems.

In the area of taxation, there are several issues related to cryptocurrencies concerning both direct and indirect taxation. Before the so-called *Hedqvist* decision, the different Member States had different opinions on how VAT should be applied on exchange transactions involving Bitcoins. However, even though there has been a decision adopted by the European Court of Justice (CJEU) in 2015<sup>3</sup>, on the VAT treatment of Bitcoin, many questions remain unanswered.<sup>4</sup> In this dissertation, the conclusions of the Court have been challenged and at the same time, at the same time, this research work has questioned whether the decision still fits with how Bitcoin is used and how it will apply to other cryptocurrencies.

Concerning direct tax matters, the qualification issues depend on the possibility for the activities involving the creation and use of so-called crypto-assets to generate taxable income. Moreover, because of the different legal systems and provisions in place in each Member State, the taxation of the capital gains differs not only in the tax rates or in the determination of the tax base but also in the design itself of the provision. Bitcoin has been compared for direct taxation purposes to a currency, to an intangible asset or even to a financial instrument and issues tend to amplify with regard to the ICOs context. The different types of tokens that have been issued in the last two years have intensified the difficulties in qualifying their legal nature and in the determination of the already existing provisions applicable to them. Furthermore, the qualification of Bitcoin and other cryptocurrencies also influences the tax consequences regarding each different activity involving those, e.g. in the example of Bitcoin: mining,

---

<sup>3</sup> CJEU, 22 October 2015, Case C-264/14, *Skatteverket v David Hedqvist*, ECLI:EU:C:2015:718.

<sup>4</sup> For a more detailed overview of the open question see section 4.2 of the dissertation.

exchange for legal tenders, and purchasing/selling goods and services in exchange for Bitcoins. In different ways, these activities are relevant also in relation to ICOs. However, in this last case, it is fundamental to distinguish between the types of released tokens as well.

On one hand, international, European and national institutions have already attempted to classify tokens and so-called crypto-assets.<sup>5</sup> On the other hand, the first definition of virtual currencies has been inserted in the last European Anti-money Laundering Directive (AMLD5)<sup>6</sup>. Nonetheless, there is still confusion about the nature of cryptocurrencies and crypto-assets. The lack of clarity on how to better define cryptocurrencies might thus lead to the chaotic (and incorrect) application of already existing provisions.

## **2. The choice to focus on the VAT treatment of Bitcoin as a case study and the Hedqvist decision**

This research work specifically addresses the VAT treatment of Bitcoin. As claimed in the previous section, tax law represents a point of convergence between different concepts and institutes from other legal fields. At the same time, it is an independent legal field with its own peculiarities.<sup>7</sup> VAT is just one of the different taxes that are implemented by States all over the world. However, at European level, it is one of the most important achievement in terms of harmonization projects in the history of the European Union. Nevertheless, there are different aspects and cases which still demonstrate that this harmonization project is yet to complete. One for all is certainly the presence of exceptional rules (i.e. exemptions and reduced tax rates) deviating from the general one according to which VAT is a general consumption tax and the different interpretation of these rules in the domestic context especially before the intervention of a decision of the Court of Justice of the European Union (CJEU). This is the clearest example of the discrepancies in the implementation of the VAT Directive among Member States. New technologies could intensify even more the difficulties in understanding how broad the scope of provisions concerning exemptions or reduced rates should be. This is why studying the VAT treatment of cryptocurrencies is an incredible opportunity to analyse the new frontiers of VAT as a harmonization project as well. Different qualifications between Member States when applying provisions regarding capital gains or issues related to anti-money laundering and enforcement of tax rules will also be shortly

---

<sup>5</sup> European Banking Authority, <https://eba.europa.eu/eba-reports-on-crypto-assets>; European Security Market Authority, [https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391\\_crypto\\_advice.pdf](https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf); Bank for International Settlements <https://www.bis.org/bcbs/publ/d490.htm>; D. Beau (BIS), The role of cryptoassets in the payment system, speech at the Official Monetary and Financial Institutions Forum (OMFIF) Meeting, London, 15 October 2019, <https://www.bis.org/review/r191015b.htm>. International Monetary Fund, Treatment of Crypto Assets in Macroeconomic Statistics, <https://www.imf.org/external/pubs/ft/bop/2019/pdf/Clarification0422.pdf>.

<sup>6</sup> Art. 3 (1) (18) AMLD5.

<sup>7</sup> On the history of how tax law gain its dogmatic autonomy from other legal fields, refer to E. Vanoni, *Opere giuridiche: Elementi di diritto tributario. Altri saggi di diritto finanziario*, Giuffrè, 1962; A. Berliri, *Principi di diritto tributario I*, Milano, 1952; Id., *Corso istituzionale di diritto tributario*, Milano, I, 1985; G. A. Micheli, "Diritto tributario e Diritto finanziario", in Enc. dir., XIII, III, pag. 9; E. De Mita, *Appunti di diritto tributario, I*, Milano, 1987, Id., *Maestri del Diritto Tributario*, Giuffrè Editore, 2013, G. Falsitta, "Nascita e sviluppo scientifico del diritto tributario in Italia", in Rass. Trib., 2000, p. 353; A. D. Giannini, *I concetti fondamentali del diritto tributario*, Torino, 1956. From a German-Austrian perspective: F. Freiherr von Myrbach-Rheinfeld, *Grundriss des Finanzrechts*, 2nd ed., Hügel'sche Buchhandlung, 1916; K. Tipke, "Steuerrecht als Wissenschaft", in K. Tipke et al. (eds.), *Festschrift für Joachim Lang. Gestaltung der Steuerrechtsordnung*, Ottoschmidt, 2011, pp. 21-56; R. Walter, "Die Lehre des Finanzrechts an der Universität Wien von 1938 bis zur Gegenwart", in W. Doralt et al. (eds.), *Steuern im Rechtsstaat. Festschrift für Gerold Stoll zum 65. Geburtstag*, Orac, 1990, pp. 11-28; A. Raupach, "Darf das Steuerrecht andere Teile der Rechtsordnung, stoeren?", in J. Lang, *Die Steuerrechtsordnung in der Diskussion. Festschrift für Klaus Tipke*, Ottoschmidt, 1995, pp. 105-124.

addressed. Nonetheless, these aspects are only ancillary to the main object of the analysis, which is the VAT treatment of Bitcoin and similar cryptocurrencies.

The CJEU decision on the VAT treatment of Bitcoin exchanges dates back to 2015. From that year on, there have been quite a few scholarly works addressing the content of this decision and some of them have already questioned its applicability in relation to other cryptocurrencies or even so-called crypto-assets.<sup>8</sup> Even before the decision, there have been a couple of papers addressing the VAT issues arising from Bitcoin. Thus, it might be argued why there is a need for further research on this decision and its implications. First of all, a critical analysis of this decision is fundamental to understand the reasoning behind it and to set the criteria for its application to other cryptocurrencies and crypto-assets. Second of all, my critical analysis of this decision highlights how this CJEU ruling could have been challenged from the very beginning and how, due to the difference in the way Bitcoin is used from how it was first envisioned, it is doubtful whether the Court would still decide in the same way. Finally, a critical analysis of the *Hedqvist* decision allows us to point out the consequences of this decision which might become even more relevant under the light of recent developments such as Libra, the cryptocurrency which Facebook plans to launch in 2020, and cryptocurrencies issued by central banks, so-called central banks digital currencies (CBDC).

Indeed, the VAT analysis of Bitcoin is a perfect case study to address the requirements and conditions for the assessment of the tax consequences of cryptocurrencies in general. Even if the analysis included in this work will be limited to Bitcoin and will not go in details with the VAT treatment of other crypto-assets and tokens, the conclusions and reasoning contained in this dissertation can be extended or dismissed in the case of other crypto-assets considering their differences and similarities with Bitcoin. Bitcoin was envisaged as pure means of payment and the decision focuses uniquely on the assumption that it will be used this way. Thus, in alignment with this ruling, the VAT consequences deriving from the *Hedqvist* decision shall be applied to all cryptocurrencies or crypto-assets which fulfil one limited function, namely being a pure means of payment. Consequently, and according to this decision, cryptocurrencies and crypto-assets whose purpose is not only to be used as a means of payment, will be treated differently than Bitcoin. Nonetheless, even if envisioned as a pure means of payment, data shows us that Bitcoin has been mainly purchased and exchanged for speculative purposes.<sup>9</sup> This is already an important element for challenging the decision and which shall be taken into consideration for the extension or not of the *Hedqvist* ruling to other cryptocurrencies. At the same time, the multilingualism characterizing the EU law-making process and the purposes behind the exemptions have played a central role in this ruling. It derives that the counter-considerations emerging in this work can be of relevance also in future VAT cases dealing with new technologies.

