THE TOKENIZER

- The Tokenizer Long Read Series

The uncertain regulatory status of NFTs

Seen from a legal perspective, when is a non-fungible token just a harmless representation of an asset, and when is it about to become something else that might catch the attention of a regulatory authority and put severe demands and restrictions on the parties involved in the NFT? This is a question that more people in the booming NFT space should probably start paying attention to - even though it's currently not easy to find a straightforward answer.

By Michael Juul Rugaard, CEO & Co-Founder of The Tokenizer

What is an NFT? This simple question has been asked in dozens of articles recently, and mostly the answer is something like this:

A non-fungible token (NFT) is a unique, *not* interchangeable (*not* fungible!) token most often designed according to the ERC-721 token standard for non-fungible tokens.

Non-fungible means that each token is unique in the same way as a particular oil painting by Picasso is unique and cannot be exchanged with or replaced by any other oil painting in the world - or a handbuilt Stradivari cannot be exchanged with any other violin in existence. The Picasso and the Stradivari are unique objects, and so are millions of other, less spectacular things in the world.

Contrary to NFTs, we have the category of fungible objects which are *not* unique and *can* be exchanged. For instance, five litres of gasoline can be exchanged with any other five litres of gasoline as long as the quality, like the level of octane, is the same. Or one particular euro is not unique but can be replaced with any other euro since the two euros have the exact same qualities and value. When speaking of tokenized fungible assets, the token standard used is typically the ERC-20 standard. The same standard is used whether the fungible token represents a cryptocurrency or a fungible real-world asset like gold, oil, or electricity.

Now, what happens if we start mixing these categories?

First: A unique asset is tokenized using the ERC-721 standard and represented by a non-fungible token (NFT) in the ratio: 1 asset = 1 NFT. And it doesn't matter if it's a native digital asset like a digital picture (like a CryptoPunks character) or a real-world Stradivari.

Second: The already tokenized asset, now represented by the NFT, is tokenized once again in the sense that it is being divided - or fractionalized - into, for instance, 2.000 smaller pieces, each represented by a new token created according to the ERC-20 standard which makes each of the 2.000 new tokens fungible, meaning that each of them represents the same qualities - like rights and value.

So what do we have now? Is it a fungible non-fungible token - which sounds as impossible as a married bachelor? Well, a fractionalized NFT is perfectly possible, and it already got a name: F-NFT. In this case, you could think of the NFT - the non-fungible token - as a kind of blockchain-based digital deed representing the entire asset and the ERC-20 fungible tokens as small pieces of the asset, each representing certain rights over a part of the asset, which will typically be an ownership right - very much like a stock.

Possible legal implications

Very much like a stock! But whoops! Did we just create a stock out of an NFT? What are the implications of that? Are we still in the realm of pure technology, or did we cross a line here? Did we just step into a regulatory space with the risk of catching the attention of a regulatory authority?

The NFT space is booming worldwide, and many very creative ideas, projects, and companies see the NFT light of day as we speak. However, technological possibilities and brilliantly creative ideas cannot form a foundation on their own in the realm of the token economy. A straightforward rule of thumb should be: Never spend your time and resources executing on a token project before it has been tested from a regulatory perspective, and you have obtained at least some level of certainty about the possible regulatory risks involved.

If somebody issues, fractionalize and trade NFTs in the naive belief that the NFTs are, for instance, simple commodities - just like creating and selling cupcakes or bicycles - and it turns out that the NFTs were, in fact, financial instruments, that the tokens were security tokens, the issuer could get into severe problems. We saw that not least in the US, where the Securities and Exchange Commission (SEC) in the aftermath of the ICO craze ended up filing many cases against illegal ICOs.

What is a security token - and a security?
Now, before continuing the analysis of NFTs in terms of legal status and regulation, we need to define what we actually mean when we talk about security tokens.

The term Security Token is unique in the token space in the sense that for the first time, the crypto community - for lack of a better word - faced the regulatory music by entering 'security' into a token name and thereby acknowledging that this token because of its securities-like characteristics was something more than just a piece of technology and crossed the line into the realm of regulation. So, to put it simply: A security token is a token that, from a legal perspective, has the characteristics of a security. But that only leads us to the following question: What is a security?

This question can be answered in different ways, and often the dividing nuances of the answer have a geographical attachment. In Europe, for instance, a definition of securities can be found in the Markets in Financial Instruments Directive II (MiFID II)[1], and in the US, the SEC uses the so-called Howey Test to decide when something should be deemed a security.

