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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Japan --

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-- Japan --

1. Introduction

1. Impediments to fair and free competition in the market will harm the economy as they discourage the incentives of enterprises to exert their originality and ingenuity and disturb sound and democratic developments of the national economy. The Antimonopoly Act provides for rules to be followed by enterprises in their business activities and the Japan Fair Trade Commission (hereinafter referred to as “the JFTC”) is responsible for enforcing the Antimonopoly Act with the aim of maintaining the competitive mechanism of the market.

2. Acts that violate the Antimonopoly Act not only infringe upon the competitive mechanism and public interest, but also on the interests of consumers and enterprises under private laws. However, the administrative measures taken by the JFTC do not necessarily recover these interests. For this reason, under the Antimonopoly Act certain victims whose interests have been infringed upon are entitled to rights to demand an injunction and rights to claim damages in the form of a private law enforcement system. The purpose of this system is to prevent the infringement of the private interests or recover the interests that have been infringed upon.¹

3. This contribution document will provide an overview of the rights to demand an injunction and rights to claim damages as private law enforcement procedures, their characteristics, and the status of their implementation, taking into account their relation with public law enforcement carried out by the JFTC.²

2. Request for injunction based on Article 24 of the Antimonopoly Act

2.1 Outline

4. Under the Antimonopoly Act, a person whose interests are infringed upon or likely to be infringed upon, due to unfair trade practices, and who is thereby suffering or likely to suffer extreme damages as a result, is entitled to seek the suspension or prevention of such infringements from the enterprise, etc. who infringed or is likely to infringe the interests. This system was introduced through the law for the amendment of the Antimonopoly Act in 2000 with the purpose of improving the methods of offering relief to victims and strengthening deterrence to performing acts in violation of the Antimonopoly Act.³

¹ In addition, if the Directors of a company cause damages to the company by committing acts that violate the Antimonopoly Act, an action to enforce the Directors’ liability to the company by shareholders (Article 423 and Article 847 of the Companies Act) can also be regarded as a private law enforcement system.

² In relation to this theme, the contribution document we submitted at the meeting in February 2011 discussed the damage compensation system based on the Antimonopoly Act and how damage was calculated. Also, the contribution document we submitted at the meeting in October 2011 provided an overview of the civil lawsuit system (request for injunction and claims for damages) based on the Antimonopoly Act.

-“Quantification of Harm to Competition by National Courts and Competition Agencies” (February 2011)

<http://www.oecd.org/daf/competition/QuantificationofHarmtoCompetition2011.pdf>.

-“Institutional and Procedural Aspects of the Relationship between Competition Authorities and Courts, and Update on Developments in Procedural Fairness and Transparency” (October 2011)

<http://www.oecd.org/daf/competition/ProceduralFairnessCompetition%20AuthoritiesCourtsandRecentDevelopments2011.pdf>.

³ Introduction of injunction system in private action was recommended in “OECD Economic Surveys of Japan, 1999”.

2.2 *Infringement subject to request for injunction*

5. Infringements subject to request for injunction are unfair trade practices. In particular, these infringements are stipulated in Article 19 (Unfair Trade Practices by Enterprises) and Article 8-1 item (v) (Inducing enterprises to employ such act as falls under unfair trade practices by Trade Associations) under the Antimonopoly Act.

2.3. *Standing to sue*

6. Standing to sue corresponds to a person whose interests are infringed upon or likely to be infringed upon, due to unfair trade practices. It can be subject to consumer in addition to competitor, trade with the violating party, etc.

2.4. *Court's notice to the JFTC*

7. When a request for an injunction is submitted, the court shall notify the JFTC to that effect (Article 79-1 of the Antimonopoly Act). This will enable the JFTC to be provided with the information about request for injunction on acts in violation of the Antimonopoly Act.

2.5. *System to ask for voluntary opinions*

8. When a request for an injunction is submitted, the court may ask for the opinion of the JFTC with respect to the application of the Antimonopoly Act for the case concerned and other necessary matters (Article 79-2 of the Antimonopoly Act). Also, the JFTC may, with the permission of the court, state an opinion to the court on the application of the Antimonopoly Act and other necessary matters (Article 79-3 of the Antimonopoly Act). However, the opinion of the JFTC is not binding on courts.

2.6. *Jurisdiction*

9. In addition to the district court that has jurisdiction over the location of the general venue under the Code of Civil Procedure (paragraph 1 of Article 4 of the Code of Civil Procedure), a plaintiff may file lawsuits with a district court that is located in the location of a high court, that corresponds to the higher court of the abovementioned district court, and the Tokyo District Court (Article 84-2 of the Antimonopoly Act).

