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Legal issues
around NFTs

Introduction

NFTs (Non-Fungible Tokens) seem to be everywhere nowadays. However, they are so disruptive that it is quite difficult to even understand “what” they really are.

NFTs are tokens registered on a blockchain. Every NFT contains a digital signature which makes each one unique. They can represent digital or physical assets, but NFTs are most commonly used for digital assets like digital artwork, collectibles, music, items in video games and virtual real estate.

They are created through a process called minting, by which a new block is recorded on the blockchain. NFTs can be minted on many different blockchains, being Ethereum, Solana or Cardano some of the most popular ones.

NFTs can be sold and bought the same way physical assets can. NFTs transactions usually take place in specialized marketplaces, but they can also be purchased in a decentralized way.

Obviously, these disruptive assets bring with them very complex legal issues.

The purpose of this practical guide is to analyze some of the most interesting legal issues coming with NFTs, from the perspective of different areas of law, such as: (i) financial regulatory, (ii) tax; (iii) IP and data protection, and gaming/gambling; (iv) corporate; (v) dispute resolution; (vi) anti-money laundering, white-collar crime, fraud and investigations.



Definitions of *supposedly* unfamiliar terms

NFTs or non-fungible tokens: It is a non-interchangeable digital asset (they have unique properties) whose ownership has been authenticated and stored on a blockchain and which can be collected, sold and traded on various online platforms. An NFT could be anything, such as digital artwork, books, collectibles, virtual land, memes, music, real world assets, etc.

Blockchain: It is essentially a digital ledger of transactions that is duplicated and distributed across the entire network of computer systems on the blockchain. Each block in the chain contains a number of transactions and every time a new transaction occurs on the blockchain, a record of that transaction is added to every participant's ledger.

Metaverse: It is a digital reality that combines aspects of social media, online gaming, augmented reality, virtual reality and cryptocurrencies in order to allow users to interact virtually. More specifically, the metaverse is a vast network where individuals –via their avatars– can interact socially and professionally, invest in currency, take classes, work, and travel in 3-D virtual reality.

Smart contracts: These consist in programs stored on a distributed, decentralized blockchain network that are automatically executed when predetermined terms and conditions are met. It is a self-executable program that automates the actions required in an agreement or contract.

Marketplace/s: A decentralized marketplace, built on blockchain technology, allows traders or investors to trade with each other while eliminating middlemen by the use of smart contracts. NFTs will be able to be traded in a marketplace.

Cryptocurrency Wallet: It is a software program (that could be centralized or decentralized) or physical device that allows the user to store their crypto and their NFTs, and allows for the sending and receiving of transactions.

Collectible: Any item worth collecting or of interest to a collector using NFT technology (tokenized).

Minting activities: Minting crypto or NFTs is the process of generating new assets by authenticating data, creating new blocks, and recording the information onto the blockchain.

Exchange agency: It is a centralized entity which generally offers the following services: exchange between FIAT currencies and cryptocurrencies; offer financial cryptocurrencies derivatives, wallet services; debit card services.

Cryptocurrencies: A cryptocurrency is a digital or virtual currency that is secured by cryptography, which makes it nearly impossible to counterfeit or double-spend. Many cryptocurrencies are decentralized networks based on blockchain technology. The main cryptocurrencies are Bitcoin (BTC), Ethereum (ETH), Binance Smart Chain (BSC) or Cardano (ADA).

NFTs under a financial regulatory law perspective



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It fits to begin by highlighting that the drive for consumer protection on the part of Spanish authorities -especially regulators- has come to the fore especially in recent years as a result of the emergence of the virtual asset paradigm and blockchain. There have been no shortage of cautionary statements issued to the market by Spanish regulators over the last few years, notably by the Bank of Spain and the National Securities Market Commission (the “**CNMV**”).

The underlying reason for these public cautions is none other than the lack of a specific national regulation that covers virtual assets (such as crypto-assets) or NFTs with proper safeguards -along the lines of what happens with securities, for example- although this is now showing signs of turning around.

What can be understood by NFTs from a Spanish financial regulatory angle?

It is certainly a good question to which, however, there is no yet surplus of answers. NFTs are barely defined under Spanish financial regulations.

The only definition of NFTs that, for the time being, is available at a purely Spanish regulatory level, is found in CNMV Circular 1/2022 of 10 January, on the advertising of crypto-assets presented as investment objects (the “**Advertising Circular**”), to which we will refer below. This Advertising Circular provides an initial approach to the concept of NFTs from the regulatory perspective, which are considered as “*crypto-assets that are unique and not fungible with other crypto-assets, when they represent collectible assets, works with intellectual property or assets whose sole purpose is their use in games or competitions, so that they are not massively offered as a mere investment object.*”

From a wider picture, recent Financial Action Task Force (“**FATF**”) guidance defined NFTs as “*digital assets that are unique, rather than interchangeable, and that are in practice used as collectibles rather than as payment or investment instruments*”. Beyond this FATF guidance, however, there is very limited regulatory commentary on precisely what regulators and governments define as NFTs, and what characteristics are expected in order to qualify.

Spain is no exception, insofar as neither the Bank of Spain nor the CNMV have produced guidelines that shed more light on the concept of NFTs from a financial regulatory side.

