

the dti



THE ENTERPRISE ORGANISATION
SOUTH AFRICA

FORM DTP 001

General information on licence agreements and guidelines applied by the Department of Trade and Industry when considering the recommendation of these agreements to the Financial Surveillance Department of the South African Reserve Bank.

INTRODUCTION

Industrial development is possible only if the necessary technology is at the disposal of industry. Technologies may either be developed locally or be imported. Own technology development in specific spheres offers distinct advantages, but it is a phenomenon throughout the world that countries import the major portion of their new technology requirements, since it is obviously not viable for every country to undertake research and develop technology in all fields.

Imported technology is normally paid for in the form of royalties to a foreign licensor in terms of a licence agreement, and the Exchange Control Regulations stipulate that the payment of such royalties requires approval from the Financial Surveillance Department of the South African Reserve Bank (SARB). When an agreement involves the local manufacture of products or the provision of certain services, the Department of Trade and Industry (DTI) acts as an adviser to the SARB. A local firm that wishes to enter into a new or a substitute agreement or the extension of an existing agreement with a foreign licensor to manufacture a product in South Africa must therefore submit an application to the DTI for its consideration. Agreements with the exception of requests which include the following clauses - down payments, minimum payments, and once off payments will be considered for approval by the Department of Trade and Industry, who will communicate their decision to the licensee. If the DTI approves the agreement, a Certificate of Approval will be issued to the licensee that will enable him to approach his banker directly for the transfer of the royalties. All agreements which contain any clauses that stipulate down payments, minimum payments and once off payments will be considered for recommendation to the SARB by the Department of Trade and Industry. Applications should be in the form of a completed questionnaire to be submitted in duplicate - see the Annexure -together with four copies of the draft/signed agreement and amendments/addendum, if applicable.

In the following cases a letter only must be submitted to the DTI:

- Changes in the name of the licensee and/or licensor (submit the relevant "Certificate of change of name of company issued by the Registrar of Companies"); and
- Changes in the local bankers or branch with whom the SARB may communicate regarding the transfer of payments under the agreement.

DEFINITIONS

NEW AGREEMENT

The first agreement between a local licensee and a foreign licensor.

EXTENSION OF A LICENCE AGREEMENT

Extension of the approval of an existing agreement.

SUBSTITUTE AGREEMENT

Substitution for a previously approved agreement, amending the terms of the licence agreement.

NOTE

The payment of fees in terms of the following categories of agreements is dealt with by the Financial Surveillance Department of the SARB and application for these payments should be made through the DTI:

- Trade mark (not in conjunction with a manufacturing agreement); lease; distribution; design; technical; management; software; and copyright (books, films, gramophone records, compact discs, video tapes, music tapes).

GENERAL GUIDELINES

When local licensees enter into a licence agreement with a foreign company, they are advised to consider the following principles and guidelines:

1. All applications are considered on merit.
2. Royalty payments in terms of manufacturing agreements should preferably be stated as a percentage of the net ex-factory selling price.

Payments for other know-how agreements should be stated as a percentage of the income generated from the application of the know-how.

Royalties should preferably be based on the South African price and should therefore not be linked to a foreign currency or price index.

3. Two categories of products/know-how are identified for the purpose of determining an acceptable royalty fee, namely:

Consumer goods/know-how	0 - 4%
Intermediate and final capital goods/know-how	0 - 6%

NB: For subsidiary licensees, the formula used is:

$$R = \alpha (115 - 0.5\beta) / 100$$

Where,

R = adjusted royalty rate

α = royalty to be allowed

β = % share - holding by licensor

The licensees are obviously expected to negotiate the lowest fees possible!

4. The value upon which royalty fees are based is calculated as follows:
 - (a) Manufacturing agreements: The net ex-factory sales value - less the in-factory landed cost of imports, directly or indirectly from the licensor, as well as Value Added Tax (VAT queries to be directed to the Department of Finance); and
 - (b) other know-how agreements: The net income value arising from the application of the know-how less the in-house cost of purchases, directly or indirectly from the licensor, related to the know-how, as well as Value Added Tax.

