New Developments of Collective Legal Protection in Germany and Japan

Takayuki Soda *

I. INTRODUCTION

In recent years, EU Directive 98/27/EC[1] on injunctions for the protection of consumers' interests has pointed out improvement of administrative or private law means for collective consumer redress. In June 2013, an EU Recommendation on injunctive and compensatory collective redress[2] was made public.

In Germany, there are the injunction claim (right to demand an injunction, *Unterlassungsanspruch*) and the claim for confiscation of profits (unlawful profits claim, *Gewinnabschöpfungsanspruch*) of Consumer Associations (CA) and Enterprise Associations (EA), for example in the Injunction Action Act (Unterlassungsklagegesetz, hereinafter: UKlaG), Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb, hereinafter: UWG), and Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, hereinafter: GWB). Moreover, there is also an opt-in collective action by a CA in which each consumer as a victim authorizes the CA to bring an action. By the 8th reform of the GWB in 2013, the injunction claim of the CA (§ 33 (2) no. 2 GWB) and unlawful profits claim of the CA (§ 34a GWB) was introduced into the

* Associate Professor, Dokkyō University, Tōkyō.

1 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, 51–55.

2 Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C (2013) 3539/3.

GWB as well as the repayment order of the Competition Authority (*Kartellbehörde*) (§ 32 (2a) GWB). By the latter, the Competition Authority can order an infringer to repay profits that the infringer has gained by infringement to each of a large number of consumers as victims. Furthermore, in early 2014 the Diet in Germany was discussing a bill[3] which introduces the opt-in class action system into the Code of Civil Procedure (Zivilprozessordnung, hereinafter: ZPO).

In Japan, the opt-in class action called "the appointed party action" is provided in the Civil Procedure Act (CPA), Art. 30, and the injunction claim of a CA was already introduced into consumer law in recent years. Moreover, on 4 December 2013, a bill named "Special Rules of Civil Procedure for Consumer's Monetary Damages"[4] (SRCPCMD)[5] that introduces the opt-in collective action by a CA was enacted. The Food Labeling Act[6] was enacted in 2013 and the injunction claim of a CA was introduced into the act. Furthermore, the Japanese government is considering the possibility of introducing a disgorgement of unlawful profits or an administrative punishment by an administrative body into consumer law. Thus, there has been a lively discussion on the collective consumer redress system, and Germany and Japan have embarked on reforms.

In general, collective legal protection systems[7] – in other words, CA action, class action, and collective consumer action – can be mainly categorized into three types according to the aim of the system. One type is an injunction claim of a CA.[8] The aim of this system is to prevent an infringement in the future and to cease any infringement which already exists. The second type is a collective monetary claim system. The aim of this system is to give each consumer who is a victim of an infringement monetary satisfaction or to recover monetary damages of the CA. This type is further divided into 1) the class action in the US and "the appointed party action" in Japan, 2) the collective action by CA in which a CA collects claims of consumers as victims and brings an action[9] in Germany,

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3 Bundestag printed paper (BT-Drucksache) 17/13756.

4 Law No. 96/2013.

5 This act was promulgated on 11 December 2013. It comes into force on the date designated by Cabinet Order within three years after the date of promulgation.

6 This act was promulgated on 28 June 2013. It comes into force on the date designated by Cabinet Order within two years after the date of promulgation.

7 F. J. SÄCKER, Kollektivklagen bei Verstößen gegen Wettbewerbs- und Verbraucherschutzvorschriften nach dem Opt-in- und Opt-out-Modell, in: Martinek/Rawert/Weitemeyer (eds.), Festschrift für Dieter Reuter zum 70. Geburtstag am 16. Oktober 2010 (Berlin 2010) 325 ff.; H.-W. MICKLITZ/P. ROTT, in: Dauses (ed.), Hdb. EU-WirtschaftsR (loose leaf, 34th supplement as of October 2013) H.V. Rn. 704 ff.

8 The injunction claim action by a CA and the action of the claim for confiscation of profits by a CA are called "Consumer Association Action" (*Verbandsklage*) in Germany.

