



ICLG

The International Comparative Legal Guide to:

Competition Litigation 2018

10th Edition

A practical cross-border insight into competition litigation work

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EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Competition Litigation*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of competition litigation.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting competition litigation work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in competition litigation in 29 jurisdictions.

All chapters are written by leading competition litigation lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Euan Burrows of Ashurst LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction 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 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 an order by the JFTC, i.e. a defendant company, may file a complaint with the Tokyo District Court to quash such JFTC order, and 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. Prior to the amendment to the Antimonopoly Law which became effective as of April 1, 2015 (“2015 Amendment”), complaints to quash JFTC orders were examined through administrative proceedings presided by the administrative judges appointed and authorised by the chairperson and commissioners of the JFTC. JFTC orders, the relevant advance notice of which was rendered prior to April 1, 2015, shall still be subject to the administrative proceedings of JFTC pursuant to the Antimonopoly Law before the 2015 Amendment.

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 rendered by the administrative judges through the JFTC’s administrative proceedings, 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”). Under the substantial evidence rule, a defendant company may submit new evidence to the judicial court proceedings only if (i) the JFTC previously refused to accept the evidence without any justifiable reason, or (ii) the defendant company was not grossly negligent for failing to introduce the evidence at the JFTC’s administrative

proceedings. 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.

Under the current Antimonopoly Law, effective as of April 1, 2015, JFTC orders are subject to review by judicial courts, without going through administrative proceedings, under the Administrative Case Litigation Law. More specifically, a defendant company may file a complaint directly with the Tokyo District Court to quash such JFTC order within six months after the service of process of the order on the defendant company. Complaints to quash JFTC orders are 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 previous law has been abolished. Namely, the Tokyo District Court shall 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 shall be quashed if the judicial court finds that the order is contrary to the laws. A defendant company and the JFTC may file an appeal against a judgment rendered by the Tokyo District Court with the Tokyo High Court where the appeal will be reviewed by a panel of three or five judges. An appeal against a judgment rendered by the Tokyo High Court to the Supreme Court can be accepted if certain requirements set forth in the Civil Procedure Law are fulfilled.

2. Criminal sanctions and appeals

Criminal penalties may be imposed on a conduct that constitutes a private monopolisation or an unreasonable restraint of trade prohibited under the Antimonopoly Law. 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 court 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 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 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 your jurisdiction 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? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

1. Appeal of JFTC orders and the JFTC decisions through JFTC administrative proceedings

In accordance with Japanese administrative law, a person must have "standing" to bring an action for quashing a JFTC order. Under the current Antimonopoly Law, 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. Under the Antimonopoly Law before the 2015 Amendment, 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. Neither collective claims nor 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

Under the current Antimonopoly Law, the Tokyo District Court has the sole and exclusive jurisdiction over actions challenging the JFTC's orders, as the court of first instance, while the JFTC's administrative proceedings still exist for the transitional period. Please see question 1.1 above.

2. Criminal sanctions

A district court has jurisdiction over criminal cases involving the violation of the Antimonopoly Law, as the court of first instance, 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

A district court has jurisdiction over civil actions for compensation of damage arising from violation of the Antimonopoly Law, as the court of first instance, in accordance with the Civil Procedure Law. Complaints based on the strict liability under Article 25 of the Antimonopoly Law shall be subject to the sole and exclusive jurisdiction of the Tokyo District Court, as the court of first instance, under the current Antimonopoly Law, while the Tokyo High Court had the sole and exclusive jurisdiction over such complaints as the court of first instance before the 2015 Amendment.

(2) Injunctions

A 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 your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Japanese laws do not have a system that attracts claimants or defendant applications to seize jurisdiction over civil cases. First, Japanese law does not provide claimants with a favourable judicial system such as class actions, discovery, treble damages or punitive damages against defendant(s) who have violated the 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's administrative proceedings) and the JFTC's policy to allow the access of the evidence collected by the JFTC during the process of its investigation. See question 4.5 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 under the Antimonopoly Law before the 2015 Amendment; (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 where the parties involved (i.e., plaintiffs and defendants or the JFTC investigators and defendant companies) and may examine their witnesses, although an appeal to the Tokyo High Court under the Antimonopoly Law before the 2015 Amendment was 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 District Court for an injunction to temporarily stop a person from continuing to

perform 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 to quash the JFTC orders has no effect on the validity of the JFTC orders served on the defendant company. Upon filing a complaint to quash the JFTC's cease and desist order, the defendant company is required to file an action to the judicial court to stop the enforcement of such order in accordance with the Administrative Case Litigation Law. If the defendant company successfully demonstrates that there is an urgent necessity to avoid grave damage to be caused by the enforcement of the given JFTC order, the judicial court will render a judgment to suspend the enforcement of such order. However, it is considered practically difficult for defendant companies to obtain a judgment to suspend the enforcement under the Administrative Case Litigation Law since the aforementioned requirement of "urgent necessity" would hardly be fulfilled.
3. Civil action for injunction under the Antimonopoly Law is available for the activities by a business association that cause a member entrepreneur to employ unfair trade practices and the unfair trade practices by an entrepreneur. Please see question 1.1 above. In addition, civil action for injunction for other conducts that violate or are likely to violate the Antimonopoly law is available under the Civil Code.

