

Non-Fungible Tokens (NFTs) – Regulation Vacuum and Challenges for Romania

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ABSTRACT: This article aims at presenting the strengths and weaknesses of the Romanian legislation towards non-fungible tokens (NFTs). We start by recognizing that there is no active legislation that deals with cryptocurrency, NFTs or any other digital asset using a digital ledger of transactions (DLT). The starting point is the analysis of the legal characteristics of an NFT through the classical qualification and distinction made for goods by the Romanian Civil code. Further, we raise some issues regarding establishing a clear tax regime and the correlation between NFTs and intellectual property rights, and finally conclude that when it comes to qualifying crypto-assets, we need to adopt a ‘substance over form’ approach, in order to avoid regulatory unpredictability.

KEYWORDS: Non-fungible tokens, NFT, cryptocurrency, DLT, blockchain

Introduction

Cryptocurrency and NFTs started the new gold-rush of the digital era. Due to the fact that the market for these digital goods has been established quite recently and has grown without precedent, the legal interest in this phenomenon is a professional obligation.

With the growth of a new financial market in trading digital assets like cryptocurrency (fungible tokens), non-fungible tokens (NFTs) have also made quite an impact. The selling of Mike Winkelmann’s (Beeple) NFT by Christies for an astonishing 69 million US dollars (<https://www.christies.com/features/Monumental-collage-by-Beeple-is-first-purely-digital-artwork-NFT-to-come-to-auction-11510-7.aspx>) reverberated across the planet and caught the attention of everybody, especially legal scholars.

An NFT is basically a digital asset that, through the aid of blockchain technology, is unique and registered as such in a digital ledger (DLT – digital ledger of transactions) where its creation and all subsequent transfers are noted so as to give the possessor of the NFT the rank of owner. The uniqueness and scarcity of an NFT is what gives it its underlying value (Bosovic 2021). But can this process of creation and transfer of NFTs be considered absolute proof in the eyes of the Romanian law that the possessor of the token is in fact a true owner?

The uniqueness of the NFTs only translates to the digital world because NFTs can be a representation of real-world goods or videos which can further entail intellectual property (IP) issues. Analyzing the NFT through the Romanian legal frame of reference some interesting points can be made.

Legal characteristics of an NFT as seen through the Romanian Civil code

Due to the novelty of it, NFTs do not benefit from special attention from the Romanian legislation, thus only an analysis of its genus can reveal certain legal characteristics.

So, what is an NFT? Is it merely a *thing* or does it rise to the *goods* status, distinction the Romanian legislation makes? If, indeed, it’s a good, what precise kind of good is it?

According to art. 535 of the Romanian Civil code (C.c.) “goods represent things, that can be corporeal or intangible, which constitute the object of a patrimonial right”. From the perspective of Romanian private law there is a difference between the notion of *things* and *goods*, in the sense that the first refers to any corporeal or intangible element in the objective reality that has its own configuration, while the second, as mentioned before, is juridically a

thing that has economic value through appropriation. The doctrine offers as example of things the *res communis*: air, light, water, basic ideas, or cultural traditions (Boroi and Angheliescu 2012, 78).

The only mention in the C.c. of *things* is in the art. 535 and in art. 1376 “Liability for damage caused by things” (“*Everyone is obliged to repair, independently of any fault, the damage caused by the thing under his care*”).

It should be underlined that an action or inaction does not constitute a *thing*. At most it can be considered a performance inside or outside of a contract that produces legal consequences. The capacity of an action to be objectified in a material matter is not enough to change its nature even though it can create, modify or even destroy a good (the possibility of destruction of a certain good, while fulfilling all other legal requirements if requested, is based on the attribute of *jus abutendi* of the ownership right).

According to Gaius, the triad of the juridical world is formed by the persons, performances (rights and obligations) and goods (Stoica 2017).

As a partial conclusion, the NFTs cannot be interpreted as being just things in the eyes of the Romanian law, but goods. Even though the inherent economic value of a good, and thus an NFT, is not enough in itself to be considered an asset in the patrimonial sense, the appropriation element completes the scheme. For example, as in the case of lost goods that cannot be taken into account when summing up the entirety of someone patrimony, if the owner of an NFT loses the public and/or private key or the hard-drive that offers access to the respective asset, in the eyes of the Romanian law the respective NFT ceases to be a good, only reverting to this status once the keys or hard-drive are found again. The implications are numerous especially in cases of bankruptcy, succession debate or enforcement action; sometimes the implications can be criminal if the debtor alienates, hides, damages or destroys, in whole or in part, NFTs in his patrimony or if invokes fictitious transfers for the purpose of creditors' fraud; according to art. 239 of Romanian Penal code any of the aforementioned acts is punishable by imprisonment from 6 months to 3 years or a fine. Due to the limited identification capability of the owners or receivers of block-chain based tokens the criminal aspect of hiding assets in the form of NFTs or cryptocurrencies poses a challenge for any state.

