REGISTRATION OBLIGATION OF VIRTUAL CURRENCY PROVIDERS IN THE EU

Master's thesis
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ABSTRACT

UNIVERSITY OF TURKU
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JENNA PENTIKÄINEN: Registration obligation of virtual currency providers in the EU

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The originality of this thesis has been checked in accordance with the University of Turku quality assurance system using the Turnitin Originality Check service.

This thesis examines the registration obligation of virtual currency providers according to the Fifth AML Directive in the light of EU internal market law. The regulator in the EU level did not take a stand on the applicability of the internal market framework in the case of virtual currency providers and it left leeway to Member States to define the scope of registration. Therefore, this thesis first examines the legal nature of virtual currencies and virtual currency providers in order to further examine the topic. It concludes that virtual currencies can be categorised under the concept of services or capital. However, the virtual currency providers are defined under the definition of services in the internal market due to their background on the Fifth AML Directive.

The research method of this thesis is legal dogmatic as it examines the current EU legal framework, relevant national legislation in Finland and the case law of the European Court of Justice. As secondary legislation in the EU does not provide an answer to the question whether a virtual currency provider can use the so-called EU passport, in other words it is unclear whether virtual currency providers can provide their services in other Member States with one registration. This thesis examines the foundations of internal market regulation. It is reasoned that there is indeed a restriction as the registration in the Host Member State causes a dual burden. As the restriction can be tackled with the mutual recognition principle, the application of the mutual recognition in the light of free movement of services is evaluated. It is also recognised that a Member State may have the option to use exceptions to justify the restriction. The relevant options for justifications relate to AML policy and consumer protection. It is concluded that a Member State may have a possibility to use the AML policy as a justification, but first it needs to prove that there was no less restrictive measure available. The author considers prior declaration as a national measure, which is more proportionate measure than prior registration. In addition to that it is noted that consumer protection may be more problematic as it is more regulated at the EU level in other secondary legislation. Furthermore, it has to be said that the stage of the regulation may change soon at the EU level as the European Commission is at the time of writing this thesis asking for consultation regarding the virtual currency markets. The further developments by the European Commission are estimated to be published on the Q3/2020.

Key words: EU law, virtual currencies, virtual currency providers, internal market, free movement of services, EU passport

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Tämän tutkielman tavoitteena on arvioida viidennen rahanpesudirektiivin mukaista virtuaalivaluutan tarjoajien rekisteröitymisvelvollisuutta EU:n sisämarkkinasääntelyn mukaisesti. Lainsäätäjä ei ole ottanut EU-tasolla kantaa, miten sisämarkkinoita koskevia yleisiä periaatteita sovelletaan virtuaalivaluutan tarjoajien kohdalla ja tämä jätti jäsenvaltioille liikkumavaraa määritellä rekisteröinnin ulottuvuutta. Tästä syystä tämä tutkielma käsittelee ensin virtuaalivaluuttojen ja virtuaalivaluutan tarjoajien luonnetta, jotta aihetta voi käsitellä pidemmälle. Lopputulokseksi saadaan, että virtuaalivaluutat voidaan jakaa joko palveluiden tai pääoman käsitteen alle. Kuitenkin virtuaalivaluutan tarjoajat voidaan kategorisoida kuuluvaksi palveluiden alle viidennen rahanpesudirektiivin tausta huomioiden.

Tutkielman tutkimusmetodina on lainoppi, sillä tutkielma arvioi nykyistä EU:n oikeudellista kehystä, Suomen lainsäädäntöä ja EU:n tuomioistuimen oikeuskäytäntöä. EU:n sekundaarilainsäädäntö ei anna vastausta siihen, saavatko virtuaalivaluutan tarjoajat käyttää niin sanottua EU-passia. Toisin sanoen voivatko virtuaalivaluutan tarjoajat tarjota yhdellä rekisteröinnillä palvelujansa muissa jäsenmaissa. Tutkielma tarkastelee tästä syystä EU:n sisämarkkinoiden lähtökohtia. Tutkielmassa päätellään, että kyseessä on rajoitus, koska kohdejäsenvaltiossa rekisteröityminen aiheuttaa päällekkäisen hallinnollisen taakan. Koska rajoitusta voidaan minimoida vastavuoroisen tunnustamisen periaatteen mukaisesti, tutkielmassa arvioidaan vastavuoroisen tunnustamisen soveltuvuutta palveluiden vapaan liikkuvuuden kautta. Kuitenkin, on huomioitu, että jäsenvaltioilla voi olla mahdollisuus käyttää oikeuttamisperusteita rajoituksen hyväksymiseksi. Merkityksellisimmiksi vaihtoehdoiksi oikeuttamisperusteille nousevat rahanpesun estäminen ja kuluttajansuoja. Lopputuloksena saadaan, että jäsenvaltiolla voi olla mahdollisuus käyttää rahanpesun estämistä oikeuttamisperusteena, mutta jäsenvaltion tulee ensin näyttää toteen, että tarjolla ei ollut vähemmän rajoittavia keinoja. Tutkielman kirjoittaja pitää ennakkoilmoitusta kohtuullisempana keinona kuin kaksinkertaista rekisteröitymistä. Tämän lisäksi on huomioitu, että kuluttajansuoja voi olla ongelmallinen oikeuttamisperusteena, sillä kuluttajansuoja on tarkemmin säädelty EU-tasolla muualla sekundaarilainsäädännössä. Lisäksi on syytä todeta, että lainsäädännön taso voi muuttua pian EU-tasolla, sillä EU:n komissio on tutkielman kirjoittamisen aikana aloittanut lausuntokierroksen virtuaalivaluuttamarkkinoista. Komission seuraavat kehityskohteet ovat arvioiden mukaan julki kolmannen vuosineljänneksen aikana vuonna 2020.

Asiasanat: EU-oikeus, virtuaalivaluutat, virtuaalivaluutan tarjoajat, sisämarkkinat, palveluiden vapaa liikkuvuus, EU-passi

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Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337.

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Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156.

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ABBREVIATIONS

AML	Anti-money laundering
AML4 Directive	Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141.
AML5 Directive	Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156.
BaFin	German Federal Financial Supervisory Authority
Court	European Court of Justice
CMU	Capital Markets Union
CTF	Counter terrorism financing
DLT	Distributed Ledger Technology
EBA	European Banking Authority
E-commerce Directive	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178.

ESMA	European Securities and Markets Authority
FATF	Financial Action Task Force
FIN-FSA	Finnish Financial Supervisory Authority
FinTech	Financial Technology
MiFID	Markets in Financial Instruments Directive
PSD2	Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337
VAT	Value added tax
Virtual Currency Act	Act on Virtual Currency Providers (572/2019)

1 INTRODUCTION

1.1 Background to the topic

The most commonly known virtual currency, Bitcoin was created a bit over a decade ago. Throughout these years, Bitcoin has developed immensely, and other virtual currencies have been established. In its early years, Bitcoin was only used among the tech-savvy people, but after the huge rise in the price in 2017 Bitcoin became known everywhere and also gained attention from the traditional media.[1] As more people have become familiar with Bitcoin and other virtual currencies, regulators have also woken up for the need of a coherent regulation. A trend can be seen everywhere as especially the law enforcement side has been worried about the illicit activity among virtual currencies.[2] However, already in 2013 the European Banking Authority (hereinafter the "EBA") warned about the risks concerning virtual currencies as at the time no specific regulatory protection existed, which meant that no one would cover the losses if a virtual currency exchange went out of business or otherwise failed in holding customer's virtual currencies.[3]

Six years later from the EBA's warning there is still no uniform regulation in the EU, which defines the virtual currencies as a good or as form of money. Virtual currencies have different characteristics and the EU has decided at least until now that the definition of the virtual currency will depend on the Member State. However, one step has already been taken in the EU as virtual currency providers will come under the Anti-Money Laundering and Counter-Terrorist Financing Directives The Fifth Anti-Money Laundering Directive[4] (hereinafter the "AML5 Directive") states in the Article

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[1] Gareth Jenkinson, 'A Brief History of Bitcoin : 10 Years of Highs and Lows' (*Cointelegraph*, 2018) <https://cointelegraph.com/news/a-brief-history-of-bitcoin-10-years-of-highs-and-lows> accessed 13 May 2019.

[2] Europol, 'Money Laundering with Digital Currencies: Working Group Established | Europol' (September 2016) <https://www.europol.europa.eu/newsroom/news/money-laundering-digital-currencies-working-group-established> accessed 26 October 2019.

[3] European Banking Authority, 'Warning to Consumers on Virtual Currencies' (December 2013) EBA/WRG/2013/01, 1.

[4] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156.

47 that '*Member States shall ensure that providers of the exchange services between virtual currencies and fiat currencies, and custodian wallet providers, are registered*'. In other words, this means that virtual currency providers are obligated to register in order to continue their business.

All Member States are obligated to implement the AML5 Directive. Therefore, according to the Article 4, virtual currency providers need to be covered by the regulation before 10th of January 2020. Finland has shown a great example in this regard, as the new law, the Act on Virtual Currency Providers (572/2019)[5](hereinafter the "Virtual Currency Act") entered into force on 1st of May 2019. According to the section 19 of the Act, virtual currency providers are obligated to register to the Finnish Financial Supervisory Authority (hereinafter the "FIN-FSA") before 1st of November 2019. The registration obligation concerns only anti-money laundering regulation and does not cover consumer protection or other financial regulation.

1.2 Research questions and delimitations

The FIN-FSA has stated that the registration of a virtual currency provider will not grant a free pass to other Member States and a virtual currency provider may be obligated to register in other EU countries.[6] This means that virtual currency providers are not able to use the basic concept in EU law, the so-called EU passport, which normally gives to the financial operators the possibility to leverage from the free movement of services and capital. The FIN-FSA confirmed its statement in the press release on 1st of November 2019, when it had granted registrations to five virtual currency providers in Finland.[7] The FIN-FSA's statements lead to the research questions of this thesis. The first research question concerns Finnish virtual currency providers and is defined as follows:

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[5] Act on Virtual Currency Providers [2019] 572/2019. See in Finnish *Laki virtuaalivaluutan tarjoajista* (572/2019).

[6] Finnish Financial Supervisory Authority, 'Virtual Currency Providers to Be Supervised by the FIN-FSA – Briefing for Virtual Currency Providers on 15 May' <https://www.finanssivalvonta.fi/en/publications-and-press-releases/supervision-releases/2019/virtual-currency-providers-to-be-supervised-by-the-fin-fsa--briefing-for-virtual-currency-providers-on-15-may/> accessed 11 May 2019.

[7] Finnish Financial Supervisory Authority, 'The Financial Supervisory Authority Granted Five Registrations as Virtual Currency Provider – Scope of Supervision Is the Prevention of Money Laundering' (2019) <https://www.finanssivalvonta.fi/en/publications-and-press-releases/Press-release/2019/the-financial-supervisory-authority-granted-five-registrations-as-virtual-currency-provider--scope-of-supervision-is-the-prevention-of-money-laundering/> accessed 3 November 2019.

1) Is a virtual currency provider obligated to register in other EU countries when it has been granted a registration from the FIN-FSA and if it is obligated to register on what grounds is this necessary?

As the EU passport is two-folded, this thesis also examines the other direction, which is formulated below:

2) If a virtual currency provider from a Member State other than Finland has received the registration in its own home Member State, can the FIN-FSA require the virtual currency provider to register also in Finland?

However, it should be noted that in order to evaluate and answer to the first and the second research question, virtual currencies and virtual currency providers need to be categorised in the EU's fundamental freedoms. This is the method that is used when the European Court of Justice (hereinafter the "Court") evaluates restrictions to the internal market.[8] The AML5 Directive and the Virtual Currency Act do not categorise virtual currencies in the light of the fundamental freedoms of EU. Therefore, the third research question evaluates the following and it is a prerequisite for the first and the second research questions:

3) Where can virtual currencies and virtual currency providers be categorised in the EU's fundamental freedoms? In other words, can virtual currencies and virtual currency providers be defined as goods, services or capital?

As the concept of virtual currency providers is broad, the thesis will not cover all the virtual currency providers. The AML5 Directive and the Virtual Currency Act cover different types of virtual currency providers. This thesis will concentrate on virtual currency exchange services. According to the section 2 in the Act on Virtual Currency Providers, a virtual currency exchange service refers to a service that it is practised by a natural or legal person as a business or professional activity. Additionally, virtual

[8] The Court evaluates restrictions to the internal market in the following order, if the fundamental freedom is not commonly known: Firstly, it evaluates where the subject matter can be categorized under the fundamental freedoms. Secondly, the Court examines that is there a restriction in the light of the specific fundamental freedom. If the Court notices that there is a restriction, it evaluates can the Member State make an exception in the internal market and justify the restriction. See the Court's pattern i.e. in Case C-97/98 *Peter Jägerskiöld v Torolf Gustafsson* [1999] ECR I-07319.

currency exchange services are services, which exchange virtual currencies into legal tender or to other virtual currencies. The term 'virtual currency exchange service' can also refer to exchange of a virtual currency into another commodity or the exchange of another commodity into virtual currency. Lastly, it can refer to the operation of a marketplace where a virtual currency provider's customer may engage in the activities mentioned previously.

The Treaty on the Functioning of the European Union (hereinafter the "TFEU")[9] notes on its Article 26 that internal market consists of an area which lacks internal frontiers. The article further specifies that inside this area the free movement of goods, persons, services and capital is ensured. As it is clear that virtual currencies do not fall into the category of free movement of persons, this thesis examines the possibility of virtual currencies to be considered goods, services or capital. All these three freedoms define what constitutes a restriction according to the TFEU and give possible justification reasons to Member States to allow such a restriction. This thesis evaluates the possibility of a Member State justifying the exception to internal market based on anti-money laundering (hereinafter the "AML") policy or consumer protection.

1.3 Research method, sources & research ethics

This thesis concentrates on the basic principles of EU law as it evaluates the suitability of the AML5 Directive and its national implementation measures in the light of the fundamental freedoms and those principles, which are applicable to them. Therefore, the research method in this thesis is legal dogmatic method, which systematizes and interprets current legislation. Legal dogmatic method evaluates the current legislation and gives meanings to different sources of legislation such as case law and legislative history. Additionally, legal dogmatic method considers various legal principles and gives to the principles different values.[10]

Legal dogmatic is the selected method as this thesis interprets and systemises the EU's primary and secondary law. Also, to further understand the primary and secondary law this thesis examines relevant case law of the Court. The selected research method

[9] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326.
[10] Ari Hirvonen, *Mitkä Metodit ? Opas Oikeustieteen Metodologiaan*, vol 17 (Helsinki 2011) 22–24.

analyses the reasoning of courts and their coherence alongside the application sources of law of the EU.[11] As the research questions focus on the situation in Finland, relevant Finnish national legislation and its legislative history are also used in order to gain a more comprehensive picture of the applicable regulations.

In addition to relevant Finnish legislation the EU angle is noted particularly through the TFEU, case law of the Court and the EBA's reports as the EBA has taken an active role in clarifying the risks related to virtual currencies at the EU level. The author of this thesis works in a registered virtual currency provider, which is supervised by the FIN-FSA. However, the author has not been assigned by a virtual currency provider to write this thesis.

1.4 Structure of the thesis

The structure of the thesis follows the classical pattern, which is commonly used not only in the EU internal market research but also in the Court's case law. As virtual currencies have rather complex technical features, the problems that are generally faced when regulating new technologies are explored in chapter 2. After this, it is explained what kind of characteristics virtual currencies have and how they fit into the definition of traditional currency such as euro and dollar. This chapter also sheds light on the current EU framework covering virtual currencies and their providers.

Chapter 3 dives into internal market regulation by reviewing the three freedoms of the internal market: goods, services and capital. It is examined to which category virtual currencies fall into order to further examine their position in the internal market. The chapter 4 compares requirements that financial institutions have when they want to benefit from the internal market and operate in other Member States and receive the so-called EU passport.

Chapter 5 forms the core of this thesis because it covers the most vital components of the research questions. First, it is examined whether a Member State is discriminating a foreign virtual currency provider and whether this can cause a restriction in the light of

[11] Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 38.

the internal market regulations. After the possible restriction is evaluated, the chapter 5 focuses on the mutual recognition principle in the EU framework and examines whether this principle is applied to virtual currency providers. After assessing the mutual recognition, it is evaluated whether a Member State can give a reason for the restriction and use justifications, which are stated in the Treaty on the Functioning of the European Union. Finally, conclusions of this thesis are gathered in chapter 6.

2 VIRTUAL CURRENCIES FROM THE LEGAL PERSPECTIVE

2.1 Defining the legal status of virtual currencies in the EU

This chapter evaluates the general problem associated with regulation of new technologies and leads to exploring the characteristics of virtual currencies and how these virtual currencies compare with traditional fiat money. After a brief examination of these issues, it is further evaluated how virtual currencies and their providers are defined in the common EU legal framework.

2.1.1 The problem with regulating new technologies

As virtual currencies have existed only for a decade it is challenging to regulate this new and emerging technology. The reasons why it is challenging are mainly due to problems of uncertainty and limited knowledge in the assessment and management of technological risks. Law has a critical role in managing tensions between innovation and risk by ensuring a high level of protection, providing safety nets, and assigning responsibility for potential damage. Occasionally, law is considered to be either an obstacle to innovations or to be unable to protect society from other risks.[12] European Banking Authority has already in 2014 evaluated risks associated with virtual currencies seeking to identify the most critical features of virtual currencies.[13]

Goodhart and Lastra have brought up so-called border problems after the 2008 Global Financial Crisis, when regulating a new field. According to their analysis there are two main borders, which are causing difficulties. The first one is the border between both, regulated and unregulated entities, and the border between regulated and unregulated activities. This means that unregulated entities start engaging in regulated activities or regulated entities start engaging in unregulated activities. For example, a regulated

[12] Maria Weimer and Luisa Marin, 'The Role of Law in Managing the Tension between Risk and Innovation' (2016) 7 European Journal of Risk Regulation (EJRR) 469, 469.
[13] European Banking Authority, 'Opinion on "Virtual Currencies"' (July 2014) EBA/Op/2014/08.

financial services provider starts trading in virtual currencies or uses virtual currencies as the underlying asset of a regulated product.[14]

Second border problem relates to the border between national jurisdictions. This refers to the transnational nature of the financial activity and national basis of regulation can lead into outcomes, which are not optimal. Virtual currencies are by nature trans-jurisdictional and make national regulations more difficult to enforce.[15] This point highlights even more the need of examination of the EU level approach to the regulation and possible application of the internal market regulation. Additionally, due to the transnational nature of virtual currencies, one possible outcome could be that the virtual currency providers will move outside of the EU. The European Banking Authority (EBA) published conclusions from the consultation on its approach to Financial Technology (Hereinafter the "FinTech"), which includes also virtual currency providers. Respondents underlined solutions for preventing forum shopping. Additionally, good solutions would promote consumer and investor confidence. Good solutions could also promote the attractiveness and competitiveness of the internal market for the Financial Technology.[16]

However, this is not a simple task even in the EU as there are still certain problems related to the creation of a European financial market. This implies that even on the traditional financial side market integration has not been very effective in the EU. Traditionally, financial markets have been separated by national borders, which leads to the situation where many financial services and most financial institutions are still limited to one country. Secondly, as financial markets are becoming markets without state, this makes national regulators less effective and may lead to the opposite direction. This can be seen at the European level in a way that national regulations impede market access and make cross-border establishment and provision of services too expensive for the financial institutions to take off in many parts of the market.[17]

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[14] Rosa María Lastra and Jason Grant Allen, 'Virtual Currencies in the Eurosystem: Challenges Ahead' (2018) PE 619.020, 13.
[15] ibid 13.
[16] European Banking Authority, 'The EBA's Fintech Roadmap: Conclusions from the Consultation on the EBA's Approach to Financial Technology (FinTech)' (March 2018), 12.
[17] Mads Andenas, 'Harmonising and Regulating Financial Markets' in Mads Andenas and Camilla Baasch Andersen (eds), Theory and Practice of Harmonisation (Edward Elgar Publishing 2012), 1–2.

