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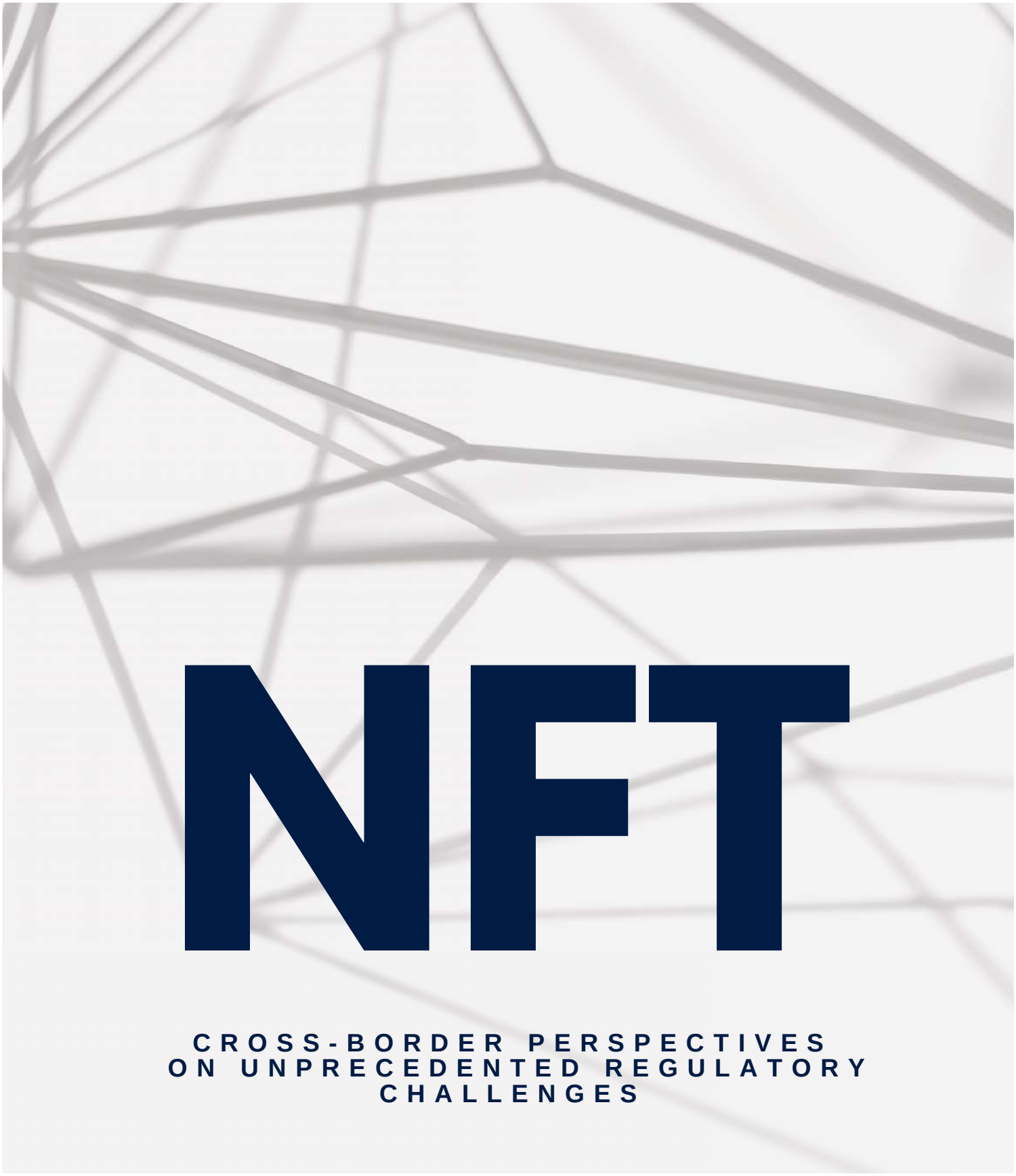

NFT

CROSS-BORDER PERSPECTIVES ON UNPRECEDENTED REGULATORY CHALLENGES

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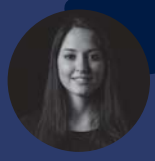

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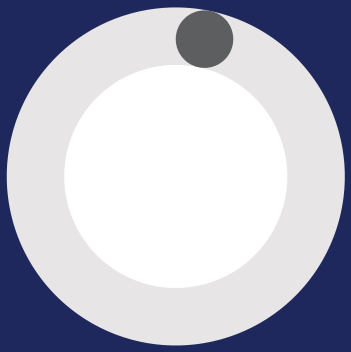
SUMMARY

