

Pursuant to Article 10 and Article 11 paragraph (1) item 3 and paragraph (2) of the Competition Act (Official Gazette, No 122/2003), the Government of the Republic of Croatia in its session held on 29. December 2004, adopted the following

REGULATION ON BLOCK EXEMPTION GRANTED TO CERTAIN CATEGORIES OF TECHNOLOGY TRANSFER AGREEMENTS

I GENERAL PROVISIONS

Subject matter of the Regulation

Article 1

This Regulation shall stipulate the conditions for block exemption granted to certain categories of technology transfer agreements, set out the conditions which such agreements must contain, the restrictions or conditions which such agreements may not contain, and other conditions which must be fulfilled in order to satisfy the conditions for exemption from application of the provisions on prohibited agreements set out in the Competition Act (hereinafter: the Act).

Definitions

Article 2

For the purpose of this Regulation:

- a) "the Agency" means the Competition Agency;
- b) "the Act" means the Competition Act;
- c) "agreement" means the contract, single provisions of the contract, explicit or tacit agreements, concerted practices, decisions made by associations of undertakings;
- d) "products" means goods and/or services including both intermediary goods and/or services and final goods and/or services;
- e) "controlled undertaking" or "connected undertakings" means undertakings within the meaning of Article 5 of the Act;
- f) "relevant product market" comprises products which are regarded by the customers (buyers and/or consumers) as interchangeable with or substitutable for the contract products, by reason of the products' characteristics, their prices, their intended use and customers' patterns of purchases, thereby satisfying the equivalent need of the customers;
- g) "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;

- h) "relevant market" is defined as a market of certain goods and/or services which are the subject of business operations performed by the undertaking in the specific geographic territory, within the meaning of Article 7 of the Act and the provisions under the Regulation on the definition of relevant market (Official Gazette, No 51/2004).

Applicability of the block exemption

Article 3

(1) Block exemption shall apply to technology transfer agreements laid down in Article 11 paragraph (1) item 3 of the Act entered into between two undertakings permitting the production of contract products and it should also cover such agreements even if conditions are stipulated for more than one level of trade.

(2) Within the meaning of paragraph (1) hereof a 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.

(3) Within the meaning of paragraph (1) hereof 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.

(4) Within the meaning of paragraphs (1) and (2) hereof know-how means a package of non-patented practical information, resulting from experience and testing, which is secret, substantial and identified. In this context, "secret" means that the know-how package as a body, or in the precise configuration and assembly of its components is not generally known or easily accessible; "substantial" means that the know-how includes information which is indispensable and useful for the manufacture of the contract products; "identified" 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.

(5) Intellectual property rights within the meaning of paragraph (2) hereof include industrial property rights, know-how, copyright and neighbouring rights.

(6) Within the meaning of paragraphs (2) and (3) hereof patents means patents, patent applications, consensual patents, applications for registration of consensual patents, industrial 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.

(7) Contract products stipulated under paragraph (1) means products produced with the licensed technology and/or products in which such technology has been incorporated.

(8) Undertakings - parties to the agreement, licensor and licensee under paragraph (1) hereof shall include their respective connected undertakings.

Inapplicability of block exemption

Article 4

According to the provisions of this Regulation block exemption shall not apply to:

- a) technology transfer agreements which do not fulfil the cumulative conditions laid down under Article 10 of the Act and which have not been brought into compliance with this Regulation;
- b) technology transfer agreements which fall within the scope of any other regulation pursuant to the provisions of Article 11 of the Act.

II CONDITIONS THAT AGREEMENTS MUST CONTAIN AND OTHER CONDITIONS FOR EXEMPTION

Market share thresholds

Article 5

(1) Where the undertakings - parties to the agreement are competing undertakings, the block 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) Where the undertakings - parties to the agreement are not competing undertakings, the block exemption provided for in Article 3 of this Regulation 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) hereof, the market share of a party on the relevant technology market is defined in terms of the presence of the licensed technology on the relevant product market.

(4) Within the meaning of paragraph (1) hereof, actual competitors on the relevant technology market shall be considered competing undertakings on the relevant technology market which licence out competing technologies without infringing intellectual property rights of other undertakings.

(5) Within the meaning of paragraph (1) hereof, actual competitors on the relevant product market shall be considered competing undertakings on the relevant product market which are both active on the relevant product and geographic market on which the contract products are sold without infringing each others' intellectual property rights.

