

Report of Study Group on Human Resources and Competition Policy (Summary)

February 15, 2018

Background

- ❑ Competition for human resources is expected to intensify due to diversifications of work styles and labor shortages along with labor population decline.
- ❑ Japan Fair Trade Commission has established a study group on human resources and competition policy in the Competition Policy Research Center (CPRC) to sort out the views on applications of the Antimonopoly Act (AMA) to competition for human resources to facilitate pleasant environment for individual workers.

Highlights

Applications of the Antimonopoly Act to Concerted Practice of Contracting Parties (Employers)

- ❑ In principle, it becomes a problem under the AMA that contracting parties (employers) jointly determine prices paid to service providers.
- ❑ It could become a problem under the AMA that contracting parties (employers) jointly restrict service providers from transferring or switching jobs.
- ❑ Illegality is generally not denied even though contracting parties (employers) jointly restrict service providers from transferring or switching jobs in order to collect investment cost on training service providers. This is because other appropriate ways to collect investment cost may be available.
- ❑ For instance, if restriction of transferring or switching is jointly determined with the purpose of maintaining or improving the level of services provided by a professional sports league consisting of a number of teams, such circumstances are considered in assessing the legality of such conduct under the AMA.

Applications of the Antimonopoly Act to Unilateral Conduct of Contracting Parties

The views on following activities against service providers by contracting parties are organized based on current analytical framework from the perspective of reduction in free competition, unfairness of competitive means, abuse of superior bargaining position; 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.

- ❑ From a perspective of reduction in free competition, it generally becomes a problem under the AMA when a contracting party has a large share in certain good or service market, and its activity prevents its competitors from supplying goods or services in market or from entering market.
- ❑ Whether an alleged conduct has pro-competitive effects, social or public purposes, reasonable competitive means, and other factors are considered in assessing the legality under the AMA from a perspective of reduction in free competition.
- ❑ From a perspective of unfairness of competitive means, it could become a problem under the AMA when contracting parties offer inaccurate terms of trade or carry out a transaction without sufficiently clarifying terms of trade (e.g. restrictions on trading with other contracting parties) resulting in preventing service providers from trading with other potential contracting parties.
- ❑ From a perspective of abuse of superior bargaining position, it could become a problem under the AMA if a contracting party who has superior bargaining position against a service provider imposes a disadvantage on the service provider. Special circumstances of market of human resources where while contracting parties are usually corporations, most service providers work as sole proprietors are considered in assessing whether a contracting party has a superior bargaining position.

- ❑ If compensatory measures for a alleged conduct are taken, such facts and the reasonability of the contents and the level of the compensatory measures are considered in assessing the legality under the AMA from a perspective of abuse of superior bargaining position.

Undesirable Activities from a View Point of Competition Policy

- ❑ Imposing confidentiality obligation and non-compete obligation that the scope is unclear is not desirable since they would deter service providers from trading with (potential) contracting parties (employers). A possible solution is to formulate and publicize the best practices to encourage clarification of such scope in each industry.
- ❑ It is desirable that contracting parties clarify trade terms such as rewards and order contents in writing.
- ❑ It is not desirable that contracting parties require service providers to conceal their trade terms such as rewards to other service providers without rational reasons since concealing trade terms generates asymmetric information across service providers resulting in diminishing competitions among contracting parties.
- ❑ It is not desirable that contracting parties, who compete in obtaining service providers, offer price in an ambiguous manner to avoid competition for human resources.

(Reference) Study Group on Human Resources and Competition Policy

A study group is consisted of 12 members who are academic researchers, experts, and practitioners in competition law, labor law, industrial organization, labor economics, and labor market.

(1) Study Group Members

- Takeshi Araki, Professor, University of Tokyo Graduate Schools for Law and Politics
- Hiroshi Ohashi, Professor, Graduate School of Economics, the University of Tokyo (Chief Researcher, Competition Policy Research Center)
- Sachiko Kazekami, Associate Professor, Chukyo University School of Economics
- Keiji Kawai, Professor, Faculty of Policy Studies, Doshisha University
- Ryo Kambayashi, Professor, Institute of Economic Research, Hitotsubashi University
- [Chair] ▪ Fumio Sensui, Professor, Graduate School of Law, Kobe University
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- Akie Nakamura, Chief Researcher, Centre for Labour Policy, Recruit Works Institute
- Masako Wakui, Specially Appointed Professor, Graduate School of Law, Osaka City University (Chief Researcher, Competition Policy Research Center)

[As arranged according to the Japanese syllabary, with titles omitted; Official positions are as of February 1, 2018]

(2) Observers

Ministry of Education, Culture, Sports, Science and Technology (Japan Sports Agency)
Ministry of Health, Labour and Welfare
Ministry of Economy, Trade and Industry

(3) Secretariat

Economic Research Office, Economic Affairs Bureau, Japan Fair Trade Commission