Civil Litigation and Competition Law - Japan and the EU

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Outline

- EU and Japan: diverging paths
- Why?
- What can we learn from the data on Japan?

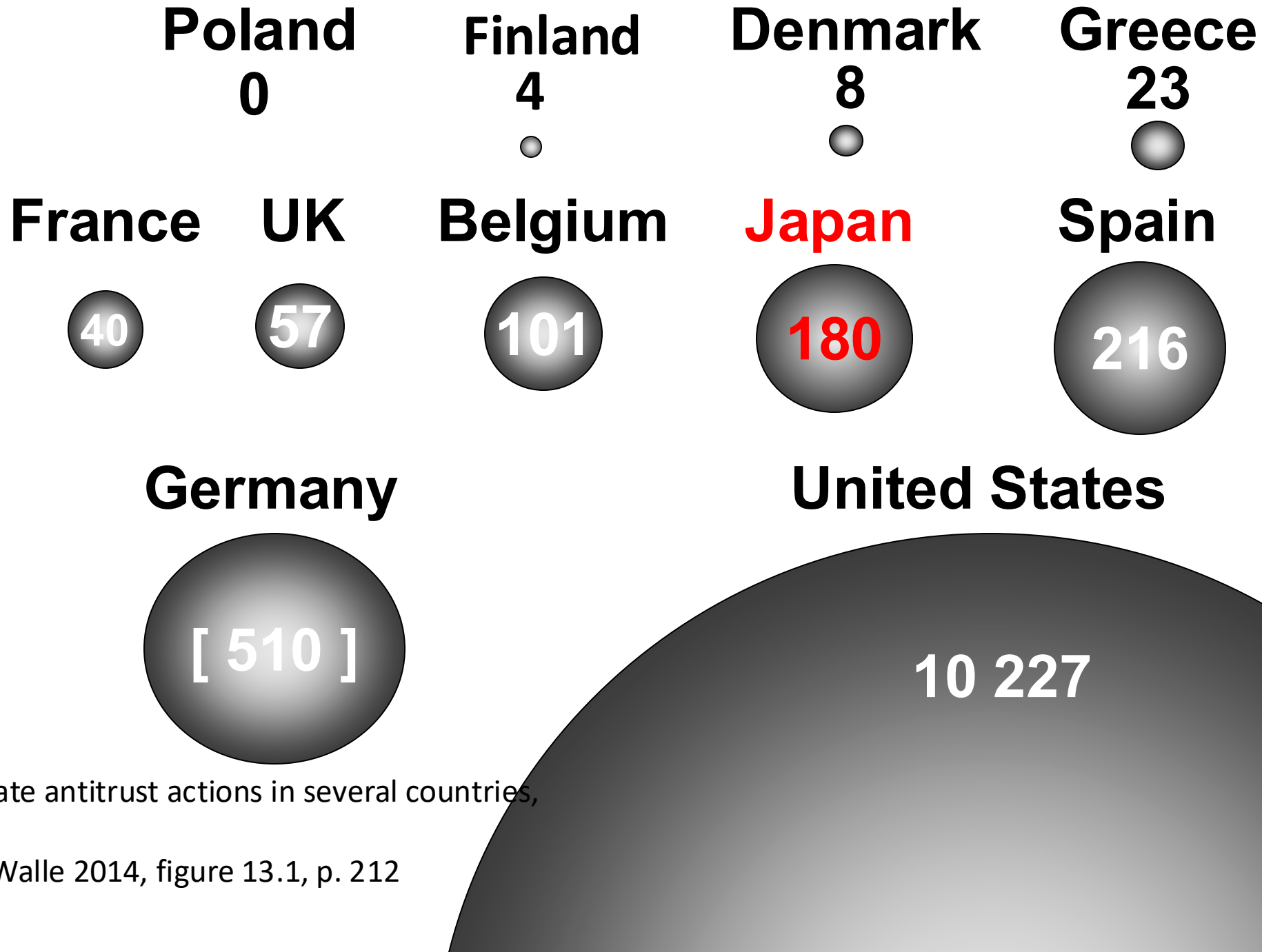
Private Litigation Mechanisms

Today's presentation

EU	Japan
Damages actions	損害賠償請求　Damages actions 不当利得返還請求 Actions for restitution 住民訴訟 Residents' lawsuits
Injunctions	差止請求　Injunctions (since 2001)
Derivative actions	株主代表訴訟　Derivative lawsuits
Voidness	無効 Voidness

