Comment

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Thank you very much for three very stimulating speeches about an actual issue of consumer law enforcement. I would like to make a brief comment by looking at the practice of collective injunction and the discussions on collective damages litigation in Japan.

1. The Proposals of the Three Speakers

The three speakers in today's conference explore the issue of how consumer law should be enforced. Building upon the basis of overviews of the historical development of consumer law ― Professor Rott covers the development in Germany and the recent trends in European law; Professor Nakagawa covers the Japanese development in the field of administrative law; Professor Sono covers the field of private law ― all three contrast private enforcement on the one hand, with public enforcement or public law sanctions on the other[1].

The three speakers, however, differ in their direction of pursuit,

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[1] All of the three presentations share the following understanding with respect to the distinction of these two types of enforcement: the difference between private and public enforcement lies in whether it is a private party that takes the initiative, or whether it is a governmental agency. The nature of the adjudicator is irrelevant. For example, in both types of enforcement, the judiciary appears as the final adjudicator. It is also irrelevant whether the cause of action is based on private law or public law. Neither is relevant whether the protected interest is a private interest or a public interest. The gist of this comment is that this distinction suggests that the ideal state of enforcement will largely depend upon the actualities of the person initiating the enforcement procedure.

and therefore they analyze different aspects or parts of the issue. In principle, redress of consumer harms should be sought by the individual who was harmed. Nonetheless, given the low value of the claims, the burden of litigation costs, the risk of losing in litigation, the difficulty in proving illegality, the length of litigation, and the psychological shame factor of being ripped off, the reality is that litigation filed by the injured individual himself is an exception (Rott IV.1.; Nakagawa III(1)). However, leaving the low-value yet wide-spread loss uncompensated will be conceding to illegal business behaviors and thus will invite behaviors that do not comply with the norm of the market. One countermeasure would be to aggregate the loss of injured parties and to allow a certain body to file a collective claim. Depending upon who will be allowed to file a law suit, there are three possible designs of such collective action. *Option 1* would be to allow one or a small number of victims to file, on behalf of the whole injured parties as a class, a damages claim that aggregates the loss of other injured parties (*i.e.*, class action). *Option 2* would be to allow a consumer association to file damages claim that aggregates the loss of all the victims. *Option 3* would be a system where an administrative agency will file a claim that aggregates the loss of all the victims. Mindful that there is an overlap of private interests and public interests in consumer law, Professor Sono attempts to overcome the theoretical limit of private litigations that "a private party cannot resort to cause of action designed to protect the interest of others or of the public" by expanding the concept of "private interest". His analysis of private enforcement would perhaps lead to the development of *Option 1*. On the other hand, Professors Rott and Nakagawa argue that there are practical limits to private enforcement and thus explore *Option 3*, a form of public enforcement.

2. Comments to the Three Speakers

Professor Sono attempts to utilize private enforcement initiated by individual consumers to protect public interests. However, as he himself admits, this will only be possible when there is collateral damage, *i.e.*, public loss collateral to private loss. Professor Nakagawa questions the effectiveness of private enforcement and derives suggestion from the

field of environmental law and labor law where there already is a collective action belonging to *Option 3*. He further argues that recall orders exist in consumer law, and calls for an expansion of such mechanism. However, although there are limits to *Options 1* and *2*, *Option 3* also has limitations of its own. The largest of such obstacles are the conventional reality and fiscal limitation of administrative agencies in Japan. In the field of environmental law and labor law, upon which Professor Nakagawa models his argument, there are long established administrative agencies with the mandate to protect and achieve specific interests. The direction of their operation is also well established through many years of practice. The Fair Trade Commission of Japan may be considered as another administrative agency of this type. However, the Consumer Affairs Agency (CAA) is a young agency which was established only in 2009. The number of staff members hired directly by the CAA is still small while the majority of the staff members are seconded from other parts of the government. Given this reality, it would be difficult for the CAA to immediately establish itself as the core body in consumer redress. Especially in cases where consumer redresses are in conflict with interest of the business, and thus in conflict with the mandate of other governmental agencies, considerable length of time will be needed until the CAA will mature to take the initiative in consumer protection. Moreover, utilization of public enforcement does not curtail the cost of collecting information about mass consumer harms. Collection of information of consumer harms (through signs of consumer harms that appear in consumer affairs consultation), verification of the existence of such harms, and implementation of appropriate countermeasures will require considerable amount of resources. Even the maintenance of consumer affairs consultation is costly. With respect to recalls, there is an increase in the number of voluntary recalls by manufacturers, but few are based on governmental recall orders. Not only that, recall orders are possible only in cases where there are physical defects of manufactured goods, and it does not cover cases of unfair inducement into contracts or unfair contract terms.

