

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Competition Issues in Labour Markets – Note by Japan****5 June 2019**

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>

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1. Introduction

1. Although our experience in conducting investigation against a sort of non-poach agreements related to labour contracts dates back to early 1960's at the latest, we had not become aware of the necessity to express our views on the application of the Antimonopoly Act (Japanese competition law; hereinafter referred to as the "AMA") to anti-competitive activities in the labour market until recently, especially before we began to suffer from labour shortage after so-called Abenomics strongly pushed down the unemployment rate below 3% two and half years ago, 2017.

2. In addition, recently, the forms of work contracts have been more diversified, and the number of freelance has been increasing and is also predicted to rise further. There are several reasons for that change in Japanese labour market. One is that the importance of external experts are increasing because of the development of ICT or open innovation. Also, the emergence of digital economy makes it easier for freelance workers to find potential contracting parties and vice versa, and job searching platforms play a significant role on this point.

3. The diversification in work contract forms can be beneficial because workers can exert their unique talents or abilities as much as possible beyond traditional working framework. This working environment could enhance competition in the human resources market. On the other hand, they cannot be protected by the existing labour regulations. Also, because contracting parties in general are corporate organizations while most freelance workers make contracts as individuals, freelance workers have less access to information than contracting parties and have weaker negotiating power. In some situations, contracting parties might not provide sufficient information to workers. Accordingly, even if the human resources market is sellers' market, we have found that there might be seen some practices which would hamper active competition, based on our survey and interviews with various persons concerned.

4. Against this backdrop, Japan Fair Trade Commission (hereinafter referred to as "JFTC") has recognized that it would be meaningful to show the views on how to apply the AMA to competition for human resources to facilitate pleasant environment for various workers, not limited to freelance workers, considering recent diversified work contracts and various problems accompanied with them.

5. Thus, JFTC established the "Study Group on Human Resources and Competition Policy" (hereinafter referred to as the "Study Group") in Competition Policy Research Centre, which published a Report¹ in February 2018. Back then, the Report has seemed to contribute to promote a better understanding of competition issues among the persons involved in the human resources market, and also to raise awareness of contracting parties for competition compliance. In fact, some business associations have come to review their rules on contracts with workers which could distort competition.

1 "Report of Study Group on Human Resource and Competition Policy". See: <https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215.html>.

6. This contribution paper is organised as follows: first, it gives a clarification on the application of the AMA to the human resources market in section 2. Next, in section 3, it discusses the application of the AMA to contracting parties' activities, with reference to the unique characteristics of the human resources market. Then section 4 introduces responses of contracting parties to the publication of the Report and JFTC's future actions in this field. Lastly, section 5 briefly summarises the paper.

2. Relationship between labour and the AMA

7. In principle, agreements between entrepreneurs regarding their employees should be subject to the AMA. Also, trades between contracting parties and self-employed workers, unlike "traditional" workers covered by labour regulations, can be regulated under the AMA.

8. On the other hand, traditionally, it has been understood that employment contracts between entrepreneurs and their employees are not regarded as trade under the AMA, and they are out of the scope of regulations by the AMA, on the ground that such employees are protected by the labour legislation including labour standards law and labour union law.

9. Recently, as mentioned above, the number of freelance workers has been increasing, and it has become ambiguous whether contracts between freelance workers and contracting parties are substantively regarded as trade under the AMA or the employment contracts.

10. The emergence of legal gray area may have brought some obstacles for JFTC to conduct active and appropriate law enforcement or publish guidance in the human resources market except in a few cases as mentioned above.

11. Through this experience, JFTC has learned that it is essential to clarify the boundary between the AMA and labour laws in order to ensure that competition authority can properly deal with conducts in the human resources market.

3. Application of the AMA to the labour market

12. The Report discussed concerted practices by multiple employers or contracting parties and unilateral conduct by a single contracting party. This section explains each of those two types of activities.

3.1. Application of the AMA to concerted practices

13. It seems that concerted practices by multiple employers or contracting parties (hereinafter referred to as "employers" in the section 3.1) have a more negative impact on competition in the human resources market than unilateral actions. And, basically, JFTC understands that **agreements among employers on the terms of trade with employees or individual workers** (hereinafter referred to as "employees" in the section 3.1) should violate the AMA², because they are intended to restrict competition in the market, and as a result, have a very severe negative impact on the competition.

² Article 3 and Article 8 (1), (3) and (4) of the AMA.

14. However, because of the unique features of the human resources market, depending on the type of conduct, they may have effects other than those of restricting competition. Therefore, the Report concludes that the illegality should be judged through a consideration of multiple matters including whether such concerted practices also have pro-competitive effects, or social or public purposes, or whether they are reasonable as means for achieving the purposes.

15. For example, **agreements related to the wages or rewards paid to employees** prevent and avoid competition for acquiring human resources among employers in the market for human resources, as such prices are the most important means for competition. So, they become problems under the AMA, and normally, there is no room for consideration of whether such actions have pro-competitive effects, whether they have public-benefit purposes, or whether they are appropriate means.

16. On the other hand, under **agreements related to transferring or switching jobs (so-called no-poach agreements)**, employers restrict employees from transferring or switching jobs in order to recover the necessary investment costs for training which they have already spent. It can be argued that those restrictions for the later recoupment are necessary in order to keep employers' incentives on investment for human resource cultivation, which may have pro-competitive effects, although we should consider whether there can be other appropriate means to achieve the objective of recovering the cost of training; in other words, whether those agreements can be reasonable and proportionate to achieve the objective. The same argument applies to agreements to impose certain disadvantages to employees who are transferring or switching their jobs rather than restricting them directly.

