



COLLECTIVE COMPENSATORY REDRESS THROUGH CONSUMER PROTECTION AUTHORITIES

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December 21, 2017

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1. CONSUMER PROTECTION AGENCIES

- The **Consumer Affairs Agency (CAA)** was established in 2009
 - (1) the nation's first "headquarters" of consumer protection in Japan
(It also drafts legislative proposals for the Cabinet.)
 - (2) comprehensive enforcement authorities over basically all consumer problems with small exceptions.
 1. consumer safety (Consumer Safety Act, etc.)
 2. fair representations (Act against Misleading Representations, Food Labelling Act, etc.)
 3. fair consumer transactions in terms of solicitation & contents (Consumer Contracts Act & Act on Specified Commercial Transactions both which prohibit fraudulent and deceptive practices)
 Most of the CAA's authorities were exercised by other agencies before 2009.
- Exceptions: Other agencies such as **Financial Services Agency** have law enforcement powers in each area. The Act on Specified Commercial Transactions provides for concurrent enforcement jurisdictions of CAA and other Ministers.

2. POLICY ISSUES— COLLECTIVE COMPENSATION

- In 2009, Diet wanted the CAA to work on “consumer redress by way of compensation”

Supplementary article 6 to the Act Establishing the CAA provides: “[w]ithin approximately three years after this Act and the other two CAA-related statutes come into force, the Government shall examine **schemes for depriving the person or entity** who has caused injuries to a large number of consumers **of their unjustified profits for the purpose of redress of victims**, including schemes to prevent the wrongdoers’ property from concealment and dissipation; and shall take necessary measures based upon those results.”

The CAA started research for drafting new laws.

- Background: traditional private lawsuits do not function well because
 - victimized consumers simply do not know (or do not want to admit) they have been deceived
 - each victim’s loss is oftentimes not significant enough to take action
 - difficult to sue “bad guys” (predatory operators) , their whereabouts are unknown

Unjustifiable profits being accumulated in businesses & less incentive for compliance

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3. OECD REPORT (2007)

According to the 2007 OECD report entitled “Recommendation on Consumer Dispute Resolution and Redress” which advises Member states about effective enforcement mechanisms against **fraudulent and deceptive commercial practices**:

- Definition of “Redress” : **compensation for economic harm** in the form of either **a monetary remedy** (e.g., a voluntary payment, damages, restitution, or other monetary relief) or **a conduct remedy with a restorative element** (e.g., exchange of defective goods or services, specific performance or rescission of contracts).
- Proposals of the report include:
 - A. dispute resolution and redress mechanisms for **consumers acting individually**
 - B. dispute resolution and redress mechanisms for **consumers acting collectively**
 - E.g., collective lawsuits (opt-in/opt-out), lawsuits filed by consumer organizations
 - C. mechanisms for **consumer protection enforcement authorities** to obtain or facilitate redress on behalf of consumers
 - E.g., enforcement authorities to seek a court order for redress in civil/criminal proceedings, enforcement authorities act as a representative party in lawsuits seeking redress

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4. THEORETICAL POSSIBILITIES

If harms (due to a violation of a law) occur, the following options can follow, theoretically:

Harm-Preventive measures (prospective)	Harm-Compensatory measures (retroactive)
<ul style="list-style-type: none"> ● ADR mechanisms ● Court proceedings (lawsuits) for enjoining illegal acts or mandating specific performance <ul style="list-style-type: none"> by victims (individually/ collectively) by special organizations by the government (as enforcer/ representative) ● Agency proceedings (ad. procedure) for ordering cease & desist/engage in corrective action or improvement/pay money penalty/confiscation 	<ul style="list-style-type: none"> ● ADR mechanisms ● Court proceedings (lawsuits) for damages/restitution by victims (individually/ collectively) by special organizations by the government (as enforcer/representative) ● Agency proceedings (ad. procedure) for ordering restoration/exchange of defective products (recall) /performance of contractual obligations
<p>Some are both preventive and compensatory</p>	
<p>payback / undo (renegotiate) contracts? confiscated money to be distributed?</p>	

5. CURRENT STATUTORY SCHEMES (COURT PROC.)

(1) For preventive relief

Since 2006 the **Consumer Contracts Act** has authorized “**Qualified Consumer Organizations (QOC’s)**” to file lawsuits enjoining traders from engaging in prohibited acts. Similar provisions are now found in **the Act against Misleading Representations** (enjoining false and misleading representations and advertisements), **the Act on Specified Commercial Transactions**, and the **Food Labeling Act**.

