

Tentative Translation

Japan Fair Trade Commission
Competition Policy Research Center

Report of the Study Group on Human Resource and Competition Policy

(This report includes English-translation only for Chapter1.2, Chapter5, and
Chapter6 from the original version.)

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Chapter 1. Introduction

2. Establishment of this Study Group, and its studies

In August 2017, Japan Fair Trade Commission has established “Study Group on Competition and Human Resources” (Chair: Prof. Fumio Sensui, Kobe University Graduate School of Law) in Competition Policy Research Center (CPRC; Director: Prof. Yosuke Okada, Hitotsubashi University Graduate School of Economics). The Study Group consisted of twelve academics, experts, and practitioners from the fields of antimonopoly law, labor law, industrial organization, labor economics, and labor markets¹.

The Study Group organizes the views on applications of Antimonopoly Act to competition for human resources from a theoretical perspective, in order to facilitate pleasant environment for individual workers, based on the cases ascertained through the survey by the Study Group Secretariat, taking the environment described in 1 under Chapter 1 above into account.

The discussions of the Study Group were mainly based on court cases, hearing decisions and guidelines of the Japan Fair Trade Commission regarding the Antimonopoly Act. This Report is the summary of the results of discussions in the Study Group, and its content is not necessarily the same as the views of the Japan Fair Trade Commission. In addition, this Report presents the results of consideration on the application of the Antimonopoly Act to competition for human resources within the scope of information ascertainable at the present. There will be a need for more in-depth study as necessary in the future.

(1) Subject of study

This Report organizes the views on competition between enterprises that receive service provision, (hereafter activities of contracting parties (employers) who could impose a disadvantage against individual workers (“service providers”) by hindering competition among contracting parties to secure service providers (competition among “employers” when suppliers of labor services are regarded as employees)

¹ The Ministry of Education, Culture, Sports, Science and Technology (Japan Sports Agency); the Ministry of Health, Labour and Welfare; the Ministry of Economy, Trade and Industry; and the Director of the CPRC participated as observers.

under the Antimonopoly Act.

A typical example of individual workers is a “freelance worker” (e.g. system engineers, programmers, IT engineers, journalists, editors, writers, animators, designers, and consultants). Besides those individual workers, a wide range of other professionals including athletes and artists were kept in mind in the Study Group’s consideration. However, the scope of the consideration did not include evaluations of specific practices in particular industries and professions.

In addition, employment contracts, contracts for work, and outsourcing contracts are considered as typical examples of contracts for service provision under the Civil Code. These are a series of concepts indicating the scope of the Study Group’s consideration. Since not only typical contracts but also combination of a number of types of contracts or non-typical contracts are used in practice, no discussion specific to each type of contracts under the Civil Code with regard to the application of the Antimonopoly Act took place.

(2) The study process

The Study Group has held the first meeting in August 2017, and by February 2018 it has held six meetings in total. Its meetings included presentations by Study Group Members and reports on the results of interviews and Web-based surveys conducted by the Study Group Secretariat. Study Group members engaged in discussions based on the presentations by the members, reports by the Secretariat, and other matters, and the Study Group’s conclusions are summarized in this Report.

Chapter 5. Application of the Antimonopoly Act to concerted practices

1. Basic views

A joint decision by multiple contracting parties (employers) on the terms of trade with service providers could be considered an issue mainly from the perspective of whether such conduct restricts competition in the market for human resources (the second half of Article 3 and Article 8, Paragraphs 1, 3, and 4 of the Antimonopoly Act). A joint, artificial decision on terms of trade, which should have been determined in the market for human resources, is illegal in principle because it is intended to restrict

competition and, as a result, has a very severe negative impact on competition.

5 However, depending on the type of conduct, it may have effects other than those of restricting competition, and its illegality is judged through a consideration of multiple matters including whether such a concerted practice also has pro-competitive effects brought by the alleged concerted practice, social or public purposes, reasonable competitive means (in other words, whether the content and implementation method of the concerted practice are reasonable and proportionate for achieving its purposes).

10 In addition, such conduct are not always immediately considered legal when it is recognized that the conduct has pro-competitive effects (e.g., increasing benefits to consumers) in the market for human resources or the markets for goods and services. Such determination is made based on a comprehensive consideration of matters including whether the degree of pro-competitive effects outweighs the counterpart of anti-competitive effects in each market.

2. Arrangements related to the price paid to service providers

20 Arrangements made jointly by multiple contracting parties (employers) regarding the price paid to suppliers of certain services prevent and avoid competition for acquiring human resources among contracting parties (employers) in the market for human resources. Since price is the most important competitive means in securing human resources, such an act substantially restrains competition in the market for human resources, and in principle, it becomes a problem under the Antimonopoly Act. In 25 this case, normally, there is no room for consideration of whether such an action has pro-competitive effects, whether it has a public-benefit purpose, or whether its means are appropriate.

30 Even if it can be considered theoretically that, due to a reduction of the prices paid for service provision are lowered below the level that would be determined through competition (i.e. competitive equilibrium), the prices paid by users/consumers for the goods and services that use the provided services will be lowered, the conduct of arranging prices paid to providers of certain services by multiple contracting parties (employers) becomes a 35 problem under the Antimonopoly Act in principle.

