THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Fifteenth Edition

Editors
Ilene Knable Gotts and Kevin S Schwartz

THE LAWREVIEWS

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. Antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed, using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: it has had private litigation arise involving non-compete clauses since the beginning of the twentieth century, and monopoly or market closure claims since the 1950s. In the past decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria), and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In addition, other jurisdictions (e.g., Switzerland) still have very rigid requirements for standing, which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government has undertaken a comprehensive review and has implemented significant changes to its private enforcement

law. The most significant developments, however, are in Europe as the EU Member States implement the EU's directive on private enforcement into their national laws. The most significant areas standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period and privilege. Member States continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In South Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there has been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a preferred jurisdiction for commencing private competition claims. Collective actions are now recognised in countries such as Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have taken steps to facilitate collective action or class action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the public interest.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must opt out of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must opt in to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions, such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority

acts that a private action will be decided by the court. Of course, in the UK – a jurisdiction that has been one of the most active and private-enforcement-friendly global forums – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the Competition Commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on private litigation cases and whether documents in the hands of the competition agency are discoverable (see, for example, Sweden). Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on effects within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider spillover effects from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Israel, Japan, the Netherlands, Norway, South Korea and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will, in certain circumstances, award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for unjust enrichment by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is, in essence, consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in a case (e.g., in Brazil, as well as in Germany, where the competition authorities may act as amicus curiae).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for

punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can obtain unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct, and in Israel, a court recently recognised the right to obtain additional damages on the basis of unjust enrichment law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and South Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, South Korea and Switzerland), several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Proceedings Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Japan, the Netherlands, South Korea, Spain and Switzerland) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In South Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney–work product or joint work product privileges exist in Japan; pre-existing documents are not protected in Portugal; there is limited recognition of privilege in Germany and Turkey; and extensive legal advice, litigation and common interest privilege exist in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority.

Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries, and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change through both proposed legislative changes and court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts and Kevin S Schwartz
Wachtell, Lipton, Rosen & Katz
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Chapter 14

JAPAN

Koki Yanagisawa[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In Japan, the number of cases categorised as private antitrust litigation has been relatively small over the years. This is partly because claimants have to overcome difficulties in bringing claims before the court under Japanese civil court proceedings where there is no comprehensive discovery system or class action system, unlike in the United States. In addition, it appears that most of the disputes involving potential claims based on breach of antitrust law in Japan have been settled by negotiations between the parties prior to bringing the claims to the court.

Nevertheless, there is a recent trend of Japanese courts receiving claims for compensation for damages arising from 'unfair trade practice' such as 'abuse of a superior bargaining position', which is one of the major forms of conduct prohibited by the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (the Antimonopoly Act). As a background to this trend, the Antimonopoly Act was amended in 2009 to introduce an administrative surcharge payment order on certain types of unfair trade practices. Pursuant to the amendment, the Japan Fair Trade Commission (JFTC) rendered a series of cease-and-desist orders and administrative surcharge payment orders against business entities that allegedly engaged in abuse of superior bargaining position from 2011 to 2013. While the JFTC orders were challenged by the entities and some of the cases are still pending before the court, the authors are of the view that the JFTC orders encouraged private antitrust claimants to file claims for compensation for damage against the businesses that allegedly committed abuse of superior bargaining position. The JFTC's enforcement of law pursuant to the 2009 amendment have caused the above-mentioned trend in antitrust litigation.