(2) For compensatory relief

In 2013 a “**collective consumer lawsuit**” was introduced which is to be filed only by “**Specific Qualified Consumer Organizations (SQOC’s)**” on behalf of a large number of victimized consumers. This is for conventional damages (with no punitive damages) or conventional restitution of unjust enrichment (no disgorgement) in relation to consumer transactions or torts (on and after Oct. 1, 2016). **US-style class action was avoided** in every sense because it was thought to be too costly to businesses.

(3) Who are QCOs?

Private entities, not part of the government. They negotiate and sue on behalf of general consumers. Currently there are 16 QCOs, and only two of them are SQCOs.

6. CURRENT STATUTORY SCHEMES (AD.PROC.)

The CAA's research on this aspect has been slow, and eventually stopped. Only the following are notable products, if any, in terms of compensatory redress by government agencies:

- (1) The Act against Misleading Representations, which prohibits false or misleading advertisements or representations of goods and services, was amended in 2014 to introduce **money penalty order** coupled with **"voluntary payback scheme."**
 - In the procedure for the money penalty order, its addressee may apply to the CAA for the certification of its "payback plan," and the amount of the money actually paid back to consumers shall be deducted when the money penalty order is finalized.
- (2) Some provisions of the Act on Specified Commercial Transactions were modified in 2016 **to make sure that the administrative orders may include compensatory remedies** in the form of directing performance of contractual obligations.
 - Text of Article 7 used to be that: "the competent minister ... may order the seller or the Service Provider to take any necessary measures." Now it reads as follows: "the competent minister ... may instruct the seller or the Service Provider **to take measures to protect the interests of the purchaser or the service recipient** or any other necessary measures." (Same regarding Art.14, 22, 38, 46, 56, 58-12)

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7. SEGMENT-BASED APPROACH

My viewpoint: legislators should generally take a "segment-based approach."

- ◆ **Against "bad guys" (rogue traders, predators):** government agencies (including criminal authorities) need to take strongest, **legalistic** measures: must raid premises, freeze or administratively confiscate assets, put individuals in jail or prison, and even get the organization bankrupt. Otherwise, they'd run away.
- ◆ **Against "normal guys" (reputation-sensitive but not necessarily compliance-oriented businesses):** Negotiation should work well only when leveraged by substantially adversarial powers on the side of government (agency orders) or QCOs (standing to sue). Here businesses are forced to **correctly** calculate economic profits and losses and **act rationally**. The CAA's orders, if **coupled with substantial money penalty**, should also function well to get the negotiation done. In the negotiation, the businesses should be given **opportunities to propose their own plans to correct their wrongdoings**.
- ◆ **Against "good guys" (compliance-oriented, but rule-ignorant small businesses):** If compliance is easy, people would comply. Leaving details to voluntary code of conduct or action plans, subject to governmental approval or guidelines, should normally be the best cost/performance way for achieving compliance. **Giving the sense of participation with nudging** is important for fostering natural compliance.

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8. EVALUATION OF CURRENT STATUTES

Substantive rules should be enforced in several different procedures: Segment approach

- Japan's current regulatory schemes are generally **not edgy enough even for "normal guys."** Most of the regulatory statutes are written, I would say, by **"the normal guys approach by halves."**
 - Only substantially adversarial powers (esp. money penalty which imposes profound amount of money, not nominal amount) can create incentives for businesses to comply with statutes. However, less than 10 statutes provide for administrative orders for such substantial money penalty.
 - QCOs, either through collective lawsuits or leveraged negotiation, should be valued as private enforcers of consumer protection laws. But there are so few of them and not with financial stability.
- Necessity to deal with **"bad guys"** is not even discussed in detail in legislative process of consumer law. They tend to be neglected as rare phenomena.
 - This approach can be found only in criminal procedure such as Act on Punishment of Organized Crimes and Control of Crime Proceeds which provides that confiscated money can be distributed to victims.

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8. EVALUATION OF CURRENT STATUTES

- **"Good guys"** approach (voluntary regulation under government approval) is seldom seen. To foster "good guys," details should be left to each individual business or industries.
 - Act against Misleading Representations is a rare exception taking such approach. Under its Article 31, industries make voluntary code of conduct regarding representations under approval by both the CAA and the FTC. Article 26 obliges each business entity to make up an action plan to keep proper representations about contents of their goods and services, which must accord with the Guidelines issued by the CAA.
- Perhaps, in most cases, each act should have all three dimensions.
 - "Normal guys," if they are big businesses, can only be dealt with by government while other smaller "normal guys" can dominantly be dealt with by QCOs. Government should also concentrate on crushing "bad guys" and fostering "good guys."

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