DECISION

On approving the Regulation on assessment of anticompetitive technology transfer agreements

no 15 as of 30.08.2013

Official Gazette no 213-215/1460 as of 27.09.2013

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Under the art.6 para.(3), art.41 para.(1) let.c), art.46 para.(6) let.c) and art.94 let.a) from the Law on Competition no 183 as of 11 July 2012 (Official Gazette of the Republic of Moldova, 2012, no 193-197, art.667), the Plenum of the Competition Council

DECIDES:

1. The Regulation on assessment of anticompetitive technology transfer agreements (attached) is being approved.

2. This decision shall enter into force on the date of its publication in Official Gazette of the Republic of Moldova.

THE PRESIDENT OF THE PLENUM

OF THE COMPETITION COUNCIL **Viorica CĂRARE**

Chişinău, 30 August 2013.

No 15.

Approved

By the Decision of the Plenum

of the Competition Council

no 15 as of 30 August 2013

REGULATION

on assessment of anticompetitive technology transfer agreements

This Regulation is drafted pursuant to art.6 para.(3), art.46 para.(6) let.c) from the Law on Competition no 183 as of 11.07.2012 and transposes the Commission Regulation (EC) no 772/2004 as of 27.04.2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, published in the Official Journal of the European Union (OJ) L 123 as of 27.04.2004; and transposes partially the Commission Notice 2004/C 101/02 Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, published in OJ C 101 as of 27.04. 2004.

I. GENERAL PROVISIONS

1. This Regulation sets out the general framework for the assessment of technology transfer agreements under art.5 para.(1) from the Law on Competition no 183 as of 07.2012 (hereinafter *Law*), application of individual exemption of technology transfer agreements under art.6 para.(1) from the Law and the block exemption thereof under the art.6 para.(3) from the Law.

2. This Regulation aims at ensuring the protection of competition, improving economic efficiency, promoting fair competition.

3. This Regulation should only deal with agreements where the licensor permits the licensee to exploit the licensed technology, possibly after further research and development by the licensee, for the production of goods or services. These provisions should not deal with licensing agreements for the purpose of subcontracting research and development activities. It should also not deal with licensing agreements to set up technology pools, that is to say, agreements for the pooling of technologies with the purpose of licensing the created package of intellectual property rights to third parties.

II. MAIN NOTIONS

4. For the purposes of this Regulation, the following notions shall apply:

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, 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;

reciprocal agreement means a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a patent license, a know-how license, a software copyright license or a mixed patent, know-how or software copyright license and where these licenses concern competing technologies or can be used for the production of competing products;

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

inter-technology competition means competition between undertakings using competing technologies;

intra-technology competition means competition between undertakings using the same technologies;

intellectual property rights includes industrial property rights, know-how, copyright and neighboring rights;

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;

severable improvement means an improvement that can be exploited without infringing the licensed technology;

competing undertakings on the relevant technology market being undertakings which license out competing technologies without infringing each other's' 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;

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 on which the contract products are sold without infringing each other's intellectual property rights (actual competitors on the product market) or would undertake the necessary additional investments or other necessary switching costs so that they could timely enter, without infringing each other's intellectual property rights, on the relevant product and geographic market 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;

know-how means a secret substantial and identified package of non-patented practical information, resulting from experience and testing: in this context "secret", means not generally known or easily accessible; "substantial" means significant and useful for using, selling, re-selling of the contract products, and "identified" means described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of "secrecy" and "substantiality";

contract products means products produced with the technology which is the object of license agreement;

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;

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;

technology transfer means active process by which the technology is transmitted among undertakings in order to make technological and scientific developments accessible to a wider domain of users, aiming at selling in the form of new goods or services;

active sales means sales by actively approaching determined customers or customers from a specific territory, allocated exclusively to other distributor, through advertising and publicity in the media or by other means of promotion, designated to the customers group at issue or to customers from the territory at issue; establishing a warehouse or point of sale in the exclusive territory of another distributor;

passive sales means sales based on unformulated applications from individual customers, including delivery of goods or provision of services. The sales generated by any publicity or promotional action, either by media, or via internet, received by the customers established on exclusive territories of other distributors or belonging to customers allocated to other distributors, but which are a means of reaching the clients situated outside these territories or such customers.

