



ICLG

The International Comparative Legal Guide to:

Competition Litigation 2015

7th Edition

A practical cross-border insight into competition litigation work

Published by Global Legal Group, in association with CDR, with contributions from:

Advokatfirmaet Wiersholm AS

Albuquerque & Asociados

AlixPartners

Antitrust Advisory

Ashurst LLP

Bakouchi & Habachi - HB Law Firm LLP

bpv Hügel Rechtsanwälte

Cárdenas & Cárdenas Abogados

DeHeng Law Offices

Dittmar & Indrenius

DLA Piper Nederland N.V.

Drew & Napier LLC

J. Sagar Associates

Johnson Winter & Slattery

King & Wood Mallesons LLP

KLEYR GRASSO

Koutalidis Law Firm

LK Shields Solicitors

Minter Ellison Rudd Watts

Motieka & Audzevičius

Müggenburg, Gorches, Peñalosa y Sepúlveda, S.C.

Nagashima Ohno & Tsunematsu

Peters & Peters Solicitors LLP

Pinheiro Neto Advogados

Proskauer

Shin & Kim

Skadden, Arps, Slate, Meagher & Flom LLP

TGC Corporate Lawyers

Walder Wyss Ltd

Wilmer Cutler Pickering Hale and Dorr LLP



GLG

Global Legal Group

Contributing Editors

Euan Burrows & Mark Clarke, Ashurst LLP

Head of Business Development

Dror Levy

Account Directors

Antony Dine,
Florjan Osmani

Senior Account Managers

Maria Lopez, Oliver Smith,
Rory Smith

Sales Support Manager

Toni Wyatt

Editor

Beatriz Arroyo

Senior Editor

Suzie Levy

Group Consulting Editor

Alan Falach

Group Publisher

Richard Firth

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Ashford Colour Press Ltd.
September 2014

Copyright © 2014
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-910083-15-4

ISSN 1757-2819

Strategic Partners



General Chapters:

1	Impact of the EU Directive on Antitrust Damages Actions - Euan Burrows & Ruth Sander, Ashurst LLP	1
2	Light at the End of the Tunnel: Litigating Access to Cartel Leniency Documents in the EU - Frédéric Louis, Wilmer Cutler Pickering Hale and Dorr LLP	10
3	Dancing a Judicial Jig on the Tricolore or Playing by the Rules?: The Common Law Response to “Blocking Statutes” - Jonathan Tickner & Jason Woodland, Peters & Peters Solicitors LLP	18
4	Tyres, Umbrella Claims and Limitation Periods – Lessons from the English Courts in the Last 12 Months - Sarah Turnbull & Elaine Whiteford, King & Wood Mallesons LLP	23
5	Lessons in the Application and Importance of Economic Evidence in Standalone Private Actions in the UK Courts from 2010 to 2014 - Mat Hughes & Cherryl Ng, AlixPartners	28

Country Question and Answer Chapters:

