

The Legalization and Regulation of Bets in Brazil: A Critical Analysis of Unconstitutionality Actions in Light of the General Theory of Law

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Abstract

The article addresses the legislation, regulations, compliance requirements, and supervision of Bets in Brazil. First, we mention creating the body responsible for analyzing requests for operating authorization, monitoring and supervising activities, and applying sanctions to operators. The text discusses the importance of the compliance structure, which is separate from other areas and enables independent risk prevention work. It also addresses the lawsuits seeking the unconstitutionality of the rules that legalized and regulated sports betting. The text is supported by graphs that illustrate the participation and, above all, the importance of the betting operator in the money laundering prevention system, from reporting suspicious transactions to the Board responsible for supervision, as well as reporting suspicious activities, such as match-fixing or other frauds. Monitoring, supervision, inspections, requests for information and access to data are also illustrated to facilitate understanding of the work of the supervisory body. Finally, we present our conclusion regarding the constitutionality of the law, our concern about the possible persistence of clandestine operators and the need to improve sanctions, especially in the criminal sphere, for people involved in illegal activities.

Keywords

Legalization of Bets, Sports Betting Regulation, Brazil Gambling Laws, Unconstitutionality Actions, Compliance in Betting, Risk Prevention, Money Laundering Prevention, Sports Law, Match-Fixing and Fraud, Supervisory Body Functions

1. Introduction

Legalizing online betting in Brazil began in 2018 when the Brazilian parliament

created the fixed odds lottery modality. In 2023, the parliament authorized commercial exploration in a competitive environment without limiting the number of authorizations of bets related to actual or virtual events throughout the national territory.

The betting operator agent must necessarily be a legal entity with proven knowledge and experience in games, bets, or lotteries and must meet technical and cybersecurity requirements. The consideration for the grant is the collection of R\$ 30 million, equivalent to US\$ 5.25 million, for the authorization to operate the activity for 5 years. The identification of bettors must use identification and facial recognition technology. Only after validating the authenticity of information by comparing it with public or private databases¹ will the operator be able to receive bets from its users.

However, the Federal Government's inertia delayed the regulatory process. It was only in 2024² that the executive branch began to issue regulatory acts, known in Brazilian administrative law as Ordinances, which defined the regulatory policy and agenda for this vital topic.

This article will address the ordinances that establish rules for payment institutions, procedures for preventing money laundering and financing terrorism, procedures for approving online games, procedures for monitoring activities and operating agents, and any sanctioning regime in case of rule violation.

2. The Supervisory Body

Just as the United Kingdom created a specific body to license, regulate and monitor betting, in this case, the *Gambling Commission*³, the Brazilian government created the Secretariat for Prizes and Bets (SPA)⁴, a body subordinate to the Ministry of Finance (MF). The MF is responsible for inspection, tax collection, and customs. The SPA also has a Subsecretariat for authorization, a Subsecretariat for monitoring and inspection and a Subsecretariat for sanctioning action.

The President of the Republic delegated the SPA to regulate, monitor and apply administrative sanctions regarding the obligation to identify customers, maintain records and report financial transactions suspected of money laundering⁵ in the case of betting operators that operate or payment institutions and financial institutions that act as intermediaries for betting. The SPA can regulate the rules for responsible gaming⁶, possibly limiting the quantity, frequency and values of bets per event or bettor. It may, for example, restrict bets on yellow or red cards. These events are the focus of suspicions of manipulation, which harms the uncertainty

¹Section 23, "caput" and § 1°, of Law n° 14.790/2023.

²Link

<https://www.gov.br/fazenda/pt-br/composicao/orgaos/secretaria-de-premios-e-apostas/legislacao/apostas> accessed on 29/10/2024.

³Link <https://www.gamblingcommission.gov.uk/> accessed on 29/10/2024.

⁴Link https://www.planalto.gov.br/ccivil_03/_ato2023-2026/2024/decreto/d11907.htm accessed on 29/10/2024.

⁵Section 55, V, do Decree n° 11.907/2024, above referenced.

⁶Section 55, subsection VIII, of Decree above referenced.

of the sporting result aiming at the illicit advantage of bettors or criminal organizations.

