Private Antitrust Litigation 2021

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the eighteenth edition of *Private Antitrust Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Brazil and India.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

In 1998, a dramatic change in the development of private antitrust litigation in Japan took place. Before this, there were almost no cases in Japan in which plaintiffs seeking damages or injunctive relief from the harm caused by the anticompetitive acts of defendants had prevailed in such an action, although several such private litigations were brought each year. However, this seminal case dramatically altered the field of private antitrust litigation.

In that case, defendant manufacturers were ordered to pay approximately US$400,000 in damages, equivalent to 5 per cent of the turnover of the cartel-related products, to the plaintiffs, who were private residents suing on behalf of a local government authority that was the victim of the anticompetitive act.

In the years since that case was decided, more than half of all private suits for damages brought in the various courts of Japan have resulted in a judgment for damages in favour of the plaintiff, with judgments for damages as high as 20 per cent of the turnover of the cartel-related products.

In March 2007, the Tokyo District Court rendered a judgment against three large Japanese corporations and ordered them to pay a total of ¥9.7 billion for damages incurred by the Tokyo metropolitan government as a result of illegal acts occurring between 1994 and 1998; two of the three corporations settled this case in the Tokyo High Court in April 2009, where they agreed to pay approximately ¥7.5 billion to the Tokyo metropolitan government. The Supreme Court also ordered five corporations that engaged in cartel conduct to pay a total amount of ¥5.5 billion for damages incurred by the Yokohama, Kobe and Fukuoka local governments in April 2009.

Further, in March 2011, the Tokyo District Court ordered a defendant to cease and desist illegal activities that constituted an 'interference against a competitor' under unfair trade practices of the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended (the Anti-monopoly Law)). It is a recent tendency for corporations listed on a stock exchange to seek damages arising from anticompetitive acts before a court, or outside court, to avoid the potential risk of a shareholder making a derivative litigation. Likewise, in recent years, there has been more derivative litigation against the directors of companies guilty of cartel behaviour alleging, in particular, damages against the company by having chosen not to apply for leniency.

Applicable legislation

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Yes. Private antitrust actions are mandated by statute under the Anti-monopoly Law and are also possible under general tort law, pursuant to the Civil Code. The standing to bring a claim is not limited to those directly affected but includes those indirectly affected under both the Anti-monopoly Law and the Civil Code.

Also, pursuant to article 24 of the Anti-monopoly Law, introduced by a 2001 amendment to the Law, a private plaintiff may, in addition to seeking damages, seek an injunction against certain 'unfair trade practices'. The Anti-monopoly Law provides for, and the Japanese Fair Trade Commission (JFTC) has designated under the authority of the Anti-monopoly Law, many unfair trade practices, such as exclusive dealing, price discrimination, below-cost sales, tie-ins, resale price maintenance, refusal to deal and trading on restrictive terms. Among these, private plaintiffs have most commonly sought injunctions for price discrimination, below-cost sales and division of sales territories. However, private plaintiffs have not prevailed in many injunction cases.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Articles 25 and 26 of the Anti-monopoly Law relate to suits for damages for anticompetitive acts. Article 25 provides that parties that have monopolised or engaged in a cartel or other unfair trade practices are liable to indemnify those injured by those practices.

Article 709 of the Civil Code provides the principles for general tort law, stating that those that violate the rights of another must compensate for the damage resulting from their actions. This is recognised to include anticompetitive acts, thereby authorising the bringing of private antitrust actions. In addition, there is another legal claim available for victims of anticompetitive acts under article 703 of the Civil Code, which provides that the victims are entitled to claim for unjust enrichment that violators gained through the anticompetitive acts.

There are three possible ways to bring an action seeking compensation, the distinction among them being the burden of proof applicable to each. Article 26 of the Anti-monopoly Law provides that the right to claim damages under article 25 of the Law may not be asserted in court until a relevant order (such as a cease-and-desist order) by the JFTC has become final and binding (which means that the judgment also needs to become final and binding if a defendant challenges the relevant order at court). However, when such an order exists, the plaintiff in a related private litigation need not prove the existence of intention or negligence of the defendant in respect of the relevant infringement

of the Anti-monopoly Law, given that such a determination will already have been made in the prior JFTC decision.

