

BOSNA I HERCEGOVINA
Konkurencijsko vijeće



БОСНА И ХЕРЦЕГОВИНА
Конкуренијски савјет

BOSNIA AND HERZEGOVINA
Council of Competition

REGULATION
ON BLOCK EXEMPTION GRANTED TO CERTAIN CATEGORIES OF
TECHNOLOGY TRANSFER AGREEMENTS
(LICENCE AND KNOW-HOW AGREEMENTS)

Sarajevo
December, 2005

Pursuant to Article 25, item a) and Article 7, paragraph (1), item c) of the Act on Competition («Official Gazettes of BH, No. 48/05), the Council of Competition in its 20th session held on 27th December 2005, has adopted the following:

REGULATION
ON BLOCK EXEMPTION GRANTED TO CERTAIN CATEGORIES OF
TECHNOLOGY TRANSFER AGREEMENTS
(LICENCE AND KNOW-HOW AGREEMENTS)

I GENERAL PROVISIONS

Article 1
(Subject matter of the Regulation)

This Regulation shall stipulate the conditions for block exemptions granted to certain categories of technology transfer agreements (licence agreements and know-how agreements) set out 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 block exemption of those agreements from application of the provisions on prohibited agreements set out in the Act on Competition (hereinafter: the Act).

Article 2
(Applicability of the block exemption)

- (1) Block exemptions shall apply to technology transfer agreements laid down in article 7, paragraph (1) item c) of the Act entered into between two undertakings permitting the production of the contract products, including the agreements permitting, besides the production, more than one level of trade.
- (2) Within the meaning of paragraph (1) of this Article a technology transfer agreement means a patent licensing agreement, licensing agreement on technological knowledge and experience (know-how), a software copyright licensing agreement or a combined patent licensing agreement, licensing agreement on technological knowledge and experience (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 and the assignment of intellectual property rights, provided that those provisions do not constitute the primary object of those agreements and that they are directly related to the production of the contract products.
- (3) Within the meaning of paragraph (1) of this Article the technology transfer agreement means also an agreement on assignment of patents, licensing agreement on technological knowledge and experience (know-how), software copyright or a combination thereof in a case where the 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 of technology is dependent on the income earned 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 that technology.
- (4) Within the meaning of paragraphs (1) and (2) of this Article licensing agreement on technological knowledge and experience (hereinafter: know-how) means a package of non – patented practical information, resulting from experience and testing, which is secret, substantial and identified. «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 data, or information which is indispensable and useful for production of the contract products. «Identified» means that the know-how is to be 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) of this Article are industrial property rights, know-how, copyrights and neighbouring rights.
- (6) Within the meaning of paragraphs (2) and (3) of this Article patents means patents, requests for patents licensing, requests for consensual patents licensing, industrial design, topographies of semiconductor- products, supplementary protection certificates for medical products or other products for which such supplementary protection certificates may be obtained and plant breeder's certificates.
- (7) Contract product stipulated under paragraph (1) of this Article means a product produced with the licensed technology and /or a product in which such technology has been incorporated.
- (8) Undertakings - parties to the agreement, that is to say a licensor and licensee under paragraph (1) of this Article include also their connected undertakings.

Article 3 (Inapplicability of block exemptions)

As for block exemptions, the following agreements may not be excluded from prohibition, according to the provisions of this Regulation:

- a) technology transfer agreements which do not fulfil the cumulative conditions laid down under Article 8, 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 7 of the Act.

II CONDITIONS THAT AGREEMENT MUST CONTAIN AND OTHER CONDITIONS FOR EXEMPTION

Article 4 (Market share)

- (1) Where the parties to the agreement are competing parties, the block exemption provided for in Article 2 of this Regulation shall apply on condition that total market share of the parties does not exceed twenty per cent (20%) on the defined relevant technology and product market.
- (2) Where the parties to the agreement are not competing parties, the block exemption provided for in Article 2 of this Regulation shall apply on condition that the market share of each of the parties to the agreement does not exceed thirty per cent (30%) on the defined relevant technology and product market.
- (3) For the purpose of paragraphs (1) and (2) of this Article, the market share of the parties to the agreement 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) of this Article, competing undertakings shall be considered actual competitors on the relevant technology market if they compete on the relevant technology market by assigning licences for substitute technologies without infringing intellectual property rights of other undertakings.
- (5) Within the meaning of paragraph (1) of this Article, undertakings shall be considered actual competitors 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) of this Article, potential competitors on the relevant technology and relevant product market are undertakings which would, on realistic grounds,

undertake necessary additional investments or other necessary switching costs so that they could timely enter, without infringing each others' intellectual property rights, that relevant market in response to a small and permanent increase in prices.