Introduction



Cross-border perspectives on unprecedented regulatory challenges

Non-fungible tokens, or “NFTs”, have been largely in the media spotlight over the past few months, with significant projects developed in various industries. For example, their development in Metaverse projects is seen by many as strategic. **NFTs are used by start-ups as well as incumbent players to develop innovative digital products and services, capable of generating new revenue streams and potentially reaching new client categories.**

An NFT is a digital and cryptographic asset recorded on a blockchain, representing digital or physical items, which - unlike other digital assets that are usually interchangeable and fungible - has a non-fungible nature. The purchaser of the NFT is given a digital encrypted certificate that makes it possible to connect in a unique way to a smart contract realised on a blockchain platform and to subsequently access various prerogatives (such as access to a digital product, a physical product or specific services).

As this new NFT industry is growing rapidly, the question of the applicable legal regime is now becoming strategic. With this in mind, and to help market players develop their NFT projects in optimum legal comfort, the European network formed by Gide, Gleiss Lutz, Chiomenti and Cuatrecasas publishes this booklet that summarises the regulatory challenges for NFTs in their five countries of expertise, i.e. France, Germany, Italy, Portugal and Spain.

Global overview of NFT regulatory framework in the EU

1

NFT a rising category of crypto-assets

Crypto-assets may generally be defined as (i) digital representation of value, rights, or assets (ii) registered on a blockchain or distributed ledger, (iii) that can be digitally tradable or transferable. They have grown very rapidly in terms of volume and quantity, representing in December 2021 a global market of more than USD 2 trillion, encompassing more than 14,000 different asset types[1]. Among them, one specific category has given rise to much publicity[1] in recent months: non-fungible tokens, or "NFTs".

NFT crypto-assets that are unique and non-fungible

NFTs may generally be defined as crypto-assets that have the specificity of being unique. Unlike other crypto-assets, NFTs are based on technical standards that make it possible to identify them individually on the blockchain they are registered on, despite potential multiple transfers. As they are identifiable individually, NFTs are distinguishable from, and may not be mixed with, other NFTs of the same kind or any other asset. As they are not fungible, their identification does not rely on their quantity but on their specific designation. In essence, NFTs can be defined as crypto-assets that are unique and non-fungible.

Globally, NFTs represented a global market of USD 338 million in 2020[2]. While still "small" when compared with the global crypto-asset market mentioned above, the NFT industry has grown substantially over recent years (more than 700% since 2018[3]), with an exponential growth trend in 2021.

[1] Source: coinmarketcap.com

[2] Source: French *Autorité des marchés financiers*, 2021 Markets and Risks Outlook, July 2021 ; Non-fungible tokens yearly report 2020; www.nonfungible.com.

[3] Source: French *Autorité des marchés financiers*, 2021 Markets and Risks Outlook, July 2021 ; Non-fungible tokens yearly report 2020; www.nonfungible.com.

> **As NFT projects frequently intend to take on an international dimension and may target acquirers in multiple jurisdictions, it is necessary to conduct a precise legal analysis based on the law applicable in all countries involved.**

NFT an innovation for multiple industries

The NFTs' specific characteristic of being unique has naturally led them to be used in multiple applications. Some may be used in conjunction with other tangible assets, generally for the purpose of tracing and/or authenticating these underlying assets. Other NFTs may be used as digital assets *per se*, independently from any other asset. In all of these cases, NFTs are generally relied upon as a representation of scarcity in a digital environment, therefore providing value. Innovative applications have been found in various sectors, such as in the gaming and art industries, and the consumer goods sector. These different projects are supported by a new ecosystem, including NFT issuers, dedicated technical solution providers and specific marketplaces and exchanges. The latter have played a key role in making NFTs accessible to a wide public, with certain marketplaces specialising in certain types of NFT (for example, platforms dedicated to NFTs in the luxury industry), while others apply across sectors.

NFT & regulatory regime, a country-by-country approach

Just like the multiple applications of NFTs across industries and businesses, there is currently no unique legal definition of NFTs on a European level. In the absence of such unique definition, there is no harmonised regulatory regime across the EU member states applicable to NFTs, their issuance, exchange, custody, etc. A country-by-country approach is therefore necessary to make sure that NFT projects correctly identify all relevant legal challenges they face, in particular as regards their legal qualification and regulatory framework likely to apply, and find the best solutions to tackle them.