A European perspective
Not surprisingly, a key term in the Markets in Financial Instruments Directive II (MiFID II)[2] is 'Financial instruments', and among those are securities - or more specifically, Transferable Securities. Now, the MiFID II definition of Transferable Securities in its Article 4(1) (44) goes like this:

"(44) 'transferable securities' means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:
(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
(b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
(c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures."[3]
So, according to the EU directive, transferable securities are financial instruments "like shares in companies" that "are negotiable on the capital market," which means that they are designed with the purpose of being traded, bought and sold, on the market.

Now, what does MiFID II say about security tokens? Nothing. The concept of security tokens wasn't even born when MiFID II was first published in 2014 (it came into force in 2018).

However, even though a specific legal definition of security tokens are still missing, it is a common assumption among many legal experts in Europe that the security definition of the MiFID II is applicable for tokens with the same characteristics as transferable securities and

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065
[2] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065
[3] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065

that MiFID II therefore in practice, in lack of specific laws, acts as the legal framework for security tokens in Europe.

This assumption is strongly supported by the 2020 EU regulation MiCA (Markets in Crypto-assets Regulation), which do NOT regulate security tokens or even mention the term 'security token', but refers to MiFID II as the directive which covers "crypto-assets that qualify as: (a) financial instruments as defined in Article 4(1), point (15), of Directive 2014/65/EU."[4]

In The Tokenizer's recent RegRadar Report conducted in collaboration with the government of Liechtenstein, several European lawyers were asked about a legal definition of security tokens in their jurisdictions, and most of them referred to MiFID II. For instance, Oliver Völkel, Partner, Stadler Völkel in Vienna, said this about the missing security token definition in Austria: “Usually, the definition of ‘transferable security’ based on MiFID II is used for describing security tokens.”

The US approach to securities
Now, if we take a quick step across the Atlantic Ocean and look at the US laws and the Securities and Exchange Commission’s (SEC) definition of both 'traditional' securities and digital assets deemed securities, the term 'investment contract' and the so-called Howey Test are vital in determining whether something is or is not a security.

The Howey test has been used for decades, and the SEC decided to also apply it to the cases following the massive ICO wave during 2017 and 2018, where a large number of presumably utility tokens came under suspicion for instead being unregistered securities.

In 2019, the SEC even published a *Framework for “Investment Contract” Analysis of Digital Assets* aiming at ICOs to provide "a framework for analyzing whether a digital asset is an investment contract and whether offers and sales of a digital asset are securities transactions." The legal basis for this framework is, once again, the Howey Test.

Under the Howey Test, “an ‘investment contract’ exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others.” This sentence covers four prongs that all need to be met for a token to be considered an investment contract and deemed a security token:
1) Investment of money
2) in a common enterprise
3) expectation of profits
4) derived from the efforts of others.

Prong number one is relatively straightforward. The investor needs to put some money into the venture. However, the second prong is more tricky since the term 'common enterprise' is being defined in three different ways by different US federal circuit courts. For those who want to deep-dive into the discussion on whether 'common enterprise' should be approached as a 'horizontal commonality', a 'narrow vertical commonality' or a 'narrow vertical commonality', I can recommend this article by Ryan Borneman.

[4] https://www.eesc.europa.eu/sites/default/files/files/presentation_-_mr_levin_0_0.pdf

However, for now, we will settle with USLegal's definition of the term, saying that: "In the context of an investment contract, a 'common enterprise' is defined as an enterprise in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those offering or selling the investment or of third parties."[5]Or as Nick Grossman says in his article "A Visual Guide to the Howey Test"[6]. A 'common enterprise' roughly means that "investors and the company rise and fall together."

Prong three and four are relatively straightforward too. An 'investment contract' involves some expectation of profits to the investor, and the investor's role is only to invest and not to, for example, help run the company or develop the company's products. It's a passive investment that - hopefully - results in a return (could be in the form of a dividend as well as an increase of the value of the asset) due to the work/efforts of others.

The Howey Test fits perfectly for traditional securities like, for instance, stocks: An investor buys a stock in a company to get a profit out of the company's success on the market.

The Howey Test on NFTs
But what does the Howey Test have to say about NFTs? Does any NFT meet all the prongs, and does any NFT qualify as a 'transferable security' as defined by MiFID II? That is the core question of this article, and we are still a bit away from the answer.

