

**Tozzini
Freire.**
ADVOGADOS

**OPEN INNOVATION AND
CORPORATE VENTURE
LEGAL ASPECTS**

BACKGROUND

ECOSYSTEM OVERVIEW



Availability of risk-oriented funding (a growing number of “unicorns” – Nubank, Wildlife, QuintoAndar, Loggi, iFood, etc.);



Multi-sectoral opportunities: Fintechs, HealthTechs, Legal Techs, InsurTechs, ConstruTechs etc.);



Ecosystem density: Startups, angel investors, startup accelerators, investment funds, corporate innovation, coworkings, universities, CVCs, among others; and



Increasing **regulatory framework maturity**, with many legal updates already in force or under legislative discussion.

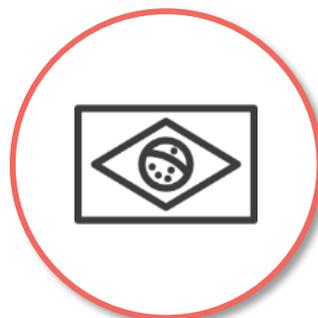
BACKGROUND

IN **NUMBERS**

(2020/21)

363

INCUBATORS



64

ACCELERATORS

3.694

**PARTICIPATING
COMPANIES**

551 mi

REVENUE

BACKGROUND

VC IN **NUMBERS** (2020)

US\$ 3.5 bi

Funding

+30% from 2019



100

PRE-SEED



205

SEED



50

SERIES A

461

Rounds

+77% from 2019

+170 EXITS

Source: Distrito

BACKGROUND

VC IN **NUMBERS**

(2019)

13.616

Startups

+70

Communities

16

Unicorns

+31,25%

between 2019 and 2021



Source: Distrito

BACKGROUND

DISTRITO

INVESTIMENTO, STARTUP

@

f

in

Startups brasileiras movimentam US\$ 5,2 bi e batem recorde no semestre

Redação - Distrito, 08/07/2021 - 15:58 | 0 | 2 min leitura

O 1º semestre de 2021 foi aquecido para as startups brasileiras: US\$ 5,2 bilhões foram investidos em **Venture Capital** até julho. Recorde histórico, o volume aportado nos primeiros seis meses do ano ultrapassou em 45% o total investido em todo o ano de 2020. Além disso, foram realizados 339 aportes de janeiro a junho – número aproximadamente 35% superior ao ano passado.

Source: Distrito

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OPEN INNOVATION

OBJECTIVES

- DEVELOPMENT OF NEW PRODUCTS, TECHNOLOGIES AND MARKETS
- EFFICIENT AND TARGETED PROBLEM-SOLVING
- COMPANY'S INTERNAL CULTURE RENEWAL
- MARKETING AN INNOVATIVE AND MODERN COMPANY REPUTATION
- FINANCIAL RETURN, DIRECT OR NOT



GENERAL LEGAL CHALLENGES INVOLVING INNOVATION

1

FLEXIBLE AGREEMENTS

2

DUE DILIGENCE

3

LGPD, GDPR AND DATA PROTECTION

4

INTELLECTUAL PROPERTY: ATTENTION POINTS

5

CONFIDENTIALITY AND INFORMATION SECURITY



MAIN OBJECTIVES: CORPORATE

To acquire or expand product branches

Exploration of new markets

Current products and/or services improvement

Elimination of disruptive competition

Acquihiring – Talent acquisition

Incorporation of startups through permanent investment

MAIN OBJECTIVES: STARTUP

Market positioning, especially in those more traditionally restricted

Better competition conditions to deal with market competitors

Funding to develop and increase brand credibility

To get access to big companies' resources and infrastructure

Improvement of already developed technologies

OPEN INNOVATION PROJECTS CAN BE CARRIED OUT IN DIFFERENT STRATEGIES

DEFINING THE STRUCTURE IS JUST THE
FIRST STEP TOWARDS A LONG-TERM
PLANNING, IN ORDER TO FOSTER
INNOVATION WHILE ALSO REDUCING
LEGAL RISKS



INVESTMENT IN STARTUPS

/// OBJECTIVE

Financially and intellectually support startups that develop innovative businesses and products with growth potential.

● STRATEGIES

Payment of a pre-agreed amount to a target startup, so it will be better funded to develop a product or even the business itself. The investor will have the right to monitor the company and, in case they enter the cap table in the future, they shall obtain rights regarding management and conduction of its business, or even a total or partial ownership of the product or service developed by the startup.

● RELEVANT LEGAL ASPECTS

The operation can be carried out through debt, equity or through a “hybrid” structure (a convertible debt). Tax analysis is essential to correctly choose the most adequate and profitable legal strategy.

It is recommended to go through the stages that involve **preliminary negotiations** (like a term sheet), a **financial and legal due diligence** and the drafting of **definitive contracts** (like a convertible note, a share purchase agreement or angel investment agreement).