6	Australia	Johnson Winter & Slattery: Aldo Nicotra & Johanna Croser	35
7	Austria	bpv Hügel Rechtsanwälte: Astrid Ablasser-Neuhuber & Florian Neumayr	41
8	Brazil	Pinheiro Neto Advogados: Cristianne Saccab Zarzur & Lilian Barreira Spina	49
9	China	DeHeng Law Offices: Ding Liang	54
10	Colombia	Cárdenas & Cárdenas Abogados: Ximena Zuleta-Londoño & Alberto Zuleta-Londoño	62
11	Czech Republic	TGC Corporate Lawyers s.r.o.: Petr Slabý & Andrea Kleinová	66
12	England & Wales	Ashurst LLP: Mark Clarke & Lorraine McLinn	71
13	European Union	Skadden, Arps, Slate, Meagher & Flom LLP: Ingrid Vandendorre & Stéphane Dionnet	86
14	Finland	Dittmar & Indrenius: Hanna Laurila & Toni Kalliokoski	95
15	France	King & Wood Mallesons LLP: Marc Lévy & Natasha Tardif	101
16	Greece	Koutalidis Law Firm: Stamatis Drakakakis	108
17	India	J. Sagar Associates: Amitabh Kumar & Amit Kapur	114
18	Ireland	LK Shields Solicitors: Marco Hickey	120
19	Japan	Nagashima Ohno & Tsunematsu: Eriko Watanabe & Koki Yanagisawa	128
20	Korea	Shin & Kim: Hyun Ah Kim & John Hyouk Choi	135
21	Lithuania	Motieka & Audzevičius: Ramūnas Audzevičius	140
22	Luxembourg	KLEYR GRASSO: Gabriel Bleser	147
23	Mexico	Müggenburg, Gorches, Peñalosa y Sepúlveda, S.C.: Esteban C. Gorches & Gabriel Barrera V.	152
24	Morocco	Bakouchi & Habachi - HB Law Firm LLP: Dr. Kamal Habachi & Salima Bakouchi	158
25	Netherlands	DLA Piper Nederland N.V.: Léon Korsten & Sophie Gilliam	163
26	New Zealand	Minter Ellison Rudd Watts: Oliver Meech & Nicko Waymouth	169
27	Norway	Advokatfirmaet Wiersholm AS: Anders Ryssdal & Monica Hilseth-Hartwig	176
28	Poland	TGC Corporate Lawyers: Beata Ordowska & Adam Dękierowski	182
29	Portugal	Albuquerque & Associados: António Mendonça Raimundo & Sónia Gemas Donário	188
30	Russia	Antitrust Advisory: Alexander Egorushkin & Evgeny Khokhlov	198
31	Singapore	Drew & Napier LLC: Cavinder Bull S.C. & Scott Clements	204
32	Slovakia	TGC Corporate Lawyers s.r.o.: Kristína Drábiková	211
33	Spain	King & Wood Mallesons LLP: Ramón García-Gallardo & Manuel Bermúdez Caballero	216
34	Switzerland	Walder Wyss Ltd: Reto Jacobs & Gion Giger	226
35	USA	Proskauer: Colin Kass & Scott M. Abeles	232

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

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 finds a violation of the Antimonopoly Law. Moreover, the JFTC is required to issue an administrative surcharge payment order if it finds the 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. Complaints to quash the JFTC orders are examined through administrative proceedings presided by the administrative judges appointed and authorised by the chairperson and commissioners of 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 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 judicial review through 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 on the JFTC’s orders 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 (“substantial evidence rule”). 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 abolishing the JFTC’s administrative proceedings was passed by the National Diet on 7 December 2013 and the amended Antimonopoly Law (the “2013 Amendment”) was promulgated on 13 December 2013. The 2013 Amendment will become effective by 13 June 2015 (the specific effective date is to be determined). Under the 2013 Amendment, JFTC orders will be subject to review by judicial courts, without going through administrative proceedings, under the applicable administrative procedures laws. More specifically, a defendant company may file a complaint directly with the Tokyo District Court to quash such JFTC orders. Complaints to quash the JFTC orders will be examined by a panel of three or five court judges. The aforementioned substantial evidence rule applicable to actions for quashing JFTC decisions before the Tokyo High Court under the current law will also be abolished. Namely, the Tokyo District Court will not be bound by the JFTC’s findings of fact and a defendant company may submit evidence to the judicial court proceedings without such restrictions as imposed by the substantial evidence rule. A JFTC order will be quashed if the judicial court finds that the order is contrary to the laws.

2. Criminal sanctions and appeals

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

order 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 1 January 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.

In addition to the above, the injunction under the Civil Procedure Law is also available for unlawful conduct, including the violation of the Antimonopoly Law if the requirements therefor are met.

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?

No special courts are assigned for civil actions. 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. Under the 2013 Amendment, the addressee of a cease and desist order or an administrative surcharge payment order rendered by the JFTC may file a complaint to quash such JFTC orders with the Tokyo District Court.