3. Arrangements related to transferring or switching jobs

Arrangements made jointly by multiple contracting parties (employers) to restrict transferring or switching jobs by service providers prevent and avoid competition for human resources among contracting parties (employers) in the market for human resources by restricting the ability of service providers to change the parties to which they provide such services. For this reason, such arrangements may be a problem under the Antimonopoly Act². In addition, such conduct could make new entry to the market more difficult because parties who intend to start offering new goods or services in the markets for goods and services might not be able to secure the service providers that they need to supply goods and services. In such case, there could be a problem under the Antimonopoly Act when competition to supply goods and services to those markets is prevented.

The descriptions above also could apply even if the content of such an arrangement does not restrict transferring or switching jobs directly, but as a consequence, it entails effects of substantially hindering transferring or switching jobs (e.g. in a case where the content of the arrangements imposes certain disadvantages when transferring or switching jobs).

In addition, the length of contract is another term of condition of service provision, and a contracting party (employer) could secure superior human resources by offering better conditions than those offered by other contracting parties (employers) through adjusting the length of contracts for service provision. Accordingly, joint arrangement by multiple contracting parties (employers) of maximum or minimum lengths of contracts, resulting in uniform lengths for which providers of services are bound to contracting parties (employers), could have the effect of avoiding or preventing competition for human resources among contracting parties (employers) in the market for human resources. In addition, if such conduct results in the convergence of contractual periods to a long time, new entry to the market becomes more difficult because parties who intend to start offering new goods or services in the markets for goods and services might not be able to secure the service providers

² An example from the United States is U.S. v. Adobe Systems, Inc., et al. (March 17, 2011 Final Judgement).

that they need to supply goods and services.

On the other hand, it could be argued that arrangements on transferring or switching jobs could be intended to recover the necessary costs of training; for example, the cost that contracting parties (employers) have already spent to train service providers.

Even if recovery of the training costs creates incentives to train human resources, and this may have the pro-competitive effects, there is a need to consider whether such effects outweigh its anti-competitive effects on the market for human resources. Furthermore, whether such conduct becomes a problem under the law is determined based on a consideration of multiple matters including whether or not the level of training costs that the contracting party attempts to recover is appropriate; whether or not the content of the arrangements is within an extent that would be appropriate for such a level of costs; and whether or not there are any means of recovering the cost of training that would be less restrictive for competition other than restriction on transferring or switching jobs. It can be considered that when multiple contracting parties (employers) arrange jointly to restrict transferring or switching jobs, it is not usually the case that there are no other appropriate means to achieve the objective of recovering the cost of training.

For example, in the field of sports, a professional sports league may be able to exist as a business only when multiple sports clubs work jointly, and in such a case, it may be argued that concerted practices among the clubs to restrict transfer of players are intended to maintain and improve the quality of services provided to consumers, through making the professional league more appealing.

This could be understood as an argument that, even though it restricts competition in the market for human resources, this would encourage competition in the markets for goods and services, and also would encourage competition in the market for human resources ultimately³. An assessment on such a case should be based on a comprehensive

³ See *Guidelines Concerning Joint Research and Development under the Antimonopoly Act* (April 20, 1993, Japan Fair Trade Commission), 1-2 (2); U.S. FTC, DOJ (2000), *Antitrust Guidelines for Collaborations Among Competitors*, p. 6.

consideration of matters such as whether or not such conduct to restrict transfer is essential to achieve the purpose mentioned above, the degree of the pro-competitive effect in the markets for goods and services (e.g., increased benefit to consumers), and whether the pro-competitive effects outweigh its anti-competitive effects in the market for human resources. Moreover, the reasonability of the contents and the means (i.e. whether or not the means are proportionate to the objective and whether or not there are any other means to achieve the objective that would be less restrictive for competition) is also taken into account in the consideration.

4. Arrangements on qualifications and standards required of service providers

In some cases, an organization such as a trade association might establish certain qualifications or standards for the service providers to supply certain goods and services. While such conduct is considered not to present any particular issues under the Antimonopoly Act⁴ in general, it could be a problem depending on the content and the type of the conduct. Setting qualifications and standards required for service providers could impede competition in the markets for goods and services by, for example, making it more difficult to supply goods and services to those markets for enterprises that are unable to secure sufficient human resources who satisfy the prescribed qualifications or standards.

Whether or not arrangements for qualifications and standards impede competition in markets for goods and services is determined based on (i) whether or not the arrangements improperly impede the benefits of users in markets for goods and services; (ii) whether they are improperly discriminatory among contracting parties (employers); and (iii) whether they are within a scope that can be considered reasonably necessary in light of an appropriate purpose, such as aligning with public benefits.

In conducting activities related to arrangements for qualifications and standards, it is desirable that trade associations and other organizations provide sufficient opportunities for hearing the opinions of related contracting parties (employers) and service providers, and exchange

⁴ *Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act* (October 30, 1995, Japan Fair Trade Commission) (“Guidelines Concerning the Activities of Trade Associations” hereinafter), 2-7 (2)

opinions with the users of goods and services, knowledgeable third parties, and others.

