

SHOULD NFT'S BE CONSIDERED "GOODS" FOR THE PURPOSES OF THE EU'S "FREE MOVEMENT OF GOODS" PROVISION?

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I. INTRODUCTION

On March 11, 2021, a piece of art titled "Everydays- The First Five Thousand Days" was sold at Christies Auction House for \$69.3 million, making it the third-most expensive piece of art ever sold by a living artist.¹ What was so unique about this piece that it warranted that high price? It doesn't physically exist. "Everydays- The First Five Thousand Days" is an NFT, a non-fungible token, essentially a digital work of art.² The work was created by digital artist Beeple, the professional name of the artist Mike Winkelmann, who has posted an image online every day since 2007.³ As the title suggests, "Everydays- The First Five Thousand Days" is a collage of the first 5,000 of these images, many of them containing commentary about the modern digital age.⁴ Beeple is not the only one selling digital images for huge sums. Jack Dorsey, the co-founder of Twitter, sold an NFT of his first tweet for nearly \$3 million in 2021.⁵ And some speculate that digital clothes in the form of NFTs will be the next big fashion trend.⁶ Indeed, as the metaverse gains traction and users, NFTs could become increasingly relevant in the ways people interact with each other.⁷

All this suggests the growing importance of NFTs as a combination of technology and art. With the growing cultural importance of NFTs, several

¹ See Abram Brown, *Beeple NFT Sells for \$69.3 Million, Becoming Most-Expensive Ever*, FORBES (Mar. 11, 2021, 10:03 AM), <https://www.forbes.com/sites/abrambrown/2021/03/11/beeple-art-sells-for-693-million-becoming-most-expensive-nft-ever/?sh=1770302a2448>.

² See *id.*; James Tarmy & Olga Kharif, *An NFT Sold for \$69 Million, Blasting Crypto Art Records*, BLOOMBERG (Mar. 11, 2021, 10:06 AM), <https://www.bloomberg.com/news/articles/2021-03-11/beeple-everydays-nft-sells-at-art-auction-for-60-million-paid-in-ether>.

³ Brown, *supra* note 1.

⁴ See *id.*

⁵ See Taylor Locke, *Jack Dorsey Sells his First Tweet Ever as an NFT for Over \$2.9 Million*, CNBC (Mar. 22, 2021, 3:07 PM), <https://www.cnbc.com/2021/03/22/jack-dorsey-sells-his-first-tweet-ever-as-an-nft-for-over-2point9-million.html>.

⁶ See Thuy Ong, *Clothes That Don't Exist Are Worth Big Money in the Metaverse*, BLOOMBERG (June 16, 2021, 5:00 PM), <https://www.bloomberg.com/news/features/2021-06-16/non-fungible-tokens-and-the-metaverse-are-digital-fashion-s-next-frontiers>.

⁷ See Oleg Fonarov, *What is the Role of NFTs in the Metaverse?*, FORBES (Mar. 11, 2022, 8:45 AM), <https://www.forbes.com/sites/forbestechcouncil/2022/03/11/what-is-the-role-of-nfts-in-the-metaverse/?sh=91d203d6bb87>.

legal questions have been raised about them: Can NFTs be copyrighted?⁸ Do NFTs qualify as securities or commodities under US law?⁹ Do property rights apply to NFTs?¹⁰ This paper endeavors to answer a question that has not been asked before: Do NFTs qualify as “goods” for the purposes of the European Union (EU)’s “free movement of goods” trade provisions?¹¹ Specifically, this paper will argue that NFTs should be considered goods under the EU’s “free movement of goods” provisions, meaning customs duties should be banned for the movement of NFTs within the EU.

Section II of this comment will provide background information on NFTs and EU trade law, explaining six key concepts. First, it will explain what NFTs are and how they work. Second, it will describe the history of the EU and its internal market. Next, this section will explain what the “free movement of goods” provisions are, how they function, and how they’ve been interpreted. Then, there will be a brief explanation of the “free movement of services” provisions and how they differ from the “free movement of goods” provisions. The section will then address pending EU legislation, the Markets in Crypto-Assets (MiCA) proposal. Finally, the section will address how the World Trade Organization (WTO), of which the EU is a member, might regulate NFTs. Section III will argue that NFTs should be considered goods under EU trade law because they fit the definition of “goods,” they are similar to other things which are considered goods, and considering NFTs goods would promote the goals of the EU. This section will also address how the MiCA proposal and WTO law might affect the EU’s determination of whether NFTs are goods. Finally, section IV will provide a concise conclusion of the background on NFTs and EU law and reiterate the argument that NFTs should be considered “goods.”

II. BACKGROUND

A. *What NFTs Are and How They Work*

Many people’s understandings of NFTs start and end with the notion that NFTs are pictures of monkeys used as Twitter avatars.¹² While the “Bored Ape” pictures commonly-seen on Twitter are NFTs, NFTs are much

⁸ See Tonya M. Evans, *Cryptokitties, Cryptography, and Copyright*, 47 AIPLA Q. J. 219, 224 (2019) (arguing that copyright law should apply to crypto assets like NFTs).

⁹ See Diana Qiao, *This is Not a Game: Blockchain Regulation and its Application to Video Games*, 40 N. ILL. UNIV. L. REV. 176, 219 (2020) (arguing NFTs should not be regulated as securities or commodities).

¹⁰ See Lawrence J. Trautman, *Virtual Art and Non-Fungible Tokens*, 50 HOFSTRA L. REV. 361, 413 (2021) (noting that NFTs are not currently treated as property, but arguing they should be).

¹¹ See Consolidated Version of the Treaty on the Functioning of the European Union art. 26, Oct. 26, 2012, O.J. (C 326) 49.

¹² See Kyle Chayka, *Why Bored Ape Avatars are Taking Over Twitter*, THE NEW YORKER (July 30, 2021), <https://www.newyorker.com/culture/infinite-scroll/why-bored-ape-avatars-are-taking-over-twitter>.

more complicated than this, as the term “NFT” applies to a diverse set of digital works.¹³ Therefore, NFTs are a lot of different kinds of things, but they all share a few key characteristics. NFT stands for “non-fungible token,” and they are digital assets like images, sounds, or videos that people can actually own.¹⁴ The “non-fungible part” of the name means that each NFT is unique and two NFTs don’t have the same value.¹⁵ Currencies, including cryptocurrencies, are fungible; one dollar has the same value as any other dollar, but this is not true of NFTs.¹⁶ NFTs are similar to trading cards in this respect.¹⁷ A rare Pokémon card is worth more than a common one, and the same is true of NFTs.¹⁸ In some rare cases, NFTs represent physical works, but the vast majority of NFTs are solely digital.¹⁹ Most NFTs are enabled through the Ethereum blockchain, and many are purchased using its cryptocurrency, Ether.²⁰ A blockchain is a type of database, a collection of information stored digitally in groups called blocks. Blocks are sort of like spreadsheets containing a set of information about a certain topic.²¹ In the case of NFTs, these blocks record all the data on transfers of the NFT, like the price paid and the identity of the new owner.²² These blocks of information are then chained together so that each set of blocks called a node contains a full record of all the data that has been stored on the database.²³

Many NFTs use pieces of code called “smart contracts” which control the transfer of the NFT.²⁴ Smart contracts are sometimes described as being like a virtual vending machine; if you send money to purchase an NFT, the NFT is automatically transferred to you, but an NFT can’t be obtained without transferring money, much like how a vending machine won’t dispense a snack until someone inserts money into the machine.²⁵ In addition to governing how NFTs are transferred, smart contracts control the transfer of funds, and can be programmed to automatically grant royalties to creators

¹³ See Mitchell Clark, *NFTs, Explained: What They Are, and Why They’re Suddenly Worth Millions*, THE VERGE (Aug. 18, 2021, 9:20 PM), <https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq>.