In article 709 litigation, no such JFTC determination will exist; therefore, the plaintiff must prove the existence of intention or negligence of the defendant at trial. A plaintiff based on article 703 of the Civil Code must also prove anticompetitive acts to present the fact that a defendant gained profits without legal cause.

A private plaintiff may, in addition to seeking damages, seek an injunction against certain unfair trade practices (article 24 of the Anti-monopoly Law).

The Tokyo District Court decisions may be appealed to the Tokyo High Court only. However, the decision on appeal may be further appealed to the Supreme Court, similar to actions brought under general tort, although the court of first instance for general tort or unjust enrichment actions is not restricted to the Tokyo District Court, and the district decision may be appealed to the relevant high court. High courts must accept an appeal of both the factual determinations and the interpretations of law by the lower court. Although the Supreme Court rarely agrees to revisit the factual determinations of the lower court, it has the discretion to do so, based on the merits of the case. Injunction litigations are initiated in the district courts.

PRIVATE ACTIONS

Availability

4 | In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

Redress for damages caused by all types of antitrust violations may be sought in a private litigation. However, under article 24 of the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended (the Anti-monopoly Law)), a private action seeking an injunction is limited solely to claims of unfair trade practices on the part of the defendant. A finding of infringement by the Japanese Fair Trade Commission (JFTC) is not required to initiate a private antitrust action.

In principle, a civil court is not bound by any determination of the JFTC regarding misconduct by a defendant. However, if a JFTC order has become final and binding, it is, as a matter of practice, likely that the facts determined by the JFTC will be given some weight in a private litigation.

In addition, when such an order exists, a plaintiff can assert the right to claim damages under article 25 of the Anti-monopoly Law, under which the plaintiff in a related private litigation need not prove the existence of intention or negligence of the defendant in respect of the relevant infringement of the Anti-monopoly Law, given that such a determination will already have been made in the prior JFTC decision. In this case, pursuant to article 84 of the Anti-monopoly Law, a court may refer to the JFTC for its opinion about the amount of damages incurred by anticompetitive acts.

Without a final and binding JFTC order, a plaintiff claiming damages must choose legal actions based on the Civil Code, such as article 709, and must prove the existence of intention or negligence of the defendant in respect of the relevant infringement. Having said that, since the presumption of fact based upon the JFTC's findings may be accepted to some extent, in practice, past claims are mainly based on the findings of infringement by the JFTC.

In some severe cases, the JFTC files a complaint with public prosecutors for criminal prosecution pursuant to articles 74 and 96 of the Anti-monopoly Law. A plaintiff in a private action may rely on findings in criminal proceedings concerning the relevant infringement. Although a civil court is not bound by the findings in criminal proceedings, it would be difficult for the defendant to rebut the findings unless new and definite evidence is submitted in the private litigation.

Required nexus

5 | What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

With regard to actions in Japan as a whole, the nexus for bringing a private action is that the anticompetitive act or agreement by the defendant must have had some impact on the Japanese market. If the Japanese market has been affected by the act of agreement, conspiracy, etc, it is possible to bring an action before a court in Japan. If a claim for damages is based on the Anti-monopoly Law, it must be brought solely in the Tokyo District Court, and if a claim is based on general tort, it must be brought in a district court pursuant to the general rule of jurisdiction under the Civil Procedures Law. If a plaintiff wishes to bring an action for damages or unjust enrichment to a district court other than the Tokyo District Court, the plaintiff must choose a claim based on the Civil Code.

Restrictions

6 | Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes, provided that those actions have an impact on the Japanese market.

PRIVATE ACTION PROCEDURE

Third-party funding

7 | May litigation be funded by third parties? Are contingency fees available?

Litigation may be funded by third parties, and contingency fees are available. In fact, most cases of private antitrust litigation are on a contingency basis. The number of corporations, in particular public corporations, that have brought such cases for damages is increasing, and a time-charge basis may be used by those public corporations.

Jury trials

8 | Are jury trials available?

No, jury trials are not available in private antitrust litigation. A lay judge system was introduced in May 2009, but it is used for serious criminal cases only.

Discovery procedures

9 | What pretrial discovery procedures are available?

