

COMMUNIQUÉ

From the Presidency of the Competition Authority:

COMMUNIQUÉ ON THE REGULATION OF THE RIGHT OF ACCESS TO THE FILE AND PROTECTION OF TRADE SECRETS COMMUNIQUÉ NO.: 2010/3

SECTION ONE

Purpose, Scope, Basis and Definitions

Purpose

ARTICLE 1 – (1) The purpose of this communiqué is to set the procedures and principles concerning the exercise of the right of access to the file by parties; and procedures and principles, for determining whether the pieces of information obtained during the implementation of the Act No. 4054 on the Protection of Competition qualify as trade secret, and for protecting those pieces of information and documents that have been classified as trade secret.

Scope

ARTICLE 2 – (1) This Communiqué shall be applicable for any information and document that have been obtained within the framework of the implementation of the Act No. 4054, in respect of the right of access to the file and evaluation of trade secrecy.

Basis

ARTICLE 3 – (1) This Communiqué has been drawn up based on the Act No. 4054 Article 44 paragraph two, Article 25 paragraph four and Article 53 paragraph two and Article 27 subparagraph (f).

Definitions

ARTICLE 4 – (1) For the provisions of this Communiqué, the following definitions apply:

- (a) File: All information and documents that have been obtained, created or collected within the scope of the investigation,
- (b) Act: Act No. 4054 on the Protection of Competition,
- (c) Board: the Competition Board,
- (d) Authority: the Competition Authority,
- (e) Complainant: Natural or legal persons that have filed an application with the Authority and have a legitimate interest,
- (f) Party: Undertakings or associations of undertakings concerning which an investigation has been opened or a final examination has been initiated.

SECTION TWO

Exercise of the Right of Access to the File

General principles

ARTICLE 5 – (1) The right of access to the file shall be granted upon the written requests lodged by the parties within due period, during the investigations conducted within the scope of the Act. The right of access to the file shall be fulfilled for one time, as long as no new evidence has been obtained within the scope of the investigation.

(2) Executives or employees of the undertakings or associations of undertakings who were intended to be given administrative fines pursuant to Article 16 paragraph four of the Act, shall also be granted the right of access to the file, provided they request it,

(3) Requests from the complainant and third parties shall be evaluated within the framework of general provisions.

Information and documents that fall under the right of access to the file

ARTICLE 6 – (1) Within the scope of the right of access to the file, the parties can have access to any document that has been drawn up and any evidence that has been obtained by the Authority concerning them, except for intra-Authority correspondences and those that include trade secrets and other confidential information about other undertakings, associations of undertakings and persons.

Intra-Authority correspondences

ARTICLE 7 – (1) Intra-Authority correspondences are correspondences between units, which have the nature of preparatory acts for the final decisions taken by the Board.

(2) Information and documents that have been obtained within the framework of Article 6 paragraph three and Article 9 paragraph three of the Regulation on Active Cooperation for Detecting Cartels, as well as correspondences between the Authority and those from whom information was obtained such as other public institutions, professional organizations that have the nature of public institution or natural and legal persons in the private sector, are accepted as internal correspondence.

The duration and form in which the right to access can be exercised (as amended by: OG-31/01/2016-29610)¹

ARTICLE 8 – (1) Parties that have been notified that an investigation was initiated concerning them can request that they be given a copy of any document drawn up, and if possible, of any evidence obtained by the Authority in relation to them.

(2) For the investigation to be conducted in a proper and secure fashion and for preempting the likely threat of obscuring of evidence, requests for access to the file prior to the notification of the investigation report can be deferred considering the specifics of the concrete incident and providing the legal grounds. In case of deferment,

¹ Previous version of the amended title: "Period during which the right of access to the file can be exercised".

the request for access to the file shall be satisfied within a reasonable period starting from the notification of the investigation report.

(3) Finally, the parties can file a request for access to the file until the termination of the last written plea period granted to them.

(4) Requests to access the file shall be made by filling the File Access Request Form attached to this Communiqué correctly and completely (**added by: RG-31/01/2016-29610**)

Evaluation of the requests for access to the file

ARTICLE 9 – (as amended by OG-31/01/2016-29610)²

(1) Requests for access to the file shall be evaluated by the investigation committee, in light of the information included in the form. In case the request is accepted, the method and timing of access to the file and the other points regarding access to the file shall be notified to the submitter of the request in writing.

(2) If the investigation committee finds that the request is partly or fully unacceptable, the decision concerning the request shall be taken by the Board. If the request for access to the file is denied, the reason thereof shall be notified to the submitter of the request.

Fulfillment of the right of access to the file

ARTICLE 10 – (1) The right of access to the file can be fulfilled by giving or sending the photocopies or electronic copies of the documents that exist in the file and have been rendered accessible, considering also the request of the concerned.