5. In the meaning of this Regulation, the terms "undertaking" and "party" include connected undertakings. "Connected undertakings" mean:

1) undertakings in which a party to the agreement, directly or indirectly has the power to exercise more than half of voting rights, has the power to appoint more than half of members of supervisory board, board of management or bodies legally representing the undertaking, or has the right to manage the undertaking's affairs;

2) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in 1);

3) undertakings in which an undertaking referred to in 2) has, directly or indirectly, the rights or powers listed in 1);

4) undertakings in which a party to the agreement together with one or more of the undertakings referred to in 1), 2) or 3), or in which two or more of the latter undertakings, jointly have the rights or powers listed in 1);

5) e) undertakings in which the rights or the powers listed in 1) are jointly held by parties to the agreement or their respective connected undertakings referred to in 1) to 4); one or more of the parties to the agreement or one or more of their connected undertakings referred to in 1) to 4) and one or more third parties.

6. The notions not defined in p.5 have the meaning given by the Law.

III. THE ASSESSMENT OF THE TECHNOLOGY TRANSFER AGREEMENTS

PURSUNAT TO ART.5 PARA.(1) FROM THE LAW

Section 1

General analytical framework. Restrictions of competition by object or effect

7. The assessment of technologic transfer agreements pursuant to art.5 para. (1) from the Law must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions, in particular assessing the competition between the parties and competition of the third parities, taking account of the likely impact of the agreement on inter-technology competition and on intra-technology competition.

8. Where the restrictions may damage the intra-technology and inter-technology competition in the same time, the assessment of whether the competition is restricted shall be performed according to this double optic.

9. Where applying the analytical framework mentioned at p.7 and p.8 distinction shall be made between:

1) Agreements having competition restraint as object thereof, agreements having competition restraint as effect thereof. A technological transfer agreement or contractual restraint is only prohibited by if its object or effect is to restrict inter-technology competition and/or intra-technology competition.

2) A technological transfer agreement between competitors and technological transfer agreement between non competitors, as well, if appropriate, by the fact that a technological transfer agreement between competitors are reciprocal and non-reciprocal. Such distinction shall not be necessary for agreements between non competitors.

10. In order to establish whether an agreement has an anticompetitive object, there shall be examined the content of the agreement and the objectives and the context in which it is (to be) applied or the actual conduct and behavior of the parties on the market. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect.

11. The establishment of the agreement anticompetitive object shall be sufficient to find the existence of anticompetitive agreement, without being necessary to examine the real or potential effects of the agreement at issue on the competition.

12. If a technological transfer agreement is not restrictive by its object, it shall be assessed whether it has actual or potential effects restricting the competition.

13. In order to establish if technology transfer agreements restrict competition by their effect, there shall be examined its probability to affect actual or potential competition by negative effects on prices, output, innovation or variety, or qualities of the products on the relevant market.

14. The relevant product market includes products which are regarded by the buyers as interchangeable with or substitutable for the contract products incorporating the licensed technology, by reason of the products' characteristics, their prices and their intended use.

15. Technology markets consist of the licensed technology and its substitutes, 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.

16. An agreement is susceptible of anticompetitive effects where at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.

17. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time. The degree of market power normally required for a finding of an infringement under art. 5 para. (1) from the Law is less than the degree of market power required for a finding of dominance under art. 10 from the Law.

18. For the purposes of analyzing restrictions of competition by effect, it is normally necessary to define the relevant market and the nature of the products and technologies concerned, pursuant Chapter V form the Law and this Regulation, and to calculate the shares of the parties on the markets affected by the cooperation. Depending upon the size of the market share of the parties, account shall be taken of other factors such as: the nature of products and technologies, the market position of buyers, the market position of competitors, the existence of potential competitors and the level of entry or expansion barriers.

19. In some cases, it may be possible to show anti-competitive effects directly by analyzing the conduct of the parties to the agreement on the market, in particular, in case of price increases, delay in introducing improved and new products which shall replace the existent ones in time.

20. If it has been demonstrated that technology transfer agreements restrict competition pursuant to art.5 para.(1) from the Law, there shall be established the advantages brought by this competition agreement and there shall be assessed if these compensate the restriction effects on the competition.

21. The exemption from the prohibition set in art.5 para.(1) from the Law may be individual pursuant art.6 para.(1) from the Law, or following the framing of the technology transfer agreement in certain categories of technology transfer agreement pursuant art.6 para.(3) from the Law.