As NFT projects frequently intend to take on an international dimension and may target acquirers in multiple jurisdictions, it is necessary to conduct a precise legal analysis based on the law applicable in all countries involved. These may include the country where the issuer is located, the one where the target market is based, etc.

Drawing on its comprehensive expertise in this field, the European network summarises below key elements for an operational regulatory analysis on NFT projects in five leading EU jurisdictions.

Please note that this document does not list exhaustively all the legal issues that NFT must deal with when developing their activities, for example regarding consumer law, tax regulation, etc.

National approach on NFT in key EU juridictions

2

FRANCE

Look at the qualification of the NFT

In France, the legislation does not explicitly provide for dedicated rules applicable to NFTs, nor does it exclude them specifically from existing regulatory regimes currently into force. **Therefore, the regulatory analysis of NFT projects under French law primarily depends on the legal qualification of the NFT in question**. The outcome of this analysis will determine the rules that may apply to their issuance, exchange, advertising and marketing, etc.

Adopt a case-by-case approach

To identify which legal qualification may apply to a given NFT and derive the rules that may apply to its supporting ecosystem, one must investigate the specific features of this NFT and the prerogatives it offers. Additionally, the analysis must also clearly identify, for instance, which entity is in charge of its minting, whether the NFT may circulate freely, or if it may only be exchanged within a limited environment, and how it is secured and stored.

The answers to these practical questions are key in determining whether the rules regarding digital assets provided under French law apply to a given NFT project. These rules were enacted to implement in France the EU Directive on anti-money laundering ("AML"), also called the "5th Directive"[4], which introduced obligations on anti-money laundering services on virtual currencies.

In implementing the 5th Directive in France in 2019, the legislator chose to introduce a more global regime, targeting "digital assets" more broadly. The latter are defined as including virtual currencies, as provided in the 5th Directive, but also "tokens".

Tokens are defined as an intangible good representing, in digital form, one or more rights and that is recorded on a distributed ledger technology[5]. These definitions of tokens and of virtual currencies do not include any criteria relating to the fungibility of the instruments involved. On the basis of these definitions, French law imposes since then mandatory obligations on entities providing certain services in relation to them, such as their custody on behalf of clients, their sale or their exchange.

A careful analysis is therefore needed to assess whether, given its characteristics, the NFT involved in a particular project may qualify as a token, or more largely as a digital asset under French law.

If this qualification applies, it may require entities involved in its advertising and marketing, sale and custody to be registered and/or licensed with the French authorities as digital asset service providers.

Other legal qualification may also be considered, such as that of a financial instrument, including "transferable securities"[6]. However, under French law, the characterisation of the latter may require a demonstration that the instruments involved confer identical rights by category. In this regard, and depending on the specificities of the project involved, the unique nature of NFTs may make it possible to exclude this qualification.

Remember how NFTs are marketed

Besides the analysis of the legal qualification of the NFT involved in a project, it is also crucial to take into account the conditions in which they are sold and marketed to the public.

Indeed, certain specific regimes provided in French law apply, even though the qualification of the instruments involved does not trigger specific sets of rules, depending on how the project is promoted. For example, the

[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

[5] French Monetary and Financial Code, art. L. 552-1.

[6] French Commercial Code, art. L. 228-1.

French regime on intermediation in miscellaneous assets [7] typically imposes that people offering clients the opportunity to acquire rights in one or more properties by promoting the possibility of a direct or indirect financial return must register with the French Financial Markets Authority (AMF or *Autorité des marchés financiers*). Depending on how NFT projects are structured and documented, a precise assessment may be needed to clarify if this regime applies.

Furthermore, depending on the functionalities attached to holding NFTs and the possibilities offered to their holders, NFT projects may fall into the scope of the French regulation on gambling and games of chance if their functioning is seen as an operation offered to the public with an expectation of profit, which would be due, even partially, to chance[8].
In this case, NFT project holders may consider drawing on the specific regimes for sport betting [9] or advertising lottery [10].
In this regard, the legal documentation supporting the NFT project plays a critical role as it clarifies the framework in which the NFT may be sold and transferred. It thus has a direct impact on the regulatory regime applicable.

Intellectual property aspects.

As most NFTs include visual artworks and/or link toward protected digital works, it is necessary to ensure that the person who mints the NFT holds the necessary intellectual property rights. We consider that associating a protected work to a NFT is part of the reproduction right.

In addition, when the NFT is sold, there is often a misconception as to the rights that the NFT owner holds: under French law, no intellectual property right is assigned to the NFT owner unless there is a written and explicit assignment specifying each of the assigned rights (e.g. reproduction right, representation right, adaptation rights, etc.) and the scope of the assignment (e.g. duration, geographical scope, etc.).

