

FOSTERING INNOVATION FOR MICRO AND SMALL COMPANIES THROUGH ANGEL INVESTMENT CONTRACTS¹

FOMENTO ÀS MICRO E PEQUENAS EMPRESAS INOVAÇÃO
POR MEIO DOS CONTRATOS DE INVESTIMENTO-ANJO

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ABSTRACT

The article analyzes the innovation promotion policy to micro and small enterprises from the legal regime perspective of the angel investors contract established by Supplementary Law nº 155/2016. The objective is extracting what elements the legal regime of angel investors contracts aims to stimulate for analyzing their adequacy and sufficiency, through an Entrepreneur State intervention perspective. First of all, it is done a review of how micro and small enterprise legislation has evolved. Next, the description of innovation promotion policy to micro and small enterprises are elaborated. And, finally, the relationship between innovation promotion policy and angel investing contracts is established, by a bibliographical research and the deductive method.

KEYWORDS: Innovation. Angel investing contracts. Supplementary Law nº 155/2016.

RESUMO

O artigo analisa a política de fomento à inovação das micro e pequenas empresas sob a perspectiva dos contratos de investimento-anjo instituídos pela Lei Complementar nº 155/2016. O objetivo é tentar extrair que elementos o regime jurídico dos contratos de investimento-anjo visa estimular, na tentativa de analisar a sua adequação e suficiência, sob o ponto de vista da intervenção de um Estado Empreendedor. Para isso,

1 In this work, the same nomenclature as Complementary Law Nº 123/2006 - "micro and small companies" - is used, despite technical imprecision. This is because the term 'company' actually refers to economic activity, while, in turn, the term 'business society' refers to the legal entity that carries out economic activity with elements of the company. Another inaccuracy of the expression chosen by the law concerns the inclusion of 'simple companies' - which aren't 'business companies' - within the scope of the definition of article 3 of Complementary Law Nº 123/2006, mentioned below. It should also be noted that, before this Complementary Law, there was no provision to include 'simple companies' in the specific legal regime that favors micro and small companies.

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primeiramente, elabora-se uma revisão de como a legislação de apoio à micro e pequena empresa evoluiu. Em seguida, descrevem-se as características das políticas de fomento à inovação nas micro e pequenas empresas. E, por fim, coteja-se a relação entre fomento à inovação e contrato investimento-anjo, por meio de uma pesquisa bibliográfica e do método dedutivo.

PALAVRAS-CHAVE: *Inovação. Contrato de investimento-anjo. Lei Complementar nº 155/2016.*

INTRODUCTION

In this paper, considering the reality of micro and small companies and the peculiarities of possible measures to encourage innovation, the legal regime of angel investment contracts is discussed as a possible mechanism to foster innovation. In this context, the following problem-question is elaborated: how did the legislator, through the figure of the angel investment contract of Complementary Law N° 155/2016, foster innovation in micro and small companies?

Then, the following hypothesis is elaborated: the instrument to foster innovation brought by Complementary Law 155/2016 aims to overcome the insufficiency of financial capital and human capital, characteristic of micro and small companies and the main difficulties that they face '?' (SEBRAE, 2018).

The theoretical framework used is the idea of 'Entrepreneurial State' developed by Mariana Mazucato (2014), according to which the State acts not only to correct market failures but also to intervene in social and environmental dimensions, among others, which aren't attractive to the private sector, using innovation to do so.

It's intended to collaborate with the theme not only from a theoretical point of view, but also pragmatically, using the deductive method. Thus, economic data on the micro and small business segment are sought to support the analysis of the elements that the legal regime of angel investment contracts aims to stimulate, in order to deduce shortcomings and gaps in the current legislation.

The objective is to investigate the economic function, extracted through the interpretation of the legal text, in order to identify any detachment between the data collected and the description of the legal regime discriminated from Article 61-A of Complementary Law N° 123/2006.

1. REGULATORY EVOLUTION OF MICRO AND SMALL COMPANIES IN BRAZIL

In Brazil, the first Law to establish a special regulation for micro companies was Law N° 7.256/1984, even before the Constitution of the Federative Republic of Brazil of 1988, and established for this category of companies a differentiated, simplified and favored regime covering administrative, social security and credit areas, among others. Despite the impor-

tance of this initiative, the special treatment established at the time had a much more restricted spectrum than the current. In this line, it's possible to observe, for example, the veto to the differentiated tax regime, related to articles 11 to 16, of Law N° 7.256/1984, in contrast to the current 'Special Unified System of Collection of Taxes and Contributions' due by Micro Businesses - Simple National (*Regime Especial Unificado de Arrecadação de Tributos e Contribuições devidos pelas Microempresas e Empresas de Pequeno Porte - Simples Nacional*), instituted by Complementary Law No. 123/2006. In addition, there was no mention of 'small companies', only micro, considering as such those with revenues of up to 10.000 OTN³ (NOGUEIRA, 2016, p. 11)⁴.