2.7. *The special provisions of order to submit documents⁴*

10. In an action to suspend or prevent an infringement under the provisions of Article 24, the court may, upon petition of a party, order a party to produce any documents necessary to prove the alleged infringement; provided, however, this does not apply if the holder of the documents has justifiable grounds for refusing to produce them (Article 80-1 of the Antimonopoly Act).

11. Whether or not the holder has the justifiable grounds shall be judged by comparing and balancing the disadvantages that the holder of the documents has as a result of a trade secret being disclosed and the disadvantages that the parties to a lawsuit have as a result of documents not being submitted.

12. If the court finds it necessary in order to ascertain the existence of a justifiable reason for refusing to produce them, it may require the holder of the documents to produce said documents, where no party to the case may request disclosure of the produced documents and only judges can ascertain the existence of a

⁴ To achieve better performance out of request for injunction, this system was introduced in 2009 after the Patent Act system.

justifiable reason through reading the produced documents (in-camera procedure, Article 80-2 of the Antimonopoly Act). In such a case, if the court finds it necessary to hear the opinions of a party, etc. to decide whether there are justifiable grounds, it may disclose said documents to the party, etc. at the discretion of the court (Article 80-3 of the Antimonopoly Act)

13. If a prima facie showing of both of the following grounds has been made with regard to a trade secret, the court may order the parties, etc. not to use the trade secret for any purpose other than pursuing the action (Article 81-1 of the Antimonopoly Act).

(i) The trade secret held by the party, is included in the contents of the documents

(ii) The party's business activities based on the trade secret under the preceding item are likely to be hindered by its disclosure.

2.8. Status of implementation (as of the end of March 2015)

14. Since 2000, 68 lawsuits have been filed to submit a request for injunction based on Article 24 of the Antimonopoly Act.

15. On the other hand, thus far there have been no opinions sought by courts to the Commission based on the provisions set forth in paragraph 2 of Article 79 of the Antimonopoly Act.

2.9. Recent case

16. The case of a request for injunction of the trade interference by a taxi operator (Osaka High Court Judgment, October 31, 2014)

1. Summary of the court case

Primarily based on the right to demand an injunction in accordance with Article 24 of the Antimonopoly Act, the plaintiffs (private taxi operators), who run a business mainly in Kobe City, claimed that the acts of the defendant (a taxi operator), who operates a business in Kobe City predominantly in the areas along A Line (pseudonym), interfered with customers using the taxis of the plaintiffs and thus amounted to business interference. These acts consisted mainly of exclusively using the waiting area in the taxi stand at B station as its own place and refusing to let the plaintiffs use it, and preventing taxis operated by the plaintiffs from driving to the front of the waiting queue of taxis. The plaintiffs requested for an injunction against the aforementioned acts, stated that they suffered damages as a result of these acts of interference, and thus submitted a claim for damages caused by these unlawful acts.

2. Outline of the judgment

A part of the claims was upheld. The request for an injunction of the interference acts and the damage claims were upheld.⁵

“When the interest of the plaintiffs, which in this case is gaining customers at a taxi stand, is infringed upon or likely to be infringed upon by the defendant’s acts of interference (unfair trade practices), ... in the plaintiffs request to the defendant ... for an injunction of the defendant’s interference acts (infringements in violation of Article 19 of the Antimonopoly Act) at the taxi stand, ... it must be clear that the relevant interference acts cause or are likely to cause severe damage to the plaintiffs (Article 24 of the Antimonopoly Act).

⁵ The case was the first in which a request for an injunction was upheld at the high court level.

In addition, ... through the unfair trade interference described in paragraph 14 of the general designation of the JFTC, the defendant took away nearly all of the business opportunities of the plaintiffs, ... the competing operators, to enter passenger vehicle transportation agreements with the users of taxis at the taxi stand, and, by committing similar acts, the defendant is expected to continue to take away nearly all of the opportunities of the plaintiffs to enter passenger vehicle transportation agreements with the users of taxis at the taxi stands in question in the future. These acts may be said to squarely deny the purpose and the principle of the Antimonopoly Act, which is the promotion of fair and free competition. Moreover, because the method is ... such that the defendant conducts physical acts in an organized manner to interfere with the taxis of the plaintiffs leaving with the customers, taking into account the details and the levels of damage, the situation of acts in violation of the Antimonopoly Act, and other matters in a comprehensive manner, the damage that is inflicted or likely to be inflicted by the defendant on the plaintiffs by the infringement of the interests of the plaintiffs through the infringements described in Article 19 of the Antimonopoly Act (unfair trade practices) of the defendant shall be considered to be severe.