Furthermore, in March 2021, the JFTC, the Small and Medium Enterprise Agency (an affiliated agency of the Ministry of Economy, Trade and Industry) and the Ministry of Health, Labour and Welfare jointly issued the Guidelines for Secure Working Conditions for Freelancers (the Freelancers Guidelines). On the basis of the perception that Japan should comprehensively develop rules to develop environments in which freelancers can work securely, the Japanese government decided to formulate the Freelancers Guidelines to clarify practices considered to be problematic under the Antimonopoly Act and the Act against Delay in Payment of Subcontract Proceeds to Subcontractors with regard to trade relationships between businesses and freelancers. Because these problematic practices mainly consist of 'abuse of a superior bargaining position', the Freelancers Guidelines provide a basic interpretation of the abuse of a superior bargaining position for freelancers in line with the

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Guidelines concerning Abuse of Superior Bargaining Position under the Antimonopoly Act issued by the JFTC in 2010. The Freelancers Guidelines are expected to encourage freelancers to bring claims against businesses largely based on abuse of a superior bargaining position.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Damages claims

Article 709 of the Civil Code

Article 709 of the Civil Code provides the grounds for a claim for compensation for damage caused by general tort. Under Article 709, any person who has engaged in conduct violating the rights or legally protected interests of another person must compensate the damage arising from the conduct. A claimant who has suffered damage by anticompetitive conduct that constitutes private monopolisation, unreasonable restraint of trade or unfair trade practice in violation of the Antimonopoly Act is entitled to bring a stand-alone claim based on Article 709 of the Civil Code.[2]

A claimant must initiate claims for compensation for damage under Article 709 of the Civil Code within the earlier of: (1) 20 years of the date on which the alleged violation of the Antimonopoly Act first occurred; or (2) three years of the date on which the claimant first became aware of the alleged violation of the Antimonopoly Act.[3]

Article 25 of the Antimonopoly Act

Article 25 of the Antimonopoly Act provides the grounds for strict liability for a follow-on claim for compensation for damage caused by anticompetitive conduct that constitutes private monopolisation, unreasonable restraint of trade or unfair trade practice in violation of the Antimonopoly Act. To file a claim under Article 25, a claimant must demonstrate that the JFTC rendered either a cease-and-desist order or an administrative surcharge payment order, and that these orders have become irrevocable. In lawsuits based on Article 25 of the Antimonopoly Act, defendants are not allowed to deny their wilfulness or negligence for the violation of the Antimonopoly Act found by the JFTC orders.

A claimant must initiate claims for compensation for damage under Article 25 of the Antimonopoly Act within three years of the date on which the relevant cease-and-desist order or administrative surcharge payment order rendered by the JFTC became irrevocable.

2 Unreasonable restraint of trade (as defined in Article 2(6) and prohibited in Article 3, latter part of the Antimonopoly Act) includes cartels and bid rigging. Typical examples of the behaviour of cartels are agreements on price-fixing, production limitation and market and customer allocation. Unfair trade practice (as defined in Article 2(9) and prohibited in Article 19 of the Antimonopoly Act) includes price discrimination, restrictions on resale pricing, below-cost sales, anticompetitive divisions of territories, concerted refusal of trade and abuse of superior bargaining position.

3 Under Japanese law, even after the expiry of any of the limitation periods, the court may uphold the claims if the defendant does not bring the defence of limitation. The running of the limitation period can be suspended upon: (1) filing of a lawsuit on the merits based on the claim at issue with the court; (2) filing of a petition for attachment, provisional seizure or provisional disposition based on the claim at issue with the court; (3) entering into an agreement to engage in negotiations; or (4) any acknowledgement of the claim at issue by the defendant.

ii Injunctions

Article 24 of the Antimonopoly Act provides the grounds for a petition for injunction for a claimant whose interests are infringed, or are likely to be infringed, by certain unfair trade practice, which includes violation of Article 8, Item 5 (activities by a business association that cause a member company to employ unfair trade practice) or Article 19 (unfair trade practice by a company) of the Antimonopoly Act.

There is no limitation period for an injunction pursuant to Article 24 of the Antimonopoly Act.

iii Recovery of unjust enrichment

Articles 703 and 704 of the Civil Code provide the grounds for an action to recover unjust enrichment. Based on these articles, a claimant can bring a claim for recovery of unjust enrichment, depending on the circumstances.

