



METI
Ministry of Economy, Trade and Industry

Overview of Guidelines on Shared Data with Limited Access

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**Intellectual Property Policy Office,
Ministry of Economy, Trade and Industry**

1. Characteristics of the Guidelines and future schedule

- Based on opinions including the one stating that “**easy-to-understand guidelines presenting ideas behind each requirement and specific examples of applicable acts, etc.** should be created” with regard to “unfair competition” related to shared data with limited access, a concept introduced as a result of the revision to the Unfair Competition Prevention Act in 2018, the Guidelines were formulated.
- The Unfair Competition Prevention Subcommittee deliberated the Guidelines of which the Working Group for Formulation of Guidelines on Unfair Competition Prevention whose members consist of persons from the industry, experts, etc. had prepared draft version.
- The Guidelines present an idea for the definition of shared data with limited access, requirements that fall under unfair competition, and other matters. However, the Guidelines are not legally binding.

Excerpt from “**Interim Report: Study to Promote Data Utilization**” by the Unfair Competition Prevention Subcommittee, Intellectual Property Committee, Industrial Structure Council

7. Efforts to improve predictability through formulation of guidelines, etc.

To clarify the details of each provision before enforcement of a new system, a study should be conducted by the Working Group for Formulation of Draft Guidelines on Unfair Competition Prevention. Then, **easy-to-understand guidelines, or materials, etc. (hereinafter “the guidelines”)** that provide information including the reasoning behind requirements for items related to and including technical management and examples thereof, and examples that do or do not fall under actions taken for the purpose of wrongful gain or causing damage under the category of significant violation of the principle of good faith, should be created. In addition, even after the system is enforced, the guidelines should be reviewed in a timely and appropriate manner, while monitoring the status of implementation of the system. It is also important for business operators to promote education and awareness-raising activities based on their regulations formulated in-house. From the perspective of promoting such activities, formulation of guidelines, etc. should be prepared so that the business operators can conduct such activities more easily.

[Reference] Unfair Competition Prevention Act -Overview

Purpose of Act (Article 1)

Types of Unfair Competition (Article 2)

- ① Creation of confusion with a well-known indication of goods, etc. (i)
- ② Misappropriation of a famous indication of goods, etc. (ii)
- ③ Imitation of the configuration of a third party's product (iii)
- ④ Infringement of Trade Secrets (iv) ~ (x)
- ⑤ Wrongful acquisition, usage of shared data with limited access (xi) ~ (xvi)
- ⑥ Provision of a device, etc. which circumvents technological restriction measures (xvii) ~ (xviii)
- ⑦ Wrongful acquisition, usage of a domain name (xix)
- ⑧ Misleading representation regarding the place of origin, quality, etc. (xx)
- ⑨ Act of harming business reputation (xxi)
- ⑩ Misappropriation of a trademark by an agent of the trademark owner (xxii)

Acts Prohibited by International Treaty

- (a) Prohibition of commercial use of foreign national flags, armorial bearings (Article ②)
- (b) Prohibition of commercial use of a mark of an international organization (Article ③)
- (c) Prohibition of bribery of foreign public officials (Article ④)

Civil Remedies and Criminal Remedies
(①②③④⑥⑧)

Details of Remedy

Civil Remedies
(⑤⑦⑨⑩)

Criminal Remedies

Civil Remedies

- Right to claim for an injunction (Article 3)
- Right to claim for compensation for loss or damage (Article 4)
- Presumption of amounts for loss or damage, etc. (Article 5 etc.)
- Order for production of documents to the courts (Article 7)
- Protection of trade secrets in a civil procedure (Article 10 etc.)
- (Orders to protect confidentiality, restriction on inspection of case records, in-camera proceedings)
- Measures to restore business reputation (Article 14)

Criminal Remedies

The following punishments are imposed on those who commit certain acts of unfair competition:

- Penal Provisions (Article 21)
 - Offense of trade secret infringement: imprisonment for not more than 10 years or a fine of not more than 20 million yen (30 million yen in the case of use outside Japan, etc.), or both.
 - Other: imprisonment for not more than 5 years or a fine of not more than 5 million yen, or both.
- Corporate penalties (Article 22)
 - Part of offenses of trade secret infringements: a fine of not more than 500 million yen (1 billion yen in the case of use outside Japan, etc.).
 - Other: a fine of not more than 300 million yen.
- Punishments against an offense committed outside Japan (Article 21, paragraph(6),(7),(8)) (offense of trade secret infringement, violation of protective order, offense of bribery of a foreign public officer)

2. Overview of the Guidelines

- Taking into consideration opinions expressed in the “Interim Report: Study to Promote Data Utilization”, requirements for objects of shared data with limited access, the category of unauthorized acquisition, the category of significant violation of the principle of good faith, and the category of subsequent acquisition are discussed using specific examples.