Carefully monitor discussions to implement a specific legal regime in France for NFTs

As NFTs impact the French economy in various sectors, the legislator continues to explore if and how to best regulate these new instruments. The most recent attempt was the discussion in the French Parliament regarding the French annual tax bill for 2022.
Among the various amendments set forth in the preparatory legislative work, one suggests the provision of a dedicated fiscal regime for NFTs. The objective is to exclude NFTs from the fiscal treatment usually applicable to other kinds of digital assets and to define an ad hoc tax regime based on the possible underlying assets (be it a piece of digital art, a luxury product, etc.). This proposal was ultimately removed from the legislative negotiations. However, it reflects a continuous effort by the French legislator to define an appropriate regime for NFTs.

"The regulatory analysis of NFT projects under French law primarily depends on the legal qualification of the NFT in question."

[7] French Monetary and Financial Code, art. L. 551-1.
[8] French Code of Internal Security, art. L. 320-1.
[9] French Law no. 2010-476 of 12 May 2010 relating to the opening to competition and the regulation of the online gambling sector.
[10] French Consumer Code, art. L. 121-36.

GERMANY

Qualification of NFTs: New Tokens, Old Law

German law does not explicitly define NFTs, nor does it provide for specific provisions on NFTs. In May 2021, the German Government declared that no changes to the regulatory regimes were planned with regard to NFTs[11]. Also, the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin*) has not (yet) published any guidelines on the regulation of NFTs. However, if NFTs show characteristics of a regulated asset class, this could trigger corresponding legal obligations. In particular, licence and prospectus requirements may become relevant.

The question of whether a service in connection with a certain token is subject to regulatory licensing requirements always starts with the classification of a token as a financial instrument. If an NFT qualifies as a financial instrument:

- Exchanges may need a licence from BaFin as they may qualify as multilateral trading facilities
- Any person engaged in distributing NTFs may need a licence from BaFin as investment advisor or investment broker
- Any person acquiring or selling NFTs on behalf of other persons would be engaged in financial portfolio management (or the execution of an order on behalf of clients) and thus need a licence from BaFin
- A person safeguarding NFTs would need a licence from BaFin as a (crypto) custodian
- The issuer of NFTs may be required to draw up and publish a prospectus (to which a strict liability regime would be attached)

NFTs may qualify as crypto-assets, units of account or securities/investment assets, all of which are considered financial instruments for the foregoing purposes.

NFTs as Crypto-Assets

Crypto-assets (*Kryptowerte*) were introduced into the German Banking Law (notably the *Kreditwesengesetz* ("KWG") and the *Wertpapierinstitutsgesetz*)) as a new class of financial instruments when implementing the 5th Directive[12]. However, here as well, the German legislator has gone beyond the definition of "virtual currencies" provided for for in this directive. In particular, crypto-assets within the meaning Section 1 (11) sent. 4 KWG are:

- digital representations of a value
- that can be transmitted, stored or traded electronically
- have not been issued by a central bank or a public institution
- do not have the legal status of a legal tender, and
- are either accepted as a means of exchange or are used for investment purposes.

Two characteristics are especially relevant when looking at NFTs: First, the definition does not require a token to be fungible to be classified as a crypto-asset; tradability is sufficient. Second – and this is the crucial point – the definition covers tokens that are used for investment purposes.

Against this background, **the key question is if and under what circumstances an NFT serves investment purposes**. If an NFT is specifically structured as an investment object (e.g. a security or security-like instrument), it will definitely classify as a financial instrument. On the other hand, NFTs that are solely used as "virtual commodities" (e.g. in a video game) will arguably have no investment purpose and therefore should not qualify as crypto-assets. In the grey zone in-between, there is much room for debate on whether other aspects – e.g. the actual use of a token for speculation on the markets – justifies the classification as a crypto-asset.

The more dominant the speculative component for the issuance and trade of an NFT is, the more likely that the NFT will be considered a crypto-asset and thus a financial instrument.

[11] Enquiry of Members of Parliament (*kleine Anfrage*) - BT-Drs. 19/30141.

[12] See Fn.4.

NFTs as Units of Account

Already before crypto-assets were introduced into the German Banking Law, the BaFin classified Bitcoins as units of account (*Rechnungseinheiten*) within the meaning of Section 1 (11) sent. 1 no. 7 KWG. According to the BaFin, units of account are, in particular, tokens that have the function of private means of payment. Currency tokens therefore regularly classify as units of account. NFTs, on the other hand, differ in this respect from currency tokens: NFTs are inherently indivisible and do not represent a similar value (due to lack of fungibility) and are thus technically not suitable as a means of payment. Accordingly, NFTs should not classify as units of account in most cases.

