REGULATION

"On the categories of technology transfer agreements"

HEAD I
General Provisions

Article 1
Object and Purpose

The purpose of this regulation is the exclusion from the prohibition of the categories of agreements which have as their object or consequence the transfer of technology, pursuant to Article 6 of Law no. 9121, dated 28.07.2003 "On Protection of Competition", as amended, (hereafter Law no. 9121/2003).
The purpose of the regulation is to ensure effective competition and legal certainty for enterprises by specifying technology transfer agreements that are exempt from prohibition, assessing their impact on the relevant market, and identifying cases where such types of agreements are not excluded.

Article 2
Scope of Application

1. This regulation applies to technology transfer agreements related to licensing of technology rights. These agreements improve economic efficiency and are competitive, they can reduce duplication of research and development, increase incentives for initial research and development, promote increased innovation, facilitate distribution and bring competition to the product market. The likelihood that such pro-competitive effects exceed anti-competitive effects as a result of possible restrictions on technology transfer agreements, the degree of market power of the undertakings in question and, consequently, the extent to which these undertakings, face the competitiveness of enterprises that have replacement technology or substitute products.
2. This regulation applies only to technology transfer agreements between licensors and licensees. The regulation also applies to these types of agreements even if they contain terms that relate to more than one level of trading, for example, requiring the licensee to establish a certain distribution system by specifying the obligations that the licensee needs or can decide resellers of products produced under this license. Such conditions and obligations must comply with the rules of competition, applicable to supply and distribution agreements, as defined by law no. 9121, dated 28.07.2003 "On the Protection of Competition", as amended and Guideline No.145/2010 "On the Evaluation of Vertical Agreements". Supply and distribution agreements concluded between a licensee and purchasers of the products under his contract are not excluded from this regulation.
3. This regulation applies only to agreements in which the licensor permits the licensee and/or one or more of his subcontractors to use the licensed technology rights,

preferably after further research and development, by the licensee and/or his subcontractors, for the purpose of producing goods and services. It does not apply to licensing in the context of research and development agreements covered by Regulation No.187/2011 "On Categories of Research and Development Agreements", or for licensing in the context of specialization agreements covered by regulation no. 190/2011 "On the categories of specialization agreements". Likewise, it does not apply to agreements aimed solely at the reproduction and distribution of copyrighted software products, as these agreements do not relate to licensing of production technology, but resemble distribution agreements. It does not apply to technology-gathering agreements, that is to say, technology-gathering agreements for the purpose of licensing them to third parties or for agreements through which the pooled technology is licensed to third parties.

4. In the individual assessment of agreements under Article 4 of the Law no. 9121/2003, several factors need to be considered, and in particular the structure and dynamics of the relevant technology and product markets.
5. Benefits from the exclusion under this regulation are those agreements that are included in Article 6 of the Law no. 9121/2003. To achieve the benefits and the objectives of technology transfer, this regulation should not only cover the transfer of technology but also other provisions that are part of technology transfer agreements, to the extent that these provisions are directly related to the production or sale of contract item products.
6. For technology transfer agreements between competitors when the combined share of the parties in the market does not exceed 20% of the affected market and if the technology transfer agreements do not contain significant anticompetitive restrictions, then this technology transfer agreements between competitors can be assumed to bring about improvement in production or distribution, and allow consumers the rightful allocation of the resulting benefits.
7. For technology transfer agreements between non-competitors when the combined share of the parties in the market does not exceed 30% of the affected market and if the technology transfer agreements do not contain significant anticompetitive restrictions, then this technology transfer agreements between non-competitors can be assumed to bring about improvement in production or distribution, and allow consumers the rightful allocation of the resulting benefits.
8. If the applicable market-share threshold is exceeded on one or more product or technology markets, the block exemption should not apply to the agreement for the relevant markets concerned.
9. This regulation should not exempt technology transfer agreements containing restrictions which are not indispensable to the improvement of production or distribution. In particular, technology transfer agreements containing certain severely anti-competitive restrictions, such as the fixing of prices charged to third parties, should be excluded from the benefit of the block exemption established by this regulation irrespective of the market shares of the undertakings concerned. In the case of such heavy restrictions the whole agreement should be excluded from the benefit of the block exemption.
10. The Commission states that, this regulation does not apply to technology transfer agreements containing specific restrictions on the relevant market when parallel networks of similar technology transfer agreements accounts more than 50% of this market.