For instance, under Japanese law, agreements or contracts entered into by parties may be declared void by the court pursuant to Article 90 of the Civil Code if these agreements or contracts include a provision in violation of the Antimonopoly Act.[4] A party to the invalid agreement or contract may file an action to recover the benefits provided to the other party pursuant to the agreement or contract as unjust enrichment, based on the grounds that the agreement or contract is void.

Under Article 166, Paragraph 1 of the Civil Code, a claimant must bring a claim for recovery of unjust enrichment pursuant to Articles 703 and 704 within 10 years of the date of the agreement or conduct at issue and within five years of the date on which the claimant first became aware of the alleged violation of the Antimonopoly Act.

III EXTRATERRITORIALITY

The Antimonopoly Act has no provision specifically addressing the issue of extraterritorial application of the Act. There are no statutory exemptions provided for conduct by foreign parties or sovereigns or that occurs outside Japan under the Antimonopoly Act.

Regarding cartel cases, the Supreme Court held that the provisions of cease-and-desist orders and administrative surcharge payment orders under the Antimonopoly Act shall apply to cartels agreed outside Japan if the economic order based on free competition in Japan is infringed by these cartels.[5] More specifically, the Supreme Court held that the economic order based on free competition in Japan should be considered to be infringed if the competitive function of the relevant market in Japan is infringed by price-fixing cartels; namely, if the cartel restricts competition in transactions involving a party located in Japan.

4 There is no specific provision that stipulates that agreements that violate antitrust law are void under Japanese law, unlike EU law.

5 Supreme Court decision of 12 December 2017, Case No. Heisei 28 (Gyo-Hi) 233.

IV STANDING

Any person who suffered damage due to the conduct of defendants in violation of the Antimonopoly Act, such as a competitor or customer, can bring a case seeking compensation for damage against the defendants. Even indirect purchasers have standing to file a lawsuit to claim damages arising from a cartel in violation of the Antimonopoly Act.

Any person whose interests are infringed or are likely to be infringed by activities in violation of Article 8, Item 5 (activities by a business association that cause a member company to employ unfair trade practice) or Article 19 (unfair trade practice by a company) of the Antimonopoly Act can file a petition for order of injunction pursuant to Article 24 of the Antimonopoly Act. [6]

V THE PROCESS OF DISCOVERY

Unlike common law jurisdictions, Japan has no comprehensive discovery scheme in civil proceedings. Alternatively, there are several schemes of disclosure available in Japan.

i Disclosure of documents

Court order of preservation of evidence

Under the Code of Civil Procedure, a potential plaintiff can obtain a court order of preservation of evidence before filing a lawsuit. To obtain the court order, it is necessary to prove with prima facie evidence that there are circumstances in which it will become difficult to use the evidence at issue unless it is reviewed by the court in advance. This scheme is expected to serve as an order of pre-action disclosure of evidence.

In addition, parties are entitled to ask the court to send a request to the other party or a third party to produce particular documents (see below) even before filing a claim with the court on condition that the parties gave prior notice of initiating the lawsuit to the opposing parties pursuant to the Code of Civil Procedure.

Court order of document production

During the course of civil proceedings, a party can ask the court to order the other party or a third party to produce particular documents, subject to certain limitations, under the Code of Civil Procedure. For instance, the court will not render an order to produce documents:

a relating to matters for which the holder or a certain related person is likely to be subject to criminal prosecution or conviction;

b concerning a secret in relation to a public officer's duties, which, if submitted, is likely to harm the public interest or substantially hinder the performance of public duties;

c containing any fact that certain professionals (e.g., doctors, attorneys-at-law, registered foreign lawyers) have learned in the course of their duties and that should be kept secret;

d containing matters concerning technical or professional secrets; or

e prepared exclusively for use by the holder.

6 A claimant is not entitled to file a petition for injunction pursuant to Article 24 against violation of the Antimonopoly Act other than unfair trade practice (e.g., unreasonable restriction of trade or private monopolisation). In this case, a claimant can file a petition for injunction to suspend or prevent the conduct based on general tort theory under the Civil Code and the Civil Preservation Act. However, these cases are very uncommon.

