

The logo for Warwick Business School (WBS) features the lowercase letters 'wbs' in a white, sans-serif font, centered within a solid blue square.

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The Legal Challenges of the Decentralised Online Platform Applications

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Luigi Cantisani

About Luigi



Tech & Business Lawyer



PGR Student



e-mail: cantisani@futura.legal or luigi.cantisani@warwick.ac.uk

LinkedIn: <https://www.linkedin.com/in/luigicantisani/>

- **Legal challenges in practice**
- **My research project**

Background

The advent of the Dapps

- 2008 - Advent of **Bitcoin**, a peer-to-peer electronic cash system which introduced:
 - it is a system that serves a single use case, namely the issuance and exchange of Bitcoin itself
- 2014: **Ethereum** debuts
 - introduced its native cryptocurrency, **Ether**
 - applied the blockchain concept and ideology to «*more than just money*»
 - made it possible to design infinite use cases through the introduction of **smart contracts**;
 - paved the way for creating **decentralised application platforms** (“**Dapps**”)

In the aftermath of Ethereum

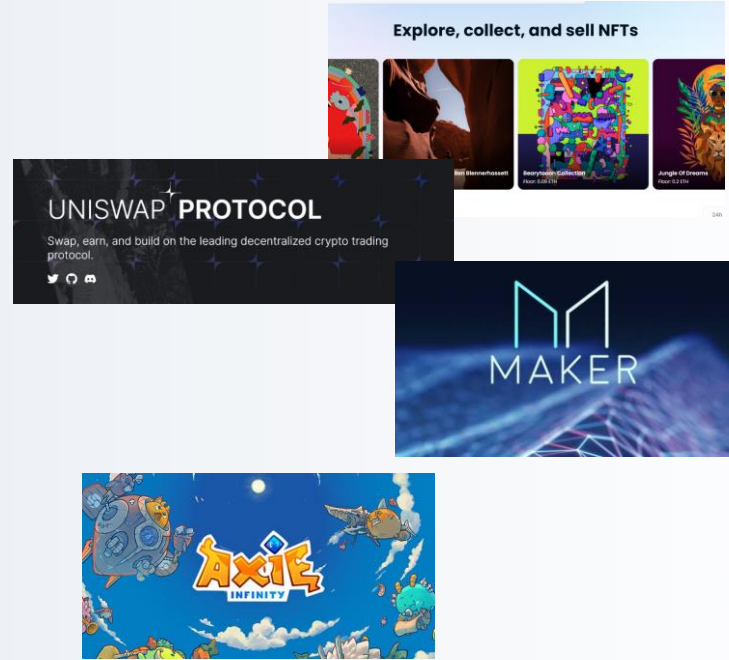
- Distributed ledger technology has grown as a large family of ledgers sharing a variable degree of decentralisation of ledger governance (blockchains, tangles, etc.)
- Proliferation of **crypto-assets representing rights**, commonly referred to as “**tokens**”, meant to serve different purposes, such as **security tokens, utility tokens, payment tokens, governance tokens**, and **other** digital representations of rights (e.g. NFTs) → See the “Token Model Container” in the Liechtenstein Blockchain Act 2000
- Emergence of **decentralised autonomous organisations**
- Rise of **Dapps** which may include all or some of the above listed elements

Recurring patterns of Dapps

- Based on 1 (at the minimum) **utility token** (which could be a **security** in disguise)
- Fund-raising through the sale or pre-sale of tokens, known as **Initial Coin/Token Offerings** (ICO//ITO)
- Some of them implement or promise to implement a DAO for the decentralised management of the Dapp (which implies a **governance token**)
- **Tokenomics** at the centre of the business model

Certain popular Dapps

- **OpenSea**, a marketplace for NFTs
- **Uniswap**, a decentralised exchange
- **MakerDAO**, a borrowing & lending platform based on the stablecoin **DAI**
- **Axie Infinity**, a videogame platform that paved the way for the play-to-earn model



Legal challenges in practice

FAQs by Dapps' developers

Do I need to incorporate a company for the purpose of my project?

- Yes *vs* No
- If yes, single entity *vs* dual entity
 - Single entity → the same entity acts both as a platform operator and a token issuer
 - Dual entity → one entity acts as a platform operator, the other one as a token issuer

FAQs by Dapps' developers

Security or not security?

- According to the laws of which country?
 - Country of issuance?
 - Countries of destination of the offer?



