

Open Research Online

The Open University's repository of research publications and other research outputs

NFT – Legal Token Classification

Other

How to cite:

Herian, Robert; Di Bernardino, Claudia; Chomczyk Penedo, Andres; Ellul, Joshua; Ferreira, Agata; von Goldbeck, Axel; Siadat, Alireza and Siedler, Nina-Luisa (2021). NFT – Legal Token Classification. EU Blockchain Observatory & Forum.

For guidance on citations see [FAQs](#).

© 2021 Robert Herian; 2021 Claudia Di Bernardino; 2021 Andres Chomczyk Penedo; 2021 Joshua Ellul; 2021 Agata Ferreira; 2021 Axel von Goldbeck; 2021 Alireza Siadat; 2021 Nina-Luisa Siedler



<https://creativecommons.org/licenses/by-nc-nd/4.0/>

Version: Version of Record

Link(s) to article on publisher's website:

<https://www.eublockchainforum.eu/sites/default/files/2021-07/NFT%20%E2%80%93%20Legal%20Token%20Classification.pdf>

Copyright and Moral Rights for the articles on this site are retained by the individual authors and/or other copyright owners. For more information on Open Research Online's data [policy](#) on reuse of materials please consult the policies page.

oro.open.ac.uk

NFT – Legal Token Classification

About this report

This report is the first of a series of brief papers relating to the main legal aspects of non-fungible tokens (**NFTs**). The aim is to highlight NFT characteristics and provide an extensive but not exhaustive overview of the legal classification and frameworks across the globe. The report places a special focus on EU laws, but it is not limited to this.

Disclaimer

The information and views set out in this publication are those of the author(s) and do not necessarily reflect the official opinion of the European Commission. The Commission does not guarantee the accuracy of the data included in this study. Neither the Commission nor any person acting on the Commission's behalf may be held responsible for the use which may be made of the information contained herein.

Acknowledgments

The EU Observatory & Forum would like to expressly acknowledge the following co-authors (in alphabetical order) for their direct contributions to this report as members of the EU Blockchain Observatory and Forum Expert Panel, or as external contributors:

- Claudia Di Bernardino - Partner, TMSHELL Law Firm
- Andres Chomczyk Penedo, PhD Researcher, Vrije Universiteit Brussel
- Dr Joshua Ellul - Director of Center for DLT, University of Malta; Chairperson, Malta Digital Innovation Authority
- Dr Agata Ferreira, Assistant Professor, Warsaw University of Technology
- Axel von Goldbeck, Partner, DWF
- Dr Robert Herian, Senior Lecturer in Law, The Open University
- Alireza Siadat, Partner, Annerton
- Dr Nina-Luisa Siedler, Partner, DWF

Introduction

Whilst the term token can mean different things in the sector (depending on the context within which it is used, for the scope of this report we refer to tokens in a generic sense without requiring or implying a strict definition. However, we will primarily differentiate between those tokens that are non-fungible and those that are not. Tokens can be defined as digital assets created on a blockchain or distributed ledger.

In order to define NFTs, it is worth explaining the concept of fungibility and non-fungibility. An asset is considered to be fungible when there is the possibility of replacing it with an identical one, both in terms of quality and quantity (e.g. money). Similarly, an asset is non-fungible when such a substitution for an identical item is not possible given the intrinsic individuality of the good itself (e.g. a work of art). A fungible token is a token equal to every other of its kind and capable of mutual substitution. In fact, one fungible token can be traded or exchanged for another fungible token (of the same kind).

On the contrary, an NFT is a peculiar type of token that is indivisible and unique. This category of tokens, as the name suggests, are characterised by their non-fungibility and interchangeability. They cannot be exchanged for the same amount of the same type precisely because they are unique and because each has different characteristics. NFTs, in fact, grant a mark of originality since each of them consists of information and data that cannot be replicated and that differentiate it from any other NFT, thus making it irreproducible. In this they differ from exchange tokens (e.g. Bitcoin) that are instead fungible in nature.

To summarise, it can be stated that NFTs are characterised by the following elements:

- uniqueness: in that an NFT is or represents a unique object, whether digital or otherwise, which may be associated unequivocally with a user or to a virtual wallet;
- indivisibility: cannot be split up into parts;
- non-fungibility/interchangeability: NFTs are not fungible and replicable.

NFTs can enable tokenised proof of title to digital versions of underlying digital assets (e.g. images, videos, other digital content) or physical assets (e.g. paintings, sculptures, other tangible assets). Whilst such tokenised proof can be generated, ownership as prescribed by law may differ. In fact, one of the main characteristics of NFTs is that they can technically represent any type of asset, both digital and physical.