A use of and a compliance with such arranged qualifications and standards should be subject to voluntary decisions. If the trade associations or other organizations coerce such use and compliance on contracting parties (employers), then, in general, the arrangements could become a problem under the Antimonopoly Act⁵.

5. Exchange of information among contracting parties (employers)

In activities to secure human resources, exchanging past information and objective information (not on important competitive means such as rates and prices for current or future business activities) would not directly become a problem under the Antimonopoly Act if such an information exchange does not serve a purpose such as setting common benchmarks for current or future prices among contracting parties (employers)⁶. However, if such an information exchange serves to form an effective agreement among contracting parties (employers) concerning the conduct described under Paragraphs 2-4 of the chapter 5 above⁷, then it could become a problem under the Antimonopoly Act.

Chapter 6. Application of the Antimonopoly Act to unilateral conduct

1. Basic concepts

Conduct by contracting parties in the market for human resources could have an effect on competition in the market for human resources or an effect on competition in markets for goods and services. In light of the fact that the Antimonopoly Act is intended ultimately to be in the interests of protecting benefits of general consumers (see Article 1 of the Antimonopoly Act), this section will discuss negative effects, which are caused by acts through the process of securing human resources, from the perspective of reduction in free competition in markets for goods and

⁵ Guidelines Concerning the Activities of Trade Associations, 2-7 (2) a.

⁶ Under the Antimonopoly Act, in principle acts of collection and provision of information on prices for consumers and others and provision of data on the quality of goods or services for which comparison by price is difficult are not considered violations of the law (Guidelines Concerning the Activities of Trade Associations, 2-9 (3), 9-5; 2-9 (3), 9-6). Similar acts in exchange of information among contracting parties (employers) are not problematic under the Antimonopoly Act.

⁷ Guidelines Concerning the Activities of Trade Associations, 2-9 (2).

services and of substantial restraint of competition, negative effects of such conduct from the perspective of unfairness of competitive means in market of human resources, and lastly, negative effects of such conduct from the perspective of misuse of a superior bargaining position.

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(1) Consideration from the perspectives of reduction in free competition and substantial restraint of competition

10 A case in which a contracting party restricts or prohibits service providers from service provision to other contracting parties or supply of goods and services to markets for goods and services in which the contracting party itself is active could become a problem under the Antimonopoly Act in the following cases; (i) When such restriction or prohibition tend to make it difficult for other contracting parties to supply goods and services by making it impossible for them to secure the service providers needed to supply the goods and services or by increasing the costs of service providers, or (ii) When such restriction or prohibition tend to make it difficult for service providers to start supplying goods or services or decrease opportunities for trade, because reduction in free competition or substantial restraint of competition in markets for goods and services arises. (see Antimonopoly Act Article 2, Paragraph 5 of the Antimonopoly Act and the latter sentence of Designation 2, Paragraph 11, Paragraph 12, etc. of the Designation of Unfair Trade Practices [Fair Trade Commission Public Notice No. 15 of 1982; “Designation of Unfair Trade Practices” hereinafter])

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25 Normally, reduction in free competition or substantial restraint of competition can be considered more likely to occur when the scope of service providers subject to restrictions or obligations is broader or the necessity or importance of the service providers subject to such restrictions or obligations is higher in markets for goods and services. In addition, such likelihood is considered to become higher in a case where multiple contracting parties independently, without any kind of arrangements among them, do such conduct simultaneously than when only one contracting party takes that conduct.

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35 For this reason, reduction in free competition and substantial restraint of competition in markets for goods and services are generally considered more likely to occur in cases where a contracting party

doing such conduct has a high shares in the markets for goods and services⁸. However, since such restrictions and obligations on service providers take place in the market for human resources, and it can be considered that, in many cases, market share in markets for goods and services is not related directly to the effect or degree of restrictions or obligations in the market for human resources, the likelihood of reduction in free competition or substantial restraint of competition arising in markets for goods and services needs to be considered on a case by case base in accordance with the conditions when alleged conduct was carried out.

There are also matters that should be considered comprehensively for alleged conduct, such as whether or not the alleged conduct has pro-competitive effects (and furthermore, as necessary, a comparison of pro-competitive effects with its anti-competitive effects) or purposes of public benefit, and whether they are reasonable as means. In doing so, since reduction in free competition or substantial restraint of competition mentioned above takes place in markets for goods and services, and users and consumers in markets for goods and services suffer such negative effects, consideration would not be given to whether or not sufficient compensatory measures (i.e., payment of prices etc.) have been implemented for such restrictions or obligations on service providers.

(2) Consideration from the perspective of unfairness of competitive means

To enable competition for human resources among contracting parties by offering better terms of trade than other contracting parties related to the securing of service providers, it is essential that service providers determine with whom to contract accurately understanding the terms of trade offered by contracting parties. A necessary

⁸ Regarding conduct that tends to be illegal as unfair trade practices when carried out by “an influential enterprise (contracting party) in a market,” such as “restriction on dealings with competitors, etc.,” “in cases an enterprise (contracting party) which has a market share of 20% or less or a new entrant commits any said action, it does not usually tend to impede fair competition and therefore is not illegal” (*Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act* [July 11, 1991, Japan Fair Trade Commission Secretariat], Part 1, 3 (4)) (Note that “(contracting parties)” in the quotes above was added when citing them in this Report.)

precondition for this is that service providers sufficiently understand information on conditions related to service provision.