After establishing that NFTs can be the object of a patrimonial right and thus be considered a good we need to understand what kind of good it is, according to the C.c.'s different criteria.

The lack of specific legislation to regulate NFTs can create difficulties in considering them or not as being able to take part in the civil circuit through juridical acts.

As a rule, the regime of legal circulation of goods in Romania is that until otherwise stipulated in an express manner by the law goods can be legally circulated. Circulation of goods can take place without restrictions, like in most case, or with certain restrictions, as is the case with firearms, fireworks, or some pharmaceutical drugs.

According to art. 1229 “only goods that are in the civil circuit can be the subject of a contractual performance”.

Currently, Romania has neither regulated NFTs nor cryptocurrencies for that matter but hasn't banned them either, a precedent which India has just set with virtual currency making it illegal to have, issue or sell such currency.

As another partial conclusion, the NFTs can be considered goods which can take part of the Romanian civil circuit through contracts.

An additional criterion by which goods are classified by the C.c. is the one that separates corporeal goods from the intangible goods which in Roman law it was expressed by the adage: “*corpo-rales hae sunt quae tangi possunt, velut fundus, vestis, aurum; incorporales quae tangi non possunt, qualia sunt quae in iure consistunt, sicut hereditas, usufructus, obligationes.*”

As stated before, when we discussed appropriation, ownership is just a tool through which a good is appropriated. The Romanian C.c. prescribe the ways in which one takes ownership over a good, movable or immovable. According to art. 557 C.c.: “the right of ownership may be acquired, under the law, by convention, legal or testamentary inheritance, accession, usucapion, as an effect of possession in good faith in the case of movable property and legal fruit, by occupation, tradition, as well as by court’s judgment, when it is translational of property by itself”.

But there are some particularities of appropriation of intangible goods:

a) With corporeal goods appropriation happens to an external object without the authorization from the law for each category of goods – the law may only restrict certain corporeal goods from appropriation – but, with intangible goods appropriation may occur only if permitted by law. The law, thus, covers transactions of digital goods for tax purposes, most of NFTs being unique digital art, assets in the form of pictures, videos or songs, it however does not recognize virtual currency like Bitcoin and Ethereum, only digital currency (see Law 210/2019 on the activity of issuing electronic money).

b) In order for the juridical possession of an intangible good not to contain only the element of *animus* (to the intention or will of the holder of the right to own the property for himself and to act as the holder of the respective real right) but also *corpus* it is necessary for the appropriation process to have a material support onto which we are able to fix the immateriality of the intangible good.

The intangibility of goods comes with some juridical restrictions. For example, the tradition or the acquisition of property over movable property as an effect of the possession in good faith, as prescribed by art. 935 of the C.c., refers only to tangible movable property; it does however allow, only exceptionally, some intangible movable property, namely bearer securities, as per art. 940 C.c. (Stoica 2013, 332-333)

There is, however, a particular case where intangible goods act like tangible goods but only in their effects, not in nature: tradition. Nowadays, in the digital age, the manual gift can be legitimately received through procedures that do not include the actual and material delivery of the given good, but nonetheless guarantee successful transfer of values from one patrimony to another – e.g. transferring a file or files to a computer, or sending money using a debit card.

In order to exemplify intangible goods, we can list the following: real rights, other than property rights; intangible properties like industrial property rights, copyright and their related rights – here we can also include NFTs; securities like shares, bonds, derivatives or any other credit securities classified by the National Securities Commission in this category, as well as trade effects like bills of exchange, promissory notes and checks; debt rights.

As a further partial conclusion, interpreting Romanian law, NFTs are intangible goods, more precisely they represent intangible property.

De lege ferenda, we find useful, considering the innovations of the digital world in matters of digital assets, the regulation of a *deposit contract (depositum) for intangible goods* since in most cases, NFTs are minted from embedding links to webpages that are hosted on the servers of third parties, which poses a legal vulnerability. Blockchain technology can only attest proof of ownership of the token and transaction history of it, the code embedded in the token usually being a link to a picture, video or song *deposited* (hosted) on a server. It’s important to understand that ownership over an NFT doesn’t always mean intellectual property of the asset represented in the NFT; one the biggest advantages of blockchain technology may be its biggest weakness: immutability and irreversibility. So, in case of art fraud, the person unknowingly paying for the *faux* NFT in cryptocurrency may consider the transaction a loss, there not being a possibility for the revertment of payment as it is paying by fiduciary money.