Another provision of Law N° 7.256/1984 that stands out is the articles related to credit support, which established, since that time, favorable conditions for micro companies in operations with public and private financial institutions, including for promotion and development banks. Among these conditions was the prohibition on requiring guarantees other than bail and endorsement (*fiança e aval*), for financing of up to 5.000 OTN. This rule points to a problem faced today by micro and small companies when requesting financing from financial institutions, which, on the other hand, require them to provide guarantees to support the risks of the operation.

Then, the Brazilian Constitution of 1988 also established favored treatment for micro and small companies, under the terms of article 179:

Art. 179. The Union, the States, the Federal District and the Municipalities will dispense for micro and small businesses, as defined by law, differentiated legal treatment, aiming to encourage them by simplifying their administrative, tax, social security and credit obligations, or by eliminating or reducing these by law. (Our translation into english) (*A União, os Estados, o Distrito Federal e os Municípios dispensarão às microempresas e às empresas de pequeno porte, assim definidas em lei, tratamento jurídico diferenciado, visando a incentivá-las pela simplificação de suas obrigações administrativas, tributárias, previdenciárias e creditícias, ou pela eliminação ou redução destas por meio de lei*) (BRASIL, 1988)

Later, by means of Constitutional Amendment n° 49 of 2006 (*Emenda Constitucional n° 49/2006*), the favored treatment of micro and small companies was erected at principle, included in the list of article 170 of the 1988 Constitution.

Since the presidential veto to articles 11 to 16 of Law N° 7.256/1984, regarding the tax regime favored by micro companies, the need for simplified treatment in the tax area had deepened. However, only in 1996, through the enactment of Law N° 9.317/1996, did the 'Special Unified System of Collection of Taxes and Contributions' due by Micro Businesses - Simple National (*Regime Especial Unificado de Arrecadação de Tributos e Contribuições devidos*

3 National Treasury Bonds (*Obrigações do Tesouro Nacional*).

4 According to Fran Martins and Carlos Henrique Abrão (2017, p. 123), the choice of the criterion to define micro and small companies is related to article 966 of the Brazilian Civil Code of 2002, which recommends that an entrepreneur is one who exercises professionally an organized economic activity for the production and circulation of goods and services. Thus, when defining a company as an economic activity, the micro enterprise is defined as the economic activity organized on a smaller scale, choosing billing as the measure of that scale. Therefore, the Complementary Law, when inspired by the Brazilian Civil Code of 2002, therefore, is also inspired reflexively by the Italian Civil Code of 1942, which removes the theory of acts of commerce. It's also noted that there are other criteria, other than just billing, to measure the size of micro and small companies, including the number of employees. In the European Union, for example, the definition is based on more than one criterion: the number of employees, annual sales and net profit (ZUCOLOTO et al., 2016, p.20). In the United States, on the other hand, it also verifies a complex criterion, based on the Naics Code (North American Industry System) that can have as reference the gross revenue, the value of the assets or the number of employees, depending on the activity (ZUCOLOTO et al., 2016, p.19).

pelas Microempresas e Empresas de Pequeno Porte - Simples Nacional) be approved, which unified six federal taxes, in despite the prediction of exceptions for some service provision activities⁵.

Subsequently, Law N° 9.841/1999 was enacted, which instituted the 'Statute of Micro and Small Enterprises' (*Estatuto da Microempresa e da Empresa de Pequeno Porte*), providing for the different, simplified and favored legal treatment provided for in articles 170 and 179 of the Brazilian Constitution of 1988. In this, the definitions of 'micro and small companies according to billing' were included, as well as the creation of 'joint guarantee societies' (*sociedades de garantia solidária*) as an alternative to the need for the submission of guarantees by micro and small companies, in the event of possible requests financing before financial institutions.

Currently, Complementary Law N° 123/2006 regulates the matter, revoking the previous regulations. With regard to tax treatment, there was a considerable expansion of the unified regime, which now includes eight federal, state and municipal taxes.

In addition, the Complementary Law N° 123/2006 also established competitive advantages in the bidding process in the event of a tie, in addition to the possibility of exclusive bids for micro and small companies up to the amount of R\$ 80 thousand and the possibility of subcontracting them in non-exclusive bids. This favored the growth of the participation of micro and small companies in public bids.