Third parties subject to the court order of document production include the JFTC. In a shareholder derivative lawsuit filed by shareholders against company directors, the Tokyo District Court rendered an order against the JFTC to produce documents such as JFTC interview records and reports produced by the company in response to the JFTC's requests for information during the course of its investigation.[7]

As to sanctions, if a party that receives the order does not submit the documents at issue, the court is entitled to deem the other party's assertions related to the content of the documents as true.

A plaintiff filing an action for injunction under Article 24 of the Antimonopoly Act can ask the court to order the defendant to produce documents, even including trade secrets, to prove the infringement, unless there is any justifiable reason to refuse production of documents. Alternatively, a party can ask the court to render an order of 'protection' of trade secrets in the same proceedings so that the documents at issue will not be disclosed to third parties.

Court request for document production

During the course of civil proceedings, a party can ask the court to send a request to the other party or a third party to produce particular documents. This is used more frequently than the aforementioned court order of document production with sanctions – courts tend to suggest that parties take this procedure prior to resorting to a petition for court order of document production.

Upon request from the court in which the damage claim is brought by the plaintiffs, the JFTC may produce certain documents collected during its investigation, including those collected from third parties, except for documents including certain information, such as trade secrets and privacy information. Furthermore, certain attorney–client privileged documents will not be provided to the civil court proceedings by the JFTC, as discussed in Section XI.

Perusal of case record of civil court proceedings

Under the Code of Civil Procedure, any person can review case records of civil court proceedings, and any person who has legal 'interests' can obtain a copy of case records, including briefs and evidence submitted to the court. In the context of private antitrust litigation, plaintiffs or potential plaintiffs can review the record of cases in which the validity of the JFTC's cease-and-desist orders and administrative surcharge payment orders are challenged by companies (i.e., defendants or potential defendants), which may include documents collected by the JFTC during the course of its investigations. Plaintiffs or potential plaintiffs of private antitrust claims may obtain a copy of the documents collected during the JFTC's investigations as a person who has legal interests. While the company, as a party to the case against the JFTC, is entitled to file a petition requesting the court not to disclose the documents to any third parties, the scope of documents protected by this petition is limited to privacy information and trade secrets.[8]

7 Tokyo District Court decision of 1 September 2006, Case No. Heisei 16 (Mo) 4715.

8 Prior to the amendment to the Antimonopoly Act in 2015, to challenge the validity of a cease-and-desist order and an administrative surcharge payment order rendered by the JFTC, a business needed to file a petition to initiate JFTC administrative hearing procedures. Private antitrust claimants, as victims of alleged violations of the Antimonopoly Act, may ask for the JFTC's permission to peruse the documents submitted to its administrative hearing by the business and JFTC administrative investigators. The

ii Written responses and testimony from opposing parties and third parties

Under the Code of Civil Procedure, parties are entitled to send questions requesting a written response to the opposing parties during the course of hearings. In addition, parties are entitled to ask the opposing parties to provide a written response to questions even before filing a claim with the court, on condition that the parties gave prior notice of the initiation of the lawsuit to the opposing parties pursuant to the Code of Civil Procedure. The opposing parties are not legally obliged to respond to the questions.

In civil court proceedings in Japan, no deposition is available and claimants must ask the court to conduct witness examinations after filing a claim to obtain testimony from opposing parties and third parties.

VI USE OF EXPERTS

In Japanese civil proceedings, a party may submit to the court a report prepared by an expert it has appointed, as documentary evidence to support claims. To examine the credibility of the expert report, the opposing party may ask the court to cross-examine the expert.

A party may also ask the court to appoint an independent expert to provide an expert opinion and the court then determines the necessity to appoint the expert. When an expert is appointed by the court, he or she is obliged to give his or her opinion in the relevant field.