Obviously, neither the Howey case (resembling investments in citrus trees in 1946) nor the Howey Test says anything about a modern phenomenon like NFTs. And up until now, the SEC hasn't published any official guidelines or statements on how to evaluate the legal status of NFTs.

However, we know that SEC Commissioner Hester M. Peirce (known as 'Crypto Mom'), in a video interview from March 2021, said that NFT creators should be aware that they might, in some instances, end up creating securities[7]:

"We [the SEC] have an interest in anything that could be a security...but the whole concept of an NFT is that it's supposed to be non-fungible, so it is supposed to be unlike anything else, which, in general, makes it less likely to be a security.

But people are being very creative in the types of NFT they are putting out there - it's a wonder what some people will pay for! And so I think, given that creativity, as with anything else, you should be asking questions, if you are doing something where you are saying: 'I am selling you this thing, and I am gonna put a lot of effort into it...building something so that the thing you are buying has a lot of value.' I mean, that is going to raise the same kinds of questions that these ICOs have raised. So you got to be very careful when you do something like that.

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[5] https://definitions.uslegal.com/c/common-enterprise/
[6] https://www.nickgrossman.xyz/2018/a-visual-guide-to-the-howey-test/
[7] https://www.youtube.com/watch?v=dkunmN8wbKE - interview starting at 23:10.

You also have to be careful if you decide that you are going to take a bunch of these NFTs and put them in a basket and then break them up and sell fractional interest. Or even if you take one NFT and sell fractions - I mean, if they are selling for 69 million dollars, you might want to break them up and sell fractional interest, and then you've got to be careful that you are not creating something that's an investment product - that's a security. So you always have got to ask those questions. I think, as we have seen, the definition of security can be pretty broad."

US law firm's opinions
Besides Hester M. Peirce's relatively vague warning, which is not an official SEC statement or guideline, all we currently have to lean against are private lawyers' interpretations of the possible regulatory implications of NFTs in the US.

However, two things are interesting when looking at the lawyers' approach to the still very new area of NFTs. The first one is that a surprisingly large number of law firms, mainly from the US, have been very quick to put out small introductions and opinion pieces on the possible legal implications of NFT, and since law firms tend to have a well-developed sense of business opportunities this could indicate that the arena of NFTs from a legal perspective may indeed start to take hold as a lawyer's business area. Bear in mind that the uncertainty in terms of NFTs as securities are only one relevant legal aspect of NFTs. In addition, issuers of NFTs will have to consider questions like copyright implications, tax law implications, and more.

The other interesting thing is that so far, most law firms seem to have a somewhat common understanding of NFTs from a legal perspective - and this understanding - perhaps not surprisingly - very much follows the lines of what Hester M. Peirce said in the quote above.

Let's look at a few examples of US law firm statements. Norton Rose Fulbright writes:

"If an NFT merely represents the ownership of an item such as a digital kitten, highlight reel, or videogame collectable - then it is arguably not a security. If, however, an NFT is promoted as a speculative investment, accompanied by the suggestion of a promoter that the NFT will increase in value as a result of the actions of the issuer or the promoter—then the NFT might very well be considered an investment contract and thus a security. For example, if a real estate developer decided to issue an NFT that represented an interest in a building yet to be built and the proceeds are used for development of the building, it would be hard to imagine this wouldn't fall under the jurisdiction of the SEC. It is also conceivable that an ostensibly non-security NFT could be sold or marketed in a manner that it may be deemed to be "wrapped" in an investment contract, thus making the whole package a security."

Tater Krinsky & Drogin writes:

"If the NFT relates to an already existing asset, like a photograph or piece of digital art, and is marketed as a collectable with a public assurance of authenticity on the blockchain it is unlikely that such an NFT would be deemed a security. However, if the NFT is being created and sold as a way for members of the public to earn investment returns then that type of NFT will be more likely to be considered a security."

Dilendorf Law Firm writes:

"The answer to whether NFTs may be treated as securities under US law is maybe – perhaps, not all NFTs will be viewed by the US regulators as securities, but quite possibly certain NFTs indeed will be. If an NFT is connected to a unique piece of digital art/collectable/gaming prop, effectively serving as a blockchain certificate of authenticity, such NFT is unlikely to be a security. If, however, NFTs are offered to the General Public with a promise of liquidity and continued services of the issuer, increasing the NFT's value, such NFT may be wrapped in an investment contract and, thus, a security itself."