The impacts of this measure are significant and growing. As a result, in 2013, purchases made by federal government entities with micro and small companies totaled R\$ 17,0 billion: an increase of 20,3% in relation to 2008 and an increase in participation in total order purchases 27,9% in the same period. (Our translation into english) (NOGUEIRA, 2016, p. 13)

It's also added that Complementary Law N° 123/2006, recognizing the importance of innovative processes for the segment, and included a chapter called "Stimulating Innovation" ("*Estímulo à Inovação*") that establishes, among other measures: a) the obligation for the Union, States, Federal District, Municipalities and their respective development agencies, Scientific and Technological Institutions (*Instituições Científicas e Tecnológicas - ICT*), technological innovation centers and support institutions to maintain specific programs for micro and small companies; b) the possibility of reducing tax rates and contributions levied on the acquisition or import of equipment acquired by micro and small companies for incorporation in their fixed assets; c) support for quality certification of products and processes for micro and small companies.

Subsequently, through Complementary Law 128/2008, the figure of the 'individual microentrepreneur' (*microempreendedor individual - MEI*) was created, whose objective was to remove various economic activities from informality. More recently, Complementary Law N° 147/2014 and Complementary Law N° 155/2016 improved the process of simplifying the regime, as well as extending the possibility of including some service provider activities in 'Simples Nacional'.

The Complementary Law N° 123/2006 continued to establish billing as a measure to define the size of the company for the purposes of its application, including whether or not

5 Then, Complementary Law N° 147/2014 increased the list of activities providing services that could be included in the favored regime.

they were included in 'Simples Nacional'. It's important to remember that such criteria for defining size are restricted to the application of Complementary Law N° 123/2006, with other rules, which regulate other effects, which set different criteria for defining the size of the company. In this direction, the limits are reproduced below:

Art. 3º For the purposes of this Complementary Law, micro or small companies are considered, the entrepreneurial company, the simple company, the limited liability individual company and the entrepreneur referred to in art. 966 of Law nº10.406, of January 10, 2002 (Civil Code), duly registered with the Commercial Companies Registry or the Civil Registry of Legal Entities, as the case may be, provided that:

I - in the case of the micro enterprise, earn, in each calendar year, gross revenue equal to or less than R\$ 360.000,00 (three hundred and sixty thousand reais); and

II - in the case of a small business, earn, in each calendar year, gross revenue greater than R\$ 360.000,00 (three hundred and sixty thousand reais) and equal to or less than R\$ 4.800.000,00 (four million and eight hundred thousand reais). (Our translation into english) (BRASIL, 2006)

The Complementary Law N° 155/2016 also brought changes to Complementary Law N° 123/2006, related to the chapter called "Stimulus to credit and capitalization" ("*Estímulo ao crédito e à capitalização*"). Preliminarily, it's registered that, even before its edition, the need for measures to improve the access of micro and small companies to the credit and capital market had already been foreseen, aiming at reducing the transaction cost, raising allocative efficiency, the incentive to the competitive environment and the quality of the information set (article 57), as well as the possibility of creating a 'National Credit Guarantee System by the Executive Branch – by the Government' (Sistema Nacional de Garantias de Crédito pelo Poder Executivo) in order to facilitate the access of micro and small companies companies, not yet completed (Article 60-A).

However, the Law, in addition to expanding public credit policies for this segment (article 58), introduced article 61-A, which established the possibility of making direct investments in micro and small companies, in order to provide the incentive for innovation activities. It's the possibility of capital injection by an individual or legal entity, called 'angel investor'. Such measure is an alternative to increasing resources in innovation without this preventing the enjoyment of the benefits resulting from the favored treatment of micro and small companies, among its the enjoyment of the 'Simples Nacional'.

More recently, despite not being in the scope of this research, Complementary Law N° 123/2006 was amended through Complementary Law N° 167/2019, to add new forms of incentive to innovation, whose legal regime was called 'Innovate Simple of the Simple Innovation Company' ("*Inova Simples da Empresa Simples de Inovação*") with a view to stimulating its creation, formalization, development and consolidation as agents that induce technological advances and the generation of jobs and income.

The regulatory evolution of micro and small companies points to the weakening of industrial policies and traditional innovation, which treat industrial and innovation policies in a stagnant manner, as pointed out by Dahlstrand et al. (2010). Thus, an integrated approach between industrial and innovation policies is increasingly common. If, on the one hand, the

industrial policies are aimed at producing income for the country, the innovation policies, according to Dahlstrand et al. (2010, p. 4), are traditionally related to three major objectives: a) growth in the intensification of research and development; b) stimulating a culture of innovation and; c) stimulating the development and commercialization of technology. Thus, considering knowledge as a predominant factor of production, industrial policies that disregard this tend to prove to be increasingly ineffective.

Gilbert et al. (2004) trace a historical panorama of how knowledge, catalyzed by globalization, has become a predominant factor of production in relation to capital, land and labor, impacting the efficiency of traditional industrial policies. In this context, it's recognized how the market structure is modified according to the innovation produced, either by the creation of new markets or by the closing of previous ones, even changing the traditional form of competition - way of forming the lowest prices (GILBERT et al., 2004, p. 314) - for that related to the opening of new technological routes.

