Unofficial translation

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TYPICAL REQUIREMENTS
for concerted actions of undertakings in the field of technology transfer, compliance with which allows for the implementation of such concerted actions without the need for obtaining a permision from the Antimonopoly Committee of Ukraine

I. General provisions

1. These Typical requirements, developed in accordance with Article 11 of the Law of Ukraine "On Protection of Economic Competition" (hereinafter - the Law), establish the requirements for concerted actions of undertakings in the field of technology transfer. In cases where the concerted actions of undertakings comply with the provisions of these Typical requirements, such actions are permitted and do not require permission from the bodies of the Antimonopoly Committee of Ukraine, in accordance with Part 1 of Article 10 of the Law.

These Typical requirements do not exempt undertakings from fulfilling additional requirements established by the Law of Ukraine "On state regulation of activities in the field of technology transfer."

2. The terms used in these Typical requirements shall have the following meanings:

active sales – sales carried out through the active search for individual customers and/or a specific group of customers (including sending postal messages, visiting potential customers, or using other methods of promoting goods, including the dissemination of advertisements on the Internet, in the media, targeted at a certain territory, group of customers, or individual customers in a specific territory, or the establishment of distribution points for goods in such a territory). Advertising or promotion aimed solely at the buyer is recognized as active sales if it facilitates the acquisition of a certain group of customers or individual customers in a specific territory;

mutual technology transfer agreement – an agreement on technology transfer whereby two undertakings mutually transfer (grant licenses to use) rights to certain technologies, provided that these rights relate to competing technologies or can be applied to the production of competing goods;

selective supply – a supply system where the licensor undertakes to grant a license for the production of contractual goods, directly or indirectly, only to licensees selected according to specified criteria, and where these licensees are obligated not to sell the contractual goods to undertakings that have not undergone the relevant selection, within the territory designated by the licensor for the operation of this system;

exclusive group of customers – a group of customers to whom only one of the parties to the technology transfer agreement is permitted to actively sell contractual goods;

exclusive territory – a territory within which only one undertaking is allowed to produce contractual goods.

At the same time, the possibility of granting another undertaking permission to produce contractual goods for one specified customer is not excluded, provided that such permission is granted to ensure this customer has an alternative source of supply;

competing undertakings:

undertakings operating in the same technology market, i.e., undertakings that grant licenses (permissions) for competing technologies;

undertakings that, in the absence of a technology transfer agreement, would compete as sellers in the same product market in which the contractual goods circulate;

undertakings that, in the absence of a technology transfer agreement, could, given realistic opportunities and within a sufficiently short period of time, enter the relevant market by making additional investments or incurring other costs associated with changing the conditions of their economic activity necessary to enter the relevant market(s), assuming a slight but permanent increase in the prices of contractual goods. A sufficiently short period is considered a period that does not exceed the time taken to develop an existing similar technology;

contractual goods – goods (products, works, services) created directly or indirectly using the transferred (licensed) technology rights;

Non-mutual technology transfer agreement – an agreement on the transfer of technology whereby only one undertaking grants a license (permission) to another for the rights to the technology, or an agreement whereby two undertakings mutually grant such licenses (permissions), but the relevant rights do not relate to competing technologies and cannot be applied to the production of competing goods;

Know-how – technical, organizational, or commercial information obtained through experience and testing of technology and its components, which:

is not generally known or readily accessible on the date of the conclusion of the technology transfer agreement;

is substantial, i.e., important and useful for the production of contractual goods, the technological process, and/or the provision of services;

is sufficiently defined, i.e., described in enough detail to verify its compliance with the criteria of non-public knowledge and substantiality.

passive sales – sales made in response to requests from individual customers or specific groups of customers, which are not caused by the actions of the seller;

technology rights – proprietary rights to know-how and subsequent proprietary rights or combinations thereof (rights to inventions, utility models, industrial designs, animal breeds, plant varieties, topographies of integrated circuits, copyright on computer programs, as well as applications for such rights and applications for their registration);

market – the area of circulation of goods in which the contractual goods and their substitutes are traded, i.e., all goods that buyers consider substitutable or interchangeable with the contractual goods in terms of consumer characteristics, prices, and functional purpose;

technology rights market – the area of circulation of goods in which the technology rights being transferred (or licensed) and their substitutes are traded, i.e., all technology rights that the recipient or intended recipient considers substitutable or interchangeable in terms of their characteristics, associated costs (royalties), and the intended use for which they are designed;

technology transfer agreement:

an agreement for the transfer of technology rights, regardless of its form, concluded between two undertakings with the purpose of producing contractual goods by the party receiving such rights (the licensee) and/or by persons authorized by the licensee;

an agreement for the transfer of technology rights, concluded between two undertakings, under which the party granting the rights (the licensor) continues to bear the risks associated with the use of this technology.