When it comes to virtual currencies, Member States have adopted very diverse approaches in regulating virtual currencies. There are some jurisdictions with advanced regulatory framework, and these are often smaller countries with a low level of virtual currency activities. These Member States are trying to attract more virtual currency providers to their area. However, larger Member States may suffer the potential risks due to the cross-border nature of virtual currencies.[18]

Additionally, when regulating a new technology, it is important to highlight the consequences of the level of regulation. Therefore, it is crucial to have an appropriate balance between forcefully addressing the risks and abuses while avoiding overregulation that could slow down innovation. In the case of virtual currencies, there might be even risks to financial stability, if the technologies attract a more wide-spread use.[19] It is important to acknowledge in the drafting phase that new regulations can also be applied and still remain relevant even if the market is new and rising. One particular challenge in the drafting of the proper regulation applicable to virtual currencies is the fact that these currencies do not have physical presence and their transactions operate in a different manner than the fiat currencies. Traditional financial regulations are based on actual physical commodities such as coins and bank notes and this is the base that is used to further develop the regulation.[20]

European Banking Authority's stakeholder group has stated that there might be circumstances where it is not clear whether a new financial product or service complies with legal and regulatory requirements. This might lead to caution on the innovator's side, and they might choose not to implement the new financial product. The EU desires to have an environment, which encourages innovations, but at the same time the environment cannot compromise the way how financial system works in terms of

[18] Apolline Blandin and others, 'Global Cryptoasset Regulatory Landscape Study' (2019) https://www.jbs.cam.ac.uk/fileadmin/user_upload/research/centres/alternative-finance/downloads/2019-04-ccaf-global-cryptoasset-regulatory-landscape-study.pdf accessed 26 July 2019, 42.
[19] Dong He and others, 'Virtual Currencies and Beyond: Initial Considerations' (January 2016) SDN/16/03, 6.
[20] Mohammed Ahmad Naheem, 'Regulating Virtual Currencies-the Challenges of Applying Fiat Currency Laws to Digital Technology Services' (2018) 25 Journal of Financial Crime 562, 563, 565.

consumers' trust and confidence. The environment also takes into consideration fair and efficient operation of the financial system.[21]

The terminology and classification of virtual currencies have been unclear between regulators as there is no coherent terminology on virtual currencies. There is no clear definition for different terms. Therefore, regulators are facing several challenges in drafting of the regulation. For example, it is cumbersome to understand the nuances of various terms associated with virtual currencies and identify the terminology, which is most suitable for regulatory objectives. The regulator needs to define the terminology clearly and ensure that it is used consistently in official statements. EU law and national law in most cases use the term 'virtual currencies', Financial Action Task Force (hereinafter the "FATF") refers to 'virtual assets' and the industry itself has used the term 'cryptocurrencies'.[22]

However, the EBA has already in 2014 pointed out that from a regulatory perspective the term 'currency' is misleading. Currency as a term usually implies the highest liquidity of an asset, and a wide or universal acceptance within its geography. It also refers to exchangeability with other currencies, which might not hold true in all virtual currency schemes.[23] Even though there is this misleading concept of currency, this thesis uses the term 'virtual currencies' as it is the term that EU law officially employs.

2.1.2 The legal nature of virtual currencies

Firstly, the legal status of virtual currencies needs to be defined in order to place virtual currencies into right categorisation of the internal market regulations. This chapter will examine the characteristics of virtual currencies and evaluate how Member States and the EU has defined virtual currencies in the secondary legislation. The purpose for using virtual currencies may vary a lot because, for example, some people use virtual currencies as a means of payment for goods and services. However, the primary

[21] Emilios Avgouleas, 'The Role of Financial Innovation in EU Market Integration and the Capital Markets Union: A Reconceptualization of Policy Objectives' in Danny Busch, Emilios Avgouleas and Guido Ferrarini (eds), *Capital Markets Union in Europe* (1st edn, Oxford University Press 2018) 188.
[22] Blandin and others (n 18) 13, 15.
[23] European Banking Authority, 'Opinion on "Virtual Currencies"' (n 13) 10.

function for many people has been using virtual currencies as a store value, which can be defined more as a speculative asset than a unit of money.[24]

Virtual currencies have different features and some of the features may depend on the specific virtual currency. Virtual currencies have the possibility of instant settlements as it is not compulsory to use a third party due to the decentralised peer-to-peer nature of virtual currencies. This feature differs virtual currencies from other digital payments because the latter as a rule require an intermediary body. Also, due to the decentralised nature, there is zero commission for transactions. Additionally, the settlements may be anonymous, and payments are irrevocable as it is not possible to reverse a transaction once it is in the blockchain. However, virtual currency transactions such as Bitcoin transactions are not fully anonymous as the transaction is recorded in the public ledger. Lastly, there is no need to convert the virtual currency into the country of settlements' currency as virtual currencies can be used as a payment method.[25]

European Central Bank has defined virtual currencies as a digital representation of value, not issued by a central bank, credit institution or e-money institution. Additionally, in some circumstances virtual currencies can be used as an alternative to money. The European Central Bank does not recognise virtual currencies as money or a currency. If the virtual currencies were money, they would need to fulfil certain criteria from an economic perspective.[26] Lawyers' approach to money is much more limited as the basic function of the money is money serving as a universal medium of exchange, which means that the money has to have 'legal tender'. In general, it can be said that economists view everything functioning like money as money.[27]

Economic literature states that there are three functions of money: i) a medium of exchange; ii) a store of value and ii) a unit of account. The most common virtual currency, Bitcoin has certain limited functions because it can be used as medium of exchange, but it has a very low level of acceptance among the general public as a

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[24] Lastra and Allen (n 14) 9.

[25] Elena Anatolyevna Kirillova and others, 'Bitcoin, Lifecoin, Namecoin: The Legal Nature of Virtual Currency' (2018) IX Journal of Advanced Research in Law and Economics 119, 124; Judith Lee and others, Bitcoin Basics: A Primer on Virtual Currencies' (2015) 16 Business Law International 21, 22.

[26] European Central Bank, 'Virtual Currency Schemes-a Further Analysis' (February 2015) 23, 25.

[27] FA (Frederick Alexander) Mann, *The Legal Aspect of Money: With Special Reference to Comparative Private and Public International Law* (4. ed, Oxford University Press 1982) 5.

payment method. Additionally, the high volatility of virtual currencies' exchange rates to currencies causes problems for the store of value function. Therefore, these two observations make virtual currencies complicated to define as money from the economic perspective.[28] Many economists argue that virtual currencies do not satisfy the traditional definition of money.[29] However, one might argue that based on this argument even some of the government issued currencies are not money as they have suffered from a hyperinflation. Also, it is important to note that in the future there might be a possibility that the number of virtual currency users and virtual currency transactions will increase to the level that virtual currency can substitute the sovereign currency.[30]

The AML5 Directive defines virtual currencies in Article 3 point 16. The Directive states that virtual currencies mean '*a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically*'. The definition shares many common elements with other definitions that are used elsewhere to describe virtual currencies. It covers the form of the asset as it is digital presentation of value, its associated properties as its transferable, storable and tradeable and lastly, it prescribes the primary function as a means of exchange.[31]

According to the EBA, the term 'digital presentation of value' is close to the monetary concept of a 'unit of account', which was mentioned earlier in the context of the economic perspective to virtual currencies. However, this term includes the option to consider virtual currencies as private money or a commodity. As virtual currencies are not issued by a central bank or public authority they are not considered as official currency, the so-called fiat currency.[32]

[28] European Central Bank (n 26) 23–24.
[29] Marek Dabrowski and Lukasz Janikowski, 'Virtual Currencies and Their Potential Impact on Financial Markets and Monetary Policy' (2018) 495, 13.
[30] ibid 14.
[31] Blandin and others (n 18) 36.
[32] European Banking Authority, 'Opinion on "Virtual Currencies"' (n 13) 11.

Furthermore, the AML5 Directive leaves electronic money and payment services outside of the concept of virtual currencies. Electronic money issuers and payment service provides are obliged entities under the AML framework, but they also have additional regulation in the EU level as in the case of virtual currencies, the AML5 directive is the only directive, where virtual currencies are clearly mentioned. Also, the so-called in-games currencies, which can be used exclusively within a specific game environment are not virtual currencies according to the AML5 Directive.[33] The newest Payment Service Directive (Hereinafter the "PSD2")[34] defines funds in the Article 4 as banknotes and coins, scriptural money or electronic money and therefore, virtual currencies do not fall under this definition.

Some virtual currencies are similar to commodities such as commodity-based currency systems (e.g. gold standard) in that the supply of the specific virtual currency is limited. Therefore, due to this reason virtual currencies are subject to great volatility and potential speculation if the demand far exceeds supply. The difference between virtual currencies and commodities such as gold, however, is that gold has an intrinsic value and a physical representation. The only commodity feature in a virtual currency like bitcoin is a 'chain of digital signatures' in other words the blockchain, which is a record of transfers of value and resembles an account ledger.[35]

None of the Member States has recognised virtual currencies as fiat money, which has legal tender[36]. In order to have legal tender, specific conditions must be fulfilled. First of all, accepting the currency has to be mandatory in a Member State, in other words the creditor of a payment obligation cannot refuse from accepting the currency unless the parties have agreed on other means of payment. Secondly, the currency has to have an acceptance at full face value, which means that the monetary value is equal to the amount indicated in the currency. Lastly, the currency has the power to discharge the

[33] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156 recital 12.

[34] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337.

[35] Lastra and Allen (n 14) 10.

[36] European Banking Authority, 'Report with Advice for the European Commission on Crypto-Assets' (January 2019) 12.

debtors from their payment obligations.[37] If virtual currencies are not defined as money, other options i.e. financial service definition needs to be evaluated. The next section explains the angle from the EU's financial supervisory authorities.

2.1.3 Virtual currencies as a financial service

European Central Bank's definition 'digital representation of value' may give an option to define virtual currencies as financial service. However, European Banking Authority has stated in their *Report with advice for the European Commission on crypto-assets* in January 2019 that current EU financial services law does not apply to many different forms of crypto activities.[38] The European Commission is currently investigating the reports from EBA and the European Securities and Markets Authority (hereinafter the "ESMA") and it will take further steps in the future.[39] If the virtual currency is defined as a security, it faces many consequences as it will affect the virtual currency's status under capital markets, prudential and tax regulations.[40] This qualification can change in the future and Member States may have already adopted different approaches in their own national regulation.

Germany has taken a different approach than the EBA to the financial services law, as the German Federal Financial Supervisory Authority (hereinafter the "BaFin") has established that Bitcoin has legally binding effect as other financial instruments. According to the German regulation bitcoin has units of account form and therefore it is a financial instrument.[41] The German authority compares bitcoin to foreign exchange with the difference that the regulation do not refer to legal tender.[42] But even in Germany, it has been shown that defining virtual currencies is not that simple as recently the state court of Berlin (*Kammergericht Berlin*) stated that bitcoins were not

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[37] European Banking Authority, 'Opinion on "Virtual Currencies"' (n 13) 13.
[38] European Banking Authority, 'Report with Advice for the European Commission on Crypto-Assets' (n 36) 18.
[39] European Banking Authority, 'EBA Report - on Regulatory Perimeter, Regulatory Status and Authorisation Approaches in Relation to FinTech Activities' (July 2019) 16.
[40] Lastra and Allen (n 14) 20.
[41] Aleksandar Arsov, 'Bitcoin as an Innovative Payment Currency in Germany: Development of the E-Gold Standard' (2016) 15th International Scientific Conference on Economic and Social Development - Human Resources Development Varazdin 9-10 June 2016, 305.
[42] German Federal Financial Supervisory Authority, 'Virtual Currency (VC)' <https://www.bafin.de/EN/Aufsicht/FinTech/VirtualCurrency/virtual_currency_node_en.html> accessed 25 July 2019.

financial instruments nor units of account as they lack some characteristics such as issuance by a known entity and statutory validity as legal tender. The German Court even criticized BaFin for overstepping the bounds of its competence. However, the criminal law decision is not binding upon BaFin as it is in the first instance. Neverthless, this is an example about the controversy which can arise, when regulating virtual currencies or bitcoin as a financial instrument.[43]

When virtual currencies are defined as transferable securities or other types of instruments according to the Markets in Financial instruments Directive (hereinafter the "MiFID"), many EU financial rules are applicable to virtual currencies. These include e.g. the Prospectus Directive, the Transparency Directive, MiFID II, the Market Abuse Directive, the Short Selling Regulation, the Central Securities Depositories Regulation and the Settlement Finality Directive.[44] Financial instruments are defined in Article 4(1)(15) of MiFID II as those instruments specified in section C of Annex I. The listing includes amongst other things transferable securities, money market instruments, units in collective investment undertaking and various derivative instruments.

However, the ESMA has highlighted in its advice that ultimately the categorising of virtual currencies as a financial instrument falls under the umbrella of national competent authority and depends on the national implementation of EU law. Additionally, it depends on what kind of information and evidence the virtual currency provider provides to the national competent authority.[45] Virtual currencies such as Bitcoin, which is also used for payments, cannot be considered as financial instruments according to the MiFID framework. This is mainly due to two reasons: these payment type virtual currencies do not confer a right on their issuer as is the requirement of a transferable security and they are not short-term instruments like money market instruments.[46]

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[43] Blandin and others (n 18) 87.
[44] ESMA, 'Advice Initial Coin Offerings and Crypto-Assets' (January 2019) ESMA50-157-1391 5.
[45] ibid 5.
[46] Niels Vandezande, *Virtual Currencies: A Legal Framework* (Intersentia 2018) 420.

2.2 *Definition of a virtual currency provider*

It is also important to examine the characteristics of the virtual currency provider, if virtual currencies cannot be defined as goods or money. As mentioned in the introduction, this thesis will only examine virtual currency providers that are providing virtual currency exchange services, which are stated in section 2 of the Act on Virtual Currency Providers. The European Central Bank has explained virtual currency exchange services in more detail in its report, and virtual currency exchange services are specified according to the following: virtual currency exchange services can be exchanges or trading platforms. Difference between these two is that an exchange offers trading services to users similarly to the traditional stock market. The exchange service will buy or sell virtual currency against fiat currencies. A trading platform, in its turn, functions only as a marketplace, which brings together buyers and sellers of virtual currencies. A trading platform does not buy or sell virtual currency itself as it only offers the platform that users are able to offer and bid among themselves.[47] Exchanges and trading platforms also have common characteristics as they both provide transfer and exchange services primarily off-chain, which means that these services are not recorded to the distributed ledger technology (hereinafter the "DLT") system. Instead of recording those to DLT system, virtual currency exchange service records the transfers in their internal database system.[48]

One possibility is to evaluate the virtual currency exchange services through the E-Commerce Directive[49], which in its Article 2(a) refers to the Directive 98/48/EC[50] on the definition of service. Article 1 states that a service can be '*any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of service'*. First, the remuneration requirement is also stated in the definition of services within the EU Article 50 TFEU. This seems quite obvious as virtual currency exchange services are

[47] European Central Bank (n 26) 8.
[48] Blandin and others (n 18) 25.
[49] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178.
[50] Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L 217.

engaging in economic activities and therefore providing services for remuneration. Second requirement, 'at a distance' indicates according to the Directive 98/48/EC that the service is provided without the parties being simultaneously present. Lodder argues that this would exclude information society services, where parties are not at a distance and face-to-face contact is possible.[51] However, virtual currency exchange services are generally provided via the internet on their website, in other words, the contact does not occur face-to-face, or parties are not close to each other.

Third requirement, 'by electronic means' is specified in the E-Commerce Directive, which spells out that the service should be sent and received using electronic equipment. This is also quite clear when it comes to virtual currency exchange services as in order to use the exchange services, the customer has to have access to internet for example through mobile phone or computer. Last requirement is 'at the individual request of a recipient of services', which means that the service should be delivered on demand. According to Lodder, a visit to a website is always a service on demand, since the recipient requests the website, when the recipient types the URL or follows the link.[52] This last statement by Lodder, makes it obvious that the requirement is fulfilled in the case of virtual currency exchange services. To sum up, when looking at all the requirements, it seems that virtual currency exchange services can be defined as information society services pursuant to the E-Commerce Directive.

The service provider is defined in the Article 2(b) of the E-Commerce Directive also as a natural or a legal person, which is mentioned in the Act on Virtual Currency Providers. However, instead of practicing business or professional activity, the E-Commerce Directive approach is to include a person, who provides information society services.

However, it is problematic to define virtual currency exchange services under the information society services as the E-Commerce Directive was enacted in 2000, which is almost ten years before Bitcoin was even invented. The E-Commerce Directive was prepared in different environment and therefore, it may not be ideal in regulating virtual currency exchange services. Alternatively, the European Commission has highlighted

[51] Arno R Lodder, *EU Regulation of E-Commerce* (Edward Elgar Publishing Limited 2017) 22.
[52] ibid 22.

that Member States should avoid imposing restrictions, which discriminate via Member State's own national laws against service providers in other states. In addition, the Court has confirmed that national selling regimes can have a discriminatory effect on the free movement of services.[53]

On the other hand, it is important to note that a majority of virtual currency related activities, which are carried out by intermediaries show strong similarities to the existing traditional activities found in other markets.[54] Therefore, it is questionable that trading platforms or exchanges could apply lighter regulations than traditional operators, which are operating in the financial industry. As the EU's secondary legislation did not provide answer to the categorisation issue, the next chapter focuses on the categorisation in the light of the internal market framework.