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. providing periodic trainings for employees and conducting 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, and (ii) requested another defendant company to conduct an act in violation of the Antimonopoly Law or 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, etc. 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? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Please see questions 1.1, 3.1, 4.3 and 5.2.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement 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. Under Japanese law, there is no special redress scheme offered to those harmed by the infringement.

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 Antimonopoly Law before the 2015 Amendment, (ii) judicial proceedings to quash JFTC orders under the current Antimonopoly Law, 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 (i.e., the JFTC or plaintiff) 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 and the subsequent appellate judicial proceedings where JFTC decisions are challenged, the JFTC investigator bears the burden of proof to show that an entrepreneur has committed a violation of the Antimonopoly Law. In the judicial proceedings where JFTC orders are challenged under the current Antimonopoly Law, 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 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

The Antimonopoly Law does not provide presumptions of loss in cartel cases.

The Supreme Court decision of December 8, 1989 held that the damages shall be the difference between the actual sales price and the sales price that would have been formed but for the cartel in question ("expected sales price") and that the sales price immediately before the cartel can be presumed to be the expected sales price unless significant changes in economic factors such as economic conditions and market structures occur between the time of the cartel and the time when customers purchase the goods at issue.

The Supreme Court decision also held that plaintiffs must prove that there is no such significant change and, if such proof is not possible, the presumption shall not be available and plaintiffs (indirect purchasers) must prove the expected sales price based on factors of price formation such as specific features of formation of sales price. The decision was sharply criticised in that plaintiffs must bear the burden of almost impossible proof.

Article 248 of the Civil Procedure Law which came into force in 1998 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, and such provision plays an important role in damage claims in general. Under Article 248, recent court decisions tend to find that the amount of damage shall be equivalent to 5 to 10 per cent of the actual contract price in bid-rigging cases.

One of the recent Tokyo High Court decisions held that the amount of damage caused by bid-rigging shall be the difference between the actual contract price and the expected contract price and that

the expected contract price shall be presumed to be the aggregate amount of (i) one-fifth of the contract price immediately after the end of the bid-rigging, and (ii) four-fifths of the total amount of manufacturing cost and expenses as well as expected profits.

4.4 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 current Antimonopoly Law, 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 Antimonopoly Law before the 2015 Amendment, 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 a "substantial evidence rule" has been abolished by the 2015 Amendment and the reviewing court is not 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.

4.5 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 a 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 created/collected by investigators during the course of their investigation but not submitted to the JFTC's administrative procedure) 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 in this respect are provided under the Antimonopoly Law, and neither in the applicable rules nor policy itself.

Under the current Antimonopoly Law, 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.

Furthermore, the current Antimonopoly Law allows a defendant company to request the JFTC to disclose the evidence supporting the alleged violation of the Antimonopoly Law during the procedures prior to the JFTC's rendition of cease and desist order, and the JFTC is not allowed to refuse the request for disclosure without justifiable reasons such as a risk of infringing the interests of third parties.

4.6 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.

4.7 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.

4.8 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. Under the Civil Procedure Law, a party to the case can file a petition requesting a court order to prevent any third party from reviewing case records which include privacy information or trade secrets. JFTC officials are under the obligation not to disclose any confidential business information under the Public Officers Act and Antimonopoly Law.

4.9 Is there provision for the national competition authority in your jurisdiction (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 business secrets), 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.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Under the Civil Procedure Law, a person who has legal interests in the result of lawsuit is allowed to intervene in such lawsuit in order to assist one of the parties thereof. Namely, the court judgment on

the merits in the lawsuit will not directly apply to the intervener, but the intervener is not allowed to raise objections to the facts found by the judgment in a subsequent potential lawsuit between the defendant and the intervener. It would theoretically be possible, on the ground thereof, for a cartel participant to join a lawsuit involving other cartel participants as an intervener, as opposed to a co-defendant. However, there are no advantages for a cartel participant to intervene in such lawsuit and we do not see any specific case where such intervention occurred in cartel cases.

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 elapses 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 thereafter) and the JFTC Rules provide that two years are a target period for the completion of the JFTC’s administrative proceedings. With regard to the judicial proceedings, the Law on Expediting Trials provides that two years are a target period for the completion of the first instance of the judicial proceedings. In practice, however, the duration of any given court proceeding may well depend on the complexity of the case, i.e., the arguments and evidence submitted to the proceeding.

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.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

No collective claims, class actions and representative actions are permitted in Japan.

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 which is equal to one-tenth of the amount of damages awarded for a plaintiff by the court through the given proceedings.

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 current Antimonopoly Law, 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 your jurisdiction? 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 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 fewer 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 4.5.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

Competition litigation that is raised in Japan is subject to the Japanese law. We do not anticipate any direct impact on competition litigation in Japan.

11.2 Have any steps been taken yet to implement the EU Directive on Antitrust Damages Actions in your jurisdiction?

This is not applicable in Japan.

11.3 Please identify with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation or, if some other arrangement applies, please describe.

This is not applicable in Japan.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

The 2015 Amendment abolishing the JFTC's administrative proceedings became effective as of April 1, 2015. Please see questions 1.1, 1.5, 1.6, 4.2, 4.4, 4.5 and 9.1.

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