¹⁴ See Brown, *supra* note 1.

¹⁵ Clark, *supra* note 13.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*; Robyn Conti & John Schmidt, *What You Need to Know About Non-Fungible Tokens (NFTs)*, FORBES (May 14, 2021, 12:17 PM), <https://www.forbes.com/advisor/investing/nft-non-fungible-token/>.

¹⁹ See *Physical NFTs*, APPLIED BLOCKCHAIN (Sept. 21, 2021), <https://appliedblockchain.com/physical-nfts>.

²⁰ See Clark, *supra* note 13.

²¹ See Luke Conway, *Blockchain Explained*, INVESTOPEDIA (May 31, 2021), <https://www.investopedia.com/terms/b/blockchain.asp>.

²² See *id.*

²³ See *id.*

²⁴ See Ghaiht Mahmood, *NFTs: What Are You Buying and What Do You Actually Own?*, THE FASHION LAW (Mar. 18, 2021), <https://www.thefashionlaw.com/nfts-what-are-you-buying-and-what-do-you-actually-own>.

²⁵ See Evans, *supra* note 8, at 245.

for secondary, downstream sales.²⁶ Many creators prefer NFTs to traditional physical works because NFTs can be programmed to give royalties automatically, simplifying the process of getting paid.²⁷

While NFTs are unique in that there is only one of any given work, they can be split into smaller parts called fractionalized NFTs.²⁸ When someone creates an NFT, they can split it into any number of pieces, but once those pieces are created, the number of pieces forming the entire work can’t be changed.²⁹ Aside from the fact that there are multiple of them, fractionalized NFTs function just like typical NFTs once created.³⁰ Fractionalized NFTs are enabled by smart contracts, which ensure that money is paid for the transfer of fractionalized NFTs just like for typical NFTs.³¹ Some of the benefits of fractionalized NFTs include giving more people the ability to own NFTs and granting greater liquidity to the NFT market.³² Currently, the most popular site for buying and selling fractionalized NFTs is called “Fractional”, though fractionalized NFTs are not as common as their non-fractionalized counterparts.³³

All NFTs are digital goods but not all digital goods are NFTs. The term “digital good” has several different definitions depending on the context, but the term generally refers to goods that are stored, sold, delivered, or transferred in digital form.³⁴ While NFTs are digital goods under this definition, the term “digital good” applies to a much broader array of products than just NFTs, including e-books, downloadable music, and even websites.³⁵ NFTs are also distinct from cryptocurrencies because NFTs are non-fungible, so NFTs cannot be exchanged for one another.³⁶ However, both NFTs and

²⁶ See Alex Gomez, *NFT Royalties: What Are They and How Do They Work?*, CYBER SCRILLA, <https://cyberscrilla.com/nft-royalties-what-are-they-and-how-do-they-work/> (last visited Oct. 30, 2021).

²⁷ See *id.*

²⁸ See Jinia Shawdager, *What Are Fractionalized NFTs?*, CRYPTO VANTAGE (Oct. 29, 2021), <https://www.cryptovantage.com/non-fungible-tokens/what-are-fractionalized-nfts/>; Edward Wilson, *What Are Fractionalized NFTs?*, ARGENT (Sept 3, 2021), <https://www.argent.xyz/learn/fractionalized-nfts/>.

²⁹ See Wilson, *supra* note 28.

³⁰ See *id.*

³¹ See *id.*

³² See Shawdager, *supra* note 28.

³³ See *id.*; Wilson, *supra* note 28.

³⁴ See Vangie Beal, *Digital Goods*, WEBOPEDIA (May 24, 2021), <https://www.webopedia.com/definitions/digital-goods/>; *Digital Goods*, TECHOPEDIA, <https://www.techopedia.com/definition/1467/digital-goods> (last visited Oct. 30, 2021).

³⁵ See *What Is a Digital Good, Anyway?*, QUADERNO (Jul. 16, 2020), <https://www.quaderno.io/blog/digital-good-anyway>.

³⁶ See Sylvia Jablonski, *Are NFTs the New Crypto? A Guide to Understanding Non-Fungible Tokens*, FORBES (Jun. 9, 2021, 7:30 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/06/09/are-nfts-the-new-crypto-a-guide-to-understanding-non-fungible-tokens/?sh=2432107a3d95>.

cryptocurrencies are enabled by blockchain, which creates a digital record of transactions.³⁷

Part of the difficulty of understanding NFTs is in understanding what rights an owner gets. Owning an NFT doesn't grant the owner intellectual property rights, most notably the ability to control distribution.³⁸ NFTs can be freely reproduced regardless of who owns them.³⁹ The creator of an NFT does have the intellectual property rights associated with the work, including potentially the ability to copyright such work, but the current owner of the NFT does not have these rights.⁴⁰ In the parlance of traditional property rights, owning an NFT does not give the full "bundle of sticks" or rights associated with a work, but it does give some of the major rights.⁴¹ Owners of NFTs have the right to own and sell the token, but since NFTs are digital and generally have no physical form, owning an NFT gives little more than prestige.⁴² In fairness, though, ownership of physical works of art is also primarily about prestige and doesn't grant the right to reproduce the work, so NFTs are not so different from physical art.

As of now, there are no US laws regarding NFTs, so it remains unclear how NFTs could be categorized. Diana Qiao has discussed whether NFTs could be considered commodities and regulated under the Commodities Exchange Act.⁴³ Other scholars, like Tonya Evans, have argued about whether NFTs could be considered intellectual property and whether they should be copyrightable.⁴⁴ Tax law provides some guidance, but gives no definitive classification. The IRS has stated that cryptocurrencies are treated as property for income tax purposes, but it has not made an explicit statement on NFTs.⁴⁵ Most scholars agree with Robert Frank in that NFT purchases could be subject to the capital gains tax, suggesting NFTs are equivalent to property.⁴⁶ In short, there is no consensus in US law about what NFTs are and how they should be regulated.

³⁷ See *id.*

³⁸ See Mahmood, *supra* note 24.

³⁹ See Clark, *supra* note 13.

⁴⁰ See Mahmood, *supra* note 24.

⁴¹ See Anna di Robilant, *Property: A Bundle of Sticks or a Tree*, 66 VAND. L. REV. 869,

872

(2013).

⁴² See Mahmood, *supra* note 24; Clark, *supra* note 13.

⁴³ E.g., Qiao, *supra* note 9, at 221-26.

⁴⁴ E.g., Evans, *supra* note 8, at 245 (arguing NFTs should be copyrightable).

⁴⁵ I.R.S. NOTICE 2014-21, 2014-16 I.R.B. 938.

⁴⁶ E.g., Robert Frank, *Tax Surprise Looms for NFT Investors Who Use Crypto*, CNBC, (Mar. 17, 2021, 8:09 AM), <https://www.cnbc.com/2021/03/17/tax-surprise-looms-for-nft-investors-who-use-crypto-.html>.