A few considerations concerning “unique” and “non-fungible” characteristics

The unique and non-fungible nature of NFTs allows them to be individually identified and be distinguished from other NFTs of the same kind or any other assets.

The concept of uniqueness has not been explored as a point of law, but it is worth pointing out that the Council of the European Union in its “Mandate for negotiations with the European Parliament” did touch upon this topic stating “*the sole attribution of a unique identifier to a crypto-asset is not sufficient to classify it as unique or not fungible.*” This statement would suggest that uniqueness

relates not only to identification data within the NFT, but also to aspects relating to appearance or rights associated with the NFT.

In relation to the fungibility characteristic, a true NFT cannot be replaced with another, unlike a fungible token (e.g., Bitcoin, Ethereum) which could be exchanged with a different token which holds exactly the same value.

In the context of NFT collectibles, a token with unique attributes and characteristics (such as, for example, different patterns or colours applied to different aspects of the token) are much more likely to be unique, in a manner similar to a unique painting.

In any event, the characteristics of each NFT should be assessed on a case-by-case basis. In this regard, it is paramount to consider the nature of the NFTs and its function in practice and not what terminology or marketing terms are used. Some NFTs that on their face do not appear to constitute virtual assets may fall under the definition if they are to be used for payment or investment purposes in practice.

Are there any specific financial regulations governing NFTs as of today?

At a purely Spanish level, not yet. This being said, nascent regulatory activity focused on virtual assets is slowly beginning to materialise in Spain. The following may be the most noteworthy ones to mention:

- A cornerstone with which the process of regulating crypto-assets in Spain began to roll was the aforementioned Advertising Circular. The legislator, however, expressly left out of the scope those NFTs that meet the conditions outlined in section 3.1 above.

The Spanish securities market regulatory framework is undergoing a revamp via the recently enacted Law 6/2023 of 17 March on Securities Markets and Investment Services (the “**Securities Market Law**”) which is geared towards modernising the Spanish securities market legal framework so that, for example, tokenisation of transferable securities will now be allowed.

The expected securities market regulation developing the Securities Market Law – as yet

unpublished – is expected to determine the characteristics that a transferable instrument shall meet to be considered as *fungible*.

Aside from what is happening on a strictly domestic scale, the recently approved Regulation on Markets in Crypto-Assets (“**MiCA**”) becomes particularly significant in this field.

MiCA, however, neither provides a definition of NFT *per se*. It merely states that it shall not apply to crypto-assets that are unique and not fungible with other crypto-assets. According to MiCA, this Regulation should also not apply to crypto-assets representing single, non-fungible physical assets or services, such as product collateral or real estate. In order to be exempted, MiCA further states that the assets or rights represented must also be unique and non-fungible.

Additionally, MiCA notes that fractional shares of a single, non-fungible crypto-asset are also not considered to be an NFT. On this basis, where crypto-assets are issued in series or bundled in issues as an investment object, they will not flee from financial regulation.

The above may be indicative of a view that appears to be becoming more common, that tokens which are unique and non-fungible should not be treated in the same manner as other virtual assets. It would therefore remain to be seen whether future regulatory developments that specifically regulate NFTs -similar to what MiCA stands for- will follow.

NFTs under a tax law perspective



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Anything can be represented by an NFT. Digital artwork is the most popular form of NFTs, but other types (such as collectibles, virtual land, memes, music, real world assets, fashion, etc.) are becoming more and more popular.

The Spanish Tax Authorities (“**STA**”) have addressed in two binding rulings the nature of NFTs, stating that NFTs are “digital certificates of authenticity” that, through blockchain technology, are linked to a unique digital file (i.e., NFTs are digital assets that cannot be mutually interchangeable).

However, as unique as they are, NFTs can largely be put into different categories, so the taxation related to the mint, transfer and holding of NFTs should be analyzed on a case by case basis and taking into account the nature of the specific NFT, if it is linked to physical assets, to a purely digital asset or to experiences.

What would be the VAT treatment applicable to the sale of NFTs?

The European Commission stated on its Working Paper 1060 on Initial Value Added Tax (“**VAT**”) reflections on the VAT treatment applicable to transactions linked to NFTs (i.e., minting, trading and earning), published on 21 March 2023, that the current majority view that NFTs are digital services cannot be taken for granted and that a case-by-case analysis is required.

In Spain, the STA have issued two rulings analyzing the VAT treatment of the sale of NFTs that grant the buyer a right to use an underlying digital artwork. In these rulings, the STA concluded that the sale of NFTs should be considered as an “electronically supplied service” and, if the place of supply is deemed to be the Spanish territory, these sales are subject to Spanish VAT at the general rate of 21% (rather than the reduced VAT rate applicable to the sale of pieces of art (i.e., 10%)). However, if the asset (or experience) that is represented by the NFT is one of a different nature, the VAT treatment may differ (when the underlying digital artwork represented by the NFT is a customized illustration, the tenure of the NFT gives ownership rights over a physical good or the transfer of the NFT can be considered as auxiliary to other transaction, etc.).