EU and Japan: diverging paths

1999-2011: number of private antitrust cases



Number of private antitrust actions in several countries, 1999–2011

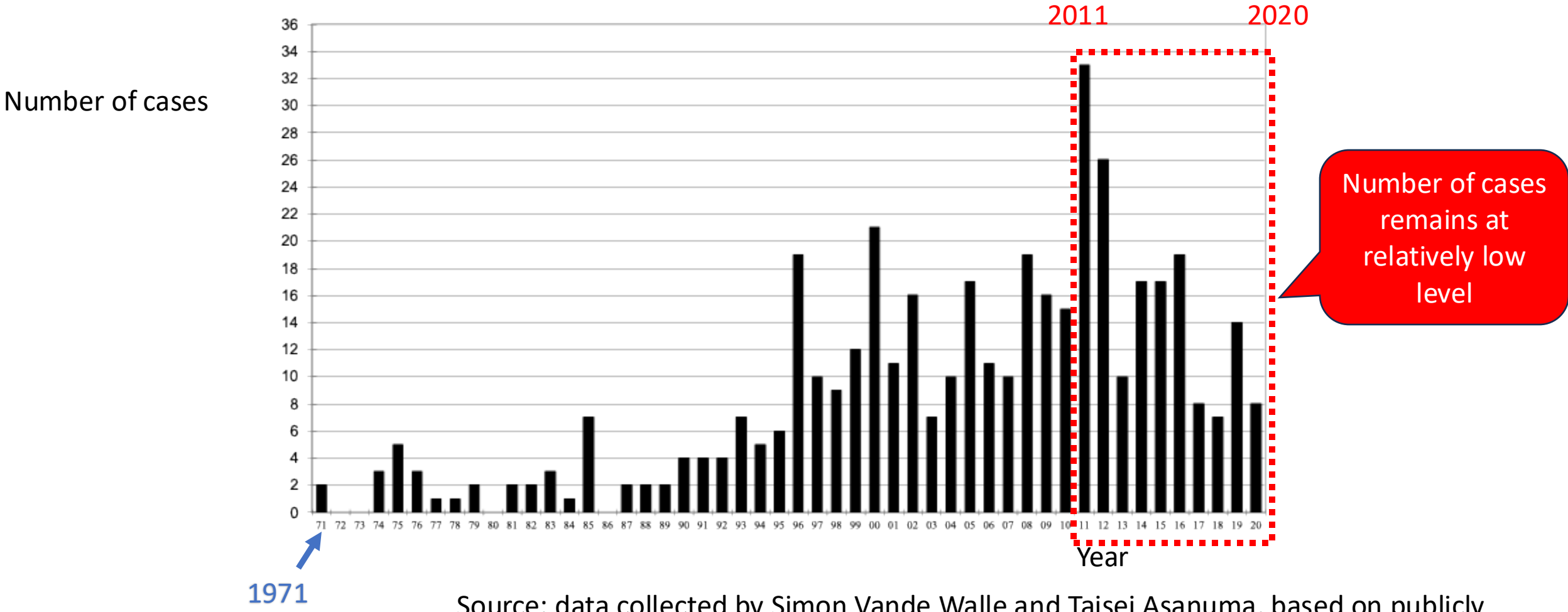
Source: Vande Walle 2014, figure 13.1, p. 212

What has happened since 2011?

Effort to collect new data on Japan

- Based on Westlaw Japan, Lex-DB, 審決集, newspapers, websites, etc.
- Some data points still being checked, so presented data is preliminary (may be refined or revised in subsequent publications)
- In cooperation with Taisei ASANUMA (graduate of the University of Tokyo, School of Law)

Japan: new cases filed per year (1971-2020)



Source: data collected by Simon Vande Walle and Taisei Asanuma, based on publicly available records, 審決集, Westlaw Japan, Lex-DB, etc.

