WHITE-COLLAR CRIME

A DECISION BY THE STF AND A BILL APPROVED BY THE HOUSE OF REPRESENTATIVES COULD DECRIMINALIZE GAMBLING IN BRAZIL

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The Federal Supreme Court (STF) *en banc* is expected to consider in April the constitutionality of article 50 of the Criminal Offenses Law (LCP)[1] and, depending on the decision, there will be important and immediate repercussions on gambling in Brazil, which activity may no longer be considered a criminal offense.

The Public Prosecutor's Office of Rio Grande do Sul filed an extraordinary appeal with the STF arguing that the criminalization of gambling does not violate any fundamental precept and rightly aims to punish conduct typified as harmful by criminal law. The case originated in a decision handed down by the Criminal Appeals Panel of the Special Criminal Courts of Rio Grande do Sul, which held that the conduct described in article 50 did not meet the elements of a crime because it went against constitutional precepts such as free enterprise, fundamental freedoms, and the principle of proportionality.

The issue is one of general repercussion. If the unconstitutionality of article 50 of the LCP is recognized, the door will be open for the legalization of gambling in Brazil, regardless of the regulations proposed by the Legislative Branch through Bill 442/91 (PL 442/91).

Recently approved by the House of Representatives, PL 442/91 seeks to transform the exploitation of games of chance into a corporate economic activity, subject to inspection by federal public agencies and tax collection. The text approved joins proposals on legalizing the operation of casinos, bingo, gambling, and other games of chance to others that aim to obtain revenue from initiatives linked to the cultural sector.[2]

The games and betting expressly authorized in PL 442/91 are: casinos, bingo games, videobingo games, online games, *jogo do bicho*, and turf betting. Regarding operators, the text defines "gambling and betting operator" to be the legal entity licensed by the government to operate games. The "gaming and betting agent", on the other hand, is the individual in charge of mediating or conducting the betting processes or the dynamics of the games.

The gaming and betting operator will have a complex corporate structure, with specific rules that, if not complied with, can generate more serious punishments than those currently imposed on gambling, considered only a misdemeanor. Avoidance of the regulations will be considered a crime subject to ordinary procedural rules, liable to imprisonment, and all the subjective criminal complexity that permeates corporate structures.

Also according to the bill, games and betting are private economic activities regulated by the Federal Government and subject to the constitutional protection of free enterprise, the Consumer Protection Code (CDC), and the General Data Protection Law (LGPD). Gaming and betting operators will have to submit to a series of criteria and obligations:

> be organized as corporations;
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> have a minimum amount of capital stock, depending on the activity they intend to conduct;[3]
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> comply with "fair gaming" guarantees, including with regard to publicizing the activity and establishments; and
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> be subject to the control and express approval of the Ministry of Economy,[4] which may request the information and documents it deems necessary to clarify the operation, including "origin of the funds" and "reputation of those involved".

Operators must also be subject to the guidelines on money laundering and prevention of financing of terrorism, by implementing and maintaining a policy capable of preventing practices of this type, including a risk profile classification of players and bettors and reporting suspicious transactions to the Financial Activities Control Board (Coaf).

Gaming and betting agents cannot be people previously convicted of administrative misconduct, a bankruptcy crime, tax evasion, corruption, graft, embezzlement, a crime against the popular economy, the public faith, property, or the Brazilian Financial System, or any other criminal conviction that prohibits, even temporarily, access to public office, by a final and unappealable judicial decision.[5]

Regarding penalties, PL 442/91 establishes that simple non-compliance with legal rules can constitute an administrative infraction and a crime punishable by imprisonment from two to four years. Anyone who defrauds the result of a game or bet, or even pays a prize in violation of the law, can also be convicted of a crime and subject to imprisonment from four to seven years and a fine.

It is worth remembering that, in the Brazilian legal system, criminal liability of legal entities is restricted to crimes against the environment, such that the conduct listed in the bill is aimed at punishing individuals. The agent of

games and betting emerges as the main subject exposed criminally, but one must also consider the criminal exposure traditionally linked to members of any corporate organization, including with regard to tax crimes that violate the tax collection system imposed by PL 442/91.

The liberalization of gambling in Brazil through this bill still depends on Senate and presidential approval.

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[1] RE n. 966177/RS had its general repercussion recognized in 2016 and corresponds to Topic 924.

[2] To wit: PL 442/91, which proposes revocation of the legal provisions that mention the practice of gambling; PL 73/2021, which provides for the Federal Government's financial support to the states, Federal District, and municipalities to guarantee emergency actions aimed at the culture sector; and PL 1518/2021, which promotes the institution of a national policy to foster the culture sector.

[3] The required capital stock varies according to the activity to be conducted, with a minimum of R$10 million for bingo operators and a maximum of R$100 million for casinos.

[4] The bill provides that corporate acts such as changes in corporate purpose or capital, mergers, splits, or takeovers will require the express approval of the Ministry of Economy, and that the entrance of a qualified shareholder or an increase in qualified shareholding equal to or greater than 15% must be reported.

4 The bill has wording regarding impediments very similar to cases of ineligibility to occupy management positions in corporations (article 147, paragraph 1, of Law No. 6,404/76)