B. *History of the European Union*

The precursor to the EU was the European Coal and Steel Community (ECSC), founded in 1951, which included France, Germany, Italy, Belgium, Luxembourg, and The Netherlands.⁴⁷ Its goal was to prevent war by granting collective control over the steel and coal industries.⁴⁸ In 1957, those same six countries signed the Treaty of Rome, which created the European Economic Community, with goals of integration and economic growth.⁴⁹ The Treaty had a goal of establishing a single market in Europe, based on the free movement of goods, people, services and capital, but the Treaty didn't provide sufficient powers to create a single market.⁵⁰ A single market would remove legal, technical, and bureaucratic barriers and allow EU citizens to live and work in any EU country and trade between other member nations freely.⁵¹ Around this time, several countries joined the European Economic Community: Denmark, Ireland, and the UK in 1973,⁵² Greece in 1981⁵³, and Portugal and Spain in 1986.⁵⁴ Nearly thirty years after the signing of the Treaty of Rome, in 1986, the Single European Act (SEA) passed, setting a goal of establishing the single market by January 1, 1993.⁵⁵ To achieve this goal, the SEA expanded the powers of the European Parliament, the EU's primary legislative body at the time.⁵⁶ It also created the European Council, a second legislative body that could make decisions about the single market by a simple majority rather than unanimity, making it easier to enact laws to create the single market.⁵⁷

This transnational organization was still called the European Economic Community, not the European Union.⁵⁸ In 1992, with the Maastricht Treaty, the EU was officially created.⁵⁹ In addition to officially creating the EU, the Maastricht Treaty also established a common foreign policy for the Union, and began the process of creating a single European

⁴⁷ See Treaty Establishing the European Coal and Steel Community, art. 2, Apr. 18, 1951, 261 U.N.T.S. 140 (expired July 23, 2002).

⁴⁸ See *id.*

⁴⁹ See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412 (now TFEU).

⁵⁰ See *id.*; ALEX WARLEIGH-LACK, EUROPEAN UNION: THE BASICS 23-25 (2nd ed. 2009).

⁵¹ See *Single Market*, EUROPEAN UNION, https://europa.eu/european-union/topics/single-market_en (last visited Apr. 2, 2023).

⁵² See *A Growing Community- The First Enlargement*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/history/1970-1979_en (last visited Feb. 4, 2023).

⁵³ See *The Changing Face of Europe - The Fall of the Berlin Wall*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/history/1980-1989_en (last visited Feb. 4, 2023).

⁵⁴ See *id.*

⁵⁵ See Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See WARLEIGH-LACK, *supra* note 50, at 26-27.

⁵⁹ See Treaty on European Union, Feb. 7 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253.

currency: the euro.⁶⁰ Shortly after, Austria, Finland, and Sweden joined the EU in 1995.⁶¹ In 2004, ten more countries joined: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.⁶² In 2007, the Treaty of Lisbon was signed, defining the institutions of the EU and describing how they function.⁶³ The Treaty of Lisbon also renamed some previous treaties.⁶⁴ The Maastricht Treaty, which began the process of creating the euro, was renamed as the Treaty on the European Union (TEU).⁶⁵ The Treaty of Rome, which defined the European Economic Community, was renamed as the Treaty on the Functioning of the European Union (TFEU).⁶⁶ Three more countries joined the EU at this time: Bulgaria and Romania joined in 2007⁶⁷, and Croatia joined in 2013.⁶⁸ With the UK leaving the EU in 2020, the EU currently has 27 member countries.⁶⁹

As it currently stands, there are four main lawmaking institutions in the EU: the European Parliament, the Council of the European Union, the Commission of the European Communities, and the European Court of Justice.⁷⁰ The European Parliament (EP) has 705 members elected directly by member countries, with the number of members elected by each country roughly proportional to its population.⁷¹ The EP oversees EU institutions and, along with the Council of the European Union, passes laws and creates budgets.⁷² The EP is sort of akin to the House of Representatives in the US

⁶⁰ *See id.*

⁶¹ *See A Europe Without Frontiers*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/history/1990-1999_en (last visited Feb. 4, 2023).

⁶² *See id.*

⁶³ *See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, Dec. 13, 2007, O.J. (C 306) 1.

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See id.*; *Treaty Establishing the European Economic Community*, Mar. 25, 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412.

⁶⁷ *See Further Expansion*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/history/2000-2009_en (last visited Feb. 4, 2023).

⁶⁸ *See A Decade of Opportunities and Challenges*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/history/2010-2019_en (last visited Feb. 4, 2023).

⁶⁹ *See Countries*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/countries_en (last visited Feb. 4, 2023).

⁷⁰ *See WARLEIGH-LACK, supra* note 50, at 41-47.

⁷¹ *See European Parliament*, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/european-parliament_en (last visited Feb. 4, 2023); *European Parliament*, CITIZEN'S INFORMATION, https://www.citizensinformation.ie/en/government_in_ireland/european_government/european_union/european_union.html (last visited Feb. 4, 2023); WARLEIGH-LACK, *supra* note 50, at 43-44.

⁷² *See European Parliament*, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/european-parliament_en (last visited Feb. 4, 2023); *European Parliament*, CITIZEN'S INFORMATION, https://www.citizensinformation.ie/en/government_in_ireland/european_government/european_union/european_union.html (last visited Feb. 4, 2023).

because it is primarily legislative and is proportional to the member states' population.⁷³ The Council of the European Union is also a legislative body, but its members are government officials from member countries in specific areas.⁷⁴ The Council has several different compositions depending on the topic at issue.⁷⁵ So, for example, each country will send its key agriculture minister to the Council to discuss agriculture and its top financial officer to discuss banking and finance.⁷⁶ The Council determines EU law and creates budgets along with the EP, but a main difference between the EP is that the Council coordinates policy among member countries.⁷⁷ Since the Council is formed of existing government officials, its members are able to influence policy in member countries so that law is consistent throughout EU member countries.⁷⁸ The Council also differs from the EP in that Council decisions must be passed by 55% of countries, representing at least 65% of the EU's population, and decisions can be vetoed by four countries representing at least 35% of the EU's population.⁷⁹ The Council is similar to the US Senate because of its ability to block decisions, similar to the filibuster, and its non-proportional representation.⁸⁰

The Commission of the European Communities, also called the European Commission, is the main executive arm of the EU.⁸¹ The Commission is composed of one Commissioner from each member country, with each Commissioner being responsible for a certain policy area.⁸² The European Parliament elects a President who decides which Commissioner is responsible for which policy area.⁸³ The Commission can propose new laws to be passed by the Council and Parliament, and it initiates budget proposals, in addition to representing the EU outside of Europe.⁸⁴ The Commission's

⁷³ See *Legislative Branches*, EUROPEAN PARLIAMENT LIAISON OFFICE IN WASHINGTON D.C., <https://www.europarl.europa.eu/unitedstates/en/eu-us-relations/legislative-branches> (last visited Feb. 4, 2023).

⁷⁴ See *Council of the European Union*, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/council-european-union_en (last visited Feb. 4, 2023); *Council of the European Union*, CITIZENS INFORMATION, https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_institutions/council_of_the_european_union.html (July 12, 2022).

⁷⁵ See *id.*

⁷⁶ See *id.*; *Council of the European Union*, CITIZENS INFORMATION, *supra* note 74.

⁷⁷ See *Council of the European Union*, EUROPEAN UNION, *supra* note 74.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *Legislative Branches*, *supra* note 73.

⁸¹ See *European Commission*, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/european-commission_en (last visited Feb. 4, 2023); *European Commission*, CITIZENS INFORMATION, https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_institutions/european_commission.html (June 21, 2022).

⁸² See *id.*

⁸³ See *European Commission*, *supra* note 81.