Besides, due to the anonymity of NFTs transactions, sellers face practical difficulties in determining whether or not they should charge Spanish VAT to the buyers on sales through online platforms. This fact has led the STA to conclude that an online marketplace which facilitates the sale of NFTs in exchange for a fee shall be deemed to act in its own name on the sale of NFTs to the final purchaser, and therefore it is liable for collecting Spanish VAT from the buyers. In practice this new ruling changes the previous criterion of the STA regarding the marketplace liability in the sale of NFTs and, in our view, involves that online marketplaces shall obtain information to confirm whether the relevant purchaser is acting or not as entrepreneur for VAT purposes and the place where the buyer is based.

However, if the issue or the subsequent sale of NFTs is carried out by individuals who do not act in the course of a business activity, the transaction would fall out of the scope of VAT, but could be subject to

Transfer Tax in Spain if the relevant NFT is deemed to be situated, can be exercised or has to be fulfilled in the Spanish territory, or outside Spain if the taxpayer (i.e., the buyer) is resident in Spain.

Which would be the tax implications of the gains obtained on the sale of NFTs?

Taxation on individuals

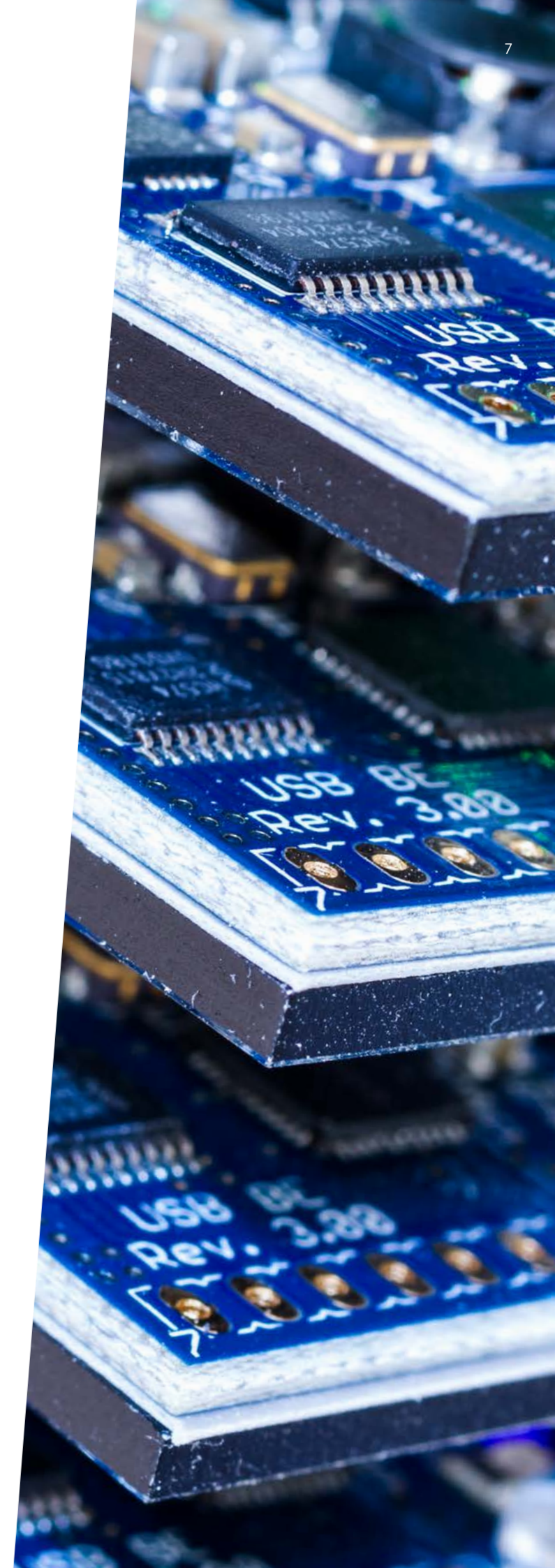
The transfer of NFTs by individuals residing in Spain is subject to Spanish Personal Income Tax (“**PIT**”), whatever the source is and wherever the relevant payer is established.

Taxation of individuals depends on whether the taxpayer acts in the course of a business activity (e.g., individuals who mint and sell NFTs) or not.

- Income obtained by creators of NFTs can be considered as income derived from a business or professional activity (*rendimiento de actividades económicas*), regardless of the occasional character of the activity in terms of the amount of sales carried out, which would be included in the general income tax base (*renta general*), subject to PIT at the progressive scale of tax rates (with a top marginal rate around 47%, depending on the Spanish region where the individual has his/her tax domicile).

The creator of the NFTs should be able to deduct the expenses to the extent that they are related to the business activity. But there is an issue which still needs to be solved: how will individuals be able to justify these expenses if the online trading platforms do not usually issue invoices for the transaction fees?

- Income derived from the transfer of NFTs by individuals who are not considered to be acting as professionals for Spanish PIT purposes is likely to be considered as a capital gain, to be included in the savings income tax base (*renta del ahorro*), which is subject to the following tax rates: 19% on gains up to €6,000; 21% on gains from €6,001 to €50,000; 23% on gains from €50,001 to €200,000; 27% on gains from €200,001 to €300,000; and 28% on capital gains greater than €300,000.



