

COMPETITION LAW AND SPORTS IN JAPAN: A NEW OLYMPIC LEGACY?



TOKYO 2020

BY SHINGO KASAHARA¹



¹ Director for Economic Research Office, Japan Fair Trade Commission.

CPI ANTITRUST CHRONICLE

APRIL 2020

CPI Talks...

...with James Keyte



Towards an Economic Theory of Amateurism: The NCAA, Antitrust, and the Student-Athlete

By John P. Bigelow & Kenneth G. Elzinga



The Equitable Future of Intercollegiate Athletics

By Michael D. Hausfeld, Sarah LaFreniere & Eduardo A. Carlo



The Antitrust Perils of Sports Data for U.S. Sports Leagues

By Gregory J. Pelnar



Game-Changer: Why the Saracens Decision Will Transform the Governance of Sport

By Benoît Keane



State Aid in Football: Fall-Out from the General Court's Judgments in the Valencia and Elche Appeals

By Peter Alexiadis & Teodor Asenov



Call Of Duty: The Yet Unknown Battlegrounds of EU Competition Law and Esports

Fredrik Löwhagen & Sinziana Ianc



Competition Law and Sports in Japan: A New Olympic Legacy?

By Shingo Kasahara



Visit www.competitionpolicyinternational.com for access to these articles and more!

CPI Antitrust Chronicle April 2020

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2020[©] Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

I. INTRODUCTION - HUMAN RESOURCES AND COMPETITION POLICY

A. Diversification of Work Styles

Recently in Japan, working patterns have become more and more diverse, and a certain proportion of workers have increasingly shifted from working as employees, to working as “freelancers” without being directed by any organization. It is said that the underlying reason for this trend is that the traditional Japanese employment system, which provides for lifetime employment and seniority-based promotion, will no longer meet the diversified working needs of industry. Open innovation and the digital economy have also made the use of external human resources more important for companies. In addition, expanding cloud-working and the sharing economy will result in more self-employed workers, including so-called “double-jobbers.”

This trend allows people to work flexibly according to their life stages, such as pregnancy and caregiving, and is thus expected to widen the labor supply base amid the rapidly aging population and declining birthrate in Japan. Nonetheless, the decrease in the workforce, as well as changes in industrial structure, have resulted in a shortage of human resources, particularly in business sectors with a growing demand for manpower.

B. A New Role to Play for Competition Policy

Issues relating to human resources traditionally have been dealt with by labor laws. This is not unique to Japan, and competition law enforcement has been very limited in this area worldwide. As self-employed workers increase in numbers, a significant proportion of labor-related contracts have been taking on the nature of transactions between businesses, and thus may fall within the scope of competition law scrutiny. As competition for human resources grows in importance due to the changes referred to above, anticompetitive practices are, concurrently, more likely to happen. Nonetheless, it is still unclear when and how competition law should intervene.²

Against this backdrop, the Japan Fair Trade Commission (“JFTC”) formed the “Study Group on Human Resources and Competition Policy” within its virtual think tank, the Competition Policy Research Center (“CPRC”). At the Study Group, twelve academics and practitioners from competition law, labor law, industrial organization, and labor economics fields discussed to identify: (i) where and how either competition law or labor law should be applied; and (ii) what types of conduct may be subject to Japanese competition law, or the Antimonopoly Act (“AMA”). Its report was published on February 15, 2018.³

² This discussion is also taking place at the international level. The OECD held a related meeting in February 2020. See <https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>.

³ <https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215.html>.

The report sets out a basic framework to apply the AMA to concerted and unilateral conducts commonly observed in various human resources markets. It also describes the role of competition law and policy in human resources markets as follows: Sound competition in human resources markets ensures appropriate revenues for workers and the efficient allocation of human resources in society (effects on the “input market”). Such optimal utilization of human resources leads to higher efficiency in product supply, which ultimately benefits consumer welfare (effects on the “output market”). The report also refers to the macroeconomic context, by claiming that competition policy in human resources markets can contribute to the easing of economic disparities and increasing wages.