Therefore, there is a change in the articulation of private actors, whether through increasingly symbiotic partnerships between large, micro and small companies, due to the rediscovery of the potential of micro and small companies to spread innovation (ORTEGA-ARGILÉS et al., 2009), or because of the need for a more intimate relation between researchers and entrepreneurs, including a proposal for 'more radical entrepreneurship' (AUDRETSCH, 2014), to go through all stages of the idealization process until profitable commercialization, producing different networks of relations (HARRYSON, 2008), among others.

Recognizing the complexity of fostering entrepreneurship to innovation, admittedly of greater impact, the legislator has increasingly endeavored to adopt measures that encourage micro and small companies focused on innovation, such as the Complementary Law N^o 155/2016.

2. THE SPECIFICITY OF PUBLIC INNOVATION POLICIES FOR MICRO AND SMALL COMPANIES

According to SEBRAE (2018), "in Brazil there are 6,4 million of establishments. Of this total, 99% are micro and small companies" (*micro e pequenas empresas - MPE*). "This MSCs account for 52% of formal jobs in the private sector (16,1 million)" (our translation into english). To illustrate the heterogeneity of the innovative dynamics of micro and small companies, the work carried out by ZUCOLOTO et al. (2016), according to which the innovative efforts of micro and small companies tend to vary according to the sector:

In this case, the sectorial research shows two different dynamics in the Brazilian reality. In high-tech industries, as discussed earlier, MSCs' entry opportunities focus on their ability to offer innovative products, inducing them to make a greater innovative effort. In addition, these sectors are dominated by transnational corporations, which tend to favor R&D activities in their countries of origin.

In the traditional industries, on the other hand, it is the larger companies that carry out the highest R&D efforts, being the smallest technological followers,

limiting themselves to accompanying technological development through the modernization of their processes. (Our translation into English) (ZUCO-LOTO *et al.*, 2016, p.39)

In other words, high-tech sectors demand more intensive innovative efforts from micro and small companies than from large companies and transnational corporations, so that those potentially launch new products on the market. On the other hand, more traditional sectors require less innovative efforts from micro and small companies than from large companies, being those that follow existing technologies, incorporating more innovation in their processes than in their products, a point of increasing their competitive advantage.

In this way, the stimulus to the 'high-tech sectors' is distinct from the traditional sectors, since, in those sectors, the uncertainty and investment costs are greater. This characteristic must necessarily impact the development of public policies for the sector. In addition, there is a gap, within the current financing instruments, characterized by the absence of mechanisms to promote pre-operational companies (the startups).

In summary, in the midst of difficulties in promoting innovation, especially in early stage businesses, one of the main aspects that industrial and innovation public policies considered is the encouragement of private financing at this stage, since the granting of loans requires, as a rule, the offer of guarantee, in return or counterpart.

In the work written by Riding (2008), the author points out the relevance of angel investment, which is more informal than investments made through 'private equity' or 'venture capital'; however, angel investment is valuable not only because it covers a broader base of companies, but also extra skills, through mentoring and support (GRILLI, 2019). For example, an angel investor who is interested in an investment in the 'legal tech area'⁶, will have a better chance of success if he knows technically the market and/or the technology that is being developed.

In meeting this concern, the hypothesis arises: the legal regime of the angel investment contract, provided for in Complementary Law N° 123/2006, which aims to reduce the investor's legal uncertainty, so that they can invest their resources to innovation projects without be co-responsible for possible tax, labor and other responsibilities, gradually encouraging the closing of this gap.

The objective is to attract private capital in the direction of stimulated public policy – the innovation. In this work, the policy of the legislator is analyzed, especially for instituting the angel investment institute –, and especially when companies aren't in the bank financing profile, either due to the impossibility of presenting traditional guarantees (mortgages and endorsement), either by uncertainty of the intended innovation increased by the scarcity of resources to be applied (financial and human).

6 They are technology-intensive startups, focused on providing services in the legal area, such as artificial intelligence applications in this industry.

3. THE GENERAL LEGAL REGIME OF THE ANGEL INVESTMENT CONTRACT DEFINED IN COMPLEMENTARY LAW N° 123/2006

At the outset, it's observed that the legal regime of the angel investment contract described from article 61-A, of Complementary Law N° 123/2006, is concerned with legal certainty, especially with that of the angel investor, that is, those who wish to invest resources in a specific micro or small company, in order to foster innovation and/or productive investments, stimulating fundraising in its activities. This is because, if angel investment is one of the instruments that aims to close the financing gap of 'technology-based micro and small companies', the stimulus sought by the legislator is related to mitigate the risks of the angel investor (WANG et al., 2019).