If the DTI receives applications for agreements not concluded on the above-mentioned basis, the necessary calculations will be made to express the payment as a percentage in order to determine whether it falls within the guideline indicated.

5. Fees paid for technology should be based on actual performance (i.e. on the sales actually achieved) and minimum payments or annual payments are, as a rule, not acceptable.
6. Down payments/up-front payments other than nominal amounts will be considered only if actual costs of transferring technology (tangible items) are involved. Applications must clearly quantify and substantiate such costs.

7. Payments for trade-marks will be considered if such trade marks are linked to the furnishing of technology. Payment for the use of a trade-mark should not exceed 1.5% and the total royalty payment (i.e. for the use of the trade mark and the provision of technology) should not exceed the maximum percentage as stated in paragraph 3 above.
8. Every effort should be made to ensure that agreements are construed and interpreted under the laws and jurisdiction of South Africa.
9. Agreements should not unduly restrict the export of licensed products.
10. Exchange approval will normally be granted for an initial period of up to 5 years, after which application may be made for an extension should the agreement itself be for a longer period. Extensions may be granted for periods of up to 5 years.
11. The following are also taken into account:
 - the economically strategic importance of the products to be manufactured;
 - the new know-how that the particular manufacturing process injects into South Africa;
 - the local content of the particular product;
 - the licensor's financial interest in the local venture;
 - the project's potential to promote small and medium-sized enterprises, for import replacement and job creation;
 - the continuous flow of technology from the licensor; and
 - a commitment to educate and train local labour to use, maintain and extend technology.

ENQUIRIES

Deliveries & Enquiries may be directed to:

**Technology Transfer (Royalties) Unit
Department of Trade and Industry, (TEO)
Cnr Esselen & Meintjies Street,
Sunnyside
Ground Floor Block A,
Private Bag X84, **PRETORIA** 0001**

OR

By telephone: 086 1843 384 or 012 394 0000 and ask for the directorate of (TEO)

ANNEXURE

INFORMATION TO BE SUBMITTED IN CONJUNCTION WITH LICENCE AGREEMENTS

For information on this questionnaire please contact the office referred above.

Please note:

- (i) The DTP001 information must be submitted, on a company's letterhead,
- (ii) Four copies (new and substitutes agreements) of the draft/signed agreement must accompany your application,
- (iii) The information submitted must be substantiated by an affidavit affirming that to the best of your knowledge and belief it is true and correct;
- (iv) Samples and illustrations to be submitted, if available; and
- (v) Agreements with the exception of requests which include the following clauses: down payments; minimum payments; and once off payments will be approved by the Department of Trade and Industry who will communicate their decision, together with a Certificate of Approval, to the licensee which will enable him to approach his banker directly for the transfer of the royalties fees. All agreements which contain any clauses that stipulate down payments, minimum payments and once off payments will be considered for recommendation to the SARB by the Department of Trade and Industry.

COMPULSORY QUESTIONS NB: ALL RESPONSES ON COMPANY'S LETTERHEAD

QUESTIONS 1 TO 7 MUST BE ANSWERED

- 1. Is this application :
 - (i) A new application (see questions A1 to A18);
 - (ii) An extension to an existing agreement (see questions B1 to B18); or
 - (iii) A substitute for an existing agreement (see questions C1 to C20)?
- 2.
 - (a) Name and address of licensee.
 - (b) Company registration number of licensee.
 - (c) Name and country of origin of licensor.
- 3. Has the licensor any direct or indirect financial interest in your company? If so, state the extent expressed as a percentage of your total shareholders' interest and furnish your audited financial accounts for the past three financial years.
- 4. (a) State:
 - (i) Name;
 - (ii) Branch; and
 - (iii) Branch number,

of your local bankers with whom the SARB may communicate regarding the transfer of payments under the agreement.

- (b) State the account holder's name. If the account holder's name differs from the licensee's name, state the reason.
5. Is the licensed product(s) patented or is a trademark registered in South Africa by the licensor? If so, state the patent or trademark registration number(s) and expiry dates.
 6. Will small and medium-sized enterprises benefit from this agreement? If so, how?
 7. Does the agreement include a commitment to educate and train local labour to use, maintain and extend technology? If so, state details.