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[53] Graham Pearce and Nicholas Platten, 'Promoting the Information Society: The EU Directive on Electronic Commerce' (2000) 6 European Law Journal 363, 369.
[54] Blandin and others (n 18) 28.

3 DEFINITION OF GOODS, SERVICES AND CAPITAL IN THE EU

3.1 Background for free movement of goods, services and capital

The AML5 Directive spells out the registration obligation for virtual currency providers, but it does not include the so-called free movement clause. Free movement clause refers to a clause in the EU's secondary legislation, which requires Member States to accept cross-border goods and services while complying with the EU minimum standard in their domestic market. The absence of free movement clause in the AML5 Directive means that it is crucial to examine under which conditions the EU primary rules permit a Member State to apply stricter standards to imported goods or services. Goods and services have to be lawfully marketed in a second Member State and they are compliant with the EU minimum standard. As the AML5 Directive is categorised under the EU secondary legislation, the AML5 Directive sets a floor for the regulatory requirements. Member States may not go below these minimum requirements mentioned in the AML5 Directive. However, a Member State has an option to go beyond the minimum requirements if they choose to do so.[55]

The Court has used two approaches for evaluating how secondary legislation respects the rights of free movement. First approach underlines that contradictions can be avoided, if secondary legislation is interpreted in a way that does not infringe the rights of free movement. If the first approach i.e. interpreting the secondary legislation in a way that complies with the free movement rules is not suitable, the Court evaluates the validity of EU secondary legislation. Should the Court decide that the secondary legislation is not valid as it infringes the free movement rules, the Court may set aside the secondary legislation to the extent that it infringes the EU law.[56]

Before going to the EU primary rules concerning free movement, it has to be determined where to categorise the virtual currencies and virtual currency providers in the freedom categories. As the legal status of virtual currencies is unclear and there is plenty of room for different interpretations regarding the legal status, this chapter will

[55] Nina Boeger, 'Minimum Harmonisation, Free Movement and Proportionality' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 69.
[56] Karsten Engsig Sørensen, 'Reconciling Secondary Legislation and the Treaty Rights of Free Movement' (2011) 36 European Law Review 339, 340.

evaluate, whether virtual currencies should be defined as goods, services or capital. The Court's case law has shown a predominant trend, which aims at a unified approach to the different freedoms of the EU law. This approach has appeared in common interpretation of the principle of mutual recognition, a common definition of the concept 'restriction to free movement' and parallel application of the mandatory requirements.[57] This chapter will examine these three different freedoms in parallel and give grounds for underlining one freedom from each other, when possible.

Internal market is defined in the Article 26 TFEU and it compromises '*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*'. Therefore, it is important to examine to which category virtual currencies and virtual currency providers belong. Articles 28, 56 and 63 TFEU define the coverage of free movement of goods, services and capital in more detail.

First, it is reasonable to start from the free movement of goods as the Court has examined goods since its early days. As mentioned earlier the Treaties do not define 'goods'. Article 28 TFEU only states that the Union shall compromise a customs union which shall cover all trade in goods. Therefore, the exact definition of goods needs to be derived from the Court's case law. The free movement of goods applies to all goods that originate from a Member State or to goods that have been legally brought into free circulation in one Member State. However, it does not apply in internal situations i.e. a cross-border element in the EU is required.[58]

The Court has also examined in several cases what constitutes a good and what constitutes a service. According to Advocate General Fennelly in *Jägerskiöld*, goods 'possess tangible physical characteristics,' and the Court has followed a functional approach when defining what constitutes a good.[59] However, an interesting exception

[57] Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013) 23.
[58] Armin Cuyvers, 'Free Movement of Goods in the EU' in Armin Cuyvers and others (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) 327.
[59] Case C-97/98 *Peter Jägerskiöld v Torolf Gustafsson* [1999] ECR I-07319, Opinion of Advocate General Fennelly para 20.

can be seen in the Court's approach, as it has determined that electricity is categorised as goods.[60]

The EU has not defined services exhaustively and generally it can be said that there is no accepted definition of what services are in economic terms or what is the legal definition of services. According to Hatzopoulos making the legal definition is too comprehensive would run a risk of embracing the investment and labour movement. On the other hand, making the definition too restrictive would make it difficult to give the definition a dynamic and extendible scope, which is necessary to cover a field in plain expansion. [61]

Article 57 TFEU spells out the definition of free movement of services. This freedom differs from the other freedoms as services are considered 'services' within the meaning of the Treaties when they are provided for remuneration, in so far as they are not governed by the provisions relating to the freedom of movement for goods, capital and persons. This addition in the article ensures that all economic activity falls within the scope of the fundamental freedoms. The last decision will be made by the Court as it will decide the centre of the gravity of the particular case.[62] As the Article 56 TFEU does not distinguish between different forms of service provisions, the Court will add the relevant Treaty provisions and define their scope of application through its case law. One reason for this approach is that various defining models have not been necessary for the EU, since Member States are bound by a unitary set of rules and principles for all supply models.[63] On the other hand, it is noteworthy to recall that the original Treaties were drafted in a different era as the trade in services did not exist in industrialised economies as they are existing nowadays.[64]

The last sentence in the Article 57 TFEU '*in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons*' has a

[60] Case C-158/94 *Commission of the European Communities v Italian Republic (electricity)* [1997] ECR I-05789 para 17.
[61] Vassilis Hatzopoulos, *Regulating Services in the European Union* (Oxford University Press 2012) 17.
[62] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th edn, Oxford University Press 2013) 365–366.
[63] Hatzopoulos (n 61) 18.
[64] Piet Eeckhout, 'Constitutional Concepts for Free Trade in Services' in Gráinne De Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing 2003) 212.

significant meaning. This negative definition implies that services are the last option, when considering the freedoms and the Articles 56-62 TFEU are only applicable if no other provisions apply.[65] The Court has evaluated the negative definition in *Gebhard*[66]. The Court stated that the Treaty Chapters on the free movement of workers, the right of establishment and the chapter on services are mutually exclusive. Additionally, the Chapter on services is subordinate to provisions regulating services.[67] In the case of virtual currencies and virtual currency providers it can be concluded that these are only services, if the other freedoms do not apply due to the negative definition.

The free movement of services article has three different elements, which are the definition of services, remuneration condition, and the temporary offering possibility. The remuneration condition means that the article excludes those services which do not have a direct economic link between the provider and the recipient from the scope of the Treaty.[68] In *Belgium v Humbel*[69], the Court has stated that the essential characteristic of remuneration is the fact that it constitutes consideration for the service in question and the provider and the recipient of the service have agreed on the service.[70]

In order to determine what is the difference between digital good and digital service, it is important to examine the earlier case law. The Court has stated that goods are material objects, whereas services are not. Goods can be seen as products which can be valued in money. Additionally, they can be part of commercial transaction and objects that can be shipped across a frontier. Services, instead, have a non-material character.[71] Whereas these definitions sound straightforward, in practise the issue has been slightly complicated. The Court has not taken a uniform approach in defining digital goods as these are treated as goods or as services. The Court has examined the objective characteristics of digital goods. However, it has also taken into consideration the

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[65] Jukka Snell, *Goods and Services in EC Law : A Study of the Relationship between the Freedoms* (Oxford University Press 2002) 7.
[66] Case C-55/94 *Reinhard Gebhard and Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165.
[67] ibid paras 20, 22.
[68] Barnard (n 62) 369, 371.
[69] Case 263/86 *Belgian State and René Humbel and Marie-Thérèse Humbel* [1988] ECR 05365.
[70] ibid para 17.
[71] Janja Hojnik, 'Technology Neutral EU Law: Digital Goods within the Traditional Goods/Services Distinction' (2017) 25 International Journal of Law and Information Technology 63, 67–68.

broader result, which the Court wants to achieve through its case law and proposals of EU legislation.[72]

Moreover, it is important to emphasize that there is a difference between the free movement of capital and the free movement of services. Articles 54 and 62 of the TFEU, which concern freedom of establishment and personal exercise of freedom to provide services are based on the EU citizen's nationality. The free movement of capital on the other hand deals with the actual process of capital movement. In other words, the owner or the recipient of the capital can be a citizen of another country outside of EU.[73]

There has been an assumption in EU law and policy that a single financial market, which is supported by a harmonised legal infrastructure can help the access of cross-border markets. These market actors should broaden and deepen the pools of capital with the result that integration should drive a reduction in the cost of capital for firms, promote stronger risk management and lead to stronger growth and employment.[74] Financial market regulation has three different aims: the stability of the financial system; consumer protection; and prevention of fraud.[75] These three different aims are also evaluated in the previously mentioned EBA's opinion about virtual currencies.[76]

Originally, the free movement of capital was not intended to apply directly. The purpose of this freedom was to facilitate the formation of a common market in financial services through directives.[77] Member States wanted to have a possibility to control the capital movements more strictly than the movements of goods, persons or services.[78] One reason for the late liberalisation is that capital movements were closely linked to the stability of economic and monetary policy of the Member States.[79] The Treaty rules on

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[72] ibid 72.
[73] Wolfgang Schön, 'Free Movement of Capital and Freedom of Establishment' (2016) 17 European Business Organization Law Review 229, 232.
[74] Niamh Moloney, 'Financial Markets Regulation' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 764.
[75] Andenas (n 16) 3.
[76] European Banking Authority, 'Opinion on "Virtual Currencies"' (n 13).
[77] Graeme Baber, *The Free Movement of Capital and Financial Services : An Exposition?* (Cambridge Scholars Publishing 2014) 8.
[78] Snell (n 65) 23.
[79] Barnard (n 62) 580.

services created support on the rules on capital movement and therefore services provisions have been constantly present in the Court's case law since the early days.[80]

Free movement of capital has changed dramatically after the Court declared in *Sanz de Lera*[81] that the Article 63 TFEU shall have a direct effect. The freedom did not practically exist in most Member States before the Court's judgement as most financial operations between Member States were controlled and regulated by state authorities.[82] The EU has adopted more detailed harmonised rules since 1997 as it has been important to protect consumers of financial services. This has further limited Member States' ability to apply their own distinct rules that could reduce competition in the financial markets.[83]

The Member States also decided that abolishing capital controls, the supervision of financial institutions, and the regulation of financial services was not enough and therefore, there needs to be more guidance in order to make the free movement of capital work. Member States were especially worried about the cost of cross-border payments, which led to defining a solution known as Euro. The Euro supports the making of free movement of capital more effective and it has been even said that it could be the ultimate harmonisation. Common currency has harmonised the currency or capital itself and takes care of mutual recognition in a way, which was not possible before in practical terms.[84] On the other hand, if we think about the benefits of virtual currencies as elaborated in the chapter 2, virtual currency transactions can be achieved at lower costs than other means of payment such as payment cards or bank transfers.[85] Therefore, to a certain extent virtual currencies achieve the same goal as euro with lower cross-border payments.

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[80] Hatzopoulos (n 61) 23.

[81] Joined Cases C-163/94, C-165/94 and C-250/94 *Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez, Figen Kapanoglu* [1995] ECR I-04821.

[82] Natalia Białek and Arkadiusz Bazylko, 'Free Movement of Money in the European Union - the Role of European Court of Justice in the Formation of the Free Movement of Capital and Payments' (2011) 7 Financial Internet Quarterly 57, 59.

[83] Caroline Bradley, 'Financial Stability, Financial Services, and the Single Market' (2016) 39 Fordham International Law Journal 1245, 1261.

[84] Andenas (n 17) 11.

[85] European Banking Authority, 'Opinion on "Virtual Currencies"' (n 13) 16–17.

However, it is unclear, when the Court applies Treaty provisions on capital movements or services to a particular transaction as the Court's case law does not provide a clear indication in this regard. Most rules have been developed by Council Directives.[86] As the Article 63 TFEU does not outline the definition for capital movements, it might be useful to include the Capital Directive 88/361/EEC[87] as a framework for defining the concept of capital or capital movements.[88] It has also become settled case-law that the Capital Directive still has the same indicative value.[89] The Treaty only states in the Article 63 TFEU that '*all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited*'. This is a remarkable difference between the other freedoms as capital is the only freedom, which also states that restrictions between Member States and third countries are prohibited.[90] Additionally, Article 63 TFEU states that all restrictions on payments between Member States and third countries shall be prohibited.

It is critical to examine Capital Directive 88/361/EEC more thoroughly and evaluate what is defined as capital according to the Directive because it still has the same value as it was enforce. The Directive includes annex, where is a nomenclature of the capital movements referred in the Directive. As a general rule it states that capital movements are classified according to the economic nature of the assets and liabilities and denominated either in national currency or in foreign exchange.[91]

In a more detailed section, the annex states that capital movements cover all operations, which are necessary for the purposes of capital movements. It includes the conclusion and performance of the transaction and related transfers. In most cases transactions are between residents of different Member States, but some capital movements are carried out by a single person for his own account. Additionally, capital movements cover

[86] Sideek M (Sideek Mohamed) Seyad, *EU Financial Law* (Juridiska fakulteten vid Stockholms universitet 2010) 35.
[87] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1988] OJ L 178.
[88] Sideek Mohamed, 'Field of Free Movement of Capital' in Anna Södersten and David Patterson (eds), *A Companion to European Union Law and International Law* (John Wiley & Sons 2016) 239.
[89] Case C-452/04 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I-09521 para 41.
[90] Case C-439/97 *Sandoz GmbH v Finanzlandesdirektion für Wien, Niederösterreich und Burgenland* [1999] I-07041 para 18.
[91] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1988] OJ L 178 annex I.

operations, whose aim is to liquidate or assign assets that have accumulated or bring the liquidated assets back to the country or the use of said assets. However, the use of those assets is limited to the obligations of EU.[92]

Even though the Capital Directive lists different capital movements it states that the list is not exhaustive and there might be other operations, which are defined as capital movements. This approach was adopted, as an exhaustive list would have restricted the scope of principle of full liberalisation of capital movements.[93] Additionally, this approach seems to suit to this day as the national authorities are in the end the ones that are defining can the virtual currency be categorised under the term capital. This section has now analysed in general terms the fundamental freedoms. The next section will focus on the analysis of virtual currencies and virtual currency providers in the light of the context provided in this section.

3.2 Virtual currencies as goods, services and capital

Before deciding how to evaluate restrictions in the field of virtual currencies, it is important to assess whether any of the three earlier mentioned freedoms is predominant or are there grounds to apply them all. Therefore, this section evaluates in detail where to categorise virtual currencies and virtual currency providers in the context of fundamental freedoms.

The categorization is based on the rule that in the absence of Union legislation, Member States are required to exercise their regulatory competence in compliance with the general rules of the Treaties. In other words, Member States are obliged to comply with the Treaty provisions on the free movement within the internal market, provided that the EU has not given any special regulation concerning the area.[94]

So far, the Court has examined the nature of virtual currencies only in one case, *Skatteverket v. David Hedqvist*[95]. The case was between the Skatteverket (Swedish tax

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[92] ibid annex I.
[93] ibid annex I.
[94] Thomas Horsley, 'Case C-382/08, Michael Neukirchinger v. Bezirkshauptmannschaft Grieskirchen, Judgment of the Court (Grand Chamber) of 25 January 2011' (2012) 49 Common Market Law Review 737, 744.
[95] Case C-264/14 *Skatteverket v David Hedqvist* [2015] ECLI:EU:C:2015:718.

authority) and Mr Hedqvist concerning a preliminary decision given by the Swedish Revenue Law Commission on whether transactions to exchange a traditional currency for the virtual currency, which in this case was Bitcoin, or vice versa were subject to value added tax (hereinafter "VAT"). Mr Hedqvist also wished to perform these transactions through a company. The Court stated that Article 2(1)(c) of Council Directive 2006/112/EC must be interpreted as meaning that transactions, which consist of the exchange of fiat currency for units of virtual currency, bitcoin and vice versa are considered as supply of services in the sense of that Article. Mr Hedqvist took a marginal from his purchase price and the selling price, which he had for his customers.

The case was interpreted in the light of VAT Directive[96], so the Court did not examine the legal nature of virtual currencies in the case. Generally, it can be said that tax authorities have been the party that is the most eager to categorise virtual currencies under legal definition and some of them have defined virtual currencies as some form of financial asset or property.[97] However, the Court noted that transactions involving non-traditional currencies, which are currencies other than those that are legal tender in one or more countries, are financial transactions. This definition has two requirements: non-traditional currencies have been accepted by the parties to a transaction as an alternative to a fiat currency, and these currencies have no purpose other than to be a means of payment.[98] In addition to that, the Advocate General Kokott stated that if there is no other function than means of payment, same provisions which are applicable to currencies, which have legal tender should be used for virtual currencies as well. Advocate General added that virtual currencies perform the same function as legal tender in the light of VAT and due to the principle of fiscal neutrality and the principle of equal treatment, virtual currencies need to be treated in a similar fashion.[99]

As virtual currencies may have different purposes such as store of value, it might be difficult to rely on the interpretation in *Skatteverket v David Hedvist*. Also, the Court stated that it has to be accepted by the parties, which refers to the classic definition of

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[96] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347.
[97] Dabrowski and Janikowski (n 28) 27.
[98] Case C-264/14 *Skatteverket v David Hedqvist* (n 95) para 49.
[99] Case C-264/14 *Skatteverket v David Hedqvist* [2015] ECLI:EU:C:2015:498, Opinion of Advocate General Kokott para 15.

money. Lastra and Allen have noted that this may have been an error in the Court's side as the Court may have not been aware of how bitcoins are normally used. According to Lastra and Allen bitcoins are not generally used as a medium of exchange and the Court should have evaluated bitcoins as a speculative store of value.[100]

As there are no other cases in the Court's case law that concern virtual currencies, virtual currencies need to be examined in the Court's general case law framework. It should be also borne in mind that the TFEU does not define what is the scope of goods in the context of free movement of goods. Therefore, the Court has also had to comment on what is evaluated as goods. In *Commission v Italy*[101], the Court defined goods as 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions'. First criterion, 'valued in money' is possible with virtual currencies as for example the price of Bitcoin is defined in fiat currencies. Virtual currencies also meet the second criterion, 'forming the subject of commercial transactions'. It is possible to buy some virtual currencies with fiat currencies through exchanges, which offer trading services[102]. On the other hand, as mentioned in the previous chapter Bitcoin can be used as a medium of exchange, in other words, as a payment method. Therefore, it cannot be explicitly said that virtual currencies fulfil the second criterion in an exhaustive way.