The Subsecretariat for Authorization is responsible for analyzing authorization requests⁷. The Subsecretariat for Monitoring and Inspection is responsible for supervising and inspecting the activity of operating fixed-odds betting and monitoring compliance with regulations related to corruption, money laundering and other crimes within the scope of sports betting. The Subsecretariat for Monitoring and Inspection is also responsible for initiating, instructing, analyzing, proposing sanctions and archiving the administrative sanctioning process to investigate irregularities⁸. Finally, the Subsecretariat for Sanctioning Action is responsible for judging the administrative sanctioning processes in the first instance and deciding whether to apply administrative sanctions or archive the process⁹.

In the compliance chart below, the SPA plays an important role as the regulatory body, exercising monitoring and supervision activities over Bets and having the authority to initiate sanctioning processes.

3. Money Laundering Prevention

Legislation to combat money laundering in Brazil was approved by the Brazilian Parliament in 1998¹⁰. Concealment of amounts derived from a criminal offence is punishable by imprisonment of 3 to 10 years. As of 2021, fixed-odds betting operators were required to identify customers¹¹, keep records of all transactions in national or foreign currency for a minimum period of 5 years, and, most importantly, report to the Financial Activities Control Council (COAF) any transactions that show signs of money laundering¹².

Companies that operate betting in Brazil must demonstrate the implementation of policies, procedures and internal controls to prevent money laundering and terrorist financing under penalty of suspension of the exercise of activities or revocation of the authorization¹³. The betting operator agent must also implement a monitoring system to characterize possible bets suspected of money laundering.

It is important to emphasize that the legislator's intention is not to communicate the operations to COAF merely; before that, the operator must structure a compliance department that provides a detailed analysis of the bets¹⁴, such as, based on suspicious bets, checking the bettors' IPs, origin devices, alerts from sports integrity monitoring companies¹⁵, cross-referencing data from open sources such as social networks, betting history, economic and financial capacity

⁷Section 56, subsection I, subsection "c", of Decree above referenced.

⁸Section 57, subsection I, II e IX, of Decree above referenced.

⁹Section 58, subsection I e II, of Decree above referenced.

¹⁰https://www.planalto.gov.br/ccivil_03/Laws/L9613.htm accessed on 26/11/2024.

¹¹Imposed obligation by Law n° 14.183 of 14 July 2021, Section 7, Link https://www.planalto.gov.br/ccivil_03/ato2019-2022/2021/lei/14183.htm accessed on 26/11/2024.

¹²Vide section 10 e 11 of Law n° 9.613/1998.

¹³Section 8° of Law n° 14.790/2023.

¹⁴Vide section 25, subsection I, of Law n° 14.790/2023.

¹⁵Examples: Sportradar, IBIA, Genius and etc.

of the bettor, among other techniques.

The Compliance Chart (**Figure 1**) vividly illustrates the crucial task of preventing money laundering. Betting operators, financial institutions, and payment applications are mandated to report any suspicious activities. This underscores the responsibility and commitment required in our roles to ensure the integrity of the financial system.

In the center of the chart, it is possible to infer the important role of COAF, which is the Brazilian Financial Intelligence Unit. COAF receives sensitive information and compiles it into Financial Intelligence Reports (RIF) through a meticulous process of data analysis and verification. These RIFs are then forwarded to the Federal Police and the Federal Public Prosecutor's Office.

4. Compliance Officer

Compliance can be defined as a set of mechanisms and procedures to protect legality, integrity and ethics within the company environment, with institutional incentives to report irregularities for investigation and punishment (Martinez, 2024: p. 35). Following the lessons of Martinez (2024), we understand that standards must be interpreted systematically and applied harmoniously (Martinez, 2024: p. 41) so that the framework created by the National Monetary Council and the Central Bank is integrated and coherent. The unit responsible for the compliance function must be fully segregated from the internal audit activity¹⁶.