---

<sup>8</sup> Among many: S. Capaccioli, “Regime impositivo delle monete virtuali: poche luci e molte ombre”, in *Il Fisco*, issue n. 37, 2016, pp. 3538-3544; S. Capaccioli, “Criptovalute, bitcoin e Iva”, in *Il Fisco*, issue n. 27, 2014, p. 2672; S. Capaccioli, “VAT & bitcoin”, in *EC Tax Review*, vol. 23, issue n. 6, 2014, pp. 361-362; S. Capaccioli, Bitcoin: le operazioni di cambio valuta a corso legale sono prestazioni di servizio esente, in “*Il Fisco*”, issue n. 44, 2015, p. 4274; A. Bal, “How to Tax Bitcoin?”, in D. Lee and K. Chuen (Eds), *Handbook of Digital Currency*, Elsevier, 2015, p. 271; A. Bal, “Bitcoin Transactions: Recent Tax Developments and Regulatory Responses”, in *Derivatives & Financial Instruments*, vol. 17, issue n. 5, 2015; A. Bal, *Taxation, Virtual Currency and Blockchain*, Kluwer, 2019; T. Ehrke and L. Zechner, “VAT treatment of cryptocurrency intermediation services”, in *Intertax 2020* (forthcoming); A. Contrino and G. Baroni, “The cryptocurrencies: fiscal issues and monitoring”, in *Diritto e Pratica Tributaria Internazionale*, issue n. 1, 2019; pp. 11 et seq.

<sup>9</sup> D. G. Baur, K. Hong, A. D. Lee, “Bitcoin: Medium of exchange or speculative assets?”, in *Journal of International Financial Markets, Institutions and Money*, vol. 54, 2018, pp. 177-189. This position is also sustained by T. Ehrke-Rabel, *Aspekte grenzüberschreitenden digitalen Wirtschaftens in der Umsatzsteuer*, in *DStJ*, 2019.

Conclusively, this research aims at offering a different narrative on whether Bitcoin shall be considered comparable to traditional currencies from a VAT perspective and on the consequences which derive from this comparison. While arguing and demonstrating why the VAT exemption contained in Art. 135 (1) (e) of the VAT Directive shall not find application in the case of Bitcoin and similar cryptocurrencies, this work looks at the *Hedqvist* decision as a sliding door into the present and future of means of payment and of the involved stakeholders.

### **3. Challenging the extensive application of Art. 135 (1) (e) VAT Directive for cryptocurrencies**

At the core of this dissertation lays the reasoning adopted by the CJEU when deciding on the applicability of the VAT exemption contained in Art. 135 (1) (e) on Bitcoin exchanges for and to legal tenders. More precisely, this dissertation highlights the fallacies in the reasoning of the Court and highlights why the application of the exemption contained in Art. 135 (1) (e) VAT Directive shall not be extended to non-legal tenders. In order to sustain such a claim, the analysis focuses on the three premises which are at the core of the reasoning developed by the CJEU. Firstly, Bitcoin is a pure means of payment and this is its only function. Secondly, the wording of the exemption contained in Art. 135 (1) (e) contained in the different language versions of the Directive, is not sufficiently clear on whether the provision applies only to legal tenders. Thirdly, due to the unclarity deriving from the different versions, the purpose justifying the presence of this exemption shall be taken into account. However, these premises, as it will be demonstrated in the next sections, can be challenged and can lead to a very different conclusion which is not only relevant for Bitcoins but for all future cryptocurrencies adopted with solely purpose of being used as pure means of payment.

#### **3.1 Bitcoin is not just used as a means of payment**

One of the first criticism that can be moved to the CJEU decision is that Bitcoin was not ultimately used as a means of payment but instead as a speculative asset. This alternative use of Bitcoin in comparison to what has been envisioned by Satoshi Nakamoto in the Bitcoin whitepaper<sup>10</sup> has emerged in empirical studies which have shown how this cryptocurrency was indeed not used as a means of payment but acquired by users as a possible store of value to be sold at a later stage.<sup>11</sup>

Obviously, this raises the issue of whether the exemption contained in Art. 135 (1) (e) could be extended to Bitcoin as it is currently not only used as a means of payment. Despite the fact that also foreign currencies transactions can have a speculative purpose, the main purpose of foreign legal tender is still to be used as a means of payment. On the contrary, in the case of Bitcoin, the speculative purpose seemed to have taken over the means of payment function. Moreover, Bitcoin even as a speculative asset cannot be included in any other exemptions contained in Art. 135 (1) since it not comparable with any other goods or services under the scope of the exemptions and thus, fails the neutrality test as developed by the Court in the Rank Group case<sup>12</sup>. Consequently, Bitcoin can just be considered as a digital asset that can be object of taxable supplies of services.

Thus, the decision could be considered as outdated in the case of Bitcoin. Nonetheless, the reasoning contained in the decision keeps being relevant in the case of other types of cryptocurrencies which are aimed as pure means of payment. Thus, it remains extremely important to verify whether the reasoning

---

<sup>10</sup> Satoshi Nakamoto is the still unknown creator of Bitcoin.

<sup>11</sup> D. G. Baur, K. Hong, A. D. Lee, "Bitcoin: Medium of exchange or speculative assets?", in *Journal of International Financial Markets, Institutions and Money*, vol. 54, 2018, pp. 177-189; F. Glaser, K. Zimmermann, M. Haferkorn, M. C. Weber and M. Siering, "Bitcoin - Asset or Currency? Revealing Users' Hidden Intentions", ECIS 2014 (Tel Aviv).

<sup>12</sup> CJEU, 10 November 2011, Joined cases C-259/10 and C-260/10, *Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc.*, ECLI:EU:C:2011:719.

of the Court can really be justified or whether the Court shall have decided differently, even when assuming Bitcoin as having the only function of being used as a pure means of payment. Indeed, as big tech companies start to be interested in issuing their own cryptocurrency, the *Hedqvist* decision would apply to them as well.

Notwithstanding, the following two sections which constitutes the core of the dissertation, examine whether there are really discrepancies in the different language version of art. 135 (1) (e) VAT Directive extending its application to means of payment different from legal tenders and if yes, whether the reasons traditionally provided for the existence of financial exemptions can still justify the extension of art. 135 (1) (e).

### 3.2 Multilingualism does not raise any issues

Multilingualism characterizes the law of the European Union, its interpretation and application. Since all European languages are considered as official languages of the Union, this means that they all have the same legal value. However, issues also arise when the different language versions can lead to different interpretations and unclarity about the legislator's intention. The lack of uniform interpretation deriving from the strict wording of the VAT directive provisions in the different languages has been referred to by the European Court of Justice as justification to sustain that no strict interpretation shall be applied in the case of the exemption regulated by Art. 135 (1) (e) VAT Directive. Nonetheless, a more careful and contextualised analysis (both from a historical and comparative viewpoint) of the different language versions of this provision reveals how the multilingualism issue shall not be seen as a matter of concern.

Indeed, a correct historical analysis shall take into consideration the different language versions of the countries which were member states of the European Union at the time of the adoption of the Directive. In the *Hedqvist* decision, both the CJEU and the advocate general, stress the fact that the different official languages present a slightly dissimilar version of the exemption described in Art. 135 (1) (e) VAT Directive. The references are to the English, German, Finnish and Italian versions. According to the AG, in the Finnish version, it seems that the legal tender status should not require the legal tender status. Differently, the English version refers to the singular currency and then it is followed after a comma by the words "banknotes" and "coins". According to the AG, the word "currency" used in its singular version is to be understood that only one legal tender is needed in the transaction for it to be exempt. However, to the interpretation given by the Court to the comma interposed between the word "currency" and "banknotes" could be opposed a different way of reading that sentence, which could have alternatively be understood as: "currency, which is in the form of bank notes and coins used as legal tender,". On the contrary, the Court stated that the German version is quite precise and refers to "Devisen..., die gesetzliches Zahlungsmittel sind" which can be literally translated in "currencies...which are legal tender". More complicated is the wording formulated in the Italian version, where the AG sustains that it can be questioned whether means of payment should need to have a legal status at all.<sup>13</sup> The Italian version refers to means of payment "con valore liberatorio" which in the AG opinion means that only the debt-discharging effect of the means of payment is the element qualifying a means of payment eligible for the exemption contained in Art. 135 (1) (e) VAT Directive.<sup>14</sup> The AG also highlights that if only legal tenders were going to be excluded the Italian version would have referred to currency "aventi corso legale", which could be literally translated in having a legal tender status.<sup>15</sup> Differently, the reference to "corso legale" is present in the Council Regulation n.