Expert opinions are sometimes used in private antitrust litigation. For instance, plaintiffs sometimes appoint economists or economic consultants as experts, and obtain their analysis on how, and the extent to which, the cartel or bid rigging impacted the price of the relevant product, to establish violation of the Antimonopoly Act (i.e., unreasonable restraint of trade) and the amount of damage arising out of the violation.

VII CLASS ACTIONS

Japanese law does not permit class action suits for claims based on violations of the Antimonopoly Act. However, there are several other systems available for collective actions based on violations of the Antimonopoly Act.

Under Article 38 of the Code of Civil Procedure, if rights or obligations as the subject matter of lawsuits are common to multiple parties or are based on the same factual or statutory causes, parties can jointly bring a suit as co-plaintiffs. It is also possible to bring a suit as co-plaintiffs in cases where rights or obligations as the subject matter of lawsuits are of a similar nature or based on the same kind of factual or statutory causes. While a large number of parties can be co-plaintiffs, this is not a system to pool a large number of claims.

Under the 'appointed-party system' provided by Article 30 of the Code of Civil Procedure, each plaintiff or defendant can appoint another plaintiff or defendant as his or her representative. It is possible for multiple claimants to use this system when bringing antitrust claims to Japanese civil courts. The system does not allow class action suits as the appointed party does not represent a 'class'.

documents may include evidentiary documents submitted by JFTC administrative investigators that were collected during the JFTC's investigations against the business (i.e., a potential defendant in private antitrust litigation).

In 2016, the Japanese government introduced a new system under which consumer protection organisations qualified by the government can file lawsuits with the court seeking compensation for damage arising out of consumer contracts. Plaintiffs can assert the defendants' violation of the Antimonopoly Act in this type of action.

VIII CALCULATING DAMAGES

It is common for courts to determine the amount of damages in cartel cases by calculating the difference between the price of the relevant product immediately before the alleged cartel conduct and its price as applied in the transaction at issue.

The Supreme Court held that the damages arising from cartel conduct is the difference between the actual sales price and the expected sales price (i.e., the sales price that would have been applied but for the cartel conduct at issue), based on the presumption that the sales price immediately before the cartel conduct is the expected sales price, unless significant changes in economic conditions and market structures occurred between the time when the cartel conduct occurred and the time when customers purchased the product at issue.[9] However, the Supreme Court decision was criticised by scholars and practitioners because plaintiffs must bear the burden of almost impossible proof pursuant to the decision. Specifically, the decision required plaintiffs (i.e., indirect purchasers) to prove that there was no significant change in economic factors and, if not possible, required the plaintiffs to prove the expected sales price based on factors of price formation.

Courts can use several legal schemes in determining the amount of damages arising from violations of the Antimonopoly Act. For instance, in an action based on Article 25 of the Antimonopoly Act, courts can obtain the JFTC's opinion in calculating the amount of damages claimed pursuant to Article 84 of the Antimonopoly Act. Under Article 248 of the Code of Civil Procedure, courts can determine a reasonable amount of damages if it is extremely difficult for the parties to prove the precise amount due to the nature of the damage.

Japanese law does not allow claimants to collect punitive damages in civil proceedings because awarding these damages is contrary to public policy in Japan.

Japanese courts do not find attorneys' fees as damages in principle. However, if a claimant's claim is for compensation for damage arising from 'tort', such as a violation of the Antimonopoly Act, the court would generally award approximately 10 per cent of the claimant's attorney's fee as part of the damages.

