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The Current Regulation of Cryptocurrencies in Brazil and What to Expect for the Future

Cryptocurrencies have been gathering a lot of attention lately, mainly due to the explosive growth in the value of bitcoins and the fact that Chicago Board Options Exchange and Chicago Mercantile Exchange are starting to negotiate these assets in regulated environments – but most of all, because of their various uses.

This kind of scenario is possible due to blockchain, the technology that grants every member of the structure access to a secure database containing all the transactions carried out within the

system. This allows members to check the path traveled by each unit generated by the system since its inception and insert new transactions, which are divulged to everyone else.

Many systems have offered some of these features and had some of these characteristics, but the cryptocurrencies and their respective blockchain have incorporated them all in the same package. They were the first systems to achieve great popularity in this field.

Cryptocurrencies allow each person to act as the custodian, the payment agent and the clearinghouse of their transactions and currency. This changes the logic behind the current financial structure, as the user becomes responsible for the security of his or her money.

Such an innovation is possible given that blockchain changed the logic behind information and transaction verification.

Previously, some companies and the state were the only entities that held a very special asset: market and consumer confidence; hence, only they could act as intermediaries in financial transactions and verification of information.

Blockchain allowed anyone to play this role, as the portion of information necessary to perform these checks is public, and the system encourages its users to perform these activities by supplying them with cryptocurrencies.

Upon analyzing the legal impact of this situation, a well-known lesson is reinforced: the law has great difficulty in keeping up with technological innovation. This fact stems from the very nature of the legislative process and the formation of precedents, which take years to complete, while technology advances and reinvents itself with great agility.

Current Regulations in Brazil

There are only a few effective rules regarding the legal treatment of cryptocurrencies in Brazil, and some regulatory efforts: Draft Bill 2303 of 2015, Notices 25,306/2013 and 31,379/2017 issued by the Brazilian Central Bank (BACEN); the Brazilian Securities Exchange Commission Market Statement published on November 16, 2017; and the positioning of the Brazilian Internal Revenue Service.

Draft Bill 2303/2015 is the main regulatory effort regarding cryptocurrencies in Brazil. It seeks to include “virtual currencies” (another nomenclature to cryptocurrencies) and air mileage programs in the definition of “payment arrangements” under the supervision of BACEN.¹

For several reasons, this bill is receiving harsh criticism given that cryptocurrencies can be used as a payment arrangement, but, due to the possibilities provided by their blockchains, they have many other completely different uses (digital identity, logistics, etc.). If this bill makes the start-ups that act in this segment comply with the rules that regulate payment arrangements, they will leave Brazil. There is no central authority issuing cryptocurrencies, so there is no way to apply the controls applied to payment arrangements to exchanges and other companies.

BACEN itself has declared that it is against the current wording of the Draft Bill 2303/2015, and several public hearings on the subject have been held. On December 12, 2017, the congress commission responsible for the Draft Bill issued a



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report stating that they are against the mining and circulation of cryptocurrencies in Brazil, whereas this is not the final position of the regulatory entities.

We will have to wait for the final result of the procedure in order to verify how the local authorities will deal with this subject.

The Brazilian Central Bank issued Notice 25,036 in 2013 in which it indicated that virtual currencies (cryptocurrencies) are not to be confused with electronic currencies (used in payment arrangements). Until now, the entity saw no reason to intervene in the market, given that it is too small to pose any threat to the Brazilian economy as a whole.

BACEN also expressed its views on the subject in Notice 31,379 issued on November 16, 2017,² in which it made clear that cryptocurrencies cannot be used as a means of international transfers. Exchange regulations and the elaboration of Financial Operations Registry, essential in the performance of foreign exchange operations, still have to be observed in order to make foreign exchange transactions, regardless of the instrument being used by the involved parties.

In addition, the Brazilian Securities and Exchange Commission (CVM) also expressed its views on the use of cryptocurrencies in its market note on Initial Coin Offerings (ICOs), indicating that, depending on their content, the ICOs must be approved by the agency.³

CVM will adopt criteria similar to those applied by the Securities Exchange Commission in order to identify which ICOs must be presented. This criteria, known as the Howey test, seeks to verify

if the analyzed asset can be considered as a security using three questions:

1. Is it an instrument for the investment of resources?
2. Is it a collective investment?
3. Is there any expectation of profit arising from the efforts of third parties, and not from the investor?

If all questions are answered with a yes, the negotiated token shall be considered as a security, and consequently CVM procedures must be observed.

The Brazilian Internal Revenue Service has also positioned itself on the taxation of cryptocurrencies in a very clear way: the purchase and mining must be included in the Annual Income Tax Declaration and the income tax over the capital gain generated by the sale of cryptocurrencies must be collected.⁴ There are exemption limits (gains of up to R \$35,000 in the year), and the applicable rates depend on the earnings generated during the year.

The Future of Regulation

By observing how each regulator has dealt with this technology to date, one can verify that the regulation of the use of cryptocurrencies in Brazil is a work in progress, including the use of blockchain, which is also taking its first steps.

What can be expected regarding the regulation of this technology in the future?

Taking into account the main concerns of public entities, the following things come to mind:

1. effective definition of the legal nature of cryptocurrencies, and how this instrument must be treated in each situation;

2. specific regulation regarding money laundering prevention and know-your-customer policies for cryptocurrency exchanges;
3. regulation of the use of cryptocurrencies in general trade and their role in the national financial system;
4. specific legislation regarding the reporting of information by individuals and legal entities that deal with cryptocurrencies, in particular exchange companies; and
5. official guidelines regarding minimum security parameters for users of cryptocurrencies.

This list certainly does not exhaust the situations that can be regulated, but each of these points is sure to require a lot of discussion in the future.

The only certainty we have at the moment is the fact that the market is moving forward, and regulation is always running behind. We can only follow the development of this subject and take the necessary precautions so that the future regulation of this technology is useful for everyone involved.⁵

1 camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=1555470

2 bcb.gov.br/pre/normativos/busca/normativo.asp?Number=31379&type=Notice&data=16/11/2017

3 cvm.gov.br/noticias/arquivos/2017/20171116-1.html

4 Question 447 -

5 idg.receita.fazenda.gov.br/interface/cidadao/irpf/2017/perguntao/pir-pf-2017-questions-and-resposals-version-1-1-03032017.pdf