Article 3
Definitions

For the purposes of this regulation, the following definitions shall apply:

1. **"Law"** means law no. 9121, dated 28.07.2003 "On Protection of Competition", as amended.
2. **"Agreements"** means the definition according to point 4 of Article 3 of Law no. 9121, dated 28.07.2003 "On Protection of Competition", as amended.
3. **"Technology rights"** means know-how and the following rights, or a combination thereof, including applications for or applications for registration of those rights: patents, utility models, design rights, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained, plant breeder's certificates and software copyrights.
4. **"Technology Transfer Agreement"** is a technology licensing agreement between two companies for the purpose of producing contractual products from its licensor and/or sub-contractor (s), the transfer of technology rights between the two companies, for the purpose of producing contractual products, in the case where the transferor continues to maintain a part of the risk associated with the use of the technology.
5. **"Reciprocal agreement"** means a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a technology rights license, and where those licenses concern competing technologies or can be used for the production of competing products.
6. **"Non-reciprocal agreement"** means a technology transfer agreement where one undertaking grants another undertaking a technology rights license, or where two undertakings grant each other such a license but where those licenses do not concern competing technologies and cannot be used for the production of competing products;
7. **"Product"** means goods or a service, including both intermediary goods and services and final goods and services;
8. **"Contract product"** means a product produced, directly or indirectly, on the basis of the licensed technology rights;
9. **"Intellectual property rights"** includes industrial property rights, in particular patents and trademarks, copyright and neighboring rights;
10. **"Know-how"** means a package of practical information, resulting from experience and testing, which is:
    i) secret, that is to say, not generally known or easily accessible,
    ii) substantial, that is to say, significant and useful for the production of the contract products, and,
    iii) identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
11. **"Relevant product market"** means the market for the contract products and their substitutes that is to say all those products which are regarded as interchangeable or substitutable by the buyer, by reason of the products' characteristics, their prices and their intended use.
12. **"Relevant technology market"** means the market for the licensed technology rights and their substitutes, that is to say all those technology rights which are regarded as interchangeable or substitutable by the licensee, by reason of the technology rights' characteristics, the royalty's payable in respect of those rights and their intended use.

13. **"Relevant geographic market"** means the area in which the undertakings concerned are involved in the supply of and demand for products or the licensing of technology rights, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas;
14. **"Relevant market"** means the combination of the relevant product or technology market with the relevant geographic market;
15. **"Competing undertakings"** means undertakings which compete on the relevant market, that is to say:
    i) competing undertakings on the relevant market where the technology rights are licensed, that is to say, undertakings which license out competing technology rights (actual competitors on the relevant market),
    ii) competing undertakings on the relevant market where the contract products are sold, that is to say, undertakings which, in the absence of the technology transfer agreement, would both be active on the relevant market(s) on which the contract products are sold (actual competitors on the relevant market) or which, in the absence of the technology transfer agreement, would, on realistic grounds and not just as a mere theoretical possibility, in response to a small and permanent increase in relative prices, be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market(s) (potential competitors on the relevant market).
16. **"Selective distribution system"** means a distribution system where the licensor undertakes to license the production of the contract products, either directly or indirectly, only to licensees selected on the basis of specified criteria and where those licensees undertake not to sell the contract products to unauthorized distributors within the territory reserved by the licensor to operate that system.
17. **"Exclusive license"** means a license under which the licensor itself is not permitted to produce on the basis of the licensed technology rights and is not permitted to license the licensed technology rights to third parties, in general or for a particular use or in a particular territory.
18. **"Exclusive territory"** means a given territory within which only one undertaking is allowed to produce the contract products, but where it is nevertheless possible to allow another licensee to produce the contract products within that territory only for a particular customer where the second license was granted in order to create an alternative source of supply for that customer.
19. **"Exclusive customer group"** means a group of customers to which only one party to the technology transfer agreement is allowed to actively sell the contract products produced with the licensed technology.

    For the purposes of this regulation, the terms 'undertaking', 'licensor' and 'licensee' shall include their respective connected undertakings.
20. **"Connected undertakings"** means:
    (a) undertakings in which a party to the technology transfer agreement, directly or indirectly: (i) has the power to exercise more than half the voting rights, or (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or (iii) has the right to manage the undertaking's affairs;
    (b) Undertakings which directly or indirectly have, over a party to the technology transfer agreement, the rights or powers listed in point (a);
    (c) Undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);

(d) Undertakings in which a party to the technology transfer agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
(e) Undertakings in which the rights or the powers listed in point (a) are jointly held by:
(i) Parties to the technology transfer agreement or their respective connected undertakings referred to in points (a) to (d), or
(ii) One or more of the parties to the technology transfer agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

HEAD II
Exceptions and Limitations

Article 4
Exceptions

1. Technology transfer agreements concluded between two companies that allows the production of contracted products are being recognized with the right of exclusion from the category of prohibited agreements.
2. The exemption applies to the extent that technology transfer agreements contain restrictions on competition, which are subject of article 4 of law no. 9121/2003, as amended. The exemption shall apply for as long as the licensed technology rights have not expired, lapsed or been declared invalid or, in the case of know-how, for as long as the know-how remains secret. However, where know-how becomes publicly known as a result of an action by the licensee, the exemption shall apply for the duration of the agreement.
3. The exemption provided in paragraph 1 shall also apply to provisions, in technology transfer agreements, which relate to the purchase of products by the licensee or which relate to the licensing or assignment of other intellectual property rights or know-how to the licensee, if, and to the extent that, those provisions are directly related to the production or sale of the contract products.