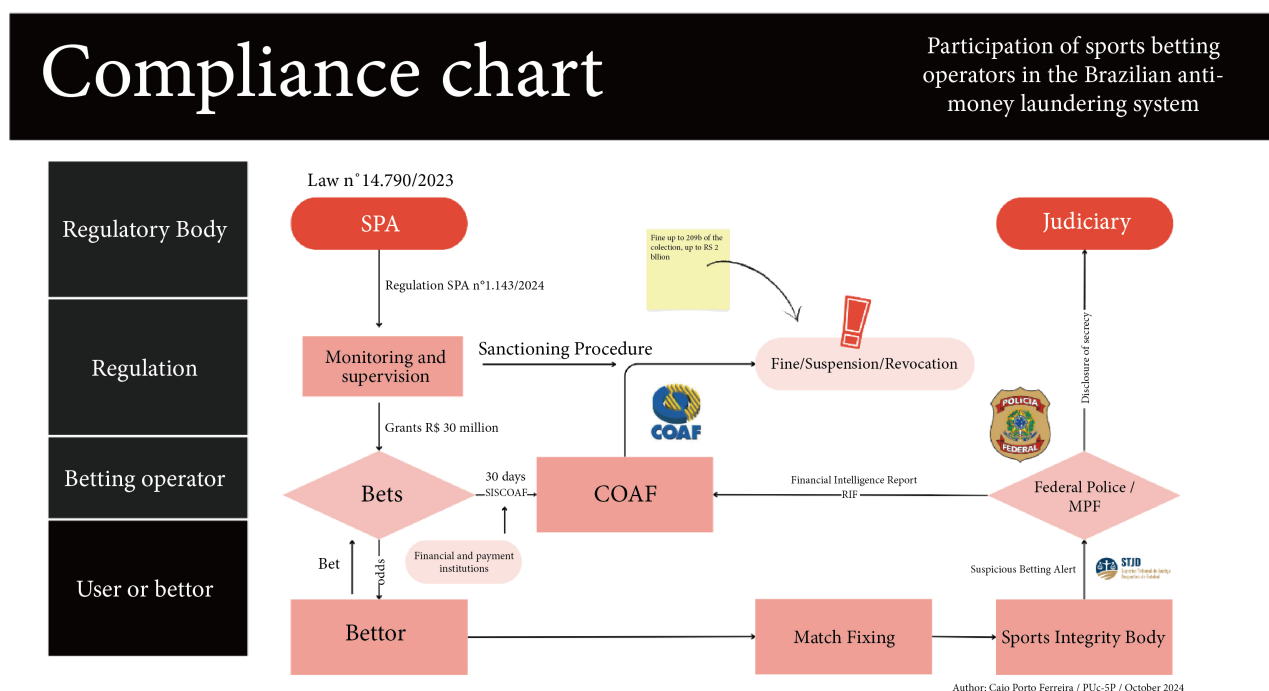


Figure 1. Flowchart illustrating Bet's duty to report suspicious activities to the Financial Intelligence Unit and the SPA.

¹⁶Vide section 6°, da Resolução BCB n° 65 de 26/01/2021, which provides for the compliance policy of Payment Institutions, <https://www.bcb.gov.br/estabilidade financeira/exibenormativo?tipo=Resolu%C3%A7%C3%A3o%20BCB&numero=65> accessed on 26/11/2024.

The SPA regulations¹⁷ establish that the identification form for controllers, holders of qualified interests, administrators and final beneficiaries must designate those responsible for the areas (1) accounting and finance, (2) processing and security of personal data, (3) operating system of the betting system, (4) integrity and compliance, (5) customer service and ombudsman and (6) relationship with the Ministry of Finance, and by force of law¹⁸, the last two are directors. The regulations, in turn, defined that those responsible for the other areas must hold the director position or equivalent¹⁹. The accumulation of functions of the areas above is prohibited²⁰.

Fixed-odds betting operators may hire specialists to carry out activities related to the compliance policy while fully maintaining the duties and responsibilities of the board of directors^{21, 22}. According to MARTINEZ, a specialist may be considered a person—natural or legal—with notable technical-professional knowledge in a given area, standing out in the market due to their in-depth experience and studies²³.

The compliance officer's role is crucial and non-negotiable in the activities of financial institutions and payment methods, particularly for the betting operator. It is a mandatory corporate policy, as expressly provided in Section 8, item II, of Law 14790/2023.

As the main liaison, the compliance officer facilitates the collaborative efforts between the Brazilian financial intelligence unit and the SPA, as you can see in the chart below. Both bodies have concurrent powers to prevent money laundering in betting, underscoring the need for a united front in compliance.

Figure 1 summarizes the participation of sports betting operators in the money laundering prevention system. The Prizes and Betting Secretariat monitors and supervises Bets. Companies, in turn, must, together with financial institutions and payment institutions, report to the Financial Activities Control Council (COAF), within a maximum period of 30 days, any operations with indications of money laundering via their system (SISCOAF):

COAF, in turn, in possession of the numerous communications it receives, prepares Financial Intelligence Reports (RIF) and forwards them to the Federal Police and Federal Public Prosecutor's Office, which may request breaches of banking and tax secrecy and search and seizure warrants to investigate criminal offences.