EU: strong increase in cases

- No precise quantitative data because
  - too many cases
  - too many jurisdictions
  - too many languages
  - last major “count” was in 2013 (Rodgers 2014)

BUT…

EU: strong increase in cases

- “changed dramatically in recent years” → “private enforcement plays a major role in the competition law landscape today” (Wish & Bailey *in* Rodgers 2023, p. 28)
- Particular explosion of follow-on damages actions after cartels and abuse of dominance cases

A look as some specific countries

ES Spain

- more than 6000 actions, before 70 commercial courts, based on trucks cartel → 3000 judgments by commercial courts, more than 1000 judgments on appeal (Marcos 2022) → ” the [trucks cartel case] has prompted a massive number of small, fragmented claims, dispersed throughout the country, popularizing antitrust law among small law firms and individual practitioners.”
- Also litigation in relation to other cartels (automobile (277 judgments), milk processors, etc.)

DE “about 650 cartel damages cases pending at the first instance courts in 2020” (Hauser, Otto & Vande Walle, p. 459)

NL follow-on damages actions after each cartel decision, also follow-on class actions against Google and Apple (abuse of dominance)

Development of ”litigation industry”

- Netherlands and Germany : “it has become a very lucrative business for law firms and competition economists” (Hauser, Otto & Vande Walle 2023, p. 458)
- Litigation funders have become active
- “assignment model”: businesses buy up claims for symbolic price, sue and return part of the recovery (e.g. 70%), while keeping the remainder (e.g. 30%)

Is the evolution in Europe good or bad?

- Most commentators positive
  - Although some controversy over one particular issue: the impact on leniency: is the drop in leniency applications in the EU caused by the increase in cartel damages actions?
- But: self-interested
  - European Commission: compensation as policy goals of the Damage Directive so applauds all actions
  - Lawyers: competition law litigation is complex and lucrative
  - Competition economists: quantification of damages

My personal view

- Has Europe imported the U.S. litigation culture and abuses?
  - Litigation culture?
    - In competition law litigation: yes
  - Abuses?
    - No. Cases brought by actual victims of cartels
- Litigation is expensive, imposes costs on society (court system) and parties (lawyer fees, time spent on litigation cannot be spent on more productive activities). These costs are not sufficiently taken into account → too rosy view on benefits of litigation (compensation, deterrence), without considering costs
- Particularly in case of follow-on damages actions: no new violation is uncovered, sufficient deterrence could come from fine (if high enough). Compensation: yes, but at a very steep price (e.g. 30% of the value of the claim).

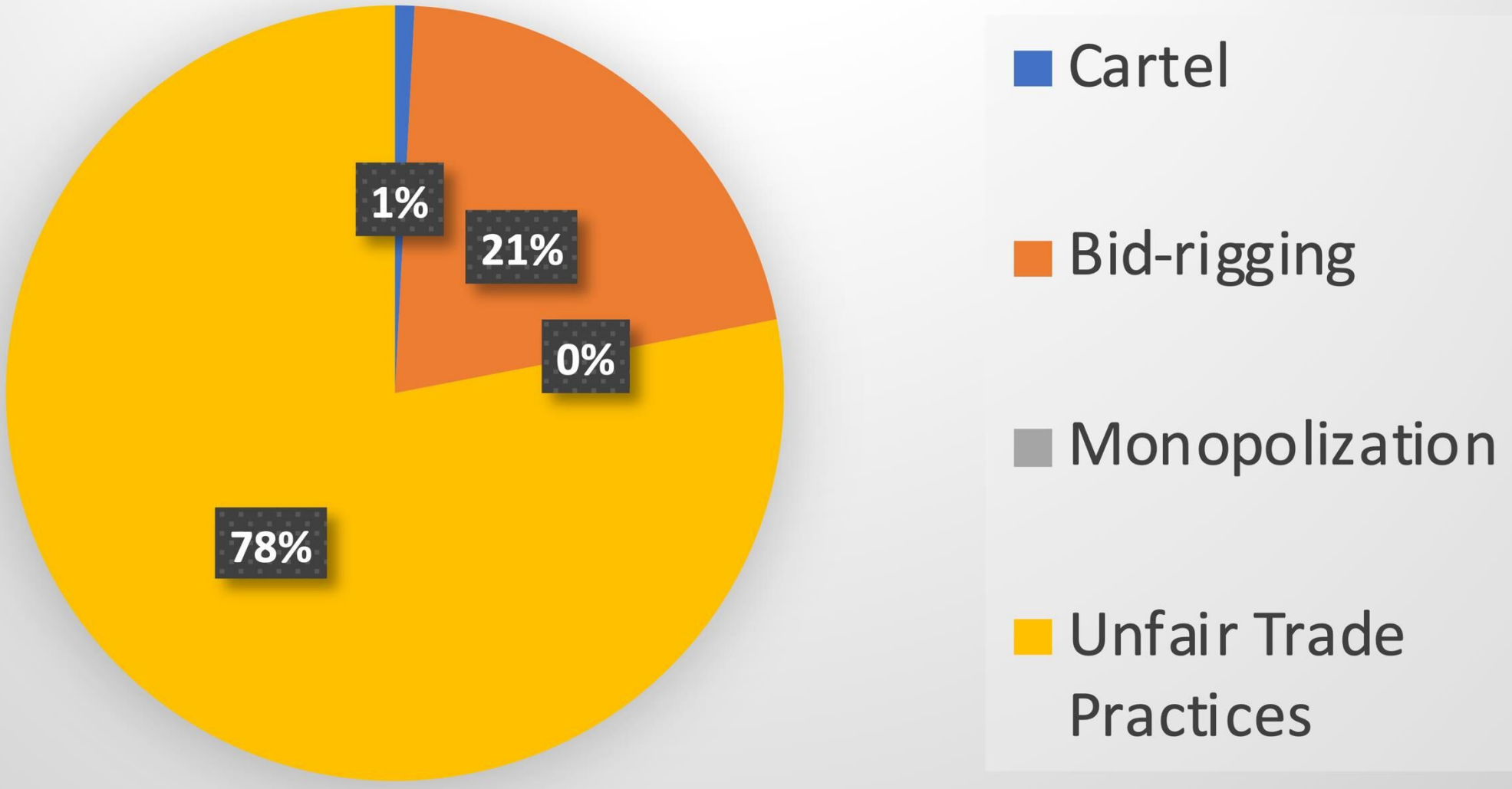
Why the divergence?