During the past 10 years or so, the Japanese legal system's form of discovery has been changed to generally extend its scope under the Civil Procedures Law. Under the system, a plaintiff or defendant may request that the court orders the other side to submit certain evidence to the court. If the court so orders, the party must comply and submit the evidence. Although this discovery system is utilised in some cases, it is limited in scope under articles 132-4 and 220 of the Civil Procedures Law in comparison with the discovery procedures of the United States and some other systems.

There have also been amendments to the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended (the Anti-monopoly Law)) since January

2010. Article 80 of the Anti-monopoly Law, introduced by the amendments, states that only a plaintiff seeking an injunction may request the court to order the defendant to produce relevant evidence that assists in establishing illegal activities.

Apart from judicial proceedings, the plaintiff may rely on the Act on Access to Information Held by Administrative Organs (the Information Disclosure Law) to request administrative documents used for investigations and possessed by the Japanese Fair Trade Commission (JFTC) under certain conditions. For instance, upon a request from victims of bid-rigging practices pursuant to the Information Disclosure Law, the JFTC has so far disclosed administrative surcharge orders, most of which are usually not revealed by the JFTC, so that the victims could identify damage from the bid-rigging practices as those orders contained information on which biddings were related to the bid-rigging practices.

Admissible evidence

10 | What evidence is admissible?

In civil actions in Japan, in general, all evidence, including documentary or testimonial evidence, is admissible. There are limited exceptions, such as evidence that was obtained by illegal activity, depending on the severity of the illegality.

Under the Civil Procedures Law, judges determine the weight or value to be ascribed to the evidence, which can include a conclusion that certain submitted evidence has no weight or value. Each party to the litigation submits its own evidence, which is, in general, limited to evidence that the party either possesses or can obtain through independent means, although it is possible for a party to request a court to order another party to produce information.

An 'e-discovery' system is not common in Japanese court or even in JFTC procedures.

Legal privilege protection

11 | What evidence is protected by legal privilege?

There is no generally applicable rule regarding the protection of the attorney–client privilege and attorney work under the Anti-monopoly Law as at the time of writing. However, in civil litigation procedures relating to testimony and the submission of documents, legal counsel (including in-house counsel) can refuse to testify or submit a document regarding facts that have come to their knowledge while performing their duties that should be kept secret. Additionally, injunctive relief can be sought to protect trade secrets under article 81 of the Anti-monopoly Law.

An amendment bill to the Anti-monopoly Law was passed in the National Diet in June 2019, whereby upon its enforcement, the JFTC will have discretion to set administrative surcharges on cartelists that apply for leniency and are willing to cooperate with the JFTC's investigation to obtain a further reduction of the surcharges.

To ensure that the new leniency system will work efficiently and fairly, in accordance with an additional resolution to the amendment adopted by the Diet, the JFTC will add new provisions to the JFTC's investigation regulations, providing that an alleged company can be subject to the attorney–client privilege in proceedings regarding unreasonable restraint of trade. This will be the first time that the attorney–client privilege will be expressly protected pursuant to provisions of Japanese Law.

The new system will be put into force by the end of 2020. As described above, under the current Anti-monopoly Law, the attorney–client privilege is not recognised, so the JFTC is theoretically able to seize and put forward any documents, including attorney–client communications, as evidence to prove unreasonable restraint of trade. After the new Anti-monopoly Law, together with the amended investigation regulations, comes into effect, the JFTC can be requested to return certain types of attorney–client communications that are seized.

In April 2020, a draft of the guidelines on the attorney–client privilege unveiled more details on the privilege in Japan. When an alleged company receives a submission order for certain documents from the JFTC officers during a dawn raid, the company will be entitled to claim that the documents should not be subject to the order because the documents contain attorney–client communications. Under those circumstances, the JFTC officers will order the submission of the documents, seal the documents and place the documents under the control of the Determination Officers at the Secretariat of the JFTC, which is independent from the Investigation Bureau. The Determination Officers will then determine whether those documents satisfy the conditions for the attorney–client privilege provided under the new regulations or guidelines. If the conditions are satisfied, the documents are promptly returned to the company.

The rationale behind the introduction of the privilege is to protect communications between companies and external attorneys in connection with investigations against unreasonable restraints of trade, resulting in a more efficient flexible surcharge system. Communications with in-house counsel will also be subject to the attorney–client privilege if it is apparent that the in-house counsel conducts legal affairs independently from and beyond the control of his or her employer after the violation (of the Anti-monopoly Law) in question is revealed, and the independence and lack of control of the in-house counsel is found to be based on the employer's instructions.