C. JFTC Advocacy and Other Activities in Human Resources

Since the report was published, the JFTC has been actively holding meetings with a wide range of industries to better communicate the AMA framework and the competition policy approach to human resources. In addition to these advocacy efforts, interviews with companies, trade associations, and workers in various sectors are ongoing, in order to collect information about possible anticompetitive practices. The information gathered has been used to build cases under the AMA and, where necessary, to formulate guidance tailored to certain sectors.⁴

II. FACT-FINDING SURVEY IN SPORTS SECTORS

In the course of its information gathering, the JFTC observed that in many sports (both professional and amateur), the bodies that organize and govern leagues or competitions enforce various types of regulations that impose certain restrictions or conditions on player transfers between teams. Though the degree of restriction varies according to the specific regulations at issue, some of them may function as a horizontal agreement to hamper competition both in relevant input and output markets. In this light, to better understand how the regulations are implemented, the JFTC conducted an extensive fact-finding survey by researching the provisions of each regulation and holding interviews with various sports organizations. At the same time, the JFTC called for information from players and other relevant parties from December 21, 2018, to collect information on cases that may raise concerns under the AMA.

The survey concluded that transfer regulations can be categorized into three general categories:

- Banning transfers for an indefinite period or a certain period (e.g. 2 or 5 years) unless the player’s current team gives consent.
- Prohibiting in-season moves or limiting the number of transfers during the same season.
- Prohibiting appearance in remaining games of the same season following a transfer.⁵

Regulations of the first type in effect restrict player transfers, since they do not permit a transferring player to appear in games or competitions held by the organization. On the other hand, no regulation was found that prohibits any transfers regardless of conditions or circumstances.

The JFTC found various cases in which the transfer regulations potentially lead to anticompetitive impact, but no in-depth competition analysis was conducted in each individual case. With respect to input markets, there are many players hoping to move from one team to another (e.g. if they are not regularly played in matches), but were not permitted to do so, and thus could not play in events. Some such players were forced into retirement. Reduced player mobility sometimes resulted in situations where a potential new entrant gave up, due to being unable to gather enough players.

It is interesting to note that, compared to professional sports, amateur sports tend to have stricter regulations, and problems arise more frequently. One of the reasons for this is that amateur sports organization bodies and teams tend to preserve an old-fashioned mentality that requires players to respect a teacher-student relationship and dedication to a single team, and pay less attention to the business aspect of their activities.

4 The most high-profile actions by the JFTC are those in show business sectors. See <https://asia.nikkei.com/Business/Media-Entertainment/Don-t-block-ex-SMAP-members-watchdog-warns-talent-agency> and <https://www.japantimes.co.jp/news/2019/08/03/national/media-national/news-outlets-japan-less-afraid-tackle-entertainment-issues/#.XmnvAy2kXow>. The JFTC meanwhile announced a list of practices that may violate the AMA, including no-poaching agreements, non-compete clauses and others that impede appropriate mobility of human resources.

5 These regulations may be applicable concurrently with others.

III. AMA GUIDANCE ON TRANSFER REGULATIONS IN SPORTS SECTORS

The JFTC survey shows that many of the existing regulations may not be sufficiently rational and necessary from the antitrust standpoint, and may restrict competition in the hiring of human resources (namely players). The JFTC also learned that many parties involved in sports activities do not have sufficient awareness and knowledge of the applicability of the AMA to their activities.

In this light, on June 17, 2019, the JFTC released its “Guidance Concerning Regulations on Player Transfers in Sports Business Sectors.” The Guidance intends to raise awareness and understanding of the AMA in sports, and hence to better prevent transfer regulations that may produce anticompetitive effects both on input and output markets. The key elements of the Guidance are summarized below.

A. Sports and Competition Law

The Guidance starts with a simple explanation of why competition law applies to sports. Namely, while sports are played for leisure or for other purposes, they often also have an economic aspect (see B. below). As such, each sports team is treated as an “enterprise” under the AMA, and all are considered to compete as businesses as well as sporting rivals.

The Guidance also emphasizes that robust competition for player acquisition incentivizes teams’ efforts to improve themselves in terms of performance, salaries, training, and so forth, to better attract good players. This eventually benefits sports fans and overall consumer welfare.

B. Business Nature of Teams and Venues for Competition

Whether a sports team is deemed to be an enterprise under the AMA varies depending on the specific circumstances. The JFTC classifies sports teams into the following three types, and identifies: (i) what features of team’s activities have a business nature; and (ii) where economic competition occurs.

