

**GENERAL PREAMBLE
OF THE BLOCK EXEMPTION COMMUNIQUÉ
RELATING TO TECHNOLOGY TRANSFER AGREEMENTS¹**

Technology transfer agreements which involve intellectual property rights — referring to patents, utility models, industrial designs, integrated circuit topographies, plant breeders' rights or software rights — and know-how, may bring about various economic efficiencies such as encouraging research and development activities, preventing waste of resources through duplication of research and developments, facilitating the dissemination of the knowledge and technology resulting from the aforementioned research and development activities, increasing competition by new and higher quality products brought to market. In addition to the aforementioned economic efficiencies, as intellectual property rights bestow monopolistic powers to their holders, technology transfer agreements involving such rights, considering also certain other provisions they contain, may lead to the restriction of competition to a certain extent; therefore the said agreements may result in being dealt with under competition law.

Technology transfer agreements whereby the above mentioned intellectual property rights are licensed are basically regulated within the framework of the legislation relating to those rights. The said legislation allows for provisions, such as granting of exclusive licenses, which may be restrictive of competition under certain circumstances, to be included in technology transfer agreements. In this context, considering the existence of legal arrangements for intellectual property rights, which are within the scope of the said agreements, and the powers bestowed by these arrangements to the right holders, the interface between such powers and competition law regulations must be specified. This Communiqué provides for the conditions whereby the provisions, contained in technology transfer agreements, which are restrictive of competition under Article 4 of the Act on the Protection of Competition No. 4054, are granted exemption when they are accepted to satisfy the requirements under Article 5 of the Act No. 4054.

¹ This part relating to general preamble has not been published on the Official Gazette.

In determining whether technology transfer agreements which are restrictive of competition satisfy the requirements of exemption, the power, held especially by those undertakings which are party to such agreements, within the relevant product and technology market, must be taken into account. In other words, the existence of substitutable technologies and substitutable products at the disposal of the competitors of the aforementioned undertakings gains importance.

In the assessment of technology transfer agreements, paying attention to the distinction whether the agreement is between competitors or not is quite important. It is less likely for technology transfer agreements between non-competitors to affect competition adversely than those that are between competitors. Therefore rules to be applied to technology transfer agreements between competitors and between non-competitors, and especially factors such as market share thresholds and limitations which would exclude the agreement from the coverage of block exemption needed to be differentiated.

Where the market shares of the undertakings which are party to technology transfer agreements exceed the market share thresholds set forth under this Communiqué, a detailed examination needs to be made so that it can be determined whether the said agreements are caught by Article 4 of the Act No. 4054 and whether they satisfy the requirements of exemption under Article 5. In making this assessment, all of the legal and economic factors related to the agreements, particularly the structure of the relevant technology and product market must be taken into account.

This Communiqué aims at the protection of competition within the market and provision of legal certainty to undertakings. To that end, the Communiqué gives the general conditions of block exemption for technology transfer agreements and enumerates the provisions which would prevent the said agreements from qualifying for the block exemption. In addition to these, rather than the approach whereby an agreement is excluded from the scope of the block exemption as a whole in relation to certain obligations, it would be appropriate to adopt the practice whereby the relevant obligations only are disqualified from block exemption and thus the agreements containing these continue to qualify for the block exemption. Whereas

the existence of issues such as market share thresholds, obligations which leave the agreement out of the scope of the block exemption and obligations which are unable to qualify for block exemption is generally sufficient to protect competition within the market, the exemption will be withdrawn where it is established that an agreement or networks of agreements which qualified for exemption under this Communiqué still do not satisfy the requirements under Article 5 of the Act No. 4054.

Although this Communiqué covers only those technology transfer agreements between a licensor and a licensee, the provisions not constituting the main purpose of the agreement however directly relating to the implementation of the technology concerned by the agreement, which are contained in these agreements, shall also be covered by the exemption. This Communiqué shall also apply where technology transfer agreements cover issues related to more than one level of trade such as the obligations the licensee must impose on resellers, for example in relation to setting up of a certain distribution system. However, in such a case, such obligations need to be in conformity with the relevant Competition Board regulations. This Communiqué shall not apply to supply and distribution agreements between licensee and their buyers.

