1. Introduction

Today we are witnessing an irruption of metaverses or virtual worlds accessed via the Internet (see Carrasco Perera, Á., and Álvarez López, C., “What is a metaverse?”). Many of these virtual worlds are created for financial purposes, either to obtain publicity for certain products and services, or to encourage consumption or investment by purchasers of goods and services from and in that metaverse, without prejudice to the fact that the units of value, tokens, can be transferred outside the metaverse in electronic trading platforms (marketplaces).

In this analysis we will focus on tokens as digital representations of value or rights that may be transferred and stored electronically using distributed ledger technology or similar technology. We find this definition, as set out in Article 3 of the Proposal for a Regulation of the European Parliament and of the Council on markets in crypto-assets (MiCA) of 19 November 2021 [2020/0265 (COD)], to be appropriate.

Our law does not specifically regulate metaverse transactions, nor does it regulate tokens as units of value (means of payment, access to services, subject matter of ownership...)

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or investment) used in them. The analogical approach must therefore be used, where appropriate, for the application of the real-world rule to certain virtual assets, taking into account the function that these tokens fulfil or can fulfil in the virtual world. For example, if tokens that could be considered financial instruments were offered in a metaverse, the applicable regime would be that contained in the Securities Market Act and applicable European legislation (prospectus regulation, market abuse regulation, transparency directive, etc.); if they were to be considered electronic money, understood as a monetary value stored by electronic or magnetic means that represents a claim on the issuer, which is issued upon receipt of funds for the purpose of carrying out payment transactions and which is accepted by a natural or legal person other than the issuer of electronic money, the payment services legislation (Royal Decree-law 19/2018 of 23 November) would be applicable.

In this brief analysis of metaverse tokens, we will consider as a starting hypothesis a virtual world whose founding entity is established in a member country of the European Economic Area, so that we can refer to the Spanish or the European regulations under development applicable to these digital representations of value or rights.

2. **Metaverse tokens**

Without prejudice to the difficulty involved in establishing categories of tokens, in addition to the mobility in the assignment of a token to a certain category depending on the use given to it by its holder, in a metaverse, we can generally find four types of tokens: non-fungible tokens (NFTs), utility tokens, asset-referenced tokens and metaverse currency tokens, which are currently distinct from classic cryptocurrencies such as bitcoin or ether. Electronic money tokens (e-money tokens) and security tokens could also appear. Governance tokens, which allow the holder to exercise governance rights in the decentralised autonomous organisation (DAO) of the metaverse, an organisation without legal personality, are excluded from this study. From these governance tokens derive governance rights that allow their holder, a member of this organisation, to decide - limited by the content of the smart contract from which they derive - on matters relating to the functioning and development of the metaverse. Sometimes, governance rights are linked to the ownership of a metaverse currency token, as is the case of the mana in Decentraland.

Since cryptoassets appear to be a very effective tool for money laundering, Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, whose content in this respect has been transposed into the law of the Member States of the European Union, establishes a regime for the control of the activity of certain cryptoasset service providers, in particular the activities of exchanging virtual currency for fiat currency and the safekeeping of electronic wallets. The currency of the metaverse is normally purchased against payment of cryptocurrencies (bitcoin or ether, for example), although nothing prevents it from being purchased directly with legal tender on a marketplace or electronic platform that performs the function of a virtual exchange house. The aforementioned classic cryptocurrencies are also purchased on marketplaces, and these cryptocurrencies are purchased with legal tender. The activity of exchanging virtual currency for fiat currency is therefore in many cases the prelude to the metaverse. And
the electronic wallet loaded with metaverse currency will allow the avatar of its holder to acquire digital assets (tokens) within the metaverse.

2.1. Access to the metaverse: the wallet

To participate in a metaverse the user needs to create a wallet to which the amount of “virtual money” (tokens) that the user deems appropriate will be added and which will allow the user to acquire the metaverse cryptocurrency. The prevailing models require the customer to acquire the metaverse money (for example, mana in the Decentraland metaverse or sand in The Sandbox, to mention the best known metaverses), a currency that is acquired by exchanging cryptocurrencies or virtual currency tokens (ether, bitcoin, etc.) for this currency created in the metaverse in specialised marketplaces, which will allow us to acquire digital goods or services. The purchase of cryptocurrency will have to be made with legal tender, for example, euros for ethers. This electronic wallet containing ethers will allow us to subsequently acquire the virtual currency of the metaverse. As we have indicated, we cannot exclude the possibility of being able to acquire the metaverse currency directly with legal tender (by paying the amount with a credit card or using payment applications on the market). Nor that it could be purchased over the counter (OTC), in a direct transaction between private individuals outside the marketplace.