---

<sup>13</sup> Opinion of Advocate General Kokott, 16 July 2015, C-264/14, *Skatteverket v David Hedqvist*, ECLI:EU:C:2015:498, para. 34.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

974/98 on the introduction of the Euro. Thus, in the AG opinion, the Italian version of the VAT Directive will have a broader scope which will not be limited to legal tenders. Indeed, this different use of the words “*valore liberatorio*” and “*corso legale*” in the European texts require us to take into consideration the Italian civil law provisions regarding money obligations. There are two particularly relevant articles: Article 1277 and Article 1278. The first article concerns a debt which can be discharged in the currency “*avente corso legale*” in the State, where State means the Italian State. Differently, the second provision is entitled “*debiti di moneta non avente corso legale*” which can be translated as “*debt of not legal tender money*” where the legislator addresses debts which are not in the currency which is a legal tender in the Italian State.<sup>16</sup> However, it is clear that in this provision the Italian legislator is referring only to not having the Italian legal tender status. Nonetheless, both provisions allow the discharge of a debt, these means that both the currencies with Italian legal tender status and the currencies with no-Italian legal status (referring to foreign legal tenders) have “*valore liberatorio*”. This might explain why the Italian translator in 1977 when working on the Italian version of the Sixth VAT Directive<sup>17</sup> decided to use the wording “*valore liberatorio*” instead of legal tender. Indeed, within the European Union, different legal tenders are still used. Moreover, before the implementation of the Sixth VAT Directive in 1979<sup>18</sup>, transactions concerning currencies were not considered exempt but outside the scope of VAT because they did not consist in a supply of services.<sup>19</sup> When implementing the exemption in the Italian framework, the legislator used the words “*le operazioni relative a valute estere aventi corso legale*” which can be translated as operations concerning foreign currencies which are legal tenders. This underlines once again that the “*legal tender*” wording was used only for the Italian currency, the lira, unless specified. Furthermore, the D.P.R. n. 687/1974 establishing that transactions concerning currencies were outside of the scope of VAT used the words “*transfer of money [...] including foreign currencies*”<sup>20</sup>. Again, foreign currencies are not named as legal tenders.

Even if in the Council regulation for the introduction of the Euro, the reference is to legal tender, this reference is in connection to national monetary units<sup>21</sup> or about the Euro and the provisions states that it has legal tender value because it substitutes the national legal tender, which certainly includes also the Italian one<sup>22</sup>. It could be argued why then in the same VAT Directive, in Art. 344 (1) n. 2 the same translator decides to use “*corso legale*” and not “*valore liberatorio*” with reference to the scope of the word investment gold contained in the Directive. Art. 344 (1) n. 2 refers to gold coins that had the legal tender status in the origin country, meaning that there was a national law in the country where they were issued establishing that that particular coin has a debt-discharging effect. However, the choice in the exemption to refer to “*valore liberatorio*” certainly intends to refer to the Italian civil code provisions since these are coins that can discharge the debtor and shall include both the old Italian currency, the lira, and the foreign currencies.

---

<sup>16</sup> The Italian civil code dates back to 1942, so much earlier than the introduction of the VAT Directive (R. D. n. 262 of 16 March 1942).

<sup>17</sup> Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax, OJ L 145 (1977).

<sup>18</sup> D.P.R. 29 Gennaio 1974, n. 24. Entered into force on March 31, 1979.

<sup>19</sup> Art. 2 (3) (a) DPR 1972, as modified by DPR 23 Dicembre 1974, n. 687. As reported by M. Mandò & G. Mandò, *Manuale dell'Imposta sul valore aggiunto con massimario*, 11 ed., Ipsoa, 1992.

<sup>20</sup> Art. 1 (1) (a), D.P.R. 23 dicembre 1974, n. 687, “*le cessioni che hanno per oggetto denaro o crediti in denaro, comprese le valute estere e i crediti in valute estere*”. Translated by the author of this dissertation.

<sup>21</sup> Art. 9, 15 and recital n. 19, Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro, OJ. L. 139 (1998), (Council Regulation 974/98).

<sup>22</sup> Art. 10 and 11 Council Regulation 974/98.

Once the linguistic doubt regarding the Italian version has been solved, there is a more substantial critique that can be moved to the linguistic analysis of the Court. In its linguistic analysis, the Court considers Finland which entered the EU in 1995 but does not take into consideration the official language versions of countries which were the Member States at the time of the adoption of the sixth Directive (1977), which are: France, Spain, the Netherlands and Denmark. When looking at the wording of the exemption concerning currencies in the version of the Directive dating 1977, all the official languages were clearly referring solely to legal tenders. Moreover, the exact same wording was used also in the updated version of the sixth VAT Directive adopted in 2006. From a historical interpretation perspective, by looking at the Member States which were part of the EU in 1977 and their official language version of the VAT Directive<sup>23</sup>, it emerges a univocal intention from the EU legislator: the scope of the exemption on currencies exchange shall be limited to legal tenders. Moreover, the same text contained in the 1977 version of the VAT Directive in all those official languages was almost literally transposed all the official language versions of the VAT Directive of 2006, showing that the will of the legislator has remained the same.

Moreover, there is a fundamental reason why the European legislator would have not wanted to include currencies different from the ones that had a legal tender status. The legal tender status is given to a currency by the State. Recognizing a currency with the legal tender status is one of the highest manifestations of State sovereignty.<sup>24</sup> Even the reason behind this exemption which is presented by the AG and consisting in facilitating payments in the single market requires the understanding of currency as the manifestation of States' sovereignty. According to the opinion of the AG, the single market would require the non-impediment of the conversion of means of payment by levying VAT since levying VAT would increase the price of a cross-border service as compared to a domestic service.<sup>25</sup> However, since both the Euro and the currencies issued by the Central Banks of the Member States which are not part of the Eurozone are recognized as legal tenders, there would be no discrimination between domestic and cross-border transactions. Moreover, it is true that this exemption is not limited to currencies issued within the EU but refers also the currencies issued by other countries in the world. However, the decision to exempt the conversion of "European" legal tenders with "third countries" legal tenders is certainly related to other economic dynamics, mainly focused on trade and productions and from which the European industries can benefit once they have to import or export with third countries. This is not the case of Bitcoin, which no other country recognised as legal tender.

### 3.3 Behind the VAT financial exemptions: have technical difficulties been already overcome?

---

<sup>23</sup> The only arguable exception could be the English version because of the comma positioned between the word "currency" and "banknotes".

<sup>24</sup> J. Bodin, *Les Six Livres de la République*, Scientia, 1576. For a complete historical framework, see D. Carreau, "Souveraineté et Coopération Monétaire Internationale", in *L'Actualité économique*, vol. 47, issue n. 1, 1971, pp. 37–38.; R.M. Lastra, *Legal Foundations of International Monetary Stability*, Oxford University Press, 2006, p. 6-7; C. Proctor, *Mann on the Legal Aspect of Money*, Oxford University Press, 2005, p. 500; C. D. Zimmermann, "The Concept of Monetary Sovereignty Revisited", in *European Journal of International Law*, vol. 24 issue 3, 2013, pp. 797–818. Reference in the context of the exemption contained in Art. 135 (1) e) also in Mayr and Ungericht, "§ 6 Steuerbefreiungen", *UStG Kommentar*, 4th ed., Manz, 2014, p. 341; K. Tipke, "Steuern als Geldabgaben", in K. Tipke (ed.), *Die Steuerrechtsordnung II*, Ottoschmidt, 2003, p. 571; M. Jachmann, "Besteuerung von Unternehmen als Gleichheitsproblem —Unterschiedliche Behandlung von Rechtsformen, Einkunftsarten, Werten und Steuersubjekten im Ertrag- und Erbschaft-steuerrecht", in *DStJG* n. 23, 2009, p. 11; G. Ingham, *La natura della moneta*, Roma, Fazi editore, 2016, pp. 33 et seq.

<sup>25</sup> Opinion of Advocate General Kokott, 16 July 2015, C-264/14, *Skatteverket v David Hedqvist*, ECLI:EU:C:2015:498, para. 38.



Since the alleged linguistic discrepancies would impede the possibility to determine the exact scope of art. 135 (1) (e), according to the Court it was necessary to adopt other interpretation methods, such as teleological interpretation. Historically, because of the linguistic discrepancies, teleological interpretation has always played a fundamental role in the rulings of the CJEU. When applying teleological interpretation, the Court needs to look at the reasons behind the adoption of a certain provision, which in the case of the Hedqvist decision requires to consider why the exemption contained art. 135 (1) (e) (part of the group of so-called financial exemptions) was adopted.