22. The burden of proof regarding the cumulative fulfilment of the exemption conditions, or, if appropriate, of belonging of the horizontal agreement to the agreements exempted on blocks lies on undertakings or associations of undertakings invoking the benefit of provisions set in art.6 from the Law.

Section 2

The distinction between competitors and non-competitors

23. Agreements between competitors pose a greater risk to competition than agreements between non-competitors. In order to determine the competitive relationship between the parties it is necessary to examine whether the parties would have been actual or potential competitors in the absence of the agreement.

24. If without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement they are deemed to be non-competitors.

25. Where the licensor and the licensee are both active on the same product market or the same technology market without one or both parties infringing the intellectual property rights of the other party, they are actual competitors. The parties are deemed to be actual competitors on the technology market if the licensee is already licensing out his technology and the licensor enters the technology market by granting a license for a competing technology to the licensee.

26. The parties are considered to be potential competitors on the product market if in the absence of the agreement and without infringing the intellectual property rights of the other party it is likely that they would have undertaken the necessary additional investment to enter the relevant market in response to a small but permanent increase in product prices. In order to constitute a realistic competitive constraint entry has to be likely to occur within a period appropriate for the time needed for the undertakings already on the market to adjust their capacities.

27. The parties are considered to be potential competitors on the technology market where they own substitutable technologies if in the specific case the licensee is not licensing his own technology, provided that he would be likely to do so in the event of a small but permanent increase in technology prices.

28. If the parties own technologies that are in a one-way or two-way blocking position, the parties are considered to be non-competitors on the technology market. A one-way blocking position exists when a technology cannot be exploited without infringing upon another technology. A two-way blocking position exists where neither technology can be exploited without infringing upon the other technology and where the holders thus need to obtain a licence or a waiver from each other. Assessing whether a blocking position exists shall be based on objective factors as opposed to the subjective views of the parties.

29. In case the object of the license represents such a drastic innovation that the technology of the licensee has become obsolete or uncompetitive, although the licensor and the licensee produce competing products, they are non-competitors.

IV. EXEMPTION OF ANTICOMPETITIVE TECHNOLOGY TRANSFER AGREEMENTS

UNDER ART. 6 PARA. (1) FROM THE LAW

30. The assessment of technology transfer agreements in view of individual derogation thereof from the interdiction provided for in art.5 para.(1) from the Law shall be carried out under art.6 para.(1) from the Law, and, depending upon the competition relation between the parts to technology transfer agreement, provisions of the Section 3 of the Chapter

III from the Regulation on assessment of anticompetitive horizontal agreements, Chapter V from the Regulation on assessment of anticompetitive vertical agreements.

V. THE APPLICATION OF BLOCK EXEMPTION OF ANTICOMPETITIVE TECHNOLOGY TRANSFER UNDER THE ART.6 PARA.(3) FROM THE LAW

Section 1

Object of exemption

31. Pursuant art.6 para.(3) from the Law and in accordance with this Regulation, the art.5 para.(1) from the Law shall not apply to agreements entered into between two undertakings having as main object technology transfer permitting the exploitation of licensed technology for production of contract products.

32. The exemption from p. 31 shall apply to the extent that such agreements contain restrictions of competition falling within the scope of art. 5 para. (1) from the Law. The exemption shall apply for as long as the intellectual property right in the licensed technology has not expired, lapsed or been declared invalid and 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**.**

33. The exemption from p.31 shall apply to anticompetitive technology transfer agreements in conditions of falling under the thresholds of market shares provided for in p.34, 35, 43 and in case the agreement does not contain severe restrictions provided for in p.45 and 46.

Section 2

Market share, exemption duration and market share threshold application

34. Where the undertakings parties to the agreement are competing undertakings, the exemption provided for in p.31-33 shall apply on condition that the combined market share of the parties does not exceed 20 % on the affected relevant technology and product market.

35. Where the undertakings parties to the agreement are not competing undertakings, the exemption provided for in in p.31-33 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.

36. The market share shall be calculated pursuant art.31 from the Law based on the data of the prior calendaristic year, taking account of the provisions of this section.

37. The market share of a licensor on the technology relevant market shall be calculated based on the sales of products incorporating the technology which makes the license object performed by the licensor, and by all its licensees individually for each relevant market.

38. When the parties are competitors on the technology market, the sales of products incorporating the technology of the licensee shall be cumulated with the sales of products incorporating the technology which makes the license object.