CORPORATE VENTURE CAPITAL

INSTITUTIONAL VENTURE CAPITAL

Strategic objectives and a riskier and more disruptive R&D

In-depth knowledge of a particular industry
Access to potential customers

Common avoidance of control (accountability)
Often appoint an observer to the Council

A multitude of results is considered, not just financial. There will be a better value if it becomes a potential 100% acquisition target, a commercial partner, a sales channel or even product integration that increases the investor's sales.

GOALS

Financial return

WHAT ARE THEY OFFERING?

Specialists in structuring companies and generating financial results

CONTROL LEVEL

Portfolio control
Usually appoint advisors

EXIT OPTIONS

There is just one way to leave: cash-out

DUE DILIGENCE

Analysis of documents and legal issues in the preparation of an investment transaction or M&A

It can be carried out by the investor/buyer or by the startup itself – in this case, it is known as *vendor's due diligence*.

Attention: The same lawyer(s) can work for both sides.

MAIN ASPECTS TO CONSIDER:

- Corporate
- Agreements
- Labor
- Intellectual Property
- Civil Litigation
- Tax
- Cybersecurity

GUIDING THE STARTUP

- WRITE (AND FILE) AGREEMENTS
- KEEP ACCOUNTING RECORDS
- KEEP UPDATED CERTIFICATES
- DO NOT FAIL TO REGISTER FORMAL ACTS (EX.: CORPORATE CHANGES)
- STORE DOCUMENTS IN AN EASILY ACCESSIBLE SYSTEM

GUIDING THE INVESTOR

- INTERPRET THE REPORTS
- SIMPLIFY COLLECTED AND SENT INFORMATION
- SUGGEST POSSIBLE FLEXIBILITIES
- CONTRIBUTE TO THE REGULARIZATION OF POINTS OF ATTENTION
- EXPLAIN WHAT ARE THE GOOD MARKET PRACTICES AND WHAT IS ACCEPTABLE

INVESTMENTS IN STARTUPS

/// KEY POINTS (and inconvenient truths)

#1

LAWYERS MUST BE PRO-DEAL

Say “no” only as much as necessary

#2

INVESTING IN STARTUPS IS RISKY

If investors want safety and quick returns, this is not the right operation for them

#3

LONG-TERM THINKING

Possible demands from future (and bigger) investors must be considered right away

#4

WHO ARE YOU INVESTING IN?

The product? The business? The team?

PARTNERSHIPS OR JOINT VENTURES

/// OBJECTIVE

Working together with other company(ies) and/or entities for the development of a specific product. It may be – or not – for free, preliminary or definitive, and for a limited period or not. In some cases, it can result in a third company incorporated.

ACTIONS AND STRATEGIES

A partnership is established between the companies. Depending on the strategy, it may involve a future action, such as the constitution of a third company (to develop and market the final product) or even the purchase of the entire final product developed, in order to explore its commercial rights exclusively.

RELEVANT LEGAL ASPECTS

1. As a very broad strategy, it is necessary to analyze, in the concrete case, what the company's objectives are when starting a partnership with another one. Clarifying competitive issues that may show up during the relationship and establishing a competent and clean legal team are key.
2. Evaluate the most appropriate legal structure for the relationship, considering tax, corporate, competition and intellectual property aspects.
3. If it becomes necessary to incorporate another company, to increase the JVs formality, the team must elaborate: i) the company's bylaws; ii) regional (state and city) registration (if needed); and iii) other documents required for new companies.
4. Otherwise, the parties can sign a partnership agreement or a memorandum of understanding providing for future hiring or purchase, for example. Depending on the legal state of the partnership, additional aspects may be assessed, such as public law matters, like incentives and tax benefits.
5. The documents presented must address issues such as confidentiality, data protection, intellectual property, competition, and labor and tax aspects.

EVENTS (HACKATHONS)

/// OBJECTIVE

A hackathon is an event dedicated exclusively to the development of a personalized solution to a concrete case proposed by the organizer. Sometimes these events are hosted by two or more corporates as a partnership.

ACTIONS AND STRATEGIES

Organization of a complete event for registered teams to develop a product that solves a challenge proposed by the organizing company(ies). This product can be used in the future by the company or the team can be hired by the host, for example. There may be awards (financial or others).

RELEVANT LEGAL ASPECTS

1. Drafting of the event's terms and guidelines for the registered teams - this document must contain the basic rules for participation and evaluation criteria for the solutions created, and how should the intellectual property developed in the event shall be shared with the organizers.
2. There is also the possibility of organizing internal competitions in the company so that employees themselves can develop solutions. In this case, labor aspects must also be considered.

INNOVATION DEDICATED SPACES (COWORKINGS, GARAGES...)

/// OBJECTIVE

Offer physical structure (office space, internet, water, energy, etc.) for startups to develop their business, free of charges or not, ensuring that companies develop or reach out to existing solutions in the ecosystem.

ACTIONS AND STRATEGIES

One or more companies come together to build an innovation and co-creation environment, which contains all the physical structure necessary to host teams or third parties that need this type of support.