According to Romanian doctrine, the deposit contract is a *contractus in re* meaning that the handing over of the asset is a condition for the valid conclusion of the deposit contract, unless the depositary already holds the asset for another purpose. In essence, according to art. 2103 C.c. the depositary receives from the depositor a movable property, with the obligation to keep it for a period of time and to return it. It is evident that, *ex lege*, the object of this contract could only be a corporeal asset.

Let's presume that we minted a token (most NFTs are registered on Ethereum's blockchain, a decentralized platform) that consists of original digital art: in order to create a block of data to be included in the chain, either a) the token must be integrated in the block (it may be costly if the token is a video or any large amount of data that needs computing), or b) the URL (Uniform Resource Locator) that connects the owner to the original token. Further discussing point b), the *sine qua non* condition for the NFT to have value is for the art-piece to be accessible online, otherwise the digital ledger of transactions attests that a person is the owner of a broken link. Thus, it becomes evident the importance of choosing a cloud-computing service provider as a depositary to host one's digital assets (Radu 2015a; Radu 2015b).

Coming back to *depositum* contract a question arises: how would the return of an intangible good like an NFT would work? As we discussed earlier about appropriating intangible things in order for them to become goods, they must be fixed on a material support, in this case a hard-drive. Restitution of intangible nonfungible digital goods can be accomplished by either using a server data migration software to transfer the database or by physically surrendering the data storage medium.

Consenting parties, of course, can draw-up the terms of any agreement if they respect public-policy, but often the lack of regulation can give way to contractual abuse from the economically dominant party.

In a case of such legislative vacuum we could apply the provisions of the deposit contract taking into account the rules for what are considered to be the normative sources of the civil law. Thus, in the situation where the law does not provide for a certain legal situation and there are no customs, the Romanian court may consider, according to art. 1 para. 2 C.c. as a source of law the legal provisions regarding similar situations – the deposit contract regulated by the C.c. in art. 2103-2123.

Another criterion that Romanian doctrine uses to distinguish among goods is based on their ability to be replaced by another in performing a contractual obligation as *payment* (Pop, Popa and Vidu 2015, 521). Thus, goods may be fungible and non-fungible. According to art. 543 par. 2 C.c., goods that can be determined by number, size or weight are fungible, so that they can be replaced by each other in the performance of an obligation. *Per a contrario*, non-fungibility lacks the equivalence ratio between two or more things.

The most important effect of this classification, besides appreciating the validity of a payment, is the moment transfer of ownership takes place. As stated in art. 1674 C.c. the property right is transferred *ex lege* to the buyer from the moment of concluding the contract, even if the good has not been handed over or the price has not been paid yet, except in the cases provided by law or if the will of the parties does not show otherwise. Meanwhile, when the sale concerns fungible goods, including goods of a limited kind, the property is transferred to the buyer on the date of their individualization by delivery, counting, weighing, and measuring or by any other means agreed or imposed by the nature of the good, as per art. 1678 C.c. (Stănciulescu 2012, 147).

This has important implications trading NFTs under Romanian law: Sale of NFTs fall under the rules of art. 1674 C.c. meaning that it does not matter if a transactional block of data was chained to the others for it to operate the transfer of ownership in the eyes of the civil law as long as the conditions of validity of the act were respected. As a rule, for a sale to be considered valid certain essential conditions must be met: the ability to contract; the consent

of the parties; a determined and lawful object; a lawful and moral cause; and, to the extent that the law provides for it, a certain form of contract must be complied with.

The selling of NFTs does not require for the contract to take any special form, the consensus principle established in art. 1178 C.c. being applicable. We might be tempted to believe that embedding the new transaction in the blockchain has the constitutive effect of rights when in reality it represents fulfillment of the delivery obligation that comes with the transfer of ownership and also serves the function of opposability to third parties.

Of course, the main issue in case of lack of consistency between the real owner and the one mentioned in the ledger is the proof of ownership and claiming damages. According to art. 309 of the Civil procedural code, no legal act can be proved with witnesses if the value of its object is higher than 250 RON. The issue becomes more real as most NFTs are evaluated at much higher prices than aprox. 60 USD or 50 EUR. So, if a person consents to selling an NFT for 1.000 USD, receives the money but there is no deed to prove this agreement nor an invoice of a money transfer, then the buyer may find himself at the mercy of the seller's good will to deliver the NFT. The equation gets more complicated if the seller sells to more than one person. If both have deeds then better claim has the one who received the NFT, the transaction having opposability to third parties; of course, in this situation the seller is liable for damages produced to the other buyer.