Professor Rott recommends public law enforcement, but there is a slight difference in tone with Professor Nakagawa's position. Based on the European and German experience with collective damages litigations, Professor Rott recognizes that collective litigations are not always effective (Rott, IV.2.). First of all, the experience of Europe suggests that collective damages litigation is not effective at all in cases where there is no material damage to the consumers (*e.g.*, cold calling cases) or in cases where consumers intimidated by fraudulent practice refrain from resorting even to collective litigations. On the other hand, Professor Rott suggests that there is room for improvement in making collective damages attractive to the relevant parties. With respect to cases where there is no material damage, the French system which allows consumer associations to use the paid damages as funds for their future operation is effective. Secondly, the experience of Germany shows that neither injunction demands by consumer associations nor collective damages litigation were effective in Germany. The failure of injunction demands is demonstrated by the continued use of abusive standard forms. The failure of collective damages litigation can be traced to the distrust towards consumer associations or individuals who file for such collective litigation. That distrust led to a design that allows consumer associations or law firms to file for collective litigations only under numerous conditions (Rott, IV.3.a)). Nonetheless, Professor Rott reports that collective damages litigations are used in cases of electricity or gas prices, cancelled flights, and abuse of banking cards. Professor Rott also reports that consumer associations are hesitant in using the skimming-off procedure (disgorgement of profits claims), due to the heavy burden of proving the amount of unlawful profit. Although Professor Rott recommends the use of public law enforcement, and criminal sanctions in particular, it is important that this is only to the extent to supplement the limits of injunction demands and collective damages litigation. It should also be noted that Professor Rott argues that the body implementing public law enforcement should not be the competition authorities or the prosecutors who only deal with consumer issues in passing, but rather it is desirable that a specialized consumer authority or ombudsmen who devote its energy to consumer issues to be in charge (Rott, VI.).

3. Direction for Japan

The issue is what kinds of measures are available to enforce consumer law, and what the best mix of them is. From this perspective, it is necessary to compare and evaluate each measures in light of their effectiveness, limits, legal nature, who the intended users are, and the situation in which the measures will be used.

The three speakers treat collective injunction demands and collective damages litigation as forms of private enforcement. Professor Rott is especially clear about this. In this sense, it may seem that Japan who enacted the collective injunction demand by certified consumer associations under the Consumer Contracts Act in 2007 and who currently is working on legislation of collective damages litigation have chosen *Option 2* of private enforcement. There is no doubt that in form this is private enforcement. However, one must not forget that the certified consumer associations who are allowed to file collective injunctive demands and collective consumer redress have a strong “public” character.

(1) First of all, there are strict requirements in order to be certified as a qualified consumer organization. For example, the organization must have articles of incorporation and rules of operation. There also must be a certain number of directors (the number of directors alone must be more than 10), auditors, Expert Advisers, and secretariat staff. They must consist of those who have experience in consumer movements, consumer affairs consultation, consumer associations, or they must be attorneys, judicial scriveners, academics, and at the same time, they must not be in a relation with business operators so as to avoid conflict of interests. Furthermore, the organization must have been in operation for more than two years before it can be certified.

(2) Secondly, once after an association is certified, it must submit an annual report to the CAA about their activities, and once every three years, they must undergo a process to renew the certification.

(3) Thirdly, a certified consumer association is granted access to consumer complaints and consumer affairs consultation data in the possession of the CAA, but at the same time, they are required to strictly manage information obtained in their course of operation and are bound

by a duty of confidentiality. They must also report to the CAA at various stages of their activity.

(4) Fourthly, certified consumer associations are expected to operate in close cooperation with local authorities including the police. They are also expected to periodically consult with other certified consumer associations and to exchange information of consumer harms. This means that the activities of certified consumer associations are incorporated into both local and national administrative activities regarding consumer affairs.

(5) Fifthly, when identical or similar demands of injunction are filed, the court will transfer or consolidate the proceedings, so as to avoid rendering conflicting decisions. In addition, once a certified consumer association has filed a demand for injunction, it is no longer allowed to settle the case or to withdraw the demand on its own.

In this way, certified consumer associations and collective litigation they file are subject to strict public law regulations. This is one reason for the small number of certified consumer associations (currently there are only 10) even after 5 years since the legislation has come into force. This is in stark contrast to the larger number in France and Germany of consumers associations with rights to file collective litigations. One must admit that Japan's conventional principles of administrative law and the fiscal restraints have created a system where the role of an ombudsman-type administrative function is "out-sourced" to certified consumer associations. Thus, demands for injunctions and collective damages claims filed by certified consumer association may be characterized as a "quasi-public" enforcement of consumer law.

Japan is at the development stage where collective injunction demands have already taken root, while legislation for collective damages suits is still in its making. Europe, including Germany, already has extensive experience with these systems and is aware of its limits. However, if the actualities of consumer associations in Europe and Japan are different, the European experience may not be automatically applicable to Japan. It seems that the direction for Japan's consumer law is to explore, among others but especially, the possibility of enforcement measures that can be positioned somewhere between *Options 2* and *3*, and to learn from the process of trial and error.