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**DRAFT COMMISSION REGULATION (EU) No .../..**

**of **XXX****

**on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements**

(Text with EEA relevance)

**DRAFT COMMISSION REGULATION (EU) No .../..**

**of XXX**

**on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices<sup>1</sup>, and in particular Article 1 thereof,

Having published a draft of this Regulation<sup>2</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

- (1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union<sup>3</sup> by regulation to certain categories of technology transfer agreements and corresponding concerted practices to which only two undertakings are party which fall within Article 101(1) of the Treaty.
- (2) Pursuant to Regulation No 19/65/EEC, the Commission has, in particular, adopted Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements<sup>4</sup>. The Regulation (EC) No 772/2004 defines categories of technology transfer agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 30 April 2014, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.
- (3) This Regulation should meet the two requirements of ensuring effective competition and providing adequate legal security for undertakings. The pursuit of these objectives should take account of the need to simplify, where possible, this Regulation and its application.
- (4) Technology transfer agreements concern the licensing of technology. Such agreements will usually improve economic efficiency and be pro-competitive as they can reduce

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<sup>1</sup> OJ 36, 6.3.1965, p. 533/65. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

<sup>2</sup> [TO BE ADDED].

<sup>3</sup> With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.

<sup>4</sup> OJ L 123, 27.4.2004, p. 11.

duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate product market competition.

- (5) The likelihood that such efficiency-enhancing and pro-competitive effects will outweigh any anti-competitive effects due to restrictions contained in technology transfer agreements depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which those undertakings face competition from undertakings owning substitute technologies or undertakings producing substitute products.
- (6) This Regulation should cover only technology transfer agreements between a licensor and a licensee. It should cover such agreements even if conditions are stipulated for more than one level of trade, by, for instance, requiring the licensee to set up a particular distribution system and specifying the obligations the licensee must or may impose on resellers of the products produced under the licence. However, such conditions and obligations should comply with the competition rules applicable to supply and distribution agreements as set out in Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.<sup>5</sup> Supply and distribution agreements concluded between a licensee and its buyers should not be exempted by this Regulation.
- (7) This Regulation should only apply to agreements where the licensor permits the licensee and/or its sub-contractor(s) to exploit the licensed technology, possibly after further research and development by the licensee and/or its sub-contractor(s), for the purpose of producing goods or services. It should not apply to licensing in the context of research and development agreements which are covered by Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to certain categories of research and development agreements<sup>6</sup> or to licensing in the context of specialisation agreements which are covered by Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements<sup>7</sup>. It should further not apply to agreements, the purpose of which is the mere reproduction and distribution of software copyright protected products as such agreements do not concern the licensing of a technology to produce but are more akin to distribution agreements. The Regulation should also not apply to licensing agreements to set up technology pools, that is to say, agreements for the pooling of technologies with the purpose of licensing these to third parties nor to agreements whereby the pooled technology is licensed out to those third parties.
- (8) For the application of Article 101(3) by regulation, it is not necessary to define those technology transfer agreements that are capable of falling within Article 101(1). In the individual assessment of agreements pursuant to Article 101(1), account has to be taken of several factors, and in particular the structure and the dynamics of the relevant technology and product markets.
- (9) The benefit of the block exemption established by this Regulation should be limited to those agreements which can be assumed with sufficient certainty to satisfy the

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<sup>5</sup> OJ L 102, 23.4.2010, p. 1.

<sup>6</sup> OJ L 335, 18.12.2010, p. 36.

<sup>7</sup> OJ L 335, 18.12.2010, p. 43.

conditions of Article 101(3). In order to attain the benefits and objectives of technology transfer, the benefit of this Regulation should also apply to provisions contained in technology transfer agreements that are directly and exclusively related to the production of the contract products.