In respect of communications with overseas attorneys, the JFTC will preclude documents or data containing those communications from the scope of submission orders by the JFTC in light of the attorney–client privilege in relevant countries, according to the draft of the guidelines.

Criminal conviction

12 | Are private actions available where there has been a criminal conviction in respect of the same matter?

Yes. The JFTC may file complaints about severe criminal cases with public prosecutors for criminal prosecution pursuant to articles 74 and 96 of the Anti-monopoly Law. In those cases, private litigation may still proceed as civil cases are clearly distinguished from criminal proceedings in Japan. In most cases in which there has been a criminal prosecution followed by private litigation against the relevant defendant, the plaintiffs have had a good chance of prevailing at trial.

However, in practice, few criminal cases are brought in Japan with regard to anti-monopoly violations (perhaps only one case every two years). In contrast, administrative decisions of the JFTC regarding anticompetitive acts are common, and in recent years, there have been 10 to 20 JFTC orders each year. Orders that have become final and binding allow for article 25 private litigations to be brought and, hence, are a much more common connective source of private antitrust litigation in Japan.

Utilising of criminal evidence

13 | Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Evidence and findings in criminal proceedings can be relied on by plaintiffs in parallel private actions. Private actions may rely on judgments or decisions rendered or evidence presented in criminal proceedings (even including JFTC administrative proceedings). Applicants for leniency are not protected from follow-on litigation. In most of the private actions thus far, the leniency applicants have been defendants.

In respect of the Information Disclosure Law, the JFTC has a general policy to disclose, at its discretion, administrative documents obtained or used in its administrative investigation (except leniency procedures) to private claimants. The JFTC has so far disclosed certain administrative documents in response to the request based on the Information Disclosure Law.

Stay of proceedings

14 | In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Generally, there is no statutory right for a defendant to stay proceedings. If a defendant's petition is made in court, the court may decide at its discretion whether to grant the stay, although such a stay of proceedings is supposed to be allowed by the court only in an exceptional circumstance.

Standard of proof

15 | What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

Generally, although there is no clear applicable standard of proof, the claimant, regardless of whether a direct purchaser, has the burden of proof to the extent of the preponderance of the evidence. With regard to the finding of the amount of damages, in cases where it is determinable that damages have arisen and if it is extremely difficult for the claimant to prove the amount owing to the nature of the damages, the court may determine a proper amount of damages on the basis of the entire import of the oral argument and the result of the examination of evidence under article 248 of the Code of Civil Procedure. In general, there are no rules of thumb or rebuttable presumptions even relating to overcharges of cartels.

Actions brought pursuant to article 25 of the Anti-monopoly Law will have the benefit of a determination by the JFTC regarding the existence of intention and negligence of the defendant. Therefore, in those actions, the defendants are liable for damages without negligence, provided that other requirements are fulfilled.

In actions brought pursuant to article 709 of the Civil Code, no such JFTC determination exists; therefore, the plaintiff has the burden at trial of proving the existence of intention and negligence of the defendant, together with other requirements provided by article 709.

A claimant for unjust enrichment under article 703 of the Civil Code must prove that the defendants obtained profits to the detriment of the claimants, and that the profit transfers from the claimant to the defendant are without legal basis, by establishing anticompetitive acts of the defendants and the invalidity of the contact that made those profit transfers.

Although a civil court is not bound by any determination of the JFTC regarding misconduct by a defendant, if a JFTC order has become final and binding, it is likely that the facts determined by the JFTC will be given some weight in a private litigation. Since this assumption is not based on any provisions of law, there is no difference in terms of the presumption between actions pursuant to articles 25 of the Anti-monopoly Law or article 709 of the Civil Code.

Time frame

16 | What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

No class proceedings may be brought in Japan.

For non-class proceedings, actions brought in a district court typically require a period of between one and two years to resolve. Actions brought in a high court typically require six months to one year to resolve.

In general, there is no mechanism for accelerating the proceedings. However, in recent years, the Japanese courts have generally sought to shorten the time required to reach a judgment in a case.

Limitation periods

17 | What are the relevant limitation periods?

