The Turkish Competition Authority adopts block exemption guidelines on technology transfer agreements on the basis of EC Reg. N° 772/2004

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The Turkish Competition Authority (hereinafter referred as "Authority") has recently adopted a communiqué entitled as "Communiqué on the Block Exemption Related to the Technology Transfer Agreements" (hereinafter referred as "Communiqué") numbered 2008/2 on the basis of the European Commission Regulation on the Block Exemption Covering Technology Transfer Agreements [1] (hereinafter referred as "Commission Regulation"). This Communiqué defines the terms and conditions under which a technology transfers agreement can benefit from the block exemption.

The scope of the Communiqué is determined in Article 2 as being certain categories of technology transfer agreements within the extent of the Article 4 of the Act on Protection of Competition numbered 4054 (hereinafter referred as "Competition Act"). The definition of the "technology transfer agreement" has also been regulated in the Article 4 of Communiqué in parallel to the definition given in Article 1 (b) of the Commission Regulation n° 772/2004/EC:

"Technology transfer agreement means licensing agreement, where relevant intellectual property rights and know-how rights are granted either separately or in a mixed content.

In case that these agreements include any provisions relating to the sale and purchase of products or the licensing or transfer of other intellectual property rights, however provided that the above mentioned provisions do not constitute the primary object of the agreement and are directly related to the production of the contract products, then these agreements shall also be deemed to be technology transfer agreements;"

In the light of the abovementioned definition, the technology transfer agreement can also be defined as a licensing agreement concluded between a licensor and a licensee which may also include to the sale and purchase of products as ancillary provisions [2].

The Article 5 of the Communiqué regulates the general conditions in order to benefit from the exemption [3]:

The exemption provided by this Communiqué covers the technology transfer agreements related to the production of the contract products, signed between two undertakings being the licensor and the licensee. The exemption shall exist as longs as the protection granted to the intellectual property rights related to the licensed technology is valid and in the case of know-how, as long as the know-how remains confidential.

Where the parties of the agreement are competitors, the exemption provided by this Communiqué shall be applied on the condition that the combined market share of the parties does not exceed 30 % of the affected relevant technology and product market.

However, if the parties of the agreement are not competitors, the exemption provided by this Communiqué shall be applied on the condition that the market share of each of the parties does not exceed 40 % of the affected relevant technology and product market [4].

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[1] The reference to the Commission Regulation is provided for the sake of completeness and might not be relevant to the content of the communiqué.

[2] Ancillary provisions are those provisions that are necessary for the fulfilment of the main object of the agreement.

[3] Conditions for exemption typically include the validity of the protection granted to the intellectual property rights.

[4] Conditions for exemption for non-competing parties are more lenient compared to those for competing parties.
Moreover, Article 6 of the Communiqué states that if a technology transfer agreement includes the restrictions determined under the said clause, then the entire agreement can not benefit from the block exemption. In other words, inclusion of such a restriction will result in exclusion of the entire technology transfer agreement—all the provisions of the agreement—out of the scope of the block exemption.

On this matter, the Communiqué makes a distinction between technology transfer agreements as: (i) agreements between competing undertakings and (ii) agreements between non-competing undertakings.

The exemption shall not be applied to the agreements between competing undertakings (Article 6.2) which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object,

restricting a party's ability to determine its sale price,

restricting the production and sale quantity of the contractual products,

restricting of the licensee's ability to exploit its own technology or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties;

allocation of markets or customers [5].

The exemption shall not be applied to the agreements between non competing undertakings (Article 6.3) which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

restricting 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;

restricting the active or passive sales to end-users by a licensee and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the selective distribution system from operating out of an unauthorised place of establishment.

restricting the territory into which, or of the customers to whom, the licensee may passively sell the contract products [6].

The Communiqué enumerates the restrictions which are not covered by the block exemption. However, in this case if the mentioned restrictions are severable, then only the provisions regarding the restriction can not benefit from the block exemption. Therefore, rest of the agreement would still be within the scope of the block exemption.

These restrictions are stated in Article 7.2 as: (a) 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, (b) any direct or indirect obligation on the licensee to assign, in whole or in part, to the licensor or to a third party designated by the licensor, rights to its own severable improvements to or its own new applications of the licensed technology, (c) any direct or indirect obligation on the licensee not to challenge the validity of intellectual property rights which the licensor holds in Turkey, without prejudice to the licensor's 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.
In addition, Article 7.3 provides that the exemption shall not be applied to the provisions of the agreements between non-competing undertakings: (a) restricting the licensee using its own technology or (b) restricting research and development activities of the licensee unless it's mandatory for preventing the disclosure of the know-how.

If the Competition Board determines that an agreement granted exemption by this Communiqué creates some effects incompatible with the conditions provided in Article 5 of the Act, it may revoke such exemption granted to the agreement by this Communiqué, based on article 13 of the Competition Act.

In case that the parallel networks comprised of vertical limitations of similar nature cover more than %50 of the relevant market, the Competition Board may also, via a Communiqué to be issued by it separately, exclude agreements involving certain limitations in the relevant market, from the exemption ensured by this Communiqué.

The Communiqué follows the same route of the Commission Regulation n° 772/2004/EC with the main exception of that it provides higher market share thresholds for the non competitors parties who would like to benefit of this Block Exemption.


[2] Article 4 also includes other accompanying definitions such as "product", "intellectual property rights" and "know-how".

The "product" is defined as "all goods and services, including intermediary goods and services".

Intellectual property Rights are defined as the rights on the patent, utility model, industrial design, integrated circuit topography, software and adjustment rights including the applications related to these rights. As regards to know-how, it is defined as a package of practical information, resulting from experience and testing, which is confidential, substantial and identified.

[3] In application of this Article the market share on the relevant technology and product market is defined upon the presence of the relevant product in the relevant market. Thus, the market share of the Licensor shall be the total market share of the Licensor and its Licensees regarding the product subject to the agreement on the relevant product market.

[4] The abovementioned limits are determined as 20% (for paragraph 2) and 30% (for paragraph 3) in the Commission Regulation n° 772/2004/EC Article 3 titled "Market-share Thresholds".

[5] Some exceptions are foreseen for the paragraph 5 of the Article 6.2 regarding the restrictions excluding the application of the block exemption. These are: (a) the obligation on the licensor and/or the licensee, to produce or 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, (b) the obligation on the licensor not to use the license subject and not to license the technology to third party in a particular territory, (c) the restriction of active sales by the licensee and/or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party. (However, the sales of the parties to third parties - who are placed at the own territory of the parties and who may implement the sale to the other territory of the country or to the customer group - can not directly or indirectly be forbidden), (d) the restriction, of active sales by the licensor into the exclusive territory or to the exclusive customer group located by the licensor to another licensee. (However, the sales of the parties to third parties - who are placed at the own territory of the parties and who may implement the sale to the other territory of the country or to the customer group - can not directly or indirectly be forbidden) (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 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.

[6] Some exceptions are foreseen for the paragraph 5 of the Article 6.3 regarding the restrictions excluding the application of the block exemption. These are: (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 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 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 unauthorised distributors by the members of a selective distribution system.