Whilst token standards have emerged (e.g. ERC-721) that may provide a means of categorising tokens, today there is yet no single standard to represent all types of infungible tokens. This could be a challenge given that NFTs are not tied to any specific blockchain platform. More so, they can incorporate a variety of rights that may make them fall into one or another type of classification, potentially [1]:

- Asset tokens: represent a specific right over a tangible or intangible asset. The person who creates (mines) the token decides the type of right owned to the person to whom the token is assigned;
- Utility tokens: provide the holders with a right of access to goods or services so that they have exclusive access to functionality within a blockchain platform;
- Security tokens: represent ownership of an asset and grant token holders similar or equal rights to those of securities. These tokens include shares, bonds and, in general, financial instruments.

NFTs represent an evolution of the physical ownership of a specific asset. The digital token includes a set of information recorded on the blockchain that represents the asset linked to the token. As a result, it is also possible to precisely identify its owner who can assert rights on the asset and also choose to exchange it. In practice, the tokens digitise something, and their exchanges and transfers can take place safely and without intermediaries. In fact, these digital assets can be exchanged in special marketplaces, thus creating a process of tokenisation from reality to digital. All the information, procedures and purchases can be easily tracked with the support of the blockchain that allows to monitor the transfer of ownership and pay the original author in the future, if required.

NFTs can be used to create verifiable digital ownership, authenticity, traceability and security, easily exploitable in different sectors and activities. These include crypto art, digital collectibles, online games, patents or other intellectual property rights, real estate, precious objects, vehicles, licenses and financial documents.

NFTs are traded globally since distributed ledger technology platforms operate beyond borders. Therefore, it is necessary to consider their legal status and the different regulatory frameworks across multiple jurisdictions within which they may be subject to. The following sections are intended to provide a general overview on how NFTs are addressed in different jurisdictions across the world.

Indeed, NFTs bring up many legal implications that include, amongst others, intellectual property, contractual and consumer protection issues. This report addresses only jurisdictional issues, while further reports will cover other legal aspects related to NFTs.

[1] The classification provided is simply indicative and definitions of tokens may differ according to jurisdictions' literature.

European Union

Looking into MiCAR

MiCAR (Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937) defines crypto assets as “a digital representation of value or rights that can be electronically transmitted and stored using distributed ledger technology or similar technology” (Art. 3 para. 1 no. 2 MiCAR). This crypto asset definition is very broad, as the embodiment of rights is also included without restriction. Only certain crypto assets that are already regulated under other EU regulatory provisions do not fall under the material scope of MiCAR.

Overall, MiCAR has created a new independent crypto assets definition that partly differs from already established crypto asset understandings. MiCAR thus uses crypto assets as an umbrella term that includes utility tokens in the broadest sense, as well as e-money tokens and asset-referenced tokens.¹ The regulatory framework of MiCAR consistently distinguishes between crypto assets that are not e-money tokens or asset-referenced tokens, and between e-money tokens and asset-referenced tokens. For crypto assets that are not e-money tokens or asset-referenced tokens, MiCAR provides for a more graduated regulatory regime than for e-money tokens and asset-referenced tokens.