Taxation on companies

If the seller of NFTs is an entity subject to Corporate Income Tax (“**CIT**”) it shall include in its annual CIT taxable base the capital gain resulting from the difference (positive or negative) between the sale price of the NFTs and their tax base cost.

This taxable income could be offset with deductible expenses of the current year, and with (if available) carried-forward tax losses and other tax attributes or tax credits.

If the annual CIT taxable income of the taxpayer is positive, it would be subject to the standard 25% CIT rate in 2023. We note that Spanish companies with an annual turnover in previous tax period lower than €1 million may apply a reduced CIT rate of 23% and start-ups may benefit from a 15% rate applicable to recently incorporated entities the first fiscal year in which they have a positive taxable income and the following one.

Could the STA tax the sale of NFTs by non-residents?

Sale of goods by non-residents are generally subject to Non-Residents Income Tax (“**NRIT**”) provided that the goods are located within Spanish territory. Taking into account that cryptoassets are decentralised -meaning they are specifically designed not to have a location- and the different types of NFTs, the determination of the source of the income and the possible taxation in Spain by non-Spanish residents could be complex, so this should be clarified by the tax authorities. In relation to the trade of NFTs that represent the ownership or rights over real-life goods located within Spanish territory (e.g., real estate), it is our understanding that gains obtained from their transfer by non-residents may be taxed in Spain. However, this is not usually the case and, when the underlying asset is of a digital nature, the taxation for non-residents is far from straightforward.

In this regard, the STA stated that capital gains derived from the transfer of cryptocurrencies in exchange for fiat currency (e.g., Euros) would be deemed to be located within Spanish territory for NRIT purposes if the entity that provides the storage services (e.g., wallet) is located in Spain. A similar approach could be followed by the STA in relation to the location of NFTs..

Are there any tax obligations related to the holding of NFTs?

Spanish individuals who have the obligation to file the Spanish Wealth Tax return would be taxed on the value of NFTs, together with their remaining assets. Furthermore, Spanish tax residents are subject to the recently introduced State Solidarity Wealth Tax on their worldwide assets and rights, when their taxable base is higher than €3,700,000.

Finally, is there currently any reporting obligation for NFTs owners or online intermediaries?

The STA have approved the legislation that develops the legal framework to introduce the obligation to report information regarding cryptocurrencies located outside Spain, which comes into force for holdings related to 2023 (to be reported in 2024) through a new tax form 721.

Also, the STA have approved reporting obligations for entities that are tax residents in Spain and carry out a cryptocurrency related activity (e.g. minting activities, exchange agencies, e-wallets, etc.) in relation to cryptocurrencies balance (form 172) and transactions with cryptocurrencies (form 173).

Although the legislation that develops these reporting obligations does not mention other IP digital assets, such as NFTs, we cannot exclude that the legislation may also include them within its scope in the near future.

Finally, on 8 December 2022, the European Commission proposed a draft text for a Directive on Administrative Cooperation 8 (“**DAC 8**”). The proposed rules aim to improve information gathering by all crypto-asset service providers (i.e., trading platform for crypto-assets), to report information relating to crypto-asset transactions (which in some cases may cover NFTs) of EU-resident clients.



NFTs under an IP & Data Protection Law and Gaming/Gambling perspective



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NFTs also raise interesting legal considerations from a copyright & rights of authors (Spanish IP), data protection and gaming/gambling points of view.

What are the main implications from an IP Law perspective?

As already advanced, NFTs are virtual assets that represent digital or physical items such as art, music, in-game items and videos (underlying work). Such underlying work may be subject to copyright & authors rights protection. One may think that by buying an NFT, the buyer owns the underlying work to it and, therefore, can use it freely. However, it is important to understand that ownership of the NFT does not necessarily entail ownership of the copyright & authors rights attached to the underlying creative work to the NFT. This means that, generally speaking, the buyer of an NFT will probably only have the rights to access / use the underlying work for personal use.

The author of such underlying work is, by default, the owner of all copyright & authors rights over the same, including both moral and patrimonial rights (please note that under Spanish intellectual property law, moral rights cannot be waived). Therefore, to own any title over the patrimonial rights attached to the underlying work of an NFT, such rights shall be transmitted by the rightful owner to the buyer of the NFT; and such transmission shall be expressly regulated to be truly effective. That is, unless there is a true alignment between the titleholder of the underlying work, the NFT seller and, finally, the buyer's intention (in many cases by means of additional agreements or representation and warranties), one of these three parties is in risk of having their rights and/or expectations undermined.

In line with the above, it is also worth highlighting that the minting of protected works requires title over the due rights over the represented works to avoid copyright or other authors' rights infringements. Now more than ever the Spanish Intellectual Property Register may become a pillar for evidentiary purposes and for titleholders to be able to enforce their rights upon the upcoming wave of NFTed underlying rights.

What are the main implications from a data protection and cybersecurity perspective?

The Spanish Data Protection Agency (“**AEPD**”) has not established any specific guidance on privacy implications that may become relevant in relation to NFTs. It has, however, provided some (very basic) information with regard to its position on blockchain technology¹, and a brief mention to them in relation to the metaverse². In broad terms, the AEPD stated that blockchain is not a processing activity by itself but a technique on which different processing activities and business models can be implemented; suggesting that processing activities built over blockchain shall comply with applicable data protection requirements.