Therefore, the request made by the plaintiffs for the injunction based on Article 24 of the Antimonopoly Act has grounds ... to the extent that the request is made for the injunction of acts that are applicable to unfair trade interference.”

3. Claim for damages based on the Antimonopoly Act and the Civil Code

3.1 Claim for damages based on Article 25 of the Antimonopoly Act

3.1.1 Outline

17. Under the Antimonopoly Act, any enterprise or trade association that has committed a certain act in violation of certain provisions of the Antimonopoly Act shall be liable for damages suffered by another party (Article 25 (1) of the Antimonopoly Act), who will be known as the plaintiff. No enterprise or trade association that has committed the above act may be exempted from the liability for the damages by proving the non-existence of intention or negligence on its part (Article 25 (2) of the Antimonopoly Act).

3.1.2 Violation Acts Subject to Liability for Damages

18. Pursuant to Article 25 of the Antimonopoly Act, any enterprise or trade association that has committed private monopolization, unreasonable restraint of trade, unfair trade practices, certain international agreements or contracts (concerning unreasonable restraint of trade or unfair trade practices), or acts that restrain or inhibit competition shall be liable for faultless (i.e. non-existence of intention or negligence) damages suffered by another party.

3.1.3 Scope of Victims

19. An enterprise or a trade association must accept liability without fault for damages caused by private monopolization or any other violation with respect to the party suffering from the damages arising from the violation. This applies irrespective of whether the victim is a consumer or an enterprise, whether it is a competitor of or has trade with the violating party, or whether it trades with the violating party directly or indirectly.

20. It is understood that the scope of the victims is broadly interpreted for the purpose of increasing the effect of eliminating the harm caused by any act in violation of the Antimonopoly Act to the economic society and of preventing such acts.

3.1.4 Requirement for Action

21. To allege the above right of claim for damages in a court, the cease and desist order (Article 61-1 of the Antimonopoly Act) or the surcharge payment order (Article 62-1 of the Antimonopoly Act) (hereinafter referred to as “the order”) shall be required to be firmly determined (Article 26-1 of the Antimonopoly Act). It is considered that this determination will have effects to alleviate a plaintiff’s burden of proof.

3.1.5 Liability without Fault for Damages

22. The reason why the Antimonopoly Act provides for non-fault liability for damages is considered to be aiming at easing the burden on the plaintiff (i.e. the victim) to provide evidence and at facilitating compensation for damages caused by the violation. According to the Civil Code as general legislation that governs relationships between private persons, claims for damages on the grounds of tort require intent or negligence on the part of the party causing the damages. The reason why the Antimonopoly Act does not have such requirements is thought to have the purpose of enhancing the effect of preventing any conduct in violation of the Antimonopoly Act by imposing greater liability than tort.

3.1.6 System for Seeking Opinions

23. The Antimonopoly Act prescribes in Article 84 that if a suit for damages under the provisions of Article 25 of the Act has been filed, the court may ask for an opinion of the JFTC with respect to the amount of damages caused by the violation as provided in the said Article.

24. This system helps to ease the burden on the plaintiff to present evidence. However, the opinion of the JFTC is not binding on courts.

3.1.7 Jurisdiction

25. As well as the treatment of action to the JFTC’s order, the jurisdiction of the first instance over any actions concerning compensation for damages pursuant to the provisions of Article 25 shall lie with the Tokyo District Court, and The Tokyo District Court shall conduct a proceeding and make a judicial decision by a panel of judges consisting of three judges (as necessary five judges) (Item 2 of Article 85 and Article 86 of the Antimonopoly Act).

26. Given that the suit is filed on the basis of the order of the JFTC and in connection with an alleged act in violation of the Antimonopoly Act requiring a technical and unified judgment, the provisions mentioned above are designed to concentrate the hearings and judgment in a single court so that relief can be swiftly given to the victim.

3.2 Claim for damages based on Article 709 of the Civil Code

27. The right of claim for damages based on Article 25 of the Antimonopoly Act may not be exercised for a suit unless the orders have become final. But, even if the orders do not exist or have not become final and binding, compensation for damages may be claimed against a party who has committed an act in violation of the Antimonopoly Act based on Article 709 of the Civil Code.

3.3 Status of implementation (as of the end of March 2015)

28. To the knowledge of the JFTC, 91 claims for damages have been filed to date based on Article 25 of the Antimonopoly Act. The JFTC does not know the accurate number of claims for damages based on Article 709 of the Civil Code.

29. Moreover, 84 opinions to date have been sought by courts to the JFTC based on the provisions set forth in Article 84 of the Antimonopoly Act.