5 However, since service providers have access to less information than contracting parties and, since they are weaker in terms of negotiating power, service providers may not be provided with sufficient information by contracting parties, which makes difficult to maintain the precondition above. If contracting parties offer to service providers inaccurate terms of trade, or if carry out a transaction without sufficiently clarifying terms of trade, resulting in preventing service providers from trading with other contracting parties, then such situations could become a problem under the Antimonopoly Act. In such a case, even if the contracting party later compensates for the difference by modifying the actual terms of trade to match those described in advance, the fact of the problems described above having arisen remains unchanged, and for this reason, it is thought that consideration would not be given to whether or not the compensatory measure of supplementation has been implemented.

10 In addition, conditions related to service provision could include contents that restrict the provision of services to other contracting parties, or oblige not to provide their services to other contracting parties against service providers. In such a case, if conduct such as offering inaccurate terms of trade and not sufficiently clarifying terms of trade against service providers is done, the problem would be more severe than in a case in which similar acts were taken in competition related to ordinary goods and services in the sense that such restrictions and obligations on the provision of services would limit the freedom of choice for service providers, and therefore, these acts are more likely to result in a problem under the Antimonopoly Act (see Designation 14 of Unfair Trade Practices).

30 (3) Consideration from the perspective of abuse of a superior bargaining position

35 Since service providers have access to less information than contracting parties and have weaker negotiating power, in some situations, contracting parties might not provide sufficient information to service providers. This makes it difficult to maintain the basis for

free competition in which service providers can choose their transaction counterparties and terms of trade freely and autonomously. Conduct that could become a problem as abuse of superior bargaining position are those in which an enterprise takes an advantage of its superior bargaining position in a transaction to establish terms of trade disadvantageous to the trading party. A precondition of such conduct is that contracting parties has a superior bargaining position over service providers.

A case in which contracting parties have a superior bargaining position over service providers is one in which a difficulty in the continuation of transactions with the contracting party would result in a severe business difficulty to the service provider⁹, and for this reason the service providers are forced to accept requests from the contracting party that would be disadvantageous to service providers. Judgment of whether such a situation applies is made through a comprehensive consideration of the following specific facts; (i) the degree of dependence of the service providers on the contracting party in their business, (ii) the contracting party's position in the market, (iii) the possibility of switching the trading party by the service providers, and (iv) other specific facts that show transactions with the contracting party are necessary for the service providers.

A distinctive property of the market for human resources is the fact that while transactions between enterprises are quite common in markets for goods and services, in market for human resources, contracting parties normally are enterprises while service providers tend to be individuals. This property could affect an opportunity for service providers to make judgments freely and autonomously based on their own benefits and costs through means such as negotiation with contracting parties on service provision based on sufficient information. Whether or not such a superior bargaining position applies is determined specifically on a case by case basis, through a

⁹ “The act of abuse of a dominant bargaining position is often conducted against the backdrop of continuous business relations, but is occasionally conducted among firms without continuous business relations [between a contracting party and a service provider in the context of this Report].” (*Guidelines Concerning Abuse of a Dominant Bargaining Position in Service Transactions under the Antimonopoly Act* [March 17, 1998, Japan Fair Trade Commission], 1-1 {Note 5})

comprehensive consideration of the factors described under (i)-(iv) above, including the properties described in this paragraph and other potential circumstances.

5 In this way, if a contracting party who has a superior bargaining position over a service provider imposes a disadvantage on the service provider improperly, it could become a problem under the Antimonopoly Act (see Article 2, Paragraph 9, Subparagraph 5, B and C of the Antimonopoly Act)¹⁰.

10 When, in such a case, the disadvantage includes restrictions on service provision to other contracting parties or obligations not to supply services to other contracting parties against service providers, the likelihood to be a problem under the Antimonopoly Act would be higher than in a case in which similar conduct were taken in
15 competition for goods and services in the sense that the freedom of choice of service providers is restrained. In such a case, if compensatory measures have been taken, then that fact and the content and level of such measures are considered.

20 2. Confidentiality obligations and non-compete obligations

In some cases, contracting parties impose on service providers confidentiality obligations that prohibit them from revealing trade secrets such as technical or client information or other confidential information learned in the process of providing services to the
25 contracting party (hereinafter collectively referred to as “trade secrets etc.”). In addition, an employer may impose confidentiality obligations on an employee leaving its employment in order to prevent divulging confidential information learned during his or her period of employment

¹⁰ “The risk of impeding fair competition are identified case-by-case, considering factors including the degree of the disadvantage at issue and the extensiveness of the act. For example, the act is likely to be found to impede fair competition [1] when the party having superior bargaining position organizationally imposes a disadvantage on a large number of transacting parties, or [2] when the party having superior bargaining position imposes a disadvantage only on a specific transacting party, but the degree of disadvantage is high or such act, if left unaddressed is likely to be carried out to other transacting parties..” (*Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act* [November 30, 2010, Japan Fair Trade Commission] [“Guidelines Concerning Abuse of a Superior Bargaining Position” hereinafter], 1-1)

after the employee leaves the company. In general, confidentiality obligations are intended to prevent divulging of trade secrets etc., and they have a pro-competitive effect in the market for human resources by, for example, enabling contracting parties (employers) to engage in transactions without worry of information leakage, and by improving the skills of service providers as contracting parties (employers) are able to provide service providers with expertise and detailed information corresponding to trade secrets etc (encouraging demand for human resources and improving goods and services supplied). They also have a pro-competitive effect in markets for goods and services through means such as stimulating business activities by protecting the trade secrets of contracting parties (employers) and so on. For these reasons, the imposition of confidentiality obligations within a scope that is considered reasonably necessary for this purpose (the reasonability of the means are recognized) does not directly present any problems under the Antimonopoly Act.