Additionally, it is vital to evaluate the distinction between goods and currency as the Court tends to apply only the capital provisions of the internal market, where the area identified is currency or financial transaction.[103] The Court has evaluated the distinction between goods and means of payment, which are situated under the concept 'capital'. The Court argued in *Thompson*[104] that if the money has by their nature legal tender in a Member State, they are regarded as means of payment, not as goods.[105] This judgment can be seen as the main rule.

[100] Lastra and Allen (n 14) 21.
[101] Case 7/68 Commission of the European Communities v Italian Republic [1968] ECR 00423.
[102] European Central Bank (n 26) 8.
[103] Joined Cases C-358/93 and C-416/93 Criminal proceedings against Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre [1995] ECR I-00361.
[104] Case 7/78 *Regina and Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss* [1978] ECR 02247.
[105] ibid para 26.

However, the Court still decided that the South African Krugerrands are defined as means of payment even though the currency did not have legal tender. The Court justified this assumption on the basis that the currency was treated on the money markets of the Member States as being equivalent to currency.[106] The interpretation of the South African Krugerrands was highly criticised, and e.g. according to Mann the Court should have asked whether in the context of particular transaction the Krugerrands were used as objects of commerce or currency. Mann states that the transactions in the case were clearly used as goods.[107]

As mentioned in the previous chapter virtual currencies do not have legal tender in Member States and therefore, they may not be categorised as means of payment. The interpretation of *Thompson* supports the argument that virtual currencies are defined as goods. Additionally, two things should be noted, when *Thompson* is compared in the context of virtual currencies. First, the case concerned gold coins, which were called as Krugerrands and they were minted in Republic of South Africa. In other words, the Krugerrands had a material character and they were produced by a public authority.[108] This may make it difficult to compare with virtual currencies because, as noted previously, virtual currencies do not have a physical presentation and they are not issued by a state or a public authority. Secondly, it is important to remember that the case was decided in 1978, that is over 30 years before the first bitcoin transaction was completed. One can argue that the case is not that relevant as the days were different back then. On the other hand, the Court intends to have a uniform interpretation of the case law, which implies that if a similar case was decided 40 years after *Thompson*, the Court would likely end up in similar result.[109]

In addition to *Thompson*, the Court has evaluated the characteristics of goods and services. It has stated that goods are material objects and services are not. Services have a non-material character. According to Hojnik rules on services apply, if digital goods are not related to a tangible entity. On the other hand, if a digital good is related to a

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[106] ibid paras 24–27.
[107] Mann (n 27) 24–25.
[108] ibid part I.
[109] See generally about the Court's interpretation approach in Paul Craig and Gráinne de Búrca, *EU Law : Text, Cases, and Materials* (6th edn, Oxford University Press 2015) 62–64; Gerard Conway, 'Levels of Generality in the Legal Reasoning of the European Court of Justice' (2008) 14 European Law Journal 787.

tangible entity, rules concerning goods can be applied.[110] As stated in the chapter 2, virtual currencies do not relate to a tangible entity. Virtual currencies depend primarily on cryptography and distributed ledger technology, which means that the information is saved through a distributed ledger such as a repeated digital copy of data available at multiple locations.[111] Therefore, the differences between virtual currencies and Krugerrands in *Thompson* and Hojnik's interpretation refer that virtual currencies cannot be defined under goods or digital goods category.

Support from the argument that virtual currencies are not goods can also be found from the Agreement on the European Economic Area and its protocol 4[112], which brings together the EU Member States and the three EEA States in a single market. Article 1 states that goods can be defined as materials or products. Materials are described as '*any ingredients, raw material, component or part used in the manufacture of the product*'. Products on the other hand are products that are being manufactured. As most virtual currencies have a decentralised character, there is no specific entity that produces them. However, Shcherbak argues that the most popular virtual currency, Bitcoin can be theoretically considered as good because the Bitcoin mining may fall into the category of manufacturing.[113]

All things considered, it is cumbersome to define virtual currencies as goods in the light of the internal market framework. If virtual currencies cannot be defined under the concept of goods, there are two options left: capital and services. Therefore, this section shall next evaluate the characteristics of these two freedoms and determine if there can be found a predominant freedom.

The Court has derived the predominant freedom approach from its case law and especially from *Fidium Finanz*. Fidium Finanz was a company established in Switzerland, which had granted credits on commercial basis to customers, established in Germany. The German Financial Supervisory Authority had denied it the right to grant the credit, as Fidium Finanz did not have an authorisation to provide these credits

[110] Hojnik (n 71) 67–69.
[111] ESMA (n 44) 7–8.
[112] Decision of the EEA Joint Committee No 71/2015 of 20 March 2015 amending Protocol 4 (rules of origin) to the EEA Agreement [2016/754] OJ L 129.
[113] Sergii Shcherbak, 'How Should Bitcoin Be Regulated' (2014) 7 European Journal of Legal Studies 41, 54.

according to the German law. The Court evaluated first, whether the granting of credits to German customers is a service or a capital movement. According to the Court, if a national measure relates to the freedom to provide services and the free movement of capital at the same time, it needs to be considered to what extent the exercise of those freedoms is affected. Secondly, it needs to be taken into account, if in the circumstances of the proceedings, one of those freedoms prevails over the other.[114]

The Court explained in *Fidium Finanz* that the business of a credit institution consisting of granting credit constitutes a service within the meaning of Article 56 TFEU. Therefore, the Court concluded that the activity of granting credit on a commercial basis constitutes a provision of services even though Fidium Finanz did not receive deposits or other repayable funds from public. On the other hand, the notion of 'capital movements' was also evaluated as the definitions in the Capital Directive 88/361/EEC annex showed that the consumer credits, which Fidium Finanz offered, can be under the notion of capital movements. Therefore, both of the freedoms could have dealth with granting of credits to consumers.[115]

The Court examined from the documents in *Fidium Finanz* that the provisions in the case form a part of the German legislation on the supervision of undertakings which carry out banking transactions and offer financial services. Furthermore, the purpose of those rules was to supervise the provision of such services and to authorise such services only for understakings which guarantee to conduct such transactions. The Court concluded that granting of credits to consumers by Fidium Finanz was under the notion of 'services'.[116]

Fidium Finanz needs to be considered in the context of virtual currencies. First, it should be explored what is the legal substance of a relevant domestic provision as it is settled case law that the purpose of the legislation must be taken into consideration.[117] Schön has argued that if the domestic provision's purpose is to regulate a commercial or professional activity of the market citizen, the provision is evaluated in the light of

[114] *Case C-452/04 Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* (n 89) para. 34.
[115] ibid paras 39–43.
[116] ibid para 45.
[117] Joined Cases C-436/08 and C-437/08 *Haribo Licorice and Austrian Salines* [2011] ECR I-00305 para 34.

freedom of establishment. Contrarily, if the Member State pursues primarily objectives related to capital markets law or currency law, the provision is evaluated based on the free movement of capital.[118] Therefore, it is important to examine the AML5 Directive and the Finnish Virtual Currency Act.

The AML5 Directive does not define legal status of virtual currencies. It only states that the AML4 Directive is the main legal instrument in preventing money laundering and terrorism financing. However, it is stated on the AML5 Directive that '*for the purposes of anti-money laundering and countering the financing of terrorism, the authorities should be able, through obliged entities, to monitor the use of virtual currencies*'.[119] In the light of this purpose, it is reasonable to evaluate virtual currencies through the obliged entities, which are providing the exchange services. As mentioned in the introduction, this thesis concentrates only on the virtual currency exchange services, which are defined in the section 2 in the Virtual Currency Act. Additionally, the Virtual Currency Act, which is based on the AML5 Directive, supports this view as the purview in the section 1 states that the Act is applied to a business activity of virtual currency providers.

Then again, there can also be found matters that support the view that the objectives are related to capital markets law. Firstly, the AML4 Directive is partly written to protect the integrity, stability and reputation of financial sector and obliged entities are mainly operating in the financial sector. In addition the AML4 Directive explicitly states that criminals may '*take advantage of the freedom of capital movements and the freedom to supply financial services which the Union's integrated financial area entails*'.[120] In other words, it may be presumed based on the AML4 Directive that the objective is to protect the financial sector.

[118] Schön (n 73) 252.

[119] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156 recital 8.

[120] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141 recitals 1,2.

Secondly, the Finnish government proposal, which includes the background and the proposal of the Virtual Currency Act, highlights that virtual currencies cause a significant risk to money laundering and terrorist financing and the risk effects the reliability of the financial sector. The proposal notes the fact that the AML5 Directive requires Member States to register the virtual currency providers. However, the AML5 Directive does not regulate specific issues such as the general requirements of the registration and the supervision of the virtual currency providers. These issues are left for the Member States to decide. The government proposal also recognised that the supervision of virtual currency providers is equivalent to other businesses, which operate in the financial sector and are supervised by the relevant authorities in the financial sector. Moreover, it suggests that the supervision of virtual currency providers has similar characters to the supervision of payment institutions.[121]

The Court has also evaluated the definition of payments, which are categorised under the concept of capital in the early case law. In *Luisi and Carbone v Ministero del Tesoro*[122], two Italians took more money out of Italy than the currency regulations at place allowed, and they were fined by the State. The Italians went to other Member States as tourists and received medical treatment there. The Court noted that even though the physical transfer of financial assets is included in a list, which defines capital movements, it does not mean that in all circumstances the physical transfer of financial assets is considered as movements of capital.[123]

Furthermore, the Court stated that the payments were defined as transfers of foreign exchange and these were paid as remuneration for a service or an action. On the other hand, the Court expressed that movements of capital are financial operations, which are essentially investment of funds than remuneration for a service. The Court gave more attention to the fact that the physical transfer of bank notes in *Luisi and Carbone v Ministero del Tesoro* corresponded to an obligation to pay a transaction, which involved movement of goods or services. Additionally, the Court stated that if the payments relate to tourism or travel for the purposes of business, education or medical treatment,

[121] HE 167/2018 vp Hallituksen esitys eduskunnalle laiksi pankki- ja maksutilien valvontajärjestelmästä ja eräiksi siihen liittyviksi laeiksi 45, 48.
[122] Joined Cases 286/82 and 26/83, *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 00377.
[123] ibid para 20.

the payments cannot be defined as movements of capital despite the fact that payments are affected by means of physical transfer of bank notes. Therefore, the physical transfer of bank notes was in this case considered. [124]

Luisi and Carbone v Ministero del Tesoro also illustrates the problematic nature of virtual currencies. According to the AML5 Directive Article 47 Member States are obligated to register providers of exchange services between virtual currencies and fiat currencies and custodian wallet providers. If the AML5 Directive is interpreted literally according to *Luisi and Carbone v Ministero del Tesoro*, it could refer that providers of exchange services between virtual currencies and fiat currencies are categorised providing payments, which are a remuneration for a service. This interpretation would imply that virtual currency providers who are providing exchange services are categorised under the concept of services in the light of the fundamental freedoms. However, one can also argue the opposite, provided that the subject of the evaluation is the virtual currencies itself. As mentioned above, the Court highlighted that movements of capital are financial operations, whose essential nature is investing. Virtual currencies can also be categorised under this financial operations definition due to their use for investment purposes.[125]

Therefore, the interpretation of virtual currencies and virtual currency providers in the light of *Luisi and Carbone v Ministero del Tesoro* depends on which one is evaluated. If the categorisation is focused on the virtual currency provider itself, it seems inevitable that the virtual currency providers are providing payments and are considered under the notion of 'service'. If the focus is transferred to virtual currencies, the division is more complicated and there is a possibility that virtual currencies are classified as capital movements.

As the earlier section about the fundamental freedoms elaborated how capital movements have traditionally been defined, it is important to evaluate virtual currencies in a similar fashion. Capital movements have been defined by the Capital Directive 88/361/EEC as it includes annex, which specifies different capital movements. The use

[124] ibid para 21–23.
[125] European Banking Authority, 'Report with Advice for the European Commission on Crypto-Assets' (n 36) 7.

of the annex has been still settled case law and it can be seen as a guideline for the concept of capital.[126] The most important element of the capital movements is the economic nature of the assets and liabilities they concern, and the capital movements can be outlined either in national currency or in foreign exchange. As virtual currencies have been existing only a decade, it is hard to place them under the Capital Directive 88/361/EEC as the capital movements stated in the annex are always denominated in national or in foreign exchange. None of the Member States have given the fiat currency status to virtual currencies and therefore, virtual currencies cannot be outlined in foreign exchange.

On the other hand, the Capital Directive 88/361/EEC Annex I declares that the nomenclature is not an exhaustive list for the concept of capital movements. It has also a section "XIII – other capital movements", which lays down that miscellaneous group can be defined as capital movements. One alternative can be categorising virtual currencies under this section as it is complicated to categorise them into other more specified sections of the Annex I.

It can be seen from the reasons mentioned above that virtual currencies have characteristics that belong to both capital and services. However, as mentioned previously, according to Schön in cases where both freedoms apply to the circumstances it must be decided whether one of the freedoms prevails over other freedoms. Schön has also argued that the Court typically gives the freedom of establishment priority over free movement of capital and the literature supports this view.[127] As the purpose of the AML5 Directive refers to regulation of obligated entities, which are providing exchange services, virtual currency providers, it seems reasonable to define the virtual currency providers under the concept of services. Also, *Luisi and Carbone v Ministero del Tesoro* supports the view that virtual currencies itself fall under the concept of services.

Furthermore, virtual currency providers are primarily providing their services through digital platform and they may have a legal entity in one Member State, but the website

[126] Case C-452/04 *Fidium Finanz* (n 89) para 41.
[127] Schön (n 73) 241, 250.

is available in other Member States.[128] Interpretation concerning online services can also be found from the Court's case law. The Court has evaluated the categorisation of online gambling companies in the light of fundamental freedoms in *Liga Portuguesa de Futebol*, where the online gambling company Bwin had a registered office in Gibraltar, but it did not have a physical establishment in Portugal. The Court decided that the Article 49 TFEU, the right of establishment, was not applicable as Bwin provided its services exclusively via the internet. Bwin did not have intermediaries in Portugal or other attachment to Portugal such as principal place of business or secondary establishment. Additionally, Bwin did not have any plans to establish a company in Portugal. The Court also evaluated that the restrictions concerning free movement of capital and payments are only a consequence of the restrictions on the freedom of provide services. Therefore, the Court decided that the online gaming company is using its freedom to provide services.[129]

If *Liga Portuguesa de Futebol* is examined in the light of defining virtual currency providers, it supports the view that virtual currency providers are providing services. This seems reasonable as virtual currency providers are providing their services online in the same way as online gambling companies. Thus, Article 56 TFEU of free movement of services is applicable to virtual currency providers. If a virtual currency provider has established a company for example physically in other Member State or wishes to do so, the evaluation is different.

However, virtual currencies themselves have many different characteristics and it may not be feasible to define one predominant freedom that would be applicable to each and every virtual currency. Suitable approach seems to be defining virtual currencies under the categories of services and capital. It may be more convenient to separate virtual currencies and virtual currency providers, which are in this thesis limited to service providers, which offer virtual currency exchange services. Also, the first and second research questions in this thesis concentrate specifically to the registration obligation, which affects the businesses operating in the industry, that is, virtual currency providers.

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[128] European Central Bank has explained different actors in the virtual currency sector and their roles for example in European Central Bank (n 26) 8.

[129] Case C-42/07 *Liga Portuguesa de Futebol Profissional, and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-07633 paras 45–47.

To summarize, this chapter has evaluated the virtual currency providers in the light of fundamental freedoms. The Court's only case evaluating virtual currencies and virtual currency providers, *Skatteverket v David Hedqvist* leans towards categorising virtual currency providers under the concept of services. This is supported by the view that virtual currency providers are providing service for exchanging virtual currency to fiat currency and the service is provided via the internet. Additionally, the purpose of the relevant legislation shall be taken into consideration. Both the AML5 Directive and the Virtual Currency Act concentrate on the obligated entities, virtual currency providers, who are providing exchange services. All things considered, it is reasonable to define virtual currency providers under the free movement of services. With this in mind, possible restrictions in the registration obligation and the justifications that are related to the restrictions are assessed in the following chapters based on the reasoning that virtual currency providers are categorised under free movement of services.

4 FINANCIAL INSTITUTIONS OBLIGATION TO REGISTER IN OTHER EU COUNTRIES

4.1 Licensing or registration obligations of financial institutions

The Treaty provisions provide the foundation for free movement and essentially eliminate the discrimination in the internal market. Additionally, the Court has taken them further with their case law. Nonetheless, the provisions do not necessarily in themselves mean that a business, which is authorised to offer a financial service activity in one Member State will be able to establish itself or offer services in another Member State, if it does not comply with the rules of the host state. Therefore, the completion of the internal market in the financial services sector has required more complex EU legislation.[130] This chapter will discuss obligations that financial institutions and payment service providers are required to satisfy in order to operate in other Member States than their home Member State.

An essential requirement of financial market integration is that there is a harmonised set of core rules, which eventually lead towards uniformity and are binding on all jurisdictions comprising the single market. If there is no uniformity, it can theoretically seriously hinder market integration. Absence of uniformity can give rise to regulatory arbitrage and hidden protectionism. However, regulatory arbitrage can have a positive effect on the profitability of cross-border institutions, which is also the case with virtual currency providers, which decide to incorporate in a favourable jurisdiction. The key reason behind maximum harmonisation may not be related only to the improvement of allocative efficiency in an integrated market. It can also be related to building trust between the key political and market players.[131]

The main obstacles to the cross-border provision of banking services have been eliminated mainly with three different policies. First, there was the harmonization of national regulatory and supervisory standards. Then Member States recognised each other's regulatory provisions and supervisory practises and last, the country of origin

[130] John A (John Anthony) Usher, *The Law of Money and Financial Services in the European Community* (Clarendon Press 1994) 64–65.
[131] Avgouleas (n 21) 180.

principle was applied. This meant almost exclusive exercise of legislative and enforcement jurisdiction in prudential matters to the home country of the financial institution and is applicable to the activities carried on at home and services provided in other Member States.[132]

It should be noted that the number of requirements set for financial services has changed over time. Also, the relationship between the EU–level and national level decision-making and administration has evolved. A degree of regulatory harmonisation has been introduced in an attempt to make internal market function effectively.[133] The EU has regulated financial services and the conditions under which each Member State's financial regulator can grant authorisation for companies providing financial services in another Member State. These conditions are defined in the single market directives. Therefore, the EU area is called as single passport regime.[134] In order to benefit from the single passport regime, Member States must have implemented the Second Banking Directive[135] in their national legal system. When a credit institution receives the single passport, Member States cannot impose any local endowment capital requirements on branches of credit institutions from other Member States and they cannot apply any stress test on their establishment.[136]

In order to achieve legitimacy and acceptance from the other Member States to which the single passport applies, each Member State has to accept the chartering standards applied by the other Member States. The acceptance of chartering standards has implied harmonisation of basic regulatory standards across Europe and a degree of central coordination of banking regulation and supervision within Europe.[137] On the other hand, the competent authorities of the home Member State have a significant role in the

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[132] Apostolos Gkoutzinis, 'Online Financial Services in the European Internal Market and the Implementation of the E-Commerce Directive in the UK' (2003) 17 International Review of Law, Computers & Technology 323, 325.
[133] Bradley (n 83) 1260.
[134] Baber (n 77) 45.
[135] Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC [1989] OJ L 386.
[136] Norman Mugarura, 'The "EU Brexit" Implication on a Single Banking License and Other Aspects of Financial Markets Regulation in the UK' (2016) 58 International Journal of Law and Management 468, 474.
[137] Philip Booth and Alan Morrison, 'Promoting a Free Market by Ending the Single Market - Reforming EU Financial Regulation' (2012) 32 Economic Affairs 24, 24–25.

authorisation as its their sole responsibility to decide the issuance of an authorisation, which is valid for the entire EU. After the authorisation, a financial institution may provide the services or perform the activities, which it has been authorised to do. There are two options, how a financial institution can act: it can establish a branch or provide its services through the free provision of services.[138] The foundation for the authorisation lies in the principle mutual recognition. Supervisory authorities in other Member States recognise the authorisation, provided that certain basic conditions are fulfilled.[139]

The authorisation and passporting requirements for financial institutions are described in detail and for this reason they are not always consistent. This means that some general requirements, which are described in detail, may differ between different financial operators.[140] The Directive on Banking Prudential Requirements[141] includes the right of establishment credit institutions in the chapter 2 and the exercise of the freedom to provide services in the chapter 3. This implies that there is a difference between the establishment and the provision of services.

