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# **Erin Brockovich turns European : is there an interest for class actions?**

**Litigation/Antitrust/Distribution law Commissions**

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National Report of Japan

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## **INTRODUCTION**

Class actions are often related and associated to the American legal culture, as it is illustrated by several movies including the famous “Erin Brockovich” picture.

However, the class actions or collective redress actions exist also in other jurisdictions, notably in Europe.

Precisely, the European Commission has recently given an accurate definition of collective redress and of its aim in its communication named “Towards a European Horizontal Framework for Collective Redress”<sup>1</sup>, accompanying its “Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”<sup>2</sup>:

*“Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.”*

Although collective redress and class actions exist in several jurisdictions in the world, there are some differences arising from different legal and procedural cultures, notably between the Common Law and the Civil Law legal systems.

Thus, the purpose of this questionnaire is to identify such differences as well as the common points between the collective redress and class actions in various jurisdictions.

There is also a particular focus on class actions in the anti-trust field, which is one of the main areas for such actions, as shown by the recent proposal for an EU “Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union”<sup>3</sup>.

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<sup>1</sup> COM(2013) 401/2

<sup>2</sup> C(2013) 3539/3

<sup>3</sup> COM(2013) 404 final

## 1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

The answer is yes. Collective redress actions in Japan are stipulated in the Consumer Protection Law (with respect to injunction) and the Law concerning Special Rules of Civil Procedure for Collective Redress of Proprietary Damages of Consumer (with respect to litigation). The latter passed the Diet in 2013 but not yet implemented. There is a specific definition of collective redress actions in these laws.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law...)?

Japanese collective redress actions is allowed only if the ground related to consumer contract (B to C contract).

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

Generally speaking, interplay of several statutes is allowed under Japanese law. For example, Japanese Antimonopoly Act (“AMA”) has a provision regarding a special damages claim, but a plaintiff can bring a general tort damages claim against the cartel under the Civil Code.

Although the AMA itself does not provide collective redress actions, because a consumer can bring a general tort claim by using collective redress action with respect to a B to C agreement with a company, it may be possible that the consumer uses this collective redress action to sue a company which involved in a cartel. Please note that the law has not yet been implemented as mentioned above.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

Japanese collective redress actions adopted a special procedure. At the first step, a certified consumer organization will bring a law suit against a company and try to confirm the existence of common obligation of the company. Then at the second step, each consumer can opt in to the procedure and the amount of claim of each consumer opted in will be determined. These two-step procedure itself is a summary proceedings compared to the ordinary civil proceedings.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors (“injunctive relief actions”) and/or to claim compensation for damage suffered (“compensatory relief actions”)?

Yes. Both injunctive relief and compensatory relief is available under Japanese collective redress actions.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

Indirect damages, lost profits, damages arising out of body injuries or pain and suffering damages are not covered under Japanese collective redress actions.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

No. Punitive damages are not allowed under Japanese law.

1.8 More particularly in the anti-trust field, how does the ‘passing on’ defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

I could not identify the specific case which allowed the “passing on” defense. However, there is a commentary of this issue which suggest that such defense is effective and makes it difficult for the claimant to prove damages.

## **2. Standing and admissibility to bring class actions/collective redress actions**

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement (“collective actions”), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice (“representative actions”)?

It is the latter. The collective redress actions in Japan will be brought initially by a certified consumer organization.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Yes. The detailed criteria is set out in the law.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements...), and can the representative entities be sanctioned if they do not comply with such requirements?

Yes. A consumer organization must satisfy certain requirements under the law and must be certified by the Consumer Protection Agency. The Consumer Protection Agency has an authority to disqualify the consumer organization if it does not comply with the law or does not satisfy the requirements.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

Admissibility of a collective redress action is likely to be reviewed by the court at an early stage.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Collective redress action must be brought by a consumer against the direct party to the consumer agreement. Therefore, third parties cannot use this collective redress action.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

As explained above, collective redress actions in Japan must be brought by certified consumer organization. Therefore, it is not expected that many claims are aggregated. However, the law provides a procedure to merge different cases to one procedure. This suggests that two or more certified consumer organization may jointly become complaints.

Just for the avoidance of doubt, there is no restriction on number of plaintiffs in the ordinary civil litigation.

2.7 More generally, what procedural defences are available for defendants short of trial and therefore before the national court decides on the merits of a collective action?

### **3. “Opt-in” vs “Opt-out” systems and information on the class action/collective redress action**

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed (“opt-in” principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group (“opt-out” principle)?

The Japanese collective redress action adopted opt-in principle.

3.2 What are the effects of the judgment on the victims in the “opt-in” or “opt-out” system chosen in your jurisdiction?

The judgment will have effect on victims who opted in. Please note that the victim can decide whether to opt-in or not after the first step judgment is rendered/settlement is reached.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

As explained above, Japanese collective redress action has two step system and the victims can decide whether to opt-in after the judgment is rendered/settlement is reached with the certified consumer organization. The victims can withdraw from the procedures until amount of their damages are finally determined in the collective redress action.

- 3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

As explained above, Japanese collective redress action has two step system and the victims can decide whether to opt-in only after the judgment is rendered/settlement is reached with the certified consumer organization.

- 3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

The defendant will know the composition of victims at the second stage when the opting-in period becomes due.