The sanctioning process may be initiated if the fixed-odds betting operator,

¹⁷Section 8°, § 2°, of Regulation SPA 827/2024.

¹⁸Section 7°, § 1°, subsections IV e VI, of Law n° 14.790/2023.

¹⁹Section 8°, § 3°, of Regulation SPA 827/2024.

²⁰Section 8°, § 4°, of Regulation SPA 827/2024.

²¹Vide section 7°, single paragraph, of Resolution 4.595 de 28/08/2017, which provides for the compliance policy of Financial Institutions, link https://normativos.bcb.gov.br/Lists/Normativos/Attachments/50427/Res_4595_v2_P.pdf accessed on 26/11/2024.

²²Vide section 7°, single paragraph, of Resolution BCB n° 65 de 26/01/2021, as amended, as of 3/1/2024, by Resolution BCB No. 368, of 1/25/2024, which also provides for the hiring of specialists.

²³*Op. Cit.* Page. 23.

financial institution or payment institution fails to maintain a specific compliance unit with human, technological and material resources for the development of an internal prevention policy, independent internal investigations, analysis of bets with red flags and communication of the information analyzed in detail within 30 days.

5. Monitoring and Inspection

Brazilian law authorizes the government to have unrestricted, continuous, and real-time access to Bet's system, which must be auditable²⁴. Inspections may be scheduled, official, or by court order²⁵. The SPA may conduct physical or remote inspections²⁶ to examine and evaluate specific aspects of the operating agents, verifying any flaws and ensuring that the company follows compliance rules.

For the proper progress of these monitoring and inspection activities, the SPA may request clarifications, technical, operational, economic-financial and accounting information, documents, certifications, certificates and reports from the operating agents²⁷. The operating agent must report any evidence of manipulation of events or results within five business days to the SPA and the Public Prosecutor's Office. **Figure 2** summarizes the monitoring and inspection activities carried out by the Prizes and Betting Secretariat (SPA):

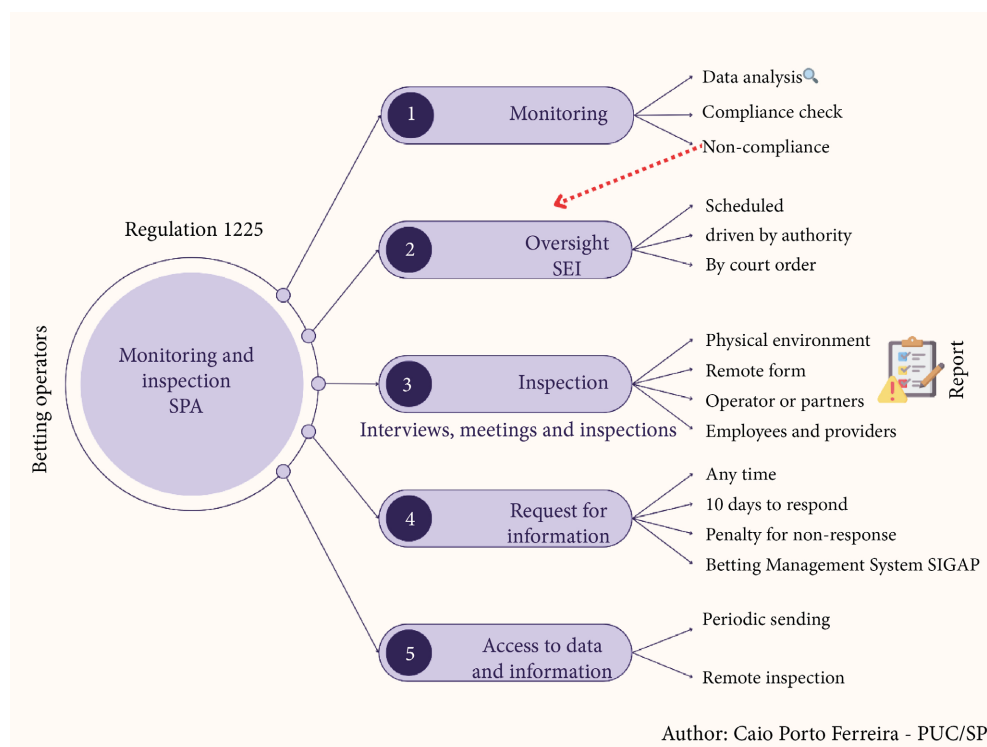


Figure 2. Lists the forms of supervision carried out by SPA in its monitoring and control activities.