Furthermore, in the context of the interpretation of exemptions included in the VAT directive, the dichotomy between strict interpretation and the neutrality principle has emerged during the years. Indeed, exemptions represent an important exception to the main rule of VAT as a general consumption tax applicable to all supplies of the exemptions in the overall VAT system. For this reason, the CJEU has decided consistently in favour of a strict interpretation of the exemptions, at least in the 1990s. However, from the 1990s on, strict interpretation has been frequently alternated with an interpretation according to the fiscal neutrality principle, which consists in “*the reflection, in matters relating to VAT, of the principle of equal treatment*”<sup>26</sup>. According to the fiscal neutrality principle, the CJEU will have to consider the compatibility of two concrete cases and at the purpose of the provision that could be applied in that particular case.

More generally, the list of VAT exemptions contained in the European VAT Directive is the outcome of long negotiations which have preceded the adoption of the Sixth Directive and represents the intent to reconcile Member States’ “political constraints” while maintaining a limited number of VAT exemptions. Among the justifications for the introduction of exemptions in the VAT system, the reason for the adoption of financial exemptions is traditionally to be found in the difficulty on the application of VAT which will lead to excessive administrative burdens.<sup>27</sup> Moreover, financial exemptions are included among the exemptions without the right to deduct input VAT.<sup>28</sup>

According to CJEU case law, the only reason behind these technical difficulties seems to depend on the need to “*alleviate the difficulties connected with determining the taxable amount and the amount of VAT deductible*”<sup>29</sup>. Thus, similarly to what emerges from economic literature, also from a jurisprudence perspective, the main issues arising in the framework of financial transactions, concerns the calculation of the value-added because of the possibility to know what the exact taxable financial margin is. Nevertheless, this type of justification seems to not hold anymore. New technologies together with the

---

<sup>26</sup> CJEU, 14 June 2017, Case C-38/16, *Compass Contract Services Limited v Commissioners for Her Majesty's Revenue & Customs*, ECLI:EU:C:2017:454, para. 24. See also, CJEU, 8 June 2006, Case C-106/05, *L.u.P. GmbH v Finanzamt Bochum-Mitte*, ECLI:EU:C:2006:380, para. 48; CJEU, 6 November 2003, Case C-45/01, *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Gießen*, ECLI:EU:C:2003:595, para. 69; CJEU, 26 May 2005, Case C-498/03, *Kingscrest Associates Ltd and Montecello Ltd v Commissioners of Customs & Excise*, ECLI:EU:C:2005:322, para. 52; and CJEU, 27 April 2006, Joined cases C-443/04 and C-444/04, *H. A. Solleveld (C-443/04) and J. E. van den Hout-van Eijnsbergen (C-444/04) v Staatssecretaris van Financiën*, ECLI:EU:C:2006:257, para. 36.

<sup>27</sup> The other two reasons justifying the presence of exemptions in the VAT system are the need to improve VAT progressivity and avoiding that goods and services which according to Musgrave can be defined as “meritorious”.

<sup>28</sup> The VAT exemptions on financial services are the ones included in Article 135 (1) from (a) to (g). These exempted financial activities can be categorized into four macro-groups:

1. Insurance transactions,
2. dealings in banknotes and coins (except for collectors’ item) and payment activities (including negotiation on deposit and current accounts, payments, transfers debts, cheques and other negotiable instruments),
3. credit activities
4. dealings in securities.

<sup>29</sup> CJEU 22 October 2015, Case C-264/14, *Skatteverket v David Hedqvist*, ECLI:EU:C:2015:718, para. 36; CJEU, 19 April 2007, *Velvet & Steel Immobilien und Handels GmbH v Finanzamt Hamburg-Eimsbüttel*, Case C-455/05, ECLI:EU:C:2007:232, para 24; CJEU, 12 June 1997, *Tiercé Ladbroke SA v Commission of the European Communities*, ECLI:EU:T:1997:84, para 24.

evolution of the banking and financial system, can facilitate the calculation of the taxable amount. On this point, a study has shown how with regard to each single type of financial transactions, this justification of the application of the exemption seems to be outdated.<sup>30</sup> Furthermore, two concrete cases demonstrate the possibility to overcome the so-called technical difficulties in the case of financial exemptions, namely the proposals for the reform of the VAT exemptions of 2007 and for the Financial Transaction Tax (FTT) of 2011. Both types of measures have been object of discussion in the past, no political agreement was reached but in 2019, they were back at the core of the Commission agenda and the political debate.

Indeed, from analysing both the Commission proposal of 2007 to reform VAT exemptions for financial transactions and from the FTT proposal, three main considerations can be drawn. First of all, both proposals were a reaction to the presumed under taxation of the financial sector and as creating distortions in the economy due to a different taxation treatment in comparison to other businesses. Secondly, both projects show that the “*technical difficulties*” assumed at the time of the adoption of the Sixth VAT Directive are now outdated and the reason why both projects failed is mainly the lack of political agreement on these measures. At the same time, concerning the reform of the VAT exemptions, the Commission just commissioned a new study and concerning the FTT, since spring 2019 and again in the framework of possible ways to raise EU own economic resources to cope with the COVID-19 crisis, it came back once again into the European political agenda. Finally, since what emerges from these two proposals is that there was no specific technical difficulty but a lack of political agreement, it can be questioned whether, using the words of the CJEU, the reason for keeping such exemptions is still to “*alleviate the difficulties connected with determining the taxable amount and the amount of VAT deductible*”<sup>31</sup>. More importantly for the present analysis, in the case of foreign currencies, technical difficulties were dismissed by the same court. In the *Hedqvist* decision, the court basically indicated how to calculate the margin derived from foreign-exchange transactions by looking at the spread between prices at which the exchanger buys/sells currencies and this calculation can be transposed also on a transaction-by-transaction basis. That said we might wonder which are the justifications for such exemptions. In the case of the exemption for interest-generating activities, we might still consider an exemption (even listed under Art. 132 on exemption on public interest ) or a zero-rate VAT because of the expected increase in the cost of borrowing which can backlash to low-income households and undermine what could be defined as the “*right to access to credit*”. However, even though for other financial activities new justifications could be found or might be explored, the only assumption of possible technical difficulties seems to hide as a mere political choice. For this reason, an extensive interpretation of these exemptions shall be undertaken very carefully.

Another justification for the exemption contained in Art. 135 (1) (e) VAT Directive could be found according to the AG by referring to the need to smooth payment in the single market is anchored to States’ sovereignty expressed in the issuing of a currency.<sup>32</sup> However, Bitcoin is not issued by any central bank neither since no State recognised it as legal tender yet. Consequently, as previously stated, it is a political decision based on States’ sovereignty and recognition of other States’ sovereignty to decide which means of payment convertibility shall be facilitated as long as there is no discrimination. There is no discrimination from a European law perspective since any European citizen using any currency recognised as legal tender within the EU can convert one legal tender to another one recognized as legal tender without that this transaction will be subject to VAT. Allowing the exemption on legal tenders which are not issued by the European Central Bank or by the Central Bank of the Member States which are not part of the Eurozone is just a recognition of another State sovereignty and

---

<sup>30</sup> A. Kerrigan, “The elusiveness of neutrality – why is it so difficult to apply VAT to financial services?”, in *International VAT Monitor*, vol. 21, issue n. 2, 2010, pp. 102-113.

<sup>31</sup> CJEU 22 October 2015, Case C-264/14, *Skatteverket v David Hedqvist*, ECLI:EU:C:2015:718, para. 36.

<sup>32</sup> Opinion of Advocate General Kokott, 16 July 2015, C-264/14, *Skatteverket v David Hedqvist*, ECLI:EU:C:2015:498, para. 39. However, the CJEU did not consider this point and justification in its decision.

can help foster trade with the country issuing that currency. It goes without saying that the Dollar, for example, a legal tender issued by a State outside the European Union is the most influential currency in the world. At the same time, China is the world industrial hub and trading with them in their local currency without paying VAT when converting Euro to and from Yen is an advantage and important benefit for the European industrial sector selling to or buying from there. Thus, there are other economic reasons to facilitate the exchange which might not be found in the case of Bitcoin. This is not to say that Bitcoin does not “*deserve*” to be considered as other means of payment and be exempt from VAT, but this is a political decision which so far certainly was based on other factors than simply “*being used as means of payment*”. While the Court stated the independency of the VAT provisions from the legal definition contained in other sectors, such as the financial one, it shall be counter-argued that tax policies and monetary policies are not so independent from each other. Ruling that because a virtual currency such as Bitcoin just because was created with the only purpose of being a means of payment shall be exempted from VAT, means that in the future, any other kind of cryptocurrency created just for the purpose of being a means of payment shall be exempted. This has monetary policies implications because it means that potentially there could be in circulation an indefinite number of means of payment whose usage is facilitated through the exempt conversion to and from a legal tender which will then be used to pay taxes with and with no control on inflation by any public authority. The reference of the AG to vouchers with a face value or points rights for later use is also misleading<sup>33</sup>. Indeed, vouchers are indicating prices, expressing the value of the underlying good or service, in legal tenders. The value of a certain good is given by its supply and demand and then the value is expressed in a certain legal tender. Bitcoins are not to be compared with the voucher but with the good or service incorporated in the voucher. Bitcoin value is also driven by supply and its rise or decrease in value is expressed in legal tenders.

