



Pursuant to Article 9, paragraph (2), of the Law on Protection of Competition ("Official Gazette of the Republic of Macedonia" No. 145/10 and 136/2011), the Government of the Republic of Macedonia, on its session held on 23.03.2012, adopted the following:

**Regulation on the detailed conditions for block exemption of certain types of agreements for transfer of technology, license or know-how ("Official Gazette of the Republic of Macedonia" No. 44/2012)<sup>1</sup>**

Article 1

**General provision**

This Regulation regulates the scope of application of the block exemption, the detailed conditions in terms of market shares, conditions for exemptions, the restrictions and obligations that agreements for transfer of technology, license or know-how (hereinafter: technology transfer agreements) shall not contain and the conditions for the withdrawal of the block exemption.

Article 2

**Definitions**

(1) Certain terms used in this Regulation shall have the following meaning:

a) "Block exemption" is exemption licensed to certain categories of technology transfer agreements of the application of the provisions on prohibited agreements stipulated in Article 7 paragraph (1) of the Law on Protection of Competition (hereinafter: the Law)

b) "technology transfer agreement" means a patent licensing agreement, a know-how licensing agreement, a software copyright licensing agreement or a mixed patent, know-how or software copyright licensing agreement, including any such agreement containing provisions which relate to the sale and purchase of products or which relate to the licensing of other intellectual property rights or the assignment of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the production of the contract products. Assignments of patents, know-how, software copyright or a combination thereof where part of the risk associated with the exploitation of the technology remains with the assignor, in particular where the sum payable in consideration of the assignment is dependent on the turnover obtained by the assignee in respect of products produced with the assigned technology, the quantity of such products produced or the number of operations carried out employing the technology, shall also be deemed to be technology transfer agreements;

c) "reciprocal agreement" means a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a patent licence, a know-how licence, a software copyright licence or a mixed patent, know-how or

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<sup>1</sup> This Regulation is harmonized with Commission Regulation (EU) No.772/2004 of 27<sup>th</sup> April 2004 on the application of Article 81 (3) of the Treaty of categories of technology transfer agreements, OJ L 123, 27.04.2004, p. 11-17, CELEX No.32004R0772 and Corrigendum to Commission Regulation (EU) No. 772/2004 of 27<sup>th</sup> of April 2004 on the application of Article 81(3) of the Treaty of categories of technology transfer agreements with CELEX No. 32004R0772(01)



software copyright licence and where these licences concern competing technologies or can be used for the production of competing products:

d) "non-reciprocal agreement" means a technology transfer agreement where one undertaking grants another undertaking a patent licence, a know-how licence, a software copyright licence or a mixed patent, know-how or software copyright licence, or where two undertakings grant each other such a licence but where these licences do not concern competing technologies and cannot be used for the production of competing products:

e) "product" means a good or a service, including both intermediary goods and services and final goods and services:

f) "contract products" means products produced with the licensed technology:

g) "intellectual property rights" includes industrial property rights, know-how, copyright and neighboring rights:

h) "patents" means patents, patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder's certificates:

i) "Know-how" means a package of non-patented practical information, resulting from experience and testing, which is:

- "secret", in the context of know-how, means that the know-how is not generally known or easily accessible:

- "substantial", in the context of know-how, means that the know-how is significant and useful for the manufacture of the contract products or the application of the contract technologies:

- "identified", in the context of know-how, means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality:

i) "Competing undertakings" means undertakings which compete on the relevant technology market and/or the relevant product market, that is to say:

- competing undertakings on the relevant technology market, being undertakings which license out competing technologies without infringing each others' intellectual property rights (actual competitors on the technology market), the relevant technology market includes technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, by reason of the technologies' characteristics, their royalties and their intended use and

- competing undertakings on the relevant product market, being undertakings which, in the absence of the technology transfer agreement, are both active on the relevant product and geographic market(s) on which the contract products are sold without infringing each others' intellectual property rights (actual competitors on the product market) or would, on realistic grounds, undertake the necessary additional investments or other necessary switching costs so that they could timely enter, without infringing each others' intellectual property rights, the(se) relevant product and geographic market(s) in response to a small and permanent increase in relative prices (potential competitors on the product market). The relevant product



market comprises products which are regarded by the buyers as interchangeable with or substitutable for the contract products, by reason of the products' characteristics, their prices and their intended use:

k) "selective distribution system" means a distribution system where the licensor undertakes to license the production of the contract products only to licensees selected on the basis of specified criteria and where these licensees undertake not to sell the contract products to unauthorized distributors:

(l) "exclusive territory" means a territory in which only one undertaking is allowed to produce the contract products with the licensed technology, without prejudice to the possibility of allowing within that territory another licensee to produce the contract products only for a particular customer where this second license was granted in order to create an alternative source of supply for that customer:

(m) "exclusive customer group" means a group of customers to which only one undertaking is allowed actively to sell the contract products produced with the licensed technology:

(n) "severable improvement" means an improvement that can be exploited without infringing the licensed technology.

(2) The terms "undertaking", "licensor" and "licensee" shall include their respective connected undertakings.

### Article 3

#### **Scope of application of the block exemption**

(1) Technology transfer agreements entered into between two undertakings permitting the production of contract products are exempt from the application of the provisions of Article 7 paragraph (1) of the Law if they meet the conditions stipulated in this Regulation, in accordance with Article 7, paragraph (3) and Article 9 paragraph (1) point 2) of the Law.