²⁴Section 33 of Law n° n° 14.790/2023.

²⁵Section 6° "caput", of Regulation SPA 1.225/2024.

²⁶Section 8° "caput", § 1° e § 2° of Regulation SPA 1.225/2024.

²⁷Section 16 of Regulation SPA 1.225/2024.

6. Combating Illegal Betting

Although the SPA has the power to monitor and inspect operators, criminal groups can engage in illegal activities such as operating illegal websites and simulating regular websites, misleading unsuspecting victims. It is not uncommon for fake betting sites to simulate games to obtain funds or even steal card data.

Empirical experience shows that despite the Government's efforts to monitor and repress crimes, criminal groups that carry out their clandestine activities online are not stagnant. They are constantly improving themselves to achieve greater profits, underscoring the need for continuous vigilance and adaptation in our fight against online crime.

One highly effective measure in combating the use of false documents or registrations is the biometric registration of users and the recurring double-check of the individual using the cell phone. These measures have proven to be a significant deterrent to online criminals.

Cooperation between institutions, particularly with the federal police, is not just necessary but crucial when dealing with organized groups focused on the repeated practice of crimes. Brazilian law to combat organized crime allows the use of special techniques to obtain evidence, such as controlled action, access to telematic records, signal interception, lifting of bank secrecy, police infiltration, and international police cooperation.

7. The Debate on the Unconstitutionality of the Bets Law

The constitutionality of laws in Brazil can be controlled in two ways: diffuse and concentrated. Every judicial body exercises diffuse control within its jurisdiction. In the first case, the judge rules out the law's applicability and, in a specific case, reveals content incompatible with constitutional precepts. However, the concentrated control of the constitutionality of federal laws or normative acts is a weighty responsibility exclusively exercised by the Supreme Federal Court when the standard norm is the Federal Constitution, regardless of its application to a specific case.

The main action is the Direct Action of Unconstitutionality (ADI). An absolute majority vote of the court's Plenary is required to declare a law unconstitutional. Since the Supreme Court in Brazil has 11 ministers, a quorum of 6 votes is required, making each vote a crucial part of the decision-making process. The law and regulatory acts that authorized and regulated the Bet's activity were challenged with lawsuits seeking to declare them unconstitutional. The three actions are analyzed in the following topics.

Those entitled to file a Direct Action of Unconstitutionality are a diverse range of entities, including the President of the Republic, the Board of the Federal Senate, the Board of the Chamber of Deputies, the Board of the Legislative Assembly of the States and the Federal District, the Governor of the State or Federal District, the Attorney General of the Republic, the Federal Council of the Brazilian Bar Association, a political party with representation in the National Congress and a

trade union confederation or class entity with national scope. This inclusivity ensures democratic character and pluralism and that a wide range of perspectives are considered in the constitutional control process.

7.1. ADI 7721²⁸

The first direct action of unconstitutionality (ADI) argues that household debt has increased considerably²⁹ since the law was passed. The entity that filed the lawsuit, a prominent organization representing and defending the economic activities of Brazilian businesses, argues that the legalization of online sports betting has also contributed to the popularization and participation of children and adolescents, whose access to online betting has become even easier, since the main instrument used is the cell phone, through access to digital platforms and applications offered freely.

Another argument would be that only 36% of bettors who win prizes use these resources to spend in other areas, not returning them to the local economy as goods and services. The absence of turnover would weaken the retail trade, which could have a negative psychological impact on individuals with compulsive gambling disorder. The union cites research that projects that bets will move between R\$60 and R\$100 billion in Brazil in 2023, equivalent to 1% of the GDP. At the time of the research, 400 companies were exploring the betting activity.

According to the argument for unconstitutionality, public health would be impacted because the affected population suffers from mental health problems since health is a right of all and a duty of the State, guaranteed through social and economic policies that aim to reduce the risk of disease and other problems and universal and equal access to actions and services for its promotion, protection and recovery, as provided for in article 196 of the Constitution of the Brazilian Republic.