Categories of acts related to shared data with limited access

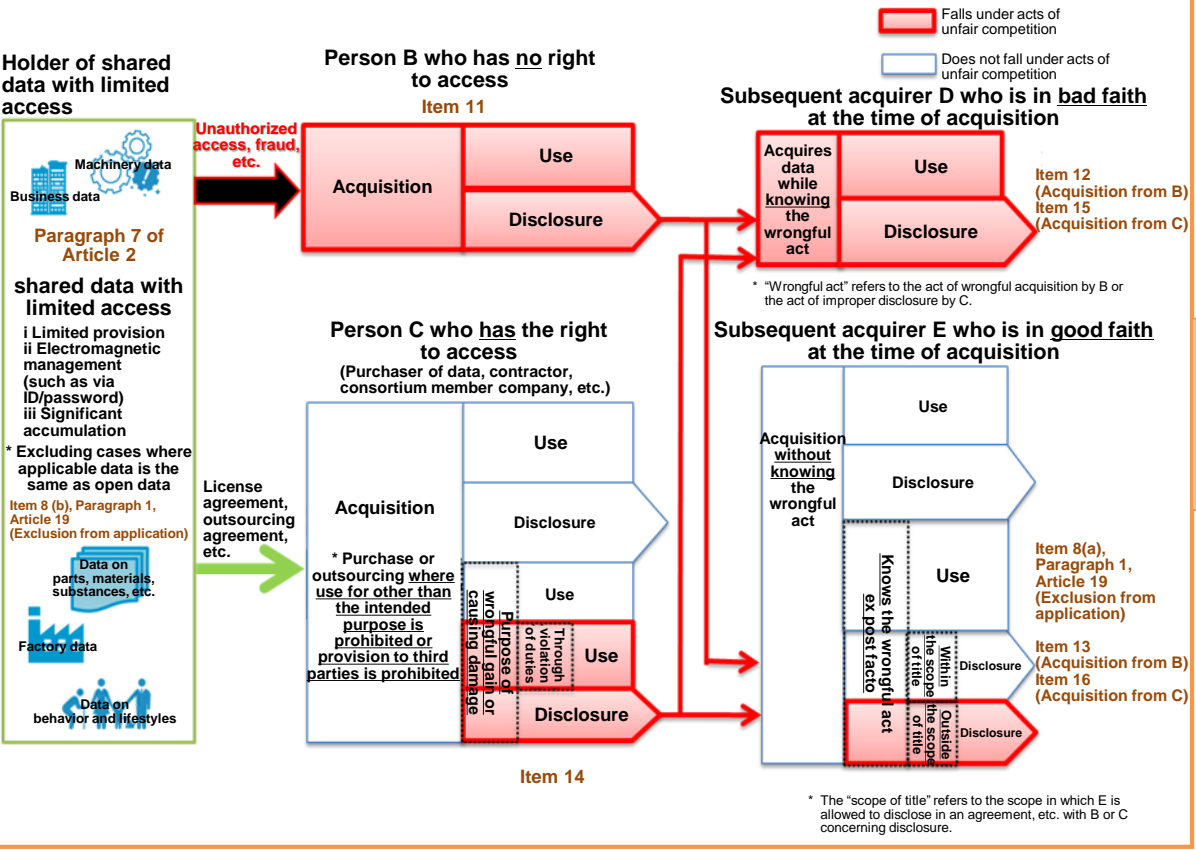


Table of contents of the Guidelines on shared data with limited access

- shared data with limited access
 - ✓ About the definition of shared data with limited access
- Acts that fall under “unfair competition”
 - ✓ About “acquisition”, “use” and “disclosure”
- Category of unauthorized acquisition
 - About “Person B who has no right to access”
- Category of significant violation of the principle of good faith
 - ✓ About “Person C who has the right to access”
- Category of subsequent acquisition
 - ✓ About subsequent acquirers D and E