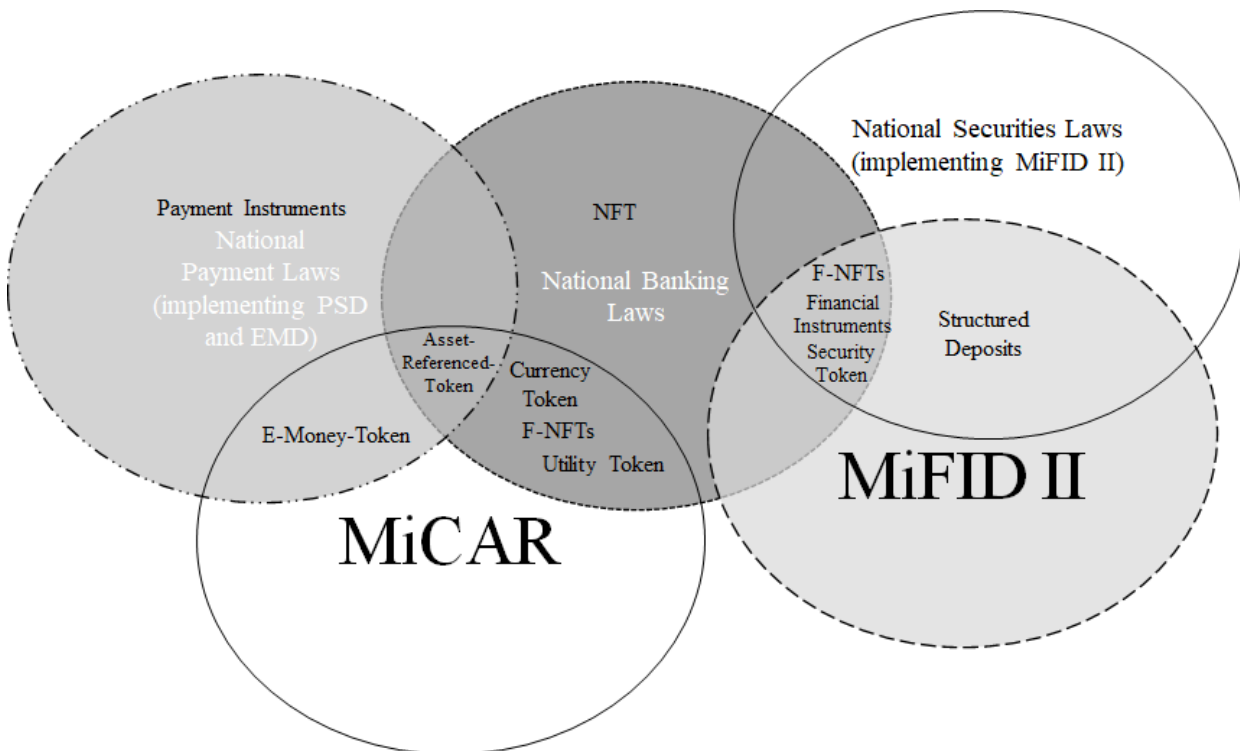
Pure utility tokens that do not qualify as stablecoins and do not have an investment character are not to be equated with financial instruments and should be largely excluded from MiCAR regulation. It is likely that utility tokens that are only intended to provide digital access to a good or service provided by the issuer of those tokens will be largely exempt from MiCAR. On the other hand, MiCAR applies to utility tokens that can be transferred between token holders. Conversely, this means that utility tokens that are only accepted by the issuer or the provider as their transfer to third parties is technically impossible or impossible without the issuer’s permission, could be excluded from the scope of most MiCAR rules. This includes, in particular, tokens that are based on bonus card systems (e.g. payback point system) and can therefore be used to acquire existing goods either only at the issuer or at a limited network determined by the issuer (so-called limited range). On the other hand, tokens used for the acquisition of non-existing/to-be-created goods are financial instrument-like products (comparable to forward transactions) and should be covered by MiCAR, if not already done so by the Markets in Financial Instruments Directive (MiFID).

The current definition of crypto assets in MiCAR will probably be narrowed. In this sense, the NFTs would not be covered by it. MiCAR is not intended to apply to crypto assets that are unique and not fungible with other crypto assets, including digital art and collectibles whose value is attributable to the unique characteristics of each crypto asset and the benefit it provides to the crypto asset holder. Similarly, MiCAR is arguably not intended to apply to NFTs providing services or physical assets that are unique and non-fungible, such as product warranties or real estate.

Although the current market trend shows that NFTs can be traded in markets, accumulated speculatively and used as a medium of exchange in limited cases, they are not yet readily exchangeable. The relative value of such an NFT in relation to another NFT, each of which is unique, cannot be determined by comparing it to an existing market or equivalent asset. These features limit the extent to which these NFTs could be used as financial instruments, thereby limiting the risks for clients and the market. Therefore, the exclusion of NFTs from MiCAR seems reasonable. Conversely, the fractional parts of an NFT (so-called fractional NFTs or F-NFTs) would not be unique and would be fungible. This could mean that they would be covered by MiCAR.

¹ The latter two types of tokens introduced by MiCAR are also referred to in the market as stablecoins. Such stablecoins are mostly used as means of payment, although depending on their design, they could also fall under e-money regulation or existing financial instruments regulation.

The mere assignment of a unique identifier to a crypto asset should thus not be sufficient to classify it as unique or non-fungible.



Potential application of MiFID II

Since the MiCAR legislative process is pending and currently there is no existing EU legislation that would explicitly regulate NFTs, the applicability of other potentially relevant EU laws needs to be considered when classifying NFTs. This includes a set of EU laws governing financial markets, like the Directive 2014/65/EU on markets in financial instruments (MiFID II), a cornerstone of the EU’s regulation of financial markets. If an NFT could fall within the category of financial instruments under MiFID II, a full set of the EU financial regulations framework would apply to NFT issuers and service providers, including the Prospectus Regulation, Market Abuse Regulation, Transparency Directive, the Settlement Finality Directive, the Market Abuse Directive, or the Short Selling Regulation.