- 3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

It is set out in the law that the commencement of the second step (i.e. the step when victims can opt-in to the procedure) will be published in the official gazette. In addition, the certified consumer organization can publish it on its webpage as well request the defendant to publish it as well. Consumer Protection Agency will also publish the result of the judgment/settlement of the first step on the webpage as well.

- 3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

There is no registry. However, Consumer Protection Agency publishes ongoing actions in a timely manner.

#### **4. Interplay of class actions / collective redress actions and public enforcement**

- 4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law (“follow-on actions”) or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

The Japanese collective redress action is designed to work as a standalone system. As mentioned above, the scope of the system is narrowly tailored to

only cover monetary damages arising out of B to C agreements, but it is not prohibited to use this system for follow-on actions, if at all possible.

- 4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

So long as the infringement relates to B to C agreements, it may be possible to structure the collective redress action as ordinary tort claim against the company which conducted cartel or abuse of dominance.

- 4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

The victims of antitrust infringement may have access to the antitrust trial files kept by Japan Fair Trade Commission as it is likely to be regarded as interested party to the trial.

Although there is some limited method to ask the other party to disclose documents in the civil procedure, general discovery is not possible in Japan.

- 4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

There is no limitation period allowing potential claimant to wait with collective redress action.

Please note, however, if it is not a class action, the claimant can choose whether to bring a damages claim based on general tort claim under the Civil Code or special claim under the AMA. The latter can only be brought after the cease and desist order is rendered by the JFTC.

- 4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

Generally speaking, the decision by the JFTC or the Tokyo High Court with respect to the administrative procedure is totally different from damages claim in the civil court. However, the decision by the JFTC (or the Tokyo High



Court) has a *de facto* influence on existence of infringement. Moreover, claimant will try to access to the JFTC file by the method mentioned above, so there will be common evidence between the administrative procedure and civil procedure.

## **5. Funding of the class actions / collective redress actions, attorney's fees**

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

No. It is structured that certified consumer organization which will lead the collective redress action is run in a very transparent way.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

No.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

No. The transparency of the certified consumer organization is secured by the law and monitoring by the Consumer Protection Agency.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

No. There is no specific system to support potential claimants in collective redress actions. However, certified consumer organizations are typically non-profit organizations and it may be receiving subsidies or tax merits from the government.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

As a general rule, contingency or success fees for legal services covering the above items are not prohibited. However, it may not apply to the collective redress actions in Japan.

As mentioned above, Japanese collective redress actions adopted two step systems. At the first step, the certified consumer organization must bring a claim by its own without involving the victims. At the second stage, the certified consumer organization can receive fees and costs from the victims. However, given that the judgment is already rendered/settlement is already reached at the second stage and considering the characteristic of typical certified consumer organization as non-profit organization, it is unlikely the fees will be on contingent/success fee basis.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party (“loser pays principle”), and in which proportion?

Losing party must pay costs such as court fees and other fees paid to expert witnesses, etc. However, it does not cover legal costs of the other party and both parties should borne their own legal costs.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

Japanese collective redress actions are only available by certified consumer organization. It cannot receive fees from victims at the first stage. Although the law has not been implemented yet, I think these will work as safeguards of abusive usage.

5.8 Are the parties to an action able to insure against the cost risks?

The law does not prohibit covering the risk by relevant insurances.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

In an injunctive relief procedure, the court will usually require the claimant to provide certain amount of deposit to cover costs. Also the claimant must pre-pay the costs for ordinary litigation including monetary damages claim.

5.10 Are there (other) ethical or Bar rules in your country relevant with respect to class actions?

No. The law has not yet been implemented and we do not have rules. However, there will be certainly lawyers who represent the certified consumer organizations and the fees payable to such lawyers may potentially include some ethical issues.

## **6. Cross-border cases**

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

General conflict of law rules and jurisdiction rules will apply to collective redress actions.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

As explained above, the representative entity must be a consumer organization certified by the Consumer Protection Agency. In addition, the collective redress action must relate to a B to C agreement. Furthermore, the Japanese court must have jurisdiction on underlying claims. If these conditions are all met, it may be theoretically possible for a foreign consumer to opt-in, but it may not practically happen.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

Because the representative entity must be a certified consumer organization, it is unlikely that the actions in the different jurisdictions are based on the same facts. However, this may happen inside Japan (i.e. different certified consumer organizations bring cases to different courts in Japan). The law provides the authority to the courts to transfer the forum and integrate the cases.

## **7. Alternative dispute resolution**

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trial and are the implications for refusing?

I am not familiar with the existence of such collective alternative dispute resolution in Japan, but I am sure that it has not yet developed well in Japan. What usually happens is that consumer protection lawyers will gather individual victims and try to negotiate or bring a law suit to the court in a traditional manner rather than using collective alternative dispute resolution.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

No. The typical resolution is the in the court settlement after it is brought to the court.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

No.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

[I will check and supplement my answer on this point next week.]

## **8. Enforcement of the court decision**

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

Please see my answer to 3.6 above.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

There is no specific rule in the collective redress action and general rule will apply. Therefore, the claimant is in charge of enforcement. It should file compulsory execution to the court if it needs to seize assets of the defendant.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

There is no specific rule in the collective redress action which ensures the effective compliance of injunctive order.