Some common understanding
Now, the current common understanding when it comes to the US seems to be that NFTs will not be deemed securities according to the Howey Test in cases such as the following:

- If an NFT is used as a digital, blockchain-based deed to prove the originality and provenance of a digital or a physical asset such as an artwork.

- If NFTs represent collectables - in the ratio 1 asset = 1 NFT - like CryptoPunks or digital in-game items such as skins or digital weapons.

- If NFTs are used, for instance, to represent concert tickets, because the NFT may be a highly efficient and secure way of transferring tickets, keeping track of them, and fighting attempts of fraud and scams.

- If NFTs are used for registration of all kinds of physical assets and by doing so replacing cumbersome paper-based deeds with more secure and efficient digital, blockchain-based deeds that potentially enables the owner of the asset to easier make the asset tradeable and liquid or to use it as collateral for loans on DeFi platforms (the MakerDAO platform, for instance, has launched its multi-collateral DAI system that allows some types of assets to be added as collateral for the issuance of loans in the stablecoin DAI).

That said, when it comes to breaking up or fractionalizing NFTs, making them into F-NFTs, most law firms - as well as SEC's Hester M. Peirce - raise a warning flag. An NFT by definition is non-fungible, but by fractionalizing the NFT, the new fractions most likely become fungible and get the same characteristics very much as traditional financial instruments deemed securities.

Again, according to the Howey Test, an investment contract, which is a security, exists "when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others." If some legal entity that owns an asset represented by an NFT breaks it up with the purpose of offering/promoting the fractions to investors as investment products with no utilities left (like proving originality and provenance), these tokens most likely will be deemed securities in the form of investment contracts.

Now, when it comes to the case of F-NFTs, the best advice to token issuers, until further notice, is probably not to go down that road unless they are prepared to register their tokens as security tokens, which is of course also an option.

MiFID II and NFTs

Now, let's go back to Europe. As described earlier in this article, MiFID II talks about financial instruments as 'transferable securities', meaning that the attribute of transferability is vital when analysing whether an asset is to be deemed a security or not.

In the whitepaper *ICOs, Cryptoassets and MiFID II: Are Tokens Transferable Securities? (2020),* the author Martin Hobza adds to his description of the MiFID II's definition of transferable securities, that: "Such instrument does not have to be actually traded on the capital market at a certain moment in order to qualify as transferable security."[8]

This point from Hobza is rather interesting because it *might* raise a question, for instance, when talking about NFTs. If NFTs sometimes become securities, is that only because they are handled in specific ways - like being traded on an exchange? Or do they become securities by design, regardless of what happens to them after their creation?

For example: If my sole intention of minting an NFT is to prove that my digital work of art is in fact created by me and not by someone else, does that in any way ensure that my non-fungible token is not a financial instrument? Or does the fact that the NFT by design *also* increases my chances of selling the digital artwork - just like I would be able to sell a physical piece of artwork - mean that I am in danger of violating the securities law?

The answer would probably be that as long as I maintain the 1 asset = 1 NFT relation as described earlier, such an NFT would have too few attributes in common with transferable securities like stocks to become a transferable security itself. Even though the digital piece of art is represented by an NFT that makes it possible to prove originality and provenance, which is a prerequisite for a sale, it still doesn't make one NFT representing one piece of art into a stock. It rather assembles a unique physical piece of art like a signed and dated oil painting which would also be genuinely non-fungible.

This interpretation of the legal status of NFTs in an EU context is supported, for instance, by the law firm McCann FitzGerald that published an article earlier this year in which it says:

“Of the various types of financial instruments listed in MiFID, ‘transferable securities’ appear most relevant to NFTs. It is, however, unlikely that an NFT will constitute a ‘transferable security’. To fall within that definition, an NFT must belong to a class of securities and to form such a class, the tokens in the class must be fungible with each other.”

Once again, it’s stressed that the attribute of truly non-fungibility makes the difference in the legal assessments. However, McCann FitzGerald underlines that it may rely on a closer analysis to decide whether or not a token really is non-fungible.