⁸⁴ See *id.*

main function, however, is ensuring that EU law is enforced consistently in member countries.⁸⁵ The Commission is similar to the President's cabinet in the US because of the policy specializations and the enforcement function of the two bodies.⁸⁶

The last major institution in the EU is the European Court of Justice (ECJ). This Court is divided into two distinct bodies. First, there is the General Court, which consists of two judges from each member country, appointed by the joint agreement of all member countries.⁸⁷ Then there is the Court of Justice, which includes one judge from each member country, plus eleven Advocates General, which are lawyers who provide arguments to help the judges make decisions.⁸⁸ Both courts are tasked with interpreting and enforcing the law, but the General Court rules on actions for annulments and focuses primarily on competition, trade, agriculture, and trademarks.⁸⁹

The Court of Justice hears requests for preliminary actions as well as annulments and appeals, so the courts have somewhat overlapping jurisdictions.⁹⁰ In the Court of Justice, each case is assigned a single judge and a single Advocate General, who read written arguments and determine how many judges should hear the case.⁹¹ Most cases are dealt with by five judges, some are heard by only three judges, and in certain situations, cases are heard by the entire court.⁹² The case then proceeds to oral argument and, if requested, an Advocate General provides an opinion.⁹³ Advocate General opinions are somewhat similar to *amicus curae* briefs, but they are given by court officials rather than the public. The General Court operates similarly, except that cases are generally heard by three-judge panels and there are no Advocates General to help judges make decisions.⁹⁴ The European Court of Justice is similar to the US Supreme Court in that it is independent of the political process, but it is different because of its division into two bodies and its inclusion of Advocates General.⁹⁵

⁸⁵ *See id.*

⁸⁶ *See EU-US Relations*, EUROPEAN PARLIAMENT LIAISON OFFICE IN WASHINGTON DC, <https://www.europarl.europa.eu/unitedstates/en/eu-us-relations/executive-branches> (last visited Feb. 4, 2023).

⁸⁷ *See Court of Justice of the European Union (CJEU)*, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en (last visited Feb. 4, 2023); *Court of Justice of the European Union (CJEU)*, CITIZEN'S INFORMATION, https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_institutions/european_court_of_justice.html (June 27, 2022).

⁸⁸ *See id.*

⁸⁹ *See Court of Justice of the European Union (CJEU)*, *supra* note 87.

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See Judicial Branches*, EUROPEAN PARLIAMENT LIAISON OFFICE IN WASHINGTON DC, <https://www.europarl.europa.eu/unitedstates/en/eu-us-relations/judicial-branches>.

C. *How the “Free Movement of Goods” Provisions Function*

The Treaty on the Functioning of the European Union (TFEU) identifies the “four freedoms”: free movement of goods, persons, capital, and services.⁹⁶ The TFEU specifies that “free movement of goods” prohibits customs duties or charges with equivalent effect on imports and exports of all goods originating in member states or in free circulation in member states.⁹⁷ While the TFEU prohibits duties and similar charges, the EU does allow countries to impose some charges when importing goods. The main ones are charges imposed to fulfill EU obligations, like the cost of required inspections of goods.⁹⁸ Some of the reasons for these provisions include facilitating a closer relationship between European nations, eliminating obstacles to economic expansion, and spurring economic progress.⁹⁹ Frustratingly, the TFEU does not define the term “goods.”¹⁰⁰ A guide to the application of the “free movement of goods” provisions published by the EU states that “the range of goods covered is as wide as the range of goods in existence,” indicating that the term “goods” should be interpreted broadly.¹⁰¹

Duties, also called tariffs, are taxes imposed when goods cross international borders.¹⁰² They are either calculated based on the value of the goods being transported, called an *ad valorem* duty, or imposed based on the number of units being transported, called a specific duty, or some combination of the two.¹⁰³ Export duties, which are paid when a good leaves a country, are rarely used in the modern world, though they still apply to some mineral, petroleum, and agricultural products.¹⁰⁴ Most modern duties are import tariffs, which are paid when a good enters a new country.¹⁰⁵ Duties are paid by the company importing the goods, and they are sometimes passed on to consumers in the form of increased prices.¹⁰⁶

In addition to barring customs duties on goods moving between member countries, the “free movement of goods” provisions also prohibit quantitative restrictions on imports and exports, and measures with

⁹⁶ See Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) art. 26, Oct. 26, 2012, O.J. (C 326) 59.

⁹⁷ See *id.* at art. 28.

⁹⁸ See ALAN DASHWOOD ET. AL., EUROPEAN UNION LAW 394–95 (6th Ed. 2011).

⁹⁹ See TFEU, *supra* note 96, at art. 26.

¹⁰⁰ See *id.*

¹⁰¹ See *Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods*, PUBLICATIONS OFFICE OF THE EU 9 (July 7, 2010).

¹⁰² See Moses L. Pava, *Tariff: International Trade*, BRITANNICA, <https://www.britannica.com/topic/tariff> (last visited Oct. 30, 2021).

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See Howard Gleckman, *What is a Tariff and Who Pays It?*, TAX POLICY CENTER, <https://www.taxpolicycenter.org/taxvox/what-tariff-and-who-pays-it> (last visited Oct. 30, 2021).

equivalent effect.¹⁰⁷ This means outright bans on certain products or quotas on imports from certain countries are not allowed for goods moving within the EU.¹⁰⁸ In *Procureur de Roi v. Dassonville*, the European Court of Justice said that all trading rules enacted by member states capable of hindering trade within the EU have equivalent effect to quantitative restrictions and cannot be imposed on goods moving within the EU.¹⁰⁹ However, the Court later said that provisions restricting selling arrangements do not have equivalent effect to quantitative restrictions and are legal.¹¹⁰

A foundational case from the European Court of Justice is *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein*, known commonly as *Cassis de Dijon*.¹¹¹ In this case, a German company wanted to import Cassis de Dijon, a blackcurrant liquor with 10-15% alcohol produced in France.¹¹² German law specified that products marketed as fruit liquor had to have over 25% alcohol, so the German company would be unable to market the liquor as fruit liquor.¹¹³ The European Court of Justice held that the effect of the German law was equivalent to a customs duty, so it was held invalid.¹¹⁴ The Court declared that laws essential to protecting public health, ensuring fair commercial transactions, and protecting consumers which result in obstacles to free trade are permissible, but non-essential provisions cannot impose obstacles to the free movement of goods.¹¹⁵ While not explicitly stated, the Court also suggested that countries should create identical regulations on certain goods.¹¹⁶ The process of creating uniform standards, called harmonisation, continues to this day and involves countries compromising on regulations in areas ranging from consumer safety to sustainable packaging.¹¹⁷ *Cassis de Dijon* also laid out the principle of mutual recognition, which states that products produced legally in one member state can move freely into other member states, even if those goods would be illegally produced in other member states.¹¹⁸

¹⁰⁷ See TFEU, *supra* note 96, at art. 26.

¹⁰⁸ See *Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods*, PUBLICATIONS OFFICE OF THE EU 11 (July 7, 2010).

¹⁰⁹ See Case 8/74, *Procureur du Roi v. Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82 (July 11, 1974).

¹¹⁰ See Joined Cases C-267/91 and C-268/91 *Keck and Mithouard*, 1993 E.C.R. I-6097, ¶ 16.

¹¹¹ See Case C-120/78, *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42 (Feb. 20, 1979).

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *Harmonised Standards*, EUROPEAN COMMISSION, https://ec.europa.eu/growth/single-market/european-standards/harmonised-standards_en (last visited Feb. 4, 2023).

¹¹⁸ See Case C-120/78, *Rewe-Zentral*, ECLI:EU:C:1979:42; Case C-110/05 *Commission v Italy*, 2009 E.C.R. I-519; *Free Movement of Goods: Guide to the Application of*

A 1994 European Court of Justice ruling considered the line between goods and services. In *Her Majesty's Customs and Excise v. Schindler*, the court determined that a UK law prohibiting the importation of lottery tickets did not violate the “free movement of goods” provisions.¹¹⁹ The main reason for this was a finding that lottery tickets are not goods, but are services because they give buyers the ability to participate in the lottery and potentially win prizes.¹²⁰ So, things which merely give access to a service which could provide goods are not goods themselves.