It also still remains difficult to move the authorisation which a bank or other financial institution has received in one jurisdiction to other Member States. When a financial institution establishes a branch in other Member State, it will remain supervised by the authorities of the home Member State. However, the establishment of the branch is not covered by the home Member State as the establishment is under the host Member State's jurisdiction.[142] In other words, a financial institution is required to comply with the legislation of two Member States as the establishment of the branch is regulated by the host Member State and the authorisation as a financial institution is received from the home Member State. Also, an interesting character in the home country control is

[138] European Banking Authority, 'Passporting and Supervision of Branches - European Banking Authority' <https://eba.europa.eu/regulation-and-policy/passporting-and-supervision-of-branches/-/activity-list/dztSy9eqjjIL/more> accessed 4 July 2019.
[139] Mugarura (n 136) 475.
[140] For instance, a competent authority of the home Member State needs to provide a reason for the decision to withdraw the authorisation of a payment institution. However, in the case of alternative investment funds, the home Member State may withdraw the authorisation, but it does not need to give a reason for the withdrawal. See more in Baber (n 77) 63.
[141] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176.
[142] Andenas (n 16) 14.

that Member States may adopt or maintain more stringent requirements to domestic banks, but they cannot impose those requirements to banks from other Member States, which are operating in their territory under the free movement provisions.[143]

According to Hatzopoulos, Member States are free to introduce stricter rules to domestic financial institutions, but it has happened rarely. Explanation for this can be found from regulatory competition as national constitutional requirements, which prohibit reverse discrimination and Article 56 TFEU (free movement of services), which is interpreted in a way that the Court ruled in *Alpine Investments*.[144] The case is further examined in the next chapter.

Another example of the single passport regime relates to the regulation concerning payment institutions. If payment institutions want to use their right of establishment and the freedom to provide services, they will need to comply with the regulatory Standards[145]. These regulatory standards clarify the cooperation and the exchange of information between the competent authorities of the home and of the host Member State. Additionally, the regulatory standards specify the ways and details of cooperation. Furthermore, the scope and treatment of information to be submitted, which include common terminology and standard notification templates, are specified under the regulatory standards.[146]

The payment institution has two options, when applying for authorization: either it can acquire a European passport, which means that it can offer services in other Member States, or it can limit its operations to its home state. If a payment institution decides to offer services in other Member States, it can provide services directly or through a secondary establishment. This means that payment institution can establish a branch, tied agent or subsidiary for offering the services in other Member States. When the payment institution establishes a subsidiary in other Member State, the payment

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[143] Gkoutzinis (n 132) 325.

[144] Hatzopoulos (n 61) 234; Case C-384/93 *Alpine Investments BV and Minister van Financiën* [1995] ECR I-01141.

[145] Commission Delegated Regulation (EU) 2017/2055 of 23 June 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for the cooperation and exchange of information between competent authorities relating to the exercise of the right of establishment and the freedom to provide services of payment institutions [2017] OJ L 294.

[146] ibid recital 1.

institution in the home Member State remains liable for the acts and omissions of its subsidiary. This is an exception as normally a subsidiary is a legal entity which has a liability for its own acts and omission.[147]

It is also important to note that the Payment Directive[148] is unusual, if it is compared to other legal instruments adopted in other sectors of financial services as the Payment Directive is based on the principle of full harmonisation. Most financial services are based on the principle of minimum harmonization, which means that Member States have more leeway to transpose the legal instrument to national law.[149] On the other hand, according to the EBA the authority that grants the authorisation can impose conditions and obligations even though EU law provides for maximum harmonisation. This applies in cases where the approval would otherwise be denied. This means that in the case there is no clear guidance in the EU legal framework, the national authorities can impose conditions, limitations or restrictions to authorisations under national law.[150] However, the Court has stated that national measures, which relate to exhaustive harmonisation, have to be assessed in the light of the provisions of the harmonising measure.[151]

The Court has also confirmed the possibility for national authorities to impose restrictions to authorisations under national law in *CO Societad de Gestión y Participatión v. DNB and Others*[152]. The Court concluded that a Member State is not prevented to authorize the national authority to attach restrictions or requirements to the approval of the acquisition in question, if the restriction or requirement is pursuant to its national legislation. The national authority can attach the restriction or the requirement by its own initiative or by formalizing commitments, which the proposed acquirer in question has given. However, it needs to be taken into consideration that the rights of

[147] Seyad (n 92) 129–131.
[148] Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC [2007] OJ L 319. The Payment Directive is no longer in force as it was repealed and replaced by the PSD2. However, the full harmonization approach did not change after the replacement.
[149] ibid 147.
[150] European Banking Authority (n 39) 20.
[151] Case C-99/01 *Criminal proceedings against Gottfried Linhart and Hans Biffl* [2002] ECR I-09375 para 18; Sørensen (n 56) 344.
[152] Case C-18/14 *CO Societad de Gestión y Participatión v. DNB and Others* [2015] ECLI:EU:C:2015:419.

the proposed acquirer, which are stated under that directive, are not adversely affected.[153]

As a conclusion, even though many regulatory requirements are imposed at the EU level to different financial operators, it still does not mean that there are no discrepancies in the regulatory requirements, and it would be easy to use the single passport. It should be especially noted that some FinTech companies may be divided to half concerning the regulatory requirements in the EU. A FinTech company may have some activities that are under specific regulatory requirements due to the nature of the activity as a financial service. Other activities in the same Fintech company may not fall under these regulatory requirements. For example, the new Payment Service Directive (PSD2)[154] widened the scope of application as it includes also payment initiation services and account information services. Certain virtual currency providers are obligated to comply with the PSD2 as they may need to execute payments in fiat currency after the exchange of virtual currency to fiat currency has taken place.[155]

4.2 Comparison of the obligations between the virtual currency providers and the other financial operators

As the previous section explained the EU passport for financial institutions and payment institutions, this section focuses on the position of virtual currency providers in the EU passport area. The European Commission published a FinTech Action plan[156], which gives insights into a more competitive and innovative European financial sector. The European Commission acknowledges that innovative FinTech companies can bring new products to the financial market or provide traditional services in innovative forms or at

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[153] ibid paras 31,34.

[154] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337.

[155] A virtual currency provider may have different virtual currencies in its service selection. The sale and exchange between these virtual currencies may not be in all cases a financial service. However, when the virtual currency provider needs to handle the fiat currency side, it needs to obtain the payment institution license. The virtual currency provider can be compared to a traditional stock exchange in a sense that the stock is compared as a virtual currency and the money to buy the stock is the handling of the fiat currency side. See more about the authorization approaches in European Banking Authority (n 39) 12–13.

[156] Commission, 'Communication from the Commission to the European Parliament, The Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions - FinTech Action Plan: For a More Competitive and Innovative European Financial Sector' COM (2018) 109/2.

lower prices. It is crucial that that these innovators are able to extend their services to a wide customer base and scale their services to a whole Union area. Therefore, the European Commission acknowledges that innovators should have the possibility to use a European passport in order to fully benefit from the single market. However, to receive a European single passport, innovators in the financial sector need to satisfy applicable regulatory requirements, and this may be challenging particularly when there are new technologies in question as these differ from standard practices, which are implemented to the traditional financial sector.[157]

Common authorisation requirements have many positive implications. It is vital to have effective supervision of service providers to ensure the stability, integrity and fairness of financial markets. Furthermore, the requirements ensure that consumers and investors are protected from i.e. frauds. The Commission consulted different service providers and some respondents even stated that most innovative business models could function under existing EU rules. However, applying current framework requires space to apply proportionality in the authorisation process. The Commission also noted that supervisors may take diverse approaches as the supervision is left to the Member States' financial supervisory authorities and there is no common supervisory authority at the EU level yet. This suggests that national supervisory authorities identify the applicable EU legislative framework differently than their counterparts and apply proportionality in a different way when licensing innovative business models.[158]

Virtual currency providers are explicitly mentioned at the EU level in the AML5 Directive, which spells out the registration obligation in Article 47, paragraph 1. The AML5 Directive amends the AML4 Directive, which specifies the requirements for obliged entities. The AML4 Directive does not specify anything about the single passport regime, but it states in the Article 45, paragraph 2 that '*Member States shall require that obliged entities that operate establishments in another Member State ensure that those establishments respect the national provisions of that other Member State transposing the Directive*'. Pursuant to this AML4 Directive the home Member State authority is responsible for supervising that the obliged entity is complying with

[157] ibid 3.
[158] ibid 5.

the applicable anti-money laundering and counter terrorism financing (hereinafter the "CTF") legal framework in the host Member State as well. However, establishment may refer to a physical location of the obliged entity. Most virtual currency providers are providing their services through online platforms, which do not require physical presence in other Member States.

However, in the absence of an explicit statement stating that the internet-based services are available at a specific market, the regulators and the Court may use different indicators for the establishment such as language of the web site, the actual provision of services to local residents, the applicable terms and conditions or the currency of the transactions.[159]

The Court has evaluated the traditional definition of establishment in its case law. In *Commission v Portugal*[160] the Court stated that the key element in the differentiation between providing services as in Article 56 TFEU and establishments as in Article 49 TFEU, is whether or not the economic operator is established in the Member State in which it offers services.[161] The main rule is that if the economic operator is established in a principal or secondary establishment in the Member State in which if offers the services, the economic operator is evaluated based on the freedom of establishment. Furthermore, the Court has stated that it considers as services within the meaning of Article 56 TFEU in the case that economic operator is established in a Member State, but it supplies with a greater or lesser degree of frequency or regularity to persons established in one or more other Member States. If an economic operator established in one Member State provides services in another Member States over an extended period, it is not a reason to evaluate the economic operator based on establishment.[162]

In addition to the traditional definition of establishment, the notion of 'establishment' has become into question i.e. in cases relating to processing of personal data. In

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[159] Gkoutzinis (n 132) 326.
[160] Case C-171/02 *Commission of the European Communities v Portuguese Republic* [2004] ECR I-05645.
[161] See also case C-55/94 *Reinhard Gebhard* (n 66) para 22.
[162] Case C-171/02 *Commission of the European Communities v Portuguese Republic* (n 162) paras. 24–27.

Weltimmo[163], the Court examined the relevant secondary legislation, which stated that establishment is considered, when on the territory of a Member State there is effective and real exercise of activity through stable arrangements. In addition to the fore mentioned, the legal form of such an establishment is not the determining factor. This examination resulted in flexible definition of establishment. In other words, the establishment is not only considered based on the place where the undertaking is registered. The evaluation of establishment is a combination of the following factors: the degree of stability of the arrangements and the effective exercise of economic activities in that other Member State. Both of these factors need to be evaluated in the light of specific nature of the economic activities and the provision of services concerned. The Court also highlighted that this interpretation is especially critical for undertakings offering services exclusively via the Internet.[164]

The flexible interpretation of establishment may also be suitable for virtual currency providers. The formal interpretation of establishment may cause an official registration in a more favourable jurisdiction within the Member States even though the virtual currency provider may target the services to specific market in the EU and the activities in fact are carried out in other Member States.[165]

Additionally, the Finnish Act on Virtual Currency Providers does not specify the issue regarding the EU passport. As the AML4 Directive did not include provisions regarding the requirements of the registration, supervising authority or consequences for operating without the registration, the issues are tackled at national level. The Finnish Constitutional Committee has emphasised that it is important that provisions concerning

[163] Case C-230/14 *Weltimmo s. r. o. v. Nemzeti Adatvédelmi és Információszabadság Hatóság* [2015] ECLI:EU:C:2015:639.

[164] ibid paras 28–29. See also for more detailed evaluation Case C-230/14 *Weltimmo s. r. o. v. Nemzeti Adatvédelmi és Információszabadság Hatóság* [2015] ECLI:EU:C:2015:426, Opinion of Advocate General Cruz Villalón paras 28,32–34.

[165] Malta has received a reputation as a ‘Blockchain Island’ which provides easy access for virtual currency providers or other virtual currency related companies entering into the EU markets. See for example Stephen O’Neal, ‘As Malta Delays Regulatory Clarity, Fewer Firms Remain on ‘Blockchain Island’’ (Cointelegraph, 03.04.2020) <https://cointelegraph.com/news/as-malta-delays-regulatory-clarity-fewer-firms-remain-on-blockchain-island> accessed 12 April 2020.

the requirements of the registration and stability of the registration should be reasonably predictable.[166]

Virtual currency providers do not have a separate EU secondary legislation regarding the EU passport in a way that payment institutions have. For payment institutions the Commission delegated regulation specifies that the purpose is '*to enhance cooperation between competent authorities and ensure a consistent and efficient notification process for payment institutions intending to exercise the right of establishment and the freedom to provide services on a cross-border basis*'.[167] As virtual currencies *ipso facto* have a cross-border nature, it is peculiar that the issue is not solved in the EU secondary legislation in the same way as has been done with payment institutions.

As mentioned previously, the situation is complicated for virtual currency providers, who deal with fiat currencies as they may be required to apply for the payment institution license, which gives them a possibility to benefit from the internal market. However, virtual currency providers are still required to apply for the registration because the registration of a virtual currency provider does not give the permission to provide services in the internal market. As the issue is not solved in the EU secondary legislation, the next chapter evaluates the possible restriction in the registration obligation in the light of internal market regulation. Also, the next chapter evaluates the mutual recognition principle, which is used in the traditional financial institution sector in the EU secondary legislation.

[166] HE 167/2018 vp Hallituksen esitys eduskunnalle laiksi pankki- ja maksutilien valvontajärjestelmästä ja eräiksi siihen liittyviksi laeiksi 48.
[167] Commission Delegated Regulation (EU) 2017/2055 of 23 June 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for the cooperation and exchange of information between competent authorities relating to the exercise of the right of establishment and the freedom to provide services of payment institutions [2017] OJ L 294 recital 1.

5 CONFLICT BETWEEN THE REGISTRATION OBLIGATION AND THE INTERNAL MARKET REGULATION

5.1 Restrictions under EU law

As virtual currencies and virtual currency providers have in the previous chapter 3 been categorised under the fundamental freedoms, the next step is to evaluate whether the registration obligation constitutes a restriction pursuant to EU law. Additionally, it is critical to assess whether the registration requirement in different Member States falls under the concept of discrimination in the internal market. As previously mentioned, the question is two-folded since there are two different scenarios, when examining the restriction. Firstly, other Member States can obligate the virtual currency provider register in their territory as well, if the virtual currency provider has already registered in Finland and the registration is approved by the Finnish Financial Supervisory Authority. If the FIN-FSA approves the registration that another Member State has given to a virtual currency provider and does not check the registration approved by the other Member State, the virtual currency provider has the so-called EU-passport. The second scenario concerns the same situation the other way around: is Finland breaking the internal market regulations, if it requires foreign service providers, which have received the registration in another Member State, to register also in Finland?

There has been a change in identifying restrictions in the internal market as before the Court had a primary role in assessing whether the regulations concerned have produced restrictive effects. This evaluation has shifted more towards the Commission, which will proactively (*ex ante*) examine restrictions. Generally, it can be argued that as soon as any piece of national regulation raises obstacles to free movement, the matter becomes 'EU relevant'. A Member State faces two options: it may be required to alter its national regulation or to refrain from applying the national regulation due to supremacy of EU law.[168] On the other hand, it may be easy to suggest that something is a restriction to foreign service providers as the internal market is based on the idea that the economic

[168] Hatzopoulos (n 61) 97–98.

operators, which are established in any Member States have the opportunity to access the markets everywhere inside the Union.[169]

According to Davies, the measures will fall within the free movement articles in situations, where the measures distort markets, create competitive advantages for some and disadvantage for other. On the other hand, when the measures only impose market-wide costs or regulatory burdens, with equal effects on all actors, the free movements provisions are not applicable. Davies argues that if everyone experiences a hindrance to market access, the hindrance does not affect to the relative market positions. The hindrance is only considered then i.e. as a cost to be passed on to the consumer.[170]

If there is no harmonisation in the concerned area, the default consequence is regulatory diversity, where national regulation should be accepted as such. However, national measures are considered from the EU perspective as mere obstacles to accomplishment of a fundamental objective of the EU Treaties. Therefore, it is crucial to determine whether the problem concerned is within an area which has been harmonised and therefore, the evaluation concerning discrimination comes into the picture or is the problem raising from regulatory diversity.[171]

As this thesis deals with the AML5 Directive imposing obligations to Member States, it is appropriate to evaluate the matter based on discrimination. This implies that whether an obligation to register in all Member States, where the virtual currency provider is offering services, impose a restriction based on discrimination. Also, the main instrument concerning anti-money laundering, the AML4 Directive, states that its purpose is to ensure consistent harmonisation in the field of financial services.[172] Therefore, it is clear from the wording that regulatory diversity cannot be relied upon

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[169] Stefan Enchelmaier, 'Restrictions on the Use of Goods and Services' in Mads Andenas, Tarjei Bekkedal and Luca Pantaleo (eds), *The Reach of Free Movement* (Asser Press 2017) 100.
[170] Gareth Davies, 'Between Market Access and Discrimination: Free Movement as a Right to Fair Conditions of Competition' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (1st edn, Edward Elgar Publishing Limited 2017) 14, 18–19.
[171] Hatzopoulos (n 61) 106–107.
[172] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141 recital 61.

because Member States have decided to use harmonisation in the field of anti-money laundering.