9 In this way, there are two more different kinds: one is to cede an obligation, the other is to authorize to bring action. In the following explanation about this type, only the latter is mentioned for convenience of explanation.

the UK, and Japan, and the *parens patriae* action[10] in the US, and 3) the damages claim of a CA itself in France. The third system is an unlawful profits claim such as a claim for confiscation of profits (unlawful profits claim, *Gewinnabschöpfungsanspruch*) in Germany and the punitive damages claim in the US. The aim of these systems is deterrence of an infringement. Therefore, in this light, this paper compares the collective legal protection system in Germany with that of Japan in order to examine both the merits and demerits of the collective legal protection systems in the two countries.

II. Injunction Claim of a Consumer Association

In order to examine some problems that are highlighted in this paper, it is necessary to discuss the theoretical reason why a CA has the injunction claim.

In Germany and Japan, in the case of an injunction claim of a CA, the individual consumer has not to authorize the CA to bring an action, and the CA does not bring actions in the name of itself for individual consumers who authorized the CA to bring an action. This is because the injunction claim of the CA is the CA's own claim in the substantive law. Furthermore, the injunction claim of a CA does not mean that the claim of the CA is a claim of "public" law; rather it is one of "private" law. There are "collective" interests[11] in the form of private interests, and they are in existence besides the individual interests. Therefore, we should think the CA which represents collective interests is able to bring the injunction claim when the collective interests are infringed,[12] because the CA is injured itself.[13]

In Germany, the UKlaG provides that a CA is able to have the injunction claim when the CA proves that it is registered in the list of qualified organizations (§ 4 UKlaG) or in the list of the EU Commission (§ 3 (1) UKlaG). The aim of the system of the list in § 4 UKlaG is to avoid abusing the system if a lawyer founded a CA with his family and relatives only to earn money. As of 26 July 2012, seventy-six CAs were already registered in the list of qualified organizations (§ 4 UKlaG).[14] In addition, the aim of the EU Commission's list is to make it easier for one court to determine whether a CA in another country that brought the injunction claim action is suitable for bringing the action or not.

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10 A *parens patriae* action is an action brought by a sovereign on behalf of its citizens.

11 Directive 98/27/EC, *supra* note 1; H. Köhler, in: Köhler/Bornkamm, UWG. Kommentar (32nd ed., München 2014) UKlaG, Vorbemerk. Rn. 1.

12 M. Wolf, Die Klagebefugnis der Verbände – Ausnahme oder allgemeines Prinzip? (Tübingen 1971) 7 ff.; F. J. Säcker, Die Einordnung der Verbandsklage in das System des Privatrechts (München 2006) 76 f.; T. Soda, *Dantai soshō no shin-tenkai* [New Developments of "Verbandsklage" in Germany] (Tōkyō 2006) 229 ff.; Säcker, *supra* note 7, 340.

13 B. Jestaedt, in: Ahrens (ed.), Der Wettbewerbsprozess (6th ed., Köln 2009) Kap. 19 Rn. 66.

14 R. Bechtold, Kartellgesetz (6th ed., München 2010) § 33 Rn. 21.

The following is a common view:[15] The requirements[16] of the register in the list (§ 3 (1) no. 1 and § 4 (2) UKlaG, § 8 (3) no. 3 UWG and § 33 (2) no. 2 GWB) have a "double nature," namely the nature of procedural law and substantive law. Moreover, it is a common view that the court should dismiss the claim without prejudice (*zurückweisen*) if the CA does not prove that it is registered in one of these lists, in the procedure of the injunction claim action.

However, on the basis of the principle of civil procedure law, it is appropriate that the requirements of the list (e.g., § 3 (1) no. 1 UKlaG) are the requirements of the claim of substantive law, not the requirements of procedural law, because those who insist that they have the claim have standing in the action for performance.[17] Therefore, the court should dismiss the claim (*abweisen*)[18] when a CA does not prove that it is registered in one of these lists. When there is no proof of this fact, the court should not dismiss without prejudice but should dismiss the claim in general.

The fact that a CA is registered in the list is a sign that it is able to have the injunction claim, because an injunction claim of a CA arises based on the theory mentioned above. Consequently, for example, when the claim of a CA arises based upon the theory mentioned above, and the claim is not against the aim of the system of the list, even if the CA does not prove that it is registered in the list of the EU Commission, the court can exceptionally establish an injunction claim of the CA and must not dismiss the claim based on the CA's lack of that proof. An example of this would be a very famous worldwide CA that is not registered in the EU Commission list which brings an action to a court in another country. Besides, § 8 (4) UWG bans the abuse of the exercise of the injunction claim.