Another key European Court of Justice case, *Jägerskiöld v. Gustafsson*, supports this conclusion that things which provide access to a service are not goods.¹²¹ In that case, a Finnish law gave people the right to fish in certain waters for a fee paid annually to the Finnish government.¹²² The court had to determine whether fishing rights were goods under the “free movement of goods” provisions of the Treaty and, if so, whether the Finnish law imposed an impermissible obstacle to the free movement of goods.¹²³ The Court determined that fishing rights are not goods, saying they make certain waters available for fishing, which is the provision of a service.¹²⁴

On the other hand, there are several cases defining things that *are* considered goods. A 1964 ruling suggested that electricity could be considered a good,¹²⁵ and a 1994 decision confirmed that electricity is protected under the “free movement of goods” provisions, meaning customs duties or equivalent charges cannot be imposed on the transport of electricity.¹²⁶ This indicates the goods need not have a tangible form, which supports the notion that NFTs could be considered goods. This case has been criticized, though, and some suggest its holding isn't about tangibility at all.¹²⁷ In fact, an alternate opinion in *Jägerskiöld* says electricity was only considered a “good” in this case so that it could be treated similarly to gas and oil to promote competition within the energy industry.¹²⁸ Nonetheless, the case does hold that electricity is a good, and later cases have expanded

Treaty Provisions Governing the Free Movement of Goods, PUBLICATIONS OFFICE OF THE EU 15 (July 7, 2010).

¹¹⁹ See Case C-275/92, *Her Majesty's Customs and Excise v. Schindler*, 1994 E.C.R. I-1089.

¹²⁰ See *id.*

¹²¹ See Case C-97/98, *Jägerskiöld v. Gustafsson*, 1999 E.C.R. I-7344.

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See Case 6/64 *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66 (July 15, 1964).

¹²⁶ See Case C-393/92 *Mun. of Almelo v. NV Energiebedrijf Ijsselmij*, ECLI:EU:C:1994:171 (Apr. 27, 1994).

¹²⁷ See Janka Hojnik, *Technology Neutral EU Law: Digital Goods within the Traditional Goods/Services Distinction*, 25 INT'L J.L. & INFO. TECH. 63, 68 (2017).

¹²⁸ Case C-97/98, *Jägerskiöld*, ECLI:EU:C:1999:315, opinion of Advocate General Fennelly, ¶ 20 (June 17, 1999).

upon this, with one case holding that computer software should be analyzed under the “free movement of goods” provisions.¹²⁹ The first case suggesting electricity could be a good is from 1964, showing that the debate about whether things without physical form can be goods is not a new one, and neither is the argument that only tangible things can be goods.¹³⁰

Also of relevance is *Commission of European Communities v. Italian Republic*, where the European Court of Justice considered whether artistic and historical works were considered goods.¹³¹ In that case, the Italian government imposed a tax on the exportation of works with artistic or historical significance, which was challenged as a violation of the “free movement of goods” provisions.¹³² The Court defined “goods” as “products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.”¹³³ Using this definition, the Court concluded that artistic and historical works are goods, and invalidated the Italian law.¹³⁴ However, this opinion, too, has been criticized, with some arguing that not all things which can be valued in money and form the subject of commercial transactions are goods.¹³⁵ The Merriam-Webster dictionary provides a slightly different definition of “good,” defining it as “something that has economic utility or satisfies an economic want,” although this definition still doesn’t include tangibility as a prerequisite.¹³⁶ In US law, the definition of “good” emphasizes moveability rather than tangibility or valuation in money. The current Uniform Commercial Code defines goods as things “which are movable at the time of identification to the contract for sale,” excluding money, investment securities, and things in action.¹³⁷

The few EU cases that discuss digital goods at all have come to varying conclusions. A 1974 case found that transmission of television signals should be considered under the free movement of services, but the film and tapes used to enable television were considered under the free movement of goods.¹³⁸ A 2011 case assessed decoding devices as services because they gave owners access to encrypted broadcasting signals,

¹²⁹ See Case C-128/11, *UsedSoft GmbH v. Oracle Int’l Corp.*, ECLI:EU:C:2012:407, ¶¶ 99-100 (July 3, 2012).

¹³⁰ See *Flaminio Costa*, 1964 ECLI:EU:C:1964:51, opinion of Advocate General Lagrange, at 600, 611 (June 25, 1964); *Mun. of Almelo*, ECLI:EU:C:1994:42, Opinion of Advocate General Darmon, ¶¶ 62, 67 (Feb. 8, 1994); *Jägerskiöld*, ECLI:EU:C:1999:315, opinion of Advocate General Fennelly, ¶¶ 20 - 21.

¹³¹ Case 7/68, *Comm’n of European Cmty’s v. Italian Republic*, 1968 E.C.R. 432, 432 .

¹³² See *id.*

¹³³ *Id.* at 428.

¹³⁴ See *id.* at 429, 431.

¹³⁵ See *Hojnik*, *supra* note 127, at 68; *Jägerskiöld*, ECLI:EU:C:1999:315, opinion of Advocate General Fennelly, ¶ 19.

¹³⁶ MERRIAM-WEBSTER, “good,” <https://www.merriam-webster.com/dictionary/good>, (last visited Oct. 30, 2021).

¹³⁷ U.C.C. § 2-105 (AM. L. INST. & UNIF. L. COMM’N 2012).

¹³⁸ Case 155/73, *Giuseppe Sacchi*, 1974 E.C.R. 00409, ¶¶ 6, 7.

essentially a service.¹³⁹ On the other hand, the 2012 case *UsedSoft v. Oracle* applied the “principle of exhaustion,” which had previously only been applied to goods, to computer software.¹⁴⁰ The principle of exhaustion says that when an intellectual property holder sells their intellectual property, they no longer have rights to that intellectual property.¹⁴¹ *UsedSoft* took a big step toward eliminating the distinction between digital and physical goods, and it suggested that computer software is a good.¹⁴² All of this indicates that the EU does not yet have a consistent system for determining what digital goods are and how they should be treated. In some cases, EU courts apply the law to digital goods to produce the ultimate results they want to achieve rather than creating a uniform set of rules on digital goods.¹⁴³

D. Free Movement of Services

Interestingly, many of the things which are not considered goods are considered services, and the EU also provides for “free movement of services.” Article 56 of the Treaty on the Functioning of the European Union specifies that “restrictions on freedom to provide services within the Union shall be prohibited.”¹⁴⁴ Article 57 specifies that “services” includes industrial activities, commercial activities, activities of craftsmen, and activities of the professions.¹⁴⁵ The “free movement of services” provisions are designed to prevent discrimination on the basis of nationality and to allow professionals and companies to freely move throughout the EU.¹⁴⁶ So, while the “free movement of goods” provisions are about eliminating customs duties and promoting free trade,¹⁴⁷ the “free movement of services” provisions are about eliminating discrimination and allowing companies and workers to operate transnationally.¹⁴⁸ Services and goods are thus treated differently under EU law, so it is important to clearly determine whether something is a good or a service.

¹³⁹ Joined Cases C-403/08 and C-428/08, *Football Association Premier League v. QC Leisure, Others and*

Karen Murphy v. Media Protection Services Ltd, 2011 E.C.R., ¶169.

¹⁴⁰ Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, ECLI:EU:C:2012:407, ¶¶ 43, 101.

¹⁴¹ See *Hojnik*, *supra* note 127, at 74.

¹⁴² See *UsedSoft GmbH*, ECLI:EU:C:2012:407 at ¶ 76.