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 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 have been the sole and exclusive procedures to appeal the JFTC's orders under the current Antimonopoly Law. The Tokyo High Court has had sole and exclusive jurisdiction over the JFTC's decisions made through the JFTC's administrative proceedings. The 2013 Amendment will, however, abolish the JFTC's administrative proceedings and the Tokyo District Court will have the sole and exclusive jurisdiction over actions challenging the JFTC's orders, as the court of first instance.

2. Criminal sanctions

The district court has jurisdiction over criminal cases involving the violation of the Antimonopoly Law, in accordance with the Criminal Procedure Law. The 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 actions for injunction under the Antimonopoly Law. The 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 Does Japan have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction and if so, why?

Japanese laws do not have the system that attracts claimants or defendant applications to seize jurisdiction over civil cases. First, Japanese law does not provide claimants with favourable judicial system such as class actions, discovery, treble damages or punitive damages against defendant(s) who have violated Antimonopoly Law. Secondly, Civil Procedure Law regulates the jurisdiction of Japanese courts over cases with foreign elements, but it does not tend to provide broad jurisdiction, in that the law relatively strictly

requires a close relationship between the venue (i.e. Japan) and the key factor(s) involved in each case (such as the domicile of the defendant and the place where the tort is committed) in order for the case to be covered by the jurisdiction of Japanese courts. Furthermore, a Japanese court can deny its jurisdiction over cases with foreign elements if it considers, taking into account the nature of the case, the defendant's burden of responding to the complaint and locations of evidence, that there are special circumstances which impede fairness of the parties or fair and prompt hearing procedures. The foregoing circumstances do not allow Japanese courts to attract claimants and defendant applications to seize jurisdiction. Having said that, there are certain provisions under the Antimonopoly Law that assist plaintiffs/potential plaintiffs in their civil actions seeking the recovery of damages (e.g. the JFTC's opinion regarding damages and access to the case record of the JFTC. See question 4.4 with regard to access by a plaintiff/potential plaintiff to the JFTC's case record/collected evidence) and the plaintiff/potential plaintiff may consider the use of such assistance.

1.8 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 (iv) 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 under the current Antimonopoly Law 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 until such orders become irrevocable. If the defendant company delivers the deposit determined by the judicial court, the JFTC orders are delayed in their 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 a 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 finds conduct in violation of the Antimonopoly Law, 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 and ratio of the surcharge that is different depending on the types of conduct in violation of the Antimonopoly Law, 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 three years before the date such conduct ceased, i.e., the JFTC usually finds the conduct ceased at the time of the JFTC's dawn raid or when the investigation is made public), by multiplying the rate prescribed under the Antimonopoly Law for each conduct in violation of the Antimonopoly Law.

For example, if a price fixing by manufacturers is involved, in principle, 10 per cent of their total sales of the given product during the period of cartel participation (up to three years before the date such conduct ceased). Moreover, an administrative surcharge will be increased by 50 per cent 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 per cent will be applicable to the entrepreneurs, in principle, if the duration of such conduct in violation of the Antimonopoly Law is less than two years and such conduct has ceased more than one month before the JFTC initiates an investigation. Furthermore, the administrative surcharge is increased by 50 per cent 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.

The JFTC has no discretion to increase/reduce administrative surcharges unless otherwise explicitly provided under the Antimonopoly Law (e.g. the leniency programme and adjustment 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 (i) JFTC administrative proceedings and appellate judicial proceedings (to quash JFTC decisions) under the current Antimonopoly Law, (ii) judicial proceedings to quash JFTC orders under the 2013 Amendment, or (iii) 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 a 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 the judicial proceedings where JFTC orders are challenged under the 2013 Amendment, the JFTC will bear the burden of proof to show that an entrepreneur has committed a violation of the Antimonopoly Law.

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 illegal conduct of the defendant; (ii) damages; (iii) causal relationship between the damages and the violation; and (iv) negligence or wilfulness of the violator.