Fiscal regime of crypto-assets

On the European level, there are efforts being made to regulate crypto-assets and thus bring stability, prediction, and protection to the crypto-market. Negotiations are currently taking place between the Member States on the basis of a proposal for a Regulation drawn up by the European Commission on the cryptocurrency market (<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52020PC0593>).

Taxwise there are a few issues that NFTs, like any other crypto-based asset, can create for the Romanian state. There is uncertainty about the legal status of crypto-assets, and this may contribute to the difficulty in tax treatment of transactions using crypto-assets because any asset can theoretically be tokenized, and the rights to those assets can be represented on a DLT – real property rights of material goods like land, houses, paintings, or the intellectual property rights over an exclusively digital asset.

Due to the fact the transactions on a DLT prove a high level of anonymity, as another challenge for tax administrations may be that crypto-assets can make it easier to avoid paying tax. As mentioned before, NFTs are not only art thus one cannot presume, *ab initio*, that transactions with NFT follow the fiscal regime of art commerce.

In Romania, electronic money was defined as money stored electronically, including magnetically, representing a claim on the issuer, issued upon receipt of funds for the purpose of conducting payment operations, and accepted by a person other than the electronic money issuer, according to Law 127/2011 on the activity of issuing electronic money. It's worth noting that the National Bank of Romania and the Financial Supervision Authority believe these currencies aren't electronic currencies or financial instruments, and thus a fiscal regime can't be underlined under the current regulated legislative framework (National Agency for Fiscal Administration 2015).

NFTs and intellectual property rights (IP)

The IP associated with the asset represented in the NFT is not transferred with the NFT (Chintalapoodi 2021). Copyrights, as a transferrable patrimonial right, stay with the artist unless said artist agrees with the commercialization of the author's IP to the benefit of the purchaser of NFT.

It must be underlined that owning an NFT doesn't restrict access to copies of it but it makes impossible for anyone else to assume ownership in the respective network of blockchains due to the transfer ledger and timestamp – it does not mean however that an NFT confirms the authenticity of the goods themselves.

It may be recommended for anyone who plans on buying NFT to pay attention in certain regards: we must obtain proof that the creator of the NFT is its true creator and has legitimate title over it that he agreed to the creation of the NFT, and the yield of its IP or copyrights.

IP rights, in the European legal framework and thus Romanian as well, encompass two elements: moral rights and patrimonial rights.

According to art. 10 of Law 8/1996 on copyright and related rights, the author of a work has the following moral rights: a) the right to decide whether, in what manner and when the work will be made public; b) the right to claim recognition of the authorship of the work; c) the right to decide under what name the work will be brought to the public knowledge; d) the right to claim respect for the integrity of the work and to oppose any modification, as well as any damage to the work, if it harms its honor or reputation; e) the right to withdraw the work, compensating, if necessary, the holders of the rights of use, harmed by the exercise of the withdrawal.

Moral rights are non-transferable and can't be forfeited. The author of a work has the exclusive patrimonial right to decide if, in what way and when his work will be used, including to consent to the use of the work by others.

The use of a work gives rise to the author's distinct and exclusive property rights to authorize or prohibit: a) reproduction of the work; b) distribution of the work; c) the import for the purpose of marketing on the domestic market the copies made, with the author's consent, after the work; d) renting the work; e) the loan of the work; f) the public communication, directly or indirectly, of the work, by any means, including by making the work available to the public, so that it can be accessed in any place and at any time chosen, individually, by the public; g) broadcasting the work; h) cable retransmission of the work; i) realization of derived works.

Conclusions

To avoid regulatory arbitrage, we need to take a "content over form" approach when it comes to classifying crypto-assets. Because of their diversity, applying the same criteria to all crypto-assets is deemed irrelevant.

At this moment, Romania and the European Union, are not yet prepared to face the challenges cryptography pose for the keeping of assets.

We may understand the temptation crypto-assets represent: any asset can theoretically be tokenized, and the rights to those assets can be represented on a DLT. Through such tokenization owners of corporeal assets may find liquidity easier; owners of immaterial assets have the advantage of protection and monetization of their rights. There are still some legislative hurdles to pass by the national authorities: problems in data privacy and tax compliance need to be addressed.

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