[8] https://www.researchgate.net/publication/345807153_ICOs_Cryptoassets_and_MiFID_II_Are_Tokens_Transferable_Securities

“In any particular case, however, it may be necessary to carry out an analysis of the relevant token to determine whether it is, in fact, non-fungible for the purposes of MiFID.”[9]

Yet another law firm specialising in crypto and the token economy is Copenhagen-based Samar Law. Founder Payam Samarghandi agrees that NFTs in a 1:1-relation are unlikely to be deemed 'transferable securities', but he points out that even if the securities laws do not regulate an NFT, it could potentially still be subject to other rules and regulations such as anti-money laundering regulations and KYC. Payam Samarghandi says:

"The jury is still out when it comes to other regulatory aspects of NFTs. None of the current financial regulations specifically regulates entities performing activities with NFTs, and the most recent guidance from FATF indicates that NFTs might not even fall under the EU definition of virtual currencies as set forth in the AML Directive. One could therefore argue that NFTs currently find themselves in a regulatory no man's land, but that would, in my opinion, be a precipitate stand. Variations of NFTs, such as fractionalized NFTs, would most likely fall under the legal definition of virtual currencies and thus financial regulation. In other cases, it would depend on the tokenized asset and/or the characteristics of the NFT in plan if the NFT falls under the definition or not.

However, at some point, the regulators will start looking closer into all possible aspects of NFTs, and my best advice to issuers and providers of NFTs would be to start keeping some kind of track record of your sales and, if possible, voluntarily implement some simple KYC procedure. If or when the FSA knocks on your door, you can show them that you have already done your best to self-regulate, which will probably make the dialogue easier and more positive."

A tangible NFT example: Damien Hirst’s The Currency
Now, anti-money laundering, KYC and other additional regulatory implications of NFTs is not the core of this article, and we will have to look into that in a future article.

The focus here is the securities regulations, and from what we have seen so far, the main problems seem to occur in cases of F-NFTs. But before settling on that conclusion, let's deep-dive into a concrete example, which shows how ambiguous this whole area still is and how many complex questions it raises.

But first, let's recapitulate: We have this seemingly simple case where an artist creates a digital artwork and decides to have it represented by an NFT. And because the NFT makes it possible for the artist to prove the uniqueness and the provenance of the digital work (which was not possible before NFTs), the artist is now able to sell his or her digital artwork to an art-loving collector just as if it was an oil on canvas painting.

The collector buys the work, adds it to his or her collection, perhaps hangs it on a living room wall in a digital NFT frame, and maybe holds it for years. This is similar to the way physical art has been sold for many decades (except for the fact that the gallery now may be replaced by NFT platforms like Opensea). Artworks sold this way have usually been

[9] https://www.mccannfitzgerald.com/knowledge/fintech/crypto-assets-the-meteoric-rise-of-non-fungible-tokens

categorised as commodities, even though the monetary value of the work may increase over the years, and the holder of the artwork may earn a profit by selling it at some point.

Now, how much different does this setup need to be before a clear case slides into a more diffuse borderline territory? Let's take a look at a specific example:

The famous British artist Damien Hirst launched his NFT project *The Currency* earlier this year. Hirst has been known for, among many other things, his spot paintings for a long time, and in this new project, he produced 10,000 physical spot paintings called Tenders, all in the same format, all consisting of coloured spots on paper, but all different, all unique artworks. Each spot painting was represented by an NFT, and all 10,000 paintings/NFTs were offered for sale to the public for a price of 2,000 $ each. From 14-21 July 2021, it was possible for buyers/investors to sign up for an artwork/NFT on the project's website on a first-come, first-served basis.

An interesting twist, typical for Damien Hirst's approach, is that the buyers/investors who have acquired a spot painting/NFT, at some point, have to make a delicate choice: Do they want to have the physical artwork or the digital NFT? They can only have one of them, and the counterpart would be burned.

Now, let's have a closer look at some of the questions - from a legal assessment perspective - that Damien Hirst's The Currency raises:

- In this case, is Damien Hirst just an individual, or is he more like a company? Does it make any difference that Damien Hirst is known worldwide almost as a market brand and has a lot of people working for him? A few years ago, when Hirst decided to focus more on oil paintings produced by himself instead of his assistants, he reportedly dismissed 50 people, meaning that he 'only' had 200 employees left. Now, does this make 'Damien Hirst' more like a company - a 'common enterprise' perhaps - than an individual, a person?

- Does it matter that the established 'Damien Hirst's name is definitely a market in itself that some art investors and galleries are very likely to try to protect - precisely as is the case, for example, with the Andy Warhol market?

- Does it make any difference that some people may be very likely to view a work by Damien Hirst as, first of all, an investment?