RELEVANT LEGAL ASPECTS

1. It is necessary to assess the legal viability of a real estate project – renting a corporate space, office or build something from scratch, for example.
2. Contracts for the use of physical space (or lease) must be signed, covering the form of payment (if any), sharing of resources, use of intellectual property and the way in which costs will be shared among users.
3. It is necessary to assess labor and tax issues related to the sharing of physical space by individuals.

EVERY RELATIONSHIP WITH A STARTUP MUST...



Be preceded by a detailed analysis of the company and its team

This preliminary check-up avoids possible reputational risks to the corporate if the startup isn't 100% compliant with the applicable legislation and/or has concerning procedures, processes and products. Such analysis is specially relevant when the corporate is planning to integrate the startup's cap table.



Have confidentiality and information security-oriented agreements

All instruments signed between the corporate and the startup must contain clauses disclosing the confidentiality of the information exchanged by them. If possible, they must also define guarantees in accordance to best practices regarding information security. It is recommended to include specific documentation for technical compliance with the IT systems and infrastructure involved.



Develop a cultural alignment between the corporate and the startup

Usually, open innovation projects face a significant cultural disparity between the corporate's organizational culture and the startup's innovation culture. While the first has more refined concerns with structure and governance, the latter operates in a more dynamic and lean way. That's why aligning all expectations is such an important factor of success for these projects.



Count with specialized lawyers, who understand the startup ecosystem

The legal team must understand what is normally practiced in the startup ecosystem to plan the most appropriate legal structures for each project. Besides "locking" innovation, unnecessarily strict demands can damage the corporate's reputation among other startups. Only experienced professionals can balance the risks and benefits of each legal structure considered in the project.



BUT MOSTLY...

THERE IS NO GOOD USE OF INNOVATION IF THERE IS NO

**CULTURAL
TRANSFORMATION**

WHAT IS THE IMPORTANCE OF CULTURE?

Eric Ries

*“Every time that the Corporation got close to a startup and tried to assimilate its **innovation culture**, what happened was exactly the opposite: it was the startup that ended embedding the corporation’s culture. [...] Big companies’ organizational culture doesn’t fit with the way startups work.*

There are so many rules, so many preconceived ideas, that any possibility of innovation is suffocated.”





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CULTURE OF INNOVATION



STARTUP

Prototype and validation

Customer Experience

Scalability

Pivoting



CORPORATE

Planning ahead of trying

Profit optimization

Hard replication

Changing is costly





WHAT ABOUT THE STARTUPS LEGAL FRAMEWORK?

(Supplementary Law n. 182/2021)

TIMELINE | THE BILL'S APPROVAL

2019



**Supplementary Law
Bill n. 146/2019**
(Legislative Power)

PROPOSED BILL

General Regulation
Public Contracts
Tax Regime
Labor Aspects
Entrepreneurship
Investments
Stock Options

2020



**Complementary Law
Bill n. 249/2020**
(Executive Power)

2021



**COMPLEMENTARY LAW
n. 182/2021
STARTUPS LEGAL
FRAMEWORK**

- ✓ General Regulation
- ✓ Public Contracts
- ✓ Entrepreneurship
 - ✓ Investment
- Stock Options
- Labor Aspects
- Tax Regime

GENERAL ASPECTS

Main objectives and entrepreneurship fostering

Startups “definition”

Research, development and innovation promotion

Public acquisition and government contracting

Regulatory sandbox

Investments in startups

Legislative changes – Flexibility to some governance aspects

Changes in the
Supplementary Law
n. 123 of 2006
Angel Investor

ATTENTION!

- ✓ *It does not create simplified corporations*
- ✓ *It does not enact tax incentives for investments in startups*

- ✓ *It does not promote nor deal with premium payment in Ltd. or debt forgiveness in loans*
- ✓ *It does not regulate stock options*

WHAT TO EXPECT FOR THE FUTURE?

As previously mentioned, there were basically four market demands voiced by the **startup** ecosystem:

- **Stock Options:** recognition of stock options as a mercantile investment instead of remunerative;
- **Tax Equivalence:** tax equivalence between investments in startups and other types of investments;
- **Simples Nacional:** recognition of startups within the *Simples Nacional* tax regime; and
- **Digital Books:** withdrawal of limitations on the use of digital books by companies.

Currently, we face a scenario where not all the demands have yet been met, but that is already showing significant advances in improving the innovation ecosystem.

As examples:

- (i) Flexibilization of certain corporate formalities (digital books, virtual publications and others);
- (ii) Innovation investments incentives;
- (iii) First steps towards a tax regime fully compatible to startups; and
- (iv) Adjustments made in order to achieve greater access to corporate governance practices.

The hope for the near future is that market demands are increasingly met, so that the corporate and commercial environment in Brazil will serve as an incentive and no longer as an impediment to business opening and growth, especially in the field of **technology and innovation**.

Thank You!



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