3. Shared data with limited access

Article 2

7. The term shared data with limited access as used in this Act means technical or business information that is **accumulated to a significant extent and is managed by electronic or magnetic means** (meaning an electronic form, magnetic form, or any other form that is impossible to perceive through the human senses alone; the same applies in the following paragraph) as information to be **provided to specific persons on a regular basis** (excluding information that is kept secret).



3 requirements for shared data with limited access



“Provided to specific persons on a regular basis” (Limited provision)

“On a regular basis” refers to cases where data holder provides data repeatedly and continuously (including cases where the intention of data holder to provide repeatedly and continuously is recognized even if data holder does not actually provide it). “Specific persons” refer to those who receive data under certain conditions.

Example “On a regular basis” : where data holder provides data repeatedly (including cases where data is provided to each person once)
“Specific persons” : members allowed to access members-only databases

“Accumulated to a significant extent by electronic or magnetic means” (Significant Accumulation)

In light of socially accepted conventions, data has value as a result of accumulation by electronic or magnetic means. “To a significant extent” is determined depending on the nature of each data type, but the following and other factors are considered: value added to the data as a result of accumulation by electronic or magnetic means; possibility of utilization; transaction prices; and labor, time, costs, etc. used for collection and analysis. Note that the concept of significant accumulation applies to cases where labor, time and costs are used to collect or analyze a part of data, resulting in value being created for that part of data.

Example If a business operator that accumulates information on mobile phone locations nationwide extracts information for specific areas and sells it, data for those specific areas satisfies this requirement (if data is considered to have value from the commercial viewpoint as a result of the data being accumulated by electromagnetic means)

“Managed by electronic or magnetic means” (Electromagnetic management)

The holder’s intention of managing data to provide the data only to specific persons is made clear to outside parties. More specifically, it is necessary to take measures such as implementation of technologies that restrict access, such as ID and password settings.

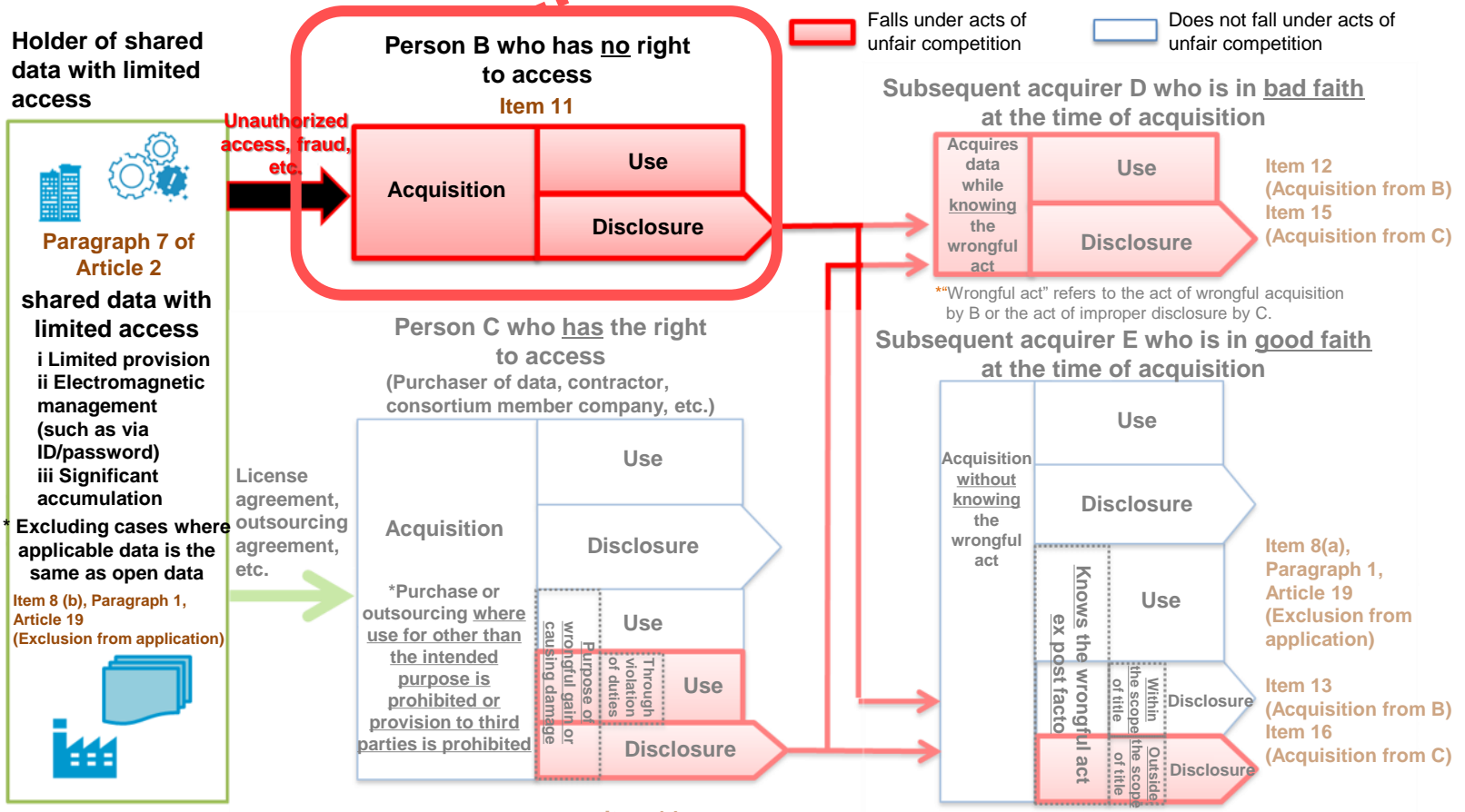
Example Access restriction by IDs, passwords, smart cards, specified terminals, tokens or biometric authentication.

