

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Treatment of legally privileged information in competition proceedings – Note by
the Russian Federation****26 November 2018**

This document reproduces a written contribution from the Russian Federation submitted for Item 2 of the 128th Working Party 3 meeting on 26 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

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1. The Federal Antimonopoly Service of the Russian Federation, in carrying out its functions, as part of conducting inspections, handling cases of violation of antimonopoly legislation, monitoring economic concentration, its own requests, receives and uses information, including information that is classified as commercial secret.
2. According to the Russian legislation, a commercial secret is a mode of confidentiality of information, allowing its owner to increase incomes under existing or possible circumstances, avoid unnecessary costs, maintain a position in the market of goods, works, services or obtain other commercial benefits to which third parties do not have free access on a legal basis and in respect of which commercial secret has been introduced.
3. The mode of commercial secret is implemented only after the owner of the information constituting a commercial secret takes measures to protect it. At the same time, information containing data that cannot be a commercial secret in accordance with the legislation (for example, information contained in applications, objections, explanations and other materials submitted at the initiative of a person participating in a case of violation of the antimonopoly legislation, written or oral form on issues arising during the consideration of the case of violation of the antimonopoly legislation).
4. Thus, during consideration of a case, a balance must be ensured between the interests of the persons who provided information constituting a commercial secret to the case materials and those involved in the case of violation of the antimonopoly legislations whose rights and legal interests are affected by the relevant case.
5. The presence in the case file of information constituting a commercial secret cannot itself constitute a basis for an unreasonable restriction of the rights of persons involved in a case of violation of the antimonopoly legislation in properly preparing and stating their own position.
6. The rights of persons involved in a case of violation of the antimonopoly legislation are ensured, among other things, by providing persons who have established a commercial secret mode in relation to the information they have submitted, to agree to familiarize themselves with information containing commercial secret to other persons involved in the case¹.
7. In the absence of such consent, the announcement in this meeting of information containing a commercial secret, submitted at the request of the antimonopoly body, is carried out in the absence of persons who do not have the right to familiarize themselves with materials containing a commercial secret.
8. The chairman of the FAS Commission has the right to suggest to the persons participating in the case to establish a procedure for the consideration of the case in which the announcement of information containing a commercial secret will be carried out at the

¹ Article 45.2. (Procedure for access of persons involved in the case of violation of the antimonopoly legislation to case materials containing commercial secrets) of the Federal Law of 26.07.2006 No. 135-FZ "On Protection of Competition"

beginning or during the meeting, with the removal from the meeting room of persons that are not entitled to see materials containing commercial secrets.

9. It is important to bear in mind that, for example, the conclusion about the circumstances of the case and the decision should contain the circumstances of the case established by the Commission and the evidence on which the Commission's conclusions are based.

10. In order to ensure the protection of commercial secrets by the antimonopoly authority's Commission, when preparing relevant conclusions on the circumstances of the case and decisions, the relevant circumstances and evidence should be described to the extent necessary to make the appropriate procedural decision, without including information directly constituting a commercial secret.

11. If it is impossible to support the findings of the Commission of the antimonopoly body without including information constituting a commercial secret, such information should be included in the relevant act, but in order to maintain the balance of public and private interests of all participants of established relations, the antimonopoly authority must issue (submit for review, send) persons involved in the case who have not obtained the relevant consent of the holder of such information, a copy of the relevant act, excluding information from it, for example, without changing the structure of the document, arrange the relevant part of its text in a non-readable form, or by transferring the text containing information constituting a commercial secret to the annex of the document that is not subject to issue (submission for review, referral) to persons participating in the case who have not obtained the relevant consent of the holder of such information).

12. The above approaches regarding the reflection of information constituting a commercial secret are applicable to the analytical report on the results of the analysis of the state of competition in the commodity market.

13. At the same time, the data of the analytical report on the size of the market share of participants in the commodity market, the goods included in the product boundaries, the substitutable goods, as well as the characteristics of the goods that exclude substitutability cannot be attributed to information constituting a commercial secret of any business entity, since such information is the result of processing the collected information and a probabilistic assessment by the antimonopoly authority of the state of competition in the relevant product market and does not belong to any specific person.

14. Information constituting a commercial secret and obtained by the antimonopoly authority in the exercise of its powers shall not be disclosed, with the exception of cases established by federal laws.

15. For the disclosure of such information, employees of the antimonopoly authority shall bear civil, administrative and criminal liability.

16. Harm caused to an individual or legal person as a result of disclosure by the antimonopoly body or its officials of information constituting commercial, official or other secrets protected by law, shall be reimbursed by the treasury of the Russian Federation².

² Article 26 (Obligation of the antimonopoly authority to comply with commercial, official, other secrets protected by law) of the Federal Law of 26.07.2006 No. 135-FZ "On Protection of Competition"