Article 5 (Calculation of the market share)

- (1) Within the meaning of Article 4 of this Regulation, the market share of the parties to technology transfer agreement 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 is 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 parties to the agreement.
- (2) The market share under paragraph (1) of this Article shall be calculated on the basis of data relating to the calendar year preceding the conclusion of the agreement.
- (3) The market share under paragraph (1) of this Article shall include the market share of the respective connected undertakings realised as provided for under paragraphs (1) and (2) of this Article.
- (4) Within the meaning of paragraphs (1), (2) and (3) of this Article, the licensor's market share on the relevant technology market shall include the combined market shares of its all licensees calculated on the basis of the sales value data of products incorporating the licensed technology and this for each relevant market separately. When the parties to the agreement are competitors on the relevant technology market, sales value data of products incorporating the licensed technology includes the sales value data of the products incorporating the licensee's own technology. In the case of new technologies being incorporated in new products which have not been yet sold on the market, the market share of the parties to the agreement shall be deemed zero on the technology relevant market until the sale of new products starts.
- (5) The market share of both parties to the agreement on the product relevant market, within the meaning of paragraphs (1), (2) and (3) of this Article, shall not take into account the sale value of other licensees-not parties to the agreement in question. The market share of the licensee on the product relevant market includes sale value data of products incorporating the licenced technology and the sale value data of their substitutes. If the licensor is also a supplier of products on the product relevant market, then the licensor's market share includes its market share on that market calculated on the basis of the sale value data of products.

Article 6 (Duration of block exemption)

- (1) The block exemption for technology transfer agreements under the conditions provided for in Article 4, paragraphs (1), (2) and (3) of this Regulation shall apply for as long as the intellectual property right in the licensed technology exists, that is to say, until the intellectual property right expires, lapses or been declared invalid. The block exemption for know-how agreements shall apply 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 licensee, in which case the block exemption shall apply for the duration of the agreement.
- (2) When the combined market share of the parties to the agreement which are competing undertakings in the relevant market initially does not exceed twenty per cent (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% of market share was first exceeded.

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

III RESTRICTIONS OR CONDITIONS WHICH AGREEMENTS MAY NOT CONTAIN

Article 7

(Hard core restrictions within agreements between competing undertakings)

- (1) Where the 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 the parties' ability to determine the sale prices of products when selling them to third parties;
 - b) the limitation of production, except the limitations on the production of contract products, imposed on the licensee in non-reciprocal agreement or imposed on only one of the licensees in the reciprocal agreement;
 - c) the allocation of markets or allocation of customers into groups, except the obligation under paragraph (2) of this Article;
 - d) the restriction of the licensee's right 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 restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.
- (2) The allocation of markets or allocation of customers into groups stipulated under paragraph (1), item c) of this Article, shall not be considered a hard core restriction of the market competition in the case of:
- a) the obligation on the licensee to produce with the licensed technology only within one or more technical fields of use or within one or more product markets;
 - b) the obligation on the licensor and /or licensee, in non-reciprocal agreement, not to produce with the licensed technology within one or more technical fields of use or within one or more product markets or within one or more exclusive territories reserved for the other party to the agreement;
 - c) the obligation on the licensor not to assign the licence for the said technology to another licensee in a particular territory;
 - d) the restriction, in 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 to the agreement;
 - 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 achievement 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 exclusively for a particular customer, where the licence is assigned for the purpose of creating an alternative source of supply for that customer.
- (3) Within the meaning of paragraph (1), item b) of this Article, reciprocal agreement means a technology transfer agreement which is based on reciprocity, where two undertakings assign each other, in the same or separate contracts, a patent licence, a know-how licence, a software copyright licence or a combined patent, know-how or software copyright licence and where these licences relate to the substitute technologies or can be used for production of the substitute products.

- (4) Within the meaning of paragraph (1), item b) and paragraph (2), items b), d), e) and g) of this Article, non-reciprocal agreement means a technology transfer agreement which is based on reciprocity, where one party assigns a technology licence to another party, and agreement where two undertakings assign each other a patent licence, a know-how licence, a software copyright licence or a combined patent, know-how or software copyright licence, provided that those licences do not relate to substitute technologies and cannot be used for production of the substitute products.
- (5) Within the meaning of paragraph (2), items b), d) and e) of this Article, exclusively allocated territory means a territory in which only one undertaking is approved 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 product only for a particular customer where this second licence was assigned with the intention of creating an alternative source of supply for that customer.
- (6) Within the meaning of paragraph (2), items d), e) and g) of this Article, exclusively allocated customer group means a group of customers to which only one undertaking is approved to sell actively the contract products produced with the licensed technology.