NFTs as Securities and Investment Assets

NFTs are by definition not fungible, which is why they are (mostly) not considered securities within the meaning of MIFID II[13][14]. German law provides for "electronic securities", which were introduced into German law by the German Act on Electronic Securities (*Gesetz zur Einführung von elektronischen Wertpapieren – "eWpG"*) in June 2021. Under the eWpG, bearer bonds (*Inhaberschuldverschreibungen*) can be issued as a token on an (centralised or decentralised) electronic register. Electronic securities under the eWpG do not require fungibility, so that NFTs seem to be within the ambit of the eWpG. However, the NFT would need to represent a repayment claim. Otherwise it would not constitute a bearer bond and, therefore, not be captured by the eWpG.

Further, NFTs could also be used to represent an investment asset (Vermögensanlage) under the German Capital Investment Act (VermAnlG). Pursuant to section 1 (2) VermAnlG, such investment assets comprise (i) participation rights in undertakings or trust arrangements, (ii) silent partnerships, (iii) subordinated loans, (iv) loans with a coupon that is a function of the borrower's profits, and (v) similar instruments. Any NFT that affords its holder one of the foregoing rights will qualify as an investment asset under the VermAnlG, with the following consequences:

- The NFT would qualify as a financial instrument, which would entail licensing requirements for exchanges, brokers, advisors etc. (see above);
- The issuer would need to draw up a prospectus if the NFTs were issued to the public. Since the prospectus requirement is only triggered when more than 20 (comparable) investment assets are offered, this risk should be rather remote for NFTs (as they are, by definition, supposed to be unique).

To sum up

NFTs potentially classify as crypto-assets under German Banking Law. In specific cases, NFTs can also be securities or investment assets if structured accordingly. **As there is no explicit regulation on NFTs and given their variety of use cases, a careful analysis of the NFT in the individual case is necessary**.

The classification of NFTs as one of the above-mentioned financial instruments would trigger regulatory licence requirements for various services in connection with such tokens (in particular investment advice, the operation of platforms and exchanges as well as the custody of NFTs). Providing such services without a licence constitutes a criminal offence under German law and may lead to severe administrative fines (including siphoning-off of profits). Moreover, any fine will be published on BaFin's website and persons involved in the infringement could be deemed to be of "bad repute" (which could prevent them from being appointed as directors of a regulated financial institution).

[13] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

[14] However, as there are differences in interpreting the respective MiFID II provisions (in particular the category of a "tradeable security"), there is no regulatory clarity yet.

ITALY

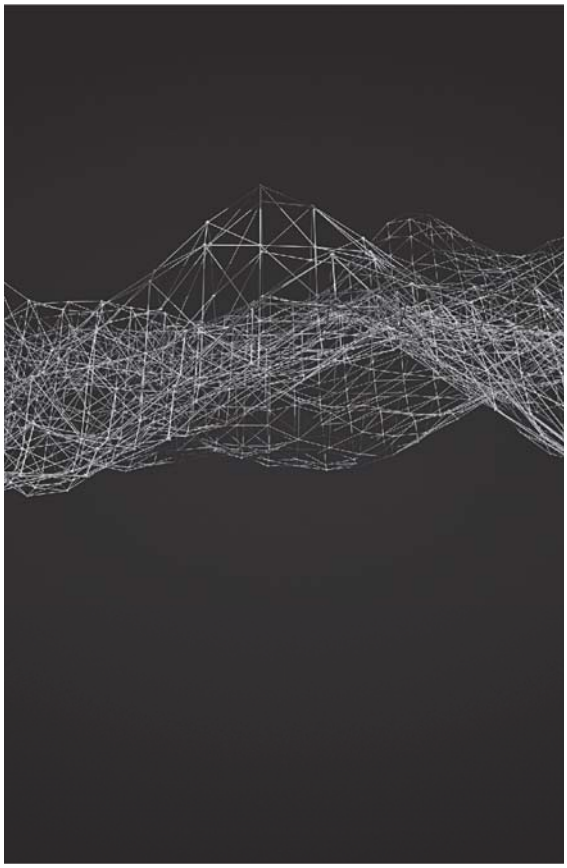
No *ad hoc* regime for NFTs does not mean "no rules"

In Italy, to date, there is no specific law, regulation or guidance on the legal characterisation or regulatory treatment of NFTs. However, this does not mean that the issuance, offer, and sale of NFTs currently occurs in a legal vacuum: a long-standing and well-established body of legislation captures instruments having characteristics and purpose which might be similar to the ones of NFTs and set out rules relating to issues particularly germane to the ones posed by NFTs. In the following paragraphs, we will provide some highlights on possible regulations that might capture also NFTs, depending on their features and purpose.