QUESTIONS A1 TO A17 MUST BE ANSWERED FOR NEW APPLICATIONS ONLY

- A1. Give a full description of the product(s) to be manufactured/the know-how transfer to be effected (samples and illustrations to be submitted, if available).
- A2. Give a brief outline of the manufacturing process involved/the application of the know-how required.
- A3. Give an explanation of the importance of the product(s)/know-how, justifying the payment of a fee.
- A4. State the end use or application of the licensed product(s)/know-how.
- A5. What is the extent of the royalty, expressed as a percentage of the ex-factory selling price (in the case of manufacturing agreements), or the income generated as a result of the application of the know-how (in the case of know-how agreements not directly related to manufacturing processes).
- A6. If provision is made in the agreement for minimum payments, state the extent and the reason thereof
- A7. If provision is made for an initial down payment or up-front payment, state the amount involved and the reason for such a fee being payable.
- A8. Will the proposed agreement entail the establishment of a new concern or subsidiary, or an expansion or a diversification of your present activities?
- A9. Where and when will the manufacture/application of the know-how commence?
- A10. May the licensed product(s)/know-how be exported? If so, to which areas are exports permitted ? If not, please state reasons.
- A11. How many new employment opportunities will be created as a direct result of this application?
- A12. Will this application entail new/additional investment? If so, state the amount involved.
- A13. Cost of inputs required for the manufacture of the licensed product(s)/application of the know-how:
- (a) Plant and machinery:
- (i) Local (Rand); and
 - (ii) (ii) Imported (Rand).

(b) Raw materials/components per year for the first five years:

- (i) Local (Rand); and
- (ii) Imported (Rand).

	Year 1	Year 2	Year 3	Year 4	Year 5	TOTALS
Import						
Local						
TOTALS						

A14. If raw materials/components are imported, are they imported from the licensor directly or indirectly?

A15. State the estimated production of the licensed product(s)/income generated by this application of the know-how per year for the first five years of the agreement:

(a) For a manufacturing agreement:

- (i) At factory cost; and

	Year 1	Year 2	Year 3	Year 4	Year 5	TOTAL
RECOVERIES						

- (ii) At net ex-factory sales value.

	Year 1	Year 2	Year 3	Year 4	Year 5	TOTAL
SALES						

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(b) For a non-manufacturing know-how agreement, the income generated per year, for the first five years.

A16. State the estimated value per year, for the first five years, of import replacement resulting from the local manufacture of the licensed product(s)/application of the know-how (See A15 above).

A17. Estimated value of exports per year for the first five years of production of the licensed product(s)/application of the know-how. (see A15 above)

A18. Any further information that you may wish to submit in support of your application.

QUESTIONS B1 TO B16 MUST BE ANSWERED ONLY IN THE CASE OF EXTENSION OF EXISTING AGREEMENTS

- B1. Has the name of the licensee or licensor changed since the previous application? If so, state the changes and submit the relevant "Certificate of change of name of company" issued by the Registrar of Companies.
- B2. (a) State the extension period applied for.
- (b) Briefly explain why an extension of the agreement is justified.
- (c) What is the extent of the royalty, expressed as a percentage of the ex-factory selling price (in the case of manufacturing agreements), or the income generated as a result of the application of the know-how (in the case of know-how agreements not directly related to manufacturing processes).
- B3. Give a full description of the product(s) to be manufactured/the know-how transfer to be effected (samples and illustrations to be submitted, if available).
- B4. Briefly explain what new/additional technology/know-how (e.g. product(s) and process improvements and training):
- (i) Has been received over the past approved years; and
- (ii) Is foreseen for the extension period.
- B5. Have you been able to negotiate more favourable terms compared with the original agreement (e.g. export territories, royalty rates and minimum payments)? Give details.
- B6. (a) What is the extent of the royalty, expressed as a percentage of the ex-factory selling price (in the case of manufacturing agreements), or the income generated as a result of the application of the know-how (in the case of know-how agreements not directly related to manufacturing processes).
- (b) State:
- (i) The royalties paid per year for the past approved years; and
- (ii) The expected royalty per year for the extension period.
- B7. If provision was made in the original approved agreement for minimum payments, state:
- (i) The minimum payments for the past approved period; and
- (ii) The minimum payments for the extension period.
- B8. How many new employment opportunities will be created as a direct result of the extension?
- B9. Will the extension of the agreement entail additional investment? If so, state the amount involved.