Among the other agreements to which the Communiqué shall not apply are also the license agreements made through pooling of technologies in order to grant license to third parties as a package. License agreements drawn up for the purpose of having an undertaking carry out research and development activities shall not be dealt with under this Communiqué either.

In consideration of the explanations given above, the Competition Board decided that this Communiqué be published.

BLOCK EXEMPTION COMMUNIQUÉ ON TECHNOLOGY TRANSFER AGREEMENTS

(Communiqué No: 2008/2)

Purpose

ARTICLE 1 – (1) The purpose of this Communiqué is to determine the conditions for granting block exemption to technology transfer agreements from the application of the provisions of Article 4 of the Act No. 4054 dated 07.12.1994 on the Protection of Competition.

Scope

ARTICLE 2 – (1) This Communiqué shall apply to technology transfer agreements in which the licensor authorizes the licensee to use the licensed technology for the production of contract products and which fall under the scope of Article 4 of the Act No. 4054.

Basis

ARTICLE 3 – (1) This Communiqué has been prepared depending on Article 4 and 5 and subparagraph (f) of Article 27 of the Act No. 4054.

Definitions

ARTICLE 4 – (1) For the purposes of this Communiqué the following definitions shall apply:

- a) **Technology transfer agreement** means an agreement in which the relevant intellectual property rights and know how are licensed individually or mixedly. Agreements containing provisions which relate to the sale and purchase of products or which relate to the licensing or assignment of other intellectual property rights shall be regarded to fall under this definition, provided that those conditions do not constitute the primary object of the agreement and are directly related to the production of the contract products.
- b) **Product** means all products or services including intermediary goods and services.
- c) **Contract products** means products produced with the licensed technology.

- d) **Intellectual property rights** means a patent, utility model, industrial design, integrated circuit topography, plant breeder's right and related applications and software rights.
- e) **Know-how** means a confidential, substantial and identified package of knowledge resulting from experience and testing.

In this definition

- 1) **Confidential** means that know-how is not generally known or easily accessible as a whole or when pieced together or combined,
 - 2) **Substantial** means that know-how is significant and useful for the production of the contract products,
 - 3) **Identified** means that know-how is described in a sufficiently comprehensive and detailed manner so as to verify that it satisfies the conditions for confidentiality and substantiality.
- f) **Competing undertakings (competitors)** means undertakings which compete on the relevant technology and/or the relevant product market. In this context:
- 1) Competing undertakings on the relevant technology market are undertakings which grant licenses related to competing technologies (actual competitors on the technology market). The relevant technology market covers technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, in respect of the technologies' characteristics, their license fees and their intended use,
 - 2) Competing undertakings on the relevant product market means undertakings which, at the time of the conclusion of the technology transfer agreement,
 - 1. are already active on both the relevant product market and the relevant geographic market (actual competitors on the relevant market) or
 - 2. would, from a realistic point of view, undertake the necessary additional investments or necessary switching costs in order to timely enter the relevant product market or the relevant geographic market in

response to a small but significant increase in relative prices (potential competitors on the relevant market).

- g) **Selective distribution system** means a distribution system where the licensor licenses the production of the contract products only to licensees selected on the basis of specific criteria and where these licensees undertake not to sell the contract products to unauthorized distributors.
- h) **Exclusive territory** means a territory in which only one undertaking is allowed to produce and sell the contract products with the licensed technology. On the other hand, the fact that a license is given to another person for the production of contract products within the related territory in order to create an alternative source of supply for a specific customer does not prejudice the exclusivity nature of that territory.
- i) **Exclusive customer group** means a group of customers to which only one undertaking is allowed to actively sell the contract products produced with the licensed technology.
- j) **Severable improvement** means an improvement that can be used without infringing the right on the licensed technology.