After the restriction is defined, justifications and derogations for the restriction need to also be examined.[173] Other reasons than nationality or origin may justify unequal treatment of nationals, or products from other Member States, provided that the reasons behind this unequal treatment are based on circumstances, which are unrelated to nationality, or place of establishment or of marketing. However, the justifications have to be proportionate to the objective they are targeting.[174] These justifications and proportionality will be evaluated in the following chapters.

5.1.1 Restriction under free movement of services

As the third chapter concluded that virtual currency providers are under the notion of 'services', the possible restriction needs to be evaluated accordingly. Article 56 TFEU prohibits the restrictions on freedom to provide services within the Union. The Article is applicable to nationals of Member States who are established in a Member State other than that the person for whom the services are intended. In other words, virtual currency provider needs to have an establishment in one of the Member States in order to benefit from Article 56 TFEU. TFEU does not define clearly what is considered as restrictions as the restriction evaluation is derived from the Court's case law.

Article 56 TFEU prohibits the distinctly applicable measures and the indistinctly applicable measures. Also, Article 56 TFEU covers both discriminatory and non-discriminatory restrictions. This means that it does not only cover the elimination of all discrimination against a provider of services on the ground of its nationality. The Article 56 TFEU abolishes any restriction on the freedom to provide services in the EU, even if it applies without distinction to national providers and to those of other Member States.[175]

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[173] Davies (n 170) 16.
[174] Case C-224/00 *Commission of the European Communities v Italian Republic (Road traffic offences)* [2002] ECR I-02965 paras 16–20.
[175] José Luis da Cruz Vilaça, *EU Law and Integration: Twenty Years of Judicial Application of EU Law* (Bloomsbury Publishing Plc 2016) 310.

In its early case law, the Court used a discrimination test as a principle for defining the restriction. However, later the Court has used the so-called 'market access test'.[176] The difference between discrimination test and market access test can be explained through foreign operators. Discrimination approach focuses on a comparison between the domestic and the foreign operator instead of focusing just on the foreign operators as is the approach in the market access test. In the beginning, the market access test was a way of challenging over-regulation by Member States as Member States may have made the cross-border trade difficult. The question of nationality was excluded from the examination.[177]

It is important to highlight that Member States have three options in regulating cross-border activities. They can treat their cross-border activities worse, equally or better than they treat their national ones. These three options are covered by the concepts of discrimination, national treatment and mutual recognition.[178] If a Member State treats the cross-border activities worse than its national ones, the treatment of the cross-border activity needs to be examined through the concept of discrimination.

When considering the rights of access to the market of services in other Member States, the most important case defining what is a restriction is *Säger*[179]. In this case, Mr. Säger complained that Dennemeyer, a British specialist in patent renewal services was operating in Germany without a license, which was required according to German law. The Court stated that requiring the licence was unlawful. In the case, the Court defined the so-called Säger-formula, which means that 'a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment'. If the Member State makes these subjects to compliance, it will deprive the practical effectiveness of the provisions of the Treaty whose objective is precisely to guarantee the freedom to provide services.[180] Additionally, the Advocate General Jacob stated that if the measure complies with the legislation of the home

[176] Catherine Barnard, *The Substantive Law of the EU : The Four Freedoms* (6th edn, Oxford University Press 2019) 23.
[177] ibid 25.
[178] Alexandre Saydé, 'Freedom as a Source of Constraint: Expanding Market Discipline through Free Movement' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing 2017) 29.
[179] Case C-76/90 *Manfred Säger and Dennemeyer & Co Ltd* [1991] ECR I-04221.
[180] ibid para 13.

Member State, where the provider is established, it should be lawful to provide services in other Member States, even though the provision of such services is not normally lawful in the Member State in question.[181]

The Court has also confirmed the *Säger* interpretation in several later cases. According to the Court Article 56 TFEU requires the elimination of all discrimination on grounds of nationality against service providers who are established in another Member States. In addition to that all the restrictions without distinction to national service providers and to those from other Member States are prohibited, if the restriction is liable to prohibit, impede or render less advantageous the services, which the service provider lawfully provides in another Member State.[182] The Court has also added that a requirement that a service provider needs to create a permanent establishment or branch in the host Member State, where the service provider intends to provide services is against the free movement of services as it makes the provision of services impossible.[183] Furthermore, the Court has evaluated service providers, who are offering services via internet to recipients in another Member State than the service provider is established. The Court has come the conclusion that any restriction to those activities creates a restriction on the freedom to provider services.[184]

Free movement of services prohibits in the Article 56 TFEU also the unjustified indistinctly applicable measures. In *Gouda*[185], the Court stated that measures which impose a dual burden on foreign service providers breach Article 56 TFEU. The case dealt with transmission by a cable of radio and television programmes broadcasting from other Member States. These programmes were specifically advertised to the Dutch public. The Dutch institution, which was responsible for supervising the operation of cable networks argued that the service providers from other Member States have to

[181] Case C-76/90 *Manfred Säger and Dennemeyer & Co Ltd* [1991] ECR I-04221, Opinion of Advocate General Jacobs para 27.
[182] Case C-58/98 *Josef Corsten* [2000] ECR I-07919 para 33; Case C-42/07 *Liga Portuguesa de Futebol Profissional, and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* (n 129) para 51.
[183] Case C-546/07 *European Commission v Federal Republic of Germany* [2010] ECR I-00439 paras 39–40.
[184] Case C-42/07 *Liga Portuguesa de Futebol Profissional, and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* (n 129) paras 52–54; Case C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others* [2003] ECR I-13031 para 54.
[185] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others Commissariaat voor de Media* [1991] ECR I-04007.

comply with the national requirements if they want to broadcast their programmes in the Netherlands. The Court concluded that restrictions are in the scope of Article 56 TFEU in two situations: firstly, the national legislation, which is applied in question to foreign service providers, is not justified by overriding reasons of public interest or secondly, the requirements that the host Member State is imposing are already satisfied by the service provider in the Member State in which they are established.[186]

Säger also presented an additional home state control rule, which means that the national court has to take into account the action already taken by the home state to protect the particular interest. In respect of services the primary regulator is the home State and for this reason the host State can only impose supplementary controls. However, the home state control rule is not applicable to Article 45 and 49 TFEU on free movement of workers and establishment as in these cases the primary regulator is the host state and the controls imposed by the home state do not have great relevance.[187]

The home state control rule places also restrictions to Member States' financial supervisory authorities' discretion as the financial supervisory authority in a particular Member State needs to check the home financial supervisory authority's decision. It can be deemed proportionate that the host supervisor will take into account the supervision which has been carried out in the home State. The AML4 Directive supports this view as it states that situations, where an obliged entity operates establishments in another Member State, the competent authority of the home Member State should be responsible for supervising the obliged entity's application of group-wide anti-money laundering and counter-terrorist financing policies and procedures.[188] However, it is important to note that the AML5 Directive does not clearly state that this is also applicable to virtual currency providers.

[186] ibid para 13.
[187] Barnard (n 62) 391.
[188] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141 recital 52.

After *Säger*, the Court ruled *Alpine Investments*[189], which had a significant impact on the future. Alpine Investment BV challenged a restriction imposed on it, a restriction requiring the company to refrain from cold-calling. In other words, the restriction prohibited the company from contacting individuals by telephone without their prior consent in writing in order to offer them various financial services. There were two preliminary questions: first one evaluated the definition of a financial service. Second one concerned the free movement of services Treaty Article and its scope in restrictions. As the Court decided that there was a restriction, the Court also evaluated can consumer protection be a justification for the restriction.

The Court stated three noteworthy issues in the case. Firstly, the Court confirmed that the expansive approach to restrictions is followed when measures deal with exports. Secondly, the Court refused to transpose to the field of services the distinction between selling arrangements and other requirements, which were established couple of years earlier in *Keck*[190] in the field of free movement of goods. Lastly, the Court held that Treaty rules on services covers the future and in addition to that also prospective services, which are likely to materialize later on.[191] On the other hand the Court validated that forbidding the cold calling was not a restriction as it was enough that there were other means to market the services.[192]

5.1.2 Registration obligation as a restrictive measure

Previous section highlighted the most important cases relating to restrictions in the field of free movement of services. This section will evaluate the registration obligation as a restrictive measure. As mentioned earlier, Member States have three options in regulating cross-border activities. This means that they can treat cross-border activities worse, equally or better than they treat their national ones. In EU law these three options are covered by the concepts of discrimination, national treatment and mutual recognition.[193]

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[189] Case C-384/93 *Alpine Investments* (n 144).
[190] Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-06097.
[191] Case C-384/93 *Alpine Investments* (n 144) paras 28, 36, 53; Hatzopoulos (n 61) 104–105.
[192] Case C-384/93 *Alpine Investments* (n 144) para 54.
[193] Saydé (n 168) 29.

It is important to examine whether the registration requirement in different Member States falls under discrimination in the internal market. As mentioned previously, the question is two-folded since there are two different scenarios, which can arise when examining discrimination. First situation is that can other Member States obligate a virtual currency provider register in their territory as well, if the virtual currency provider has already registered in Finland and the registration is accepted by the Finnish Financial Supervisory Authority or can the registration give the right to the so-called EU passport. Second situation seeks to establish whether Finland is breaking internal market regulations, if it requires foreign service providers, which have received the registration in other Member States, to register in Finland as well.

The Finnish Act on Virtual Currency Providers states that an entrepreneur can only provide services related to virtual currencies, if the entrepreneur has been registered as virtual currency provider and complies with the requirements of the Act on Virtual Currency Providers.[194] The Virtual Currency Act itself does not separate a foreign virtual currency provider from a national one. If there is no discrimination between a foreign and the national virtual currency provider, foreign virtual currency providers enjoy the same treatment as their in-state equivalents.[195]

The Court has defined discrimination test in its famous case, *Dassonville*[196]. In the judgement the so-called *Dassonville* formula was developed, and it is as follows: '*all trading rules enacted by Member States, which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions*'.[197] This is also spelled out in Article 34 TFEU. The concept 'all trading rules' concerns the marketing stage and not the production stage of the economic process.[198] *Dassonville* concerned free movement of goods.

Barnard asserts that the wording 'directly or indirectly, actually or potentially' is the most important element of the *Dassonville* formula since it underlines the effect of the

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[194] Act on Virtual Currency Providers (n 5) Section 4.
[195] Barnard (n 62) 17.
[196] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 00837.
[197] ibid para 5.
[198] Barnard (n 62) 75.

measure, not the intention behind it.[199] Generally, discrimination can be established based on the following. First, it should be examined whether the restriction of use applies in law equally to domestic producers and providers from other Member States. These restrictions are called as indistinctly applicable measures.[200] This means that indistinctly applicable measures do not give a different treatment on the grounds of nationality, of establishment or place of marketing.[201] In the case of virtual currency providers, it should be therefore examined whether the registration obligation applies equally to domestic and foreign operators.

The registration obligation in the Virtual Currency Act itself is neutral towards domestic and foreign virtual currency providers as all virtual currency providers are obligated to register to the FIN-FSA.[202] The wording is similar for both foreign and domestic virtual currency operator and therefore, the wording itself is not discriminatory. However, despite of the neutral wording, the obligation causes an administrative burden to foreign a virtual currency provider, who is registered in its own Member State and wants to provide virtual currency services in Finland. As mentioned earlier, the Court has evaluated these indistinctly applicable measures in *Gouda*. The Court expressed that a dual burden to service providers breach Article 56 TFEU.

Also, *Säger* has already earlier confirmed the above statement. As *Säger* dealt with professional qualifications, the Court stated that if national legislation forces an undertaking established in another Member State subject to the issue of administrative license in order for the service provider to provide services in that area, it constitutes a restriction according to Article 56 TFEU.[203] With these cases in mind, it seems that there is indeed a restriction concerning foreign virtual currency providers, which have obtained registration in other Member States than Finland. Also, the in the light of the previously mentioned *Gouda*, it seems appropriate to suggest that the registration obligation can be qualified as an unjustified indistinctly applicable measure.

[199] ibid 79.
[200] Enchelmaier (n 169) 85.
[201] Stefan Enchelmaier, 'The Awkward Selling of a Good Idea, or a Traditionalist Interpretation of Keck' (2003) 22 Yearbook of European Law 249, 254.
[202] Act on Virtual Currency Providers (n 5) section 4.
[203] Case C-76/90 *Säger* (n 179) para 14.

In addition to the previous cases, which were evaluated above, the Court has evaluated restriction related to providing insurances. In *Commission v Germany*[204] the Court concluded that the requirements that Germany imposed caused a restriction. Germany required that an insurer who is established in another Member State, authorised by the supervisory authority of that Member State and supervised by that authority needs to have a permanent establishment within the territory of Germany in which the service is provided. Additionally, the service provider was required to obtain a separate authorisation from the supervisory authority of that Member State. The Court stated that these requirements increased the cost of the services especially in situations where the insurer conducts business in that Member State only occasionally.[205]

Commission v Germany also partly indicates that if Finnish virtual currency provider is required to obtain registration in other Member States in addition to obtaining the registration in Finland, the registration in other Member States can be evaluated as restriction. However, the difference with the mentioned case and the registration obligation of virtual currency providers is that the latter one does not need to have a permanent establishment within the Member State it intends to provide services.

The restriction approach is also supported by Eeckhout, who explains that in the case of indistinctly applicable measures there is always a discrimination present when a foreign service provider is subject to a double regulatory burden. If the host Member State does not take into account the home Member State's regulation, this conduct results in discrimination. The host Member State is obligated to look at the regulation in the home Member State. If the regulation is equivalent to its own regulation, the host Member State has to recognise the regulation and it cannot impose its own standard.[206] This approach supports the view that FIN-FSA has to take into account foreign virtual currency provider's registration in its own home Member State. Also, if a registered Finnish virtual currency provider wants to provide its services in other Member States, the host Member State needs at least take into consideration the registration in Finland. This is further examined in the section 5.3. Mutual recognition.

[204] Case 205/84 *Commission of the European Communities v Federal Republic of Germany* [1986] ECR 03755.
[205] ibid para 28.
[206] Eeckhout (n 64) 225.

Second step is to examine whether the restriction has similar effects on domestic services and imports provided by operators established in the same Member State as the recipient, and on services in whose provision a border between Member States is crossed.[207] Currently, the Finnish Financial Supervisory Authority has only granted registrations of virtual currency provider to national entities.[208] Also, as the deadline for implementing the AML5 Directive was 10th of January 2020 and other Member States may not have started to registrate virtual currency providers yet, it is difficult to evaluate this second step.[209] Therefore, the second step is excluded from the scope of evaluation.

Third step is to assess whether the restriction prohibits the last remaining use in the Member State in question. The situation can be that the use remains legal in at least one other Member State or the importing Member State is the last to allow this use.[210] Some Member States may be stricter when applying the registration obligation as they might not allow foreign operators in their area albeit they have been accepted to the register in another Member State. As mentioned previously, the implementing period ended recently and for this reason the Member States have not started to take further actions against foreign virtual currency providers.

However, it is important to note that there is no clear definition for discrimination. In the end, this is left on the discretion of the Court.[211] The Court has highlighted in several cases the coverage of the rules of equality of treatment between nationals and non-nationals. The simplest rule is that discrimination is forbidden based on nationality or in the case of a company based on its seat. Additionally, the prohibition covers all forms of discrimination, which lead to the same result, when the rule is applied or there are other distinguishing criteria.[212] Discrimination on the grounds of nationality is a general

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[207] Enchelmaier (n 169) 85.
[208] Finnish Financial Supervisory Authority (n 7).
[209]See for example Kevin Helms, 'EU Countries Commence Crypto Regulations as Mandated by New Directive' (2020) <https://news.bitcoin.com/eu-countries-commence-crypto-regulations/> accessed 18 January 2020.
[210] Enchelmaier (n 169) 85.
[211] Hatzopoulos (n 61) 157.
[212] Case C-382/08 *Michael Neukirchinger v Bezirkshauptmannschaft Grieskirchen* [2011] ECR I-00139 para 92.

prohibition clause in EU law in Article 18 TFEU and covers all situations governed by EU law, in case there are no specific rules.[213]

If the national rule is genuinely non-discriminatory, it is considered as lawful. On the other hand, if there is unjustified discrimination in the national rule, EU law requires the discriminatory element of the national measure to be set aside. The substance of the national rule, however, stays in force.[214] As mentioned earlier, the Virtual Currency Act has a neutral wording towards domestic and foreign virtual currency providers as both virtual currency providers are obligated to register in Finland. Therefore, the Virtual Currency Act may be stated as genuinely non-discriminatory. On the other hand, the discriminatory element of the national element in other words, the registration obligation of a foreign virtual currency provider, who has already established registration in another Member State may be set aside.

In conclusion, it can be argued that the registration obligation of foreign virtual currency providers who have established the registration in another Member State than Finland can be classified as unjustified indistinctly applicable measure, which is evaluated as a restriction according to Article 56 TFEU, if Finland does not justify the restriction with overriding reasons of public interest or take into consideration the requirements that the virtual currency provider is already fulfilling in its home Member State.

Also, the virtual currency provider, who has been granted the registration by the FIN-FSA, can face unjustified indistinctly applicable measures. The above-mentioned scenario applies in both ways. In other words, if host Member State makes the registered Finnish virtual currency provider to apply for the registration from its own supervisory authority and does not justify the restriction with overriding reasons of public interest or take into consideration the requirements that the Finnish virtual currency provider is already satisfying in Finland. The next section evaluates the role of the latter, the principle of mutual recognition before a Member State opposes the justification.

[213] Enchelmaier (n 201) 252.
[214] Barnard (n 62) 17.

5.2 Mutual recognition

The previous section examined whether there is a restriction in the double registration obligation. The next step is to evaluate whether the mutual recognition principle can be applied in the case of virtual currency providers. As stated in the beginning and discussed in more details in the chapter 4, the AML Directives do not take into account a single passport regime, which is based on the idea of mutual recognition.

Mutual recognition principle has a critical role in the internal market regulations as it allows the free movement of the fundamental freedoms without the need for harmonisation of national legislation at EU level.[215] This means that it allows access to the markets of Member States and its purpose is to set limits on the restrictions regarding fundamental freedoms. Restrictions may be justified based on the mandatory requirements of the public interest. However, the secondary law may refer to the mutual recognition principle as an instrument to overcome such hindrances. This principle helps the market participants to effectively enforce their legal positions, which they can base on directly applicable fundamental freedoms and on secondary law.[216] This section will examine different scenarios through mutual recognition principle in those situations where internal market regulation concerning free movement of goods, services or capital are applicable to virtual currency providers.