Be aware of the domestic category of "financial products"

International market players should be conscious that the Italian law extends some rules applicable to the offer and sale of financial instruments (e.g. the obligation to publish a prospectus, the obligation to comply with certain licensing and conduct rules) also to the offer of "financial products" (*prodotti finanziari*), which is a broad category of instruments including "*financial instruments and any other form of investment having financial nature*"[15]. In light of Consob's consolidated interpretation, such category encompasses any investment products characterised by the following main features: (i) the investment of capital; (ii) the promise/expectation of a financial return deriving from the capital invested; and (iii) the assumption of a financial risk directly connected and related to the investment[16].

According to the Authority, the scope of "financial product" does not, however, cover investments in consumer products, i.e. transactions involving the purchase of goods and the provision of services which, even if



concluded with the intention of investing one's own assets, are essentially designed to procure the investor the enjoyment of the asset, to transform one's own assets into real goods capable of directly satisfying the customer's non-financial needs.

The distinction between investments in "consumer goods" and in "financial products" is evidently blurred and the subtlety of the relevant boundary is particularly exacerbated in the case of NFTs.

Certain criteria that can be used to carry out this assessment have been indicated by Consob over time and include, inter alia, the existence of a secondary market for the product and the presentation of the purchase of the product as a way to obtain a future return (both indications that the product might qualify as a financial product).

[15] Article 1, para.1, let. (u), of the Italian Consolidated Financial Act.

[16] In particular, we refer to Consob Communication n. DIS/ 98082979 of 22 October 1998 and Consob Communication no. 99006197 of 28 January 1999. Even if the two Communications date back to the 90s, we are of the view that they can still be considered as a point of reference in the interpretation of the notion of financial product, considering that the definition of the latter is still the same.

In any case, as also highlighted by Consob in a recent document[17], a case-by-case assessment is currently necessary to identify the regulatory framework applicable to crypto-assets.

Consider the possible AML implications

In implementing the 5th Directive, Italy has decided to adopt a significantly broader notion of virtual currency and virtual currency service provider compared with the EU corresponding ones, so that, in Italy, the provision of services that are functional to the use, exchange, issuance, or storage of NFTs may reasonably fall within the scope of the AML regulations, although, also in this case, a case-by-case assessment of the characteristics of relevant NFTs would be necessary.

Pay special attention to NFTs representing artworks

In Italy, persons issuing NFTs representing artworks (either physical or digital) or other copyrighted items (e.g. videos, songs, images) would need to comply with Italian copyright provisions (e.g. Law no. 633/1941 on the Protection of Copyright and neighbouring rights).
Indeed, incorporating or representing a copyrighted item shall be considered as a new form of reproduction of the item to be expressly authorised by the copyright holder of this specific exploitation right. Furthermore, when purchasing an NFT, consumers shall be informed that the token does not transfer any right on the underlying original artworks, unless otherwise agreed.

> **"The distinction between investments in "consumer goods" and in "financial products" is evidently blurred and the subtlety of the relevant boundary is particularly exacerbated in the case of NFTs."**

[17] Discussion paper on initial coin offerings and exchange of crypto-assets published on 19 March 2019.

SPAIN & PORTUGAL

NFTs as understood by pre-existing legal provisions

While a specific legal definition for the concept of NFTs does not exist as such within the Spanish or Portuguese legal frameworks, there are specific aspects of an NFT that can be framed under existing regulations. In Spain as well as in Portugal, things can be either tangible or intangible, and the notion of fungibility in things is defined by Civil Law as something that can be determined by their kind, quality, and quantity when they are the object of legal relations. Hence, from a Spanish and Portuguese perspective, an NFT could be either a thing or a document, since the legal definition of the latter consists of any man-made object made for the purpose of reproducing or representing a person, thing or fact. The above definitions will be of help when assessing the legal nature of NFTs under Spanish and Portuguese law. Depending on the legal nature of an NFT, its regulation may change.

In the Portuguese AML Law, a virtual asset is defined as "*a digital representation of value that is not necessarily attached to a legally established currency and does not possess a legal status of fiat currency, but is accepted by natural or legal persons as a means of exchange or of investment and which can be transferred, stored, and traded electronically.*"

A similar definition is established in Spanish AML law for "virtual currencies".