Pursuant to article 26, paragraph 2 of the Anti-monopoly Law, private actions brought pursuant to article 25 must be brought within three years of the date of the finalisation of the relevant JFTC order in the matter (ie, the limitation period starts to run from the finalised date of the relevant JFTC order).

Actions brought under general tort, pursuant to article 709 of the Civil Code, must be brought either within three years of the date on which the victim or plaintiff became aware of both the damage and the defendants who caused the damage through involvement in the conspiracy or act, or within 20 years of the date of the conspiracy or damaging act, whichever is earlier.

A claim for unjust enrichment under article 703 of the Civil Code must be brought within five years of the date when the claimant became aware of capability of the claim, or 10 years of the date when the claim is objectively available, whichever is earlier.

Appeals

18 | What appeals are available? Is appeal available on the facts or on the law?

Actions pursuant to article 25 must be brought solely in the Tokyo District Court. The Tokyo District Court decisions may only be appealed to the Tokyo High Court, and the decision on appeal may be further appealed to the Supreme Court. The Tokyo High Court must accept an appeal on the factual determinations as well as the interpretations of law of the Tokyo District Court. The Supreme Court rarely agrees to revisit the factual determinations of the lower court although it has the discretion to do so if it chooses.

Actions under general tort and unjust enrichment as well as actions seeking an injunction under article 24 of the Anti-monopoly Law are brought in district courts, the decisions of which may be appealed to the relevant high court.

COLLECTIVE ACTIONS

Availability

19 | Are collective proceedings available in respect of antitrust claims?

No, class proceedings are not available in Japan.

Applicable legislation

20 | Are collective proceedings mandated by legislation?

Not applicable.

Certification process

21 | If collective proceedings are allowed, is there a certification process? What is the test?

Not applicable.

22 | Have courts certified collective proceedings in antitrust matters?

Not applicable.

Opting in or out

23 | Can plaintiffs opt out or opt in?

Not applicable.

Judicial authorisation

24 | Do collective settlements require judicial authorisation?

Not applicable.

National collective proceedings

25 | If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable since neither class nor collective proceedings are available.

Japan has multiple courts, with the relevant courts of general jurisdiction being the district courts located throughout the country. Above the district courts are the related high courts. Private actions brought pursuant to article 25 of the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade must be brought solely in the Tokyo District Court, as the court of first instance.

Actions brought under the Civil Code, such as articles 703 and 709, will be brought in the relevant district court. An appropriate nexus for the choice of a district court is generally the court in the locale where the plaintiff's residence or corporate headquarters is located, the place where the conspiracy or act occurred, or the place where the headquarters of the defendant is located. It is only possible to bring an action in one jurisdiction in regard to any claim.

Collective-proceeding bar

26 | Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

REMEDIES

Compensation

27 | What forms of compensation are available and on what basis are they allowed?

Damages are limited to actual loss only, and only the loss that has a reasonable causation link to the harmful act or conspiracy. However, unlike in some other jurisdictions, damages can, in principle, be claimed by both direct and indirect purchasers as long as they can show that they suffered loss because of the original harmful act or conspiracy.

In Japan, some of the largest damages are awarded in bid-rigging cases and, in particular, to local governments or public corporations that have suffered damage as a result of an agreement among bidding participants to agree in advance upon the successful bidder and the amount of the successful bid. Because of this, there has been a trend in recent years for local governments and public corporations to insert a clause in the project contract specifying a pre-agreed amount of damages to be paid if it is subsequently discovered that the successful bidder had participated in bid rigging. Typically, the amount specified in such contracts is between 6 and 20 per cent of the contract value. For example, it has been reported that the Tokyo Metropolitan Government stipulates a damages clause amounting to 10 per cent of the contract value, and many other local governments have followed this 10 per cent stipulation.

Other remedies

28 | What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

Article 24 of the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended (the Anti-monopoly Law)) permits a person, whose interests are infringed upon or likely to be infringed upon by unfair trade practices, and who is thereby suffering or is likely to suffer serious damages, to seek an injunction suspending or preventing the party from engaging in those infringements. Both provisional (interim) and permanent injunctions are available although the burden of proof is lower in provisional dispositions than in permanent injunctions.

Further, restitution is rarely granted as a remedy although it may be granted at least in part through an injunction to restore the injured party to the position it held prior to the commencement of the violation.