Mutual recognition principle serves different purposes in the EU and combines three different approaches: host-country control; state of origin; and harmonisation. Host-country control refers to a situation, where the legal provisions of the host Member State are applied. The host Member State is only restricted by national treatment principle, i.e. it cannot favour national operators at the expense of foreign operators. Mutual recognition takes this into consideration to the extent that the host Member State may demand the application of its provisions, which are justified according to the public interest requirement.[217]

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[215] Commission, 'Mutual Recognition in the Context of the Follow-up to the Action Plan for the Single Market' COM (1999) 299 Final 3.

[216] Wulf-Henning Roth, 'Mutual Recognition' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (1st edn, Edward Elgar Publishing Limited 2017) 427.

[217] ibid 429–430.

In practise, host-country control means that virtual currency providers need to heed the host Member State's legislation. If virtual currency provider has the registration in one Member State, it could not rely only upon the registration in its home Member State. However, the host Member State cannot force a virtual currency provider to comply with the legislation, which is not justified by the public interest requirement.

Second approach, the state of origin principle ensures that goods and services lawfully produced in the state of origin can be lawfully marketed all over the internal market and the operator does not have to consider the regulations set forth in the host Member States. Mutual recognition uses this approach, when the host Member State is providing market access and it has to consider the regulatory conditions under which the product or service has been produced and marketed in the home Member State.[218]

The state of origin approach differs from the host country control in practise significantly, in situations where it may be applied to virtual currency providers. This means that virtual currency providers do not need to take into consideration the host Member State's legislation, if they have received the registration in one of the Member States.

The last approach, harmonisation is pursued in the Union as different legal rules and standards can be as an obstacle to the realisation of the fundamental freedoms. Mutual recognition principle shows that there is a need for harmonisation as the decision making in EU is decentralised: Member States still have plenty of power to regulate and supervision is usually carried out nationally. [219]

Hatzopoulos asserts that the mutual recognition principle offers an obligation of means instead of providing a result. He recommends that national authorities have in place necessary procedures to evaluate the activities that the service provider already is already undertaking. If the requirements which the service provider fulfils in its home Member State are fundamentally different from the ones required by the host Member State, the national authorities of the host Member State are not obliged include any kind

[218] ibid 429–430.
[219] ibid 430.

of recognition.[220] Article 47 in AML5 Directive spells out the registration obligation for virtual currency providers that Member States must establish. However, neither the AML5 Directive nor the AML4 Directive does explicitly state what are the requirements for the registration. On the other hand, the purpose is that competent authorities are able to monitor the use of virtual currencies through virtual currency providers.[221] This may indicate that the purpose is the same in every Member State and the requirements cannot vary fundamentally between Member States. Therefore, the national authorities are obliged to include at least recognition to a certain extent.

5.2.1 Background from the Court's case law

Mutual recognition principle was introduced in the Court's early case law, in *Cassis de Dijon*[222]. The principle has many different wordings as it can be also referred as the principle of equivalence, the principle of home state control or as the principle of country of origin. *Cassis de Dijon* concerned free movement of goods and the Court presented the rule of reason, which is a fundamental aspect in the mutual recognition. The case introduced a three-step test, which shows the obstacles to the free movement of goods. First, there is no harmonised European measure on the matter that prevents a Member State from regulating, and secondly, a Member State has not invoked an acceptable mandatory requirement and lastly, the national measure in question is adequate and proportionate to satisfy the mandatory requirements.[223]

The first and second steps imply that it is only possible to refer to *Cassis de Dijon*, if the restriction derives from national law or from other measures, which are not harmonised at the EU level. Originally, the case concerned only free movement of goods, but it has widened its coverage as a principle to other freedoms as well.[224] As the AML5 Directive does not harmonise the coverage of the registration in EU, the restriction is derived

[220] Hatzopoulos (n 61) 220.
[221] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156 recital 8.
[222] Case 120/78 *Rewe-Zentral AG and Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 00649.
[223] Janssens (n 57) 11–13.
[224] Ari Sormunen, 'Ajankohtaista Eurooppaoikeutta: Vastavuoroisen Tunnistamisen Periaate Muutoksessa' (2008) 1 Defensor Legis 119, 119–120.

from national law and therefore, notions contained in *Cassis De Dijon* may be applicable in the case of virtual currency providers.

Advocate General Van Gerven has stated that behind *Cassis De Dijon* is the idea that disparities between national laws may lead to serious obstacles in the internal market. These obstacles may make extra expense or additional efforts to the private operator as it needs to make the manufacture, or the marketing of the product comply with laws of the Member States.[225] If virtual currency providers are obligated to register in every Member State, the extra expense comes from the compliance costs in order to fulfil the requirements in each Member State. The next section evaluates further the mutual recognition element in free movement of services.

5.2.2 Mutual recognition in free movement of services

It is important to note that the free movement of services in TFEU consists of two components. It consists of a rule and the exception to the rule. The mutual recognition principle is the main rule and requires that 'the host State does not prohibit, impede or make less attractive an export from a provider already established in another Member State (home State) in which the provider lawfully supplies a service such as the one it intends to export'. If a measure is not compatible with the EU law, when the main rule has been evaluated, the second question is that can it fall under an exception. In the second stage, it will be examined whether the restriction can be justified.[226]

The mutual recognition principle was also introduced in the concept of free movement of services even before the *Cassis de Dijon* judgement. In *Choquet*[227], the Court stated a ban on dual burdens and a duty to compare the driver licence requirements in the other Member State and if necessary, take into account tests taken in another Member State. Additionally, the Court evaluated the licensing requirement for entertainment activities in *Van Wesemael*[228]. The Court stated that the Member State in question can only

[225] Case C-145/88 *Torfaen Borough Council v B & Q (Sunday Trading)* [1989] ECR 03851, Opinion of Advocate General Van Gerven para 15.
[226] Matteo Ortino, 'The Role and Functioning of Mutual Recognition in the European Market of Financial Services' (2007) 56 International & Comparative Law Quarterly 309, 311, 313.
[227] Case 16/78 *Criminal proceedings v Michel Choquet* [1978] ECR 02293.
[228] Joined Cases 110/78 and 111/78 *Ministère public and"Chambre syndicale des agents artistiques et impresarii de Belgique" ASBL v Willy van Wesemael and others* [1979] ECR 00035.

enforce a licensing requirement, if the requirement is objectively justified. This criterium is fulfilled when the Member state ensures that the professional rules of conduct are observed and the Member State protects these rules.[229] It can be argued that the Court was clearly obliging the Member State in which the service was performed to consider all requirements that had previously been complied with in the Member State of establishment (home State). This obligation was considered to avoid unjustified duplications of equivalent statutory provisions.

However, an important milestone touching upon the mutual recognition principle concerning free movement of services was the *Säger* judgement, which made clear that in the absence of any justification grounds, there is no valid reason why services that were lawfully performed in one Member State should not be permitted in another Member State.[230] The British company provided patent renewal services in Germany and Mr. Säger applied for an injunction to restrain the activities of the British company, as German legislation reserved the maintenance of industrial property rights to lawyers and patent agents, which acted in their personal capacity. Snell points out to an interesting difference between the earlier case law and *Säger* as the German system went further with patent renewal services regulation than the British system and there was no equivalent system in United Kingdom, the British company did not have to fulfil similar requirements twice.[231]

EU's secondary legislation can also provide solutions, which are based on the idea of mutual recognition. If virtual currency providers are under the E-commerce Directive, the services will benefit from the country of origin principle, which is the same as mutual recognition principle as mentioned earlier. The applicability of the E-commerce Directive means that according to the Article 3 (1) a service provider, which is established in the home Member State needs to comply with the national provisions applicable in the Member State in question. However, the country of origin principle applies only to a certain type of regulation enacted by the Member States as the regulation is required to belong to the coordinated field, which is elaborated in the Article 2 (h). The coordinated field includes taking up of the activity of an information

[229] ibid para 29.
[230] Janssens (n 57) 14–15.
[231] Snell (n 65) 60–61.

society service. These could include, for instance, requirements concerning qualifications, authorisation or notification. As virtual currency providers are obligated to register in Member States, the registration obligation might fall under the coordinated field as an authorisation.

On the other hand, the applicability of the E-commerce Directive to virtual currency providers is not clear. The EBA has still highlighted last year that virtual currencies are not typically regulated financial products under EU law, and that there is no straightforward regulation governing virtual currencies and related products and services. The European Commission has confirmed that it evaluates further the advice from the EBA and ESMA.[232] Therefore, there is no straightforward answer to the question whether the secondary regulation can be applied to virtual currency providers in the light of mutual recognition principle.

5.3 Justifications under EU law

As mentioned previously, the mutual recognition principle is the main rule. If a Member State is not willing to use mutual recognition in its evaluation, it needs to justify the exemption that it makes to the Article 56 TFEU. If the result is that foreign virtual currency providers are also obligated to register in Finland and the double registration is considered as restriction according to the EU law, the national measure needs to be examined. This implies that Finland needs to justify the double registration obligation based on overriding reasons of public interest. It should be noted that in the case justification is accepted, the mutual recognition may have been used to a certain extent. However, the national measure itself is considered as proportionate to restrict the free movement of services, given that the justification is accepted.

As the previous chapter evaluated the scope of the restriction under internal market regulations, this chapter will focus on defining the existence of a legitimate interest behind the restriction. As a legitimate interest is not the only requirement in order to accept the restriction, a Member State needs to justify the national measure according to

[232] European Supervisory Authorities 'Joint Opinion of the European Supervisory Authorities on the Risks of Money Laundering and Terrorist Financing Affecting the European Union's Financial Sector' (October 2019) JC2019 59 04, 14, 27.

the principle of proportionality. This means that the legitimate interest has to be evaluated according to the two-prong test of the principle of proportionality. First part is to investigate the pursued interest. The second part is examining, whether the restrictive measure is justified.[233]

According to Maletic, the case law generally reveals apparent willingness of considering the public interest justification. Moreover, the Court has often engaged in a soft proportionality approach, which means that the Court has allowed a considerable discretion to Member States regarding the choice of the most suitable means to protect accepted national interest, when the Court has reviewed the compatibility of national measures with the four freedoms.[234]

The previous mentioned case, *Gebhard*[235] also gave some details about the requirements necessary for a national rule to satisfy the test of justification. The Court stated that national measures liable of hindering or making less attractive the exercise of fundamental freedoms, which are written in the Treaties, has to fulfil four conditions. Otherwise, the justification would breach Article 49 TFEU, which defines the restriction for the right of establishment. These four conditions are the following: the justification has to be applied in a non-discriminatory manner. Secondly, it has to be justified by compulsory requirements in the general interest. Thirdly, it has to be suitable for securing the goal of the objective which they are pursued. Lastly, the justification cannot go beyond what was necessary to attain it.[236] The third and fourth conditions refer to the traditional view of two-prong-test for the principle of proportionality.[237]

If the nature of the justification is purely economic, a Member State cannot use it to justify the restriction. The Court has made this clear on its case law of the doctrine of mandatory or overriding requirements. This conclusion can also be found from the written exceptions in provisions such as Article 36 TFEU. Snell asserts that if the Court

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[233] Hatzopoulos (n 61) 146.
[234] Isidora Maletić, *The Law and Policy of Harmonisation in Europe's Internal Market* (Edward Elgar Publishing 2013) 10–11.
[235] Case C-55/94 *Reinhard Gebhard* (n 66).
[236] ibid para 37.
[237] Hatzopoulos (n 61) 173.

finds the aim as purely economical, it ends the whole discussion and there is no need to investigate deeper, provided that the Member State can justify the restriction.[238]

According to Sørensen the case law provides a blurred picture about situations where there is exhaustive harmonization. Apparently, there are indications that Member States cannot rely for example on the Treaty-based justifications, if there is exhaustive harmonization.[239] This statement is not yet applicable for this research as the registration obligation is based on the minimum harmonization. However, it should be kept in mind that the situation can change in the future.[240]

In addition to the Treaty based justifications, the Court has had to add some justifications, which are referred as 'overriding reasons of public interest'. These are judge-made exception to the internal market rules.[241] The Court has already added these mandatory requirements in *Cassis de Dijon* and these are complementing public policy exception to the extent that justifications of non-discriminatory national measures are concerned. The grounds for justification are diverse as the objectives can cover topics from consumer protection and fairness of commercial transactions to environmental protection and even the effectiveness of financial supervision.[242]

It is important to note that Member States cannot themselves define these overriding reasons as deciding the scope of overriding reasons belongs to the Court. If a Member State refers to the overriding reasons, the Member State has the burden of proof of the justified national measure and the aim it tries to achieve.[243] Also, the EU interference

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[238] Jukka Snell, 'Economic Justifications and the Role of the State' in Panos Koutrakos, Niamh Nic Shuibhne and Phill Syrpis (eds), *Exceptions from EU Free Movement Law : Derogation, Justification and Proportionality* (1st edn, Bloomsbury Publishing Plc 2016) 12–13.
[239] Sørensen (n 56) 345.
[240] The European Commission has launched a public consultation on 19th of December 2019 about a Directive or Regulation establishing a European framework for virtual currency markets. Therefore, the minimum harmonization may change to exhaustive harmonization in the future. See the public consultation Commission, 'European Commission Consultation Document on an EU Framework for Markets in Crypto-Assets' (December 2019).
[241] Hatzopoulos (n 61) 146, 151.
[242] Daniel Thym, 'The Constitutional Dimension of Public Policy Justifications' in Panos Koutrakos, Niamh Nic Shuibhne and Phill Syrpis (eds), *Exceptions from EU Free Movement Law : Derogation, Justification and Proportionality* (Bloomsbury Publishing Plc 2016) 172–173.
[243] Heidi Kaila, 'Tavaroiden Vapaa Liikkuvuus Euroopan Unionissa - Cassis de Dijon - Oikeuskäytännön Jäljillä, Osa II' (2016) 4 Defensor Legis 676 680.

has to be justified as there needs to be an economic justification for the EU to interfere with national regulatory autonomy.[244]

In the case of virtual currency providers there is undoubtedly an economic reason for the EU to interfere as these providers are flooding virtual currencies to different Member States and as Member States cannot act alone due to virtual currencies international nature. If Finland decides to force the foreign registered virtual currency providers to register in Finland as well or other Member State determines that a Finnish virtual currency provider, who has received the registration from the FIN-FSA, has to register in that Member State, it needs to be examined what kind of options are considered as overriding reasons of public interest which the Member State can use. This thesis evaluates two options: AML policy and consumer protection.

First, it will be evaluated whether AML policy can be considered as overriding reason of public interest. In *Commission v Spain (lottery winnings)*[245], the Court left open the question whether the objective of preventing money laundering and combating tax evasion could fall within the definition of public policy, which would be evaluated as Treaty-based justification. However, the Court stated that the authorities of a Member State cannot assume in a general way and without distinction that bodies and entities established in another Member State are engaging in criminal activity.[246] Generally, Member States need to show that the same objective could not have been reached by less restrictive means.[247]

On the other hand, the Court has evaluated earlier whether a Member State can permit national measures in so far as they are planned to prevent for example money laundering and terrorist financing. However, both cases, *Bordessa* and *Sanz de Lera* concerned restrictions to free movement of capital. The Member States did not succeed in justifying the objective as there were less restrictive measures to use.[248] In *Bordessa*, the Court stated that a prior declaration as a prerequisite measure may be evaluated as proportionate to the objective and can be justified as it does not include a suspension of

[244] Maletić (n 234) 10.
[245] *Case C-153/08 Commission of the European Communities v Kingdom of Spain [2009] ECR I-09735.*
[246] ibid para 39.
[247] Cuyvers (n 58) 340.
[248] Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera* (n 81) paras 22–23, 30; Joined Cases C-358/93 and C-416/93 *Bordessa* (n 103) paras 21–23, 25.

the transaction in question. A prior declaration would allow the national authorities to exercise effective supervision.[249]

If AML policy can be evaluated as overriding reason of public interest, it needs to pass the proportionality test. The general limits stated in the case law require that exceptions '*must be interpreted in such a way that its scope is not extended any further than necessary*' and that they '*must not create obstacles to imports which are disproportionate to these objectives*'.[250] This also means that the measures need to be suitable and necessary in relation to the legitimate aim they pursue in order to be proportionate.[251] Therefore, it is important to challenge whether it is suitable that all virtual currency providers need to register in every Member State where they operate. If this is suitable, it must be asked whether it is necessary to demand this kind of registration. Also, it is essential to examine whether there are any other less restrictive measures, which can achieve the same aim[252].

On the other hand, the Court stated in *Alpine Investments* that the fact that one Member State imposes less strict rules than another Member State does not mean that the rules in a stricter Member State are disproportionate and therefore incompatible with the EU law.[253] Harbo has examined between the cases *Alpine Investments* and *Peijper*[254] and asserted that the Court does not have a consistent line in the proportionality evaluation. In the latter case, the least restrictive measure was only considered as proportionate, which is contradictory to the argument in Alpine Investments.[255] However, these cases concerned different freedoms as *Peijper* concerned the import of medicine and *Alpine Investments* financial services. Therefore, it may be more suitable to rely on the interpretation of *Alpine Investments*, which can be deemed to be more relevant for virtual currency providers. The Court's statement definitely raises a question that can a Member State obligate a virtual currency provider, who has already registered in one

[249] Joined Cases C-358/93 and C-416/93 *Bordessa* (n 103) para 27.
[250] Thym (n 242) 176.
[251] Cuyvers (n 58) 340.
[252] Enchelmaier (n 201) 263.
[253] Case C-384/93 *Alpine Investments* (n 144) para 51.
[254] Case 104-75 *Adriaan de Peijper, Managing Director of Centrafarm BV* [1976] ECR 00613.
[255] Tor Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal 158 174.

Member State, to also register in another Member State as stricter regulation as such is not defined as disproportionate.

However, the application of stricter rules in one Member State means that domestic operators may face higher compliance costs than their foreign counterparts. A Member State may have face difficulties in defending the proportionality of the justification, if it affects cross-border trade. This approach can be seen reflected in the Court's extreme cases, where it decides that a Member State cannot enforce higher standards against cross-border goods and services at all. As a result, in wholly internal situations, there might be higher standards than in the cross-border situations.[256] In other words, a Finnish virtual currency provider, which is registered by the FIN-FSA may be forced to comply with stricter regulation as defined in Finland, but the FIN-FSA cannot force the foreign virtual currency provider, which is supervised by other supervisory authority in its home state and provides virtual currency services in Finland to comply with these stricter standards as it affects cross-border trade.