- Does it matter that people should apply on The Currency's website to acquire one of the 10,000 artworks and that the application site was open for only one week? Could this have contributed to a kind of FOMO not unlike what we witnessed during the ICO frenzy? In this case, no less than 32,472 people tried to get hold of the 10,000 artworks/NFTs during the week in July.

- Does the fact that The Currency is not only about one NFT but 10,0000 NFTs all looking *almost* alike and all part of the same project make any difference in how the NFTs are legally assessed? Would it perhaps be possible to argue that, in this case,

the actual artwork is something bigger than each of the 10,000 spot paintings/NFTs/Tenders? In this case, the artwork is the project The Currency itself as a conceptual piece of art. And the 10,000 spot paintings/NFTs/Tenders are just fractions of The Currency. And as such, the 10,000 fractions are fungible because their individual differences are nothing more than the difference between two 1-dollars bills, each equipped with a unique combination of 11 numbers and letters revealing information on the note series the issuing Federal Reserve bank. This unique number doesn't make the dollar bills non-fungible. In fact, what Damien Hirst was trying to achieve with this project - The Currency - was to create a currency! And apparently, that was the reason for making as many as 10,000 pieces (perhaps besides the simple fact that 10,000 pieces times 2,000 $ = 20,000,000 $, which is quite a lot of money).

- Does it matter that the project of which the NFTs are the core elements has been promoted rather intensively for a period leading up to the sale of the 10,000 NFTs?

- Does it matter that the platform/website behind The Currency called The HENI Marketplace (the place that offers information about the project and from which the order applications for the artwork should be sent) even provides detailed instructions on how to resell the purchased artworks on the secondary market:

  “The first option is to directly list an NFT for sale. From the Sell section you are able to list an NFT that you own for sale. Select the artwork you wish to sell, and set the price in DAI that you want to list your artwork at. Your item will be listed for a maximum of 90 days, or until you remove it from sale. You are able to cancel your listing at any time. If your NFT has been sold on the HENI Marketplace, the funds (minus commission) will be transferred directly to your connected MetaMask wallet. The NFT will be transferred directly to the buyer’s MetaMask wallet.”[10]

- Does the below report from the sales of the Damien Hirst's spot painting/NFT on the secondary market, which was opened immediately - apparently with no holding period - make any difference in the legal assessment of these NFTs?

  “The secondary marketplace for buying and selling Tenders has been open since 29 July. The first day of trading on the secondary market saw trading volumes of more than $1.3 million. The average sales price on this day was $7,128. Over the next 10 days (until 9 August), the volume of tenders traded averaged $395,173 per day with an average price of $8,379.

  Saturday 14 August saw an increase in volume to $2.8 million in 24 hours. The average price on the day was $14,582, having opened at $11,302 and closed at $19,032.

  Sunday 15 August saw the trading volume increase to $9.6 million in 24 hours. The price opened at $21,224 and closed at the end of the day at $36,027. The overall average price on the day from 351 sales was $27,417.

[10] https://heni-support.zendesk.com/hc/en-gb/articles/4404794352657-How-can-I-sell-an-NFT-on-the-HENI-Marketplace-

> Tuesday 31 August saw trading volume of $6 million in 24 hours. The price opened at $52,107 and closed at the end of the day at $63,114. The overall average on the day from 98 sales was $61,224."[11]

I want to underline that I view Damien Hirst's The Currency as one of the most exciting artworks I have seen in the NFT space. And likely, the questions and comments above do not matter at all from a legal and regulatory token assessment perspective. But what they do is to show that some cases tend to get a bit more complex if you take a closer look.

And by the way, if you know just a bit about Damien Hirst, this is no surprise. He has been a true master of raising questions throughout his artistic career. Just to give an example, which somehow resonates with the above discussion: Damien Hirst was the first artist ever to skip the primary market entirely and - on September 15 2008 - sell a series of 223 brand new artworks directly through an auction at Sotheby's. The auction, which took place literally seconds before the outburst of the global financial crisis, reached more than 200 million US dollars.

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Disclaimer: *Michael Juul Rugaard, the author of this article, is not a lawyer, and this article only expresses a layman's understanding of the legal implications of NFTs.This understanding could include factual mistakes and should not be read in any other way than precisely as a layman's attempt to understand and communicate these legal implications of NFTs.*

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11 https://fadmagazine.com/2021/09/13/damien-hirst-the-currency-the-total-market-value-of-the-project-is-approximately-500million/#:~:text=The%20Currency%20by%20Damien%20Hirst,each%20of%20the%2010%2C000%20artworks.