* Other than the above, in the “Guidelines on shared data with limited access”, an explanation is also provided about “technical or business information” and “excluding information that is kept secret”.
* Specific examples are also provided with regard to the scope of information that is “the same as open data” and that is excluded from application.

4. Acts that fall under “unfair competition” and the category of unauthorized acquisition

Article 2 The term “Unfair Competition” as used in this Act means any of the following:

(xi) the act of **acquiring** shared data with limited access **by theft, by fraud, by duress, or by other wrongful means** (hereinafter referred to as an "act of wrongful acquisition of shared data with limited access"); or the act of **using** or **disclosing** shared data with limited access acquired through an act of wrongful acquisition of shared data with limited access;



*The “scope of title” refers to the scope in which E is allowed to disclose in an agreement, etc. with B or C concerning disclosure.

In relation to “unfair competition”, acts of “**acquisition**”, “**use**” and “**disclosure**” are set out and the Guidelines provide the following definitions in “III. Acts that fall under the category of unfair competition (general remarks)”.

Acquisition

Refers to **placing data under one’s management**. This applies to cases where a person or a third party obtains data itself via media, etc. on which the data is recorded or cases where a person or a third party obtains data without media, etc. on which the data is recorded.

Example Act of copying data stored on a server to one’s own PC

Use

Refers to **the act of using data**. Note that the use, etc. of products (goods, etc. developed using the data) created by using the data acquired does not fall under the act of unfair competition unless such products are considered virtually the same as the data acquired.

Example Act of creating a program by using data acquired

Disclosure

Refers to **making data available by a third party**. It does not matter whether or not a third party actually accesses the data.

Example Act of uploading data to a website that is accessible by a third party.

*With regard to the “category of significant violation of the principle of good faith” and the “category of subsequent acquisition”, the terms “acquisition”, “use” and “disclosure” are defined in the same manner.

Theft, fraud, duress or other wrongful means

As for “by theft, by fraud, by duress, or by other wrongful means”, “theft”, “fraud” and “duress” are presented as examples of wrongful means. “Other wrongful means” are considered to not only refer to **acts subject to criminal punishment, such as a charge of theft and a charge of fraud**, but also to **the case of using a means that is against public policy such as being deemed illegal to the same extent as the above acts in light of socially accepted conventions**.