3.4 *Response to bid rigging by procurement bodies*

30. In recent years, there has been an increase in the number of cases in which procurement bodies, such as national and local governments, that suffered damages caused by bid rigging submit claims for damages to enterprises based on the provisions set forth in Article 25 of the Antimonopoly Act or Article 709 of the Civil Code. At present in 2015, there has been a total of 120 cases in which procurement bodies themselves submit claims for damages (69 cases based on Article 25 of the Antimonopoly Act and 51 cases based on Article 709 of the Civil Code) (limited to the number that has been recognized by the JFTC). In addition, there are procurement bodies that insert penalty clauses or liquidated damage clauses in the contracts for cases in which bid rigging takes place.⁶

31. The JFTC has also adopted a policy of supporting damage suits in light of the prevention of acts in violation of the Antimonopoly Act. It provides municipalities and other parties to a lawsuit with documents related to information necessary and beneficial for the examinations of the relevant claims (refer to 4 below for the details of support).

3.5 *Recent case*

32. The case of bid rigging in the construction of the upper steel bridge part ordered by Japan Highway Public Corporation (Supreme Court Ruling, June 25, 2013, and others).

1. *Summary of the court case*

With respect to the bid rigging in the construction of the upper steel bridge part that was ordered by Japan Highway Public Corporation, the JFTC made a recommendation decision on November 18, 2005 that called on 40 parties, including those who bid on the construction, to cease, desist, and otherwise stop performing the corresponding acts. After the relevant decision was made, the plaintiffs, who succeeded the position of Japan Highway Public Corporation, the contractee, exercised the rights to submit claims for damages that were inflicted upon Japan Highway Public Corporation as a result of bid rigging that was confirmed by the relevant decision, and filed damage suits against Mitsui Engineering & Shipbuilding Co., Ltd. and other 29 parties based on the provisions set forth in Article 25 of the Antimonopoly Act with the Tokyo High Court.⁷

In this instance, opinions were sought by the Tokyo High Court based on provisions set forth in paragraph 1 of Article 84 of the Antimonopoly Act regarding the amount of damages caused by the acts in violation of the Antimonopoly Act. The JFTC provided opinion reports for each case.

⁶ For example, the Ministry of Land, Infrastructure, Transport and Tourism has established penalty clauses since June 2003 that contractors who commit bid rigging and other types of misconduct must pay a penalty of 10% of the contract amounts. It has also reinforced these measures since December 2012 by adding penalty clauses that require contractors who fall under certain criteria to pay a penalty of 15% of the contract amounts.

⁷ Because the relevant case is a case in which the jurisdiction of the first instance was given to the Tokyo High Court under the Antimonopoly Act before amendment, a lawsuit has been filed with the Tokyo High Court. In addition, because Japan Highway Public Corporation was split up into private companies, such as Central Nippon Expressway Corporation Limited, in 2005, these companies are the plaintiffs.

In this instance, 22 actions were withdrawn by fiscal 2012, and one case was settled. The Tokyo High Court ruled to uphold the claims in 7 cases, while it rejected the claims in 5 cases. Appeals and petitions for acceptance of final appeal were filed for all 12 of these cases, but because the Supreme Court decided to reject the appeals and the acceptance of the final appeal, the decision of the Tokyo High Court has become final and binding.

2. Outline of the judgment

We will introduce one of the cases upheld partly in Tokyo High Court that has become final and binding from the original decision. (Tokyo High Court Judgment, July 27, 2012).

“As the amount of damages to the plaintiff should be determined based on the amount of final contract after the changes of the contents of construction, the amount of damages in the case should be regarded as equivalent to 6.5% of the amount of the final contract, taking it into account comprehensively that;

- i. The bid acceptance ratio of the contract was 98.54%.
- ii. The average bid acceptance ratio over the 22 contracts was 90.99%, as a result of excluding 9 cases which were appendant constructions or do not represent the general tendency of bidding results from 31 cases which the plaintiff alleged as the basis of calculating the average bid acceptance ratio.
- iii. The average bid acceptance ratio was 92.67%, which was calculated based on the similar bidding contracts ordered by East Nippon Expressway Company Limited, Central Nippon Expressway Corporation Limited, or West Nippon Expressway Company Limited in Fiscal Years 2008 and 2009.
- iv. The excessive profit which the successful bidder obtained illegally in this bid rigging case could be presumed from 3% to 7%.”

4. Support by the JFTC in the above suits for damages

33. If requested by a court or by parties to a lawsuit, the JFTC will provide the material as shown below to make effective use of the damage suit system based on Article 25 of the Antimonopoly Act and serve for a suit for damages based on Article 709 of the Civil Code.

