Foreword

Hiroo SONO and Takeshi FUJITANI

One of the prominent features of the modern regulatory state is its *multiplicity*. First, it is often the case that *multiple* regulatory agencies are involved in a given field of regulation; for instance, in the US, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are concurrently in charge of enforcing antitrust law. Second, the collaboration among public agencies and private actors (again, with diverse backgrounds) has developed even deeper and more complicated; today, the so-called public-private collaboration includes a rich variety: market-based mechanism, regulatory negotiation, self-regulation, to name a few.

On the one hand, for the sake of effectiveness and legitimacy of the regulation (or perhaps more appropriately, the *governance*), it is becoming inevitable to incorporate diverse stakeholders into the regulatory process, to coordinate various regulatory actors, both public and private, and to harmonize multi-level regimes. On the other hand, however, such multiplicity could result in wasteful duplication, unnecessary conflicts among uncoordinated actions, and lack of transparency and predictability. It is easy to chant the praises of the regulatory multiplicity, but we must recognize its challenges and risks, too.

In the face of these potentials and challenges, our research project, *New Global Law and Policy for Multi-Agential Governance* at Hokkaido University School of Law, accepts as given the multiplicity feature of the contemporary regulation as the natural course of development, especially in this complex modern society. At the same time, we take its accompanying challenges seriously, and seek the legal theoretical answers so as to achieve better “multi-agential governance.”

In particular, our focus is on the following questions:

- *Institutional Arrangements*: How should we arrange relevant regulatory agencies and stakeholders and coordinate their delegated authorities and participation, so as to enhance the effectiveness of the regulatory process without sacrificing its legitimacy and transparency? What are the key factors for successful arrangements within any given regulatory field? How about the coordination among the multi-level regulatory regimes?

- *Political Viability and the Process of Learning*: Discussion on institutional designs which tends to focus on idealistic social engineering often faces two pitfalls. *First*, any arrangement would not survive if it fails to satisfy the political viability: perhaps the *governance* literature in the political science is instructive; no political actor or social planner can be the almighty architect of the governance. We must integrate these insights into our discussion. *Second*, a social engineer cannot escape her own limits of knowledge; thus the institutional arrangement must be deliberately left open to the new knowledge and learning; and hopefully it should incorporate the process of learning through participation and experiments. At the same time, however, the institutional arrangement must assure the "fail-safe" function, too. Can we achieve these conflicting demands?

To address these abstract questions in light of a more concrete context, we have organized the "International Workshop: Enforcing Competition Law with Multiple Agencies" on June 26, 2010 at Hokkaido University. Competition law is particularly interesting from our perspective not only because of the abundant examples of "*multiplicity*" as described above, but also because of the "public goods" nature of competition. On the one hand, no single actor is apportioned an exclusive entitlement to the well-being of competition. On the other hand, any regulatory action of competition will have external effects. This suggests the need for an examination of the coordination question.

The three papers that follow are collections of presentations at the workshop[*]. Professor Daniel A. Crane (University of Michigan Law School), after describing the global trend in the institutional design of multi-agential enforcement of competition law, provides a US perspective by empirically demonstrating that the interaction between the DOJ and FTC, as well as between the two governmental agencies and private litigants often results in unfortunate failure of coordination. However, his paper also suggests that despite the lack of justification for the US model in terms of institutional design, there is little political viability for changing that path-dependent system. Professor Makoto Kurita (Chiba University Law School) provides a view from Japan by demonstrating the institutional impediments to effective enforcement of the Japanese Antimonopoly Act. After identifying the incentive structure of the Japan Fair Trade Commission (JFTC) from the perspective of public choice and decision theories, his paper evaluates the surcharge system; the proposed abolishment of JFTC's adjudicatory function; and JFTC's frequent use of informal enforcement measures. His paper also critically analyses the "JFTC-centralism" and advocates an enhanced use of criminal as well as private enforcement measures. Professor Akihiko Nakagawa (Hokkaido University School of Law) responds to Professors Crane and Kurita in his comments in which he also emphasizes the incentive structure of the various actors involved. From that perspective, he discusses the pitfall of a horizontally distributed agency model; the possible justification for a vertically integrated agency model; and the limits of private actions. He also provides suggestions for reform in Japan's enforcement scheme.

We hope that this collection will serve as a building block for the further examination of the question of multi-agential governance.

[*] Japanese language versions of the three papers appeared in the December 2010 issue of "*Koseitorihiki*" (Issue no. 722) together with added contributions from Korea, China, and Taiwan. The organizers of the workshop are grateful to Professor Toshifumi Hienuki (Hokkai Gakuen University School of Law) for his support in making the product of the workshop available to a larger Japanese audience.

特集にあたって

曽野　裕夫＝藤谷　武史

北海道大学大学院法学研究科を拠点とするグローバルCOE「多元分散型統御を目指す新世代法政策学」では、2010年６月26日に、北海道大学経済法研究会との共催により、日米の研究者による国際ワークショップ「競争法の多元的エンフォースメント（Enforcing Competition Law with Multiple Agencies）」を、北海道大学において開催した。競争法は、多元的なアクター（米国でいえば司法省・連邦取引委員会（FTC）・私人、日本でいえば公正取引委員会と私人）と手段によってエンフォースされていることから、多元分散型統御のあり方が正面から問われる領域であり、ワークショップではそのような多元的エンフォースメントをふまえた制度設計のあり方とその政治的実現可能性について活発な議論が行われた。本特集は、このワークショップにおけるダニエル・Ａ・クレイン教授（ミシガン大学ロースクール）、栗田誠教授（千葉大学大学院専門法務研究科）、そして中川晶比兒准教授（北海道大学大学院法学研究科）の報告原稿に手を加えた３編の論文を原文（英文）のまま収録したものである。

なお、これらの論文の日本語版も、『公正取引』722号（2010年12月号）の「特集競争法の多元的エンフォースメントについて考える」に収録されている（ただし、『公正取引』誌に掲載された栗田教授の論稿は、英文版の一部が省略されており、また、中川准教授の論稿は英文コメントの翻訳ではなく、それをさらに発展させた新規のものとなっている）。『公正取引』誌への特集の掲載は、GCOE研究協力者である稗貫俊文教授（北海学園大学大学院法務研究科）のご尽力によるものであり、韓国・中国・台湾における多元的エンフォースメントについての論稿も収められているので、あわせて参照していただければ幸いである。