



# Football Legal

*The international journal dedicated to football law*

# 16 - December 2021

## Calcio and Crypto – What should Italian football clubs keep in mind while negotiating partnership agreements with cryptocurrency platforms?



→ **Blockchain - Cryptocurrencies - Non-Fungibles Tokens (NFTs) - Fan Tokens - Smart contracts - Sponsorship - Naional law - Serie A League**



By Gianluca CAMBARERI  
Lawyer, Tonnucci & Partners  
Rome - Italy

It is no secret that cryptocurrency and football have become a pair. What appeared to be a tendency within the football sponsorship and marketing industry has become a trend that will most probably guide the football market in the next future.

In Italy, like in all major football nations, football clubs have been harshly hit by the pandemic era, and cryptocurrency and related blockchain opportunities are currently constituting a new and profitable source of revenues for clubs, also in consideration of the measures adopted by the Italian Government in 2018 with the “*gambling advertising ban*” which caused the loss of an important revenue stream for the clubs.

As of today, many Italian *Serie A* football clubs have entered into agreements with cryptocurrency platforms. Business models and partnership structures may vary from club to club, also depending on the business of the partner platform(s), but these partnerships typically provide for a sponsorship deal and a license to produce and commercialize fan tokens allowing holders to

impact certain decisions regarding the club or accessing exclusive experiences or non-fungible tokens including property assets of the club (brand, audiovisual content, players’ image, etc.).

### **Tokens, Non-Fungible Tokens, Blockchain and Smart Contracts applied to Football Business**

Fan tokens are fungible (*i.e.* interchangeable) digital assets that can be bought on the partners’ platform. They usually grant voting rights in specific decision-making polls, impacting the club’s non-athletic strategy and/or the right to access exclusive “*money can’t buy*” experiences. As opposed to fungible tokens, non-fungible tokens (commonly known with the acronymous NFT) are unique, and their contents may vary on the single projects: digital reproduction of a physical shirt, work of art inspired to the IP properties of the clubs, collectibles including the image of the players, audiovisual contents enriched with unique graphics or multi-media contents.

Trace of each token transaction (so-called “*hash*”) is stored on a decentralized digital ledger called blockchain, a technology that guarantees the considered digital asset to be immutable and incorruptible. Each token transaction is run by software programming called smart contracts, which allow to verify ownership and handle transactions.

Generally, the tokens can be traded only through cryptocurrencies and, at least upon first purchase, exclusively on the associated cryptocurrency platform.

### **Main legal issues to have in mind when it comes to Football/Crypto partnership**

#### **Financial regulations aspects and risk of qualification as a security**

Nowadays, in Italy, there are no specific regulations banning or restricting the offering of cryptocurrency and tokens to the Italian public. Indeed, cryptocurrency is not included within the definition of “*electronic money*” within the meaning of EU Directive 2009/110

(transposed in Italy with the Legislative Decree no. 45/2012) and neither cryptocurrency nor NFTs have been expressly included within the definition of financial products under Article 1 u) of the Consolidated Law on Finance (“*Testo Unico della Finanza*”).

There is, however, a debate at stake in this regard, and EU, US and European Governments and market stakeholders are reflecting on a possible regulation on crypto and on the opportunity to qualify tokens as financial products traded with speculative purposes. In particular, the nature of tokens is questioned worldwide, including in Italy, and certain observers consider that even though a token can reasonably qualify as a mere utility tool upon its first sale, the way it is promoted or sold to the public may cause the latter to become a security, which speculative nature may call for specific regulations.

### ***Technical characteristics of the crypto/token business and legal issues pertaining thereto***

Tokens are stored and traded on the blockchain, so all the transactions are tracked and registered, while the digital assets associated with the tokens are stored elsewhere and do not benefit from the immutability and inviolability of the blockchain. This might trigger claims and actions from token holders (*i.e.* in case of theft of the underlying digital assets or fraud), which might not only revert to the trading platform but directly to the club, considering the inclusion and centrality of this latter (especially where the club is the token issuer).