17. In addition, conduct by a trade association, such as setting certain **qualifications or standards for employees to supply certain goods and services**, is considered not to present any particular issues under the AMA in general. However, it could be a problem in exceptional circumstances, depending on the content and the type of the conduct. For example, such qualifications and standards could impede competition in the markets for the goods and services by making it more difficult for certain employers to supply them because such employers could not secure sufficient human resources who satisfy the qualifications or standards.

18. Lastly, **exchanging past information and objective information** (not on important means for competition such as prices for current or future business activities) among employers would not directly become a problem under the AMA, unless such an information exchange could serve a purpose such as setting common benchmarks for current or future wages or rewards among employers.

3.2. Application of the AMA to unilateral conduct

3.2.1. Basic framework for analysis

19. The Report also describes the application of the AMA to various unilateral activities by a single contracting party. They are assessed in the light of following three points:

1. whether such conduct reduces free competition or substantially restraints competition in markets for goods and services provided by workers;
2. whether such conduct is unfair as a method of competing for human resources;

3. whether such conduct is an abuse of superior bargaining position to workers.
20. To be more precise about the approach mentioned above:
 1. some conditions imposed on workers by a contracting party to restrain or prohibit providing their services to other contracting parties or supplying goods and services to markets could become a problem under the AMA³ in the following cases:
 - when such restriction or prohibition tends to make it difficult for other contracting parties to supply the goods and services by making it impossible for them to secure workers needed to supply the goods and services or by increasing the costs of workers;
 - when such restriction or prohibition tends to make it difficult for workers to start supplying the goods and services or decrease their opportunities for trade.

Also, such 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 large share in the markets for the goods and services.

2. There are some activities by contracting parties regarded unfair as a means for competition. One of the unique features of the human resources market is that there is a gap of information and negotiation power between contracting parties, who are usually business entities with organisational capacity, and workers, as individuals. In this sense, because the lack of information regarding trade terms offered by contracting parties, workers cannot fully look for better job opportunities. As a result, the competition among contracting parties become less active. To enhance competition for human resources among contracting parties by offering better terms of working contracts than other contracting parties, it is essential that workers accurately understand such terms offered by contracting parties. Therefore, if a contracting party offers to workers inaccurate terms of working contracts, or if it carries out a transaction without sufficiently clarifying the terms, resulting in preventing workers from trading with other contracting parties, it could become a problem under the AMA as an unjust interference with competitors' transactions⁴.
 3. If a contracting party has a superior bargaining position to a worker and imposes disadvantageous terms of work contracts by taking advantage of the position, it can be regarded as an abuse of superior bargaining position⁵. A "superior bargaining position" is found where the worker needs to continue transactions with the contracting party as discontinuing the contracts substantially impedes its business and thus it cannot reject the disadvantageous terms offered by the contracting party.
21. In assessing whether the contracting party is in the "superior bargaining position", we should consider the following facts: (i) the degree of dependence of the worker on the contracting party in his or her business, (ii) the contracting party's position in the market, (iii) the worker's possibility of switching work contracts to the other contracting parties, and (iv) other specific facts which show that transactions with the contracting party are

3 For example, Paragraph 2 (other refusal to trade), 11 (trading on exclusive terms) or 12 (trading on restrictive terms) of the Designation of Unfair Trade Practices.

4 Paragraph 14 of the Designation of Unfair Trade Practices.

5 Article 2(5) of the AMA.

necessary for the worker. The gap of information and negotiation capability is considered here again, because it can make it difficult for workers to choose contracting parties and terms of work contracts freely at his or her discretion, resulting in the difficulty in switching contracting parties.

3.2.2. Specific unilateral conduct

22. Having explained the basic idea of the analysis under the AMA, the Report specifically focused on competition concerns including the following unilateral activities against workers by contracting parties: (i) **confidentiality obligation**, (ii) **non-compete obligation**, (iii) **exclusive obligation**, (iv) **restriction on uses of output produced through service provision** and (v) **offering inaccurate terms of trade**.

23. As these activities cannot necessarily be considered illegal under the AMA, we should carefully analyse their effects on competitions in the market of not just human resource but also the goods and services provided by the individual workers.

4. Contracting parties' responses and JFTC's future actions in the labour market

24. After the publication of the Report, JFTC has held lecture meetings for contracting parties and other parties for 32 times in various regions in Japan to let all of the parties concerned know the views shown in the Report. Also, there have been a number of face to face dialogues between JFTC and some business associations.

25. As a result of such continuous and patient efforts, recently, we have seen self-improvements to solve competition concerns by the contracting parties' side, and there have been some iconic movements by sports associations and show business associations. Japan Rugby Football Union has voluntarily abolished its "letter of permission" system, under which it is prohibited for any athletes having moved to another team to play in official games without a letter of permission by the previous team. Japan Boxing Commission has voluntarily revised their practices which can inhibit boxers from changing the gym that they belong to. Also, Japan Association of Music Enterprises is in the process of reviewing a transfer restriction clause in its model contract, by which clause entertainment agencies can be entitled to renew contracts with entertainers one time regardless of the entertainers' will. Moreover, Japan Industrial Track & Field Association are considering the revision of their rules which can prevent athletes from transferring to another team.

26. Although some serious cases should be subject to investigations, and strict measures if they violate the AMA, JFTC continues its effort to promote competition compliance environment in the human resources market.

5. Summary

27. The application of the AMA and basic approaches to anti-competitive activities by contracting parties have been clarified in response to the change in Japanese labour market, which is driven partly by tight labour shortage and the emergence of digital economy. Like in other markets, fair and free competition in the human resources market would lead to efficiency enhancement in the markets of labour or goods and services, and ultimately to enhancement of consumer welfare. In that sense, JFTC recognises that promotion of the

competition for the human resources market is one of the most important missions assigned to it.