Drivers of increase in the EU

- Antitrust Damages Directive facilitated many aspects of competition litigation (access to evidence, presumption that cartels cause harm,
- Court of Justice case law: plaintiff-friendly (*Courage, Skanska, Sumal*)
- European Commission encourages private damages actions
  - Mentions possibility in press release
  - Guidance: *passing-on guidelines* (2019) and *practical guide on quantification of damages* (2013)
- Development of specialized lawyers, economists, litigation funders

What can we learn from the data on Japan?

Type of infringement alleged



Success rate

- 2011 to 2022 (Vande Walle & Asanuma)
  - 10% successful or partially successful
  - 85% unsuccessful
  - 5% no ruling on competition law claim

- *Compare:*
  - 1970s to 2010 period:
    - 88 cases lost, 64 cases successful or partially successful → 42% success rate (not including cases that were settled)
    - If settlements included:
      - 27 % successful or partially successful
      - 37% unsuccessful
      - 36% settled
      - (Vande Walle, 2013, p. 136)
  - Germany: 37% (2012 study on German private antitrust litigation)
  - UK: 26% / 51%
  - Portugal: 18% (Sousa 2023)

- We look at the antitrust aspect of the litigation so
  - successful = win on the merits of the antitrust claim

- Analysis of cases suggests that:
  - Broadly formulated provisions lead to litigation without merits
    - Many cases based on 優越的地位の濫用 abuse of superior bargaining position, interference with competitors transactions 競争者に対する取引妨害
    - Almost all dismissed
  - Japan's problem: too many "bad" cases and too few "good" cases

How much have plaintiffs recovered?

- Amount of damages recovered has decreased significantly in period after 2011

→ Private damages now contribute *less* to deterrence than before

Big part of the explanation: decrease in number of (successful) residents' lawsuits 住民訴訟

- More settlements based on contractual provision 違約金条項
- Fewer residents' lawsuits, fewer cases successful
- Mechanism for recovery of attorney fees does not function: local governments obtain damages thanks to residents' lawsuits but do not have to pay attorney fees of lawsuits because they settled with the companies

Conclusion on role of private antitrust litigation in Japan

- The increase in cases that started in the 1990s has not continued
- Number of cases has stagnated
- Private antitrust litigation now contributes less to deterrence than before (fewer successful damages actions)
- Low success rate suggests many cases without merit and/or high burdens imposed by the courts

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Questions or comments?

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