The Law Applicable to Acts Restricting Free Competition — Suggestions from Discussions in EU and Switzerland (summary)

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The purpose of this article is to examine from a comparative law perspective (notably EU and Swiss law) the question of the law applicable to acts restricting free competition in Japan. In this respect, two main issues need to be considered. The first issue concerns the applicability of foreign competition law. The second issue relates to the process of determining the applicable law.

As to the first question, the applicability of foreign competition law depends on how claims seeking private remedies (e.g., injunction and damages) on the basis of acts restricting free competition are categorized. In the U.S, competition law claims are regarded as an aspect of the implementation by the states of the public interest through the exercise of their public authority. However, in the EU and Switzerland, although competition law claims serve to maintain the market order, they also aim to adjust the private interests between the victim and the offender/tortfeasor. Indeed, it is considered that the question in competition law claims is to provide remedy for the victims (compensation to the victims of competition law infringements) rather than the public enforcement by competition authorities. In addition, remedies for victims are not something that the offender/tortfeasor is compelled to provide by the competition authorities and can be settled by agreement of the parties. Therefore, competition law claims should be subject to the bilateral conflict-of-law rule methodology. Put it differently, following the EU and the Swiss examples, claims regarding acts restricting free competition can be regulated by special bilateral conflict-of-law rules the application of which may lead to the application of foreign competition law by national courts (Art. 6 (3) Rome II Regulation and Art. 137 Swiss Private International Law).

As to the question of the process of determining the applicable law, it is pointed out that the law of the country where the market is, or is likely to be directly affected by the (alleged) anticompetitive act in question should apply. This is justified by the fact that the country whose market is affected has normally an interest to regulate the act at issue since the legal interests that should be protected here are the competitive interest of the

market participants such as the interest to buy a product or service at a market price, not cartel price. However, the parties should be allowed to choose the applicable law to the extent that the civil aspects of competition claims are concerned (e.g., the amount of damages). In practice, competition law claims can be settled by agreement, and in the EU, as far as civil aspects are concerned, the unilateral and indirect choice of law by the claimant is admitted (Art. 6 (3) (b) Rome II Regulation). Similarly in Switzerland, the possibility to admit the selection of the applicable law by the parties has gained support among academics.

As a conclusion, the following comments are in order: 1. Competition law claims should be considered as a matter of private law rather than public law and therefore, subject to the conflict-of-law rule methodology. 2. The law applicable to acts restricting free competition should be basically the law of the country whose market is or is likely to be directly affected by (alleged) acts restricting free competition. However, the choice of the applicable law by the parties should be restricted to the civil law aspects only of the competition claims (e.g., damages amount).