To this end, the Complementary Law in question makes possible to use a contract that ends an advantageous economic relation for both: for micro and small companies, which benefit from the resources contributed, as well as for the investor, who benefits from the returns invested, as well as by possible shareholding. Otherwise, if there were no favorable conditions for micro and small companies, they wouldn't use the institute and would probably they opt for traditional mechanisms, even if insufficient, since the choice to open the business to investors depends on the decision-making instances of the society/company itself.

On the one hand, the non-payment of resources invested in the corporate capital of the business company, under the caput of article 61-A, of Complementary Law N° 123/2006 ("Art. 61-A. In order to encourage innovation activities and productive investments, the society classified as a microenterprise or small business, under the terms of this Complementary Law, may admit the capital contribution, which will not integrate the company's social capital") (our translation into english) ("Art. 61-A. Para incentivar as atividades de inovação e os investimentos produtivos, a sociedade enquadrada como microempresa ou empresa de pequeno porte, nos termos desta Lei Complementar, poderá admitir o aporte de capital, que não integrará o capital social da empresa"), it favors micro and small companies, given that the company in which it was invested will continue to enjoy the tax benefits of the 'Simples Nacional'. This is because, under the terms of the legal provision, contributions aren't considered revenue for tax purposes, pursuant to article 61-A, of Complementary Law N° 123/2006 ("§ 5º. For purposes of framing the company as a microenterprise or small business, the amounts of capital contributed aren't considered as company revenues") (our translation into english) ("§ 5º. Para fins de enquadramento da sociedade como microempresa ou empresa de pequeno porte, os valores de capital aportado não são considerados receitas da sociedade").

On the other hand, the Complementary Law also establishes rules to encourage investors, especially with regard to legal certainty. One of the mechanisms used is the 'asset shielding of the angel investor', by differentiating him from the partner/member and excluding him from the liability of any debt, including judicial recovery, under the terms of article 61-A, §4, of the Complementary Law N° 123/2006 ("§ 4º. The angel investor: I - will not be considered a partner and will not have any right to management or vote in the administration of the company; II - will not be liable for any debt of the company, including in judicial recovery, and not

applying to him the art. 50 of Law N° 10.406, of January 10, 2002 - Civil Code") (our translation into english) ("§ 4º. O investidor-anjo: I - não será considerado sócio nem terá qualquer direito a gerência ou voto na administração da empresa; II - não responderá por qualquer dívida da empresa, inclusive em recuperação judicial, não se aplicando a ele o art. 50 da Lei n° 10.406, de 10 de janeiro de 2002 - Código Civil").

In this way, the Complementary Law allows the angel investor to be able to estimate more securely how much he will invest in the micro or small business society, thus avoiding future commitments, avoiding, for example, of the tax, labor and other responsibilities, even derived from the disregard of the legal personality, since the angel investor doesn't become a partner/member.

In addition, another point to highlight is the 'competitive concern' that the Complementary Law seems to have had, although this message isn't expressly reproduced. This inference stems from the rules related to the limits set for investments, with an evident concern to mitigate the participation of investors in the direction of the business, pursuant to article 61-A, § 6º, of Complementary Law N° 123/2006 ("§ 6º. At the end of each period, the angel investor will be entitled to the remuneration corresponding to the distributed results, according to the participation agreement, not exceeding 50% (fifty percent) of the profits of the company classified as a micro or small company") (our translation into english) ("§ 6º Ao final de cada período, o investidor-anjo fará jus à remuneração correspondente aos resultados distribuídos, conforme contrato de participação, não superior a 50% (cinquenta por cento) dos lucros da sociedade enquadrada como microempresa ou empresa de pequeno porte"), or § 7º, of the same article ("§ 7º. The angel investor can only exercise the redemption right after, at least, two years after the capital contribution, or a longer term established in the participation agreement, and his assets will be paid in accordance with art. 1.031 of Law N° 10.406, of January 10, 2002 - Civil Code, which cannot exceed the invested amount duly corrected") (our translation into english) ("§ 7º. O investidor-anjo somente poderá exercer o direito de resgate depois de decorridos, no mínimo, dois anos do aporte de capital, ou prazo superior estabelecido no contrato de participação, e seus haveres serão pagos na forma do art. 1.031 da Lei n° 10.406, de 10 de janeiro de 2002 - Código Civil, não podendo ultrapassar o valor investido devidamente corrigido").

The question that remains is whether such rules should really have been fixed a priori, given that the economic effects vary according to the market structure in which the economic agents are inserted, that is, the same behavior can bring positive or negative externalities depending on the relevant market in question and on the economic power of the agent.

Despite the importance of the regulation defined by Complementary Law N° 123/2006, in particular embodied in the paragraphs mentioned above (which will be reflected in the contractual clauses of any investment contracts entered into), it should be noted that, in the case of transactions involving technology intended to innovate, it appears that the economic relations are more complex than Complementary Law N° 123/2006 seemed to apprehend.