¹⁴³ See *Hojnik*, *supra* note 127, at 68.

¹⁴⁴ TFEU, *supra* note 96, at art. 56.

¹⁴⁵ TFEU, *supra* note 96, at art. 57.

¹⁴⁶ See *Freedom of establishment and freedom to provide services*, EUROPEAN PARLIAMENT, <https://www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services>.

¹⁴⁷ See generally TFEU, *supra* note 96, at art. 56-63.

¹⁴⁸ See TFEU, *supra* note 96, at art. 56; *Freedom of establishment and freedom to provide services*, EUROPEAN PARLIAMENT, <https://www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services>.

E. The Markets in Crypto-Assets (MiCA) Proposal

This A proposed EU regulation, Markets in Crypto-Assets (MiCA), would regulate the issuance and use of crypto-assets, but it's unclear if NFTs qualify as crypto-assets under this proposal.¹⁴⁹ The proposal defines a "crypto-asset" as "a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology."¹⁵⁰ Distributed ledger technology means "technology that support the distributed recording of encrypted data,"¹⁵¹ which includes blockchain and similar programs.¹⁵²

The main thrust of the proposal is requiring issuers of crypto-assets to draft and publish crypto-asset white papers, which are documents containing extensive and accurate information about the issuer, the offer to the public, and the crypto-asset itself, including a description of the rights and obligations attached to it, the technology used to store it, and the risks involved in issuing such a crypto-asset.¹⁵³ However, unique, non-fungible crypto-assets, potentially including NFTs, are exempted from the white paper requirements. Issuers of non-fungible crypto-assets must be legal entities and must communicate honestly, avoid conflicts of interest, and comply with security protocols, but do not have to draft or publish crypto-asset white papers.¹⁵⁴ A portion of the proposal addresses asset-referenced tokens, which it defines as "a type of crypto-asset that purports to maintain a stable value by reference to one of several fiat currencies that are legal tender."¹⁵⁵ The proposal specifies that issuers of asset-referenced tokens must be authorized to issue such assets by their home country.¹⁵⁶

In summary, the MiCA proposal would regulate how crypto-assets are issued to provide a uniform framework and instill confidence in users of these assets.¹⁵⁷ The proposal focuses on banking, and it doesn't address trade law or the "free movement of goods" provisions.¹⁵⁸ It is not clear whether NFTs would be covered under this proposal, since its definition of a crypto-asset does not clearly cover NFTs. One article argues that fractionalized NFTs could be regulated under MiCA, but notes that until NFTs are more clearly defined, it is unclear how this proposal and EU law more broadly will

¹⁴⁹ See *Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-Assets, and amending Directive EU 2019/1937*, COM (2020) 593 final (Sept. 24, 2020).

¹⁵⁰ *Id.* at art. 3, para. 1, no. 2.

¹⁵¹ *Id.* at 1.

¹⁵² See Jake Frankenfield, *Distributed Ledger Technology (DLT)*, INVESTOPEDIA (Aug. 27, 2021), <https://www.investopedia.com/terms/d/distributed-ledger-technology-dlt.asp>.

¹⁵³ See *Proposal for a Regulation*, *supra* note 149, at art. 5.

¹⁵⁴ See *id.* at art. 13.

¹⁵⁵ See *id.* at art. 3.

¹⁵⁶ See *id.* at art. 15.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.* at art. 4.

apply to them.¹⁵⁹ The proposal is pending in the European Commission, so it does not apply to anything yet,¹⁶⁰ but how it will apply to NFTs if it is enacted remains unclear.

F. *The World Trade Organization's Regulation of NFTs*

The WTO is an international organization providing global trade rules with the goal of producing predictable, stable, free trade across the world.¹⁶¹ The EU is a member of the WTO, and its member nations are also members in their own rights.¹⁶² In 1998, the WTO issued the Declaration on Global Electronic Commerce, also called the moratorium on e-commerce, in which member countries agreed to continue their practice of not imposing customs duties on electronic transmissions.¹⁶³ The WTO has agreed to extend this moratorium several times, the most recent extension occurring in 2022 and extending the moratorium until at least December 2023.¹⁶⁴ The WTO has defined “electronic commerce” as “the production, distribution, marketing, sale or delivery of goods and services by electronic means.”¹⁶⁵ The WTO has not explicitly stated whether NFTs are covered by this provision.

Recently, some countries, mainly India and South Africa, have voiced opposition to the moratorium on e-commerce.¹⁶⁶ India and South Africa distributed communication to WTO members explaining their opposition to the moratorium’s ban on customs duties for electronic transmissions.¹⁶⁷ India and South Africa note that most of the world’s e-commerce is conducted by the US, the EU, and China, while developing countries have little participation in the digital economy.¹⁶⁸ The

¹⁵⁹ See Claudia Di Bernardino et al, *NFT - Legal Token Classification*, EU BLOCKCHAIN OBSERVATORY AND FORUM NFT REPORTS (July 22, 2021).

¹⁶⁰ See *Proposal for a Regulation*, *supra* note 149.

¹⁶¹ See *WTO In Brief*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm (last visited Feb. 4, 2023).

¹⁶² See *The European Union and the WTO*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (last visited Feb. 4, 2023).

¹⁶³ See The Geneva Ministerial Declaration on Global Electronic Commerce, WTO Doc. WT/MIN(98)/DEC/2 (May 25, 1998).

¹⁶⁴ See Emma Farge, *WTO Provisionally Agrees to Extend E-Commerce Tariff Moratorium* – Sources, REUTERS (June 16, 2022, 10:40 AM), <https://www.reuters.com/markets/commodities/wto-provisionally-agrees-extend-e-commerce-tariff-moratorium-sources-2022-06-16/>.

¹⁶⁵ Work Programme on Electronic Commerce, WTO Doc. WT/L/274, Sec. 1.3 (Sept. 30, 1998).

¹⁶⁶ See *WTO Members Highlight Benefits and Drawbacks of E-commerce Moratorium*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (July 23, 2020), <https://sdg.iisd.org/news/wto-members-highlight-benefits-and-drawbacks-of-e-commerce-moratorium/>.

¹⁶⁷ See Work Programme on Electronic Commerce, The E-Commerce Moratorium: Scope and Impact, Communication from India and South Africa, WTO Doc. WT/GC/W/798 (Mar. 10, 2020).

¹⁶⁸ See *id.*

communication cites a United Nations Conference on Trade and Development report which found that the moratorium on e-commerce tariffs results in a loss of revenue of more than \$10 billion annually, with 95% of this revenue loss being suffered by developing countries.¹⁶⁹ This revenue loss is limited to five key areas of e-commerce: printed matter, music downloads, video downloads, software, and video games.¹⁷⁰ The communication notes that as electronic transactions become more prevalent, the amount of revenue lost by developing countries from the moratorium on e-commerce tariffs is likely to increase.¹⁷¹

Because of this, India and South Africa conclude that the moratorium on e-commerce will be catastrophic for economic development and job creation, as well as increase economic inequality between countries.¹⁷² Based on this, India and South Africa say the moratorium on e-commerce "must be reconsidered."¹⁷³ As previously mentioned, the WTO renewed the moratorium on e-commerce in 2022, but it is possible changes will be made to the moratorium in the future.