In the USA

- Federal laws and a federal regulator (SEC)
- States laws and regulators
- Self-regulatory organizations

Howey Test, a transaction is an **investment contract** if:

- a) it is an investment of money;
- b) there is an expectation of profits from the investment;
- c) the investment of money is in a common enterprise;
- d) any profit comes from the efforts of a promoter or third party.

In the EU

- EU laws
 - Directive 2014/65/EU (MIFID II)
 - Regulation (EU) 600/2014 (MIFIR)
- Laws of the Member States
- Secondary sources of the law: guidelines and decisions by European Banking Authority (EBA), European Securities and Markets Authority (ESMA), and domestic regulators.

Make no mistake: **Markets In Crypto-Assets (MiCA) Regulation** will not apply to investment/security tokens

FAQs by Dapps' developers

My platform is going to be decentralised... Does this mean that my Dapp is not subject to the laws of any jurisdictions?

Freedom of contract and party autonomy

VS

Private International Law and Conflict of Laws Rules

VS

Overriding Mandatory Rules and Public Policy

Uniswap Labs Terms of Service

Last modified: March 3, 2023

8.1 Governing Law

You agree that the laws of the State of New York, without regard to principles of conflict of laws, govern this Agreement and any Dispute between you and us. You further agree that each of our Products shall be deemed to be based solely in the State of New York, and that although a Product may be available in other jurisdictions, its availability does not give rise to general or specific personal jurisdiction in any forum outside the State of New York. The parties acknowledge that this Agreement evidences interstate commerce. Any arbitration conducted pursuant to this Agreement shall be governed by the Federal Arbitration Act. You agree that the federal and state courts of New York County, New York are the proper forum for any appeals of an arbitration award or for court proceedings in the event that this Agreement's binding arbitration clause is found to be unenforceable.

OpenSea Terms of Service

Last Updated: August 2nd, 2022

17. Governing Law and Venue

These Terms and your access to and use of the Service shall be governed by and construed and enforced in accordance with the laws of the State of New York (without regard to conflict of law rules or principles of the State of New York, or any other jurisdiction that would cause the application of the laws of any other jurisdiction). Any dispute between the parties that is not subject to arbitration as set forth in Section 16 or cannot be heard in small claims court, shall be resolved in the state or federal courts of New York County in the State of New York, and the United States, respectively, sitting in the State of New York.

Art. 3 UK GDPR

1. *This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the United Kingdom, regardless of whether the processing takes place in the United Kingdom or not.*
2. *This Regulation applies to the relevant processing of personal data of data subjects who are in the United Kingdom by a controller or processor not established in the United Kingdom, where the processing activities are related to:*
 - (a) *the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the United Kingdom;*
 - (b) *the monitoring of their behaviour as far as their behaviour takes place within the United Kingdom.*

The ultimate question

Where should I start my project?

The importance of being of a blockchain and crypto-assets friendly jurisdiction

Should technology be regulated, and if yes, to what extent?

My research project

**(Dis)intermediating Online Platforms:
A disruptive phenomenon analysed from a EU law
perspective**

Central Research Question:

**If and to what extent, from a European Law perspective, are
Dapps really disintermediated?**

Unpacking the central question

- **Why does disintermediation matter?**
- **Why from an European Law perspective?**

Why the legal meaning of disintermediation matters?

Because if we remove the actor who normally serves as an 'intermediary' from the platform formula, we need to understand how the rights, obligations and liabilities of the intermediary are reallocated

The often thin line between centralisation and decentralisation requires more legal certainty

The reasons for choosing the EU framework

- Traditionally, the EU is very careful and stringent on issues such as **consumer, data and markets protection**
- The EU regulates issues rooted in technology in accordance with a **principle of technological neutrality**
- The impact of the **GDPR** (Regulation EU 2019/679)
- The ongoing process of **over-regulation** in the EU

Focus: the impact of the GDPR

- **Extra-territorial scope of application:**
 - GDPR applies not only to operators established in the EU, but also to data controllers and data processors not established in the EU but offering services or products to data subjects located in the territory of the EU
- The change from a prescriptions-based to a **risk-based approach**
- The *post*-GDPR “**Brussels Effect**”:
 - Bradford (2012, 2020) coined the expression 'Brussels effect' to indicate the recognisable influence of the EU law over other legal frameworks
 - The effect is visible with regard to the GDPR (India, Brazil, Japan, California)
 - The EU's intention seems to be creating a globally exportable regulatory framework for digital technologies