In other words, the success of the business depends not only on financial capital, but also on the human capital that will conduct the business, that is, the operation will necessarily involve a network of employees, considering that, as a rule, the small size of the companies of this type doesn't allow the hiring of specialized labor for different expertise. Therefore, the clauses contained in the angel investment contract must go far beyond financial clauses

or the clauses considered mandatory by the legal regime described above, and must include a well-defined goal metric.

4. ANGEL INVESTMENT CONTRACT IN PRACTICE: FROM DUE DILIGENCE TO DISINVESTMENT

Considering that angel investment activity is a private activity not regulated by the "Securities Market Commission" (Comissão de Valores Mobiliários – CVM), unlike what happens with open fundraising, including crowdfunding⁷, some precautions need to be reinforced, especially with regard to prospecting of the investee, the due diligence⁸ and the divestment.

Before the contractual instrument is signed, the angel investor needs to know the investment object. On the other hand, the investee company may need to protect the information that was organized before the transaction. At that time, it's recommended to enter into a Non-Disclosure Agreement (NDA), a confidentiality agreement to protect the sensitive information of the future business.

After the prospecting phase, the investor and investee sign a Term Sheet, that is, a memorandum of understanding, prior to the angel investment contract itself, in which the first conditions precedent to the contract are established (aspects analyzed in due diligence, in special), the structure of the transaction, the investor's rights, the confidentiality clause, especially when the Non-Disclosure Agreement (NDA) was not signed, among other possibilities. Here it's already observed that the instrument has the potential not only to meet the financial constraints of micro and small companies, but also to supply the insufficiency of specialized human resources, especially when, among the conditions, it's inserted: the commitment of the founding partners and team founder (usually holders of specialized knowledge) do not withdraw from society.

As a rule, it's possible to observe the use of these agreements in high technology sectors. This is because, when it comes to innovation, the speed of market transformations, especially in high-tech sectors, can affect the success of a given startup, in case it's necessary to restart a negotiation looking for a new investor, after the default of an eventual memorandum of understandings. In this market segment, timing is extremely important, otherwise the business will be lost. However, if it is a mere productive investment, such documents can be disregarded, not required.

Then, the due diligence phase begins, the phase in which the investor in fact will analyze the health of the company and the risk of the investment to be made, according to the criteria established in the memorandum of understanding. Therefore, it's recommended to analyze accounting, financial, legal aspects, regulatory restrictions to the business, relevant intellectual property records and operational feasibility analysis (CROCE et al., 2017). According to Robert Wiltbank and Warren Boeker (2007), investors who invested more time in due dili-

7 The CVM Instruction N° 588/2017 deals with the 'public offer for distribution of securities' and 'the issuance of small business companies' carried out by exempting registration through an electronic platform for participatory investment, among other measures.

8 See Ramalho's teachings (2019).

gence obtained better results, despite the fact that due diligence procedure entails financial and time costs. In this sense, as a public policy, Complementary Law N° 123/2006 failed to encourage due diligence procedures, especially in high technology sectors, considering the asymmetry of information between investors and those invested in an unregulated market.

It should also be noted that the parameters defined in these phases help to demonstrate possible pre-contractual liability, in case the business doesn't materialize due to violation of the principle of violation of good faith and protection of trust, pursuant to articles 421 ("Art. 421. The freedom to contract will be exercised due to and within the limits of the social function of the contract") (our translation into english) ("Art. 421. A liberdade de contratar será exercida em razão e nos limites da função social do contrato") and 422 ("Art. 422. The contractors are obliged to keep the principles of probity and good faith in the conclusion of the contract, as well as in its execution") (our translation into english) ("Art. 422. Os contratantes são obrigados a guardar, assim na conclusão do contrato, como em sua execução, os princípios de probidade e boa-fé"), both of the Brazilian Civil Code.

An example that could be hypothetically elaborated is, if after due diligence, the investor discovers that the investee has no right to exploit a patent essential to the object of the business. In this case, the investor could fail to enter into the investment contract without suffering any type of liability, even if pre-contractual.

Then, after the due diligence procedure, the investor confirms or not the amount to be contributed, considering the evaluation of the business company - before the contribution - and the prognosis about the future evaluation. It's important to point out that, from a business point of view, in the event of a clause converting the contribution into equity interest (not mandatory in the legal regime of Complementary Law N° 123/2006), the participation in the business company securitized by the angel investor after conversion, as a rule, it has an intermediate value between the evaluation before the investment and the prognosis of the evaluation after the investment, so that there is a financial incentive for both, for the investor and for the investee. The more balanced the return between the parties, greater are the chances of new rounds of investment.

Then, if the conditions of the Memorandum of Understanding are implemented, the instrument of the angel investment contract itself is signed. It's, therefore, an angel investment contract convertible or not into equity interest, that is, an intermediary model between the 'convertible loan agreement' (used predominantly for anonymous society) and the 'purchase and sale agreement of equity interest', in order to meet the peculiarities of the innovation market, which influence the new clauses that will compose the new investment modality.