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, the JFTC's administrative proceedings, judicial proceedings where JFTC orders are challenged under the

2013 Amendment, 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 to quash JFTC decisions under the current Antimonopoly Law, 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. Such "substantial evidence rule" will be abolished by the 2013 Amendment and then the reviewing court will not be bound by the JFTC's fact-findings and a defendant company may submit evidence to the court proceedings where a JFTC order is challenged without such restrictions as imposed by the substantial evidence rule.

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 order or decision holding that an entrepreneur has committed a violation of the Antimonopoly Law has become irrevocable, the order or decision can be produced as proof of the illegality of the entrepreneur's conduct in a later civil action, in which a damaged 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 or a potential plaintiff of a civil action involving the violation of the Antimonopoly Law, may request the 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 not including documents in the possession of investigators or any documents produced by investigators during their investigation) under the Antimonopoly Law. The 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 with access to certain investigation records which the JFTC collects during its investigation, through a 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 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.

Under the proceedings to be introduced by the 2013 Amendment, any person may request the review of case records of the judicial proceedings where JFTC orders are challenged, pursuant to the Civil Procedure Law. Reproduction of case records is available only for parties to the case (i.e. a defendant company and the JFTC) as well as legally interested persons. Under the Civil Procedure Law, parties to the case (i.e. a defendant company or the JFTC) can file a petition requesting a court order to prevent any third party from reviewing case records which include privacy information or trade secrets.

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

In the JFTC's administrative proceedings, while there is no process by which witnesses are directly forced to appear before the JFTC, penalties may be imposed on witnesses who do not appear before the JFTC, in breach of the JFTC's summons to appear. On the other hand, in judicial proceedings (i.e., both criminal and civil proceedings) the court may order a subpoena of witnesses who do not voluntarily appear before the court, without justifiable reason, by which such witnesses would be forcibly taken before the court. Penalties may also be imposed on witnesses who have failed, or refused, to appear before the court, although such penalties 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, or by the 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. JFTC officials are under the obligation not to disclose any confidential business information under the Public Officers Act and Antimonopoly Law.

4.8 Is there provision for the national competition authority in Japan (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

There is no explicit provision under the Antimonopoly Law by which the JFTC is obligated to make its findings and analysis for a particular case public. However, the Antimonopoly Law provides that the JFTC may make the matters public to the extent necessary for the operation of the Antimonopoly Law (excluding the business secret), and the JFTC usually makes a public announcement of the conclusion of its investigation, i.e., the JFTC makes public the order, fact findings and application of the Antimonopoly Law for almost all cases for which the JFTC has conducted formal investigations.

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 five 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) three years from the date on which 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 a JFTC investigation in 2012 FY was 14 months (no information is made public for 2013 FY) and the JFTC Rules provide that two years are a target period for the completion of the JFTC's administrative proceedings. We do not have any specific period of time for judicial proceedings. 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 are the same as, or similar to, those of the 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 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 at 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 a reasonable extent.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

There are no explicit provisions under Japanese law that prohibit such funding. 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. Under the 2013 Amendment, the Tokyo District Court decisions over complaints to quash JFTC orders can be appealed to the Tokyo High Court and then to the Supreme Court. 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 regard to cartels, i.e. the unreasonable restraint of trade. The first in may enjoy 100 per cent immunity, the second in may enjoy 50 per cent and the third in through to the fifth in may enjoy a 30 per cent reduction of the administrative surcharges. The 2010 Amendment increased the number of leniency applicants up to five applicants; up to five applicants before a dawn raid, and up to three applicants after the JFTC conducts a dawn raid if there are less than five applicants before the dawn raid. The leniency applicant must provide the information/evidence valuable to the JFTC.

The first in and its officers/employees may be exempt from criminal accusation. No leniency applicant may be exempt from civil claims for compensation for damages or enjoy a reduction in compensation for damages under 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 (other than the oral statements provided to the JFTC) may not be withheld in the administrative proceedings and subsequent judicial proceedings. Please see question 4.4.

11 Anticipated Reforms

11.1 Highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that may be required.

We do not anticipate any direct impact on competition litigation in Japan.

11.2 Are there any other proposed reforms in Japan relating to competition litigation?

The bill of amendment to the Antimonopoly Law abolishing the JFTC’s administrative proceedings was passed by the National Diet on 7 December 2013 and the amended law was promulgated on 13 December 2013. The amendment will become effective by 13 June 2015 (the specific effective date is to be determined). Under the amended law, JFTC orders will be directly subject to review by judicial courts, without going through the JFTC’s administrative proceedings. Please see questions 1.1, 1.5, 1.6, 4.2, 4.4 and 9.1.

**Eriko Watanabe**

Nagashima Ohno & Tsunematsu
Kioicho Building, 3-12, Kioicho, Chiyoda-ku
Tokyo 102-0094
Japan

Tel: +81 3 3511 6131
Fax: +81 3 5213 2231
Email: eriko_watanabe@noandt.com
URL: www.noandt.com

Admitted to Bar: 1988, Japan.

Education: Tohoku University (LL.B.). University of Washington School of Law (LL.M.).

Professional Experience: Kirkland & Ellis, Chicago, 1994-1995. The Fair Trade Commission of Japan, 1995-1998. Keio University, Law School Professor (Antitrust and Corporate Law), 2004-2007.

Languages: Japanese and English.

Practice Areas: Antitrust/Competition Law.

Major Publications (English): "Regulation on Setting Technology Standards Under The Antimonopoly Law of Japan" Washington University Global Studies Law Review (2002). "Japan: Reform of the Enforcement Regime of the Antimonopoly Law (2006)" Concurrences (2006). "Defense Strategies for International Cartel Cases - A Japan Perspective" ABA International Cartel Workshop (2004, 2006 and 2008). "Anti-Cartel Enforcement in Japan and Proposed Amendment to the Antimonopoly Law in 2008" ABA International Competition Conference (2008). "Merger Control Worldwide" (Japan part) Cambridge University Press (2008). "Anti-Cartel Enforcement Worldwide" (Japan part) Cambridge University Press (2008). "Merger Control Worldwide" (Japan part) Cambridge University Press (2010). "Doing Business in Japan - Competition Law" Matthew Bender (2010 and 2011).

**Koki Yanagisawa**

Nagashima Ohno & Tsunematsu
Kioicho Building, 3-12, Kioicho, Chiyoda-ku
Tokyo 102-0094
Japan

Tel: +81 3 3511 6250
Fax: +81 3 5213 2350
Email: koki_yanagisawa@noandt.com
URL: www.noandt.com

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. He was named as one of the top 40 antitrust lawyers under 40 by Global Competition Review in 2012.

Mr. Yanagisawa joined Nagashima Ohno & Tsunematsu in 2001. He earned his LL.B. in 2000 from the University of Tokyo, and his LL.M. in 2007 from Columbia Law School, where he was a Harlan Fiske Stone Scholar. He worked as a visiting attorney at Debevoise & Plimpton LLP in New York City from 2007 to 2008.

NAGASHIMA OHNO & TSUNEMATSU

Nagashima Ohno & Tsunematsu, having offices in Tokyo, New York, Singapore, Bangkok and Ho Chi Minh City, is widely known as a leading law firm and a foremost provider of international and commercial legal services in Japan. The firm represents domestic and foreign companies and organisations involved in every major industry sector and in every legal service area in Japan. The firm has structured and negotiated many of Japan's largest and most significant corporate and finance transactions, and has extensive litigation strength spanning key commercial areas, including intellectual property and taxation. The firm comprises around 340 lawyers (including 11 foreign attorneys) capable of providing its clients with practical solutions to meet their business needs.

With one of the largest legal teams in the country, the firm brings a wealth of practical knowledge focused on the singular purpose of providing high-quality legal expertise for developing optimum solutions for any business problem or goal that its clients may have. The firm, with its knowledge and experience across a full range of practice areas, is always prepared to meet the legal needs of its clients in any industry.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk