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Incorporation of DAOs in Brazil

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Considering a groundbreaking model of organization (or community) of people with common purposes and objectives, DAOs (Decentralized Autonomous Organizations) have as their main features the autonomous and decentralized character and its functioning that differs from the structures of traditional businesses.

In other words, DAOs may be defined as organizations whose decisions are executed automatically through a series of smart contracts, and in which there is no defined hierarchy, so that all members participate in the decision-making process jointly, in a democratic and inclusive manner.

The smart contracts establish the fundamental structure by which the DAO shall operate. These contracts are verifiable and auditable so that any member may comprehend how the protocol shall function step by step on the blockchain. Once these rules are detailed, it is common that a DAO aims, as a second step, to its own funding. This is normally reached through the issuance of tokens, which are sold, under the protocol rules, to raise funds for the operation of the DAO.

Usually, anyone who owns tokens of a DAO is able to vote on proposals, and its votes will be taken into account according to the number of tokens owned – similar to the voting rights of shares – or according to other models of governance also addressed in this e-book. If the proposal receives enough votes, a smart contract is activated, and the deliberation approved is executed and registered on the blockchain in order to ensure its transparency and publicity.

These characteristics turn DAOs into disruptive and innovative organizations in the legal landscape, both nationally and internationally, attracting numerous interested people across the world once they allow the participation of individuals from anywhere under the same organization and without commons obstacles faced by companies normally used to realize investments or projects in general.

Nevertheless, these are the same characteristics that create the risk for DAOs being framed as, in the Brazilian legal context, general partnerships, locally called as "*sociedades de fato*".

This concept from Brazilian Civil Law, which also exists in certain European countries, as in France, as well as in countries of Common Law in the context of general partnerships, permits the framing of a company where there is an ensemble of efforts aiming at a common objective, for instance, even where there is no instrument of constitution archived in the appropriate registrars.

According to national case law, the elements normally pointed out as decisive to recognize a sociedade de fato are: (a) the ensemble of efforts with a view to a common objective – the development of an economic activity; (b) the sharing of the profits obtained with the exploitation of such activity; (c) the active participation of partners in conducting the business; and (d) the external visibility of the relation between the parties as a company.

Once recognized as a *sociedade de fato*, the consequences may be particularly important for the members of a DAO. One example is the joint and unlimited liability of the partners towards the obligations of the company.

Despite not knowing, to date, of a concrete situation in which such a framework has been applied, in the national or international legal context, the legal risks associated with a possible disregard of DAOs' structures, or the framing of the organization as a *sociedade de fato* must be taken into account by its members.

Facing the risks described above, and bearing in mind that there is not, under Brazilian Law, another legal regime that recognizes nor determines DAOs' specific legal nature, it is necessary to evaluate different legal regimes and analyze structures used across the world to identify the one potentially applicable in the Brazilian legal context – as for the *sociedade limitada* (similar to Limited Liability Companies) or the *sociedade anônima* (similar to Corporations), notwithstanding the restrictions brought by both incorporation regimes.

It must be cautioned that we are still in the early stages of legislative evolution on the subject at a global level, even though this is starting to change. As is currently the case for the regulation of cryptocurrencies, it will be necessary to develop and deepen the discussions to concede DAOs certain legitimacy needed to better establish themselves and evolve as alternative structures and, in a certain manner, mitigate potential risks for their functioning and for its members or third parties, allying a better safety and adequacy for everyone.

>>> This content belongs to our e-book "DAOs: Legal Challenges for Decentralized Autonomous Organizations". Click here to read more articles.

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