(6) Within the meaning of paragraph (1) hereof, potential competitors on the relevant technology and relevant product market are undertakings which 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, this relevant market in response to a small and permanent increase in relative prices.

Calculation of the market share

Article 6

(1) Within the meaning of Article 5 of this Regulation the market share of the parties to technology transfer agreements shall be calculated on the basis of the market sales value of the contract products and their substitutes. If the market sales value data concerned are not available, estimates based on other reliable market information, including market sales volumes of the contract products and their substitutes in the relevant market, may be used to establish the market share of the undertaking concerned.

(2) The market share under paragraph (1) hereof shall be calculated on the basis of data relating to the preceding calendar year to the year the agreement is entered into.

(3) The market share under paragraph (1) hereof shall be increased by the market share of the respective connected undertakings realised as provided for under paragraphs (1) and (2) hereof.

(4) Within the meaning of paragraphs (1), (2) and (3) hereof, a licensor's market share on the relevant technology market shall be the combined market share calculated on the basis of the sales of the licensor and all his licensees of products incorporating the licensed technology and this for each relevant market

separately. When the parties are competitors on the relevant technology market, sales of products incorporating the licensee's own technology must be combined with the sales of the products incorporating the licensed technology. In the case of new technologies incorporated in new products that have not yet generated any sales, a zero market share is assigned. When sales commence the technology will start accumulating market share.

(5) Within the meaning of paragraphs (1), (2) and (3) hereof, in the calculation of market shares for the relevant product market, sales made by other licensees - not parties to the agreement in question, are not taken into account when calculating the licensee's and/or licensor's market share. In the case of the relevant product market, the licensee's market share is to be calculated on the basis of the licensee's sales of products incorporating the licensor's technology and the sales of their substitutes on the relevant market. Where the licensor is also a supplier of products on the relevant product market, the licensor's sales on the product market in question must also be taken into account in the calculation of his market share.

Duration of block exemption

Article 7

(1) The block exemption for technology transfer agreements under the conditions provided for in Article 5 paragraphs (1), (2) and (3) of this Regulation shall apply for as long as the intellectual property right in the licensed technology has not expired, lapsed or been declared invalid. 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 block exemption shall apply for the duration of the agreement.

(2) When the combined market share of the undertakings - parties to the agreement which are competing undertakings in the relevant market initially does not exceed 20 %, but subsequently rises above that level, the block exemption shall continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold was first exceeded.

(3) When the market share of each of the undertakings - parties to the agreement which are not competing undertakings in the relevant market initially does not exceed 30 %, but subsequently rises above that level, the block exemption shall continue to apply for a period of two consecutive calendar years following the year in which the 30 % threshold of each of the parties to the agreement was first exceeded.

III RESTRICTIONS OR CONDITIONS WHICH AGREEMENTS MAY NOT CONTAIN

Hard core restrictions within agreements between competing undertakings

Article 8

(1) Where the undertakings - parties to the agreement are competing undertakings, the block exemption 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 obligations under paragraph (2) of this Article;
- (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) The allocation of markets or customers stipulated under paragraph (1) item c) hereof shall not be considered a hard core restriction in the case of:

- (a) 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,
- (b) 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,
- (c) the obligation on the licensor not to license the technology to another licensee in a particular territory,
- (d) 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,
- (e) 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 in the relevant market at the time of the conclusion of its own licence,

- (f) 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,
- (g) 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.

(3) Within the meaning of paragraph (1) item b) hereof 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 software copyright licence and where these licences concern competing technologies or can be used for the production of competing products.

(4) Within the meaning of paragraph (1) item b) and paragraph (2) items b), d), e) and g) hereof, 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.

(5) Within the meaning of paragraph (2) items b), d), e) hereof 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 licence was granted in order to create an alternative source of supply for that customer.

(6) Within the meaning of paragraph (2) items d), e) and g) hereof 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.

Hard core restrictions within agreements between non-competing undertakings

Article 9

(1) Where the undertakings - parties to the agreement are not competing undertakings, the block exemption 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 obligations under paragraph (2) of this Article;
- 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.

(2) The restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products referred to under paragraph (1) item b) hereof shall not be considered a hard core restriction in the case of:

- (a) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor,
- (b) 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 (2) years that this other licensee is selling the contract products in that territory or to that customer group,
- (c) 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,
- (d) 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,
- (e) the restriction of sales to end-users by a licensee operating at the wholesale level of trade,
- (f) the restriction of active or passive sales to unauthorised distributors by the members of a selective distribution system.