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

(3) **Connected undertakings** means

(a) undertakings in which a party to the agreement, directly or indirectly:

1) has the power to exercise more than half the voting rights, or

2) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

3) has the right to manage the undertaking's affairs;

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

(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:

1) parties to the agreement or their respective connected undertakings referred to in (a) to (d), or

2) one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

General Conditions for Exemption

ARTICLE 5 – (1) The exemption granted by this Communiqué shall apply to technology transfer agreements which are entered between a licensor and a licensee and which relate to the production of contract products. The exemption shall continue to apply for as long as the protection granted to the intellectual property right regarding the licensed technology is valid and in case of know-how, as long as the know-how remains secret. In cases where the know-how becomes publicly known because of the licensee, it shall continue to apply for during the term of the agreement.

(2) Where the undertakings party to the agreement are competitors, the exemption provided for in this Communiqué shall apply on condition that the total market share of the parties does not exceed 30 % on the affected relevant technology and product market.

(3) Where the undertakings party to the agreement are not competitors, the exemption provided for in this Communiqué shall apply on condition that the total market share of the parties does not exceed 40 % on the affected relevant technology and product market.

(4) In terms of paragraphs 1 and 2, the market share on the relevant technology market is defined depending on the presence of the licensed technology on the relevant product market. The market share of the licensor on the relevant technology market shall be the total market share of the contract products produced by the licensor and the licensees on the relevant product market.

Restrictions that render technology transfer agreements out of the scope of the block exemption

ARTICLE 6 – (1) Where a technology transfer agreement includes any of the restrictions laid down in this Article, the agreement shall not benefit from the block exemption as a whole.

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

- a) The restriction of a party's right to determine its sales prices.
- b) The restriction of production and sales volumes of contract products.
- c) The allocation of markets and customers except the following cases:
 - 1) The obligation on the licensor and/or the licensee to or not to produce with the licensed technology on one or more technical fields of use or product markets or territories.
 - 2) The obligation on the licensor not to give a license to a third party and not to use the subject of the license on a particular territory.
 - 3) The restriction of the active sales by the licensor and/or the licensee into the territory or the customer group reserved for the other party. However, the parties cannot be restricted directly or indirectly from making sales to third parties which are present in their territories and which make sales into the other territories or customer groups within the country.
 - 4) The restriction of active sales by the licensee into a territory or a customer group allocated by the licensor to another licensee. However, the parties cannot be restricted directly or indirectly from making sales to third parties which are present in their territories and which make sales into the other territories or customer groups within the country.
 - 5) The obligation on the licensee to produce the contract products only for its own use. However the licensee shall not be restricted from actively or passively selling the contract products as spare parts for its own products.

6) The obligation on the licensee to produce the contract products for a specific customer provided that the license is given in order to create an alternative source of supply for that customer.

d) The restriction of a licensee's right to use its own technology or the restriction of a party's right to carry out research and development activities unless such restriction is necessary in order to prevent the disclosure of the licensed know-how to third parties.

(3) Where undertakings party to the agreement are not competitors, the exemption provided for in this Communiqué shall not apply to the agreements which directly or indirectly, individually or in combination with other factors that are under the control of the parties have as their object:

a) Restriction of a party's right to determine its sales prices. On the other hand, it is possible to determine the maximum sales price or recommend a sales price provided that it does not develop into a fixed or minimum sales price as a result of pressure or incentive from 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 following cases:

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

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

3) The obligation on the licensee to produce the contract products for only its own use. However, the licensee shall not be restricted from actively or passively selling the contract products as spare parts for its own products.

4) The obligation on the licensee to produce the contract products for a particular customer provided that the license is given in order to create an alternative source of supply for that customer.

5) The restriction of active sales to end users by a licensee carrying out activities at the wholesale level.

