

Brazil Continues to Scratch its Head With LOTEX Flop

by Neil Montgomery & Helena Calderano

Brazil's first attempt to privatize government-run lotteries has failed. In a country avid for entertainment and highly engaged in football tournaments, the general prohibition of games of chance seems incongruous and outdated. The only legally authorized games of chance are betting on horseraces in authorized tracks and the state-run lotteries. While bingos made a brief comeback before being definitively outlawed, the now nearly 80-year old ban on games of chance seems unlikely to be lifted this year due to the upcoming presidential elections in October.



In an election year, when not only the president but also state governors and members of both houses of congress are running, and in a political climate fraught with corruption scandals including the imprisonment of former President Lula, politicians are weary of associating themselves with an activity that is still very much viewed as being closely linked to money laundering and illegal activity. It is always important to remember that Brazil is still the world's largest Catholic country and that the morality that caused the ban to be instated nearly 80 years ago is still very much present in much of the Brazilian population who fear gambling addiction and mob-like crimes.

Both bills of law seeking the legalization of games of chance have so far had disappointing progress in congress. While the Senate's Constitution and Justice Commission recently voted against the Bill proposed in such house, significantly reducing its chances of passing, the House of Representatives Bill, which was initially proposed in 1991, is moving at a very slow pace.

In this political scenario, the proposed privatization of the instant scratch-card Lottery LOTEX, formerly run by State-owned bank *Caixa Econômica Federal*, was viewed by many as an experiment and teaser to show those opposing the legalization of games of chance that a privately run institution could comply with strict compliance standards while at the same time promoting a relevant economic sector which could be used to help the country better its economy by creating jobs and generating revenue for the government in the form of taxes.

The privatization of LOTEX was also viewed as a way to show foreign investors part of Brazil's potential and prepare the market generally for the much anticipated legalization of games of chance.



The proposed privatization was, therefore, highly anticipated and its preparation included a road show to the UK and the U.S., public consultations, establishment of a virtual data room and more.

Given the above context, the result of the public bid was disappointing to say the least – no bids were received by the June 25, 2018, deadline. The federal government must now decide whether it will either open a new date for submission of bids, change the terms of the invitation to bid or give-up the privatization altogether.

The main factor in dissuading potential entrants in bidding was recent Provisional Measure No. 841/2018, issued by President Temer on June 12, 2018, which unifies public safety, granting part of the money raised by lotteries to fund public safety measures. While provisional measures are in force as of their enactment, they must be reviewed and approved by congress to continue to be effective within 120 days of their issuance. Therefore, Provisional Measure No. 841/2018 is currently being reviewed by congress, where it has already received 95 proposed amendments, many of which seek to reduce the funds destined to subsidize LOTEX and reducing its pay-out.

The uncertainty caused by Provisional Measure No. 841/2018 has deterred potential bids for the privatization of LOTEX. Given the 120-day deadline for congress to review the Provisional Measure, it must be voted by no later than October 10th, although the vote is currently scheduled for September 12th. It is interesting to note that the election that will decide the new members of Congress will be held on October 7th, which will certainly influence the outcome of the vote of Provisional Measure No. 841/2018 should the same occur prior to the election.

Depending on the outcome of the vote, it may be that a new bid for the privatization of LOTEX will be scheduled. Should the outcome of the vote on Provisional Measure No. 841/2018 require that the terms and conditions of the invitation to bid be changed, the bidding process will take longer to be implemented, with new deadlines for comments and oppositions, which would likely push the bid into 2019.

However, the enactment of Provisional Measure No. 841/2018 is not the only legal barrier causing uncertainty for the privatization of LOTEX. Many states were questioning the Federal Union's right to grant exclusivity to a nationwide lottery operator before the Supreme Court, based on a law predating the Federal Constitution of 1988 that allowed states to run their own lotteries. Therefore, even if the bid proceeds, the winner may be faced with state-level competition on what was envisaged to be a national monopoly.

To complete this legal pandemonium, the Supreme Court is also currently reviewing the constitutionality of the restriction of games of chance, which predates the Federal Constitution and is argued to have been revoked by the latter. The decision of the Supreme Court in this case will bind all lower courts. Therefore, if the Supreme Court agrees with the argument that the restriction on games of chance was revoked by the Federal Constitution in 1988, Brazil could be faced with a lift on the restriction without any rules or regulations.

With so many opposing interests and views, the outcomes are uncertain and the variables are too many to factor. There is no doubt, however, given the geographical dimensions of Brazil and the size of its consumer market, that despite all the uncertainty, it is still a market to be watched. ♣

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