Article 8

(Hard core restrictions within agreements between non-competing undertakings)

- (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 on a party's right to determine freely sale 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 to the agreement;
 - 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 licensee to operate out of an unauthorised place of business.
- (2) The restriction of the territory into which, or the customers to whom, the licensee may passively sell the contract product referred to under paragraph (1), item b) of this Article, shall not be considered a hard core restriction of the market competition in the case of:
 - a) the restriction on the licensee making passive sales into an exclusively allocated territory or to an exclusively allocated customer group reserved for the licensor;
 - b) the restriction on the licensee making passive sales into an exclusively allocated territory or to an exclusively allocated customer group assigned by the licensor to another licensee during the first two (2) years, when the latter licensee sells the contract products in that territory or to that customer group;
 - c) 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;
 - d) the obligation on the licensee to produce the contract products exclusively for a particular customer, where the licence was assigned for the purpose of creating an alternative source of supply for that customer;
 - e) the restriction on licensee operating at the wholesale level of trade the active or passive sales to end-users;

- f) the restriction on the members of a selective distribution system the active or passive sales to unauthorised distributors.
- (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) of this Article shall apply to them for the full life of agreement unless the agreement is amended in any significant part.
- (4) Within the meaning of paragraph (1), item c) and paragraph (2), item f) of this Article, selective distribution system means a distribution system where the licensor undertakes to assign the license on production of the contract products only to licensees selected on the basis of specified criteria and where these licensees undertake not to sell actively or passively the contract products to unauthorised distributors.
- (5) Within the meaning of paragraph (1), item c) and paragraph (2), items c), e) and f) of this Article, active sales means sales made by actively searching for or approaching to customers or customer groups inside another parties' exclusive territory, initiation of conclusion of individual agreements and taking measures of general presentation of products to those customers, establishment of branches, warehouses or organization of distribution networks and advertising in that territory. Active approach includes visits, direct and electronic mail, advertisements in the media or other promotions specifically targeted at those customers or customer group in the other parties' exclusive territory.
- (6) Within the meaning of paragraph (1), items b) and c) and paragraph (2), items a), b), c), e) and f) of this Article, passive sales means sales in response to 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 easy access, are considered to be a reasonable method of approaching those customers.

Article 9

(Particular obligations which agreements may not contain)

- (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 assign to the licensor or to a third party designated by the licensor an exclusive licence in respect of its own improvements to or its own new applications of the licensed technology;
 - b) any direct or indirect obligation on licensee to assign, in whole or in part, to the licensor or to a third party designated by the licensor, the rights in respect of its own 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 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 rights to exploit its own technology or limiting the right 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) The improvement referred to under paragraph (1), items a) and b) of this Article means an improvement that can be exploited without infringing the rights covered in the licensed technology.

IV WITHDRAWAL OF BLOCK EXEMPTION AND INDIVIDUAL EXEMPTIONS

Article 10 (Conditions for withdrawal of block exemptions)

- (1) Pursuant to Article 7, paragraph (4) of the Act, the Council of Competition may ex-officio or at the request of a party initiate the proceedings for assessment of compatibility of a particular agreement or agreements under Article 2 of this Regulation with the provisions laid down in Article 4, paragraph (3) of the Act and this Regulation, where the effects of such agreements, individually or in combination with similar agreements in the relevant market do not fulfil the conditions for block exemption.
- (2) Within the meaning of paragraph (1) of this Article, the Council of Competition 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 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 by the cumulative effects of parallel networks of similar restrictive agreements prohibiting licensors from assessing the licence to other licensees;
 - c) without any objectively valid reason, the parties to the agreement 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 Council of Competition shall by means of a decision withdraw the benefit granted by block exemption to this particular agreement.

Article 11 (Individual exemption)

Pursuant to Article 5 of the Act the undertakings-parties to the agreement may submit to the Council of Competition a request for individual exemption, if the agreement concerned does not fall under applicability of block exemption within the meaning of Article 3 of this Regulation.

Article 12 (Non-compulsory notification)

The undertakings-parties to the technology transfer agreements that satisfy the conditions for block exemption laid down in this Regulation within the meaning of Article 7, paragraph (3) of the Act, are not obliged to submit those agreements to the Council of Competition for assessment in respect of individual exemption.

V TRANSITIONAL AND FINAL PROVISIONS

Article 13

- (1) Technology transfer agreements under Article 2 of this Regulation, which have been concluded before this Regulation enters into force, must be brought into compliance with the provisions of this Regulation by 31st December 2006.
- (2) As regards technology transfer agreements which have been concluded before this Regulation enters into force, on condition that they have been brought in compliance with the provisions of this Regulation set out under paragraph (1) of this Regulation, the market share, with the

exception of Article 5, paragraph (2) of this Regulation, shall be calculated on the basis of the data relating to the calendar year preceding the year of the entry into force of this Regulation.

Article 14
(Entry into force)

This Regulation shall enter into force on the eight day following the day of its publication in the «Official Gazettes of Bosnia and Herzegovina» and it shall be published in official gazettes of Entities and Brcko District of Bosnia and Herzegovina.

CC. Number: 01-01-26-628/05
Sarajevo, 30th December 2005

President
Council of Competition
Sena Hatibović