

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Sixth Edition

Editor
ILENE KNABLE GOTTS

LAW BUSINESS RESEARCH LTD

CONTENTS

Editor's Prefacevii
	<i>Ilene Knable Gotts</i>
Chapter 1	EUROPEAN PRIVATE ENFORCEMENT – THE CLAIMANT'S PERSPECTIVE1
	<i>Lianne Craig and David Lawne</i>
Chapter 2	EUROPEAN PRIVATE ENFORCEMENT – THE DEFENDANT'S PERSPECTIVE.....14
	<i>Mark Clarke and Euan Burrows</i>
Chapter 3	AUSTRIA29
	<i>Christina Hummer and Milosz Cywinski</i>
Chapter 4	BELGIUM.....39
	<i>Bertold Bär-Bouyssière, Dominique Devos, Dodo Chochitaichvili and Pierre M Sabbadini</i>
Chapter 5	BRAZIL51
	<i>Carlos Francisco de Magalhães, Gabriel Nogueira Dias and Cristiano Rodrigo Del Debbio</i>
Chapter 6	BULGARIA64
	<i>Evgenya Kosorova</i>
Chapter 7	CANADA76
	<i>Eliot Kolers and Danielle Royal</i>
Chapter 8	CHILE89
	<i>Ricardo Riesco and Felipe Cerda</i>

Chapter 9	CHINA.....101 <i>Janet Hui (Xu Rongrong), Mabel Liu (Liu Dongping) and Stanley Xing Wan</i>
Chapter 10	DENMARK.....111 <i>Jens Munk Plum, Erik Bertelsen and Morten Kofmann</i>
Chapter 11	ENGLAND & WALES122 <i>Peter Scott, Mark Simpson and James Flett</i>
Chapter 12	EUROPEAN UNION.....165 <i>Rona Bar-Isaac and Andy Curtis</i>
Chapter 13	FRANCE179 <i>Mélanie Thill-Tayara and Marta Giner Asins</i>
Chapter 14	GERMANY194 <i>Michael Dietrich and Marco Hartmann-Rüppel</i>
Chapter 15	INDIA216 <i>Sitesh Mukherjee, Rahul Singh and Ashwini Chawla</i>
Chapter 16	ISRAEL.....226 <i>Eytan Epstein, Tamar Dolev-Green and Shiran Shabtai</i>
Chapter 17	ITALY247 <i>Cristoforo Osti and Alessandra Prastaro</i>
Chapter 18	JAPAN264 <i>Kentaro Hirayama</i>
Chapter 19	KOREA.....274 <i>Sai Ree Yun, Cecil Saehoon Chung, Kum Ju Son, Seung Hyuck Han and In Seon Choi</i>
Chapter 20	LITHUANIA.....286 <i>Ramūnas Audzevičius and Mantas Gudžiūnas</i>

Chapter 21	NETHERLANDS303 <i>Naomi Dempsey, Albert Knigge and Weyer VerLoren van Themaat</i>
Chapter 22	POLAND318 <i>Dorothy Hansberry-Biegunska</i>
Chapter 23	ROMANIA328 <i>Silviu Stoica and Mihaela Ion</i>
Chapter 24	RUSSIA.....341 <i>Tatiana Kamenskaya</i>
Chapter 25	SOUTH AFRICA.....352 <i>Jocelyn Katz and Wade Graaff</i>
Chapter 26	SPAIN366 <i>Alfonso Gutiérrez</i>
Chapter 27	SWEDEN380 <i>Kent Karlsson and Pamela Hansson</i>
Chapter 28	SWITZERLAND 395 <i>Christoph Tagmann and Bernhard C Lauterburg</i>
Chapter 29	TURKEY408 <i>Esin Çamlıbel</i>
Chapter 30	UNITED STATES424 <i>Chul Pak and Tiffany Lee</i>
Chapter 31	VENEZUELA.....451 <i>Pedro Ignacio Sosa Mendoza, Pedro Luis Planchart, Nizar El Fakih and Rodrigo Moncho Stefani</i>
Appendix 1	ABOUT THE AUTHORS.....460
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS ...486

Chapter 18

JAPAN

*Kentaro Hirayama*¹

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The number of private antitrust cases has been increasing recently, in terms of both damage suits and injunctions. As of 31 March 2013, 32 cases are pending in relation to damage suits under Article 25 of the Japanese Antimonopoly Act (AMA), and 14 cases are pending in relation to injunctions under Article 24 of the AMA.