II. Scope of application

These Typical requirements apply to technology transfer agreements, the subject of which is technology rights that have not expired, have not been terminated, have not been declared invalid, and have signs of actions provided for in part one of Article 6 of the Law.

In cases where the subject of technology transfer agreements is know-how that has been made publicly available by the recipient of the technology rights (or the licensee for their use), these Typical requirements apply for the duration of the technology transfer agreement.

These Typical requirements also extend to provisions of technology transfer agreements that pertain to:

the acquisition of goods by the recipient of the rights (licensee);

the licensing or transfer of other intellectual property rights or know-how, insofar as they are directly related to the production or sale of contractual goods.

III. Permitted concerted actions in the field of technology transfer

1. The following agreements are permitted and do not require permission:

technology transfer agreements between competing undertakings if the combined market share of the participants does not exceed 20 percent;

technology transfer agreements between non-competing undertakings if the market share of each participant does not exceed 30 percent.

2. The market share of the parties to the agreements mentioned in clause 1 of this section is calculated as follows:

1) based on data regarding the value of market sales. In the absence of direct data on the value of market sales, market shares of the relevant undertakings are calculated using estimates based on other market information, including sales volumes in the market;

2) based on data from the calendar year preceding the year in which the calculation is made;

3) if the parties to the technology transfer agreement exercise joint control over an undertaking that also operates in the market of contractual goods, the market share of each of these parties is increased by the share of the undertaking under their joint control, divided equally between each party to the agreement;

4) the market share of the licensor is determined based on the aggregate value of sales of contractual goods by both the licensor and its licensees;

5) if the market share initially did not exceed one of the thresholds specified in clause 1 of this section but later exceeded that threshold, the provisions of clause 1 of this section continue to apply to the relevant concerted actions for two years following the year in which the threshold was exceeded for the first time.

The calculation of market shares is carried out by the parties to the technology transfer agreements and may be verified by the Antimonopoly Committee of Ukraine in the course of reviewing their application for conclusions on the qualification of actions, preliminary conclusions on concerted actions of undertakings, or on its own initiative.

IV. Significant and exclusive restrictions

1. The provisions of clause 1 of section III of these Typical requirements do not apply to technology transfer agreements between competing undertakings that directly or indirectly, individually or in combination with other conditions dependent on the parties, provide for the following:

1) restrictions on the ability of one of the parties to determine its own prices when selling goods to third parties;

2) restrictions on the production of contractual goods, except for:

restrictions on the production of contractual goods imposed on the party receiving the technology rights in a non-mutual technology transfer agreement;

restrictions on the production of contractual goods imposed on only one party in a mutual technology transfer agreement;

3) market allocation based on territorial, product range, or customer (consumer) criteria, except for:

an obligation imposed on one or both parties in a non-mutual technology transfer agreement not to produce contractual goods in the exclusive territory of the other party and/or not to sell contractual goods in the exclusive territory or to the exclusive group of customers of the other party;

a restriction on active sales imposed by the licensor in a non-mutual agreement on the other party in the exclusive territory or to the exclusive group of customers of the undertaking that received permission from the licensor to use the technology rights, provided that such an undertaking was not its competitor at the time of the conclusion of its own technology transfer agreement;

a requirement imposed by the licensor in a non-mutual agreement obligating the other party to produce contractual goods solely for a specific customer if the technology transfer was carried out to create an alternative supply source for that customer;

a requirement imposed by the licensor in the agreement obligating the other party to produce contractual goods exclusively for its own use, provided that it is free to sell them as spare parts for its own products.

4) restrictions on the ability of the party to the agreement, to whom the rights to the technology are transferred (the licensee), to use its own technology rights, or restrictions on the ability of one of the parties to the agreement to conduct research and development (R&D) activities, unless such a restriction is necessary to prevent the dissemination of know-how to third parties.