1. Professional Sports Teams⁶

This type of team is obviously a business entity. As participants in a professional sports league such as baseball or soccer, teams compete for the league title. By their nature, professional teams seek to earn profits from admission, broadcasting, sponsorship, etc., and thus compete on the supply side of the market for sports content (the output market). In addition, so as to achieve better business results, the teams compete on the demand side for human resources to acquire excellent players (the input market).

2. School Teams

In such sports as gymnastics and swimming, players often belong to a team that runs a school business. The school provides its members (customers) with training for a fee. Through these services, some members may achieve good results for the team in sports competitions, and those achievements can be used as a form of “advertising” for the school to draw more customers. In this context, competition in the school business takes place among the teams (the output market). Meanwhile, the teams also compete with one another to attract quality prospective players on the demand side for human resources (the input market).

3. Works Teams

Works teams are quite common in the Japanese amateur sports scene. This is the case not only in team sports (e.g. rugby, volleyball and marathon relay race, or *ekiden*), but also in individual sports such as table tennis. Companies have such teams for multiple reasons. Although they may enhance employee welfare and build corporate togetherness, they may also serve a business purpose. A company, through its sporting activities, can develop broader exposure of its name to the public via media coverage, and ultimately enhance its visibility and reputation. This forms part of

⁶ Even an amateur sports team (i.e. no remuneration is paid for players) may be included insofar as the team receives admission fees or other financial value as one of its material objectives.

the sales and promotional efforts for its goods or services. As a result, competition takes place in a certain product market (the output market).⁷ On the human resources market side, competition to hire better players is also observed among works teams (or companies) participating in the same sports league or tournament (the input market).

C. Theories of Harm on Transfer Regulations in Sports Sectors

In general, a mutual agreement among competitors to restrict the movement of their employees or other human resources (or not to poach them from competitors) is illegal in principle.⁸ Such an agreement set by a trade association is similarly illegal.⁹

With respect to sports, transfer regulations may cease or suppress competition for players (the input market). Such reduced competition could also lead to the cessation or suppression of competition in sports content business markets (the output market) where players are a very substantial input. Moreover, new entry into the output market would be hampered if a potential team cannot gather the necessary number of players.

D. Basic Framework to Evaluate Transfer Regulations

As noted in the JFTC survey, there are two major purposes for transfer regulations in sports. The first is to provide teams with more incentives to develop their own players by securing the recovery of up-front investments. The second is to maintain or improve attractiveness of a sports competition by balancing the strength of teams. In the antitrust context, both purposes may have procompetitive effects. Therefore, a transfer regulation implemented by a sports organization body (or teams in concert) should not always be regarded as illegal, even where the harms mentioned above emerge. Rather, an individual assessment on the rationality and necessity of each regulation is needed. More specifically, a comprehensive assessment must be made, based on various relevant factors from the standpoints of: (i) whether the purposes of the transfer regulation are rational even from an antitrust perspective; and (ii) whether the details of the regulation are necessary and proportionate to realize those purposes.

The Guidance also offers more detailed explanation of the elements to be considered, as set forth in the table below.

	Purpose 1 To increase teams' incentives to develop their own players by securing the recovery of up-front investments	Purpose 2 To maintain or improve attractiveness of a sports competition by balancing the strength of teams
Rationality of purpose	<ul style="list-style-type: none"> ➤ Rationality of the purpose ➤ Quantitative adequacy of the purpose 	
Examples	<ul style="list-style-type: none"> ✓ Is the secured recovery indispensable for carrying on the sports business? ✓ Does the cost to be recovered go beyond the degree required to ensure the incentives? 	<ul style="list-style-type: none"> ✓ Is team leveling mandatory for maintaining or improving the attractiveness? ✓ How essential is team leveling for carrying on the sports business? ✓ Does the team homogeneity go beyond the degree required to ensure the attractiveness?