¹ See [Blockchain and Data Protection](#) (only in Spanish) and [Blockchain \(II\): Basic concepts](#).

² See [Metaverse and Privacy](#).

Taking into account previous constructions of the AEPD on what shall be considered personal data (e.g., with regard to the IP address), we anticipate that the AEPD will most probably understand that the public keys and transaction data generated in the process of operating an NFT constitute “personal data” within the meaning of EU data protection laws, as they can be related to an identified or identifiable individual. As a result, such processing would be subject to both the General Data Protection Regulation (“**GDPR**”) and Spanish Organic Law 3/2018 on personal data protection and digital rights guarantees. This gives rise to a variety of data protection questions which the Spanish Data Protection Agency has not yet answered.

It is worth noting that, as per the latest pronouncements of the AEPD, special consideration shall be taken when using/developing smart contracts in the blockchain³ (especially in relation to article 22 GDPR and the right of data subjects not to be subject to decisions based solely on automated decisions, including profiling, when those decisions have legal effects on him/her or significantly affect him/her).

How NFTs are used, their content and how they end up being settled down in our society would have a great impact on the approach the AEPD and other EU Supervisory Authorities will take: enacting particular rules or leaving them to general ones.

What are the main implications from a gaming/gambling perspective?

NFTs have hit hard the videogame industry. New forms of gaming such as earn-to-play, free-to-play, MMOs, have boosted their use in forms of rewards, collectibles, in-game purchases, etc. such as skins, or tools.

In this area, their use and legal construction have also been the target of authorities and regulators, particularly, those related to gambling. In this aspect, the Spanish Gambling Act was recently amended to establish that the Government will develop a set of guidelines to ensure the safer use of non-fungible digital assets, loot boxes or mechanics of monetization of the participation of videogame users. These guidelines (which as of today have not been published) will impact the use of NFTs

³ See the following blog published by the AEPD: [Blockchain \(III\): Smart contracts and personal data](#)

in this context with regards to the commercial communications regime, information duties vis-à-vis users and security measures.

It is worth highlighting that, due to its relation to the use of NFTs, a law on loot boxes is on its way (draft bill has already been published) which could set an standard in the EU. Such law approaches loot boxes from the gambling perspective due to some similarities described therein.



NFTs under a Corporate Law perspective



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What protections might apply to Spanish consumers buying NFTs?

Currently, business activities in the NFT area are probable to be subject to general Spanish Civil Law principles. Nevertheless, if we focus our attention in a business to consumer (“**B2C**”) context, specific Spanish consumer protection laws will most likely apply. For instance, smart contracts (which are used in NFT trade) must be compliant with Spanish consumer protection laws, including the consumer guarantees and provisions surrounding unfair and abusive/unbalanced contractual terms/clauses. These provisions are mandatory.

Therefore, when buying an NFT, Spanish consumers acquire various rights. This will occur whether or not the trader is based in Spain, as long as: (i) the NFT acquirer qualifies as a “consumer”; and, (ii) the NFT has been marketed by the trader to Spanish consumers.

Some protections to consider include:

Information provision: before making an online purchase there is an obligation on the seller to provide certain key details regarding the transaction in Spanish and in a clear and not misleading manner. These include the identity of the seller, the main characteristics of the product, clear and comprehensible information on the total price, any requirements the consumer should be aware of following the sale, procedure for payment, delivery and performance, right of withdrawal, post-sale assistance and guarantees, codes of conduct, contractual duration and out-of-court complaint and redress mechanism. For NFT purposes this would include: (a) information regarding ownership – in particular clear information regarding how that relates to ownership of any rights in the underlying asset, and (b) details regarding the existence and functionality of any embedded “smart contract” arrangements.

Implied terms: specific terms can be implied into a contract under Spanish law. There are various implied terms established in the Spanish Civil Code that apply to all contracts, as well as other implied terms that only apply to contracts for the sale of consumer goods between sellers and consumers.

Implied terms applicable to all contracts include rules regarding eviction (*evicción*) and hidden defects (*vicios ocultos*).

For consumer contracts, the Spanish Consumer Protection Law 1/2007 (in Spanish “*Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*”) follows Directive 99/44/EC on the sale of consumer goods (Sale of Consumer Goods Directive), with the most important implied term being the right of consumers to:

- Have defective goods brought back into conformity free of charge through repair or replacement.
- A price reduction or the rescission of the contract if the goods delivered by the seller are not in conformity with the contract of sale.

In addition, the Spanish Consumer Protection Law 1/2007 establishes that consumer contracts must be construed both in accordance with objective good faith and in favor of the consumer, including in those cases where pre-contractual information was omitted. Therefore, terms that should form part of the contract according to the objective good-faith principle would be implied terms and would be construed in favor of the consumer.