- (10) For technology transfer agreements between competitors it can be presumed that, where the combined share of the relevant markets accounted for by the parties does not exceed 20 % and the agreements do not contain certain severely anti-competitive restraints as set out in Article 4, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.
- (11) For technology transfer agreements between non-competitors it can be presumed that, where the individual share of the relevant markets accounted for by each of the parties does not exceed 30 % and the agreements do not contain certain severely anti-competitive restraints as set out in Article 4, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.
- (12) If the applicable market-share threshold is exceeded on one or several product and technology market(s), the block exemption should not apply to the agreement for the relevant market(s) concerned.
- (13) There can be no presumption that above these market-share thresholds technology transfer agreements do fall within the scope of Article 101(1). For instance, an exclusive licensing agreement between non-competing undertakings does often not fall within the scope of Article 101(1). There can also be no presumption that, above these market-share thresholds, technology transfer agreements falling within the scope of Article 101(1) will not satisfy the conditions for exemption. However, it can also not be presumed that they will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition.
- (14) 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 restraints set out in Article 4 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 hardcore restrictions the whole agreement should be excluded from the benefit of the block exemption.
- (15) In order to protect incentives to innovate and the appropriate application of intellectual property rights, certain restrictions should be excluded from the block exemption. In particular exclusive grant back obligations and non-challenge clauses should be excluded. Where such a restriction is included in a licence agreement only the restriction in question should be excluded from the benefit of the block exemption.
- (16) The market-share thresholds, the non-exemption of technology transfer agreements containing severely anti-competitive restraints and the excluded restrictions provided for in Articles 3, 4 and 5 will normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.
- (17) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the

Treaty<sup>8</sup>, where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty. This may occur in particular where the incentives to innovate are reduced or where access to markets is hindered.

- (18) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.
- (19) In order to strengthen supervision of parallel networks of technology transfer agreements which have similar restrictive effects and which cover more than 50 % of a given market, the Commission may by regulation declare this Regulation inapplicable to technology transfer agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 101 to such agreements,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

#### **Definitions**

1. For the purposes of this Regulation, the following definitions shall apply:
  - (a) "agreement" means an agreement, a decision of an association of undertakings or a concerted practice;
  - (b) "technology" means know-how as well as the following rights, or a combination thereof, including the applications or applications for registration of these rights:
    - (a) patents,
    - (b) utility models,
    - (c) design rights,
    - (d) topographies of semiconductor products,
    - (e) supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained,
    - (f) plant breeder's certificates and
    - (g) software copyright.
  - (c) "technology transfer agreement" means a technology licensing agreement, including any such agreement containing provisions 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, provided that those provisions are directly and exclusively related to the production of the contract products; assignments of technology where part of the risk associated with the exploitation of the technology remains with the assignor shall also be deemed to be technology transfer agreements;

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<sup>8</sup> OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

- (d) "reciprocal agreement" means a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a technology licence, and where those licences concern competing technologies or can be used for the production of competing products;
- (e) "non-reciprocal agreement" means a technology transfer agreement where one undertaking grants another undertaking a technology licence, or where two undertakings grant each other such a licence but where these licences do not concern competing technologies and cannot be used for the production of competing products;
- (f) "product" means a good or a service, including both intermediary goods and services and final goods and services;
- (g) "contract products" means products produced with the licensed technology;
- (h) "intellectual property rights" includes industrial property rights, in particular patents and trademarks, copyright and neighbouring rights;
- (i) "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;
- (j) "relevant product market" comprises 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;
- (k) "relevant technology market" comprises the licensed technology and its substitutes, that is to say all those technologies which are regarded as interchangeable or substitutable by the licensee, by reason of the technologies' characteristics, their royalties and their intended use;
- (l) "relevant geographic market" comprises the area in which the undertakings concerned are involved in the supply and demand of products or the licensing of technology, 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;
- (m) "relevant market" means the combination of the relevant product or technology market with the relevant geographic market;
- (n) "competing undertakings" means undertakings which compete on the relevant market, that is to say:
  - (i) competing undertakings on the relevant market where the technology is licensed, being undertakings which license out competing technologies without infringing each others' intellectual property rights (actual competitors on the relevant market) or misappropriating each others' know-how;
  - (ii) competing undertakings on the relevant market where the contract products are sold, being undertakings which, in the absence of the technology transfer agreement,

are both active on the relevant market(s) on which the contract products are sold without infringing each others' intellectual property rights (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, without infringing each others' intellectual property rights, the relevant market(s) (potential competitors on the relevant market);

- (o) "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 these licensees undertake not to sell the contract products to unauthorised distributors within the territory reserved by the licensor to operate that system;
  - (p) "exclusive licence" means that the licensee is the only one who is permitted to produce on the basis of the licensed technology, in general or for a particular use or in a particular territory.
  - (q) "exclusive territory" means a given territory within which only one undertaking is allowed to produce and/or sell the contract products, without prejudice to the possibility of allowing another licensee to produce the contract products within that territory only for and/or to sell the contract products within that territory only to a particular customer where the second licence was granted in order to create an alternative source of supply for that customer;
  - (r) "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;
2. The terms "undertaking", "licensor" and "licensee" shall include their respective connected undertakings.