Article 5
Market-share thresholds

1. When undertakings, parties to an agreement are competing undertakings, the exemption provided in Article 4 of this regulation, shall be applied on condition that the combined share of the parties in the market does not exceed 20% of the relevant affected market.
2. When undertakings, parties to an agreement, are not competitive undertakings, the exemption provided for in Article 4 shall be applied on condition that the market share of each party does not exceed 30% of the relevant market concerned.

Article 6
Application of the market-share thresholds

1. For the purposes of implementing the limits of the market share, according to Article 5 of this regulation, the following rules apply:

a) The market share is calculated on the basis of market sales value data, and if market value data is missing, estimates based on other reliable market information may be used, including volume data of sales in the market, to determine the market shares of the company in question;
b) The market share shall be calculated on the basis of data relating to the preceding calendar year;
c) The market value held by the undertaking referred in Article 3 of this regulation shall be equally divided between undertakings having the rights or competencies listed in this Article.

2. The market shares of a licensor on a relevant market, for the licensed technology rights shall be calculated on the basis of the presence of the licensed technology rights on the relevant markets (that is the product markets and the geographic markets) where the contract products are sold, that is on the basis of the sales data relating to the contract products produced by the licensor and its licensees combined;
3. If the market share referred to in article 5, point 1 or 2 is initially is not more than 20% or 30 % respectively, but subsequently rises above those levels, the exemption provided for in article 4 of this regulation, 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 7
Heavy restrictions

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in article 4 of this regulation, shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, that have as their object any of the following;
   a) the restriction of one 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 nonreciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;
   c) the allocation of markets or customers, excepting:
      i) the obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology rights within the exclusive territory reserved for the other party and/or not to sell actively and/or passively into the exclusive territory or to the exclusive customer group reserved for the other party,
      ii) 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 license,
      iii) 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,
      iv) the obligation on the licensee, in a non-reciprocal agreement, to produce the contract products only for a particular customer, where the license was granted in order to create an alternative source of supply for that customer;
   d) The restriction of the licensee's ability to exploit its own technology rights 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 4 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 any of the following;
   a) the restriction of one 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:
      i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor,
      ii) 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,
      iii) the obligation to produce the contract products only for a particular customer, where the license was granted in order to create an alternative source of supply for that customer,
      iv) the restriction of sales to end-users by a licensee operating at the wholesale level of trade,
      v) the restriction of sales to unauthorized 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 unauthorized 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 and not paragraph 1 shall apply for the full duration of the agreement unless the agreement is subsequently amended.

Article 8
Other restrictions that are not excluded

1. The exemption provided in article 4 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 license or to assign rights, in whole or in part, to the licensor or to a third party designated by the licensor in respect of its own improvements to, or its own new applications of, the licensed technology;
   b) any direct or indirect obligation on a party not to challenge the validity of intellectual property rights which the other party holds in the Union, without prejudice to the possibility, in the case of an exclusive license, of providing for termination of the technology transfer agreement in the event that the licensee challenges the validity of any of the licensed technology rights.
2. Where the undertakings party to an agreement are not competing undertakings, the exemption provided in article 4 of the law, shall not apply to any direct or indirect obligation limiting the licensee's ability to exploit its own technology rights 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 9
Revocation in individual cases

1. The Commission may withdraw the benefit of this regulation, where it finds that in any particular case a technology transfer agreement to which the exemption provided in article 4 of this regulation applies nevertheless has effects which are incompatible with article 5 of the law, and in particular where:
   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 or because the only technology owner licensing out relevant technology rights concludes an exclusive license with a licensee who is already active on the product market on the basis of substitutable technology rights.
2. Where, in any particular case, a technology transfer agreement to which the exemption provided for in article 4 of the regulation has been granted has effects contrary to article 5 of the law, the Competition Commission may revoke the benefits previously granted in implementation of this regulation, as defined in paragraph 1 of this article.

HEAD III
Final provision

Article 10
Abrogation

The regulation "On the Categories of Technological Transfer Agreements", approved by Decision No. 179, dated 02.03.2011, of the Competition Commission is repealed.

Article 11
Entry into force

This regulation comes into force immediately.