

Recent Developments in the Brazilian Informatics Law

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Introduction

The changes that have occurred in the legal environment surrounding the Brazilian computer science field clearly demonstrate the transition through which the country has been going in its attempt to open and deregulate the market.

For many years now, Brazil has been considered Latin America's biggest computer market, although off-limits to most outsiders. From 1970 until recently, offshore computer manufacturers were barred from producing or marketing goods that might compete with local production. Brazil also severely limited imports of almost all kinds of informatics goods, ranging from remote-control toys to factory robots. This policy embodied a well-meaning attempt to foster the domestic information processing industry without any foreign intervention or control, promoting the local computer industry at the expense of foreign products and manufacturers.

The main expectation for Brazil's protectionist strategy was that it would offset high costs with the creation of a solid and profitable domestic computer market, formed by highly qualified technicians. This goal seems more elusive than ever as the Brazilian computer industry is far from efficient and only shows a profit due to its ivory-tower protection from the international market.

The upshot, Brazilians now realize, is an exclusive local market for computer industries that manufacture costly and low-quality computers that lag alarmingly behind the rest of the world. The Brazilian computer industry has also failed to collaborate with universities and research centers in scientific development.

Brazil has been ensnared by its own market reserve, and is now attempting to escape from the ensuing technological isolation. By attracting up-to-the-minute computer technology,

the Collor Administration hopes to stimulate Brazil's economy in the computer science sector, in a vital step towards the free-market reforms recently introduced. Some attempts have resulted in groundbreaking legislation, while others have not met with much success. June 1990 marked the starting point for the specific action taken in this respect.

Law No. 7232 of October 29, 1984 - The Original Informatics Law

In October 1984, Congress approved Law No. 7232 (the Informatics Law), establishing the principles, objectives and guidelines for the Brazilian Informatics Policy and empowering the federal government to establish restrictions on the manufacture, operation, marketing and import of technical informatics goods and services. This legislation enacted the body of regulation known as "market reserve".

Although the expression "market reserve" is not actually mentioned in the law, the federal government has been monitoring imports of informatics goods and services since October 30, 1984, as well as examining and deciding on plans for development and production of informatics goods. Plan approval by the competent authorities has become necessary not only to qualify for certain tax benefits, but also to import parts or accessories, and to acquire foreign technology.

Companies not considered "domestic" or "national" pursuant to article 12 of the Informatics Law could only have their manufacturing plans approved and qualify for the above benefits if: (i) these plans were considered to be of interest to local scientific and production activities; and (ii) there were no domestic companies capable of meeting the needs of the Brazilian market with technology developed in Brazil or acquired abroad. Once these basic requirements had been satisfied, the companies then had to submit a program to CONIN (the National Informatics and Automation Council) for training of their technical staff in product and production process technology, and also had to invest 5 % of their annual gross income in informatics research and development in Brazil.

It was only in October 26, 1990, that the Administration approved a list of products and activities subject to market reserve. This means that for six years the development of Brazilian computer industries and the domestic market were entirely at the mercy of governmental monitoring of imports of informatics products and services, and deciding on plans for development and production of computer goods. More often than not, such decision-making was highly subjective, based on vague, xenophobic national security concerns. Informatics goods not included on such list could be freely imported and produced in Brazil, and technology agreements not affected by market reserve would only require National Institute of Industrial Property - INPI approval (INPI is the governmental agency responsible for technology transfers).

Under article 12 of Law 7232/84, a "domestic company" was defined as one whose principal place of business is Brazil, and among other things, which has been organized according to Brazilian law. Additionally, to be defined as a domestic company, it was necessary that the decision-making as well as technological and capital control were in the hands - exclusively and unconditionally, directly or indirectly - of individuals resident and domiciled in Brazil. In other words, not only management, but also at least 70 % of the total corporate capital, all voting rights and especially the power to decide on the development and acquisition of technology had to be held or exercised by Brazilian residents. This concept of "domestic company" has recently been altered by the latest legislation, and will be commented on later.

Technological Joint Ventures - Resolution No. 19 of October 11, 1990 ("Resolution 19/90")

For many years, the defunct Special Informatics Office (superseded by the Science and Technology Office - SCT) took the position that a foreign company participating in the corporate capital of a domestic company could not assign such company its informatics technology, since this would represent technological control over the Brazilian company, which was forbidden by Law 7232/84.

The enactment of Resolution 19/90 paved the way for a new interpretation of this matter, and established that technological joint ventures were, from then on, permissible. This new understanding meant that a domestic company could freely opt to acquire foreign technology, even from a nondomestic company holding its corporate capital. Nevertheless, there were some legal restrictions on such participation. A foreign company could hold up to 30 % of a domestic company's nonvoting stock. In fact, management in general - meaning the Brazilian company's day-to-day affairs - had to remain under the control of Brazilian residents. The equity participation belonging to foreign shareholders would not trigger any actual or even potential voting rights.

Approval of technology transfers from a foreign partner to a Brazilian company then depended on a preliminary evaluation by competent governmental authorities. Resolution 19/90 established certain criteria to ensure domestic-company autonomy as regarded decision-making for development and acquisition of technology purposes.

Although resolution 19/90 was a supplementary ruling (not a result of the legislative process), and consequently yields no legislative impact, it was an effective attempt to define the vague interpretation given to article 12 of Law 7232/84.

Law No. 8248 of October 23, 1991 - The New Informatics Law

President Collor has recently approved the new Informatics Law, which introduces important changes in the concept of a "domestic company", and targets October 1992 for the end of the computer market reserve.

This new law has adopted the definition stated in item II of article 171 of the Brazilian Constitution. The current definition of a "domestic company" is that it is a company organized under Brazilian law with its principal place of business in Brazil and in fact controlled, either directly or indirectly, by individuals residing and domiciled in Brazil, or by a state-owned company. The expression "actual control" means direct or indirect ownership of shares representing at least 51 % of the voting capital; this differs from the previous legal requirements (in informatics) for domestic companies, where 70 % of the total corporate capital and 100 % of the voting capital had to be owned by Brazilian residents.

There are, therefore, two requirements for classification of a company in the informatics sector as a Brazilian company with domestic capital: (i) 51 % of its voting capital must be held by a Brazilian resident; and (ii) the company must be managed - meaning the decision-making power, management and control - by Brazilian residents. The Brazilian partner must have the authority to manage the joint venture and choose the technology which best suits the company.

Starting in October 1992, the Science and Technology Office will no longer be empowered to analyze and decide upon plans that involve the development and manufacture of informatics goods and services, nor to grant preliminary authorization for their import. This means that informatics goods and services will, in principle, be freely imported into, developed and manufactured in Brazil.

Certain tax benefits have also been granted to companies in the computer science sector, provided they allocate at least 5 % of their respective domestic market gross invoicings to research and development, and invest 2 % under covenants with universities and research institutes.

Conclusion

The transition period that the informatics sector in Brazil is undergoing should be faced with the firm optimism that the progressive opening up and full development of the Brazilian computer science industries will in the foreseeable future foster a healthy competition with other countries throughout the world. Ending the market-reserve ban has spurred the race by offshore companies to form joint ventures and invest in what is arguably the world market most voracious for personal computers and other information technology.