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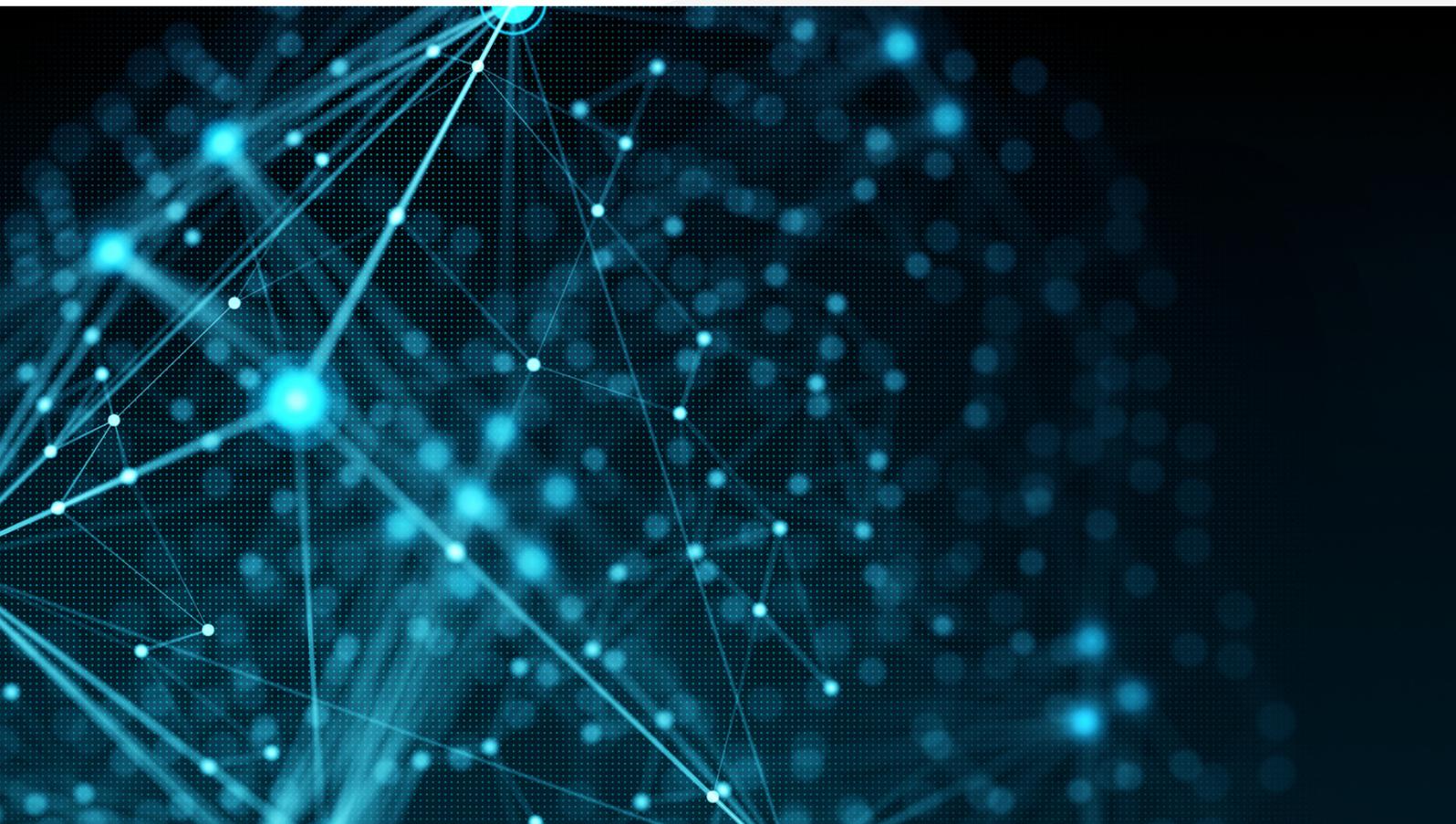
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FILIPPO ZATTI

The Non-Fungible Token Market
(NFT) in Italy.
The Crypto-Renaissance awaits
(also) the law.

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The Non-Fungible Token Market in Italy.
The Crypto-Renaissance awaits (also) the law

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Abstract

Italy is distinguishing itself as one of the pioneers of crypto art and among its most important 'producers'. If domestic blockchain technology-based industry is lacking, its applications in the field of art are fuelling a cultural awakening in the country. NFTs are pushing a sector different from the one in which the creative industry traditionally deployed, so much so that it is named 'Crypto Renaissance'. However, the need undermines this promising opportunity for a clear regulatory framework while waiting for future EU Regulations. However, the MiCAR proposal, in its current version, excludes from its scope NFTs, leaving space for the Member States. How Italy could use this space to create a market for NFTs in Italy by reviving the lustre of the past and taking advantage of the technology's development opportunities for the future is yet to be seen.