Financial instruments are defined in Article 4(1)(15) of MiFID II as those instruments specified in Section C of Annex I that provides a list of financial instruments. The exact definition of a financial instrument will depend on how each individual EU Member State transposed MiFID II into its respective national laws. As a result, there are divergences in the definitional scope of a financial instrument across various Member States.

Various types of financial instruments listed in Annex I to MiFID II include ‘transferable securities’, ‘money market instruments’, ‘units in collective investment undertakings’ and several derivative instruments. The most relevant for NFTs appears to be the category of ‘transferable securities’ defined under Article 4(1)(44) of MiFID II. Under such Art 4(1)(44) read in conjunction with Art. 2(a) of a Prospectus Regulation, NFTs seem unlikely to fall within the definition of securities. Further, to fall within the definition of a ‘transferable security’, an NFT would need to belong to a class of securities. Although MiFID II does not explicitly define the term ‘class’ and not all EU Member States developed a specific definition of a ‘class’, the common interpretations of this term imply fungibility, or interchangeability or replicability. Therefore, non-fungibility would effectively exclude an NFT from the category of transferable securities under MiFID II. However, in the case of F-NFTs that are fungible, they could potentially qualify as fungible financial instruments under MiFID II. In each case, careful consideration should be given to the standard used for the token (e.g. ERC 721 vs. 1121) since some standards used for NFTs do not allow the swap of the token against another token that may not allow free trade. Given the divergences in interpretations of MiFID II provisions, the diversity of NFTs, early stages of their development and dynamic evolution, until there is regulatory certainty, additional guidance or a dedicated set of laws, careful analysis of each NFT instrument is needed. This would particularly concern tokens not covered by MiCAR, as the applicability of MiCAR and MiFID is mutually exclusive.

Summary

MiCAR will provide a single regulatory framework for crypto assets that do not already qualify as financial instruments under MiFID. Such crypto assets may be fungible crypto assets but no (true) NFTs, whilst fractional NFTs may qualify as crypto assets. Although non-fungibility could effectively exclude an NFT from the category of transferable securities under MiFID II, given the differences in interpreting MiFID II provisions, the diversity of NFTs, early stages of their development and dynamic evolution, until there is regulatory certainty, additional guidance or a dedicated set of laws, careful analysis is needed of each NFT instrument (including F-NFTs).

Germany

Germany acknowledges several categories of financial instruments in tokenised form. In addition to the EU MiFID security and e-money, Germany has just recently enacted new law for electronic securities. As of 2020, its banking law includes a new financial instrument called crypto assets (*Kryptowert*). Prior to that amendment, crypto currencies like Bitcoin were recognised (and still are) as units of accounts.

(i) Crypto assets pursuant to sec. 1 (11) sentence 4 German Banking Act (*Kreditwesengesetz, KWG*)

FATF Virtual Asset	AMLD Virtual Asset	MiCAR Crypto Asset	German Crypto Asset
<ul style="list-style-type: none"> digital repr. of value digitally tradable or transferable can be used for payment or investment purposes excl. fiat, securities and other financial assets covered elsewhere in FATF Recommendations 	<ul style="list-style-type: none"> digital repr. of value electronically transferable, storable & tradable not issued/guaranteed by public authority/no legal status of currency/money accepted as means of exchange 	<ul style="list-style-type: none"> digital repr. of value or rights electronically transferable & storable Using DLT or similar tech 	<ul style="list-style-type: none"> digital repr. of value electronically transfer-able, storable & tradable not issued/guaranteed by public authority/no legal status of currency/money based on agreement or actual practice: accepted as means of exchange/ payment OR serving investment purposes

According to the legal definition in Section 1 (11) sentence 4 KWG, crypto assets are digital representations of a value that has not been issued or guaranteed by any central bank or public body and does not have the legal status of a legal tender, but are accepted by natural or legal persons as a means of exchange or payment on the basis of an agreement or actual practice, or used for investment purposes and can be transmitted, stored and traded electronically. This definition is based on the definition of virtual currencies in Art. 3 No. 18 of the Directive (EU) 2018/843 (AMLD5) amending i.a. Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AMLD4). However, the German definition of crypto assets extends such a term to instruments for investment purposes that are not included in the AMLD5 definition of virtual assets. Instead, Germany referred to the definition of virtual assets in the FATF recommendations that the FATF issued in October 2018 and which had been developed more or less parallel to the AMLD definition from May 2018 (forming base for the current proposal of Markets in Crypto Assets Regulation – MiCAR).