Arguably a non-fungible asset would not be fit to serve as a means of exchange, but it could be considered to be a means of investment under certain circumstances, which would require any natural or legal person that provides exchange, transfer or custody services of NFTs to be registered as a Virtual Asset Service Provider for AML purposes in both countries.

NFTs regulated by civil law

The general rule under Spanish law will be in most cases that an NFT will be regulated by the same laws as its underlying asset. In case the underlying asset is a digital copy of an artwork, the regulation applicable to the NFT will be the regulation applicable to copies of artworks. Under the existing definition of non-fungibility, for example, the Spanish Civil Code will allow the transmission of the NFT without transmitting its property.

This is regulated differently in the case of other crypto-assets that are fungible. The transmission of a fungible crypto-asset will always entail the transmission of its property. There will be cases where the NFT itself will be the good to be exchanged, and not a digital representation of an underlying asset. In this case, the same rules for a typical sale and purchase agreement would apply to an exchange of non-fungible intangible things or assets. Altogether, the same principles above are applicable in Portugal as well.

NFTs as financial instruments

Spanish regulations define securities as rights of patrimonial content which, by their own legal configuration and transmission regime, are susceptible to generalised and impersonal traffic in a financial market.

The main requirement of a financial instrument lies on its generalised and impersonal traffic in a financial market. NFTs could fall within these characteristics if the representing assets or right can be traded in a general and impersonal manner. **The non-fungible nature of NFTs under the existing definition of non-fungibility does not disqualify them automatically for being considered a financial instrument**. Moreover, their technical uniqueness does not mean that the good or right represented through the NFT in a unique manner is also unique or even non-fungible. Hence, a case-by-case analysis must be performed to exclude certain NFTs from the regulation that applies to financial instruments.

In Portugal, the concept of security encompasses, in addition to those typified in the law, any type of document (physical or digital) representing a homogeneous legal situation that is susceptible of being transmitted in the market.

For example, an NFT that grants rights to earning or interests to its holder, or an NFT that encompasses any legal obligation of its issuer to perform acts that will increase its value, would be treated as a security.

> **"The non-fungible nature of NFTs under the existing definition of non-fungibility does not disqualify them automatically for being considered a financial instrument."**

Crypto-assets marketed as investment.

As NFTs can be considered a category of crypto-asset, Article 240 bis of the Spanish Markets and Securities Act regulates how to proceed when crypto-assets are marketed as investments. This section of the Spanish Markets and Securities Act was passed on 12 March 2021 with a mandate to the Spanish Markets and Securities Commission to develop further guidance on the advertisement of crypto-assets as investment. Guidance 1/2022 on crypto-assets marketed as investment was published on January 17, 2022. However, the Guidance excludes NFTs from its scope as long as they are unique and non-fungible.

Intellectual Property Rights and NFTs

Most of the current use cases of NFTs can be observed in the gaming, art and music sectors. These sectors have in common that their main assets have always been intangible. Therefore, the protection of intangible assets through intellectual property rights has always been a hot topic. When minting NFTs of artworks, music pieces or gaming objects, it is paramount to analyse and regulate the intellectual property rights attached to such assets.

Under Spanish and Portuguese intellectual property law, intellectual property rights have a twofold nature. On the one hand, creations that generate intellectual property rights are protected by moral rights that are inherent to the creator of the asset and cannot be transferred. On the other hand, creations that generate intellectual property rights are also protected by exploitation rights. The transmission of exploitation rights attached to NFTs should be regulated expressly (in practice, this may be done either in the code of the NFT [18] −as a smart contract or at the beginning of its code as it is the case of open software licences−, or otherwise in a written agreement accepted as a condition to acquire the NFT).

[18] Even though, in certain jurisdictions, it remains unclear whether the code may actually include a customized license governing precisely the exploitation rights of the NFT involved.

Conclusion

3

NFT projects willing to develop across multiple jurisdictions in the EU must carefully take into account the relevant jurisdictions whose laws may impact their activities and assess if/how the national regulations apply to them. **Their structure, and the documents with clients, partners and other stakeholders, must be diligently prepared to best tackle these regulatory challenges.** Our experts in the European Network remain at your disposal to help you develop your activities in the various countries they cover.

Hopefully, the need to have this country-by-country approach may be limited to the short/medium term. **Several regulatory initiatives at international and European levels may lead to the adoption of a more harmonised regime for NFT projects.**

On an international level

The phenomenon of NFTs is currently fuelling the work led by international regulatory instances, such as the Financial Action Task Force (the "FATF").