2. The provisions of clause 1 of Section III of these Typical requirements do not apply to technology transfer agreements between non-competing undertakings that, directly or indirectly, individually or in combination with other factors controlled by the parties, provide for:

1) restrictions on the ability of one party to determine its prices when selling goods to third parties, except for the ability to set maximum or recommended sales prices, provided this does not lead to the establishment of fixed or minimum sales prices as a result of pressure or incentives from one of the parties;

2) restrictions concerning the territory (customer group) within which (whom) the party to the agreement, to whom the rights to the technology are transferred, may conduct passive sales of the contract goods, except for:

restrictions on passive sales of contract goods in an exclusive territory or to an exclusive customer group that has been allocated to the licensor;

obligations to manufacture contract goods exclusively for own use, provided they may be freely sold as spare parts for own products;

obligations to manufacture contract goods exclusively for a specific customer if the technology transfer was carried out to create an alternative supply source for that customer;

restrictions on sales of contract goods to end-users if the party to the agreement, to whom the technology is transferred, conducts wholesale sales of these and/or interchangeable or substitutable goods in the market;

restrictions on sales of contract goods by members of a selective distribution system to other suppliers;

3) restrictions on sales of contract goods to end-users by the party to the agreement, to whom the technology is transferred (the licensee) and who is a member of the selective distribution system conducting retail sales of contract goods, except for prohibiting a member of the selective distribution system from carrying out such activities from an unauthorized location.

3. If the parties to the technology transfer agreement were not competing undertakings at the time of its conclusion but later became so, the provisions of clause 2 of this section shall apply to them throughout the duration of the relevant agreement, unless substantial amendments are made to the agreement. A technology transfer agreement that has been substantially amended, including with respect to the nature, scope of the technology rights transferred, or the conditions of such transfer, shall be considered a different agreement.

4. The provisions of clause 1 of Section III of these Typical requirements do not apply to:

1) any direct or indirect obligations of the party to the agreement, to whom the rights to the technology are transferred (the licensee), to grant an exclusive license for a specific technology to the licensor or to a third party designated by the licensor, or to transfer to them the entirety or part of the rights to improvements made by the party, to whom the technology is transferred, to the transferred technology, or to its new use developed by the licensee;

2) any direct or indirect obligations of the parties to the technology transfer agreement that limit the ability to challenge the validity of intellectual property rights owned by the other party in Ukraine, except for the ability to provide for the termination of the technology transfer agreement in the event that the party, to whom the technology is transferred, challenges the validity of any rights transferred to it in the case of an exclusive license;

3) any direct or indirect obligations contained in technology transfer agreements between non-competing undertakings that restrict the ability of the party to the agreement, to whom the rights to the technology are transferred, to use its own technology rights or restrict the ability of one of the parties to the agreement to conduct research and development (R&D) activities, unless such a restriction is necessary to prevent the dissemination of know-how to third parties.

V. Non-application of the Typical requirements

1. The provisions of clause 1 of Section III of these Typical requirements may not apply to specific technology transfer agreements that do not contribute to the positive effects provided for in part one of Article 10 of the Law, where competition in the market is significantly restricted, particularly in the presence of:

1) restrictions on market access for technologies owned by third parties, for example, as a result of the cumulative effect of parallel networks of similar agreements that prohibit the parties to whom the technology rights are transferred from using technologies owned by third parties;

2) restrictions on market access for undertakings that could have been granted the right to the technology, for example, due to the cumulative effect of parallel networks of similar agreements that prohibit the parties transferring the technology rights from granting such rights to other parties, or due to the fact that the sole owner of the technology rights has granted an exclusive license to an undertaking that already operates in the market for goods produced using a substitute technology.

2. The provisions of clause 1 of Section III of these Typical requirements may also not apply to certain markets as a result of studies conducted by the Antimonopoly Committee of Ukraine of these markets, in cases where a combination of mutually unrelated technology transfer agreements containing similar restrictions covers more than 50 percent of that market.

3. The non-application of the provisions of clause 1 of Section III of these Typical requirements in accordance with clauses 1 and 2 of this section is formalized by an order of the Antimonopoly Committee of Ukraine, which takes effect no earlier than six months after its adoption.

4. The said order is subject to mandatory publication within 3 working days after its adoption.