B10. Cost of inputs required for the manufacture of the licensed product(s)/application of the know-how:

(a) Plant and machinery:

(i) Local (Rand); and

(ii) Imported (Rand).

(b) Raw materials/components per year for the extension period:

(i) Local (Rand); and

(ii) Imported (Rand).

	Year 1	Year 2	Year 3	Year 4	Year 5	TOTALS
Import						
Local						
TOTALS						

B11 If raw materials/components are imported, are they imported from the licensor directly or indirectly?

B12. State the actual production of the licensed product(s)/income generated by the application of the know-how per year for the previously approved years of the agreement:

(a) For a manufacturing agreement:

(i) At factory cost; and

(ii) At net ex-factory sales value.

(b) For a non-manufacturing know-how agreement, the annual income generated.

B13. State the estimated production of the licensed product(s)/income that will be generated by the application of the know-how per year for the extension period of the agreement:

(a) For a manufacturing agreement:

(i) At factory cost;

	Year 1	Year 2	Year 3	Year 4	Year 5	TOTAL
RECOVERIES						

(ii) At net ex-factory sales value.

	Year 1	Year 2	Year 3	Year 4	Year 5	TOTAL
SALES						

(b) For a non-manufacturing know-how agreement, the annual income generated.

- B14. State the actual value per year, for the past years, of import replacement resulting from the local manufacture of the licensed product(s)/application of know-how.
- B15. State the estimated value per year, for the extension period, of import replacement resulting from the local manufacture of the licensed product(s)/application of know-how.
- B16. State the actual value per year for the past years, of exports resulting from the local manufacture of the licensed product(s)/application of know-how.
- B17. State the estimated value per year for the extension period, of exports resulting from the local manufacture of the licensed product(s)/application of know-how.
- B18. Any further information that you may wish to submit in support of your application.

QUESTIONS C2 TO C17 MUST BE ANSWERED ONLY IN THE CASE OF SUBSTITUTION OF EXISTING AGREEMENTS

- C1. Has the name of the licensee or licensor changed since the previous application? If so, state the changes and submit the relevant "Certificate of change of name of company" issued by the Registrar of Companies.
- C2. Give a brief outline of the substitute manufacturing process involved/the application of the substitute know-how required.
- C3. Give an explanation of the importance of the substitute product(s) and/or additional know-how, justifying the payment of a fee.
- C4. What is the end-use or application of the substitute licensed product(s)/know-how?
- C5. (a) What is the extent of the substitute royalty, expressed as a percentage of the ex-factory selling price (in the case of manufacturing agreements), or the income generated as a result of the application of the substitute know-how (in the case of know-how agreements not directly related to manufacturing processes)?
- (b) State:
- (i) The royalties paid per year for the past approved years; and
 - (ii) The expected royalty per year for the remainder of the approved period or for the next five years if a new period is required.
- C6. (a) If provision was made in the original approved agreement for minimum payments, state:
- (i) The minimum payments for the past approved period.
- (b) If provision is made in the substitute agreement for minimum payments, state:
- (i) The expected minimum payments for the remainder of the approved period or for the next five years if a new period is required.
- C7. If provision is made for a down payment or up-front payment, state the amount involved and the reason for such a fee being payable.
- C8. Will the substitute agreement entail the establishment of a new concern or subsidiary, or an expansion or diversification of your present activities?
- C9. How many new employment opportunities will be created as a direct result of the substitute agreement?
- C10. If the manufacture of the substitute licensed product(s)/the application of the substitute know-how entails new or additional investment, state the amount involved.

C11. Cost of inputs required for the manufacture of the substitute licensed product(s)/application of the know-how:

(a) Plant and machinery:

- (i) Local (Rand); and
- (ii) Imported (Rand).