Keywords: NFT, token, Blockchain, Crypto Art

The adoption of Non-Fungible Tokens (henceforth, NFTs) - i.e. those tokens that blockchain technology allows to be mined in such a way as to reproduce, even in the digital world, the scarcity and uniqueness experienced in the physical world - has recently gained momentum. Their adoption affects many sectors of the economy. Most recently, what is referred to as Web 3.0 (*The Future of Nfts Beyond the Art World - Single | Scenarios and Horizons Stories*, 2021).¹

However, at the moment, NFTs owe their fame to the art world. A look at the history of NFTs reveals that since the months following the release of the first and most famous Bitcoin blockchain, there was interest in a solution to overcome the fungibility of tokens (Sudarshan M, 2020) and that the first applications were related to the world of art and collecting (Kevin McCoy [@mccoospace], 2021; *FDCARD Asset Information*, s.d.; *History of Crypto Art - Martin Lukas Ostachowski*, 2021).

1. The NFT factor for the art market: state of the art.

According to the *Art Market Report 2022*, the total value of transactions in the online art market reached \$ 13.3 billion in 2021, to which NFTs contribute an impressive \$ 11.1 billion. The value of art-related NFT sales increased more than a hundredfold compared to the previous year (*The Art Market*, 2022, p. 14). Such a significant figure shifts even more attention to anti-counterfeiting and how artworks and collectables are transferred digitally and *phygital* (Zorloni, 2021, para. 4).

Italy has so far been an unexpected pioneer in the application of NFT to art. The interest is actually not recent. Since 2018, Italian artists have tried their hand at the opportunities offered by Ethereum-like blockchains. Today, Italy ranks third worldwide in terms of the total number of sales in one of the most important Art Blockchain Networks, SuperRare ('Italy Is Emerging as an Unexpected Hub for Crypto Art. But Regulatory Challenges Are Stunting the Growth of Its NFT Market | Artnet News', 2022). This is not to be underestimated, considering that, on this platform alone, transactions involving the works of fifty-six Italian artists generated revenues of around \$10.4 million. ('Italy Is Emerging as an Unexpected Hub for Crypto Art. But Regulatory Challenges Are Stunting the Growth of Its NFT Market | Artnet News', 2022).

¹ In particular, for identity management.

The pandemic certainly contributed to the acceleration of the digital art market from 2020 onwards. Following the cancellation or rescheduling of in-person events by auction houses and private art galleries, digital initiatives increased to the extent that online art and the antique market accounted for one-fifth of global art sales. NFT-based so-called Crypto Art also contributed to this growth. Striking in this respect was, in March 2021, although overshadowed by doubts about transparency (Palm, 2021), the transaction carried out by Christie's auction house of the work 'Everydays: The First 5000 Days' for \$69.3 million. (*Beeple (b. 1981), EVERYDAYS: THE FIRST 5000 DAYS | Christie's*, s.d.). The value of global NFT sales in the art market amounted to \$2.57 billion in 2021, up significantly from around \$20 million in 2020. Even in the collectables market, sales increased from \$10 million in 2020 to nearly \$8.6 billion in 2021 (*Global Art Market Value 2021*, s.d.).

2. NFT market players in Italy

For Italy, some speak of a real Crypto Renaissance. The interest in Italian artists is evidenced by the sales figures of what are, to date, the most important NFT marketplaces in the world (*Blockchain art*, 2021).² Blockchain technology makes it possible to track transactions. Exploring their activity, Italian artists emerge as top performers in terms of sales volume. The Italian artist duo Hackatao is mentioned, for example, among the seventeen most influential NFT creators in the world (Fadilpasic, 2021).³ Not only that. An Italian art curator, Eleonora Brizi, was among the initiators of one of the first digital art projects on the Blockchain, 'The Rarest Book'. (Klein, 2019). Furthermore, leafing through Italian-language magazines, you are increasingly likely to come across articles reporting on innovative projects involving NFT for music (Nast, 2022c), photography (*Logu NFT - NFT related project by LOGU*, s.d.; *NFT Marketplace*, s.d.), fashion ((Nast, 2022b; or initiatives such as that of the fashion house Regina Schrecker: *Cryptolovelocks*, s.d.), tourism (*Italian Wonders | Support Italy's Wonders*

² The so-called *Art Blockchain Network* (ABN) OpenSea, Nifty Gateway, Rarible, Superare, Async Art, MakersPlace, KnownOrigin, Foundation, Zora and Mintable, Hic et Nunc.