An impact of the peculiarities of the innovation market in the angel investment contract with a view to meeting its economic function is the need to establish a business plan with goal setting. In none of the contracts indicated above (loan and purchase and sale), this feature makes up the structure of the transaction. It turns out that when it comes to innovation, as discussed earlier, uncertainty is its mark (KLINE et al. 2017). Therefore, the more detailed the steps to be developed by the investee, the easier it will be to identify the events that give rise to the application of specific clauses of this type of transaction, thus allowing the reduction of information asymmetry.

It's also added that the business plan and the goals set, intrinsically related to innovation activities, are also important as parameters for the eventual demonstration of blame on the part of managers in the event of failure, especially in cases where there has been no appreciation of the business company initially foreseen, as well as for the interpretation of eventual hypotheses of defaults, absolute or relative by any of the contracting parties.

In this line, Complementary Law No. 123/2006 fails to include completely different objects in the same legal regime: innovation activities (which may or may not include productive investments) and productive investments (which do not necessarily imply innovation), since productive investments aren't characterized by the uncertainty inherent in innovation activities ("Art. 61-A. In order to encourage innovation activities and productive investments, the society classified as a microenterprise or small business, under the terms of this Complementary Law, may admit the capital contribution, which will not integrate the company's social capital") (our translation into english) ("Art. 61-A. Para incentivar as atividades de inovação e os investimentos produtivos, a sociedade enquadrada como microempresa ou empresa de pequeno porte, nos termos desta Lei Complementar, poderá admitir o aporte de capital, que não integrará o capital social da empresa").

However, this characteristic may have arisen from the need to stimulate the sector considering the heterogeneity of the micro and small companies market, since not all micro and small companies are dedicated to innovative activity (be it process - traditional sectors -, be it product - high technology sectors). Thus, micro and small companies that do not innovate 'hitchhike' in the legal regime described here, to meet their productive investment purposes. In fact, the biggest problem is the regulatory insufficiency for financing innovative activities to any degree (products or processes).

Therefore, given the broad spectrum of the contractual object (innovation activities and productive investments) included in the regulation of the angel investment contract, the Complementary Law N° 155/2016 failed to detail the legal regime specifically related to innovation activities, for example, failing to protect parts of the information asymmetry, inherent in this type of activity. In other words, other public policies, other than the angel investment contract, could be used more effectively to promote productive investments in micro and small companies and this legal regime could have been more daring in terms of regulation and incentives.

In addition, Complementary Law N° 155/2016 provided for the possibility for the investor to redeem their investment, after a period of 2 (two) years ("§ 7º. The angel investor can only exercise the redemption right after, at least, two years after the capital contribution, or a longer term established in the participation agreement, and his assets will be paid in accordance with art. 1.031 of Law N° 10.406, of January 10, 2002 - Civil Code, which cannot exceed the invested amount duly corrected") (our translation into english) ("§ 7º O investidor-anjo somente poderá exercer o direito de resgate depois de decorridos, no mínimo, dois anos do aporte de capital, ou prazo superior estabelecido no contrato de participação, e seus haveres serão pagos na forma do art. 1.031 da Lei nº 10.406, de 10 de janeiro de 2002 – Código Civil, não podendo ultrapassar o valor investido devidamente corrigido"), if the investor understands that the return risks may be increased in the event that his investments remain in the company, even if its goals are being met.

This isn't a case of default on goals, which could give rise to early redemption (theory of absolute default). In the first case, the rule of article 1.031 of Civil Code of 2002 applies, according to which the parameter for the resolution is the company's equity situation, recorded on the balance sheet on the resolution date, limited to the corrected invested amount⁹.

Another beneficial clause for investors that don't have the power to intervene in the direction of business, is the remuneration of the contribution, corresponding to the distributed results ("§6º. At the end of each period, the angel investor will be entitled to the remuneration corresponding to the distributed results, according to the participation agreement, not exceeding 50% (fifty percent) of the profits of the company classified as a micro or small company") (our translation into english) ("§ 6º. Ao final de cada período, o investidor-anjo fará jus à remuneração correspondente aos resultados distribuídos, conforme contrato de participação, não superior a 50% (cinquenta por cento) dos lucros da sociedade enquadrada como microempresa ou empresa de pequeno porte").

This form of remuneration can be advantageous if the startup is leveraged in a period of time below the limit of the investment contract provided for by law, that is, seven years. Otherwise, the return will only come in the form of article 61-A, § 7º, of Complementary Law Nº 123/2006, already commented. Therefore, due diligence is essential for a more accurate prognosis.