In order to secure the efficacy of confidentiality obligations, conduct that restricts transactions with other contracting parties may take place due to a high likelihood of violation of confidentiality obligations, and such conduct does not directly present issues under the Antimonopoly Act as long as they are limited to a reasonably necessary scope as described above.

However, if such conduct could restrain the provision by service providers (including workers who have left employment) of services to other contracting parties (employers), making the supply of goods and services and new entry difficult through making it impossible for other contracting parties to secure the service providers that they need to supply goods and services to the markets for goods and services, or increasing costs to secure service providers, then such conduct could become a problem under the Antimonopoly Act from the perspective of reduction in free competition.

In addition, contracting parties may impose obligations not to provide services to their competitors for a certain period of time after the end of the contract on provision of services. Also, employers, in some cases, will impose non-compete obligations on workers who are leaving their

employment by prohibiting them from engaging in businesses in competition with the employers or beginning employment with competing companies, in order to prevent the leakage of trade secrets etc. after leaving employment. These non-compete obligations are imposed for purposes similar to those of confidentiality obligations described above and generally have a pro-competitive effect in markets for goods and services, and when imposed within a scope considered reasonable in light of these purposes, they do not directly present any issues under the Antimonopoly Act.

However, since non-compete obligations restrict service providers from becoming competitors to contracting parties (employers) (i.e., by service providers going into business independently on their own) and prohibit or restrict service providers from employment by or provision of services to competitors, even though the content of these obligations differs from those of the confidentiality obligations described above, they do resemble confidentiality obligations in that they restrict the provision of services by service providers to other contracting parties (employers). For this reason, such conduct could have effects such as making it difficult for service providers subjected to non-compete obligations to begin the supply of new goods and services in markets for goods and services, or making it difficult to enter the market through impeding other contracting parties from securing the service providers that they need to supply goods and services to the markets for goods and services or increasing the costs to secure service providers. In such a case, the broader the scope of parties subject to non-compete obligations or of competitors unable to secure service providers, the broader or longer the content or period of confidentiality obligations/non-compete obligations in light of their purpose, or the larger the number of contracting parties (employers) imposing these obligations simultaneously, the likelihood to become a problem under the Antimonopoly Act becomes higher.

Even if the content and period of confidentiality obligations/non-compete obligations itself cannot be recognized as excessive directly because it does not deviate from the content of ordinary such obligations, it could become a problem under the Antimonopoly Act when the content of such restrictions is abstract, rather than specific and limited,

and there is room for its overly broad interpretation by contracting parties (employers).

5 These also could lead to issues from the perspective of unfairness of competitive means. Since confidentiality obligations and non-compete obligations restrict transactions between service providers and other contracting parties competing with the contracting parties (employers) implementing such obligations, they affect competition for human resources among contracting parties. In such a case, if contracting parties (employers) describe to service providers the content of such obligations in a way that differs from actual circumstances or does not sufficiently clarify the content of obligations in advance, and service providers therefore accept such obligations, then they could become a problem under the Antimonopoly Act.

15 Furthermore, they also could present issues from the perspective of abuse of superior bargaining position. These obligations impose a disadvantage on service providers by depriving service providers of opportunities to supply services to other contracting parties (employers). For this reason, if confidentiality obligations or non-compete obligations imposed by contracting parties (employers) deemed to be in superior bargaining positions against the subjects of such obligations impose disadvantages on service providers improperly, then they could become a problem under the Antimonopoly Act.

25 Whether or not such obligations impose disadvantages improperly is judged based on a consideration of matters such as whether or not the content or period of these obligations is excessive in light of their purposes, the degree of the disadvantages imposed on service providers, whether or not any compensatory measures have been taken and the levels thereof, decision process including whether or not sufficient discussions took place with transaction counterparties (service providers) prior to the imposition of such obligations, whether the obligations are discriminatory compared to the terms of trade imposed on other counterparties (service providers), and their deviation from ordinary non-compete obligations and confidentiality obligations.

3. Exclusive obligation

In some cases, contracting parties impose on service providers an obligation to transact with them only (“exclusive obligation” hereinafter) and restrict service providers from service provision to other contracting parties. Contracting parties impose exclusive obligations on service providers for the purpose of, for example, having suppliers devote themselves exclusively in order to secure necessary labor services to supply goods and services in market, or recovering the costs of training by the contracting parties to teach service providers specific expertise, skills, etc. For these reasons, an exclusive obligation could, in general, have pro-competitive effects in the market for human resources and markets for goods and services such as enabling contracting parties to invest service providers through training them (improving their capabilities as human resources), which stimulate the business activities of contracting parties. Imposition of an exclusive obligation within a scope that is deemed reasonably necessary for these purposes above (including the reasonability of the competitive means employed) would not directly present any issues under the Antimonopoly Act.