The trade representative argues that Law 14.790/2023 barely established the obligation of “Responsible Gaming”, imposing mere limitations on misleading advertising and unsatisfactory policies for the prevention of psychological disorders related to gambling. However, this also presents an opportunity for positive change and improvement.

7.2. ADI 7723³⁰

The second lawsuit, filed by a political party called *Solidariedade*, sought to declare the Bets law unconstitutional. The plaintiff claimed that law 14.970/2023 did not respect the constitutional principles of the Democratic State of Law of human dignity, the social values of work, free enterprise, and the social right to health³¹.

He claims that the Federal Government is subjecting consumers to risks, dangers,

²⁸<https://portal.stf.jus.br/processos/detalhe.asp?incidente=7044517> accessed on 16/03/2025.

²⁹<https://noticias.stf.jus.br/postsnoticias/setor-de-comercio-pede-que-supremo-reconheca-lei-das-bets-como-inconstitucional/> accessed on 26/11/2024.

³⁰<https://portal.stf.jus.br/processos/detalhe.asp?incidente=7050029> accessed on 16/03/2025.

³¹<https://noticias.stf.jus.br/postsnoticias/stf-recebe-segunda-acao-contra-Law-das-bets/> accessed on 26/11/2024.

harmfulness, abuse, exclusions, and damages. He also claims that the regulatory framework is an affront to work and free enterprise and increases inequality and unemployment.

Finally, he argues that there is a violation of the social right to health due to the absence of strict advertising rules and a possible increase in the risk of disease without any effective counterpart of actions or services for prevention and recovery from the mental and social harm caused.

7.3. ADI 7749³²

The Attorney General of the Republic has taken a firm stance on the third unconstitutionality action, asserting that the set of rules outlined in articles 29 to 33 of Law 13,756/2018 and Law 14,790/2023 is largely incompatible with the constitutional text³³.

The head of the Federal Public Prosecutor's Office emphasizes that virtual betting must be in harmony with the constitutional framework. However, the two laws mentioned fall short of the minimum requirements for preserving values protected by the Constitution. He also points out that there is unconstitutionality due to the inappropriateness of the authorization instrument for granting public lottery services, which should be operated through concession or permission after a bidding process³⁴.

Another compelling argument put forth by the Attorney General is that the principle of formal legal reserve was not respected. This principle mandates that a law issued by parliament, and not SPA ordinances, should regulate matters, especially when the harmful potential of virtual betting would not be adequately prevented by sub-legal norms.

Finally, the unconstitutionality is questioned due to insufficient protection of fundamental rights. It states that although it is not up to the Judiciary to determine, in the abstract, the degree of harmfulness of a given economic activity with a view to establishing the viability of its safe exploitation, it cites that the STF has already declared that the exploitation of certain economic activities is not constitutionally viable.

8. Acts Not Subject to Control by the Judiciary

In the first case, we will analyze concerns and acts not subject to constitutional review by the Judiciary. Extraordinary Appeal (RE) 1297884 was recognized as having General Repercussion³⁵. Because of the relevance of the matter and the

³²<https://portal.stf.jus.br/processos/detalhe.asp?incidente=7096595> accessed on 16/03/2025.

³³<https://noticias.stf.jus.br/postsnovicias/procuradoria-geral-da-republica-entra-com-acao-no-su-premo-contra-Law-das-bets/> accessed on 26/11/2024.

³⁴See AADPF 492/RJ and 493/DF, and ADI 4986 link <https://portal.stf.jus.br/processos/detalhe.asp?incidente=4425284> accessed on 27/01/2025.

³⁵See theme 1120—Separation of powers and jurisdictional control of constitutionality in relation to the interpretation of procedural rules of the Legislative Houses <https://portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=6044054&numeroProcesso=1297884&classeProcesso=RE&numeroTema=1120> accessed on

significant number of appeals regarding the same controversy, the judgment of the case serves as a leading case for application to other similar cases.

The court of origin discussed the suppression of a phase of the legislative process regarding revoking a cause for increased punishment. Numerous decisions declared the provision unconstitutional because they understood that there was a procedural defect in the Federal Senate, specifically the error in publishing the final text of the bill.

The Supreme Federal Court declared that the Judiciary is prohibited from exercising jurisdictional control over the meaning and scope of merely procedural rules of the Legislative Houses since this is an *interna corporis* matter. This position upheld the constitutional principle of separation of powers.