In Japan, the injunction claim of Qualified Consumer Associations (QCA) was introduced into the Consumer Contract Act (CCA) in June 2007. As of today, there have been about fifty cases of an injunction claim action. It is necessary for the CA to be certified by the Prime Minister to be able to have an injunction claim. The requirements for the certification are provided in Art. 13 CCA, for example, "as its main objective, the person engages in activities such as collecting and providing information on consumer affairs,

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15 BGH, in: Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2006, 517 – *Blutdruckmessungen*; JESTAEDT (Fn. 13) Kap. 18 Rn. 4; A. BERGMANN, in: Harte-Bavendamm/Henning-Bodewig (eds.), UWG. Kommentar (2nd ed., München 2009) UWG § 8 Rn. 261.

16 § 4 (2) UKlaG provides the following requirements for registering in the list: 1) the CA has the juridical personality, 2) pursuing the consumer interests is one of the aims of the articles of the CA, 3) the CA has associations which act for the aim of the CA or over 75 natural persons as members and 4) the CA has already acted for over one year and based on the actions it seems the CA can perform its task.

17 M. VOLLKOMMER, in: R. Zöller (founder), ZPO. Kommentar (30th ed. 2014) ZPO vor § 50 Rn. 18.

18 About § 8 (3) UWG, see KÖHLER, *supra* note 11, UWG § 8 Rn. 3.10; SODA, *supra* note 12, 177–178.

preventing and remedying harm to consumers, and other activities to protect the interests of many and unspecified consumers, and it is found to have been properly carrying out such activities for a reasonable period of time" (Art. 13 (3) no. 2 CCA). Today, there are eleven QCAs in Japan.

In Japan, these requirements are provided because the exercise of the injunction claim has strong social and economic influences, so appropriate and clear requirements are necessary. However, the injunction claim of a CA can arise based on the theory. Therefore, the requirements that Art. 13 CCA provided are a sign that a CA is able to have the injunction claim in the substantive law. Consequently, the CA can have the injunction claim based on the theory as mentioned above, without the certification, when the injunction claim is not incompatible with the aim of the requirements, because the state must not limit the right of a private person unjustly. Besides, a QCA must not abuse the injunction claim (Art. 23 (2) CCA).

In Japan, a QCA cannot have the claim for injunction where the content of the claim and the adverse party are the same as those for which a final and binding judgment already exists from a previous lawsuit in connection with an injunction claim to which another QCA was a party (Art. 12-2 no. 2 CCA). The aim of this system is the prevention of bringing a dispute up again. In this case, it seems that the QCA cannot have the injunction claim by this system. However, the injunction claim of CA can arise based on the theory mentioned above. Therefore, when a CA (called "S") represents the collective interests that another CA (called "T"), which has received the judgment of the injunction claim, does not represent, the CA "S" is able to have the injunction claim and exercise the claim, even if there is such a judgment, because the injunction claim is not incompatible with the aim of the system in this case.

On the other hand, in Germany there is no provision that provides the limitation of the injunction claim as in Japan as mentioned above. Besides, § 11 UKlaG provides the limitation of the effect of the judgment.

In Germany, when there is an infringement of an "act for consumer protection" (*Verbraucherschutzgesetz*), a CA is able to have the injunction claim (§ 2 (1) UKlaG). Furthermore, an "act for consumer protection" is explained with an example (§ 2 (2) UKlaG). Therefore, there is a possibility that the court judges whether or not an act which the defendant infringed is an "act for consumer protection." In Germany, the GWB did not have a provision of the injunction claim of a CA before the eighth reform of the GWB in 2013. However, even before the Reform, a CA was able to have the injunction claim in the act: after the seventh reform of the GWB in 2005, a "victim" came to be able to have the injunction claim in the act (§ 33 (1) GWB). The indirect purchaser is also included in the concept of the "victim." Moreover, not only the enterprise but also the consumer as an indirect purchaser is comprised in the "victim." The German Supreme Court (*Bundesgerichtshof*) pointed out the same thing in its judgment of

28 June 2011.[19] It is a common view that the GWB is not an "act for consumer protection."[20] However, in light of this development, the GWB must be an "act for consumer protection," too. The injunction claim of a CA was introduced into the GWB by the eighth reform in 2013. Today, there is a provision of the claim of a CA in § 33 (2) no. 2 GWB. