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Global Legal Group



# The International Comparative Legal Guide to: Competition Litigation 2012

A practical cross-border insight  
into competition litigation work

Published by Global Legal Group, in association with  
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Allende & Brea  
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## Published by

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## GLG Cover Design

F&F Studio Design

## GLG Cover Image Source

iStockphoto

## Printed by

Ashford Colour Press Ltd  
September 2011

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ISBN 978-1-908070-07-4  
ISSN 1757-2819



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# Japan

Eriko Watanabe



Koki Yanagisawa



## Nagashima Ohno & Tsunematsu

### 1 General

#### 1.1 Please identify the scope of claims that may be brought in Japan for breach of competition law.

##### 1. Administrative sanctions and appeals

The Japan Fair Trade Commission (the “JFTC”) may issue a cease and desist order if it identifies a violation of the Antimonopoly Law. Moreover, the JFTC is required to issue an administrative surcharge payment order if it identifies the type of conduct that is provided under the Antimonopoly Law as that which is subject to administrative surcharges, i.e., conduct that constitutes: (a) a private monopolisation (i.e. the “control” of other entrepreneurs that relates to, or may affect, the price, or the “exclusion” of other entrepreneurs); (b) an unreasonable restraint of trade that relates to, or may affect, the price; or (c) certain types of unfair trade practices that are provided under the Antimonopoly Law as those that are subject to administrative surcharges (e.g., resale price maintenance).

An addressee of the JFTC orders, i.e. a defendant company, may file a complaint with the JFTC to quash such JFTC orders, if it has an objection against the JFTC orders. The complaint to quash the JFTC orders are examined through the administrative proceedings presided by the administrative judges appointed and authorised by the JFTC. While the administrative judges are independent from the General Secretariat of the JFTC, to which the investigators belong, as a matter of practice, the chairperson and commissioners of the JFTC make a decision on both the JFTC orders and the decisions through the JFTC’s administrative proceedings. The procedures for JFTC’s administrative proceedings are similar to those of civil actions.

The decisions rendered by the administrative judges through the JFTC’s administrative proceedings are subject to the judicial review through the judicial court proceedings (appellate judicial proceedings) as an administrative case, i.e., the defendant company may file a complaint with the Tokyo High Court to quash a JFTC decision under the Antimonopoly Law. In an action for quashing a JFTC decision, however, the Tokyo High Court is bound by the JFTC’s findings of fact as long as they are supported by substantial evidence. A defendant company may submit new evidence only if (i) the JFTC previously refused to accept the evidence without any justifiable reason, or (ii) the defendant company was not able to introduce the evidence at the JFTC’s administrative proceedings without its gross negligence. A JFTC decision may be quashed (i) if the facts on which it is based are not supported by substantial evidence, or (ii) if the decision is contrary to the Constitution or other laws.

The bill of amendment to the Antimonopoly Law that abolishes the JFTC’s administrative proceedings is under review by the National Diet. If the bill of amendment is passed by the National Diet, JFTC orders will be directly subject to review by judicial courts, without administrative proceedings, under the applicable administrative procedures laws.

##### 2. Criminal sanctions and appeals

The conduct that constitutes a private monopolisation or an unreasonable restraint of trade prohibited under the Antimonopoly Law is subject to the criminal penalties. The Antimonopoly Law stipulates a fine of 500 million yen or less for a company, and servitude (i.e., labour in prison) of 5 years or less and/or a fine of 5 million yen or less for an individual (e.g., an employee in charge of the conduct) with regard to a private monopolisation or an unreasonable restraint of trade.

The JFTC has an exclusive power to file an accusation for the criminal offences under the Antimonopoly Law with the Public Prosecutors’ Office. Once the Public Prosecutors’ Office decides to prosecute a criminal offence under the Antimonopoly Law, the procedures will be taken in accordance with the Criminal Procedures Law as a criminal case.

##### 3. Private actions

###### (1) Action for compensation of damages:

Any person who suffered damages by the conduct that constitutes a private monopolisation, an unreasonable restraint of trade or an unfair trade practice in violation of the Antimonopoly Law, is entitled to bring an action to the court on the grounds of either (i) strict liability under Article 25 of the Antimonopoly Law, or (ii) more general tort law under the Civil Code. A private action based on Articles 703 and 704 of the Civil Code may be available, depending on the cases. Complaints based on the strict liability under Article 25 of the Antimonopoly Law may be filed with the courts only after the JFTC’s decision through the JFTC’s administrative proceedings becomes irrevocable. Unlike the United States, Japanese law provides for collection of neither treble damages nor punitive damages, and there is no class action system under the Antimonopoly Law or the Civil Procedure Law.

In addition, there have been damage suits filed by residents representing local governments which have suffered damages due to bid-riggings in violation of the Antimonopoly Law and/or deliberative suits by the shareholders of companies with regard to the companies’ payments of the administrative surcharges due to conduct in violation of the Antimonopoly Law.

###### (2) Injunction:

Any person, whose interests are infringed or are likely to be infringed by activities that violate Article 8, item 5 (i.e., activities

by a business association that cause a member entrepreneur to employ unfair trade practices) or Article 19 (i.e., unfair trade practices by an entrepreneur) is entitled, under the Antimonopoly Law, to demand the suspension or prevention of such infringement from an entrepreneur or a business association if such person suffers or is likely to suffer material damages by such activities.

If a suit for such an injunction has been filed under the Antimonopoly Law, the court shall file a notice to the JFTC, and the court may request the opinion of the JFTC with respect to the application of the Antimonopoly Law and other necessary matters. The court may, upon motion, order the plaintiff to furnish an adequate security deposit at the request of the defendant company in order to prevent an abuse of such right.

The amendment of the Antimonopoly Law, effective as of January 1, 2010 (the “2010 Amendment”), introduced, for the purpose of strengthening the private enforcement of the Antimonopoly Law, special provisions pertaining to document production orders in judicial proceedings for injunctions with regard to the unfair trade practices.

## 1.2 What is the legal basis for bringing an action for breach of competition law?

Please see question 1.1 above.

## 1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is derived from national law.

## 1.4 Are there specialist courts in Japan to which competition law cases are assigned?

Please see question 1.1 above.

## 1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

1. Appeal of JFTC orders and the JFTC’s decision through the JFTC administrative proceedings

In accordance with Japanese administrative law, a person must have “standing” to bring an action against the JFTC for quashing a JFTC order. The addressee of a cease and desist order or an administrative surcharge payment order rendered by the JFTC may file a complaint against such JFTC orders and an appeal against the JFTC’s decision made in response to such complaint through the administrative proceedings.

2. Civil action

- (1) Actions for compensation of damages

A plaintiff who suffered damages due to the defendant’s conduct in violation of the Antimonopoly Law (e.g., competitors and customers) may file a complaint for compensation for damages. No class action is permitted under the Japanese law with regard to the violation under the Antimonopoly Law.

- (2) Injunctions

Please see question 1.1 above.

## 1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

1. Administrative proceedings

The JFTC’s administrative proceedings are sole and exclusive procedures to appeal JFTC’s orders. The Tokyo High Court has a sole and exclusive jurisdiction over the JFTC’s decisions made through the JFTC’s administrative proceedings.

2. Criminal sanctions

The district court has jurisdiction over the criminal case involving the violation of the Antimonopoly Law, in accordance with the Criminal Procedure Law. Antimonopoly Law provides that if an action is brought in a local district court, certain major district courts also have jurisdiction and a case may be transferred to such major district court.

3. Civil action

- (1) Actions for compensation of damages

The district court has jurisdiction in accordance with the Civil Procedure Law.

- (2) Injunctions

The district court has jurisdiction over the actions for injunction under the Antimonopoly Law. Antimonopoly Law provides that if an action is brought in a local district court, certain major district courts also have jurisdiction and a case may be transferred to such major district court.

## 1.7 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial, regardless of whether the process is for: (i) quashing JFTC orders; (ii) quashing the JFTC’s decisions made through the JFTC’s administrative proceedings; (iii) civil actions for compensation for damages or injunctive relief; or (iii) criminal prosecution. The court judges (or administrative judges with regard to the JFTC’s administrative proceedings) may hold hearings and examine the investigators/plaintiffs/accused and their witnesses, although an appeal to the Tokyo High Court is subject to the “substantial evidence rules”.

## 2 Interim Remedies

### 2.1 Are interim remedies available in competition law cases?

1. The JFTC may apply to the Tokyo High Court for an injunction to temporarily stop a person from continuing to do an act allegedly violating the Antimonopoly Law, if the JFTC successfully shows that the conduct against which the injunction is sought would gravely injure fair competition and the normal remedies could not effectively restore competitive conditions.
2. The JFTC orders become effective as of the date of the service thereof, and a filing of the complaint against the JFTC orders has no effect on the validity of the JFTC orders served to the defendant company. The defendant company is required to file an action to the judicial court to stop the enforcement of the JFTC’s cease and desist orders during the JFTC’s administrative proceedings and the appellate judicial proceedings in which the JFTC’s decision is reviewed by the court thereafter. If the defendant company delivers the deposit determined by the judicial court, the JFTC orders are delayed in its enforcement.
3. Civil action for injunction. Please see question 1.1 above.

## 2.2 What interim remedies are available and under what conditions will a court grant them?

Please see question 2.1 above.

## 3 Final Remedies

### 3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

#### 1. Cease and desist order

The JFTC may issue a cease and desist order to an entrepreneur who violated the Antimonopoly Law. The cease and desist order usually encompasses orders against the violator to cease and desist from continuing violation, to make a public notice thereof, and to take certain actions (e.g., periodic trainings and legal audit).

#### 2. Administrative surcharges

The JFTC is required to issue an administrative surcharge payment order, if it identifies the type of conduct that is provided under the Antimonopoly Law as that which is subject to administrative surcharges, i.e., conduct that constitutes: (a) a private monopolisation (i.e., the “control” of other entrepreneurs that relates to, or may affect, the price, or the “exclusion” of other entrepreneurs); (b) an unreasonable restraint of trade that relates to, or may affect, the price; or (c) certain types of unfair trade practices that are provided under the Antimonopoly Law as those that are subject to the administrative surcharges (e.g., resale price maintenance).

The calculation method is set out under the Antimonopoly Law. In essence, the amount of the administrative surcharge is determined based on the amount of sales of the product supplied or the service provided in violation of the Antimonopoly Law during the time period in which the violation continues (up to 3 years from the date such conduct ceased, i.e., immediately before the JFTC’s investigation started) by multiplying the rate prescribed under the Antimonopoly Law for each conduct in violation of the Antimonopoly Law, e.g., if a price fixing by manufacturers is involved, in principle, 10% of their total sales of the given product during the period of cartel participation (up to 3 years from the date such conduct ceased).

Moreover, an administrative surcharge will be increased by 50% for those entrepreneurs, in general, who have repeated conduct in violation of the Antimonopoly Law and who were subject to an administrative surcharge payment order within the last 10 years. On the other hand, an administrative surcharge decreased by 20% will be applicable to the entrepreneurs, in principle, if the duration of such conduct in violation of the Antimonopoly Law is less than 2 years and such conduct has ceased more than 1 month before the JFTC initiates an investigation.

The 2010 Amendment increases the administrative surcharge rates by 50% if a defendant company (i) planned the conduct that constitutes an unreasonable restraint of trade in violation of the Antimonopoly Law, (ii) requested another defendant company to conduct an act in violation of the Antimonopoly Law, or (iii) stopped other defendant companies from ceasing such conduct. Further, if the defendant company played a leading role in the conduct constituting an unreasonable restraint of trade and has repeatedly acted in violation of the Antimonopoly Law within the past 10 years, the amended Antimonopoly Law provides that the administrative surcharge will be twice the applicable administrative surcharge.

The JFTC has no discretion to increase/reduce administrative surcharges unless otherwise explicitly provided under the Antimonopoly Law (i.e., the leniency programme, the addition due to repeated violation/planning of cartel/stopping other entrepreneurs’ ‘withdrawal from cartel’ and the reduction for early termination), as described above.

#### 3. Civil damage action

The requirements for awarding civil damages under the general torts law are the illegality of the conduct at issue, occurrence of damages, causal relationship between the violation of the Antimonopoly Law and the damages, and negligence or wilfulness of the violator. Article 25 of the Antimonopoly Law does not require the negligence or wilfulness of the violator. The court may seek the JFTC’s opinion with regard to the damages if an action for damages is brought to the courts under Article 25 of the Antimonopoly Law.

### 3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

Please see questions 1.1, 3.1 and 5.2.

### 3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

Neither the administrative surcharges nor criminal fines are to be considered by the courts in awarding the damages.

## 4 Evidence

### 4.1 What is the standard of proof?

In criminal proceedings in connection with a violation of the Antimonopoly Law, the government must prove each element comprising the violation “beyond a reasonable doubt”. On the other hand, in JFTC administrative proceedings and appellate judicial proceedings (for challenging JFTC decisions) or civil proceedings (involving claims for injunctions and/or damages), a relatively relaxed standard of proof will apply. In these proceedings, the party with the burden of proof must prove that the alleged facts are “highly probable”.

### 4.2 Who bears the evidential burden of proof?

In criminal proceedings, the government bears the burden of proof to demonstrate violation of the Antimonopoly Law.

In JFTC’s administrative proceedings, the JFTC investigator bears the burden of proof to show that an entrepreneur has committed a violation of the Antimonopoly Law. Even in subsequent appellate judicial proceedings where JFTC decisions are challenged, the JFTC still must, in theory, prove the lawfulness of its decisions.

In civil proceedings, as in any civil tort cases, the plaintiff alleging the defendant’s violation of the Antimonopoly Law bears the burden of proof to demonstrate: (i) the illegality of the defendant’s conduct; (ii) damages; (iii) causal relationship between the damages and the violation; and (iv) negligence or willfulness of the violation.

#### 4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

In criminal proceedings, JFTC's administrative proceedings, and civil proceedings involving claims for injunctions and/or damages, there are no particular limitations on the forms of evidence that may be submitted, and expert evidence will be accepted at court and JFTC proceedings. In the appellate judicial proceedings for challenging JFTC decisions, a defendant company is not allowed to submit new evidence with the court under the "substantial evidence rule", which is a principle indicating that a reviewing court should uphold a JFTC decision if such decision is supported by evidence on which the JFTC could reasonably base its decision.

#### 4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

When a JFTC decision holding that an entrepreneur has committed a violation of the Antimonopoly Law has become irrevocable, the decision can be produced as proof of the illegality of the entrepreneur's conduct in a later civil action in which an injured party seeks compensation of damages suffered by the activities in violation of the Antimonopoly Law against the relevant entrepreneur.

A legally interested person, such as a plaintiff of a civil action involving the violation of the Antimonopoly Law, may request the JFTC for review and reproduction of the JFTC's case records (i.e., any documents prepared during the JFTC's administrative proceedings and all evidence submitted at that procedure, but does not include documents in the possession of investigators or any documents produced by investigators during their investigation) under the Antimonopoly Law. The amended Antimonopoly Law stipulates that the JFTC may restrict access to documents or otherwise impose conditions that are deemed proper in response to such request for reproduction.

Moreover, the JFTC made a public announcement in 1991 that the JFTC provides the plaintiffs access to certain investigation records which the JFTC collects during its investigation, through the request by the court if a damage suit is filed in the court, except for certain information such as trade secrets and privacy information, etc. Through these procedures, various documents, including the attorney client privileged documents which may be protected in other jurisdictions, may be filed for the judicial review. No particular procedures for the defendant's due process are provided under the Antimonopoly Law, and neither in the applicable rules nor policy itself.

#### 4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

In JFTC's administrative proceedings, there is no process by which witnesses may be forced to appear before the JFTC. On the other hand, the courts have such power in civil and criminal proceedings; however, the penalties to be imposed on witnesses who have failed or refused to appear before the courts are not severe. In general, witnesses are subject to cross-examination in relation to the matters raised during questioning in the examination. Even judges may supplementarily examine witnesses.

#### 4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

No. In practice, however, the JFTC seems to take account of the decisions by foreign authorities during the process of the investigation. With regard to the judicial court or administrative proceedings, we do not see such an influence.

#### 4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

It depends on the decision by the judges in the judicial proceedings/administrative judges of the JFTC's administrative proceedings. While the hearings must be, in principle, open to the public, certain evidence may be exchanged between the plaintiffs and defendants or investigators and defendant companies, without being made available to the public. The JFTC officials are under the obligation to not disclose any confidential business information under the Public Officers Act and Antimonopoly Law.

## 5 Justification / Defences

### 5.1 Is a defence of justification/public interest available?

A private monopolisation and an unreasonable restraint of trade prohibited under the Antimonopoly Law may, theoretically, be justified if they are not "contrary to the public interest". The Supreme Court held that even cartels could not be considered "contrary to the public interest" if such acts would not interfere with the ultimate purpose of the Antimonopoly Law, such as "promoting the democratic and wholesome development of the national economy" and "assuring the interests of general consumers". In practice, however, the JFTC definitely finds that the "contrary to the public interest" requirement is fulfilled as long as the entrepreneur's acts in question are deemed to have caused a "substantial restraint of competition".

### 5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

While the "passing on defence" itself is not recognised in Japan, passing on value (i.e., the amount that direct purchasers have collected from indirect purchasers) will theoretically be taken into account when calculating the amount of damage suffered by direct purchasers. Even indirect purchasers have legal standing to file a lawsuit to claim civil damages arising from a violation of the Antimonopoly Law. However, in cases involving both direct and indirect purchaser(s), it will not be easy in practice to prove the amount of damages as well as any causal relationship between the violation at issue and the alleged damages. Article 248 of the Civil Procedure Law could be of assistance in overcoming the practical obstacle involved in determining the amount of damage, as it allows the court to determine a reasonable amount of damage if it is extremely difficult to prove the amount thereof from the nature of the damage.

## 6 Timing

### 6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The JFTC's orders are subject to a statutory limitation period of 5 years from the date on which the violation ceased.

Civil damages claims should be initiated within (i) 20 years from the date on which the alleged violation first occurred, or (ii) 3 years from the date that the plaintiff first became aware of the alleged violation, whichever period may elapse earlier.

### 6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

According to the JFTC, the average period of the JFTC investigation in 2010 FY was 12 months and the JFTC Rules provide that 2 years are a target period for the completion of the JFTC's administrative proceedings. We do not have any specific period of time for appellate judicial proceedings in the Tokyo High Court and for civil actions. The duration of any given court proceeding may well depend on the complexity of the case, i.e., the arguments and evidence.

## 7 Settlement

### 7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

#### 1. JFTC's orders and JFTC's decisions

We do not have "Settlement Procedures" that is the same as, or similar to, those in EU under the Antimonopoly Law. Also, we do not have a concept of "settlement" with the JFTC with regard to the JFTC's orders during the administrative proceedings and appellate judicial proceedings.

#### 2. Civil actions

If the settlement between a plaintiff and a defendant is made during the process of the judicial court proceedings, the court is required to determine the terms and conditions of the settlement, i.e., the judges have a discussion with a plaintiff and defendant, respectively, and determine the terms and conditions agreeable by both plaintiff and defendant. However, parties may freely reach a settlement agreement any time without involvement of the judges, if it is not reached through the judicial court proceedings.

## 8 Costs

### 8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

#### 1. The JFTC's orders and decisions

The claimant/defendant cannot recover its legal costs.

#### 2. Civil actions

Usually the prevailing party in civil proceedings involving tort claims may recover its legal costs from the non-prevailing party in accordance with the decision by the court. However, the court usually limits the amount of recovery for attorneys' fees.

### 8.2 Are lawyers permitted to act on a contingency fee basis?

Yes, if it is within the reasonable extent.

### 8.3 Is third party funding of competition law claims permitted?

There are no explicit provisions under the Japanese law that prohibits such funding, and we do not have knowledge as to whether such practice exists.

## 9 Appeal

### 9.1 Can decisions of the court be appealed?

Civil and criminal proceedings on antitrust law claims are reviewed first in a district court, and then a high court and the Supreme Court in accordance with the Civil Procedure Law and Criminal Procedure Law, unless otherwise provided under the Antimonopoly Law. Please see question 1.1.

## 10 Leniency

### 10.1 Is leniency offered by a national competition authority in Japan? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

There is a leniency programme under the Antimonopoly Law with regards to cartels, i.e., the unreasonable restraint of trade. The 1st-in may enjoy 100% immunity, the 2nd-in may enjoy 50% and the 3rd-in through 5th-in may enjoy a 30% reduction of the administrative surcharges. The 2010 Amendment increased the number of leniency applicants up to 5 applicants; up to 5 applicants before a dawnraid, and up to 3 applicants after the JFTC conducts a dawnraid if there are less than 5 applicants before the dawnraid. The leniency applicant must provide the information/evidence valuable to the JFTC.

The 1st-in and its officers/employees may be exempt from the criminal accusation. No leniency applicant may be exempt from civil claims for compensation for damages or enjoy the reduction of the compensation for damages under the Japanese law.

### 10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

No. Evidence disclosed to obtain leniency may not be withheld in the administrative proceedings and appellate judicial proceedings. Please see question 4.4.

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Koki Yanagisawa is a partner in the Litigation Group of Nagashima Ohno & Tsunematsu. His practice focuses on resolution of disputes in the areas of antitrust law, commercial law and employment law. He has represented a variety of Japanese and foreign companies in a wide breadth of industries in litigation, arbitration and other dispute resolution procedures. His experience includes representations of clients in the administrative hearing procedure before the Japan Fair Trade Commission.

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