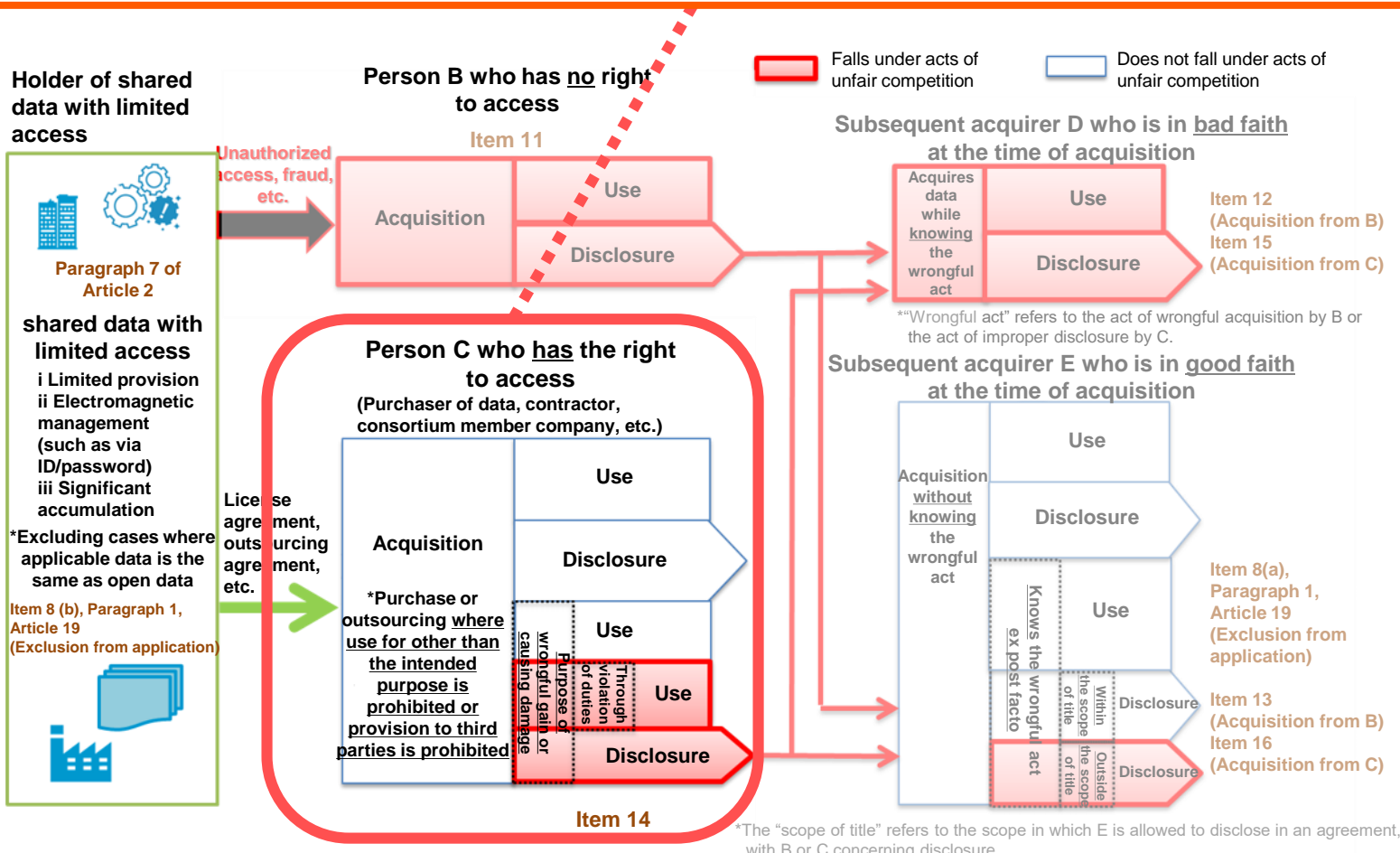
*The Guidelines also present examples of acts that fall under “theft, fraud, duress or other wrongful means”.

Example) The act of having an access to a PC of another company via a network without permission, operating the PC and deactivating the password to acquire data.

5. Category of significant violation of the principle of good faith

Article 2 The term “Unfair Competition” as used in this Act means any of the following:

(xiv) the act of using or disclosing shared data with limited access disclosed by an undertaking holding that data (hereinafter referred to as the "holder of shared data with limited access"), **for the purpose of wrongful gain or causing damage to that holder of shared data with limited access** (using the relevant data for that purpose is limited to an act conducted in breach of the duties regarding the management of that data);



*The "scope of title" refers to the scope in which E is allowed to disclose in an agreement, etc. with B or C concerning disclosure.

Act of use that satisfies requirements (1) and (2) below
Act of disclosure that satisfies the requirement (1) below



Falls under acts of unfair competition

(1) “for the purpose of wrongful gain or causing damage to that holder of shared data with limited access”

When determining whether requirements for the purpose of wrongful gain or causing damage are satisfied, it is assumed that it is obvious for both parties concerned that the relevant act of use or disclosure is not permitted by the holder of shared data with limited access, and that the rightful acquirer is aware of such fact.

[Requirements for the purpose of wrongful gain or causing damage: satisfied]

When the items i through iii below are applicable

- i. Cases where although it is obvious for parties concerned that the use (or disclosure) is not permitted and they are aware of such fact,
- ii. the party uses or discloses acquired data for the purpose of wrongful gain for itself or a third party or causing damage to the owner of shared data with limited access;
- iii. except where there is a justifiable purpose for such act

[Requirements for the purpose of wrongful gain or causing damage: not satisfied]

- ◆ When a contract does not clearly state the obligation of non-disclosure to a third party
- ◆ In the case of violation by negligence
- ◆ When conducted for the benefit of the holder of shared data with limited access
- ◆ When there is a justifiable purpose: conducted in emergency, in accordance with laws and regulations, there are reasons based on public interests such as life saving)

(2) Act “conducted in breach of the duties regarding the management of the shared data with limited access”

As for “the duties regarding the management of the shared data with limited access”, it refers to cases considered to include duties conducted for the holder of shared data with limited access, rather than duties under a simple data agreement. More specifically, this refers to cases where there is a relationship in which one party outsources services to, and places confidence in, the other party.

[Duties related to management: satisfied]

- ◆ When upon the request of the holder of shared data with limited access, a person conducts analysis using shared data with limited access.