Among several types of private litigation, damage suits in bid-rigging cases have long been the most prevalent in Japan. Recent notable cases include the damage suit brought by the Tokyo metropolitan government in relation to the bid rigging of waste incinerators, in which the Tokyo District Court ordered the defendants to pay ¥9.7 billion² and the damage suit brought in relation to the bid rigging of iron bridges, in which the Tokyo High Court ordered the defendants to pay ¥80 million,³ both of which were brought after the Japan Fair Trade Commission (JFTC), the sole administrative regulator for competition in Japan, had ordered a cease-and-desist order and orders to pay administrative fines (surcharges) against defendants.

In addition to these notable damage suits, injunctive relief against unfair trade practices (e.g., predatory pricing, unilateral refusal of trade, obstruction to competitors' trading, resale price maintenance, prohibition of parallel imports), which are prohibited under Article 19 of the AMA, was introduced in 2001. There have been several cases in 2011 and 2012 in which District Courts granted provisional and permanent injunctive orders based on defendants' unfair trade practices.

1 Kentaro Hirayama is a senior associate at Iwata Godo Law Offices.

2 Tokyo District Court, 20 March 2007.

3 Tokyo High Court, 30 August 2011.

ii Recent legislative changes

The amendment of the AMA in 2009 (the 2009 Amendments) implemented, in 2010, a special rule⁴ dealing with court orders to produce documents in relation to injunctive relief. The 2009 Amendments also changed the system regarding the Courts seeking the JFTC's opinion on the amount of damages in damage suits. These amendments are explained below.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Damages claims pursuant to Article 25 of the AMA

Under Article 25 of the AMA, parties found by the JFTC to be engaged in private monopolisation, unreasonable restriction of trade⁵ (cartels and bid rigging) or unfair trade practices⁶ are liable to indemnify those injured by such parties.

A cease-and-desist order or order to pay an administrative fine (or the JFTC hearing decision in cases where defendants appealed to the JFTC administrative hearing procedure) need to be finalised before the plaintiff takes action pursuant to Article 25 of the AMA. Although plaintiffs can also file damage suits as a general tort claim under Article 709 of the Japanese Civil Code (an Article 709 action) even before relevant JFTC orders become final, the plaintiff need not prove the defendant's intent or negligence as to the harmful acts in an Article 25 action; the relevant court will instead rely on the JFTC findings from the order or hearing decision, and the defendants cannot challenge such facts.

Plaintiffs in an Article 25 action still need to prove the amount of damages and the reasonable causation between the defendant's conduct and the damages. However, Article 84 of the AMA allows the court to request an opinion from the JFTC on the scope and calculation of damages in an Article 25 action,⁷ which can reduce the burden of proof.

An Article 25 action by a private plaintiff must be brought to Tokyo High Court within three years of the date on which the relevant JFTC order or hearing decision becomes final.⁸ Plaintiffs can choose to file either an Article 25 action or an Article 709 action.

4 Article 83(4) of the AMA.

5 Article 3 of the AMA.

6 Article 19 of the AMA.

7 In practice, opinions of the JFTC for Article 25 actions are based on a 'before and after' theory (see Section VIII, *infra*).

8 Article 26(2) of AMA.

As a recent example, some of the franchisees of 7-Eleven, Inc filed a lawsuit based on Article 25 of the AMA against the convenience store franchiser at the Tokyo High Court for its abuse of its dominant bargaining position, prohibited in Article 19 of the AMA, and for which the JFTC issued a cease-and-desist order in June 2009. In addition, it has recently become quite common that the government or local governments file Article 25 actions after the JFTC has issued a cease-and-desist order against members of a bid-rigging group.

ii General tort claims under the Civil Code

Under Article 709 of the Civil Code, persons who violate the rights of another person must pay the damages resulting from their actions; an Article 709 action is available in competition law cases.