IX PASS-ON DEFENCES

In Japan, the 'passing-on defence' is brought by a defendant as the issue of scope of damages, as opposed to as the issue of standing. Under Japanese law, the amount that a direct purchaser collected from indirect purchasers may be taken into account when calculating the amount of damage suffered by the direct purchaser because the amount of damage 'actually' suffered by a plaintiff can be compensated. As such, a defendant can assert that the alleged loss suffered by the plaintiff (i.e., a direct purchaser) has been reduced by having passed on to its consumers any overcharge arising from the defendant's violation of the Antimonopoly Act.[10] The plaintiff will then be required to prove the actual amount of damage by taking into account

9 Supreme Court decision of 8 December 1989, Case No. Showa 60 (O) 933, 1162 (*Tsuruoka Kerosene* case).

10 Supreme Court decision of 2 July 1987, Case No. Showa 56 (Gyo-Tsu) 178.

the passing-on value (i.e., the amount that the direct purchaser has collected from indirect purchasers). If a direct purchaser passed on the amount of loss to its customers, it would be difficult to prove that the direct purchaser suffered actual loss. It is also difficult to prove the causal relationship between the conduct at issue and the alleged damage. As a result, the amount of damages would be reduced accordingly.

X FOLLOW-ON LITIGATION

Parties undergoing JFTC administrative investigations or criminal investigations, as well as immunity applicants in those investigations, are not exempt from civil liability arising from violations of the Antimonopoly Act. Accordingly, there are no limitations on private actions or awards against these parties in follow-on private litigation.

Administrative surcharges imposed by the JFTC and criminal fines imposed by criminal courts are not taken into consideration by the court in calculating the amount of damages in follow-on private litigation.

XI PRIVILEGES

Unlike in common law jurisdictions, Japanese civil courts do not recognise attorney–client, attorney–work product or joint work product defences to protect attorney–client communication or attorney materials. Accordingly, documents cannot be withheld from disclosure on the basis of privilege.

Under the Code of Civil Procedure, attorneys are granted the right to refuse to give testimony regarding communications with their clients, and attorneys are not obliged to produce documents exchanged with their clients and regarded as 'document[s] containing any fact which certain professionals have learnt in the course of their duties and which should be kept secret' or 'document[s] containing matters regarding technical or professional secrets' as defined under the Code of Civil Procedure. On the other hand, clients are granted no right to protect communications with their attorneys on the basis of privilege.

As discussed in Section V, the JFTC may produce certain documents collected during its investigations at civil court proceedings upon request from the court in which a damages claim is brought by plaintiffs. Until recently, the JFTC could collect and hold attorney–client privileged documents during an investigation and could even produce these at civil court proceedings. In December 2020, however, the JFTC introduced the determination procedure under which documents it collected during investigations would be returned to businesses on condition that the documents included confidential communications between businesses and their attorneys regarding legal advice on conduct alleged to be a violation to which the leniency programme applies (e.g., unreasonable restraint of trade). As a result, certain attorney–client privileged documents will not be produced by the JFTC at civil court proceedings.

XII SETTLEMENT PROCEDURES

During the course of civil court proceedings, judges tend to attempt to urge parties to settle disputes amicably before the court, which is known as judicial settlement. Typically, judges wish to settle cases before preparing for a draft judgment. Accordingly, immediately before moving to, or immediately after completing, witness examinations, parties are asked by

the court whether they are willing to seek an opportunity to resolve the dispute by judicial settlement. If both parties agree to proceed with judicial settlement, the judge holds discussions with plaintiffs and defendants respectively, persuading the parties to make concessions to reach terms and conditions that are agreeable to both parties. Once a settlement agreement has been reached between the parties, the agreement is set forth in the court record and the record has the same effect as a final and binding judgment on the merits.

XIII ARBITRATION

Arbitration is available as a method of resolution of disputes involving private antitrust claims in Japan. The Arbitration Act provides that a civil dispute that may be resolved by settlement between the parties is arbitrable. A dispute involving private antitrust claims is also arbitrable under this Act. Japanese courts are expected to enforce an arbitration agreement even for a dispute involving private antitrust claims. There is no legislation or court precedent that provides exceptions to this rule.