III. LEGAL ANALYSIS: WHY NFTS SHOULD BE CONSIDERED "GOODS" UNDER EU LAW

A. *NFTs Fall Under the Definition of "Goods"*

NFTs should be considered goods because NFTs are goods by any reasonable definition of the term. Merriam-Webster defines "good" in the economic sense as "something that has economic utility or satisfies an economic want."¹⁷⁴ NFTs are goods under this definition because they satisfy an economic want, specifically a person's want to have a virtual work of art. NFTs can bring people happiness and satisfaction, which is a form of economic utility.¹⁷⁵ While some earlier definitions of "good" included a requirement of tangibility and some suggest tangibility is still a definitional element of goods, most modern law does not include tangibility in the definition of a "good."¹⁷⁶ In fact, the current Uniform Commercial Code defines goods as things "which are movable at the time of identification to

¹⁶⁹ See *id.*; U.N. Conference on Trade and Development, *Growing Trade in Electronic Transmissions: Implications for the South*, UNCTAD/SER.RP/2019/1 [hereinafter UNCTAD].

¹⁷⁰ See Work Programme on Electronic Commerce *supra* note 167; UNCTAD, *supra* note 169.

¹⁷¹ See Work Programme on Electronic Commerce *supra* note 167.

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ *Good*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/good> (last visited Apr. 2, 2023).

¹⁷⁵ See Michael J. Boyle, *Utility*, INVESTOPEDIA (Jan. 16, 2021), <https://www.investopedia.com/terms/u/utility.asp>.

¹⁷⁶ See, e.g., ADAM SMITH, *THE WEALTH OF NATIONS* 16 (1776); NASSAU WILLIAM SENIOR, *AN OUTLINE OF THE SCIENCE OF POLITICAL ECONOMY* 8 (1836).

the contract for sale,” excluding money, investment securities, and things in action.¹⁷⁷ This definition emphasizes “movability” rather than tangibility, and NFTs are covered under this definition because they can be moved from one digital location to another digital location. This definition is sort of a middle ground between people who argue that only tangible works can be goods and people who take the more expansive view that anything with value is a good.

While the EU doesn’t seem to emphasize movability in its interpretation of the “free movement of goods” provisions, movability could be one reason for the seemingly divergent conclusions EU courts have come to about digital works.¹⁷⁸ One case found that television signals were not goods, while another case suggested that computer software is a good.¹⁷⁹ This doesn’t make much sense if tangibility is the defining factor of whether something is a good, since television signals and computer software are both intangible, but it can be explained using moveability as a defining factor. Computer software can be moved from a location in one computer’s hard drive to a location in another computer’s hard drive, but television signals don’t move.¹⁸⁰ Television signals are broadcast in the air as electromagnetic waves, which antennae can receive.¹⁸¹ These signals are always present and don’t move from one location to another, so they are not movable, perhaps explaining why the EU Court found that television signals are not goods.¹⁸²

The European Court of Justice has given a fairly clear definition of “goods,” as used in the “free movement of goods” provisions. In *Commission of European Communities v. Italian Republic*, the Court defined “goods” as “products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.”¹⁸³ Some argue that this is not the true definition of “good” under EU law, claiming that not everything which falls under this definition is a good because tangibility is a prerequisite to being a good.¹⁸⁴ The main thrust of this argument is that non-tangible goods should not be considered goods because they don’t physically move across borders.¹⁸⁵ Regardless of whether tangibility *should* be a requirement for goods, the definition articulated in *Commission of European Communities v. Italian Republic* doesn’t include a tangibility requirement, and this is the

¹⁷⁷ U.C.C. § 2-105 (AM. L. INST. & UNIF. L. COMM’N 2012).

¹⁷⁸ See Case 7/68, Comm’n v. Italian Republic, 1968 E.C.R. 432.

¹⁷⁹ Case 155/73, Giuseppe Sacchi, 1974 E.C.R. 409, 439; Case C-128/11, UsedSoft GmbH v. Oracle Int’l Corp., ECLI:EU:C:2012:407, (July 3, 2012).

¹⁸⁰ See Linda Rosencrance, *What is Software? Definition, Types, and Examples*, TECHTARGET, (Dec. 5, 2021), <https://searchapparchitecture.techtargget.com/definition/software>.

¹⁸¹ See Chris Woodford, *Television*, EXPLAIN THAT STUFF! (June 1, 2021), <https://www.explainthatstuff.com/television.html>.

¹⁸² Case 155/73, Giuseppe Sacchi, 1974 E.C.R. 409, 439.

¹⁸³ Case 7/68, Comm’n v. Italian Republic, 1968 E.C.R. 432, 428.

¹⁸⁴ See Hojnik, *supra* note 127, at 68; Case C-97/98, Jägerskiöld v. Gustafsson, ECLI:EU:C:1999:315, opinion of Advocate General Fennelly, ¶ 20 (June 17, 1999).

¹⁸⁵ See, e.g., Case C-97/98, Jägerskiöld v. Gustafsson, ECLI:EU:C:1999:315, opinion of Advocate General Fennelly, ¶ 20.

accepted definition used within the EU.¹⁸⁶ NFTs fall under this definition and therefore are goods for the purposes of the “free movement of goods” provisions. NFTs can be valued in money. NFTs are typically bought and sold using cryptocurrency, but the EU recognizes cryptocurrency as a qualified financial instrument, and EU laws do not prohibit the use of cryptocurrencies.¹⁸⁷ Additionally, NFTs can be valued in non-cryptocurrencies by using known exchange rates.¹⁸⁸ Further, NFTs can and do form the basis of commercial transactions. There are several marketplaces for buying and selling NFTs, and NFT transactions are becoming increasingly popular.¹⁸⁹ In 2020, the NFT market involved \$338 million in transaction volume.¹⁹⁰ NFTs can be valued in money and are capable of forming the subject of commercial transactions, meaning NFTs are goods under the EU’s “free movement of goods” provisions and should not have customs duties imposed on them.

B. *NFTs Are Similar to Other Products Classified as “Goods”*

If NFTs should be considered “goods” for the purposes of the EU’s “free movement of goods” provisions because NFTs are similar to other products which have been considered “goods” and they are dissimilar from products that have been deemed not to be goods. As previously mentioned, a European Court of Justice case determined that artistic works are considered “goods” under the “free movement of goods” provisions.¹⁹¹ NFTs are essentially digital works of art, so they should be given the same status as physical art. The only real difference between NFTs and traditional art is that NFTs have no tangible form, which may seem to disqualify NFTs from being considered “goods.” However, as previously mentioned, a European Court of Justice ruling determined that electricity is covered by the “free movement of goods” provisions, indicating that tangibility is not required for a product to be considered a good.¹⁹² While some have argued this ruling was not meant to create a general principle about tangibility and was instead trying to regulate electricity like other forms of energy, the plain language of the opinion states that “electricity constitutes a good.”¹⁹³ Additionally, later cases have built upon this opinion, with a 2012 case indicating that computer

¹⁸⁶ See Case 7/68, *Comm’n v. Italian Republic*, 1968 E.C.R. 432, 428.

¹⁸⁷ See *Cryptocurrency Regulations in the EU*, COMPLY ADVANTAGE (July 6, 2018), <https://complyadvantage.com/knowledgebase/crypto-regulations/cryptocurrency-regulations-eu-european-union/>.

¹⁸⁸ See Clark, *supra* note 13.

¹⁸⁹ *Id.*

¹⁹⁰ Luke Lango, *Why the NFT Market Could Really Grow by 1,000X*, NASDAQ (Sep. 5, 2021, 7:30 AM), <https://www.nasdaq.com/articles/why-the-nft-market-could-really-grow-by-1000x-2021-09-05>.

¹⁹¹ See Case 7/68, *Comm’n v. Italian Republic*, 1968 E.C.R. 432, 428.

¹⁹² See Case C-393/92 *Mun. of Almelo*, ECLI:EU:C:1994:42, opinion of Advocate General Darmon (Feb. 8, 1994).