Once the user has the metaverse currency in his or her wallet, he or she can purchase tokens in the metaverse. Entry into the metaverse, i.e. the creation of the avatar, is normally free of charge. In general, the metaverse will offer non-fungible tokens representing intangible goods (a plot of land, a painting, clothes, accessories) or services (a ticket to a virtual music concert, to a bar, etc.), tokens delimited by the content of the smart contract within a constantly evolving range of possibilities. For this reason, the following statements should be understood in relative terms, since entrepreneurs can create, thanks to these disruptive technologies, new types of digital assets or a combination of those mentioned below.

2.2. Digital assets to be acquired in the metaverse: non-fungible tokens and service tokens against proprietary digital currencies

a) Non-Fungible Tokens (NFTs)

In a first approach, we could define the non-fungible token (NFT) as a digital representation that can only be stored electronically, that only exists in the virtual world and that is irreplaceable by another token, as it is unique and unrepeatable in the metaverse. The feature of transferability, commonly predicated of these tokens, is not of essence in their characterisation, notwithstanding the fact that in a general approach they can be the subject matter of a transfer: what is transferred is not the token itself (pure digital creation), but the certificate of its existence and uniqueness in the virtual world. Normally, the non-fungible token is owned by a single person, with no possibility of division in the metaverse; its value is given by the unique characteristics of that cryptoasset and by the
utility it provides to its holder. However, nothing prevents the non-fungible token from being split into a multiplicity of tokens. These would be fungible with each other and would lose their NFT nature.

It is not of the essence of this concept that the non-fungible token is created for an indefinite duration or expires after, for example, one year from its acquisition. Some tokens are designed to exist virtually for a certain period of time after which they would expire. Others remain as long as technology permits.

Non-fungible tokens can generally be transferred not only in the metaverse (think of a plot), but also on marketplaces outside the virtual world, such as OpenSea. The most exemplary cases, in addition to plots or dwellings in the metaverse, would be those of collectible assets, works with intellectual property or assets whose sole purpose is to be used in games or competitions. The CNMV refers to the latter in order to exclude them from the scope of application of the rules instrument Circular 1/2022, insofar as they are unique, non-fungible and not massively offered as subject matter of investment object.

However, according to the Financial Action Task Force (FATF) guidance on the risk of virtual assets and virtual asset service providers, updated in October 2021, a non-fungible token could be considered a payment or investment instrument for the purposes of money laundering and terrorist financing legislation. Non-fungible tokens are defined in this document as digital assets that are unique and non-exchangeable, and which in practice are used as collectibles rather than as payment or investment instruments. These assets, depending on their characteristics, are generally not considered as “virtual assets” (VA) in the definition given by the abovementioned group. The intergovernmental body defines virtual assets as representations of value that can be transferred or traded digitally and that can be used for payment or investment purposes. This definition does not include digital representations of legal tender, transferable securities and other financial assets referred to in other recommendations of the group. The G20 has urged member countries to incorporate this guidance into their domestic law. The Financial Action Task Force understands that, while non-fungible tokens could not a priori be considered as virtual assets (VA), they may fit the definition if they are used in practice as a means of payment or investment. It therefore postulates, in view of the rapid evolution of distributed ledger technology that enables the creation of tokens or digital assets, that a functional approach is particularly relevant in the context of non-fungible tokens. It recommends that States consider the application of these standards to non-fungible tokens on a case-by-case basis.

On the other hand, the abovementioned proposal for a MiCA regula-
tion chooses to exclude them from its scope of application: although this type of cryptoasset can be traded on marketplaces, accumulated for speculative purposes and - in very specific cases - used as a medium of exchange, they are not easily exchangeable and their value in relation to another, as they are unique, cannot be determined by comparison with an equivalent asset or by reference to the value of this token on a given market. These characteristics limit the scope for the potential use of these tokens as a financial asset. A different matter is the aforementioned division of a non-fungible token into fractions. These new tokens issued in this way are not unique and non-fungible and could fall within the scope of the proposed MiCA regulation.

b) Utility tokens

They are a type or class of cryptoasset that gives access in the metaverse to a certain service (for example, the aforementioned attendance to a concert) or that allows to exercise a certain right or even to intervene in the governance or management of the metaverse through access as a member of the decentralised autonomous organisation (DAO). These utility tokens are only accepted by the issuer of the token in question (the concert organiser, the DAO) and it is currently more difficult to transfer them outside the metaverse in a marketplace, as is the case with non-fungible tokens. However, the provision of a service by the avatar (who wins a game in a game in the metaverse or the animator of events within the metaverse) is sometimes remunerated with such tokens, which can then be exchanged for money in the metaverse.

We have already indicated that a token, depending on the content delimited by the smart contract from which it originates, can be assigned to one or another category or share the characteristics of several. This would be the case of mana, the currency of Decentraland, which together with its use as a means of payment allows the exercise of governance rights in the decentralised autonomous organisation (DAO) of the metaverse.