A plaintiff in an Article 709 action must prove the intent or negligence of the defendant, the amount of damages and the reasonable causation between the defendant's conduct and the damages. In practice, however, the burden of proof for the intent or negligence of the defendant is not deemed important: violations of the AMA are normally associated at least with negligence by the violators.

An Article 709 action must be brought in the district courts either within three years of the possible victim or plaintiff becoming aware of the conduct that caused the damages or within 20 years of the execution of such conduct.

As a recent example, in the *USEN* private monopoly case, an Article 709 action damage suit was filed by a competitor of USEN Corporation, after the JFTC issued a cease-and-desist order against USEN. The Tokyo District Court partially admitted the plaintiff's claims and finally settled at Tokyo High Court in July 2010, whereby USEN agreed to pay ¥2 billion to the competitor.

iii Injunctions pursuant to Article 24 of the AMA

Under Article 24 of the AMA, a plaintiff may seek an injunction (provisional as well as permanent) against certain unfair trade practices⁹ such as predatory pricing, unilateral refusal of trade, obstruction to competitors' trading, resale price maintenance, prohibition of parallel imports (an Article 24 action). Article 24 does not allow injunctions based on a breach of Article 3 (cartels and bid rigging and private monopolisation), but some types of Article 3 violations can also be deemed unfair trade practices and thus subject to Article 24 actions.

An Article 24 action must be brought in the district courts, including Tokyo District Court.¹⁰ A district court's decision may be appealed to a high court, and a high court decision may be further appealed to the Supreme Court.

For the first 10 years following the introduction of the Article 24 action in 2001, there were no successful injunction cases, partly because an Article 24 action requires the private plaintiff to demonstrate 'extreme damages', which is a somewhat higher standard than the ordinary level of damages for plaintiffs to prove in damage suits.

9 Article 19 of the AMA.

10 See Article 84(2) of AMA.

Recently, however, the trend has been changing: in March 2011 the Tokyo District Court issued the first decision in which a private plaintiff prevailed in an Article 24 injunction case. In this case the Tokyo District Court found that the defendant disseminated a falsehood injurious to the business reputation of the plaintiff and thereby obstructed businesses of the plaintiff. In addition, Utsunomiya District Court issued a permanent injunction in November 2011 against a local bus company that engaged in predatory pricing.¹¹

iv Derivative shareholder actions under the Corporation Act

Derivative shareholder actions under the Corporation Act will also have an impact on companies violating the AMA. Under Articles 425 and 847 of the Corporation Act, if a company has been found liable under laws including the AMA, the Civil Code or others, its shareholders may file a damage suit against the directors of the corporation for their intentional or negligent acts if the corporation does not implement its own lawsuit against its directors within 60 days of receipt of the shareholders' request.

Thus, in the event that the corporation is given an order by the JFTC to pay an administrative fine or is found liable for damages under an Article 25 action or an Article 709 action, the shareholders of the corporation¹² may file a derivative shareholder action against the directors of the corporation.

As an example, a derivative shareholder action was filed in December 2010 against the directors of Sumitomo Denko for negligence in not filing a leniency application in a timely manner in the cartel on optical fibre cable, for which Sumitomo Denko was finally ordered by the JFTC to pay an administrative fine without any reduction under the leniency programme. This illustrates the growing attention paid by Japanese society to violations of AMA.

vi Civil litigation against anti-competitive contacts

Any person can file a civil lawsuit alleging invalidity of contract pursuant to Article 90 of the Civil Code, which is a general provision invalidating any legal conduct violating public interests. In determining violations of public interests, the fact of violation of the AMA has been taken into consideration in the courts.