6) The restriction of sales by members of a selective distribution system to unauthorized distributors.

c) Restriction of active or passive sales to end users by a licensee carrying out activities at the retail level without prejudice to the right to prohibit a member of a selective distribution system from carrying out activities at an unauthorized place.

(4) Where undertakings party to the agreement are not competitors at the time of the conclusion of the agreement but become competitors afterwards, paragraph 3 and not paragraph 2 shall apply during the term of the agreement. However, in order for paragraph 3 to apply, the agreement shall not be substantially amended.

Restrictions that cannot benefit from the block exemption

ARTICLE 7 – (1) Where a technology transfer agreement contains any of the restrictions laid down in this article and the related restriction is separable from the rest of the agreement, only that restriction shall not benefit from and the rest of the agreement shall continue to be covered by the block exemption. Where any of the restrictions laid down in this article cannot be separated from the rest of the agreement, the whole agreement shall not benefit from the block exemption.

(2) The exemption provided for in this Communiqué shall not apply to the following restrictions:

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

b) Any direct or indirect obligation on the licensee to assign, partly or completely, to the licensor or a third party designated by the licensor the rights related to its own severable improvements on or new applications of the licensed technology,

c) The obligation on the licensee not to challenge the validity of the related intellectual property rights that the licensor owns in Turkey. However, the right of the licensor to terminate the technology transfer agreement in case the licensee challenges the validity of one or more of the related licensed intellectual property rights is reserved.

(3) Where undertakings party to the agreement are not competitors the exemption provided for in this Communiqué shall not apply for any obligation which directly or indirectly:

a) restricts the licensee's right to use its own technology

b) restricts research and development activities of any of the parties to the agreement unless it is necessary to prevent the disclosure of the licensed know-how to third parties.

Withdrawal of the block exemption

ARTICLE 8 – (1) The Competition Board may withdraw the exemption provided for in this Communiqué, according to Article 13 of the Act No. 4054, in cases where the Board finds that a technology transfer agreement covered by the exemption provided for in this Communiqué has effects incompatible with Article 5 of the Act No. 4054 and especially that entry of third parties' technologies to the market is restricted for instance because of the cumulative effects created by a network of agreements containing similar restrictions that prohibit licensees from using third parties' technologies. The Competition Board shall request written or oral opinions from parties before giving its final decision on withdrawal of exemption.

(2) Where parallel networks created by similar technology transfer agreements cover more than 50 % of the relevant market, the Competition Board may, by a communiqué which it shall further issue, render agreements containing particular restrictions out of the scope the exemption provided for in this Communiqué. In this case, the concerned parties shall be given sufficient time starting from the publication date of such communiqué to fulfill its demands before it enters into force.

Application of the market share threshold

ARTICLE 9 – (1) The market shares provided for in this Communiqué shall be calculated on the basis of market sales value. If market sales value data are not available, estimates based on other reliable market data including market sales volumes may be used in order to calculate the market share of the undertaking concerned.

(2) The market shares shall be calculated on the basis of data of the year previous to that of evaluation.

(3) The market share belonging to the undertakings referred to in subparagraph (d) of Article 1(3) on definitions shall be equally portioned to the undertakings holding the rights and powers listed in subparagraph (a).

(4) If the market share is initially under the cover of the block exemption but subsequently passes the threshold provided for in this Communiqué, the exemption shall continue to apply until the end of the second year following the year in which the threshold is first exceeded.

Application of the Communiqué to concerted practices and decisions of association of undertakings

ARTICLE 10 – (1) The provisions of this Communiqué shall apply to concerted practices between undertakings and decisions of association of undertakings to the extent that it is appropriate.

Application of Article 6 of the Act

ARTICLE 11 – (1) The exemption granted according to the provisions of this Communiqué is without prejudice to the application of Article 6 of the Act No. 4054.

Entry into Force

ARTICLE 12 – (1) This Communiqué shall enter into force on the date it is published.

Execution

ARTICLE 13 – (1) The provisions of this Communiqué shall be executed by the President of the Competition Authority.