⁷ In reality, most companies whose works teams join the same sports league often run different businesses from each other, which means they are in separate output markets. For instance, companies in the Japanese top-tier rugby league are diverse: beverages, automobiles, telecommunication, steel and so on. In such cases, the effect on output markets may not be subject to the AMA, because in Japan cartels have been narrowly interpreted to be limited to agreements among competitors. Nonetheless, they would still violate Article 8(iv) of the AMA, which prohibits a trade association from unjustly restricting members' functions or activities.

⁸ Article 3 of the AMA (unreasonable restraint of trade).

⁹ Article 8(i) of the AMA (substantial restraint of competition by a trade association). Even if the conduct does not substantively restrict competition, Article 8(iv) may be still applicable (unjust restriction of members' functions or activities).

Necessity & proportionality of regulation	<ul style="list-style-type: none"> ➤ Nexus between the regulation and its purpose ➤ Necessity/proportionality of restriction imposed for the purpose ➤ Less restrictive alternatives to realize the purpose 	
Examples	<ul style="list-style-type: none"> ✓ Do the details of the regulation (e.g. target players, duration and conditions) stay within the extent necessary to attain the purpose? ✓ Is any less restrictive alternative (e.g. transfer compensation) available? 	<ul style="list-style-type: none"> ✓ Does the regulation truly lead to balancing teams? (Transfer restriction narrows available choices for weaker teams, and may result in entrenching or widening team disparities.) ✓ Do the details of the regulation (e.g. target players, duration, conditions) stay within the extent necessary to attain the purpose? ✓ Is any less restrictive alternative (e.g. transfer compensation) available?

Again, sports sectors employ a wide variety of transfer regulations and their impacts are quite different from each other. Some directly or indirectly ban transfers for an indefinite period. As a general matter, the evaluation of regulations should be conducted on an individual basis. However, at least as far as such indefinite restrictions are concerned, neither rationality nor proportionality will be found in accordance with the framework set out in the Guidance.

IV. REACTIONS FROM SPORTS BUSINESSES

Along with disseminating the Guidance to the relevant parties, the JFTC has been calling on sports organizations to voluntarily review, and to amend if necessary, transfer regulations either in force or under consideration with reference to the Guidance. One reason not to immediately enforce the AMA is that many parties, especially those in amateur sports, were not sufficiently aware of the antitrust dimension of their regulations. The voluntary reviews can be expected through the increased awareness, and they can improve the situation more effectively.

Presumably in response to the message from the JFTC (or earlier discussion by the Study Group), many sports organizations have lifted or modified their regulations. For example, two works team sports associations, the rugby Top League and the badminton league, eliminated regulations that had imposed a suspension (for one or two years, respectively) on a player transferring without the ex-team's consent. In professional sports, the Japan Pro Boxing Association and the Japan Boxing Commission remedied a longtime unwritten practice that the Commission would not issue a license to a moving boxer unless their former boxing gym provided consent. In addition, the Japan Industrial Track & Field Association once enforced a regulation prohibiting an athlete that transferred without the consent of his/her former team from participating in works team races governed by the Association.¹⁰ From April this year, this exclusion will become applicable only to exceptional cases, and the exclusion term itself will be shortened to a maximum of one year.

V. CONCLUSION

With the JFTC initiatives and the subsequent actions by sporting organizations, it seems that most of the transfer regulations that raise obvious antitrust concerns have been redressed. Still, there remain various regulations that may potentially produce anticompetitive effects, but require far more detailed analysis in line with the framework set out in the Guidance. Some of these potentially problematic regulations are implemented even by major professional sports leagues, and many players and fans have questioned and criticized them. If self-assessment is no longer an effective solution, law enforcement must be the next option where appropriate.

¹⁰ This restriction is fatal to long-distance athletes because even marathoners normally can receive training opportunities within a works team community, and works teams are often reluctant to hire those who cannot contribute to *ekiden* races.

It is certain that current developments have been driven in part by the public atmosphere created through the Tokyo Olympic Games 2020 “Action & Legacy Plan,” which is a series of campaigns to pass on the positive benefits (legacies) of hosting the event to future generations.¹¹ The postponement of Tokyo 2020 due to the tragic worldwide coronavirus outbreak may, for better or worse, serve as “extra time” for further improvements. In this way, current global difficulties could be turned into further legacy of the forthcoming Olympic Games.

¹¹ <https://tokyo2020.org/en/games/legacy/>.



CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.