Moreover, the Court cannot go beyond the intention of the legislators, which in the 1970s could not think about such a post-Westphalian vision of currencies. Consequently, as in the case of the fifth Anti-money laundering Directive, it would be advisable for the legislator to intervene by adopting an ad hoc provision, also considering the different types of so-called crypto-assets that are misleading being called “*cryptocurrencies*” while not having a means of payment function.

For all these reasons, while lacking the adoption of new ad hoc provisions concerning the possible exemptions of cryptocurrencies, we shall conclude that at the moment, the qualification (which is more consistent with the European VAT system) of the exchange activities involving legal tenders and Bitcoin or similar cryptocurrencies is the one considering these transactions as non-exempt supplies of services.

#### **4. Bitcoin-related activities: the VAT consequences**

The previous sections have summarized the criticisms that this dissertation has raised regarding the reasoning on which the decision adopted by the CJEU is based. These criticisms ultimately lead to a different definition and qualification of Bitcoin and similar cryptocurrencies from a VAT perspective. Indeed, when not extending the exemption contained in Art. 135 (1) (e) Bitcoin exchanges against legal tenders will be considered as a supply of services under the VAT Directive and thus, subjected to VAT.

This difference in qualification has consequences also in other ways in which Bitcoins and similar cryptocurrencies can be obtained and which differ from how Mr Hedqvist was carrying out his business. For instance, Bitcoins can be bought or sold through exchange platforms or can be bought through dedicated ATMs. In the case of platforms, the rules on agency in VAT will be applicable and it is

---

<sup>33</sup> Opinion of Advocate General Kokott, 16 July 2015, C-264/14, *Skatteverket v David Hedqvist*, ECLI:EU:C:2015:498, para. 16.

important to examine the type of service provided by the platform. On one hand, some platforms offer the possibility to sell and buy Bitcoins by acting in the name and on behalf of one of the parties. On the other hand, there are other platforms which just offer the technical infrastructure on which then parties will be interacting. In this second case, it is questionable under the light of previous case law on the SWIFT and other technical/IT system used by financial institutions, whether the platform activity will still be exempt.<sup>34</sup> Differently, when considering Bitcoin outside the scope of the exemption enshrined in Art. 135 (1) (e), thus as a digital asset which can be object of a taxable supply of digital service, VAT will be applicable.

Moreover, a different qualification impacts also on the businesses offering services for the storage of cryptocurrencies (such as so-called wallet providers, which can be offering storing services together with exchange services or not). Previous considerations made in the case of exchange platforms concerning the possibility of these activities to be VAT exempted or not based on Bitcoins' qualification and the type of service provided by the platforms can also be extended to wallet service providers which most of the time are offered together with exchange services. In the case of wallet providers, there is also a very important difference concerning the types of wallet. There are, in fact, different types of wallets which can be purchased by users both in the form of software or hardware, as a mobile app or as an online service. Wallet providers might be aware of the private key of the users or no. These different types of wallets influence the qualification of the activity from a VAT perspective.

Furthermore, qualification issues emerge also in the case of mining, which consists in the production of Bitcoins and similar cryptocurrencies and which were not addressed by the CJEU in the Hedqvist decision. In the case of Bitcoin mining, it can be questioned whether it shall be considered as an entrepreneurial activity or gambling. In fact, in the case of mining, scholars and practitioners have been divided into these two different teams. According to some scholars and practitioners, mining should be considered as an entrepreneurial activity and the Bitcoin received by the miners once they have verified the transaction and were the first ones to do so consists in the consideration.<sup>35</sup> Nevertheless, other scholars have demonstrated how mining shall be considered as a form of gambling since, in order to receive Bitcoin, it is not sufficient to validate the transaction by solving a mathematical problem which periodically increases in difficulty. Indeed, in order to obtain Bitcoin, the miner needs to be the first one to mine a new Bitcoin and the chances that were calculated to be the first one to mine a new Bitcoin were so incredibly low that as also participants to the Bitcoin network recognize that the mining process currently just ends up being a selection driven by chance.<sup>36</sup> Based on the different qualifications of mining (entrepreneurial activity vs gambling), the VAT consequences will differ as well. Especially in the case where mining is to be considered as comparable to gambling, this will imply that mining represents a form of unauthorized game of chance and consequently, an illegal activity. According to copious CJEU case law, pursuant the principle of fiscal neutrality, illegal activities are to be treated as

---

<sup>34</sup> CJEU, 28 July 2011, Case C-350/10, *Nordea Pankki Suomi Oyj*, ECLI:EU:C:2011:532; CJEU, 5 June 1997, Case C-2/95, *Sparekassernes Datacenter (SDC) v Skatteministeriet*, ECLI:EU:C:1997:278, para. 66; CJEU, 13 December 2001, Case C-235/00, *Commissioners of Customs & Excise v CSC Financial Services Ltd.*, ECLI:EU:C:2001:696, para. 26; CJEU, 28 July 2011, Case C-350/10, *Nordea Pankki Suomi Oyj*, ECLI:EU:C:2011:532, para. 24.

<sup>35</sup> N. Enzinger, "Mining von Kryptowährungen", in SWK, 2017; M. Petutschnig, "Sind Bitcoins ertragsteuerpflichtig?", in ÖStZ, 2014, p. 357.

<sup>36</sup> T. Ehrke-Rabel, I. Eisenberger, E. Hödl, L. Zechner, "Bitcoin-Miner als Prosumer: Eine Frage staatlicher Regulierung?", in Austrian Law Journal, issue n. 3, 2017; T. Ehrke-Rabel, "Kryptowährungen und Umsatzsteuer", in Kirchmayr et al (eds.), *Digitalisierung im Konzernsteuerrecht, Kryptowährungen und Umsatzsteuer*, Linde, 2018.

a legal activity when they compete with each other.<sup>37</sup> Thus, Bitcoin mining as an unauthorized game of chance will be treated as authorized ones. The VAT Directive provides for a specific exemption on games of chance (Art. 135 (1) (g)). However, the particularity of this exemption is that the Member States will be able to set the limits and conditions. In other words, in some Member States, there might be games of chance which are exempt while in others no. This consequently reflects also on the possibility of mining to be exempt or not.

Conclusively, in the case of non-application of the exemption contained in Art. 135 (1) (e), as sustained by the author of this dissertation, it can be questioned how this different VAT treatment could impact on the purchase of goods and services when using cryptocurrencies as well. The way in which payments in Bitcoin functions when purchasing goods and services resemble the payments when using credit cards especially in the case when linked to a foreign account in foreign currencies. As with more traditional digital payments, VAT shall be calculated at the moment of the transaction, but it will be remitted to the tax authority at a later stage. In both cases, even if the buyer wants to spend Bitcoin or the foreign currencies, the price of the good or service that he/she had bought will still be expressed in Euro and the due VAT will be levied on the Euro exchange value. However, the decision to keep the Bitcoins received and not changing them within a short time (a decision that could be easily driven by the high volatility of Bitcoin), which for some Bitcoin application is about 24 hours, might have some repercussion at a later stage, where the taxable person will have to remit the due VAT calculated on the day of the transaction. Indeed, most of the biggest platforms offering cryptocurrencies payment services for e-commerce grant the possibility to have cryptocurrencies directly exchanged and sent to the traditional bank account in the used legal tender. Thus, risk-averse people might decide to accept payments in Bitcoin just because they convert them straight away and they are treating them as an alternative to a credit card payment system. Not so differently, if we exclude the possibility to compare Bitcoin to legal tenders, the VAT will have to be calculated for both transactions based on the value in Euro of that transaction. The result is almost indifferent from a practical perspective. Nonetheless, considering Bitcoin as not exempted within the VAT regime, will mean that the buyer paying with Bitcoin had to pay VAT when acquiring them in the first place in exchange for traditional legal tenders. This would mean that Bitcoin might be a more expensive means of payment than other traditional currencies. Consequently, it could be argued whether the application of VAT to Bitcoin used as a means of payment could be contrary to the free movement of payment. Unfortunately, the Treaty on the Functioning of the European Union does not clarify the scope of Art. 63 (2) which enshrine the free movement of payments. However, previous case law has used the legal tender status as a criterion to decide whether coins should fall under the free movement of goods or capital. Since Bitcoin does not have this status the not exempt VAT treatment will not be breaching this freedom. This certainly underlines how both taxation and monetary policy are interconnected as both representations of sovereignty.