While there is much debate about certain elements of the definition of crypto assets, the legislator stated quite clearly in the reasoning for the definition that the extension to digital assets serving investment purposes are meant to cover any tradeable asset. Fungibility, however, is no express criteria for crypto assets. Therefore, NFTs, as long as technically tradeable (irrespective of actual trades or listing), will most likely be regarded as crypto assets and, hence, as financial instruments under German law. As a result financial regulation is extended quite far into an area that would be usually seen in the non-financial sector.

(ii) German Electronic Securities Act (*Gesetz zur Einführung von elektronischen Wertpapieren, eWpG*)

On 10 June 2021, the German law to introduce electronic securities entered into force. It enables two new types of electronic securities in addition to the traditional, paper-based securities: one based on a central intermediary providing the required electronic register and another based on a decentralised electronic

register. The latter must still be provided for by a licensed (hence centralised) entity, but such an entity may use a decentralised technology.

The eWpG allows the electronic form for debt instruments (*Schuldverschreibungen*) and investment certificates only. Equity instruments still require paper deeds. The reference to the German bond as defined in § 793 German Civil Code makes clear that performance promises (*Leistungsversprechen*) of all kinds that are represented by a deed are covered by the eWpG. Fungibility is not a prerequisite for a German *Schuldverschreibung*. Thus, under German civil law, NFT may be a security even if under the MIFID definition it is not.

(iii) Investment assets (*Vermögensanlage* according to the *Gesetz über Vermögensanlagen, VermAnIG*)

According to sec. 1 of the German Asset Investment Act (*Vermögensanlagegesetz*, not to be confused with the German Investment Act (*Kapitalanlagegesetzbuch*)) provides for certain contractual instruments that are regarded as financial instruments according to § 1 (11) German Banking Act. Any NFT that confers one of the rights enumerated in § 1 (2) German Asset Investment Act will therefore be regarded as investment assets and financial instruments. In addition, when registered in a crypto security register, they may be securities under German civil law though not under MiFID II.

(iv) Unit of account

German financial supervisory authority (*Bundesaufsichtsamt für Finanzdienstleistungen BaFin*) classifies i.a. Bitcoins, in accordance with its longstanding administrative practice, as units of account within the meaning of Section 1 (11) sentence 1 no. 7 KWG, and thus as financial instruments. Units of account are comparable to foreign exchange, but are not denominated in legal tender. This also includes units of value that have the function of private means of payment in ring exchange transactions, as well as any other substitute currency that is used as a means of payment in multilateral clearing groups on the basis of agreements under private law.

Summary

NFTs may in most cases classify as German crypto assets, less likely as unit of account and in certain rather specific cases as electronic securities or investment assets. All of those are recognised as financial instruments in Germany. Hence, any service delivered for such instruments (be it advisory (investment advice), exchange services, wallet (custody service), market making) might be subject to license requirements in Germany.

Italy

Italy has not yet developed regulatory frameworks specifically applicable to NFTs. However, it has introduced the notions of distributed ledger-based technologies and smart contracts with the Decree-Law no. 135 of 14 December 2018, converted by Law no. 12 of 11 February 2019, and entered into force on 15 December, 2019. In particular, art. 8-ter of the decree defined:

1. Distributed ledger-based technologies as *IT technologies and protocols that use a shared, distributed, replicable, simultaneously accessible, architecturally decentralised ledger on a cryptographic basis, such as to enable the recording, validation, updating and storage of both unencrypted and further cryptographically protected data verifiable by each participant, not alterable and not modifiable.*
2. A smart contract as *a computer programme that operates on distributed ledger-based technologies and whose execution automatically binds two or more parties based on effects predefined by them. The smart contract satisfies the requirement of written form after computer identification of the parties involved through a process having the requirements set by the Agency for Digital Italy with guidelines to be adopted within 90 days from the date of entry into force of the law converting this decree.*

Even if NFTs are not currently specifically regulated in Italy, they can fall into one of the existing regulatory frameworks depending on their features and purposes. They can qualify as virtual currency, taking into consideration the definition of virtual currency included in the legislative decree 125/2019. In fact, the Italian legislator has implemented the EU Directive 2018/843 (so-called Anti-Money Laundering Directive) by issuing Legislative Decree 125/2019, which in turn amends Titles I, II, III and V of Legislative Decree 231/2007 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. With the amendments made by Legislative Decree 125/2019, both virtual currency and all service providers relating to the use of virtual currency and virtual wallets fall within the scope of anti-money laundering and counter-terrorist financing legislation, and are therefore fully subject to its obligations and related sanctions.

Pursuant to the Italian implementation of the Anti-Money Laundering Directive, a virtual currency means a *digital representation of value, neither issued nor guaranteed by a central bank or public authority, not necessarily linked to a currency having legal course, used like means of exchange for the purchase of goods and services or for investment purposes, and transferred, stored and traded electronically.* According to this definition, some NFTs could fall within the scope of virtual currency and generate anti-money laundering obligations.

NFTs could also be considered as investment products and subject to the Legislative Decree 58/1998, the so-called Italian Consolidated Financial Act, if they meet the following conditions:

- (i) a capital disbursement;
- (ii) the expectation of a financial gain;
- (iii) the assumption of a risk directly linked and correlated to the capital disbursement.

Common law jurisdictions

Introduction

This section considers the regulatory position and challenges regarding blockchain-based financial products and assets, notably NFTs, in a selection of common law jurisdictions. Central to development of policy and practice in common law jurisdictions on crypto assets has been the UK Jurisdiction Taskforce, Law Tech Delivery Panel’s *Legal Statement on Cryptoassets and Smart Contracts* (November, 2019). Launching the statement in 2019, Sir Geoffrey Vos, Chancellor of the High Court, said that “[t]he objective is to provide much needed market confidence and a degree of legal certainty as regards English common law in an area that is critical to the successful development and use of crypto assets and smart contracts in the global financial services industry and beyond.” The discussion here in part reflects on the relative success of that objective within common law jurisdictions where, according to recent research by the UK’s Financial Conduct Authority (FCA), public awareness of crypto assets is growing, but understanding has either fallen or remains poor.

(i) UK

The UK does not directly regulate NFTs, nor have legislative or regulatory bodies made a definitive statement on NFTs or NFT regulation at the time of writing. The position on four main crypto asset/token types (exchange tokens, e.g. Bitcoin, security tokens, utility tokens, and stablecoins) is more advanced, but remains in a state of flux across different government departments and regulatory authorities, including Her Majesty’s Revenue and Customs (HMRC), FCA, Bank of England and the Treasury. In accordance with international financial regulatory standards, the UK regulates exchange tokens for money laundering purposes. Since January 2020, the FCA has had regulatory powers to allow supervision of how crypto asset businesses manage the risk of money laundering and counter-terrorist financing. UK crypto asset businesses must comply with money laundering regulations and register with the FCA, although the FCA acknowledges crypto assets remain, generally, outside the ‘regulatory perimeter’.

Security tokens, which may cover aspects of NFT use where this reflects promotion of the NFT as a speculative investment, accompanied by the suggestion of a promoter that the NFT will increase in value because of the actions of the issuer or the promoter, are not directly regulated. However, they would likely fall within the domain of the FCA’s securities regulation in terms of rights regarding ownership position, repayment of a specific sum of money and entitlement to a share in future profits. This would, for example, mirror the position of the Securities and Exchange Commission in the United States.

HMRC, who have led on crypto asset definitions in the UK, considers NFTs separately identifiable assets regarding capital gains tax (CGT). This reflects an approach to “pooling” for the benefit of simpler tax calculations, which HMRC does not consider viable for NFTs or exchange tokens such as Bitcoin or Ether that must have their own associated ‘pooled allowable cost’. HMRC largely views crypto assets as individual investment vehicles for capital appreciation, hence the emphasis on CGT. However, although not regulation *per se*, HMRC warns individuals that income tax and national insurance could be payable where crypto assets are accepted from an employer as payment or through engagement with mining, transaction confirmation or airdrops, key areas that could well act as modes of crypto asset market regulation if taxed at an individual and organisation level.

(ii) Australia

Like the UK, Australia does not directly regulate NFTs. Instead, Australia’s approach considers regulation or the potential for regulation on whether the NFT represents or certifies, or causes stakeholders to treat an NFT, like a regulated financial service, product or asset, such as a security. Australia’s financial regulatory framework comprises three agencies, each with specific functional responsibilities: the Australian Prudential Regulation Authority (APRA) responsible for prudential supervision; the Australian Securities and Investments Commission (ASIC) tasked with market integrity and consumer protection across the financial system; and the

Reserve Bank of Australia (RBA) in charge of monetary policy, overall financial system stability and regulation of the payments system.

ASIC's position on digital currencies is not clear, with a review of the Digital Asset Framework in Australia yet to be undertaken by the Commissioner and the federal government. The primary published guidance in Australia falls behind clearer guidance in the UK and Singapore, with ASIC's Information Sheet 225 'Initial coin offerings and crypto-assets' (INFO225) first published in September 2017 and subsequently updated in several iterations. It aims to provide "high-level regulatory signposts for crypto-asset participants as a starting point." Like the UK, ASIC emphasises that blockchain and crypto asset use cases could be financial products requiring the token-issuing entity to hold an Australian financial services licence (AFSL) to operate, with a clear emphasis towards token sales. Unlike HMRC in the UK, the Australian Tax Office (ATO) has not provided progressive definitions or statements on crypto assets, with much of the ATO's work limited to 2014 taxation guidance.

(iii) New Zealand

New Zealand does not directly regulate NFTs or crypto assets, including exchange tokens such as Bitcoin. Mirroring other jurisdictions, New Zealand's approach is one of regulatory capture where crypto assets facilitate key activities that fall within definitions of financial services. These include exchanges, wallets, deposits, broking and initial coin offerings (ICOs). If these activities involve crypto assets that are classed as 'financial products' under the Financial Markets Conduct Act 2013 (FMCA), this creates obligations such as general obligations regarding licensed markets (s.314 FMCA)

ICOs have also been subject to the fair dealing requirements in Part 2 of the FMCA. These are broad principles that prohibit misleading or deceptive conduct, false representations and unsubstantiated representations.

Summary

At the time of writing, the jurisdictions briefly discussed continue to work towards comparative if not the same regulatory objectives regarding crypto assets, by seeking to provide "much needed market confidence and a degree of legal certainty." Yet in all cases, crypto assets remain outside or beyond regulatory perimeters. Far from providing tailored approaches to the technologies in question, these objectives build on a combination of existing regulation (regulatory capture), general 'wait and see' principles and market-focused self-regulation aimed at promoting and not stifling innovation. Insofar as NFTs fall within more mature definitions of crypto assets, regulatory approach to NFTs will probably mirror that of crypto assets in the short to medium term.

In terms of the legal evolution of NFTs, we ought not to underestimate the role of judge-made law in common law jurisdictions. The ability of courts, tribunals and associated dispute resolution services to define and shape crypto assets and NFTs, especially under existing property, trusts, and contract law, concepts and theories, will be crucial in the next 5 to 10 years. To some extent, the process has begun in two leading cases from the UK and New Zealand, *AA v Persons Unknown* [2020] 4 WLR 35 and *Ruscoe v Cryptopia* [2020] NZHC 728, and via the recent UK Jurisdiction Taskforce *Digital Dispute Resolution Rules* (June 2021), but legal certainty remains in question.

Latin America

Although Latin America is seen as one of the leading regions in digital asset adoption and development, the regulatory landscape has been slow to react towards this phenomenon. In this respect, very few countries have adopted legislation or regulation and, even in those cases, they had a reactive approach towards digital assets, rather than a constructive and proactive perspective for the industry. This also has an impact on existing and potential classifications regarding tokens as a type of digital asset. Moreover, there is no unique supranational organisation that can help regarding unifying criteria and terms, as in the case of the EU. The few available specific legal rules applicable to digital assets, in particular crypto assets, have focused on anti-money laundering, following FATF’s recommendations, and taxation.

When it comes to identifying a regulatory framework for tokens classification, most efforts in this respect have been made by academia and civil society organisations rather than regulatory agencies. For example, a recent report conducted by an Argentine Bitcoin NGO within an Inter-American Development Bank funded project provided a theoretical framework for tokens in the Latin American context that classified them in (i) payment tokens, (ii) utility tokens and (iii) asset tokens depending on the function that the token seeks to fulfil (Chomczyk, 2020). In this regard, an NFT, depending on its particular details and functioning, would sit between an asset or utility token.

This section provides a brief overview of jurisdictions where crypto assets have seen adoption. In this respect, we shall cover the following jurisdictions: (i) Argentina; (ii) Brazil; (iii) Colombia; and (iv) Mexico. While each jurisdiction has its distinct and own rules, there are shared traits amongst them. For example, the definitions for the term ‘security’ are similar to each other.

(i) Argentina

In Argentina, there is no legal formal framework from any legislative or regulatory body that provides for a classification or definitions for tokens. Nevertheless, there is fragmented regulation that deals with the crypto-economy, such as Resolution No. 300/2014 from the national Financial Information Unit (*Unidad de Información Financiera*) that deals with virtual currencies (*monedas virtuales*) from an anti-money laundering perspective or the national Law No. 27,430 that amended the income tax law to include a specific tax rate for profits resulting from sales of digital currencies (*monedas digitales*). Consequently, there is a diversity of definitions that results in a lack of coordination regarding the exact applicability of each obligation and the correspondence between frameworks. It is worth noting that the definition for securities (*valores negociables*) under the Argentine Capital Markets Act (*Ley de Mercado de Capitales*) is broad and could, in certain situations, be applicable to NFTs, in particular if its issuance is done with short-term speculative purposes. If NFTs are not subject to securities regulations, then they would be governed by private law under the Civil and Commercial Code.