39. For new technologies which have not yet generated sales, a market share equal to zero shall be at assigned. The market shares related to technologies at issue shall be accumulated when the sales begin.

40. The market share of the licensee on the product market shall be calculated based on its sales of products incorporating the technology of the licensee and its sales of competing products.

41. While calculating the market shares of the licensee and/or the licensor on the product markets, the sales performed by other licensee shall not be included.

42. The market share held by the undertakings mentioned in p. 5, subp.5), shall be shared equally to each undertaking having rights or competences provided for in p. 5, subp.1).

43. If the market share provided for in p.34 or p.35 is initially lower that 20% and correspondingly 30%, but subsequently rises above these levels, the exemption provided for in p. 31-33 shall be applied further for a period of two calendaristic years consecutively, following the year in which the threshold of 20% and correspondingly 30% was exceeded for the first time.

44. The thresholds of the market share shall apply both to technology markets and to the product markets incorporating the technology which makes the object of license. If the market share is higher than the threshold applied to the affected relevant market, the agreement shall not benefit from block exemption.

Section 3

Hardcore restrictions eliminating the agreement's benefit to block exemption

45. Where the undertakings parties to the agreement are competing undertakings, the exemption provided for in p.31-33 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:

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

2) 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;

3) the allocation of markets or customers except:

a) the obligation on the licensees 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 at the time of the conclusion of its own license,

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 license was granted in order to create an alternative source of supply for that customer;

4) 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 activities, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

46. Where the undertakings parties to the agreement are not competing undertakings, the exemption provided for in p.31-33 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:

1) 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;

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

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 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 license 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 sales to unauthorized distributors by the members of a selective distribution system;

3) 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.

47. If the undertakings parties to agreement are not competing undertakings at the moment of agreement conclusion, but subsequently become competitors, p.46 (not p. 45) shall apply for the entire duration of the agreement, except for the event in which the agreement is modified subsequently in any essential aspect.

Section 4

Excluded restrictions

48. The exemption provided for in p.31-33 shall not apply to any of the following obligations contained in technology transfer agreements:

1) any direct or indirect obligation on the licensee to grant an exclusive license 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;

2) 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;

3) 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.

49. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in p.31-33 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.

Section 5

Withdrawal of the benefit of exemption under art.6 para.(6) from the Law

50. The Competition Council may withdraw the benefit of exemption set out by this Regulation for some technology transfer agreements categories, where it finds these have effects which are incompatible with the provisions of art. 6 para. (1) from the Law and in particular where:

1) access of third parties' technologies to the market is restricted;

2) access of potential licensees to the market is restricted;

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

Section 6

Non application of block exemption of technology transfer agreements

51. Where parallel networks of similar technology transfer agreements cover more than 50 % of a relevant market, the exemption provided for in p.31-33 shall not apply to technology transfer agreements containing specific restraints relating to that market.

52. The decision of the Competition Council issued pursuant p.51 shall become applicable after six months following its adoption.

Section 7

The procedure of block exemptions

53. Pursuant the provisions of art.6 para.(3) from the Law, technology transfer agreements that fulfil the exemption conditions set out in p.31-33 are deemed legal, without the obligation of notification or obtaining Competition Council decision. The undertakings invoking block exemption have the task to demonstrate fulfilment of the conditions set out in this Regulation.

54. In case of not fulfilment of block exemption conditions, the parties involved may renegotiate the technology transfer agreement insofar to frame into the provisions of Chapter V from this Regulation, or to opt for the individual exemption under art.6 para.(1) from the Law.

Section 8

The relationship with other regulations providing for block exemption

55. Where several undertakings establish a production joint venture and license the joint venture to exploit technology, which is used in the production of the products manufactured by the joint venture, such licensing is subject to Chapter V from the Regulation on assessment of anticompetitive horizontal agreements, not subject to this Regulation, except for the case when the joint venture engages in licensing of the technology to third parties.

56. Chapter IV from the Regulation on assessment of anticompetitive horizontal agreements covers licensing between and by the parties to a joint venture within research and development agreements. If the outcomes of research and development activities make the object of a license by third parties, the individual license agreement concluded with the third parties shall benefit from block exemption according to the provisions of this Regulation.

57. This regulation covers the agreement between the licensor and the licensee, while the agreement between the licensee and the buyer falls under the Regulation on assessment of anticompetitive vertical agreements.