However, in cases such as when an exclusive obligation that exceeds the scope necessary for this purpose might make it difficult for other contracting parties to supply goods and services through impeding them from securing service providers they need to supply goods and services to markets for goods and services or raising the costs, then, an exclusive obligation could become a problem under the Antimonopoly Act from the perspective of reduction in free competition. In such a case, the broader the scope of other contracting parties unable to secure service providers due to the exclusive obligation, the more the content or period of the exclusive obligation (or the period over which service provision is assumed to continue in a case where even after the end of the contractual period the supplier continues to provide services through renewal of the contract on service provision, including the exclusive obligation, by the judgment of the contracting party alone) exceeds what would be proportionate to its purpose, or the larger the number of contracting parties imposing such obligations simultaneously, the more likely it is to become a problem under the Antimonopoly Act.

December 8, 2017 press release from the European Commission

- The European Commission has decided that International Skating Union (ISU) rules imposing severe penalties (up to a lifetime ban) on athletes participating in speed skating competitions that are not authorized by the ISU are in breach of EU antitrust law (Article 101 of the Treaty on the Functioning of the European Union). . . . The decision requires the ISU to stop its illegal conduct within 90 days
- (T)he ISU can abolish or modify its eligibility rules so that they are based only on legitimate objectives (explicitly excluding the ISU's own economic interests) and that they are inherent and proportionate to achieve those objectives.

5 It also could present issues from the perspective of unfairness of competitive means. Exclusive obligation restrains trade on provision of services between service providers and contracting parties who compete with the contracting party imposing the exclusive obligation on the service providers, thus affecting competition between contracting parties in the market for human resources. In such a case, if the contracting party has described to service providers the content of such obligations in a way that differs from actual circumstances or if service providers have
10 accepted the obligation without being clarified sufficiently in advance, then, it could become a problem under the Antimonopoly Act.

15 This also could present issues from the perspective of abuse of superior bargaining position. Exclusive obligation imposes a disadvantage on service providers in the sense that service providers lose opportunities to supply services to other contracting parties. For this reason, if an exclusive obligation imposed by a contracting party deemed to be in a superior bargaining position against service providers disadvantages the service providers improperly, then it could become a problem under the
20 Antimonopoly Act.

25 Whether or not obligations impose disadvantages improperly is judged based on a consideration of matters such as whether or not the content or period of the obligations is excessive in light of their purposes, the degree of the disadvantages imposed on service providers, whether or not any compensatory measures have been taken and the levels thereof, decision process including whether or not sufficient discussions took place with transaction counterparties (service providers) prior to the imposition of

such obligations, whether the obligations are discriminatory compared to the terms of trade imposed on other service providers, and their deviation from ordinary exclusive obligations.

5 4. Restriction on uses of output produced in connection with service provision

10 In some cases, a contracting party, while describing as its own the output produced through production or other activities using the services provided by service providers, will require service providers not to publicize clearly the fact that they are the providers of such services (obligation of non-publicity of output produced). Sometimes such obligations are imposed by contracting parties without reasonable grounds for doing so. For example, the contracting parties impose such obligations to enclose service providers who deliver high-quality output produced, since if they become better known, orders to the service providers would increase and the service providers would not take the orders when the contracting parties order them again in the future. If facts that service provider has provided services are important competitive means for them in securing contracting parties with whom they trade their services in the market for human resources, then this obligation could have the effect of restraining new trade by the service provider with contracting parties other than the one that imposed the obligation.

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25 In addition, for some services provided by the service provider to the contracting party, the service provider might have certain rights such as copyright with regard to the output they produced. In such a case, a contracting party might prohibit the service provider from providing the same output to other contracting parties (restriction of diversion of output produced), or demand exclusive permission to use the portrait rights or other rights of the service providers (obligation of exclusive permission to use portrait rights etc.), or demand transfer of copyright for free or at a markedly low price after or immediately before delivery, despite the fact that no arrangements had been made in advance regarding ownership of copyright on the grounds that the rights arise in the process of the service provision or the service was provided at the expense of the contracting party .

If the imposition of such obligations, restrictions, etc. make it difficult for other contracting parties to supply goods and services through impeding other contracting parties from securing the service providers, outputs, portrait rights, etc., which are necessary for them to supply goods and services in markets for goods and services, or raising the costs, then it could present issues under the Antimonopoly Act from the perspective of reduction in free competition. In such a case, the broader the scope of other contracting parties unable to secure service providers, outputs, portrait rights, etc. due to the obligation or restriction, the more the content of the obligation or restriction exceeds what would be proportionate to its purpose, or the larger the number of contracting parties imposing such obligations or restrictions simultaneously, the more likely such obligations are to become a problem under the Antimonopoly Act.

