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Brazil: Foreign Investment and Informatics

SPECIAL STUDY

BRAZIL: FOREIGN INVESTMENT AND INFORMATICS

On October 3, 1984, Congress passed its own version of the President's Informatics Bill.[1] The bill, with some minor vetoes, was signed into Law No. 7.232 by the President on October 29, 1984, and enters into force in sixty days, counting from October 30, 1984, when it was published in the Federal Official Gazette.

Law No. 7.232 (hereafter the "Informatics Law") is ostensibly aimed at reversing the Brazilian informatics market for Brazilian companies, although it allows foreign investments and technology in certain "Informatics Export Districts" (DEI). The Informatics Law sets up a National Council of Informatics and Automation (CONIN) as the major policy making agency, leaving the current policy-making Special Informatics Secretariat (SEI) in charge of administering policy and recommending changes to CONIN. Among others, CONIN is composed of government officials and representatives of manufacturing and user groups. CONIN will report directly to the President rather than to the military-controlled National Security Council (CSN), contrary to current practice with the SEI. Every three years CONIN must submit a National Informatics Plan to the President, subject to further review by the Congress.

The significant provisions related to foreign participation in the informatics area are summarized below.

Import Restrictions

Article 2 of the Informatics Law defines the goal of National Informatics Policy as the achievement of national capability in the informatics area. One of its key element is the control of the im-

1. Informatics is an international scientific term covering all items (i.e., hardware, software, computer manufacturing; data processing and the study of computer science) in the computer industry, as well as business related to such items.

port of related goods and services for the next eight (8) years.[2] As a matter of fact, such control has existed since the creation of the first government agency in charge of the informatics activities (CAPRE) in 1972,[3] later reinforced by the creation of the SEI in 1979.

"Reserved Market" Policy

The Informatics Law gives the President the power to "adopt restrictions of a temporary nature in the production, operation, trade and import of goods and technical services of informatics" in order to "secure adequate levels of protection to national companies".[4]

The President may even establish restrictions on domestic commerce in informatics products and services, whether or not of Brazilian origin, whenever such transactions create monopolies in certain areas of the informatics sector.[5]

The Informatics Law defines Brazilian companies in the most restrictive sense of any Brazilian legislation. A company is deemed to be "national" when it is incorporated under Brazilian law, with its head office in Brazil, but only if its control, whether direct or indirect is "permanently, exclusively and unconditionally", in the hands of individuals (*not* nationals) resident in Brazil or of Brazilian governmental entities. In order to meet the "control" test, three factors must be taken into consideration: *decision, technology,* and *stock ownership.*

Control over decisions means the power, granted by law or otherwise, to elect the directors and officers of the company and to direct the functioning of the corporate bodies. *Technology control* means the power to develop, generate, acquire, transfer, and vary the product technology and the manufacturing process. *Stock control,* normally provided in some other laws, is the direct or indirect ownership of all the voting shares and of at least seventy (70) percent of the entire capital stock. In this case, the voting stock, which must be in registered form, also includes stock with prospective voting rights (some classes of preferred stock as defined in the 1976 Corporation Law).

2. Law No. 7.232 of Oct. 29, 1984, art. 4 (VIII).
3. Decree No. 70.370 of April 5, 1972.
4. Law No. 7.232, art. 9.
5. *Id.* at art. 10.

Although the "control" test applies to all types and forms of companies, the voting control requirements become more stringent in the case of publicly-held companies. In publicly-held corporations, shares with voting rights or with rights to fixed or minimum dividends must include at least two-thirds (⅔) of the capital stock and must be exclusively owned by individual residents (*not* necessarily nationals) and domiciliaries of Brazil, by Brazilian government entities, or by "national" companies.

Exceptions to the Reserved Market

The Informatics Law permits local production of informatics goods and services by companies that do not fully meet the "national" company test, provided that the following other tests are met:

(i) The goods and services are deemed to be of "relevant interest to the local scientific and productive activities";
(ii) "National" companies are incapable of meeting the effective needs of the domestic market;
(iii) Producers show they have adequate technology (its own or acquired from abroad). The acquisition (not license) of foreign technology will only be allowed in case of "recognized market interest" and lack of local technical capability.[6]

If these tests are met, the company must then fulfill the following additional requirements:

(i) securing approval by the competent authorities of a program aimed at training its technical staff in the product technology and manufacturing process;
(ii) investing in research and development of an amount equivalent to a percentage of annual gross income;[7]
(iii) submitting an export plan to the competent authorities;
(iv) establishing a plan for the development of local suppliers.

These tests and requirements do not apply to locally manufactured products and locally furnished services in accordance with plans and projects approved by the SEI until the Informatics Law enters into force.

6. *Id.* at art. 22.
7. This percentage is to be established from time to time by the competent authorities.

Informatics Export Districts (DEI)

The Informatics Law allows the use of foreign technology (even with the local availability of a corresponding technology) by companies not meeting the "national" company test, but subject to the following conditions:

(i) Production shall be aimed exclusively at external (not domestic) markets;
(ii) Manufacturing plants must be located in DEI, which shall be in SUDAM (Amazon) and SUDENE (Northeast) areas to be indicated by Congress.[8]

The relevant manufacturing, sale, and importation in the DEI shall be exempt from Federal income tax. The sale of spare parts and companies to the DEI by Brazilian companies shall be equivalent, for tax incentive purposes, to export sales.

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8. Law No. 7.232, art. 24.