(2) Pieces of information that have been obtained within the framework of Article 6 paragraph three and Article 9 paragraph three of the Regulation on Active Cooperation for Detecting Cartels, as well as other intra-Authority correspondences that have the nature of exculpatory or accusatory evidence can be examined at the headquarters of the Authority.

(3) The nature and number of pages of the documents that are to be given to the parties within the scope of the right of access to the file shall be recorded in writing as minutes or as a letter to be sent to the parties.

(4) For the information and documents provided within the scope of the right of access to the file, the submitter of the request can be charged a fee amounting to the cost required by the access.

² Previous version of the amended article is as follows:

(1) Requests for access to the file shall be evaluated by the investigation committee. In case the request is accepted, the method and timing of access to the file and the other points regarding access to the file shall be notified to the submitter of the request in writing.

(2) If the investigation committee is convinced that the request is not acceptable, the decision concerning the request shall be taken by the Board. In case the request for access to the file is denied, the reason thereof shall be notified to the submitter of the request.

Usage of information and documents accessed through the right of access to the file

ARTICLE 11 – (1) Information or documents that have been obtained within the scope of the right of access to the file can only be used, in relation to the file opened to access, for pleas to be made within the scope of the Act No. 4054 and for seeking administrative judicial review.

SECTION THREE

Determination of Trade Secrets and Maintenance of their Secrecy General principles

ARTICLE 12 – (1) Trade secret refers to any information and document relating to the field of activity of undertakings, that undertakings have the freedom to keep secret, that is known to and can be obtained by only a certain and restricted group, and that is likely to result in serious damage to the undertaking concerned when disclosed to third persons, especially competitors, and to public.

(2) Depending on the characteristics of the incident and the undertaking, information and documents such as the internal institutional structure and organization of undertakings, their financial, economic, credit and cash position, research and development activities, operational strategy, raw material resources, technical information related to production and manufacturing, pricing policies, marketing tactics and costs, market shares, wholesale and retail customer potential and networks, contractual connections that are subject to or not subject to authorization, can be accepted as trade secret.

(3) Information and documents relating to contracts, agreements, settlements and actions that are in violation of the competition law legislation, even if their disclosure is likely to result in damage to the undertaking concerned or its competitors, shall not be considered trade secret.

(4) Information that has been published, made public, or included in official registers or balance sheets as well as annual reports, together with information that has lost its trade significance due to causes such as the fact that it is five years old or more, may not be deemed trade secret.

Trade secrecy statement by undertakings

ARTICLE 13 – (1) Determination of whether information and documents that enter into the records of the Authority include trade secret, and the justification thereof, is essentially the responsibility of the undertakings to which the secret belongs.

(2) In their secrecy claims, undertakings shall notify the Authority, in written, of;

- a) what the information and documents that include trade secret are,
- b) the grounds that attest to the trade secrecy of these pieces of information and documents,
- c) those versions of documents that do not include trade secret.

(3) Trade secrecy evaluation of the information and documents, copies of which have been obtained from undertakings during on-the-spot inspections carried out under Article 15 of the Act, shall be sent by the undertakings to the Authority within the period determined by the professional staff in charge.

(4) Where it deems necessary and by allowing time, the Authority can ask for detailed explanation from the undertakings with regard to their secrecy claims.

(5) Undertakings filing a claim of secrecy shall state, one by one, the trade secrets included in the documents concerned. Statements to the effect that the documents about which secrecy claims have been filed have the nature of trade secret as a whole shall not be accepted.

(6) Undertakings can file secrecy claims regarding only those trade secrets that have been obtained from them or that relate to them.

Determination of trade secrets

ARTICLE 14 – (1) Where undertakings do not make secrecy claims, the information and documents concerned are deemed not to include trade secret. However, for possible trade secrets that might be included in information and documents, the Authority can ask the undertakings for an evaluation, by allowing time, or make an ex officio evaluation.

(2) Where deemed necessary, undertakings can be called to the Authority and asked to screen the documents obtained from them and related to them, for trade secrets.

(3) Undertakings that have not made trade secrecy evaluation despite the request of the Authority cannot file trade secrecy claims.

Protection of trade secrets

ARTICLE 15 – (1) If the Authority accepts claims that are related to the confidentiality of trade secrecy, it shall not disclose them.

(2) The Authority may not take into account secrecy claims related to information and documents that are indispensable to be used as evidence for proving the infringement of competition. In such cases, the Authority can disclose such information and documents that have the nature of trade secret, respecting the balance between public interest and private interest and in accordance with the proportionality criterion.

(3) In Board decisions, trade secrets that are not indispensable for proving the infringement, cannot be disclosed merely for the purpose of strengthening the justification. However, depending on the nature of the information, methods such as giving approximate values or ranges can be adopted.

(4) Board members and other staff of the Authority cannot disclose or use, in favor of themselves or others, the confidential information related to the Authority, and trade secrets of undertakings or associations of undertakings that they learned about during the implementation of this Act, even if they have left their office.