December 21, 2017 press release of the German Federal Cartel Office (Bundeskartellamt)

○ The Bundeskartellamt is currently conducting an administrative proceeding against the German Olympic Sports Confederation (DOSB) and the International Olympic Committee (IOC). The Bundeskartellamt suspects that . . . DOSB and IOC are abusing their dominant position. . . . According to the IOC Guidelines... , no athlete participating in the Olympic Games may allow his or her person, name, picture, or sports performances during the Olympic Games - and several days before and after the games – to be used for advertising purposes.

They also could present issues from the perspective of unfairness of competitive means. These obligations, restrictions, etc. might restrain trade on provision of services between service providers and contracting parties who compete with the contracting party that impose them, thus affecting competition between contracting parties in the market for human resources. In such a case, if the contracting party has described to service providers the content of such obligations, restrictions, etc. in a way that differs from actual circumstances, or if service providers have accepted them without being clarified sufficiently in advance, then they

could become a problem under the Antimonopoly Act.

They also could present issues from the perspective of abuse of superior bargaining position. These obligations and restrictions impose a disadvantage on service providers in the sense that service providers lose opportunities to supply services to other contracting parties. For this reason, if an obligation or restriction imposed by a contracting party deemed to be in a superior bargaining position against service providers disadvantages the service providers improperly, then it could become a problem under the Antimonopoly Act.

Whether or not these obligations or restrictions impose disadvantages improperly is judged based on a consideration of matters such as whether or not the content of the obligations or restrictions is excessive in light of their purposes, the degree of the disadvantages imposed on service providers, whether or not any compensatory measures have been taken and the levels thereof, and decision process including whether or not sufficient discussions took place with service providers to enable them to realize disadvantages (including the content of compensatory measures) in advance prior to an imposition of such obligations or restrictions.

5. Attempting to secure trade with service providers by offering deceptively superior terms of trade

In the provision of ordinary goods and services, suppliers in some cases do not provide sufficient information on terms of trade such as price and quality to consumers. As a result, consumers are unable to ascertain accurate details of the terms of trade such as price and quality, and they may choose certain goods and services out of a mistaken belief that they are superior to other goods and services. This imposes a disadvantage on consumers because they are unable to obtain higher-quality and lower-priced goods and services, and puts competitors who supply higher-quality and lower-priced goods and services at a competitive disadvantage. For this reason, such conduct is regulated under the Act against Unjustifiable Premiums and Misleading Representations and Designation 8 of Unfair Trade Practices (Deceptive Customer Inducement).

If the same practice are to take place between contracting parties (employers) and service providers, the same problem arises for goods and services —that is, if service providers are unable to choose contracting parties (employers) based on an accurate understanding of the terms of service provision offered by contracting parties (employers) because a contracting party (employer) offers service providers inaccurate terms of trade that deceptively appear superior, or because it fails to explain the terms of service provision sufficiently, and thus service providers were misled or deceived into engaging in trade with the contracting party (employer), thinking that the terms of trade it offered were superior to those offered by others, such conduct imposes disadvantages not only on service providers but also on contracting parties (employers) that offer accurate terms of trade. In light of the presence of such issues, such conduct could become a problem under the Antimonopoly Act from the perspective of unfairness of competitive means, as “interference with a competitor’s transactions”.

6. Other acts that are intended to secure or increase the earnings of contracting parties

In addition to conduct described in 2-4 under Chapter 6 above, if a contracting party in a superior bargaining position uses that position to impose a disadvantage on service providers improperly, then that could become a problem under the Antimonopoly Act from the perspective of abuse of superior bargaining position.

The basic view regarding how to assess whether or not such conduct imposes a disadvantage improperly are described below. Moreover, if the conduct below satisfy the conditions of application of the Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (“Subcontract Act” hereinafter), then they are considered violations of that act. Even if they fail to satisfy the conditions for application of the Subcontract Act, they may become a problem under the Antimonopoly Act from the perspective of abuse of superior bargaining position.

(1) Delay in the payment of proceeds, demands for price reductions, and refusal to receive goods

The following practices by a contracting party, without justifiable

grounds, could cause improper disadvantages to service providers as delay in payment of proceeds (A), demand for price reductions (B-D), or refusal to receive goods (E).

- 5 A. Delaying a predetermined deadline for payment of compensation, for reasons of the contracting party alone
- B. Reducing a predetermined contracted monetary amount, for reasons of the contracting party alone
- 10 C. Leaving compensations unchanged although additional works for service providers are required through changing predetermined specifications, for reasons of the contracting party alone
- D. Not compensating losses suffered by service providers due to a cancellation of an order for reasons of the contracting party alone
- 15 E. Placing simultaneous orders with multiple service providers and then trading only with the service provider that delivered the highest-quality output produced and refusing to receive output produced from other service providers

(2) Demanding transactions at markedly low prices

20 When a contracting party engages in the following practices, judgment of whether or not they impose disadvantages on service providers improperly is made through a consideration of matters such as the method of deciding on prices (e.g., whether or not sufficient discussions with service providers took place in deciding on prices) and
25 the content of such decisions (e.g., whether they are discriminatory compared to other service providers' prices). However, it must be noted that since actual prices decided on may be markedly lower than service providers' desired prices, these cases should not be judged as directly imposing improper disadvantages.