## **5. Why Article 135 (1) (e) VAT Directive shall not be extensively applied to Bitcoin and other comparable cryptocurrencies**

As it emerged in the previous sections, there are different reasons why the extension of Art. 135 (1) (e) to Bitcoin and similar cryptocurrencies is questionable. However, when assessing the possible extension

---

<sup>37</sup> Among the ones previously cited: CJEU, 28 February 1984, Case 294/82, *Senta Einberger v Hauptzollamt Freiburg (Einberger II)*, ECLI:EU:C:1984:81; CJEU, 5 July 1988, Case 269/86, *W. J. R. Mol v Inspecteur der Invoerrechten en Accijnzen*, ECLI:EU:C:1988:359; CJEU, 5 July 1988, Case 289/86, *Vereniging Happy Family Rustenburgerstraat v Inspecteur der Omzetbelasting*, ECLI:EU:C:1988:360; CJEU, 29 June 1999, Case C-158/98, *Staatssecretaris van Financiën v Coffeeshop "Siberië" vof*, ECLI:EU:C:1999:334.

of Art. 135 (1) (e) in the context of cryptocurrencies, there are other motivations that must also be taken into account and were not considered by the CJEU. The first area of concern is that there is a need to strive for coherence in the EU law-making process and interpretation of EU law. Secondly, the *Hedqvist* decision will affect also cryptocurrencies issued by private multinational tech companies, such as the Libra project by Facebook in its initial version. Thirdly, money can also be seen as a constitutional project and it is doubtful how Bitcoin or cryptocurrency issued by big tech companies can really fulfil this task.

### **5.1 Coherence in the interpretation and application of EU law**

New technologies certainly challenge legislators and policymakers in various areas of the law. However, for the sake of legal certainty and avoiding possible mismatches, how these technologies shall be defined and regulated must be coordinated. At the same time, it is questionable whether the challenges raised by new technologies could be simply addressed through an extensive interpretation by the CJEU or whether there is a need for the legislator to intervene. Against this backdrop, in the area of VAT, we have already witnessed a case where the CJEU has first reacted on the qualification of a certain technology for the application of a provision and then the legislator has intervened by adopting a new provision. This has been the case of electronic books (e-books) where the relevant question was whether they could have been compared to traditional books and consequently whether the reduced VAT rate should have been applied to them as well. After few decisions where the Court has adopted a more stringent interpretation of the wording of the provisions concerning reduced rates for printed books<sup>38</sup>, the EU legislator finally adopted a provision to clarify the VAT treatment of e-books. Thus, the approach taken in relation to e-books can certainly represent an important example to advocate for the legislator intervention also in the context of the VAT treatment of cryptocurrencies. Indeed, such a sensitive matter as defining what shall be considered as comparable to money and given the influence that the application or non-application of VAT can have on the wider adoption of cryptocurrencies as means of payment, shall certainly be addressed by the legislator.

In addition to this example, the need for the EU legislator to intervene in this area can be derived also by the 5<sup>th</sup> anti-money laundering directive (AMLD5). Indeed, when striving for coherence within EU law, it cannot go unnoticed that after the *Hedqvist* decision, the EU legislator has adopted in the AMLD5 a definition of virtual currencies and virtual currencies providers. Looking at the process that has led to the adoption of the Directive, already shed a light on how the EU legislator might adopt a different approach than the one adopted by the CJEU. In relation to the AML field, the legislator has intervened in 2018 and took a position different from the CJEU. The AMLD5 contains a definition of virtual currencies and this inclusion is extremely relevant for two different reasons. On one hand, the adoption of new provisions in the area of AMLD despite the fact the AMLD was already recently amended shows that current provisions were not considered “*extendable*” to cryptocurrencies used as pure means of payment. Consequently, this approach highlights once more the importance of the legislator’s intervention in this field. On the other hand, the definition provided in the AMLD5 differs from the one which can be derived by the CJEU reasoning in the *Hedqvist* decision. In this decision, the Court refers to Bitcoins as pure means of payment. Differently, the AMLD5 refers to virtual currencies as means of exchange. This different approach was supported also in a note on the proposal for the new version of

---

<sup>38</sup> CJEU, 11 September 2014, Case C-219/13, *K Oy*, ECLI:EU:C:2014:2207, para. 51; CJEU, 7 March 2017, Case C-390/15, *Rzecznik Praw Obywatelskich (RPO)*, ECLI:EU:C:2017:174.

the AMLD that was prepared by European Central Bank (ECB).<sup>39</sup> In this note, the ECB stated that the original wording of the 5th AMLD proposal referring to virtual currencies as means of payment was too encouraging towards the use of cryptocurrencies.<sup>40</sup> The opinion of the ECB in contrast to the initial proposal presented by the European Commission certainly underlines how there is a necessity to go through a political and democratic debate and law-making process when defining the legal qualification and treatment of cryptocurrencies. Finally, the recent EU proposal for a regulation of the markets for crypto-assets<sup>41</sup> and the intention of the European Commission to revise the directive on international tax cooperation in order to include also crypto-assets and e-money (so-called DAC8)<sup>42</sup> are clear hints that the legislator is fully aware of the unclarity of the legal and tax treatment of this new technology and extensive interpretation does not seem to be an effective and desirable solution.

## 5.2 Future developments: cryptocurrencies issued by multinational tech companies

The possibility to issue a cryptocurrency alternative to traditional legal tenders has led multinational tech companies to investigate whether they could introduce their own cryptocurrency as well. The most emblematic example of these initiatives is certainly Libra, a project presented by Facebook. In June 2019, Facebook published the concept paper for its own cryptocurrency, called Libra and whose launch was initially planned in 2020. However, due to a critical statement of the French and German governments<sup>43</sup> and the departure of some of the investors, the original plan to issue their own cryptocurrencies has been transformed into the plan to create a digital payment system. Nonetheless, the Libra project in its first version should raise the attention of policymakers on what could be future developments in the area of cryptocurrencies. As expressly affirmed by France and Germany in their joint statement “*no private entity can claim monetary power, which is inherent to the sovereignty of nations*”.<sup>44</sup>

According to the first version of the Libra’s white paper and Mark Zuckerberg’s statements, the idea behind Libra is to provide to the ones left out from the financial system a “*global, open, instant and low-cost movement of money*”<sup>45</sup>. Indeed, in many areas of the world people remain on the fringe of the existing financial system, banks are far away, they have to pay high fees, or they do not have access to the necessary documentation to open a bank account. Facebook claims to be offering a proper solution by creating a global currency, helping advance “*financial inclusion, support ethical actors and continuously uphold the integrity of the ecosystem*”<sup>46</sup> and sustaining that “*a global currency and financial infrastructure should be designed and governed as a public good*”.<sup>47</sup> However, is Facebook really the best stakeholder to be in charge of designing and governing this type of public good?

---

<sup>39</sup> ECB, (2016) Opinion on a proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849, OJ C 459/3, 12 October. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52016AB0049>

<sup>40</sup> Id. 1.1.2 and 1.1.3.

<sup>41</sup> Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937

<sup>42</sup> EU Commission, Fair Taxation: Member States agree on new tax transparency rules on digital platforms, Press Release, December 10, 2020. [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2253](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2253)

<sup>43</sup> [https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Financial\\_markets/Articles/2019-09-17-Libra.html](https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Financial_markets/Articles/2019-09-17-Libra.html).

<sup>44</sup> Ibid.

<sup>45</sup> Libra white paper, p. 2. Available online and in pdf here: <https://libra.org/en-US/white-paper/#introducing-libra> (first version).

<sup>46</sup> Ibid.

<sup>47</sup> Ibid., emphasis added by the author of this summary and dissertation.