³ To date, the highest price ever achieved for one of their NFTs was 7 ETH for the work "Have FUN #8/10") and in total they have sold (as of April 2022) 9184 works for a total of approximately \$37 million. NFTs by other Italian artists also reached significant prices: Federico Clapis' 'Searching for God' was sold for 44.7 ETH; DotPigeon's 'This would be perfect to welcome your guests' for 12.232 ETH and, finally, Mattia Cuttini, sold '#36 Digital Papercut Artwork' for 1.1 ETH. The same goes for artists such as Fabiano Speziari, Emanuele Dascanio, Matteo Mauro, Andrea Crespi, Giuseppe Veneziano, and Dangiuz, Annibale Siconolfi, Giusy Amoroso, Skygolpe, Catello Gragnaniello, Giovanni Motta, Giuseppe Lo Schiavo and Fabio Catapano. The list, of course, is not exhaustive but only indicative of the extent of the phenomenon in Italy. We apologise to those artists we did not identify from the research carried out. And also with those initiatives and activities whose existence has not been documented. Among these we would like to start with that, in the numismatic sector, of the Istituto poligrafico e zecca dello Stato.

during *Its Hard COVID-19 Fallout*, s.d.; ‘Ca’ di Dio Auctions NFT’s First Night Exclusive’, s.d.), transport (*NCL Announces Cruise Industry’s First NFT Collection*, s.d.), sports (*GENUINE - Collect Digital. Own Physical.*, s.d.; *Crypto.Com NFT | The New Era of Calcio | Lega Serie A*, s.d.; AGI-Agenzia AgenziaItalia, 2022), automotive ((‘The 2023 Alfa Romeo Tonale SUV Is the World’s First NFT Certified Car’, 2022)gaming (Hexarchia, s.d.) and even charity initiatives (HERSTORY (@herstoryDAO) / Twitter, s.d.). Further proof of the growing consideration of Crypto Art is the attention paid to it also in Italy by auction houses and museums. The Cambi Auction House organised the first online auction on SuperRare of a collection of NFT (Dystopian Visions, 2021), curated by Serena Tabacchi, director of MoCDA, Museum of Contemporary Digital Art. At the same time, galleries and art exhibitions are mostly still in an exploratory phase of the phenomenon or waiting. And the DART | Museo della Permanente organised the first NFT exhibition last autumn - this year. It set up a second edition (*Exhibitions*, s.d.) - followed a few months later by the Venice Biennale (*Decentral Art Pavilion Venice 2022 International NFT Art Exhibition*, s.d.) and the Fondazione Palazzo Strozzi in Florence (“Let’s Get Digital!”, s.d.).

Some initiatives use blockchain technology more specifically for the transferability of assets where the NFT is linked to the physical asset (Nast, 2022a). Well before 2021, in 2015, Franco Losi and John Blem, by founding Cinello, had anticipated the digital focus on art. Proof of this is the DAW patent[®] (Losi & Blem, 2015) which offers a cutting-edge solution to manage in a sophisticated way and resilient to theft and forgery - using cryptographic keys - images of works of art made available by the museums that host them. Here, the Ethereum Blockchain is used for its ability to facilitate and guarantee the transferability of assets - in this case, the purchased artwork. And not to undermine digital work. Another significant aspect concerns the contractual profile both from an economic point of view - the sharing of sales proceeds and royalties from possible future exhibitions - and from a legal point of view - the waiver of any constraints or rights limiting the transferability of the asset. Cinello also has the advantage of creating a kind of inducement in the function of the tools necessary to compose the physical work. In particular, in addition to high-resolution monitors (4k and 8k), the frame that the hands of competent artisans make it possible to reproduce in any way identical to the original. Cinello has emerged in the news with the sale of a DAW[®] of the Doni tondo (Roccella, 2021) and, more recently, for holding an exhibition at Unit London (*Eternalising Art History*, s.d.).

3. The (state of the art) of NFTs from a legal point of view

The lack of a legal framework for NFTs appears to be a significant constraint on the development of the market in terms of legal certainty for the companies and entities involved in the creation-management-transfer of digital assets; and in terms of protecting the users-investors of this market, whatever form NFTs take and whatever use is made of them. The issue is broader and concerns NFTs and generally all tokens that are ‘created’ based on a Blockchain.

In fact, to date, a legal framework for the nature of tokens still needs to be developed in domestic law. And if the national legal system is not the only one to leave the issue unresolved, and indeed it is in good company, since few countries have already adopted responses in terms of law and regulation of the phenomenon, it is also true, however, that the current ferment runs the risk of dying out as a flash in the pan if at least those intangible factors - such as the absence of a legal profile of the nature of tokens - that prevent the start-up of new projects as well as limiting the development of those that already exist, are not removed. Among the few initiatives to regulate the phenomenon, that of the Helvetic system - which has been equipped with cutting-edge legislation since February last year - can create the conditions for ‘*regulatory competition*’ by favouring the outflow of capital and national projects towards the Canton of Ticino.