The Court usually focuses on the concrete objective and the regulatory context of the harmonisation measure in question when determining how much differentiation it can allow under the measure.[257] Therefore, it is important to evaluate the objective behind the AML policy. The AML5 Directive states that the AML4 Directive is the main instrument in the prevention of money laundering and terrorist financing by using the Union financial system. The AML4 Directive also mentions the common worry in the Member States, keeping up with evolving trends and the need for further measures. Therefore, the Directive pursues increased transparency of financial transactions. However, it is stated that the measures taken should be proportionate to the risks.[258]

It is important to remember that the purpose of categorising virtual currency providers under the AML legal framework was shielding regulated financial services from virtual currency schemes. The AML legal framework mitigates the AML and CTF risks that arise from the interaction between virtual currency schemes and regulated financial

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[256] Boeger (n 55) 71, 75.
[257] ibid 75.
[258] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156 recitals 1,2.

services. It does not mitigate risks that arise internally or between the virtual currencies themselves such as volatility of virtual currencies.[259]

Considering the purpose of the AML legal framework, it should be noted that the Court has already in *Alpine Investments* expressed that maintaining the good reputation of the national financial sector can be a public interest reason. Therefore, it can be justified as a restriction on the freedom to provide financial services.[260] *Alpine Investments* may be also applicable for justifying the national measure, if the AML policy is considered as public interest reason as the one of the purposes for AML policy is to protect the reputation of the financial sector.

The main legal instrument in the prevention of money laundering and terrorist financing, the AML4 Directive, states that '*the flows of illicit money can damage the integrity, stability and reputation of the financial sector*'. Additionally, they can threat the internal market of the EU international development. The AML4 Directive clearly declares that money laundering and terrorism financing should be addressed at the Union level as it is a significant problem.[261] This statement supports the view that there is an economic justification for the EU to interfere with national regulatory autonomy concerning registration obligation of virtual currency providers.

If the AML policy can be considered as an overriding reason of public interest, it needs to be examined whether the restriction is proportionate. In the context of the research questions this means asking whether Finland can justify the registration obligation of the foreign virtual currency provider with the AML policy or are there less restrictive means to achieve the same goal. The *Bordessa* case may give some reference regarding the proportionality test and possibly a less restrictive measure for Finland to use. As mentioned earlier, the Court accepted a prior declaration as a measure for the Member State to use as it gives an opportunity to the competent authority to exercise effective supervision and it will not prevent the transactions.

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[259] European Banking Authority, 'Opinion on "Virtual Currencies"' (n 13) 6.
[260] Case C-384/93 *Alpine Investments* (n 144) para 44.
[261] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141 recital 1.

Therefore, the use of a prior declaration can be considered proportionate for foreign virtual currency provider as it does not suspend them from providing their services. Neverthless, it may not be reasonable to make a reference to *Bordessa* as the case concerned free movement of capital. Also, it should be noted that the registration obligation is lighter administrative procedure than a license, which was noted in the chapter 4 in the description of the relevant legislation of financial institutions and payment service providers. However, in the end it is Finland's duty to show that the prevention of money laundering and terrorist financing could not have been reached through less restrictive measures.

In addition to the first scenario, Finland justifying the use of AML policy, the second scenario needs to be examined. In the second scenario it must be asked whether a Member State other than Finland can justify the non-acceptance of the registration of the registration of a Finnish virtual currency provider with the consequence that this Member States requires the Finnish virtual currency provider to register also in this country. As mentioned previously, a Member State needs to confirm that the double registration obligation is suitable and necessary in relation to the preventing money laundering and terrorist financing, which it pursues with the justification. Otherwise, a Member State cannot force the Finnish virtual currency provider to register there as well. The double registration obligation creates obstacles to imports and therefore, the Member State cannot just disregard the registration that the Finnish virtual currency provider has received from the FIN-FSA.

As previously mentioned, the justification can be evaluated from the consumer protection perspective as the protection of consumers can be an overriding reason of public interest, which is capable of justifying a restriction on the freedom to provide services according to the Court's case law.[262] Consumer confidence is of particular importance, when the regulation concerns financial service providers and products. If consumers lose confidence in the financial system, a result might be systemic collapse as consumers are the starting point in the financial system. On the other hand, if consumers are using financial services to an optimal extent, the use of financial services

[262] Case C-265/12 *Citroën Belux NV v Federatie voor Verzekerings- en Financiële Tussenpersonen (FvF)* [2013] ECLI:EU:C:2013:498 para 38.

may have positive effects to the financial market.[263] Also, the EBA has affirmed that virtual currencies impose significant risks to consumers and therefore, it is reasonable to evaluate whether Member States can use consumer protection as an overriding reason of public interest.[264]

The Court has dealt with many cases that introduce provisions in secondary legislation, which authorise Member States to allow additional rules to protect consumers. In spite of these additional rules, Sørensen argues that the additional rules do not allow Member States to introduce provisions, which infringe the free movement rights.[265] Consumer perspective is also briefly noted in the AML4 Directive. It states that regulatory technical standards in financial services should ensure consumer protection in the Union. However, this is only a secondarily cited and is not the main objective in the AML legal framework.[266]

According to Kaila, protecting consumers by restricting the free movement of goods is not usually proportionate as the consumers can be protected by providing sufficient and appropriate information about the product. Also, in practise Member States have limited possibilities to refer to consumer protection as overriding reasons due to the fact that many consumer protection matters are regulated at the EU level.[267] The EBA has commented that there may rise differentiating approaches across the EU concerning consumer protection in the field of virtual currencies. Therefore, the EBA suggested that the EU framework may be justified in the future concerning virtual currency activities.[268]

Provisions about marketing are usually specifying the information that needs to be provided to consumer about the product. AML5 Directive in itself does not impose any

[263] George J Benston, 'Consumer Protection as Justification for Regulating Financial-Services Firms and Products' (2000) 17 Journal of Financial Services Research 277, 279.
[264] EBA has commented several times that virtual currencies impose risks to consumers. See for example European Banking Authority, 'Opinion on "Virtual Currencies"' (n 13) 8, 45; European Banking Authority, 'Report with Advice for the European Commission on Crypto-Assets' (n 36) 17.
[265] Sørensen (n 56) 341.
[266] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337 recital 61.
[267] Kaila (n 243) 683.
[268] European Banking Authority, 'Report with Advice for the European Commission on Crypto-Assets' (n 36) 17.

requirements for the virtual currency provider about marketing. Finland has tackled marketing in the Virtual Currency Act section 12. Section 12 states that the virtual currency provider is obligated to provide to the customer all the information that may have significance, when the customer is making choices about the service. The Government proposal specifies that the marketing definition is derived from the Consumer Protection Act[269] chapter 2.[270] Finland has implemented Unfair Commercial Practices Directive[271] into national legislation in the chapter 2 of the Consumer Protection Act. Therefore, also the provision concerning marketing are derived from the EU law, which may result in that it is more difficult to use consumer protection as overriding reason of public interest as noted by Kaila earlier.

However, the Court has shown sector-specific sensitivity in the case of financial services as it has stated that financial services are by nature complex and entail specific risks. Consumers may not always be sufficiently well informed about the risks.[272] *Citroën Belux NV v Federatie voor Verzekerings- en Financiële Tussenpersonen* concerned offers for consumers and the lack of transparency in these kinds of systems. The Court accepted the consumer protection justification because in the circumstances in question, the prohibition of combined offers was contributing to consumer protection. According to Weatherill, a Member State may justify the restriction, if the arguments for the justification are sincere and targeted.[273]

If the interpretation is found from the case mentioned above, the FIN-FSA needs to target clearly, how the consumers are affected in order to justify the consumer protection justification. Additionally, the evaluation of proportionality comes into question. Both the FIN-FSA and the EBA have warned consumers about virtual

[269] Consumer Protection Act [1978] (38/1978). See in Finnish *Kuluttajansuojalaki* (38/1978).
[270] HE 167/2018 vp Hallituksen esitys eduskunnalle laiksi pankki- ja maksutilien valvontajärjestelmästä ja eräiksi siihen liittyviksi laeiksi 90.
[271] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L 149.
[272] Case C-265/12 *Citroën Belux NV v Federatie voor Verzekerings- en Financiële Tussenpersonen (FvF)* (n 262) para 39.
[273] Stephen Weatherill, 'Justification, Proportionality and Consumer Protection' in Panos Koutrakos, Niamh Nic Shuibhne and Phill Syrpis (eds), *Exceptions from EU Free Movement Law : Derogation, Justification and Proportionality* (Bloomsbury Publishing Plc 2016) 251.

currencies.[274] Therefore, it needs to be carefully examined what the requirements that the consumer protection can raise are. As the consumer protection justification is hypothetical, it is problematic to comment on the proportionality. Furthermore, it should be noted that consumers are already mainly protected at the EU level and therefore it may not be reasonable to consider consumer protection in the AML framework. On the other hand, the EBA has raised consumer protection as one of the primary objectives driving new regulation towards virtual currencies and therefore, it cannot be disregarded.[275]

To conclude, it seems likely that Finland or the other Member State, which evaluates the registration of a Finnish virtual currency provider, cannot use the consumer protection as a justification in the light of the AML Directive framework. However, if the virtual currency providers are obliged to comply with other legal frameworks that financial operators normally are obligated to follow, consumer protection may be evaluated differently.

If virtual currency providers are evaluated based on the existing secondary legislation, previously mentioned E-commerce Directive may become into question. If the E-commerce Directive is applicable to virtual currency providers, it would provide derogation options for Member States. According to the Article 3 (4) a Member State may take measures, if the measures are necessary due to public policy or the protection of consumers, which includes investors. The public policy exception concerns in particular the prevention, investigation, detection and prosecution of criminal offences. However, a Member State can use these derogations only in measures, which are proportionate to the objectives and which are targeted to the specific information society service, which affects the achievements of the objectives. A Member State can also use the derogations, if the information society service presents a serious and grave risks to the objectives.

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[274] European Banking Authority ‘Warning to Consumers on Virtual Currencies’ (n 3); Finnish Financial Supervisory Authority ‘Finanssivalvonnan Varoitus: Kryptovaluutat Ja ICOt Riskialttiita Sijoituskohteita’ (2017) <https://www.finanssivalvonta.fi/tiedotteet-ja-julkaisut/lehdistotiedotteet/2017/finanssivalvonnan-varoitus-kryptovaluutat-ja-icot-initial-coin-offering-riskialttiita-sijoituskohteita/> accessed 9 February 2020.

[275] European Banking Authority, ‘Report with Advice for the European Commission on Crypto-Assets’ (n 36) 17.

The Article 3 (4) on E-commerce Directive follows the same pattern that is used in the evaluation above. Thus, I would be careful in evaluating the justification based on the E-commerce Directive as the European Banking Authority has not mentioned the E-commerce Directive at all and as a majority of virtual currency related activities, which are carried out by intermediaries show similarities to the existing traditional activities found in financial markets.

Some reference can also be found from the Services Directive[276] as it also concerns services which can be provided at distance i.e. via the Internet.[277] The Service Directive states about the authorization schemes concerning freedom of establishment on the Article 12. Service activity or the exercise of the establishment can be under authorization scheme, if three conditions are met: firstly, the authorization scheme does not discriminate the service provider; secondly, Member State has justified the need for an authorization scheme by an overriding reason relating to the public interest and; lastly, there are no other less restrictive measures to attain the pursued objective.

In addition to the freedom of establishment, Article 16 (2b) in the Services Directive states that Member State may not impose '*an obligation on the service provider to obtain an authorization from their competent authorities*', except where the exception is stated in the Services Directive or other instruments of EU law. Therefore, if the Services Directive is applicable to virtual currency providers, the double registration needs to be stated in the secondary legislation. As the Commission released the public consultation on legal framework for crypto-assets, which include the virtual currency providers, it seems likely that relevant secondary legislation will be provided in the future.[278]

On the other hand, it should be noted that the Services Directive excludes financial services from its scope as financial services are subject of specific Community legislation. The reason for excluding the financial services from the scope of the Service Directive is that the specific Community legislation targets to achieve a genuine internal

[276] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376.
[277] ibid recital 33.
[278] See more (n 240).

market.[279] As previously mentioned, the EBA has stated that virtual currencies do not normally fall under the traditional financial services legislation, therefore it may be reasonable to claim that before there is specific legislation concerning virtual currency providers at the Union level, the virtual currency providers fall under the scope of the Services Directive.

[279] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376 recital 18.

6 CONCLUSIONS

It seems clear that there is no coherent definition and categorization for virtual currencies as virtual currencies may have different characteristics. The case *Thompson* pointed out towards goods, but the virtual currencies do not have a physical representation, which makes them difficult to categorise under the concept of goods. The eager involvement from the EBA in the field of virtual currencies can also indicate direction towards financial regulation as the EBA has written opinions and reports about virtual currencies and the EBA is supervising the financial sector at the EU level.[280] Also, the objective of AML Directives is the protection of the financial sector. Therefore, it seems inevitable that virtual currencies are categorised under free movement of services or free movement of capital in the light of internal market regulation.

However, as the first and the second research questions of this thesis are strongly based on entities providing virtual currencies in their business activities, it was necessary to evaluate virtual currency providers from the perspective of the fundamental freedoms. The Court's only case concerning virtual currencies and virtual currency providers, *Skatteverket v David Hedqvist* leans towards categorising virtual currency providers under the concept of services. Additionally, a reference from the Court's case law can be found from Internet-based services in the gambling industry as virtual currency providers are providing their services also via the internet.

Academic literature and the Court's case law support the argument that the purpose of the legislation needs to be taken into account when classifying virtual currencies and virtual currency providers. Both the AML5 Directive and the Finnish Virtual Currency Act concentrate on the obligated entities providing exchange services. In other words, the purpose of the legislation supported the view that virtual currency providers are defined under the concept of freedom of services and that the restrictions should be evaluated based on Article 56 TFEU.

[280] See also more information about EBA's new role in European Banking Authority, 'Anti-Money Laundering and Countering the Financing of Terrorism: Factsheet on the EBA's New Role' (February 2020). The EBA will take the lead on AML/CTF on behalf of all competent authorities.

The main research questions in this thesis concentrated on the evaluation of registration obligation in different Member States and does the double registration obligation constitute an acceptable restriction. Some Member States may be more active on forcing the registration obligation in their own State even though the foreign virtual currency provider has already received the registration in its home Member State. Therefore, the regulatory burden is not equal to virtual currency providers, who are operating in different Member States. The Court has already stated in *Gouda,* that measures, which impose dual burden to service providers are evaluated as restrictions based on Article 56 TFEU.

Additionally, the Court has evaluated service providers offering their services via internet to recipients in a Member State other than the Member State in which service provider is established. Virtual currency providers may be evaluated in the same way to a certain extent because virtual currency providers are often physically established in one Member State while offering their services throughout the EU via Internet. The Court has concluded that any national measure, which hinders providing services via the internet, are considered as restrictions on the freedom to provide services.

On the other hand, the Court has already stated in *Alpine Investments* that the fact that one Member State imposes less strict rules than another Member State does not imply that the rules in a Member State applying stricter rules are disproportionate and therefore incompatible with the EU law. If the FIN-FSA requires a foreign virtual currency provider, which is registered in other Member State, to registrate also in Finland, a domestic virtual currency provider may face higher compliance costs as it is difficult to force the foreign virtual currency provider to comply with stricter Finnish regulations as the double registration obligation affects cross-border trade.

Mutual recognition has an important role in evaluating the registration of virtual currency providers as there is no specific EU passport regulation yet for virtual currency providers. The mutual recognition principle is interpreted as the main rule and this principle requires that the host state does not prohibit, impede or make less attractive an export from a provider, which is already established in another Member State (home State), if the provider lawfully supplies a service in the home State like the one he intends to export in the host State. Regardless of the main rule, the host State may have

an option to disregard the requirements that the provider is already fulfilling in its home State, if these requirements are fundamentally different in the host state.

The AML4 and AML5 Directives seek to ensure that competent authorities are able to monitor the use of virtual currencies through virtual currency providers. As the purpose is the same in each Member States, the common purpose may indicate that the requirements cannot vary significantly between Member States. This implies that the FIN-FSA is obligated to check the requirements that a foreign virtual currency provider is complying in its own home Member State. In addition, this means that the FIN-FSA cannot force the virtual currency provider to comply with stricter requirements. This can also be interpreted as the other way around too, which means that a Finnish virtual currency provider, who is registered by the FIN-FSA and wants to provide its services in other Member States can benefit from the principle of mutual recognition. The host state's supervisory authority needs to examine the requirements that the Finnish virtual currency provider needs to fulfil in Finland.

As the registration obligation is considered as a restriction based on the dual burden virtual currency providers have, when they need to apply for the registration in different Member States, Member States have the option to justify the restriction with overriding reasons of public interest. However, the principle of mutual recognition may be applied to a certain extent, but the national measure has been considered as proportionate to restrict the free movement of services.

Member States may have two options to use overriding reasons of public interest: AML policy and consumer protection. The first option has not been evaluated by the Court as the Court disregarded the evaluation in *Commission v Spain (lottery winnings)*. However, the Court has evaluated the prevention of money laundering as an objective and considered the proportionality of national measures. *Bordessa* gave a possibility to use a prior declaration as a less restrictive measure. On the other hand, Finland needs to show that there were no other means than forcing foreign virtual currency providers to register in Finland as well in order to reach the objective. Additionally, Member States other than Finland cannot force the double registration obligation to a Finnish virtual currency provider if the Finnish virtual currency provider wants to provide its services there. The Member State needs to justify the national measure, which means that the

registration obligation is suitable and necessary in order to prevent money laundering and terrorist financing.

The second option, consumer protection as a justification reason is more difficult to evaluate as it is not mentioned as a priority in the AML Directives. Also, there are other measures to protect consumers, and there is specific legislation concerning consumers, which is primarily enacted at the EU level. Therefore, it seems inevitable that Finland or other Member State cannot use consumer protection as justification.

All things considered, it can be asserted that the evaluation of the registration obligation is problematic as the legal framework for virtual currency providers is still in infancy. The Court evaluates the elements case by case and although the current case law has provided some guidelines for the evaluation of virtual currency providers, but it is difficult to say in the end which would be the reasonable factors used by the Court. The mutual recognition principle and the avoidance of the double burden raise important questions in the EU framework. However, it is clear that a Member State, who forces a foreign virtual currency provider to register in their area as well, needs to do an evaluation of overriding reasons of public interest before it can force the foreign virtual currency provider to register to their competent authority. The European Commission's next steps will give more guidance for virtual currency providers and the situation may evolve soon as the European Commission intends to publish its conclusions about the future framework for virtual currency providers and the whole virtual currency market later this year.