When looking at the governance framework for Libra, the governing entity of the Libra Blockchain and the Libra Reserve is the Libra association, a not-for-profit membership organization.<sup>48</sup> The members of this association should consist of businesses, non-profit, multilateral organizations and academic institutions which are geographically distributed, in charge of facilitate the operation of the Libra Blockchain, coordinate the agreement among its stakeholders (the network's validator nodes), promote, develop and expand the network and manage the reserve.<sup>49</sup> Consequently, only a restricted number of private stakeholders will be in charge of the issuing and control of this currency. Moreover, in its first version (Libra as a currency and not a payment system), Libra would have been fully backed by a reserve of real assets including a collection of low-volatility assets such as “*bank deposits and short-term government securities in currencies from stable and reputable central banks*”.<sup>50</sup> This means that the value of one Libra would have fluctuated depending on the value of the underlying assets. However, due to the type of monopoly of Facebook over different social networks, it can be questioned whether Libra would have also been able to influence the value of the underlying assets.

From a VAT perspective, the first version of Libra (a pure means of payment) would have fulfilled the requirements set by the Court of Justice in the *Hedqvist* decision for determining the scope of the exemption contained in Art. 135 (1) (e). Thus, referring to this decision, Libra exchanges would also be exempt. It derives that VAT as an obstacle for the wider adoption of Libra as a means of payment is eliminated. It can be argued that this reasoning would be in line with the fiscal neutrality of VAT. But are Libra and legal tenders exactly the same thing? Indeed, cryptocurrencies as Libra might be used for the same purpose of any other legal tender. However, is this really desirable? And shall this be promoted through a lousy interpretation of an exemption which is an exception to the general VAT system? Or shall the decision on extending the exemption be left to the legislator in such a sensitive area?

The negative approach towards libra adopted by France and Germany seems to highlight that some Member States would be inclined to not liberalize or at least not incentivize the use of such currency. In this case, applying VAT on the exchange transaction would make Libra more expensive to use in comparison to other legal tenders. Thus, VAT would play a policy function as well.

### 5.3 Money as a constitutional project

As stated by Menger, “*money is a natural product of human economy*”<sup>51</sup> created by the need of economizing individuals to continuously trade less-liquid for more-liquid commodities which could be easily used to buy according to their needs. From an economic perspective, money has traditionally been seen as fulfilling three different functions, namely being a means of exchange, a store of value and a unit of account. The possibility for Bitcoin to really fulfil these functions has been questioned by many scholars.<sup>52</sup> At the same time, from a legal perspective, historically, money should consist only of legal tenders for which there is a legal obligation to be accepted.<sup>53</sup> At the moment, for Bitcoin or similar

---

<sup>48</sup> *Id.*, p. 5.

<sup>49</sup> *Id.*, p. 8.

<sup>50</sup> *Id.*, p. 7.

<sup>51</sup> C. Menger, *Principles of Economics*, trans J. Dingwall and B. F. Hoselitz, New York University Press, 1981, p. 263.

<sup>52</sup> S. Ammous, “Can cryptocurrencies fulfil the functions of money?”, in *The Quarterly Review of Economics and Finance*, vol. 70, 2018, pp. 38-51; G. Claeys, M. Demertzis, K. Efstathiou, “Cryptocurrencies and monetary policy”, in *Bruegel Policy Contribution*, n. 10/2018; L. Fantacci, “Cryptocurrencies and the Denationalization of Money”, in *International Journal of Political Economy*, vol. 48, 2019; G. Peters, E. Panayi and A. Chapelle, “Trends in Cryptocurrencies and Blockchain Technologies: A Monetary Theory and Regulation Perspective”, in *Journal of Financial Perspectives*, vol. 3, issue n. 3, 2015.

<sup>53</sup> In the law literature, the definition of money follows Knapp's theory: F. A. Mann, *The Legal aspect of Money*, Oxford University Press, 1982, p. 5 et seq. and p. 14 et seq.



cryptocurrencies including the ones which could be potentially issued by big tech companies, there is no such obligation to be accepted.

Nonetheless, there is another dimension of money to be considered when addressing cryptocurrencies and their comparable treatment to traditional legal tenders. Even though, the traditional economic narrative seems to overlook the role of public determinants, money can, indeed, have a constitutional dimension as well.

A first analysis of money as a creation of the State and its relationship with the financing of the State can be attributed to *Suhr* and *Vogel*. Firstly, *Suhr* has analysed the constitutional relevance of money by looking at its relationship with citizens, freedom, property and the welfare State (*Sozialstaatlichkeit*). Focusing on the welfare State, *Suhr* sustains that money should ideally embody the correlation between the obligation to contribute to the social welfare and the entitlement to be the recipient of what has been produced by the welfare state.<sup>54</sup> According to him, this obligation/right relationship would reflect our “*socio-anthropological freedom and socio-anthropological dependency*” relationship within the constitutional welfare State.<sup>55</sup> Drawing from some of *Suhr*’s observations, *Vogel* connects the dots between money, public finances and taxes. Recalling *Bodin*’s definition of public finances as “*le nerfs de la République*”<sup>56</sup>, he highlights how this image perfectly reflects what public finances still represent in today modern States. Indeed, historically, the strengthening of the princes’ power through the formation of standing armies and the transition to a mercantilist economy led to an increasing need for public finances.<sup>57</sup> In its historical excursus in the 16<sup>th</sup> century, he shows how the need for assets by the rulers of the provinces led to the setup of the first type of tax administrations.<sup>58</sup> Starting from this excursus, *Vogel* aims at pointing out how money becomes constitutionally relevant for the organization and the activities of the States and its administrative bodies, both from the viewpoint of the relationship between each other and with citizens. Although *Weber* had already pointed out the relevancy of money in the sphere of public administration by emphasising the importance of remunerating public officials in the legal tender and the need to have a financing system for the bureaucratic apparatus based on money deriving from taxes,<sup>59</sup> according to *Vogel*, the influence of money on modern administration goes much further. With its economic functions alone, money is already able to give administrations the possibility to function and implement instruments for covering and plan what is needed, which without money, the public administration would not have otherwise pursued.<sup>60</sup> In this way, money determined the action of the administrative power. Thus, money can play a fundamental role in the

---

<sup>54</sup> D. Suhr, “Die Geldordnung aus verfassungsrechtlicher Sicht”, in J. Starbatty (ed.), *Geldordnung und Geldpolitik in einer freiheitlichen Gesellschaft*, Mohr, 1982, pp. 113.

<sup>55</sup> Id., p. 116.

<sup>56</sup> J. Bodin, *Lex Six Livres de la République*, 1576, L. VI, cap. 2 p. 855. According to Vogel, Bodin would have been inspired for this definition by Ulpian, Digesto, 1.20: “(tributi) in quibus esse rei publicae nervos”. K. Vogel, “Der Finanz- und Steuerstaat”, in P. Kirchof (ed.), *Klaus Vogel. Der offene Finanz- und Steuerstaat. Ausgewählte Schriften 1964 bis 1990*, C. F. Mueller, 1991, para 22, p. 354.

<sup>57</sup> Ibid.

<sup>58</sup> Id., p. 355, para 23.

<sup>59</sup> M. Weber, *Wirtschaft und Gesellschaft. Grundriß der Verstehenden Soziologie*, Mohr, 1922, vol. 2 p. 655 and vol. 1 p. 129.

<sup>60</sup> K. Vogel, “Der Finanz- und Steuerstaat”, in P. Kirchof (ed.), *Klaus Vogel. Der offene Finanz- und Steuerstaat. Ausgewählte Schriften 1964 bis 1990*, C. F. Mueller, 1991, para 24, p. 356.

relationship between what *Vogel* defines as the “*Finanzstaat*”<sup>61</sup> (Public Finance State) and the “*Steuerstaat*”<sup>62</sup> (Tax State).<sup>63</sup>

Similarly and by looking at the history of money in the UK starting from the medieval age, *Desan* refers to money as a “*constitutional project*”.<sup>64</sup> According to her, in the 7<sup>th</sup> century, at the core of the creation of money there is the need of stakeholders to organize their communities and resources through a common medium. The ruler would have taken goods and labour from the inhabitants of his territory (particularly needed in times of war) and when requiring double the contribution would have rewarded the inhabitants with tokens because they would have fulfilled their obligations in advance.<sup>65</sup> These tokens could have then be passed to other persons and exchanged since they were backed by a value recognised both by the ruler and the same community. At the same time, services and goods are transferred not only depending on the intrinsic value but also based on the legal practice of claiming, using, regulated by the ruler.<sup>66</sup> Because of the functioning of such a system, money can be understood as a “*constitutional project*”, in other words, as a way of governance for a material world. Differently from the classical dichotomy where money has no impact on the real economy and only provides information, from *Desan*’s analysis, it emerges how money represents a way to mark and mobilize material value by starting at the core, gaining resources and information and then redirecting them within a community.<sup>67</sup> Money carries material value and it does so by changing the way people relate to resources and in this same way it distributes costs and profits. Money acting as a “*mode of governance*” creates new value for the authorities and the individuals.<sup>68</sup>

If money can be considered as a constitutional project which grows and evolves within our constitutional development, this requires monetary policies interlinked with a democratic constitutional basis. However, a democratic constitutional basis pivoted on a checks and balances principle seems to be currently lacking in cryptocurrencies.<sup>69</sup> Even if one of the main features of Bitcoin is to be

---

<sup>61</sup> For the definition according to *Vogel*, see K. *Vogel*, “Der Finanz- und Steuerstaat”, in P. *Kirchhof* (ed.), *Klaus Vogel. Der offene Finanz- und Steuerstaat. Ausgewählte Schriften 1964 bis 1990*, C. F. *Mueller*, 1991, pp. 346-347.