III EXTRATERRITORIALITY

If a violation of the AMA has a substantial effect on the Japanese market, then the AMA can apply to conduct that occurs in a foreign country or is conducted by a foreign party (the effects doctrine). The 'Japanese market' entails consumers located in Japan.

In terms of administrative and criminal proceedings, if there is a conflict of jurisdiction, the Japanese government will respect international comity. An interesting

11 Tokyo High Court reversed this judgment in 2012 based on a finding that the defendant had already ceased its predatory pricing and thus there was no need to order an injunction.

12 A shareholder must continuously hold a corporation's shares for a period of six months in order to file a derivative shareholder action.

example of extraterritoriality of the AMA is the *Marine hose* international cartel case of February 2008,¹³ in which case the JFTC issued a cease-and-desist order for the first time to parties involved in an international cartel – including foreign parties for cartel activities carried out in foreign countries. Also, the JFTC imposed administrative fines upon foreign parties in the CRT (cathode ray tube) international cartel case of October 2009:¹⁴ the JFTC ordered the payment of administrative fines by corporations located in Malaysia, Thailand and Korea.

In the sphere of private antitrust litigation, it is likely that the effects doctrine will be applied in the same manner as the JFTC's administrative investigations, although there is no specific statute regarding extraterritoriality (or jurisdiction) of the AMA to be applied in private lawsuits. It is possible, therefore, that foreign companies will face private lawsuits from Japanese consumers for violations of the AMA that take place outside Japan.

There is no statutory provision in Japanese law regarding sovereign immunity, and the Supreme Court declared in July 2006 that sovereign immunity would be applied only to certain limited conduct of foreign governments, such as the use of state power.

IV STANDING

The parties who can bring a case are as follows.

i Damages claims pursuant to Article 25 of the AMA

Parties who allegedly were injured by any violation of the AMA and successfully demonstrated causation between an injury and a violation and the amount of damage can claim damages under Article 25 of the AMA. As previously noted, it is required that a relevant JFTC order or hearing decision is finalised before undertaking the Article 25 action. This action is available for not only direct purchasers, but also indirect purchasers and consumers. Injured parties can maintain their standing even in cases where an injured party has 'passed on' the relevant costs to its own customers, although it is likely that such passing on of costs would be taken into account in calculating the amount of damages.

ii General tort claims under the Article 709 of the Civil Code

Parties who allegedly were injured by any violation of the AMA and successfully demonstrated causation between an injury and a violation, defendant's negligence or intention and the amount of damage can file an Article 709 action. As discussed, it is not necessary that the JFTC findings regarding the violating conduct are final and binding. This action is available for not only direct purchasers, but also indirect purchasers and consumers. Injured parties can maintain their standing even in cases where an injured party has 'passed on' the relevant costs to its own customers, although it is likely that

13 JFTC order, 22 February 2008.

14 JFTC order, 7 October 2009.

such passing on of costs would be taken into account in calculating the actual amount of damages.

Injured parties can file an Article 709 action to the district courts and an Article 25 action to Tokyo High Court at the same time. This strategy would be necessary for plaintiffs to suspend the statute of limitations; in such cases Tokyo High Court would tentatively stop the Article 25 procedure and wait for the district court judgment and an appeal to Tokyo High Court in an Article 709 action.

iii Injunctions under Article 24 of the AMA

A party whose interest is harmed or is threatened by unfair trade practices has standing to bring an Article 24 action. It is not necessary for the relevant JFTC order or hearing decision to be issued or finalised. Indirect purchasers can also be plaintiffs.

iv Derivative shareholder actions under the Corporation Act

A shareholder of a corporation who continuously holds the shares of a corporation for six months has standing in such an action.

V THE PROCESS OF DISCOVERY

There is no US-style mandatory document production or extensive discovery system in Japan, except when a court orders a production of documents under the Civil Litigation Code.