National legislation has so far focused on the phenomenon of tokens as crypto-assets - in particular, at the moment, as virtual currencies - acting in a piecemeal manner at the urging of the European legislator (in implementation of the Fifth Anti-Money Laundering Directive); or with an isolated intervention within the Simplifications Decree 2019 (concerning, however, the technological infrastructure - and defining technology based on distributed registers and *smart contracts*); or for the creation of a specific record of operators in virtual currencies (*Ways and timing by which virtual currency service providers and digital wallet service providers are required to disclose their operations in the national territory as well as forms of cooperation between the Ministry of Economy and Finance and the police, 2022*) or with legislative projects of parliamentary initiative, as in the case of the bill concerning the tax profile of cryptocurrencies.⁴ Even the postponement of an intervention by the European legislator, expected in any case no earlier than 2023, is proving to be unrealistic, given that NFTs are excluded from the scope of the MiCAR proposal, which is currently being examined by the

⁴ A.C. 3131. Provisions on the tax treatment of transactions in virtual currencies, as well as regulation of anti-money laundering obligations, tabled by Zanichelli et al. on 24 May 2021.

trialogue.⁵ And in any case, this is a regulatory framework functional to harmonising the tasks and functions entrusted to the competent national capital market regulators. Nothing can add to the private-sector aspects of the legal tenor of cryptocurrency tokens. The phenomenon had probably not been deemed worthy of attention by the European legislator, considering that until 2020 it had not experienced the glories that later brought it to the centre of many market initiatives. At the same time, however, the exemption from MiCAR put this type of token in the spotlight. In any case, both at the national level and, in perspective, as far as the EU is concerned, at the European level, several unresolved and currently neglected or, at least, underestimated aspects need to be answered.

NFTs lend themselves to broader uses than those likely to be identified for *fungible tokens*. These include solutions that allow NFTs to be categorised as *securities tokens* according to the functional distinction proposed for financial market regulation. The possibility of using NFTs as collectors of funds by assimilating them with financial instruments would create an asymmetry between the regulation of fungible and NFTs (*Regulating for the future. Policy notes on Non-Fungible Tokens*, 2022, p. 5). And it would limit their development and application even where they could be a financing instrument for restoring and recovering works of art (Lawson-Tancred, 2022). In addition, disharmonious solutions between jurisdictions would be easily circumvented, given the ubiquitous nature of blockchain.

It is, therefore, a matter of formulating a legal response aimed at creating standards while simultaneously removing the ambiguities of interpretation that currently limit their application by failing to protect purchasers. While common law jurisdictions have a well-established doctrine and jurisprudence on the nature of tokens - fungible and non-fungible - as a 'property right', in civil law jurisdictions, there is now a well-established doctrine and jurisprudence on the nature of tokens as a 'property right'. (Moringiello & Odinet, 2021), in civil law systems, the question is much more complex, even daring to be resolved when faced with the existence of a typified regulation of tokens as it is in the national legal system.⁶ The solutions put forward so far, i.e., framing NFTs, depending on the case, as securities in the strict sense, with declaratory or real content, need to be substantiated. And they do not, however, exhaust the issues concerning these digital assets and their legal relationship with related and/or pre-

⁵ Art. 4 (2) of the Proposal for a Regulation of the European Parliament and of the Council on crypto-assets markets and amending Directive (EU) 2019/1937, COM(2020) 593 final, Brussels, 24.9.2020.

⁶ On these issues, see for further discussion, Annunziata & Conso, 2021; Rampone & Deotto, s.d.; Garavaglia, 2022.

existing works of art by raising a whole series of questions related to the intellectual property (Bufano, 2021, para. 5).

4. Conclusions

The Crypto-Renaissance has created a promising market for Italian artists. The initiatives that are also coagulating in the wake of this movement face a whole series of unknowns that need a political response that can no longer be postponed. It is a matter of dissolving the reserve with which the regulatory authorities have treated the 'crypto' phenomenon by stopping at the world of virtual currencies threshold. Business initiatives that are active, in various capacities, in this market have to reckon with legal systems and economic and financial systems that are already equipped to foster crypto art activities. This risks causing resources that have hitherto been committed internally to flow into those systems. And with the transfer of activities, the country would lose one of the rare opportunities for structural development that the artistic, cultural and landscape wealth it possesses can convey. Moreover, the entire country system could benefit from this market. Therefore, private art galleries, auction houses, and the national museum system could benefit from the possibilities that block.

However, without a defined and specific legal framework, without adapting the legal system to the needs created by the adoption of new technologies, what could be a new Renaissance would remain little more than a Rococo.

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