<sup>62</sup> For the definition according to *Vogel*, see K. *Vogel*, “Der Finanz- und Steuerstaat”, in P. *Kirchhof* (ed.), *Klaus Vogel. Der offene Finanz- und Steuerstaat. Ausgewählte Schriften 1964 bis 1990*, C. F. *Mueller*, 1991, pp. 346-347, pp. 369 et seq.

<sup>63</sup> *Id.*, p. 350, para. 11.

<sup>64</sup> C. *Desan*, *Making Money: Coin, Currency, and the Coming of Capitalism*, Oxford University Press, 2014.

<sup>65</sup> *Id.*, p. 52. Differently, *Lupi* sees money as the link between the economic circuit and the political-legal circuit. Money is a form of credit which is born in the private sector, i.e. in the economic exchanges between private but is a credit granted by the public power, which in exchange for providing defence and a legal systems with remedies enabling the maintenance of the public order, will receive a quote of what produced in the economic circuit. Thus, the public power which in the past would have received percentage from the material goods and services produced in the economic circuit would have returned part of them in circulation in the form of money which the public power itself would have granted. R. *Lupi*, “Moneta e sovranità, tra economia e diritto”, in *Innovazione e diritto*, issue n. 6, 2017, pp. 149 et seq.

<sup>66</sup> *Id.*, p. 39.

<sup>67</sup> *Id.*, p. 42.

<sup>68</sup> C. *Desan*, “Money as a Legal Institution”, in D. *Fox* and W. *Ernst* (eds.), *Money in the Western Legal Tradition: Middle Ages to Bretton Woods*, Oxford University Press, 2016, p. 21.

<sup>69</sup> On the misunderstanding the power dynamics within blockchain systems: A. *Walch*, “Deconstructing 'Decentralization': Exploring the Core Claim of Crypto Systems”, in C. *Brummer* (ed.), *Crypto Assets: Legal and Monetary Perspectives*, Oxford University Press, 2020. On the concentration of powers in certain mining pools: O. *Kharif*, Bitcoin’s Network Operations Are Controlled by Five Companies, in *Bloomberg*, 31.01.2020, available at this link: <https://www.bloomberg.com/news/articles/2020-01-31/bitcoin-s-network-operations-are-controlled-by-five-companies>. On the efforts in preventing mining pools to get more than 51% of Bitcoins processing power as it happened in June 2014, see P. *Goutam*, S. *Pratik* and M. *Sarbajit*, Towards a More

decentralized and to allow anybody to participate in the mining and validation of transactions, mining is still mostly undertaken by a concentration of miners, in other words a concentration of power. This concentration of discretionary power to be found also in the case of virtual currencies issued by multinational companies. However, as money represents a constitutional project, it cannot be separated from fiscal policies and how resources will be redistributed, which in a democratic society shall be in the public interest of a community and aimed at fulfilling socio and economic rights. Indeed, our current banking and financial system, as well as our monetary and fiscal policies are far from perfect. Thus, in this sense, cryptocurrencies may nonetheless be an opportunity to open our eyes on current fallacies and to look at them through different lenses.

## Conclusions

In this constantly changing society, cryptocurrencies, including but not limited to Bitcoin, pose challenges to the VAT system as well. After the CJEU decision of 2015, no other cases on the topic have undergone the scrutiny of the European Court. At the same time, as the previous sections have demonstrated, the outcome of the *Hedqvist* decision can be contested. This becomes even more necessary nowadays as the attention towards Bitcoin is increasing once again and as multinational tech companies are thinking about launching their own virtual currencies.

The grounds under which the CJEU decision can be challenged are mainly three. First of all, contrary to the assumption of the Court in 2015, Bitcoins are not mainly used as means of payment but as a store of value. For this reason, it must be questioned whether the exemption contained in Art. 135 (1) (e) shall find application merely on the basis that Bitcoin plays the same function of traditional legal tenders. Secondly, the alleged multilingualism issue can be easily solved through historic interpretation of the VAT Directive provision. Second of all, extending the exemption contained in Article 135 (1) (e) based on the technical difficulties of applying VAT to financial transactions as the underlying reason for VAT financial exemption does not hold anymore under the light of more recent proposals to reform VAT and to introducing a FTT. Thus, there must be another underlying reason at present to justify the extensive interpretation of an exception to the application of VAT as a general consumption tax.

Moreover, when addressing the VAT treatment of transaction involving Bitcoin, or cryptocurrencies which according to the Court are envisaged to be used as pure means of payment, it must be considered that legal tenders are expressions of the sovereignty of a State. Shall cryptocurrencies be treated in the same way as legal tenders even from “*just*” a VAT perspective? Doing so will make them easily accepted as any other legal tender. While it might seem that there would be no harm in embracing this approach, it is still important to keep in mind the other side of the medal. Cryptocurrencies such as Bitcoin are not issued by any public body, over these currencies there is no control by any State and their governance framework is only apparently transparent and lacks an independent system of checks and balance. Thus, when things go wrong, they still require the same democratic institutional framework they aim to escape.<sup>70</sup> This also leads to the question of whether it would not be legitimate from the legislator perspective to restrict the exemption on currencies different from legal tenders in order to reaffirm of monetary policy as a prerogative of the State.

---

Democratic Mining in Bitcoins, in A. Prakash, R. Shyamasundar (eds), Information Systems Security. ICISS 2014. Lecture Notes in Computer Science, vol 8880, Springer 2014.

<sup>70</sup> Episodes such as the Mt Gox insolvency and the DAO ‘hack’ clearly shows that human decision-making still plays a fundamental role. R. M. Lastra and J. G. Allen, *Virtual currencies in the Eurosystem: challenges ahead*, Monetary Dialogue July 2018, European Parliament Study, 2018, p. 18. More recently, there has been a new fraud case investigated in the US, <https://www.justice.gov/usao-nj/pr/two-people-indicted-30-million-dollar-fraud-scheme-involving-blockchain-technology>.

Bitcoin and most importantly, the underlying Blockchain technology represent a fundamental technological development with possible economic and societal implications. Yet we should ask ourselves, what type of innovation is being fostered through cryptocurrencies and how to make sure malicious players do not benefit from the lack of regulation at the expenses of the other well-intentioned players. As highlighted by *Pistor*, in a decentralized digital world where the State is no longer needed, digital code is scalable and offer the possibility to a few “*super-coders*” to settle rules and conditions for everyone else.<sup>71</sup> Even though they want to escape traditional hierarchical structures and distribution of powers, they still internally live the same struggle. Even in the digital sphere someone will be in charge of writing the code, others of monitoring it and others to fix the bugs. Hierarchical structures are reproduced within the systems because even if the code is based on meritocracy, intrinsically this still means that only the one with better skills will be the one ruling for all the others. Equal rights among coders are also not automatically given through the participation to the code. At the same time, it shall be questioned in whose interests the code is serving or ought to serve.<sup>72</sup>

Conclusively, because of the critiques to the CJEU previously outlined, it is hard to justify an extensive interpretation of the VAT exemption contained in Article 135 (1) (e) to Bitcoin and similar cryptocurrencies. The broader concerns that this technology raise and the implications it might have on our economy and society, demand a legislative intervention. The decision of exempting certain transactions from VAT represents a political choice and as such should be taken by the European legislator. Legislative measures have already been taken in the area of money-laundering taking distance from the CJEU decision. As we see the developments of new crypto-assets and the reinvigorated interest in Bitcoin and similar cryptocurrencies, a legislative proposal in the area of VAT is a necessary step forward.

---

<sup>71</sup> K. Pistor, *The Code of Capital*, Princeton University Press, 2019, p. 185.

<sup>72</sup> *Ibid.*