

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

DISCUSSION ON HOW TO DEFINE CONFIDENTIAL INFORMATION

-- Japan --

29 October

This note is submitted by Japan to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item IV at its forthcoming meeting to be held on 29 October 2013.

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– Japan –

1 Introduction

1. The staff members of the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”), as the duty of national public servants and JFTC officials respectively, must protect the confidentiality of confidential information, in accordance with the laws. The scope of the confidential information of which they are obliged to protect the confidentiality is determined by the laws.

2. Below is a brief outline of the legal provisions pertaining to the obligation placed on staff members of the JFTC to maintain confidentiality, followed by an explanation of the definition of the confidential information of which they must protect the confidentiality.

2 Legal provisions

2.1 Article 100 of the National Public Service Act (obligation of confidentiality placed on all national public servants):

1. Article 100 of the National Public Service Act (hereinafter referred to as the “NPSA”): stipulates that “An official shall not divulge any secret which may have come to his/her knowledge in the course of his/her duties. This shall also be applied after he/she has left his/her position.” This provision is applied where national public servants (including those who have left their position; the same shall apply hereinafter), including staff members of the JFTC, have obtained confidential information. Accordingly, staff members of the JFTC must respect this obligation of confidentiality in accordance with this provision based on their position as national public servants.
2. The term “secret” in this article means, according to the judicial precedent (The Supreme Court decision on December 19, 1977), any non-public fact which is found to be valuable essentially to be kept secret.

2.2 Article 39 of the Antimonopoly Act (obligation of confidentiality placed on staff members of the JFTC):

1. Article 39 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as the “Antimonopoly Act”) stipulates that “The chairman, commissioners and staff members of the Fair Trade Commission and any person who once held such a position shall not divulge to others or make surreptitious use of the secrets of enterprises that came to their knowledge in the course of their duties.” This provision is applied where the staff members of the JFTC (including the chairman and the commissioners; the same shall apply hereinafter) have obtained information of enterprises in their enforcement of the Antimonopoly Act and imposes a duty of confidentiality on staff members (including any person who once held such a position; the same shall apply hereinafter) of the JFTC only.

2. The term “the secrets of enterprises” in this article means, according to the judicial precedent (Tokyo District Court decision on July 28, 1978), information which meets all of the following conditions: " (1) non-public facts (2) which are hoped to be kept secret by the enterprises and (3) for which there is an objective rationale to keep them secret". The scope of the information protected by the obligation of confidentiality provided by Article 39 of the Antimonopoly Act is construed to fall within the scope of the information protected by the obligation of confidentiality provided by Article 100 of the NPSA.

3. How the definition of the confidential information relates to the nature of the information, the way of obtaining the information, and the use of the information

3. The following summarizes the way in which information that staff members of the JFTC are obliged to keep confidential in accordance with Article 100 of the NPSA and Article 39 of the Antimonopoly Act, as explained in section 2 above. Confidential information is defined with regards to the nature of the information, the way of obtaining the information and the use of the information.

3.1 The nature of the information

4. Information that is protected by the obligation of confidentiality provided by Article 100 of the NPSA concerns, as explained above in section 2 (2.1) point 1) and (2.2) point 2), any secrets which may have come to his/her (a national public servant's) knowledge in the course of his/her duties, including any information falling under the obligation of confidentiality provided by Article 39 of the Antimonopoly Act and the requirements thereof are construed as “non-public” and “worth protecting as a secret”, as explained in section 2 (2.1) point 2) above.

5. Further, confidential information protected by the obligation of confidentiality provided by Article 39 of the Antimonopoly Act includes, as explained in section 2 (2.2) point 1) above, any information named a secret of an enterprise which came to a staff member's knowledge in the course of his/her duties and the requirements thereof are construed as “non-public”, (2) which are hoped to be kept secret by the enterprises and (3) for which there is an objective rationale to keep them secret ", as explained in section 2 (2.2) point 2) above.

6. Therefore, it can be said that information falling under the scope of the obligation of confidentiality provided by the two acts is, in both cases, defined as confidential information depending on the nature of the information.

3.2 The way of obtaining the information

7. Since information provided by both acts is stipulated in the provisions of both acts as those “which may have come to his/her (a national public servant's) knowledge in the course of his/her duties” and those “which came to their (staff members') knowledge in the course of their duties” and thus is limited to the cases where information is obtained in the course of his/her or their duties, it can be said that the information that the staff members of the JFTC are obliged to keep confidential is defined as confidential information depending on the way the information was obtained.

3.3 The use of the information

8. It cannot be said from the requirements of both acts that in either case the information that the staff members of the JFTC are obliged to keep confidential is defined as confidential information in terms of the use of the information.

3.4 Summary

9. As explained above in (3.1) - (3.3), the definition of confidential information of which the staff members of the JFTC are obliged to keep confidential may be defined depending on the nature of the information and the way the information was obtained.

4 Scope of application of the definition of confidential information

10. As explained in Section 2 (2.1) and (2.2) above, the obligation of confidentiality provided by Article 100 of the NPSA is an obligation placed on all national public servants, and the obligation of confidentiality provided by Article 39 of the Antimonopoly Act is a obligation placed only on staff members of the JFTC. Therefore, also with respect to the definition of confidential information subject to the obligation of confidentiality provided by these legal provisions, the definition in relation to the former is applied generally to information obtained from enterprises or individuals by all national public servants as well as agency information, while the definition in relation to the latter is applied when the staff members of the JFTC have obtained information concerning enterprises in their investigation activities and other duties pursuant to the Antimonopoly Act.

5 Role of the source that provides the information

11. With respect to whether or not information falls under confidential information, it is considered that if the enterprise that is the source of the information has given a waiver to the authority to permit the transfer by the authority of the information to other competition authorities, the information does not fall under the scope of secrets of enterprises to the extent that the waiver permits, as the condition that “hoped to be kept secret by the enterprises” which is one of the requirements for “secret of enterprises” is not met.