(b) Raw materials/components per year for five years:

- (i) Local (Rand); and
- (iii) Imported (Rand).

	Year 1	Year 2	Year 3	Year 4	Year 5	TOTALS
Import						
Local						
TOTALS						

C12. If raw materials/components are imported, are they imported from the licensor directly or indirectly?

C13. State the actual production per year of the licensed product(s)/income generated for the years since the last approval was granted:

(a) In the case of a manufacturing agreement:

- (i) At factory cost; and
- (ii) At net ex-factory sales value.

or

(b) In the case of a non-manufacturing know-how agreement, state the annual income generated only.

C14. State the estimated production per year, for the remainder of the approved period or for the next five years if a new period is required, of the product(s)/income generated by the application of the substitute know-how for:

(a) In the case of a manufacturing agreement:

- (i) At factory cost; and

	Year 1	Year 2	Year 3	Year 4	Year 5	TOTAL
RECOVERIES						

(ii) At net ex-factory sales value.

	Year 1	Year 2	Year 3	Year 4	Year 5	TOTAL
RECOVERIES						

or

(b) In the case of a non-manufacturing know-how agreement, state the annual income generated only.

C15. State the estimated production per year, for the remainder of the approved period or for the next five years if a new period is required, of only the substitute product(s)/income generated by the application of the substitute know-how for:

(a) In the case of a manufacturing agreement:

- (i) At factory cost; and
- (ii) At net ex-factory sales value.

or

(b) In the case of a non-manufacturing know-how agreement, state the annual income generated only.

C16. State the actual value per year, for the past years, of import replacement resulting from the local manufacture of the licensed product(s)/application of know-how.

C17. State the estimated value of import replacement, per year, resulting from the local manufacture of the substitute product(s)/know-how for the remainder of the approved period or for a new period if required.

C18. State the actual value per year for the past years, of exports resulting from the local manufacture of the licensed product(s)/application of know-how.

C19. State the estimated value per year, of exports resulting from the manufacture of the substitute product(s)/know-how for the remainder of the approval period or for a new period if required.

C20. Any further information that you may wish to submit in support of your application.

DEFINITIONS AND INTERPRETATIONS

ACT

The Exchange Control Regulation of 1961

ECONOMICALLY STRATEGIC IMPORTANCE

When technology is viewed of national importance to the economy, these factors should be considered when evaluating/processing an agreement:

- the promotion of SMMEs,
- import replacement,
- education and training of local labour to use, maintain and extend technology,
- use of local raw materials and components,
- export promotion,
- investment made,
- know-how imported into SA

FORM DTP 001

General guidelines and questionnaire on which all applications are based.

IMPORT REPLACEMENT

When products that are normally imported are replaced by licensed products (locally produced).

IN-FACTORY LANDED COSTS

Price of imported raw materials and components, including packaging, excluding duties, freight costs and shipping costs.

KNOW-HOW

A body of industrially useful, secret, novel and valuable information, associated technical and other information and skills, lawfully in possession by the licensor with the right to transfer and currently employed by the licensor as will be adequate and sufficient for the licensee to manufacture/produce a product and/or generate income.

LAW OF SOUTH AFRICA

Agreements must be construed and interpreted under the laws and jurisdiction of the RSA.

LICENCE AGREEMENT

Legal agreement between, at least, two parties that sets out the privileges exchanged between the parties and the limitations placed on them in the exercise of those privileges in terms of a foreign licensor providing technology to a local licensee.

LICENSEE

The party who acquires technology from a foreign licensor.

LICENSOR

The party who owns technology.

LOCAL CONTENT

Raw materials and components should be locally purchased as far as possible. If the licensee wishes to import raw materials and components, a motivation must be given.

NET EX-WORK/FACTORY SALES

Price at which the licensee's factory sells the product (excluding VAT)

SARB

The South African Reserve Bank, Financial Surveillance Department, Pretoria. Appointed by government in terms of: Exchange Control Regulations 1961, to approve all licence agreements.

TECHNOLOGY

Any knowledge, know-how, process or technique which, when used by man would increase his effectiveness in the creation of wealth