2.3. Legal regime applicable to tokens

After this summary and brief description of cryptoassets in the metaverse, we will briefly refer to the Spanish positive law and the projected European law on cryptoassets that could be applicable to the holder of tokens in the metaverse, apart from invoking financial and payment services legislation when tokens can be considered financial instruments or electronic money in view of the function they fulfil for their holders. It should be kept in mind that financial services legislation was not designed with distributed ledger technology and cryptoassets in mind. This is acknowledged by the European Commission in the Proposal for a Regulation on a pilot regime for market infrastructures based on distributed ledger technology [2020/0267(COD)].

We must therefore consider the legal regime applicable in Spain to
cryptocurrencies that allow us to acquire metaverse money (the anteroom to the metaverse), metaverse money or token currency instrumented in tokens, non-fungible tokens and utility tokens.

With regard to the first question, we have already referred on another occasion to the provisions on virtual wallet managers and providers of certain cryptocurrency services under the Money Laundering and Terrorist Financing Prevention Act 10/2010 of 28 April, amended on this point last year, and we refer to this analysis².

The legal nature of the tokens used as a unit of exchange in the metaverse is a complex issue. In many cases, the units available are limited from the moment the virtual universe is created (for example, three billion units of sands in The Sandbox) and therefore differ in this respect from classic cryptocurrencies such as bitcoin or ether, which lack a backing asset (they are purely a creation of the distributed ledger or blockchain, without reference to any underlying asset). The unit of exchange of the metaverse has been issued by the creators of this virtual world and can be bought or sold through marketplaces. It can therefore be subsumed under the definition of virtual currency provided by the Spanish legislator in Article 1(5) of Act 10/2010 (“digital representation of value not issued or guaranteed by a central bank or public authority, not necessarily associated with a legally established currency and which does not have the legal status of currency or money, but which is accepted as a medium of exchange and can be transferred, stored or traded electronically”).

At this point, in the planned European law, which most probably was not thinking about the metaverse when it drafted the Proposal for a Regulation on cryptoasset markets (MiCA), a clear difference is established, at least in the version consulted in November 2021, between cryptocurrencies such as bitcoin or ether and metaverse money, the tokens that are used there as a unit of exchange for the acquisition of digital goods or services.

Classic cryptocurrencies are not covered by the proposed MiCA regulation because there is no single issuer of bitcoins or ether, unlike mana or metaverse sand in which there is an issuer that creates this unit of exchange (in limited number) used in the specific metaverse and a white paper or prospectus that incorporates the main characteristics of these assets. In the case of ether, although it was originally considered a utility token, the subsequent evolution of this cryptoasset and its widespread use by individuals and companies leads us to consider it a classic cryptocurrency.

In general terms, the proposed MiCA regulation proposes a three-part classification: asset-referenced tokens, e-money tokens and utility tokens.

Leaving aside e-money tokens (referenced to the value of a legal tender fiat currency), the means of payment or medium of exchange of the metaverse could in some scenarios be considered an asset-referenced token, defined as “a type of crypto-asset that purports to maintain a stable value by referring to the value of several fiat currencies that

are legal tender, one or several commodities or one or several crypto-assets, or a combination of such assets”.

Utility tokens, provided they are issued, would also be covered by the proposed MiCA regulation, which defines them as “a type of crypto-asset which is intended to provide digital access to a good or service, available on DLT [distributed ledger technology], and is only accepted by the issuer of that token”. But the proposal does not apply to utility tokens that do not have an investment nature.

MiCA also excludes non-fungible tokens from its scope of application and focuses on tokens that can circulate or be exchanged in a financial market, whether used as a medium of exchange or investment, and which are outside the scope of current financial services legislation. They are unique tokens - in the sense that they represent a single digital object that can be unambiguously associated with a user or a digital wallet -, are indivisible and cannot be replicated in the metaverse.

In any case and in Spain, if any of these tokens is massively offered as a subject matter of investment, through advertising activity, they will be subject to the advertising control regime by the Securities Market Authority (CNMV) set out in Circular 1/2022, of 10 January, on the advertising of cryptoassets presented as the subject matter of investment.

In conclusion, we argue for a functional approach to the legal regime applicable to metaverse tokens, depending on the characteristics that the smart contract attributes to the token and the use that its holder gives it inside or outside the virtual world.

The main novelty of its creation law and circulation regime lies in the lack of a centralised ledger in the metaverse, as is the case, for example, with book-entry securities. For this reason, the approach taken by the Spanish supervisor deserves a positive assessment, said approach dispensing with the classification of tokens and focusing on the function that the cryptoasset fulfils or can fulfil in the market: if they are or can be the subject matter of investment (or speculation, we would add), whether cryptocurrencies, virtual currencies, utility tokens or even non-fungible tokens, they would be subject to the supervision of the Securities Market Authority when they are the subject matter of advertising campaigns. Disruptive technologies - such as distributed ledger technology - and especially the mass acquisition of these digital assets have led the CNMV, for the sake of investor protection, to adopt the aforementioned regulation, unlike what happened in previous times when goods such as stamps or trees, despite being offered as assets suitable for investment whose potential purchasers were an indeterminate number of people, escaped the control of the Securities Market Authority.

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