4.1 Provision of material after orders have become final

4.1.1 Procedure before a damage suit is brought to court

34. When the order of the JFTC has become final and binding and if the provision of material relating to the final and binding order is requested by the plaintiff or a lawyer representing the plaintiff, the JFTC shall provide the authenticated transcript or extract of the written cease and desist order or the written surcharge payment order related to the violation.

4.1.2 *Procedure after a damage suit is brought to court*

35. When a damage suit is brought to court with respect to a violation for which the final and binding orders exist, and the court in charge of the case requests the sending of documents based on Article 226 of the Code of Civil Procedure, (i) material relating to the proof of existence of a violation⁸ and (ii) material relating to the proof of a relation or a causal relationship between a violation and damages as well as the amount of damages⁹ shall be submitted to the court.

36. However, divulging any of the “secrets of enterprises”¹⁰ that come to the knowledge in the course of duties is prohibited under Article 39 of the Antimonopoly Act. When material, including “secrets of enterprises,” is submitted to a court, the JFTC shall pay attention to their confidentiality. This will similarly apply to cases in which, if the source of provision of material is made clear, the provider of the material will receive disadvantageous treatment, thereby hinder the handling of the case, or cases in which matters infringing upon individual persons’ privacy are included.

37. In addition, the JFTC does not provide documents related to leniency application.¹¹

4.2 *Provision of material before the orders have become final and binding*

38. Under the condition where the orders have not yet become final and binding, such as the cases in which a suit to rescind the decision is being brought, etc., if the provision of material is requested by the victims, etc. of the violation as necessary for filing a suit for damages or by the plaintiff or lawyer representing the plaintiff after a lawsuit is brought to court, the authenticated transcription or extract of the written cease and desist order or the written surcharge payment order shall be provided.

4.3 *Inspection and copying of the records of cases*

39. Before its revision in 2013, Article 70-15 of the Antimonopoly Act stipulated that, after the commencement of hearing proceedings, any interested person (victims of acts of violation, etc.) may submit a request to inspect or copy the records of the case that have been provided for the hearing proceedings. It also stipulated that the JFTC may not refuse to allow the person to inspect or copy the records of the case in question unless doing so was likely to infringe on the interests of a third party or unless there were any other justifiable grounds.

⁸ For example, material supporting the recognition of a fact in the Order.

⁹ For example, material concerning products, service transactions, distribution practices, etc. that are the object of a violation.

¹⁰ The secret of enterprises denotes a fact that (i) is not publicly known, (ii) is desired to be secret by concerned enterprises, and (iii) can be objectively determined to have sufficient reasons for being described as secret. Such items as manufacturing costs and the purchase price of individual products as well as business know-how fall into this category.

¹¹ In the case of the petition for an order to submit documents made by Sumitomo Electric Industries, Ltd. (Osaka District Court Judgment, June 15, 2012), the court carried out in-camera procedures to assess the obligations of submitting documents related to leniency application. In its response to the appeal, the JFTC stated, “If documents related to leniency application are disclosed, the incentives for leniency application will be lost, and the use of the leniency system will be hindered, causing significant problems for the JFTC in carrying out its public duties.” In its decision, the court rejected the petition because it judged there was no relationship between the relevant leniency documents and the fact that the petitioner claimed to be proved.

40. While this system has been terminated following the termination of the hearing system of the JFTC as a result of the revision in 2013, the system may continue to be applied to cases for which hearings commenced in accordance with the provisions before the revision.

5. Conclusion

41. The private law enforcement system has been actively used in recent years in Japan. With respect to damage suits, as a result of an increase in the number of cases of bid rigging since the 1990s, national and local governments, the contractees and victims of bid rigging, have started to actively use damage suits as set forth in Article 25 of the Antimonopoly Act and Article 709 of the Civil Code. The number of cases in which claims for damages are upheld has also been gradually rising over the last few years. In a similar manner, the rights to demand an injunction have also been steadily exercised over the last 15 years since they were introduced in 2000, and court cases in which requests for injunction are upheld have also started to gradually emerge in recent years.¹²

42. In conclusion, the private law enforcement system is functioning to a significant level as an effective system to prevent the infringement of interests or to recover the interests of victims whose interests were infringed upon through acts in violation of the Antimonopoly Act. It may be said that the system is playing a key role in complementing the public law enforcement, such as administrative actions, carried out by the JFTC.

¹²

In instances of bid rigging, because the suspension of designation for bids is normally imposed for several months, the decrease of opportunities to receive orders, which is caused by this suspension may also be regarded as a kind of penalty.