Punitive damages

29 | Are punitive or exemplary damages available?

No.

Interest

30 | Is there provision for interest on damages awards and from when does it accrue?

Yes. The court must award interest at a rate of 3 per cent per year from the time the damaging act or conspiracy occurred until the defendant makes the payment.

Consideration of fines

31 | Are the fines imposed by competition authorities taken into account when setting damages?

No. Fines (administrative surcharges) imposed by competition authorities are calculated as a percentage (ie, 10 per cent of the violator's turnover of the related product or products during the relevant period up to 10 years). Fines paid by violators are contributed to the Japanese national treasury and are not distributed to private parties injured by the violator's conduct. Therefore, the court does not take into account the fines imposed by the Japanese Fair Trade Commission (JFTC) at all.

Legal costs

32 | Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

In general, each party must bear its own legal costs.

Joint and several liability

33 | Is liability imposed on a joint and several basis?

Yes, tortfeasors are generally liable for actual damages on a joint and several basis.

Contribution and indemnity

34 | Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

Yes. If there are several defendants, in the event that one defendant is required to pay an entire damages award, that defendant may seek indemnification from the co-defendants and demand a contribution equivalent to their respective proportion of the damages. Such a contribution is commonly sought in these cases.

A defendant who paid the whole or a part of the damages can seek indemnification from the co-defendants in or out of court, provided that for the defendant to assert those claims, the amount paid by the defendant to a victim or plaintiff must exceed the amount for which the defendant is liable. The claim for indemnification from the co-defendants is brought in separate proceedings from the principal claim and is normally pursued after a judgment or settlement of the principal claim.

Passing on

35 | Is the 'passing-on' defence allowed?

The passing-on defence may be taken into account although not by that name. In Japanese civil litigation, an award of damages must compensate for the injury actually suffered by the plaintiff. This stems from the underlying principle that the purpose of private actions is to compensate for a loss, not to act as a deterrent. Based on this, if a direct purchaser passes an overcharge down the supply chain, it may still have difficulty showing the non-existence of an injury.

Other defences

36 | Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

No.

Alternative dispute resolution

37 | Is alternative dispute resolution available?

In theory, private claims for violations of the Anti-monopoly Law may be resolved by agreement through arbitration. Although any such arbitration that has occurred under confidential conditions would not be publicly reported, we believe that there has been almost no such arbitration or alternative dispute resolution used in Japan for Anti-monopoly Law claims. This is because the Anti-monopoly Law is a 'national and public law' in Japan, and any matters arising under it are, as a matter of practice, generally submitted to the JFTC regardless of whether such private claims are settled through arbitration.

UPDATE AND TRENDS

Recent developments

38 | Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

The commitment procedure was effectively introduced into the Act concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended (the Anti-monopoly Law)) on 30 December 2018. The commitment procedure is similar to the commitment system under EU competition law in that it is aimed at resolving suspected violations against the Anti-monopoly Law on a voluntarily basis, by consent between the Japanese Fair Trade Commission (JFTC) and the undertakings concerned.

Under the new system, undertakings in which a certain type of violation of the Anti-monopoly Law occurred may not be subject to the issuance of an infringement decision if the JFTC decides to apply the commitment procedure for the resolution of the suspected conduct. As at May 2020, there have been two cases for which the JFTC applied the commitment procedure since December 2018.

When a JFTC order has been issued, a plaintiff can assert its right to claim damages under article 25 of the Anti-monopoly Law, pursuant to which the plaintiff (in the related private litigation) need not prove the existence of intention or negligence of the defendant in respect of the relevant infringement of the Anti-monopoly Law, given that such a determination will already have been made by the JFTC decision. Accordingly, undertakings that have allegedly violated the Anti-monopoly Law may benefit from the introduction of the commitment procedure in that they may avoid a JFTC order that finds an infringement against them and the consequent claims for damages under articles 25 of the Anti-monopoly Law.

However, on the other side of the coin, the plaintiff of an anti-monopoly infringement case will only have recourse to articles 703 and 709 of the Civil Code as a legal basis for action against an infringement if the JFTC decides to deal with the matter via the commitment procedure. Pursuant to those provisions of the Civil Code, an infringement of the defendant must be proven or shown by the plaintiff, which may be an onerous task, depending on the circumstances of the case.

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