Token transactions are completed through “*smart contracts*”, which are not typical contracts but programs allowing to run the tokens on the blockchain. This means that all relevant terms and conditions pertaining to the digital asset purchased will necessarily have to be stated in separate Terms & Conditions (T&Cs) to be accepted by the purchaser upon purchase of the token. From the club perspective, it is essential that certain aspects pertaining to the intellectual property, image rights and, more generally, ownership of the underlying assets be regulated under the T&Cs in order to avoid risks of claims from the token holders.

In relation to football digital products such as NFTs, special attention must be drawn to football players’ image rights, often used as underlying content of the token (*i.e.* football players’ collectibles). It may be questioned by players themselves or players’ associations such as FIFPRO (the international union of football players’) or AIC (Italian football players’ union) if those rights belong to the clubs, which have their full right of economic exploitation or not. Indeed,

boundaries between club’s right to use and license the collective image of the team and the player’s right to exploit its individual image are not always crystal clear and clubs shall carefully carve out any responsibility that may derive from a possible infringement of those rights.

Moreover, with specific regards to Football tokens, it is worth stressing that the blockchain’s characteristic of immutability appears to be hardly compatible with the concept of temporary license, which is endemic to club’s partnership with sponsors and licensees, and might become an issue when the partnership comes to an end if not adequately regulated in the contract between the club and its partners.

More generally, it is a matter of fact that there is no global regulation pertaining to cryptocurrency and NFTs and this is also imputable to the fact that they are trans-territorial and transnational transactions by nature. This creates uncertainty as to effective compliance with an applicable legal framework and the risk of a potential violation of applicable regulation is rather high, especially in a context where there is a lack of transparency.

### ***How to mitigate legal risks while negotiating partnership agreements with cryptocurrency/NFT platforms?***

In light of the above and as a general principle, due to the uncertainty related to the business and legal framework applicable thereto, it is recommendable that fan token/NFTs deals are structured as license agreements under which clubs grant the right to use their brand and IP assets to the crypto partners, which remains exclusively responsible for the implementation of the business (*i.e.* creation and trading of the tokens) assuming all the risks pertaining thereto. Structured indemnification clauses shall be inserted in the license agreement so as to protect the clubs accordingly.

One other general advice is to investigate the cryptocurrency platform interested in the partnership. Not all platforms are identical and business models may vary among different operators. Hence, this is not only a matter of economics and cash flow but a matter of credibility and reputation for the club, which is essential for the success of token operations.

The uncertainty related to the business of crypto makes lead advisable for the clubs to negotiate agreements to mitigate risks of a possible change/implementation of a specific regulation regarding cryptocurrency or tokens.

In particular, clubs should aim at inserting specific withdrawal clause in favor of the club in sponsorship and license agreements stipulated with cryptocurrency platforms providing for club's right to withdraw immediately and without costs in case of a change in regulation which renders the activity illegal or, more generally, damageable to club's image and reputation.

In order to adequately protect its immaterial assets such as logo, team players' image and archive materials, clubs should obtain specific representations regarding the use and ownership of corresponding intellectual property and image rights. It should be made clear in terms of the license that what is granted is neither the ownership of the underlying asset (audiovisual content, photograph, work of art) nor a general license to use the same but a limited license of the underlying asset in connection to the token. On the other side, special contractual carves-out shall be provided to avoid or limit club's liability to use players' image rights within the NFTs. Relevant will also be the contractual regulation of the termination of the license, whereby the platform shall cease to issue / commercialize tokens and, where appropriate (for unsold NFTs for example), proceed to the burning of the token.

Adequate clauses shall also be included in the license to keep the club harmless from any claim or damage that may derive from the token digital file or physical asset associated thereto and, more generally, from any damage deriving from technological failure.

---