Control of unfair contract terms: unfair terms are defined as terms that are not individually negotiated between the parties and which breach good faith by causing a significant imbalance in the rights and obligations of the parties under the contract to the detriment of the consumer. Unfair terms are null and void. The inclusion of unfair terms in a contract normally results in the nullity of the unfair term, while the rest of the contract remains binding, unless the contract cannot survive without the unfair term. If the nullity of the entire contract would result in negative consequences for the consumer, the gap left by the unfair terms may be filled by the default provisions of the Spanish law.

The Spanish Consumer Protection Law 1/2007 establishes a (particularly lengthy, compared to other EU jurisdictions) non-exhaustive or open list of terms that will always be deemed unfair (that is, a blacklist of unfair terms).

Right of withdrawal: Spanish consumers have a right to withdraw from the contract within 14 calendar days without giving any reason and without incurring any costs, except in specific cases expressly established in the Spanish Consumer Protection Law 1/2007. That period may be extended if the seller did not provide information on that right to the consumer. The exercise and effects of the withdrawal right and the obligations and rights of the parties in the event of withdrawal are also regulated under the Spanish Consumer Protection Law 1/2007.

Satisfactory conformity: sellers must respond to the lack of conformity of the digital content within two years from the delivery date.

What remedies are available for breach of an electronic contract selling NFTs?

The remedies in the case of breach of electronic contracts are those foreseen for civil contracts. The general regime states that the right to terminate contracts is deemed to be implied in reciprocal obligations where one of the parties does not perform its obligation. The aggrieved party can choose between requesting:

- the performance of the breached obligation; or,
- the termination of the contract; and,
- in the cases above referred, compensation of damages.

NFTs under a dispute resolution perspective



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There is no doubt that NFT-related disputes will soon be a new reality in the litigation landscape. We are already seeing in different jurisdictions the very first NFT-related disputes, where parties are discovering the many different uncertainties deriving from litigation involving such a disruptive asset. One of this uncertainties -which is the focus of this analysis- is where (in which jurisdiction) are NFT-related going to be solved.

Indeed, determining jurisdiction will probably be the first controversy to solve in almost every NFT-related dispute. Defendants are usually tempted to challenge jurisdiction when proceedings are initiated abroad, and in NFT litigation they shall, generally speaking, have arguments to do so, regardless of where is the litigation initiated.

We analyze below the most common scenarios in which NFT's transactions take place, and the jurisdiction issues which may arise in each one.

Which would be the competent court in a dispute between a seller and a purchaser in the marketplace?

The most common way to acquire NFTs nowadays is through a marketplace. Usually, marketplaces include in their terms and conditions dispute resolution clauses which submit any disputes to arbitration. However, even in these cases jurisdiction may be an issue, as jurisdiction clauses included in the marketplace's terms and conditions may be challenged. This type of discussions will be particularly likely to arise in those cases where claimants can be considered consumers under the laws of the country where they wish to initiate actions.

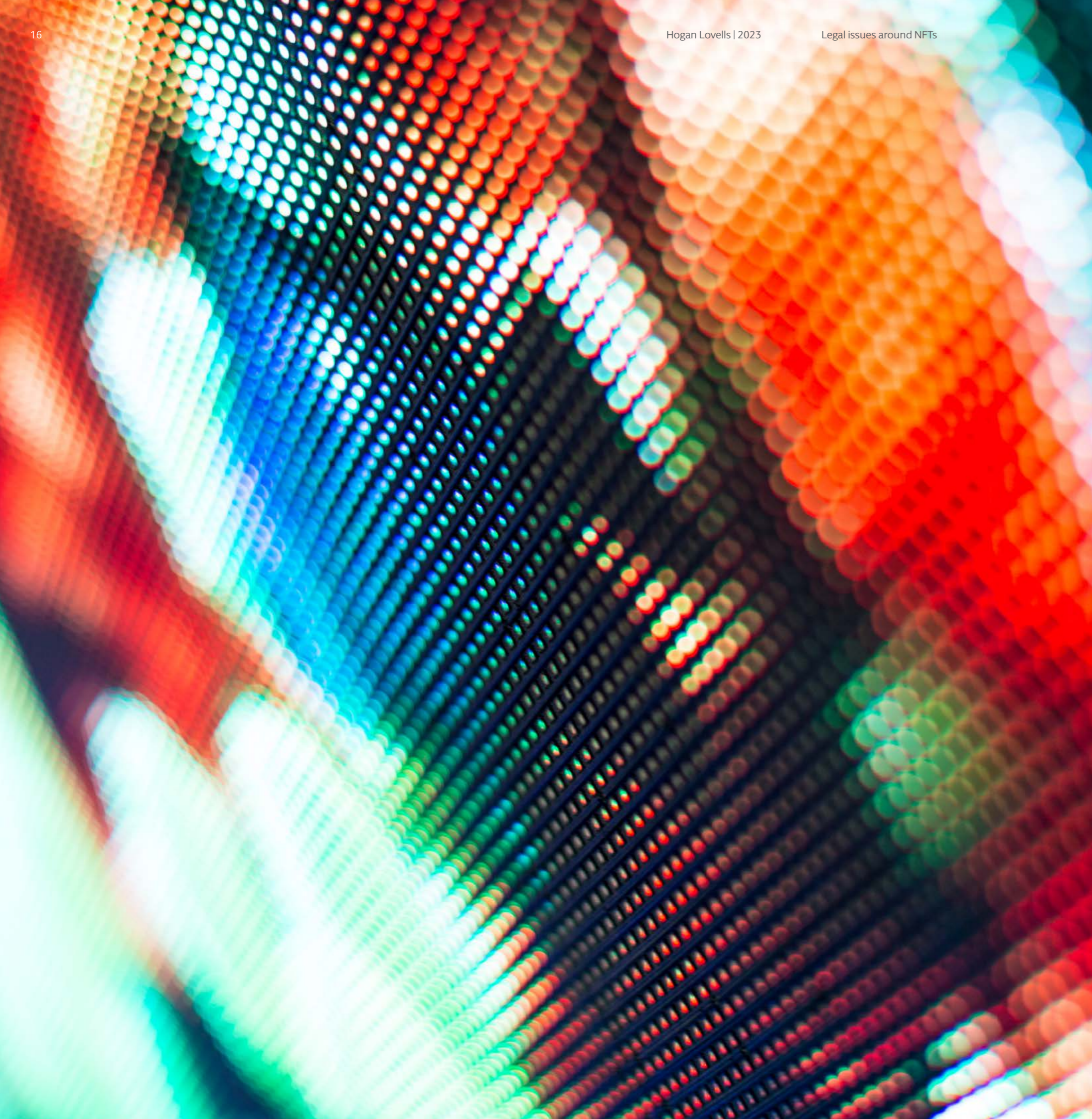
For example, one of the leading marketplaces submits its disputes to the laws and courts of Delaware, but if the purchaser of the NFT lives in Spain, Delaware's jurisdiction may be challenged on the grounds that Spanish courts have jurisdiction over the dispute because a Spanish consumer cannot be forced to litigate abroad if the asset was acquired online, but from Spain.