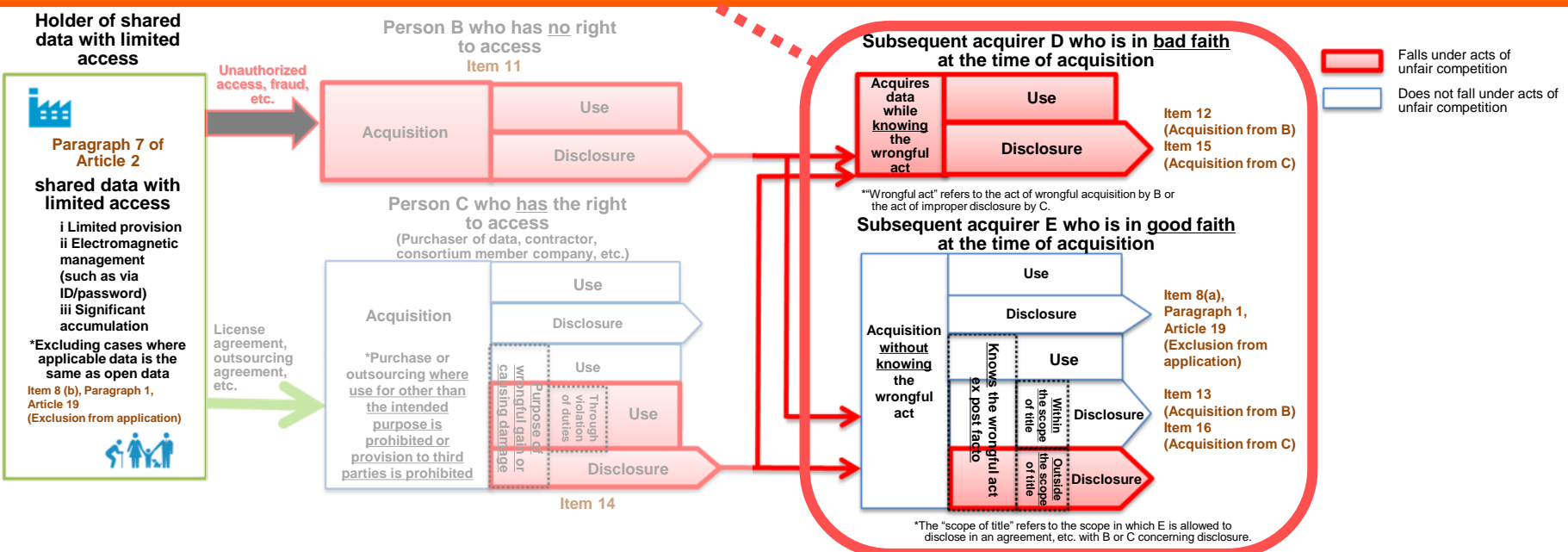
6. Category of subsequent acquisition

[Category of subsequent acquisition in bad faith at the time of acquisition]

Article 2 The term “Unfair Competition” as used in this Act means any of the following:
 (xii) the act of acquiring shared data with limited access **with the knowledge that there has been an intervening act of wrongful acquisition of shared data with limited access**, or the act of using or disclosing shared data with limited access acquired in such a way;
 (xv) the act of acquiring shared data with limited access **with the knowledge that the disclosure of that data is an act of improper disclosure of shared data with limited access** (meaning, in the case described in the preceding item, the act of disclosing shared data with limited access for the purpose as provided for in the same item; the same applies hereinafter) **or that there has been an intervening act of improper disclosure of shared data with limited access with regard to the relevant shared data with limited access**, or the act of using or disclosing shared data with limited access acquired in such a way;

[Category of subsequent acquisition in good faith at the time of acquisition]

Article 2 The term “Unfair Competition” as used in this Act means any of the following:
 (xiii) the act of disclosing shared data with limited access after **having acquired it and learning that there had been an intervening act of wrongful acquisition of shared data with limited access**;
 (xvi) the act of disclosing shared data with limited access after **having acquired that data and learning that the relevant acquisition falls under an act of improper disclosure of shared data with limited access or that there had been an intervening act of improper disclosure of shared data with limited access**;
 *Item 8 (a) under Paragraph 1 of Article 19 sets out that with respect to the category of subsequent acquisition in good faith at the time of acquisition, the “act of disclosing the shared data with limited access **within the scope of title acquired through the transaction**” shall be excluded from application.



“With the knowledge that there had been an intervening act of wrongful acquisition of shared data with limited access” (=“bad faith”)

To argue that the subsequent acquirer is in “bad faith”, the following requirements (a) and (b) must be satisfied.

(a) The subsequent acquirer is aware that the act of wrongful acquisition of shared data with limited access or the act of improper disclosure of shared data with limited access has been conducted.

(Example)

- ◆ If the subsequent acquirer has requested the rightful acquirer of data to unrightfully provide data in exchange for money or goods
- ◆ If the subsequent acquirer has received from the data holder a warning clearly evidencing that there has been a wrongful act



(b) The subsequent acquirer is aware that data for which the act of wrongful acquisition of shared data with limited access or the act of improper disclosure of shared data with limited access is conducted is the same as data subject to the subsequent acquisition.

(Example)

- ◆ If it has been confirmed as a result of analysis of a digital watermark, etc. for traceability that the data is identical
- ◆ If the subsequent acquirer has received from the data holder a warning clearly evidencing that the data is identical

*Cases where it is not evident whether there has been an intervening act of wrongful acquisition cannot be considered cases involving “bad faith”.

*It is clearly stated that the subsequent acquirer does not owe the duty of care or the duty of investigation such as the obligation of checking whether a wrongful act has been committed.

“Within the scope of title”

This refers to “within the scope in which conditions (disclosure period, purpose and manner) set forth in a transaction (sale, licensing, etc.) where shared data with limited access is acquired are applicable”. In the case of an agreement whose contractual relationship is reasonably expected to continue although the term of the agreement has expired formally, such continued agreement is considered to be covered “within the scope of title”.

Example Cases where a person executes an agreement subject to automatic renewal, the agreement is renewed automatically after learning of a relevant wrongful act, and, after the renewal, s/he provides data (that has been acquired before learning of the relevant wrongful act) to a third party