

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

**Working Party No. 3 on Co-operation and Enforcement**

**INTERNATIONAL CO-OPERATION**

-- Japan --

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## **1. Introduction**

1. The Japan Fair Trade Commission (JFTC), in accordance with the Antimonopoly Act (AMA), has been committed to addressing entrepreneurs' cross-border anticompetitive activities that would affect Japanese markets regardless of whether enterprises are located in Japan or abroad. The JFTC is experienced in exchanging information with foreign competition authorities in some cases of international cartels and mergers.

2. The information to be exchanged is divided into two types, non-confidential and confidential information. The JFTC has provided foreign competition authorities with non-confidential information within the limitation of its resources, where appropriate.

3. Regarding confidential information, the chairman, commissioners and staff members of the JFTC are obliged to protect confidentiality of information in accordance with the relevant laws. On the other hand, Article 43-2 of the AMA enables the JFTC to offer confidential information to foreign competition authorities, and it stipulates conditions for the provision of such information.

4. The followings explain confidentiality obligations that bind the chairman, commissioners and staff members of the JFTC. They also include an outline of Article 43-2 of the AMA, and issues relevant to provision of confidential information to foreign authorities pursuant to this article.

## **2. Confidentiality obligation**

5. The staff of the JFTC are obliged to keep confidential information based on the National Public Service Act (NPSA) and the AMA as national public officials and the JFTC's officials respectively. The detail is as described below.

1. Article 100 of 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." The "secret" in this article has been interpreted as the non-public facts which are found to be valuable essentially to be protected as a secret(The Supreme Court decision on December 19, 1977).

Any person who violated this article shall be punished by imprisonment with work for not more than one year or a fine of not more than half a million yen (Item 12 of Article 109 of the NPSA).

2. Article 39 of the AMA 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." The "secrets of enterprises" referred in this article has been interpreted as the non-public facts which are hoped to be remained secret by the enterprises as well as are found to be objectively rationale to be remained secret (The Tokyo District Court decision on July 28, 1978).

It is understood that interest protected by Article 100 of the NPSA includes one protected by Article 39 of the AMA.

Any person who violated Article 39 of the AMA shall be punished by imprisonment with work for not more than one year or by a fine of not more than one million yen (Article 93 of the AMA).

### 3. Outline of Article 43-2

6. Article 43-2 of the AMA was introduced by the amendment of the AMA in 2009, in light of increased opportunities to exchange information with foreign competition authorities, forming the basis for provision of confidential information with foreign competition authorities in order to clarify the conditions for such provision of confidential information. An outline of each paragraph is as follows:

(1) Article 43-2, Paragraph 1

This paragraph stipulates that the JFTC may provide any foreign competition authority with information that is deemed helpful for the execution of its duties; provided, however, that this does not apply to cases where the provision of such information is deemed likely to interfere with proper executions of the AMA or to infringe on the interests of Japan in any other way. In this regard, whether it falls on the “cases where such information provision is deemed likely to interfere with proper executions of the AMA or to infringe on the interests of Japan in any other way” or not shall be judged through examining if such provision is justified in light of Article 39 of the AMA and Article 100 of the NPSA.

(2) Article 43-2, Paragraph 2

This paragraph stipulates that when the JFTC provides confidential information to a foreign competition authority, Paragraph 2 of this article requires the JFTC to confirm:

- (a) if the principle of reciprocal exchange is guaranteed (Item 1);
- (b) if the secrecy of the information provided as a secret is protected to the same degree as in Japan (Item 2); and
- (c) that information provided will not be used by foreign competition authorities for any other purpose than for the execution of its duties (Item 3).

(3) Article 43-2, Paragraph 3

This paragraph stipulates that appropriate measures shall be taken to ensure that any information provided by the JFTC will not be used for any criminal proceedings conducted by courts or judges of foreign countries.

Provided that provision of evidences necessary for criminal proceedings and collection of evidence for such purposes for foreign countries shall comply only with requirements and procedures stipulated in “the Act on International Assistance in Investigation and Other Related Matters<sup>1</sup>”, it is necessary for the JFTC to confirm that information

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<sup>1</sup> Under the Act on International Assistance in Investigation and Other Related Matters, a request for assistance shall be received, and evidence shall be forwarded to the requesting country, by the Minister of Foreign Affairs (Article 3, Paragraph 1), and upon receiving a request for assistance, the Minister of Foreign Affairs shall send to the Minister of Justice the written request for assistance, as well as related documents, with the opinion of the Minister of Foreign Affairs attached (Article 4).

With respect to a request for assistance in matters other than a transfer of a sentenced inmate for testimony, except where any item in Article 2 regarding restrictions on assistance applies (e.g. when the offense for which assistance is requested is a political offense), the Minister of Justice shall, when the Minister of Justice deems it appropriate to honor the request, send the related documents to the Chief Prosecutor of an appropriate district public prosecutor’s office and order the Chief Prosecutor to collect the evidence necessary for assistance or to take other necessary measures (Article 5) .

provided to foreign competition authorities pursuant to Paragraph 1 of Article 43-2 of the AMA will never be subject to the de facto practice of “assistance” stipulated in the said Act.

#### **4. Provision of confidential information pursuant to Article 43-2**

##### **(1) Secrets of Enterprises**

If provision of confidential information is deemed not likely to interfere with the proper execution of the AMA or to infringe on the interests of Japan in any other way, such provision does not fall under the proviso to Paragraph 1, Article 43-2 and therefore it is permitted. Whether it falls on the above provision or not shall be judged through whether gaining benefits would be larger than losing benefits regarding providing secrets of enterprises. When providing such information to foreign competition authorities, the JFTC has to confirm items of (a) to (c) of 3 (2) and measure referred in 3 (3) above.

##### **(2) Information related to law enforcement by the JFTC (agency information)**

Information such as the JFTC’s investigative policies and progress of investigations that may help investigations concerning international cases conducted by foreign competition authorities falls under the category of “secret which may have come to knowledge in the course of his/her duties ” provided by Article 100 of the NPSA and shall be subject to the obligation of confidentiality.

Nevertheless, provision of information above is possible if it is deemed not likely to interfere with the proper execution of the AMA or to infringe on the interests of Japan in any other way. Whether it falls on the above provision or not shall be judged through whether gaining benefits would be larger than losing benefits regarding providing such information. When providing such information to foreign competition authorities, the JFTC has to confirm items of (a) to (c) of 3 (2) and measures referred in 3 (3) above.

##### **(3) Foreign bilateral agreements**

The Japanese government has concluded agreements — such as antitrust cooperation agreements and economic partnership agreements — with multiple foreign countries. Most agreements include information exchange provisions for (a) to (c) of 3 (2) and measures referred in 3 (3) above. Therefore, burdens involved in confirmation procedures for provision of information to the competition authority of other countries, as stipulated in Article 43, Paragraph 2 and 3 of the AMA, are considerably reduced<sup>2</sup>.

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<sup>2</sup> In case the JFTC provides confidential information in accordance with antitrust cooperation agreements (with the United States, EC, or Canada) or economic partnership agreements (with Mexico, Thailand, Indonesia, Switzerland, or Peru), the country or competition authority receiving confidential information shall carry the obligation of confidentiality. In addition, use of such information shall be limited to the purpose of effective enforcement of competition laws of the receiving country, and cannot be used for criminal proceedings.