- 30 A. Deciding on order unit prices without taking necessary expenses into consideration
- B. Deciding on order unit prices after beginning transactions, for reasons of the contracting party alone
- 35 C. Not negotiating with a premise to discuss transaction prices (i.e., service providers merely sign written estimates prepared by the

contracting party, with estimated amounts already printed on them).

(3) Unilateral handling of rights etc. on output produced

5 For some services provided by a service provider to a contracting party, the service provider may have certain rights to the output produced from the services, such as copyright.

10 In such a case, if the contracting party engages in the following conduct on the grounds that such rights arose during the process of provision of services to the contracting party, or that the service was provided at the expense of the contracting party, then whether or not such practices impose an improper disadvantage is judged based on a consideration of matters such as whether or not the contracting party has employed compensatory measures, whether the level of such measures is appropriate to the disadvantage arising, whether negotiations on prices took place in a form that included compensatory measures, and whether or not the contracting party contributed to the creation of such rights.

20 A. Not paying to the service provider the price of reuse by the contracting party of the output produced for purposes other than those for which it was ordered

25 B. Deciding on the price paid by the contracting party to the service provider when the former sells goods such as merchandise featuring the portrait or other property of the service provider (royalties) without negotiating with the service provider, or refusing to pay any royalties at all.

(4) Other matters

30 There is a possibility that when a contracting party, without justifiable grounds, imposes an obligation to transfer to the contracting party a part of the earnings of the service provider from transactions other than those with the contracting party. Such conduct could be regarded as imposing an improper disadvantage on the service provider.

35 7. Factors that should be considered when determining whether or not a

party has a superior bargaining position

Special circumstances of market for human resources that, in general, contracting parties are a corporate organization while most service providers work as individuals, and such circumstances may be reflected, directly or indirectly, in the situations enumerated under (1)-(4) below. Such special circumstances of the market for human resources can be considered to support the argument that the contracting party is in a superior bargaining position against the service provider, and the presence of a superior bargaining position is judged specifically on a case-by-case basis, through a comprehensive consideration of these circumstances and those under 1(3), (i)-(iv) under Chapter 6 above, along with other circumstances.

(1) Situation where service providers lack the information and negotiating power needed in negotiations

Due to the circumstances of service providers such that most service providers work as individuals, their abilities to gather information are limited, and for this reason, it is conceivable that there might be little possibility for service providers to change their trading counterparties in a case where they lack, or find it difficult to obtain, information on the presence of other contracting parties to which they could potentially provide their services besides the contracting party with which they do business.

In addition, even though service providers have or can obtain information on the presence of other contracting parties, they are unable to obtain sufficient information as needed to judge reasonably whether or not the terms of trade offered by a contracting party are appropriate or correct due to weak negotiating power, or it is difficult for them to possess or obtain the legal and other knowledge needed in such judgment, it is conceivable that there might arise the same situation regarding the possibility to change the trading counterparties since it might be difficult for the service providers to compare the terms of trade offered by other contracting parties while maintaining negotiations with a contracting party.

(2) Situation where negative information about service providers spreads

among contracting parties, impeding transactions as a result

In an industry in which it is easy for information to spread among contracting parties, if a service provider expresses dissatisfaction with the content of the terms of trade to one contracting party or communicates its intentions such as a desire not to trade with the contracting party in the future, then such information could spread among other contracting parties in the form of a negative evaluation of the service provider, impeding future trade with other contracting parties in the same industry. In such a case, a negotiation initiated from the service provider to the contracting party on the terms of trade could result in a lower possibility for the service provider to change the trading counterparties.

In addition, as described in 2 (1) under Chapter 4 above, in the market for human resources, the scope of contracting parties to which service providers would be able to provide services might be limited, and it can be considered that in such a case, the possibility of changing the trading counterparties declines even more in the situation above.

(3) Situation where the number of contracting parties that can be traded with at one time is limited due to a small scale of business

Service providers often do business as individuals, and in such a case, it is difficult to do business with a large number of counterparties simultaneously due to limitations on business processing capacity, and sometimes the number of clients from which a service provider can accept orders at one time is limited to only a few enterprises. Also, depending on the content of the services, the period of providing the services would be long-term. Such circumstances can be considered to be grounds for a situation in which service providers have a high degree of dependence on the contracting parties and there is little possibility of changing the trading counterparties.

(4) Situation where freedom of choice by service providers is restricted

Service providers should be able to change the parties to which they provide services freely based on their own will. However, in cases such as when an agreement between the current contracting party and the new contracting party is required for a service provider to switch the

trading party, or the contract on service provision can be continued even after the end of the contractual period through the unilateral decision of the contracting party, service providers' freedom of choice is limited, and in such cases the possibility of changing the trading counterparties can be considered to be low.

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In particular, when a service provider is also subject to an exclusive obligation, the degree of dependence of the service provider on transactions with the contracting party is 100 percent. In such a case, it can be considered more likely that the contracting party would be deemed to have a superior bargaining position.

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In addition, even when there are multiple contracting parties from which service providers could choose and the circumstances restricting freedom of choice described above do not apply, if the terms of trade offered by each contracting party are identical or similar to each other, then there would be no room for service providers to choose the trading counterparties from a diverse range of terms of trade, so the service provider's freedom of choice is limited substantially, and the possibility of changing the trading counterparties can be considered to be low.

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