However, remunerative financial clauses aren't enough to guarantee the success of the operation. To protect the investor, there are other clauses that can be incorporated into the contract. The preference and tag along clauses¹⁰, for example, were established as mandatory in this type of business transaction, both established in art. 61-C, of Complementary Law Nº 123/2006 ("Art. 61-C. If the partners decide to sell the company, the angel investor will have preemptive rights in the acquisition, as well as the right to 'joint sale of ownership of the capital contribution', under the same terms and conditions that are offered to the regular partners") (our translation into english) ("Art. 61-C. Caso os sócios decidam pela venda da empresa, o investidor-anjo terá direito de preferência na aquisição, bem como direito de venda conjunta da titularidade do aporte de capital, nos mesmos termos e condições que forem ofertados aos sócios regulares"). Despite the mandatory nature of these in the legal regime of Complementary Law 123/2006, it's possible that, depending on the business, such clauses aren't interesting.

On the other hand, it's more appropriate to include other unnamed clauses in the regulation of the legal regime of the angel investment contract, such as: no shop clause¹¹, full ratchet clause¹², lockup clause¹³, clause for converting the contribution into equity interest,

9 This prediction discourages the investor to make the redemption, because, if he simply wanted his corrected money, he could invest his resources in other, with less risky, investment modalities. Such observation becomes even more explicit when the equivalence of income tax rates on income resulting from capital contributions made is identified, pursuant to article 61-A of Complementary Law Nº 123/2006 (article 5º of the Normative Instruction of Brazil Nº 1.719/2017) and on net income and gains earned in the financial and capital markets (Normative Instruction of Brazil Nº 1.585/2015). In other words, by taxing the two economic facts in the same way, the one with the greatest risk was discouraged, in this case, the first hypothesis.

10 Clause traditionally attributed to the protection of minority shareholders, who are guaranteed the same conditions offered to majority shareholders, in the event of the sale of equity interest. In this case, the clause was adapted to protect the angel investor.

11 Clause that prohibits the potential investor from holding interests in competing companies.

12 Clause establishing some kind of counterpart against decisions that harm minority shareholders.

13 Clause that prevents the entrepreneur and / or the founding team from leaving the company, as long as there is potential for the investor to grow.

clause prohibiting the transfer to third parties of intellectual property technology relevant to the business, among others, depending on the structure of the transaction and the relevant market used.

Therefore, depending on the dynamics of the sector to be invested, it's essential to complement the angel investment contract in addition to the legal regime of Complementary Law No. 123/2006 and to establish an efficient due diligence, as by this that it will depend on the chances of return and the legal structure of the transaction.

CONCLUSION

The present work sought to analyze the legal regime established by Complementary Law N° 155/2016 about the angel investment, in the context of public policies to foster innovation aimed at micro and small companies. Thus, the path taken initially was to analyze the regulatory evolution of the promotion mechanisms in Brazil, as well as the peculiarities of micro and small companies.

Thus, it was verified how Complementary Law n° 155/2016 collaborated with overcoming the insufficiency of financial capital and human capital characteristic of micro and small companies, considering the insufficiency of financial capital and human capital of micro and small companies, main difficulties they face (SEBRAE, 2018) and the importance of innovation for a country's economic development (DAHLSTRAND et al., 2010).

Thus, some shortcomings were identified in this development initiative, Complementary Law N° 155/2016, dispensing, for example, with the angel investment legal regime established by Complementary Law N° 155/2016 and opting for the 'convertible loan into shareholding regime', since the remuneration to the investor may be low (article 61-A, § 7º, of Complementary Law N° 123/2006), if, for example, the time for incorporating the technology in the market is longer than the term of 7-year (article 61-A, § 6º, of Complementary Law N° 123/2006).

The Complementary Law N° 155/2016 also failed to encourage the due diligence procedure, which is essential for the profitability of the investment made, as well as for stimulating new investment rounds. In addition, this Complementary Law N° 155/2016 could also have, at least, indicated possible business clauses typical of foreign literature adaptable to investment contracts, which would also have the power to favor the correct interpretation of the courts in cases of judicialization of the contractual relations.

In addition, the legal regime of the investment contract established by Complementary Law N° 155/2016, focused on establishing financial clauses to solve the credit problem of micro and small companies, losing the opportunity to more assertively solve the problem of insufficiency of human capital, characteristic of micro and small companies, and failing, for example, to make mandatory the commitment of the founding partners and teams not to leave the company until the redemption has been carried out.

Therefore, the legal regime of the instituted angel investment contract could have more strongly mitigated the problem of insufficient financial capital and human capital, characteristic of micro and small companies, to privilege the credit issue, especially giving more secu-

urity to the angel investor regarding the return on his investments through a more appropriate tax treatment regarding the shielding of the labor and fiscal responsibility of investors when, for example, the legal regime of the contracts doesn't fit the specific business circumstances (deadline previously fixed, for example).

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