Under the Civil Litigation Code, courts can request production of documents not only to the counterparty, but also to third parties. The scope of the court order to third parties has been expanded in recent private antitrust litigation, where a court ordered production of documents retained by the JFTC, such as interview records prepared by the JFTC and reports produced by the defendant in reply to requests for information by the JFTC.¹⁵

Under the Civil Litigation Code, if the court so orders, the relevant party must comply and submit requested materials.¹⁶ If the ordered party does not submit the relevant evidence, then the other party, as well as the court, is generally entitled to deem such other party's allegations related to the content of such materials as true.¹⁷ There are several exceptions, such as documents subject to the confidential obligations of public servants or professionals; documents created exclusively for self use; and documents relating to the right to remain silent under criminal procedure.

15 Tokyo High Court, 16 February 2007 and Osaka District Court, 15 June 2012.

16 Article 223 of the Civil Litigation Code.

17 Article 224 of the Civil Litigation Code.

The 2009 Amendments introduced a special rule for such a court order relating to an Article 24 action. The relevant party is entitled to request that the other party submit materials as ordered by the court, except for cases in which there is a justifiable reason to reject submission of the requested materials. This rule expands the scope of documents to be disclosed since it targets all documents except for those with a justifiable reason not to be submitted.

VI USE OF EXPERTS

Expert testimony, opinions or examination by experts are widely accepted in Japanese courts as evidence. Where expert testimony is used to determine the scope of damages as well as the existence of illegal conduct in private antitrust litigation, experts are often academics or experts in the relevant industry.

Unlike in other jurisdictions such as the EU and the US, Japanese courts have not established a practice of utilising economic analysis offered by economists in determining the scope of damages. Rather, Article 84 of the AMA allows the court to request an opinion from the JFTC on the scope and calculation of damages in an Article 25 action, and the JFTC has actually produced its opinions in many cases upon requests from the courts.

VII CLASS ACTIONS

Class actions are not available in Japan. Certified consumer groups may act as a 'class' and seek injunctions for certain types of lawsuits, but this scheme is not available in private antitrust litigation.

VIII CALCULATING DAMAGES

Both in Article 25 and Article 709 actions, damages are limited to those cases where causal links between damages and violation have been successfully demonstrated. Under Japanese law, treble damages are not available.

i How damages awards are determined

With respect to how damages awards are determined, the 'before and after' theory is often used as a method of calculating damages in private antitrust litigation. Under this theory, the actual price of the relevant product or service before the commencement of the cartel or bid rigging are compared with those within the cartel period, and the difference will be deemed the amount of relevant damages. This method of calculation is often used in bid-rigging cases as well as cartel cases, and the JFTC also uses this method in producing its opinion pursuant to requests from the courts under Article 84 of the AMA.

If the scope of the damages is uncertain and the 'before and after' theory is not available or is inappropriate, then the court may determine the amount of damages at its discretion, which is allowed under Article 248 of the Civil Litigation Code. For example,

in recent bid-rigging cases, courts found that relevant damages should be approximately 5–10 per cent of the turnover of the relevant products within the period of the cartel.

In addition, recently the government, local governments and public corporations generally insert clauses for penalty charges into contracts in a tender, which specify an agreed amount of damages to be paid if violations of the AMA such as bid rigging are subsequently found by the JFTC. Typically, the amount specified in such provision is between 10 and 20 per cent of the contract value.

ii Interest and attorneys' fees

When calculating the amount of damages payable on the judgment date, the court will include interest (at a per annum rate of 5 per cent) from the date on which the relevant illegal conduct occurred until the date on which the defendant actually pays such damages. As for attorneys' fees, in Article 25 and Article 709 actions, lawyers' fees may be partially recoverable if the court finds it appropriate,¹⁸ although each party generally bear its own lawyers' fees.

IX PASS-ON DEFENCES

The defendant is free to allege that no damages should be granted to the direct-purchaser plaintiff where the plaintiff has already passed on the amount of the damages to its own customers. However, as noted earlier, although it can be argued in the context of the scope of damages, it should not be a factor when considering the issue of standing.