Duty of Deference on Technical Acts

The second case of the impossibility of judicial review was verified in Extraordinary Appeal 1083955/DF³⁶. It dealt with the controversy of the Administrative Council for Economic Defense (CADE) applying a penalty against a chain of gas stations that, using its economic power, acted with illegal practices to eliminate potential competition from local hypermarket chains that intended to resell fuel in supermarket parking lots.

The Union representing the gas stations filed a lawsuit to annul the CADE fine, winning the case in the first instance. In the second instance, the Regional Federal Court recognized the impossibility of judicial review of CADE's decisions.

The Supreme Federal Court established the duty of the Judiciary to defer to the technical decisions adopted by regulatory bodies. The first ground was the courts' lack of expertise³⁷ and institutional capacity to decide on regulatory interventions, which involve polycentric issues and technical forecasts. A second argument applied was the fear that judicial review would lead to systemic effects that would harm administrative regulatory coherence and dynamics.

9. Provisional Judgment of Unconstitutionality Actions

All the cases were assigned to the same rapporteur³⁸, who granted a preliminary injunction³⁹, later unanimously ratified by the Supreme Federal Court, to immediately apply the SPA Ordinance that establishes rules for advertising aimed at protecting children and adolescents⁴⁰ and the immediate implementation of special protection to prevent participation in fixed-odds betting with resources from

³⁶<https://portal.stf.jus.br/processos/detalhe.asp?incidente=5287514> accessed on 27/01/2025.

³⁷The summary of the judgment stated: “*The institutional capacity in the regulatory field, which attracts controversies of a highly complex nature, which demand specialized and qualified treatment, reveals the limited expertise of the Judiciary for the jurisdictional control of the political and technical choices underlying economic regulation, as well as their systemic effects*” (Jordão, 2016: pp. 131-141).

³⁸Minister of the Supreme Federal Court Luiz Fux

³⁹<https://portal.stf.jus.br/processos/downloadTexto.asp?id=6394865&text=RTF> accessed on 26/11/2024.

⁴⁰Regulation SPA n° 1.231/2024, link <https://www.in.gov.br/en/web/dou/-/Regulation-spa/mf-n-1.231-de-31-de-julho-de-2024-575670297> accessed on 26/11/2024.

social and welfare programs⁴¹. This last measure, the limitation on the use of welfare funds, could have been implemented on the initiative of the Executive Branch. Still, the Government refrained from displeasing the dense political base that depended on these resources and preferred to leave the political burden to the Judiciary Branch.

As can be seen, the Supreme Federal Court innovated by enacting a regulation⁴² using a judicial decision, which the public administration would only demand compliance with in the future. MENDES understands that the Constitutional Court will not be exceeding its functions when it recognizes special procedural protection: “If we understand that the binding effect of the decision is closely linked to the very nature of constitutional jurisdiction in a given democratic State and to the role of guardian of the Constitution performed by the Court, we must also admit that the ordinary legislator and the Supreme Federal Court itself are not prevented from recognizing this special procedural protection to other decisions on constitutional controversies handed down by the Court. Along the same lines, it should be noted that the STF will not exceed its functions by recognizing binding effect to paradigmatic decisions it has issued in the protection and defence of the Constitution.” (Mendes, 2009: p. 17).

10. Jurisprudences about the Theses Raised and Prognosis

The lawsuits seeking to block the legalization of Bets were filed before the start of the regulated market, which opened on January 1, 2025. The development of the players’ activity and performance in the coming months will be decisive for the Supreme Court’s judgment.

With the dawn of the regulated market, the first month saw 77 companies registering 171 brands and domains⁴³, and collecting R\$2.3 billion in concession fees, equivalent to US\$390 million. This marks the beginning of a potentially transformative period in the gambling industry.

Despite the Attorney General’s stance on the need for a prior bidding process and compliance with permit and concession requirements, the recent Supreme Court ruling has brought clarity. The Court declared that the characteristics of the contractor are irrelevant to the State as long as they are suitable and prove their capacity to fulfil the obligations assumed, which is measured by objective and pre-established criteria.

Furthermore, Section 5 of Law 14790/2023 expressly provides that the operation of fixed-odds betting will not be subject to a minimum or maximum number

⁴¹Example: Family benefit, Continuous Benefit Payment and similar programs

⁴²See the text of Regulation SPA 1.231/2024: “*Art. 59. The rules for inspection, monitoring and sanctions for non-compliance with the provisions set forth in this Regulation will be implemented by the Prizes and Betting Secretariat from January 1, 2025*”. It should be noted that the injunction was granted on November 14, 2024, that is, the court order brought forward the validity of the normative act by 51 days.