FATF is an intergovernmental organisation focused on defining harmonised standards and policies to combat money laundering. Long interested in the development of crypto-assets and the challenges they pose in terms of money laundering, FATF regularly publishes guidance to recommend to countries how they can build an efficient regulatory framework to address this specific risk. In its last update published in October 2021[19], the FATF specifically addresses the issue of NFTs. The document clarifies the circumstances under which NFTs should be treated just like any other virtual asset, and should therefore be subject to the full set of anti-money laundering obligations.

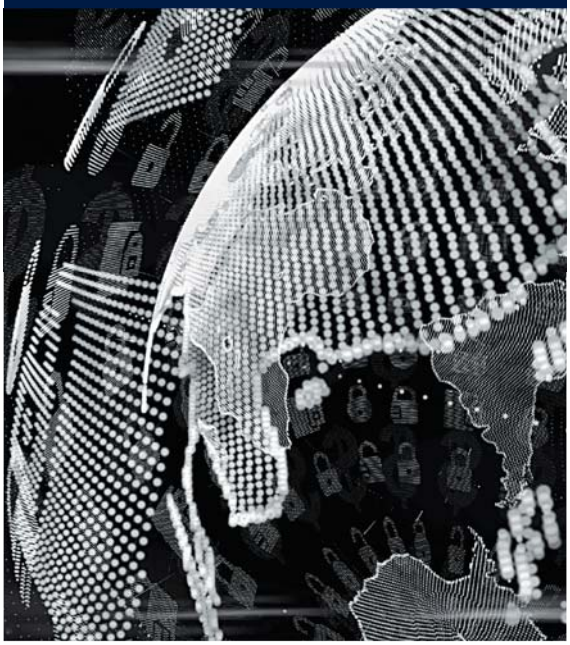
As FATF's work directly influences the regulatory reforms initiated in Europe, this recent publication may lead European institutions to provide a particular set of rules for NFTs in the reform of the existing EU framework on anti-money laundering and countering the financing of terrorism, currently under discussion at EU level[20].

In the European Union

Besides the aforementioned negotiations currently led to reform the EU's anti-money laundering regime, the European Commission also published in September 2020 a proposal[21] to harmonise in the EU the regulatory regime for markets in crypto-assets (the draft "MiCA regulation"). It has given EU institutions the opportunity to discuss whether a specific regime for NFTs would be needed.

In the European Commission's proposal, NFTs would be exempted from certain obligations, particularly from the requirement for their issuers to publish a white-paper. Nevertheless, as NFTs would be defined as crypto-assets, their issuers, and the providers of related services, would overall be subject to the other obligations incumbent upon crypto-asset issuers and service providers.

"Their structure, and the documents with clients, partners and other stakeholders, must be diligently prepared to best tackle these regulatory challenges."



[19] FATF, Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers, 28 October 2021.

[20] See European Commission, Legislative Package, "Beating financial crime: Commission overhauls anti-money laundering and countering the financing of terrorism rules", 21 July 2021.

[21] European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, 20 September 2020.

“Several regulatory initiatives at international and European levels may lead to the adoption of a more harmonised regime for NFT projects.”

This would include the duty to be authorised as crypto-asset service providers to provide the services of (i) exchange of NFT for fiat currency or crypto-assets, or (ii) custody of NFTs on behalf of third parties.
However, negotiations continue before the final enactment of this proposal. Certain voices, especially that of the European Parliament, may advocate for the adoption of a specific regime for NFTs that is distinct from the rules applicable to crypto-assets pursuant to the MiCA regulation.
Furthermore, in the position adopted by the Council in November 2021, crypto-assets:

- “that are unique and not fungible with other crypto-assets, including digital art and collectibles, whose value is attributable to each crypto asset’s unique characteristics and the utility it gives to the token holder”; and
- “representing services or physical assets that are unique and not fungible, such as product guarantees or real estate”;

would be explicitly excluded from the scope of the MiCA regulation[22].

Market players developing activities in the NFT sector must therefore carefully monitor current negotiations to adopt a harmonised regulatory framework, especially in the EU. It appears to be the most efficient method to (i) make sure that these future reforms will indeed provide the support necessary to the development of this new market in the EU, and (ii) be in the best possible position to seize the opportunities that may arise.

[22] Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 - Mandate for negotiations with the European Parliament, recital 8 b), 19 November 2021.

THE EUROPEAN NETWORK

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