X FOLLOW-ON LITIGATION

Both Article 25 actions and Article 709 actions are available for the purpose of follow-on litigation. In cases of Article 25 action, either a cease-and-desist order, an order to pay an administrative fine or a hearing decision regarding the violation of the AMA need to be final and binding in order for the plaintiff to bring an action. With respect to Article 709 actions, there is no limitation on private actions against parties who have been subject to the JFTC's investigations, and the court will, in practice, rely on a decision rendered by the JFTC in the cases where the JFTC already opened its own investigation.

XI PRIVILEGES

Attorney–client privilege is not recognised in Japan. Therefore, the JFTC can seize attorney–client communications in its dawn-raid as far as the JFTC believes that the communications are necessary for the JFTC's investigation, and use it as a supporting evidence without regard to such privilege.

¹⁸ In practice, approximately 10 per cent of awarded damages have been ordered by the court as recovery of lawyers' fees.

The JFTC must keep any trade secret of targets of investigations, under Article 39 of the AMA. However, in cases in which the JFTC issues a cease-and-desist order or an order to pay an administrative fine, and defendants appeal to the JFTC administrative hearing procedure, supporting evidence that the JFTC investigators produce to the hearing judges will be available for disclosure to interested parties, which includes injured parties who are considering filing damage suits. In order to mitigate the risk of disclosure, the AMA was amended in 2009 to enable the JFTC to restrict disclosure of such documents if the JFTC considers there is a risk of harming the interest of a third party or finds a justifiable reason for the restriction.¹⁹

Although foreign courts might order the JFTC or defendants to submit evidence (or copy thereof) that the defendants submitted to the JFTC that includes attorney-client communications, the JFTC has recently issued a letter to the US district court arguing that documents submitted in the process of a leniency application or regarding cases still under investigation should be exempt from discovery, in view of ensuring the parties' cooperation with its leniency programme and subsequent investigations. In addition, the JFTC accepts oral statements from leniency applicants, where those leniency applications (and evidence attached to them) may be subjected to discovery in foreign courts.

XII SETTLEMENT PROCEDURES

Settlement in civil litigation is available either in the course of the court proceedings or outside the courts. In the event of settlement in the courts, judges may often recommend a settlement to the parties and if a settlement is reached, a record of settlement is created by the court. There are no specific procedures for cases of settlement outside the courts, although sometimes parties make a settlement record at a notary's office.²⁰

Settlement is available in private antitrust litigation as well, and between April 2012 and March 2013 four cases were settled in Article 25 actions, and two in Article 24 actions. For example, in the *USEN* private monopoly case a competitor filed an Article 709 action against USEN and finally settlement was reached in July 2010, with USEN agreeing to pay ¥2 billion to the competitor.

XIII ARBITRATION

Arbitration is generally available for dispute resolution in Japan, and administered by entities including the Japan Commercial Arbitration Association or the Committee for Adjustment of Construction Work Disputes. However, no arbitration or other alternative dispute resolution mechanism has been reported to have been used in Japan in private antitrust litigation so far.

¹⁹ Article 70(15)(1) of the AMA.

²⁰ Notarised settlement records with respect to monetary liabilities are enforceable just as courts' final judgments are.

XIV INDEMNIFICATION AND CONTRIBUTION

Under Japanese law, parties who have jointly conducted torts are generally liable for damages on a joint and several basis.²¹ This is also the case in Article 709 actions as well as Article 25 actions.²² In such cases, the defendants may seek indemnification from their co-defendants based on their respective proportion of the damages.

XV FUTURE DEVELOPMENTS AND OUTLOOK

The number of private antitrust cases is gradually increasing and, as noted above, successful injunctions as well as significant amounts of damages have recently been awarded to plaintiffs.

In addition, the JFTC's recent enforcement of the AMA has become more active and aggressive in both domestic cases and international cartel cases, which will trigger more follow-on claims. On the basis of these recent enforcement trends, I expect that there will be a further increase in the number of private antitrust litigation cases in the near future.

21 Article 719 of the Civil Code.

22 Tokyo High Court, 7 October 2010.