"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.

## *Article 2*

### **Exemption**

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to technology transfer agreements entered into between two undertakings for the purpose of the production of contract products by the licensee and/or its sub-contractor(s).
2. This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 101(1). The exemption shall apply for as long as the intellectual property right in the licensed technology has not expired, lapsed or been declared invalid or, 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.

## *Article 3*

### **Market-share thresholds**

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 2 shall apply on condition that the combined market share of the parties does not exceed 20 % on any relevant market.
2. Where the undertakings party to the agreement are not competing undertakings but the licensee owns a technology which it uses only for in-house production and which is substitutable for the licensed technology, the exemption provided for in Article 2 shall apply on condition that the market share threshold provided in paragraph 1 is not exceeded on any relevant market.
3. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall apply on condition that the market share of each of the parties does not exceed 30 % on any relevant market.

## *Article 4*

### **Hardcore restrictions**

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 2 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 a 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 non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;

- (c) the allocation of markets or customers except:
    - (i) the obligation on the licensee(s) to produce with the licensed technology only within one or more technical fields of use or one or more product markets,
    - (ii) 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,
    - (iii) the obligation on the licensor not to license the technology to another licensee in a particular territory,
    - (iv) 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,
    - (v) 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 licence,
    - (vi) 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,
    - (vii) the obligation on the licensee, in a non-reciprocal agreement, to produce the contract products only for a particular customer, where the licence 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 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 2 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 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;
  - (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 licence 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 unauthorised 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 unauthorised 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 life of the agreement unless the agreement is subsequently amended in any material respect. A material amendment includes the conclusion of a new technology transfer agreement between the parties concerning competing technologies, which can be used for the production of products competing with the contract products.

#### *Article 5*

##### **Excluded restrictions**

1. The exemption provided for in Article 2 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 licence 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 European Union, including any right for a party to terminate the technology transfer agreement in the event that the other party challenges the validity of any of the intellectual property rights which a party to the agreement holds in the European Union.
2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 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.

#### *Article 6*

##### **Withdrawal in individual cases**

1. The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Regulation (EC) No 1/2003, where it finds in any particular case that a technology transfer agreement to which the exemption provided for in Article 2

applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty, 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;
  - (c) without any objectively valid reason, the parties do not exploit the licensed technology.
2. Where, in any particular case, a technology transfer agreement to which the exemption provided for in Article 2 applies has effects which are incompatible with Article 101(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of this Regulation, pursuant to Article 29(2) of Regulation (EC) No 1/2003, in respect of that territory, under the same circumstances as those set out in paragraph 1 of this Article.

#### *Article 7*

##### **Non-application of this Regulation**

1. Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar technology transfer agreements cover more than 50 % of a relevant market, this Regulation is not to apply to technology transfer agreements containing specific restraints relating to that market.
2. A regulation pursuant to paragraph 1 shall not become applicable earlier than six months following its adoption.

#### *Article 8*

##### **Application of the market-share thresholds**

For the purposes of applying the market-share thresholds provided for in Article 3 the following rules shall apply:

- (a) the market share shall be calculated on the basis of market sales value data. If market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned;
- (b) the market share shall be calculated on the basis of data relating to the preceding calendar year;
- (c) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2);
- (d) the market share of a licensor on a relevant market for the licensed technology shall be calculated, both for the product and the geographic dimension, on the basis of the presence of the licensed technology on the relevant market(s) where the contract

products are sold, that is on the basis of the sales data of the contract products produced by the licensor and its licensees combined;

- (e) if the market share referred to in Article 3(1) or (2) is initially not more than 20 % respectively 30 % but subsequently rises above those levels, the exemption provided for in Article 2 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 9*

##### **Relationship with other block exemption regulations**

This Regulation shall not apply to licensing agreements the subject matter of which falls within the scope of Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to certain categories of research and development agreements or Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.

#### *Article 10*

##### **Transitional period**

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 May 2014 to 30 April 2015 in respect of agreements already in force on 30 April 2014 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 30 April 2014, satisfied the conditions for exemption provided for in Regulation (EC) No 772/2004.

#### *Article 11*

##### **Period of validity**

This Regulation shall enter into force on 1 May 2014.

It shall expire on 30 April 2026.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Commission*

*Joaquín ALMUNIA  
Vice-President*