(2) Block exemption shall apply if agreements set out in paragraph (1) of this Article contain restrictions on competition stipulated in Article 7 paragraph (1) of the Law.

(3) The exemption provided for in paragraph (1) and (2) of this Article shall apply for as long as the intellectual property right in the licensed technology has not expired, lapsed or been declared invalid or, in the case of know-how, for as long as the know-how remains secret, except in the event where the know-how becomes publicly known as a result of action by the licensee, in which case the exemption shall apply for the duration of the agreement.

### Article 4

#### **Detailed conditions in terms of market-shares thresholds that shall be met for the application of the block exemption**

(1) In case where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 3 of this Regulation shall apply on condition that the combined market share of the parties does not exceed 20 % on the affected relevant technology and product market.



(2) In case where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 3 shall apply on condition that the market share of each of the parties does not exceed 30 % on the affected relevant technology and product market.

(3) For the purposes of paragraphs (1) and (2) of this Article, the market share of a party on the relevant technology market(s) is defined in terms of the presence of the licensed technology on the relevant product market(s). A licensor's market share on the relevant technology market shall be the combined market share on the relevant product market of the contract products produced by the licensor and its licensees.

(4) For the purposes of applying the market-share thresholds provided for in paragraph (1) and (2) of this Article, the rules set out in this paragraph shall apply:

a) The market share shall be calculated on the basis of market sales value data, if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned:

b) The market share shall be calculated on the basis of data relating to the preceding calendar year:

c) If the market share referred to paragraph (1) and (2) of this Article is initially not more than 20 % respectively 30 % but subsequently rises above those levels, the exemption shall continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold or 30 % threshold was first exceeded.

## Article 5

### **Restriction that may not be included in technology transfer agreement (hardcore restrictions)**

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 3 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of a party's ability to determine its prices when selling products to third parties:

(b) the limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement:

(c) the allocation of markets or customers except:

- the obligation on the licensee(s) to produce with the licensed technology only within one or more technical fields of use or one or more product markets.

- the obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology within one or more technical fields of use or one or more product markets or one or more exclusive territories reserved for the other party.



- the obligation on the licensor not to license the technology to another licensee in a particular territory.

- the restriction, in a non-reciprocal agreement, of active and/or passive sales by the licensee and/or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party.

- the restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee provided the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence.

- the obligation on the licensee to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products and/or

- the obligation on the licensee, in a non-reciprocal agreement, to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer and/or:

d) the restriction of the licensee's ability to exploit its own technology or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

(2) Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility of imposing a maximum sale price or recommending a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties:

(b) the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, except:

- the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor.

- the restriction of passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee during the first two years that this other licensee is selling the contract products in that territory or to that customer group.

- the obligation to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products.

- the obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer.





- the restriction of sales to end-users by a licensee operating at the wholesale level of trade.

- the restriction of sales to unauthorised distributors by the members of a selective distribution system:

c) the restriction of active or passive sales to end-users by a licensee which is a member of a selective distribution system and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

(3) Where the undertakings party to the agreement are not competing undertakings at the time of the conclusion of the agreement but become competing undertakings afterwards, paragraph 2 of this Article shall apply for the full life of the agreement unless the agreement is subsequently amended in any material respect.

## Article 6

### **Obligations that must not be included in technology transfer agreement (excluded restrictions)**

1. The exemption provided for in Article 3 of this Regulation shall not apply to any of the following obligations contained in technology transfer agreements:

(a) any direct or indirect obligation on the licensee to grant an exclusive licence to the licensor or to a third party designated by the licensor in respect of its own severable improvements to or its own new applications of the licensed technology;

(b) any direct or indirect obligation on the licensee to assign, in whole or in part, to the licensor or to a third party designated by the licensor, rights to its own severable improvements to or its own new applications of the licensed technology and/or;

(c) any direct or indirect obligation on the licensee not to challenge the validity of intellectual property rights which the licensor holds in the common market, without prejudice to the possibility of providing for termination of the technology transfer agreement in the event that the licensee challenges the validity of one or more of the licensed intellectual property rights.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 3 of this Regulation shall not apply to any direct or indirect obligation limiting the licensee's ability to exploit its own technology or limiting the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

## Article 7

### **Detailed conditions for the withdrawal of the block exemption**

Commission for Protection of Competition may withdraw exemption if in a proceedings initiated ex officio or upon request of a party determines that the technology transfer agreement which is subject to the exemption in Article 3 of this Regulation, have consequences that are not in accordance to the conditions laid down in Article 7 (3) of the Law, and particularly if:



(a) access of third parties' technologies to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third parties' technologies;

(b) access of potential licensees to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensors from licensing to other licensees and/or

(c) without any objectively valid reason, the parties do not exploit the licensed technology.

#### Article 8

#### **Termination**

On the day this Regulation enters into force the Regulation on block exemption granted to technology transfer agreements, license or know-how ("Official Gazette of the Republic of Macedonia" No.91/05) shall cease to be valid.

#### Article 10

#### **Entry into force**

This Regulation shall enter into force on the eight day after its publication in the "Official Gazette of the Republic of Macedonia".