¹⁹³ *Id.*

software can be considered a “good.”¹⁹⁴ If non-tangible products like electricity and computer software are considered goods, NFTs can be considered goods as well. And since works of art are considered goods and NFTs are just virtual art, NFTs should be considered goods.

The types of things not considered goods are often classified as services instead, but NFTs cannot be considered services. The European Court of Justice has ruled that fishing rights and lottery tickets are not goods, saying fishing rights merely give access to goods and lottery tickets give access to a service, the lottery.¹⁹⁵ Purchasing an NFT does give the buyer access to the work, but NFTs themselves are not like fishing rights because an NFT is a good in itself, rather than just giving the owner the right to acquire a good. Owning a license to fish in a certain area doesn't grant ownership of the area or any of the fish. Owning an NFT, on the other hand, grants ownership of the image. In short, NFTs are not like fishing rights and do not merely give access to goods because they grant ownership of goods. Similarly, NFTs are not equivalent to lottery tickets because NFTs do not grant access to a service. While lottery tickets grant buyers the ability to participate in a service, namely the lottery, NFTs do not grant any such participation in a service. There is no service involved in NFTs. Buying an NFT grants ownership of a work of art; it does not grant a service. Because NFTs are not services and do not merely grant the right to search for a good, NFTs should be considered “goods” under the EU's “free movement of goods” provisions.

C. Considering NFTs Goods Promotes the Purposes of the Internal Market

The EU was created with many goals, including promoting economic development and preventing military conflict. Similarly, the EU's internal market has several goals, including promoting a closer relationship between European nations, eliminating obstacles to economic expansion, and ensuring economic progress.¹⁹⁶ Imposing customs duties or similar charges on the transfer of NFTs would undermine these goals, so NFTs should be considered goods and made free from customs charges.

Imposing import or export charges on NFTs would be administratively difficult, if not impossible. Duties are imposed on goods when they cross international borders, and they are usually paid by importers when goods enter a new country.¹⁹⁷ For virtual goods, the logistics of

¹⁹⁴ See Case C-128/11, *UsedSoft GmbH*, ECLI:EU:C:2012:407.

¹⁹⁵ See Case C-97/98, *Jägerskiöld*, 1999 E.C.R. I-7344; Case C-275/92, *Her Majesty's Customs and Excise*, 1994 E.C.R. I-1089.

¹⁹⁶ See TFEU, *supra* note 96, at Preamble.

¹⁹⁷ See Mos Moses L. Pava, *Tariff: International Trade*, BRITANNICA (Dec. 16, 2022), <https://www.britannica.com/topic/tariff>; Howard Gleckman, *What is a Tariff and Who Pays It?*,

collecting duties would be difficult. There is no opportunity for officers to check that duties have been paid for virtual goods because they don't physically cross borders. Essentially, there is no way to ensure that customs duties for virtual goods get paid. To ensure duties are paid on all virtual transfers of goods would use a considerable amount of resources which could be spent on other aspects of economic development. In essence, imposing customs duties on virtual goods like NFTs and ensuring these duties get paid would be a barrier to economic expansion, which the internal market sought to eliminate. Exempting NFTs from customs duties by considering them goods would avoid these barriers to economic development and support the goals of the internal market.

As previously discussed, NFTs are becoming increasingly prevalent, but countries are unsure what they are and how to deal with them. Coming up with a definite regulatory scheme for NFTs would indicate economic development in addressing concerns of the digital age. So, the EU declaring NFTs goods and committing to not impose customs duties on them would fulfill the goal of ensuring economic progress. Additionally, not imposing customs duties on NFTs would promote the internal market's goal of removing barriers to trade and reducing variation between nations.¹⁹⁸ In short, declaring NFTs goods and not imposing customs duties on their import and export would promote the goals of the EU's internal market and modernize the European economy.

D. How the MiCA Proposal and WTO Law Affect EU Regulation of NFTs

The Markets in Crypto-Assets (MiCA) proposal discussed in Section II.C is an effort by the EU to give uniform guidance and promote good practices in the crypto-asset market.¹⁹⁹ If enacted, its regulations on crypto-asset white pages would not apply to NFTs because unique, non-fungible goods are exempted from these provisions, but the regulations on asset-referenced tokens could apply to NFTs.²⁰⁰ However, based on the context and substance of the proposal, NFTs should not be covered at all. If NFTs are covered under this proposal, it would not affect whether NFTs are considered goods under the "free movement of goods" provisions because this proposal does not relate to trade law. First, this proposal should not apply to NFTs. The proposal defines a crypto-asset as "a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology."²⁰¹ The purchase of an

TAX POLICY CENTER (Sep. 25, 2018), <https://www.taxpolicycenter.org/taxvox/what-tariff-and-who-pays-it>.

¹⁹⁸ See TFEU, *supra* note 96, at Preamble.

¹⁹⁹ See *Proposal for a Regulation*, *supra* note 149.

²⁰⁰ See *id.* at arts. 4(2)(c), 15(1).

²⁰¹ See *id.* at art. 3(1)(2).

NFT does convey some rights, mainly the right to sell, but NFTs themselves are not representations of rights. Additionally, the proposal is designed to regulate the financial industry, as evidenced by its goal of enabling tokenization of traditional assets, its implementation by the European Banking Authority and the European Securities and Markets Authority, and its role as part of the EU's Digital Finance package. Based on the definition given and the context of the proposal, NFTs should not be regulated by this proposal. Second, if NFTs are regulated under this proposal, this would not affect whether NFTs are considered goods and granted freedom from customs duties under the "free movement of goods" provisions. The MiCA proposal is part of the EU's Digital Finance package, which provides strategies for transitioning into the digital age.²⁰² The Digital Finance package is not intended to alter EU trade law, including the "free movement of goods" provisions. In short, the MiCA proposal does not affect whether NFTs are considered goods.

The WTO's "moratorium on e-commerce" is an agreement by member countries to not impose customs duties on electronic transactions.²⁰³ Electronic commerce is defined as "the production, distribution, marketing, sale or delivery of goods and services by electronic means," which does seem to include NFTs, though no official WTO documents confirm this.²⁰⁴ If NFTs are protected from customs duties by a WTO agreement, the EU might not need to ban customs duties on NFTs independently. However, the WTO's moratorium on e-commerce is not guaranteed to continue due to opposition from developing countries like India and South Africa.²⁰⁵ So, it would benefit the EU to be certain that customs duties will not be imposed on NFTs, which would undermine the EU's goals of economic development and unity. For this reason, the EU should declare NFTs to be goods, free from customs duties under the "free movement of goods" provisions notwithstanding the WTO's ban on customs duties for e-commerce.

IV. CONCLUSION

NFTs are an emerging and complex combination of technology and art. If NFTs are going to continue to increase in relevance, there must be clear answers about how the law applies to them, and so far, there is very little law addressing NFTs. It remains unclear how NFTs should be regulated under tax law, intellectual property law, securities law, and more, but it is clear how EU trade law should apply to NFTs. NFTs should be considered goods for the purposes of the EU's "free movement of goods" provisions, meaning

²⁰² See *Digital Finance Package*, EUROPEAN COMMISSION (Sept. 24, 2020), https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en.

²⁰³ See General Council Decision, *Work Programme on Electronic Commerce*, WT/L/1079 (Dec. 11, 2019).

²⁰⁴ *Work Programme on Electronic Commerce*, *supra* note 165.

²⁰⁵ See *The E-Commerce Moratorium*, *supra* note 166.

there should be no customs duties imposed on NFTs moving between EU member countries. Considering NFTs goods is in line with past European Court of Justice cases addressing what is considered a good, and this classification promotes the goals of the EU's internal market.