(3) Where the undertakings - parties to the agreement are not competing undertakings in the relevant market at the time of the conclusion of the agreement but become competing undertakings afterwards, the provisions of paragraphs (1) and (2) hereof shall apply for the full life of the agreement unless the agreement is subsequently amended in any material respect.

(4) Within the meaning of paragraph (1) item c) and paragraph (2) item f) hereof, 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 unauthorised distributors.

(5) Within the meaning of paragraph (1) item c) and paragraph (2) items c), e) and f) hereof, active sales shall mean sales made by actively searching for or approaching individual customers or customer groups inside another parties' exclusive territory. This may be for instance by initiating the conclusion of individual agreements or taking measures of general presentation of products to these customers, by establishing a warehouse or distribution outlet or organizing of distribution networks and advertising in this territory. Active approach includes visits, direct and electronic mail, advertisements in the media or other promotions specifically targeted at these customers or customer group in the other parties' exclusive territory.

(6) Within the meaning of paragraph (1) items b) and c), paragraph (2) items a), b), c), e) and f) hereof, passive sales shall mean sales in response to unsolicited requests from individual customers in other parties' exclusive territories, including delivery of products to such customers, to the extent that such responding is not the result of active sales operations. Sales generated by general advertising or promotion in the media or on the Internet that reaches customers in other parties' exclusive territories or customers in the respective territories, as a result of the development in the technology and since being easily accessible, are considered to be a reasonable method of approaching these customers.

Particular obligations which agreements may not contain (excluded restrictions)

Article 10

(1) The block exemption 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;
- (c) any direct or indirect obligation on the licensee not to challenge the validity of intellectual property rights which the licensor holds in the relevant 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 - parties to the agreement are not competing undertakings in the relevant market, the block exemption shall not apply to technology transfer agreements containing 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.

(3) Severable improvement referred to under paragraph (1) items a) and b) hereof means an improvement that can be exploited without infringing the licensed technology.

IV WITHDRAWAL OF BLOCK EXEMPTION AND INDIVIDUAL EXEMPTION

Conditions for withdrawal of block exemption

Article 13

(1) Pursuant to Article 11 paragraph (4) of the Act the Agency may, *ex officio*, initiate the proceedings for assessment of compatibility of a particular agreement or agreements under Article 3 hereof, with the provisions laid down in Article 10 of the Act and this Regulation, if such an agreement or agreements, individually or in combination with agreements which have similar restrictive effects in the relevant market do not fulfil the conditions for block exemption.

(2) Within the meaning of paragraph (1) hereof the Agency may initiate the proceedings for assessment of a technology transfer agreement, in particular where:

- (a) access of third parties' technologies to the relevant 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 relevant market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensors from licensing to other licensees;
- (c) without any objectively valid reason, the parties do not exploit the licensed technology.

(3) Where the results of the assessment of an agreement on the compliance with the provisions of the Act and this Regulation prove that there are no grounds for the applicability of block exemption the Agency shall by means of a decision withdraw the benefit granted by block exemption to this particular agreement.

Individual exemption

Article 12

Pursuant to Article 12 of the Act the undertakings - parties to the agreement may submit to the Agency a request for individual exemption, if the agreement

concerned does not fall under applicability of block exemption within the meaning of Article 4 of this Regulation.

Non-compulsory notification

Article 13

There is no compulsory notification for the undertakings - parties to the technology transfer agreement that satisfy the conditions for block exemption laid down in this Regulation within the meaning of Article 11 paragraph (3) of the Act, i.e. such agreements need not to be submitted to the Agency for assessment in respect of individual exemption.

V TRANSITIONAL AND FINAL PROVISIONS

Article 14

(1) Technology transfer agreements under Article 3 hereof, which have been concluded before this Regulation enters into force, must be brought in compliance with the provisions thereof by 31 March 2006.

(2) As regards technology transfer agreements which have been concluded before this Regulation enters into force, under the condition that they have been brought in compliance with the provisions thereof within the time period set out under paragraph (1) hereof, the market share, without prejudice to Article 6 paragraph (2) of this Regulation, shall be calculated on the basis of the market sales value during the financial year preceding the year of the entry into force of this Regulation.

Entry into force

Article 15

This Regulation shall enter into force on the eighth day following the day of its publication in the Official Gazette.

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Zagreb, 29 December 2004

Prime Minister

Ivo Sanader, ScD