In Japan, civil mediation proceedings before the court are frequently utilised as a method of alternative dispute resolution. This may be used for private antitrust claims. In the civil mediation proceedings, the court appoints mediation committee members from lawyers and experts who are familiar with the subject matter of each dispute. The mediation committee members are in charge of handling the proceedings that facilitate settlement discussions between the parties. When the parties reach an agreement on the settlement terms, the agreed terms set forth in the official court record have the same effect as a final and binding judgment rendered by a court through a lawsuit. Both parties may terminate the proceedings at any point during the course of the proceedings.

XIV INDEMNIFICATION AND CONTRIBUTION

In Japanese civil proceedings, a defendant can seek contribution from co-defendants or third parties (such as potential co-defendants) that assume joint and several liability (e.g., joint tortfeasor). If the court renders a judgment in favour of a plaintiff against a defendant, the defendant may initiate another civil court proceeding to seek contribution from a third party. Under the Code of Civil Procedure, a defendant can give notice of a lawsuit to a third party that has a legal interest in the outcome of the lawsuit. In cases where a defendant could pass on liability to, or share its liability with, a third party, the third party is considered to have a legal interest. The third party that received the notice may join the lawsuit as an assisting intervener. Once a third party receives notice of a lawsuit from a defendant, it is not permitted to dispute the relevant facts in a subsequent lawsuit with the defendant.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Among recent notable legislative changes in Japan, the amendment to the Antimonopoly Act introduced the 'commitment procedure' on 30 December 2018. The commitment procedure is a system to resolve potential violations of the Antimonopoly Act alleged by the JFTC through voluntary consent by entities. Upon receipt of a notification from the JFTC regarding an alleged violation of the Antimonopoly Act, an entity may devise a plan to take the necessary measures to cease the conduct allegedly violating the Antimonopoly Act and

file a petition for approval of the plan with the JFTC. If approved, the JFTC determines not to render a cease-and-desist order or administrative surcharge payment order against the company.

While a summary of the company's conduct allegedly violating the Antimonopoly Act is set forth in a press release of the completion of the commitment procedure issued by the JFTC, the press release also stipulates that it does not mean that the JFTC found actual violation of the Antimonopoly Act. As such, private antitrust claimants would not be able to utilise the result of the commitment procedure as evidence supporting their claim against the company. Rather, if a case involving potential violation of the Antimonopoly Act is settled through the commitment procedure without rendering a cease-and-desist order and administrative surcharge payment order, it is not possible for potential plaintiffs to utilise such orders in bringing private antitrust claims. In this regard, under the commitment procedure, the JFTC has a policy that it may use the documents submitted by the petitioner during the course of the commitment procedure in its further investigations to be conducted in a case where the JFTC disapproves the petitioner's plan to take the necessary measures to cease the conduct allegedly violating the Antimonopoly Act. The extent to which documents submitted to the commitment procedures are protected from disclosure in future private antitrust suits will be a significant issue in this field.

Appendix 1

ABOUT THE AUTHORS

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Koki Yanagisawa is a litigation partner at Nagashima Ohno & Tsunematsu. His practice focuses on the resolution of disputes in the areas of antitrust law and commercial law. He has represented a variety of Japanese and non-Japanese clients in litigation, arbitration and mediation procedures, including complex antitrust litigation, since 2001. After earning his LLB at the University of Tokyo, he completed his LLM at Columbia Law School, where he was a Harlan Fiske Stone Scholar. He then worked as a visiting attorney at Debevoise & Plimpton LLP in New York City from 2007 to 2008. He was admitted to New York State Bar in 2008 (currently inactive).

He was named Dispute Resolution Lawyer of the Year at the ALB Japan Law Awards 2021, organised by *Asian Legal Business*. He is recognised as a 'Dispute Resolution Star in Commercial and Transactions in Japan' by *Benchmark Litigation Asia-Pacific* 2021 and also as a distinguished practitioner in the field of dispute resolution by *Asialaw Leading Lawyers 2022*. He was named as one of the top 40 antitrust lawyers under 40 by *Global Competition Review* in 2012.

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