What about those disputes arising from transactions performed outside the marketplace?

NFTs can also be acquired without the intermediation of a marketplace. For example, NFT transactions can be performed using peer to-peer (or "**P2P**") trading services, such as those offered by nfttrader.io, sudoswap.xyz or tradingtent.io. Generally, these disputes do not fall within the scope of any arbitration clauses. As a consequence, jurisdiction will be determined by the applicable treaties and conventions, or directly by the internal laws of the country where the claimant decides to initiate litigation.

In these cases determining jurisdiction will be a great challenge, as the usual parameters to determine jurisdiction in the physical world are difficult to apply in the NFT world. Note that the country in which sellers and purchasers are located may be unknown (NFTs are acquired through





wallets which do not include information regarding the user's location), so this could make extremely difficult to determine the nature of the transaction (even determining whether it is a civil or a commercial transaction may be difficult) or the legal nature of the NFT itself.

Thus, international courts and arbitral tribunals may find it difficult to determine whether they are competent to hear a specific case.

Finally, what about disputes that arise between the creator of the NFT and its first owner?

Although some collections are minted directly in marketplaces (such as the collections launched on MagicEden's lunchpad), this is not the case for a great percentage of the most popular collections.

Collections are usually minted in a "minting page" implemented by the creators of the project. In few occasions these transactions may be subject to specific dispute resolution clauses included in the terms and conditions accepted by the acquirer during the minting process. These cases face the same difficulties as those set out in the first question.

However, in most cases the "minting page" will not include any jurisdiction clauses (this was actually the cases of some of the most famous collections, such as Cryptopunks or Bored Ape Yacht Club). In these cases, jurisdiction shall be subject to the same uncertainties as the ones described in the second question above.

NFTs from an anti-money laundering, whitecollar, fraud & investigations perspective



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Does the Spanish Criminal Code provide for a protection of NFTs?

The Spanish legislation -as it is the case of the majority of jurisdictions- has not yet developed tailor-made provisions aimed at prosecuting and punishing criminal offences affecting NFTs. However, this does not translate into an absence of mechanisms to fight back criminal behaviours in this brand new reality (and market). Generic offences serve to prevent behaviours and new forms of crime that the criminal legislator did not even conceive of when defining the offences.

NFTs are aimed to be unique and original creations by digital artists. Given this, we may think of two different scenarios in the commercialization of NFTs in which the criminal legislation might step in to protect that singularity and artistic nature of NFTs, as well as their creators and purchasers:

- A first scenario could take place when a buyer purchases an NFT in the conviction that its creator is a well-known artist (e.g., Beeple). However, this NFT turns out to be nothing but a mere forgery. The criminal legislation would apply as if the exact same behaviour affected more traditional artwork (a painting from Picasso or Rubens). Hence, in a situation as the one described, in which (i) a seller deceives someone into thinking that an NFT is an original piece from a certain artist, (ii) this deceit results in a mistake by the buyer, (iii) who ends up paying an economic sum for the acquisition of the fake NFT and (iv) in the benefit of the seller, all the elements of a fraud offence would be present and this action from the seller of the forged NFT could be prosecuted and punished by the criminal authorities (articles 248-251 bis of the Spanish Criminal Code).
- A second scenario may take place when a third party sells copies, reproduces or economically exploits by any other means an NFT without the due authorisation from its creator. Such conduct may result in criminal liability. Provided that the regulations on intellectual rights do not exclude NFTs from that regime, criminal offences aimed at their protection could be applicable (articles 270-272 of the Spanish Criminal Code).

In conclusion, there might not be yet a specific criminal offence applicable to the new risks which may arise for artists and buyers of NFTs within the commercialisation of these digital products but more generic criminal legislation does already provide for an answer and reaction to certain unlawful behaviours affecting this new form of art.

What criminal risks should be considered by platforms involved in the trading of NFTs?

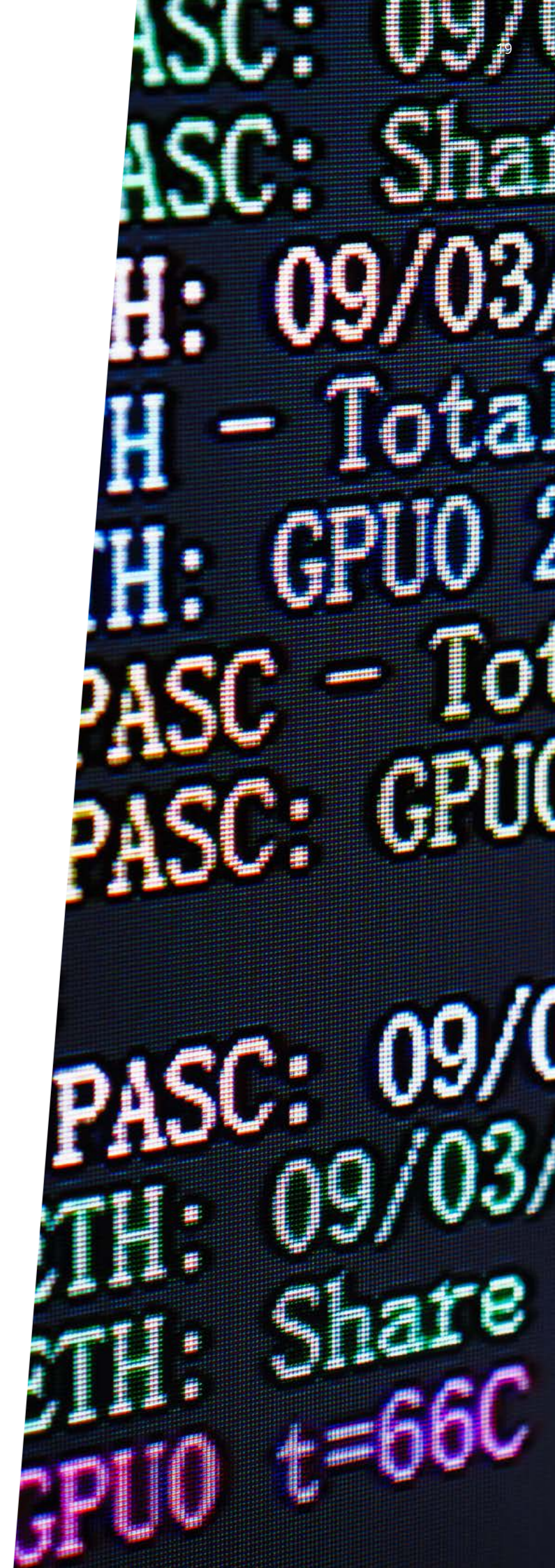
Trading platforms of NFTs are facing important challenges which are already being spotted and prosecuted by the authorities in different jurisdictions. These are risks typically applicable to any trading market. However, given the novelty of these trading platforms, the still limited controls and the quick evolution of digital technologies, the NFTs' market has become quite a playing field for various market abuse forms.

A first area of risk would refer to the potential misuse of NFTs and NFTs platforms for the purpose of money laundering (articles 301-304 of the Spanish Criminal Code), a risk that has traditionally affected the commercialisation of art. These unlawful behaviours are probably enhanced by the absence of a physical delivery of assets, which translates into fewer transactional costs, less exposure of the purchase, as well as high speed of the transactions. The prosecution of this criminal offence in Spain is particularly harsh, and even negligent behaviours (if severe) can lead to criminally liability.

Additional risks may result from insider trading schemes (already under prosecution by the DOJ), or from wash trading (simulating a demand, value and liquidity of the NFTs in the market that is not supported by the reality). Different criminal offences, aimed at protecting the market and consumers, could be applicable to these dynamics (e.g., the criminal offence of insider trading set out in article 285 bis of the Spanish Criminal Code, criminal offences of market manipulation punished by articles 284 and 285 of the Spanish Criminal Code, or the offence of deceptive advertisement provided for in article 282 of the Spanish Criminal Code).

All of the above-referred criminal behaviours may entail corporate criminal liability, provided that the requirements established in article 31 bis of the Spanish Criminal Code are met.

In order to try to avoid these risks (and any potential liability resulting from these behaviours), it would be advisable for trading platforms to implement compliance mechanisms including, among other requirements: (i) an analysis of the specific criminal risks entailed by their activity (in particular, regarding the trading of NFTs); (ii) adequate policies in order to control and prevent these risks; and (iii) a proper compliance structure (e.g., a compliance officer, an internal whistleblowing channel) to enable the entity to monitor compliance with the internal rules and detect illicit behaviours within the company.



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