SECTION FOUR

Final Provisions

Application by comparison

ARTICLE 16 – (1) Provisions included in this Communiqué in relation to the right of access to the file shall be applicable, by comparison, to merger and acquisition transactions that the Board put under final investigation and to withdrawal of exemption, to the extent that their nature allows.

(2) Provisions included in this Communiqué in relation to trade secrets shall be applicable, by comparison, to other confidential information that does not have the nature of trade secret but is likely to result in significant damage to the parties concerned or third parties when disclosed, to the extent that their nature allows.

Current investigations

TEMPORARY ARTICLE 1 – (1) This Communiqué shall not apply to investigations that were decided to be conducted before its entry into force.

Enforcement

ARTICLE 17 – (1) This Communiqué shall enter into force on the date of its publication.

Execution

ARTICLE 18 – (1) The provisions of this Communiqué shall be executed by the President of the Competition Authority.

(Attachment: OG-31/01/2016-29610) ATTACHMENT

File Access Request Form

Application Date				
File No				
Subject of the File				
Title and Address of the Undertaking Requesting Access				
Title and Address of the Applying Representative				
Title of the Undertaking in the File		Party <input type="checkbox"/>	Complainant <input type="checkbox"/>	3rd Party <input type="checkbox"/>
Whether the Right to Access the File Was Exercised Before		Yes <input type="checkbox"/>	No <input type="checkbox"/>	Date:
In Which Form the Examination Is Requested		<input type="checkbox"/> On CD-ROM or other electronic data storage <input type="checkbox"/> On paper (to be sent by mail) <input type="checkbox"/> Examination of the file at the Authority's facilities at a place and date to be determined		
In case examination at the Authority's Facilities is Requested, the Names and Titles of Those to Attend the Examination³				
Any Other Points to Note				
Item No	Documents Requested for Access⁴	File Document Number of the Document Requested for Access		Reason for the Request to Access the Documents in Question⁶
		Document No	Paragraph No⁵	
1				
2				
...				

³ All of the persons to take part in the examination must ready their power of attorney or authorization documents together with an authorized signatures list before access.

⁴ In case the name or number of the document is not fully stated, details on the content of the document must be supplied for the identification of the requested document/record. Where the request could not be made sufficiently clear, relevant Authority staff shall assist the applicant in identifying the information, documents and record.

⁵ In case the document requested for access is used in a report (investigation, final examination, additional opinion, etc.) the relevant section of the report must be referenced by paragraph number.

⁶ Instead of general reasons, concrete and illustrative reasons are expected separately for each document/subject requested for access.

GENERAL PREAMBLE TO THE COMMUNIQUÉ ON THE REGULATION OF THE RIGHT OF ACCESS TO THE FILE AND PROTECTION OF TRADE SECRETS

- (1) The right of access to the file, which is vested by Article 44 of the Act No. 4054 on the Protection of Competition, is one of the procedural safeguards that contributes to a more effective exercise of the right of defense. Before the Competition Boards takes its final decision, it allows parties to access the file that was drawn up by the Competition Authority concerning them, in order to ensure that they are able to exercise their right of defense fully. The right of access to the file must be exercised in a way both to allow the right of defense to be exercised duly and to not prevent an effective implementation of the Act.
- (2) On the other hand, many pieces of information and documents that are confidential and have the nature of trade secret, concerning the undertakings, associations of undertakings and persons addressed by the implementation of the Act, enter into the records of the Authority and are learned by the employees of the Authority. Articles 25 and 53 of the Act stipulate that trade secrets and confidential information must not be disclosed. However, it is deemed beneficial to explain, in detail, the procedures and principles that relate to how trade secrets and other confidential information will be evaluated.
- (3) The purpose of this Communiqué is to regulate the right of access to the file vested in the Act No. 4054 and to set the procedures and principles for determining and maintaining the confidentiality of trade secrets included in information and documents that enter into the records of the Authority. Within this framework, the Communiqué is made up of two parts: The procedures and principles relating to the exercise of the right of access to the file are provided in the first part, whereas those relating to the determination and protection of trade secrets are provided in the second part.
- (4) The right of access to the file and the right of access to information which is regulated under the Act No. 4982 on the Right of Access to Information, have differences in terms of their purpose and scope. This Communiqué solely regulates the right of access to the file that is within the scope of the right of defense vested by the Act No. 4054. In this respect, issues that do not fall in the scope of the Communiqué are subject to the provisions of the Act No. 4982 and other relevant legislation.
- (5) Bearing in mind the above explanations, the Competition Board decided that this Communiqué shall be published.

LIST OF AMENDING COMMUNIQUÉS

Official Gazette Date	Official Gazette No	Communiqué
31.1.2016	29610	Communiqué Amending the Communiqué no. 2010/3 on the Regulation of the Right of Access to the File and Protection of Trade Secrets (Communiqué no. 2016/2)