On the enforcement front, a considerable number of regulatory agencies, such as the Argentine Central Bank (*Banco Central de la República Argentina*) or the National Securities Commission (*Comisión Nacional de Valores*) have issued non-binding opinions on different issues regarding the crypto-economy, like ICOs that provide some ideas on possible interpretations of existing rules. For example, ICOs were hinted to be considered as an initial offering of securities under Argentine law. In this respect, if an NFT meets the criteria to be considered as security, then it might be treated as such. However, none of these regulatory bodies have moved forward with formal and general rules as mentioned above. While some legal proceedings have taken place in the last couple of years, particularly in criminal law, none has provided a classification or definition for tokens either as *obiter dictum* or *ratio decidendi* of such lawsuits.

(ii) Brazil

In Brazil, the legislative and regulatory situation of tokens does not see an improvement over Argentina. Although the documents issued by regulatory bodies, mainly the Brazilian Central Bank (*Banco Central do Brasil*) and the Securities Commission (*Comissão de Valores Mobiliários*) are not legally binding, they provide some reflections regarding digital assets. In this sense, cryptocurrencies can be considered for accounting purposes as nonfinancial assets. However, Brazil’s internal legal framework is also besieged by inconsistencies and contradictions as its national tax agency (*Secretaria Especial da Receita Federal do Brasil*) treats them as financial assets. Moving beyond the realm of cryptocurrencies, there are no provisions, binding or non-binding, that contemplate any other type of digital asset. As with other countries in the region, the ICO bubble of 2017 triggered several notices that hinted at the possibility of considering a digital asset, such as a token, as a security if the criteria for that category were met under the Brazilian Capital Markets Act.

(iii) Colombia

As with other Latin American countries, Colombia does not have a uniform and specific legal framework to deal with tokens. However, the country does have a history of certain pieces of legislation and regulation that tried to tackle different issues regarding the crypto-economy. In this regard, the Colombian Finance Superintendence (*Superintendencia Financiera de Colombia*), the Colombian Central Bank (*Banco de la República*), the National Tax and Customs Directorate (*Dirección de Impuestos y Aduana Nacionales*) and the Technical Council of the Public Prosecutor (*Consejo Técnico de la Contaduría Pública de Colombia*) have issued opinions and decisions on the matter. However, they contradict each other.

Despite the limited legislation and regulation adopted in the country, the available legal literature argued that if tokens met the criteria to be considered as securities under local law, then the rest of the general requirements for that regime would be applicable (Henao & Cañas, 2021). Consequently, if a token, such as an NFT, does not meet the legal requirements to be considered as security, then its issuance would be governed exclusively by private law regulations ranging from a contract to the default provisions foreseen in the Civil Code.

(iv) Mexico

While Mexico has been a pioneer in the field of fintech legislation and regulation in the region, its Fintech Law (*Ley para Regular las Instituciones de Tecnología Financiera*) takes a restrictive approach on crypto assets. In this regard, the Mexican Fintech Law deals with virtual assets (*activos virtuales*) and limits the application of its provisions to those virtual assets that are used as a medium of exchange/payment. The regulatory decision dealing with virtual assets further specifies that these should not represent ownership or rights in the underlying assets (“... *que no representen la titularidad o derechos de un activo subyacente o bien ...*”). Therefore, an NFT would fall outside the scope of the Mexican Fintech Law and its regulation, and subject to private law.

Summary

Although this analysis is not exhaustive of all Latin American jurisdictions, it does provide a glimpse into some of the biggest markets in terms of value operated and user base. Nevertheless, Latin American countries tend to move together in the same direction given the similarities between the legal systems. At the time of writing, several countries have regulation proposals under discussion in their congresses, but most only deal with cryptocurrencies and payment tokens, particularly with rules for exchanges. As for NFTs in particular, it is most likely that legal scholars and civil society organisations will move forward with interpretations of the existing legal framework to identify where securities regulations would be applicable and when NFTs would be governed by private law.

Sources:

Chomczyk, A. (2020). Regulación de blockchain e identidad digital en América Latina: El futuro de la identidad digital (2020.a ed.). Banco interamericano de Desarrollo. <https://doi.org/10.18235/0002935>

Henao, J. C., & Cañas, S. A. T. (2021). Políticas públicas y regulación en las tecnologías disruptivas: Disrupción tecnológica, transformación y sociedad. Universidad Externado.