⁴³<https://www.gov.br/fazenda/pt-br/composicao/orgaos/secretaria-de-premios-e-apostas/lista-de-empresas> accessed on 27/01/2025.

of operating agents. Therefore, it makes no sense to require a bidding process if any legal entity with expertise and meeting the requirements can apply for the concession.

Our perspective is that unconstitutional actions will not prosper. Since the work of the Brazilian Gambling Commission (SPA) has been developing satisfactorily and technically, we believe that the Supreme Court will honour the technical work and adopt a deferential stance towards the merits of the regulations carried out by the Secretariat.

Indeed, the members of the Supreme Court will adopt, on specific issues, the systematic interpretation⁴⁴ that determines the meaning of the law primarily by taking into account positive definitions and the principle of reasonableness. We have full confidence in the constitutionality of the laws, and believe that the global trend towards online gambling is a path that is difficult to reverse. We can regulate and discuss a more appropriate way of disciplining but not prohibiting.

The decision handed down by the Supreme Court⁴⁵ goes beyond applying the law to the facts, that is, giving an interpretation to the Betting Law in accordance with the Constitution; it also created law by imposing on the SPA the monitoring and sanctioning of companies that carry out advertising that targets children and adolescents. Antonin Scalia describes this legal reality: “Common-law courts performed two functions: One was to apply the law to the facts. All adjudicators—French judges, arbitrators, even baseball umpires and football referees—do that. But the second function, and the more important one, was to make the law” (Scalia, 2018: p. 4).

Scalia describes the courts’ most crucial function⁴⁶ as the creation of law and states that legal practitioners need to think critically to distinguish a controversial case from a possible precedent, as follows: “*Within such a precedent-bound common-law system, it is critical for the lawyer, or the judge, to establish whether the case at hand falls within a principle that has already been decided. Hence the technique—or the art, or the game—of ‘distinguishing’ earlier cases. It is an art or a game, rather than a science, because what constitutes the ‘holding’ of an earlier case is not well defined and can be adjusted to suit the occasion*” (Scalia, 2018: p. 6).

11. Conclusion

The debate on the legalization and regulation of online gambling is contemporary and is at the centre of the discussion in the media, executive, legislative and judicial branches. It is necessary to admit that it is part of human nature to make the correct predictions, and there is no harm in having a moderate amount of capital

⁴⁴In Portuguese the definition is called “Interpretação conforme a Constituição”.

⁴⁵<https://noticias.stf.jus.br/postsnoticias/stf-veda-publicidade-de-bets-para-criancas-e-determina-adocao-de-medidas-contrario-uso-de-recursos-do-bolsa-familia-em-apostas/> accessed on 27/11/2024.

⁴⁶The author makes this statement referring to the Common Law courts. However, it is known that the system in force in Brazil is the Civil Law system. However, the clear influence of Common Law on the STF is noticeable.

to seek a reward. Practical experience shows that it is not feasible to prohibit gambling or declare the unconstitutionality of the law that authorized the activity. It is possible, however, to improve the regulatory framework to minimize harmful consequences.

The central issue is not the law and regulations, which are well-detailed and have adequate technical rigour. The crucial point is how and when betting operators will adapt and satisfactorily comply with the rules imposed for the operation of the activity. At the same time, the supervisory bodies must structure themselves to coherently carry out monitoring and data cross-referencing routines to prevent the occurrence of administrative infractions and crimes.

On the other hand, sites not authorized by SPA may insist on offering illegal games. Regarding this clandestine offer, I understand that the prevention tools and sanctions need to be increased since these operators. However, they collect funds via Pix⁴⁷ with a “generic” National Registry of Legal Entities (CNPJ) headquartered outside Brazilian jurisdiction.

Finally, overcoming the previously mentioned legal discussion, which in our prognosis will be for constitutionality, indicating an interpretation in accordance with the Constitution on specific points, we conclude that this new market in Brazil can be favourable, with the generation of jobs, new businesses and tax collection. With the regulatory legal framework developed by the Public Administration in recent months, differentiating companies that follow compliance requirements from those that opt for improper practices will be more effective and will discipline this new industry.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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⁴⁷Instant payment method implemented by the Central Bank of Brazil.