Focus: the over-regulation process of the EU

- Coming soon...
 - **Data Act**, which defines who can create value by using data; provides for interoperability standards to remove barriers to sharing; defines smart contracts, also setting out the security requirements they must have
 - **Market in Crypto-Assets Regulation**: is meant to govern define utility, payment and stablecoins, and govern issuers other than those offering securities and Virtual Asset Service Providers (VASP)
 - **Digital Market Act**: sets out new obligations for big online platforms acting as “gatekeepers” (meant for big tech companies)
 - **Digital Service Act**: sets out new obligations for will regulate the provision of services on the Internet. Meant to protect consumers and offer legal certainty to providers
 - **Proposal to amend eIDAS Regulation**: should defines the requirements for electronic ledgers and qualified electronic ledgers, and the EU Wallet Identity

Focus: the over-regulation process of the EU

- Already in force:
 - **Regulation (EU) 2019/1150**, the so-called **Platform-to-Business Regulation** on promoting fairness and transparency for business users of online intermediation services (meant for marketplaces)
 - **MiFID II**: which apply by analogy to security/investment/equity tokens

Areas of law impacted by the online platforms

- Corporate Law
- **International Commercial Law**
- Financial/Security law
- Consumer Law
- Data Protection/Privacy Law
- Intellectual Property Law
- Etc.

Interdisciplinary area: **'Platform Law'**

How will the research question be answered?

The platform economy and the law

The spread of the online platforms led to:

- Digitisation of transactions and different types of contractual relationships
- The emergence of today's big tech companies
- Establishment of new business models, generally ascribed to the same macro-family known as “**online platform**”
- The rise of the “**platform economy**”⁽¹⁾

(1) Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, and Fryderyk Zoll, The Rise of the Platform Economy: A New Challenge for EU Consumer Law?, in Journal of European Consumer and Market Law 3 (C.H. Beck, 2016)

1. Understand the notion of “intermediary” in the context of Dapp

Analysing technology and understanding who...

- materially exercises control over the relationships and transactions among users
- makes a profit out of it

2. Searching for “legal intermediation indicators”

Through the study of EU regulations and the interpretation offered by the pre-existing literature, and jurisprudence, identifying the legal traits of an intermediary in the context of a Dapp

Examples:

- **Data controller:** any natural or legal person which determines the purposes and means of the processing of personal data (art. 6.7 GDPR)
- **Provider of online intermediation services:** any natural or legal person which provides, or which offers to provide, online intermediation services to business users (Art 2.3 P2B Regulation)

3. Identifying the most relevant Dapps on the market

- 1. Criteria for assessing relevance will be established**
- 2. Data to measure relevance will be collected**

4. Checking the presence of legal intermediation indicators in the circumscribed test sample

Examining technology (e.g. reading code disclosed) and legal documents (T&C, Whitepapers, etc, Simple Agreements for Future Tokens, etc.) made available for the Dapps under analysis, to verify if and to what extent legal intermediation indicators are present

Expected outcomes and contribution to further research

- Defining what full and partial disintermediation should mean in legal terms
- Providing an answer about the current state of disintermediation of self-proclaimed Dapps
- As a byproduct of the analysis, offer a **legal taxonomy** of the Dapps based on the different levels of disintermediation possibly observed, on which further research can build on
- Provide a method of legal analysis of “disintermediation” for online platforms that can be re-used for different legal frameworks, and/or for platforms using other (future?) disintermediation technology, and/or for a different test sample
- Contributing to the academic debate around **regulation of technology**

The underpinning philosophical debate

Should technology be regulated, and if yes, to what extent?

5 provisional conclusions and recommendations for regulators

1. Treat **digital assets** as technological **containers** of rights and obligations (see the "Token Container Model" of the Liechtenstein Blockchain Act 2020);
2. Consider **legal compliance costs** for startups issuing tokens (learn from the EU MiCA Regulation mistakes);
3. Do **not over-legislate** and use existing laws where applicable (e.g. the EU MiCA Regulation does not regulate investment tokens and defers to the application of the MiFID II Directive);
4. Bear in mind the mandates and scopes of the **regulatory authorities** (for UK, FCA, CMA, ICO);
5. **Draw a legal border** as to when any decentralised application is to be considered decentralised or not from a legal standpoint.

Thanks for your attention!

e-mail: cantisani@futural.legal or luigi.cantisani@warwick.ac.uk

LinkedIn: <https://www.linkedin.com/in/luigicantisani/>
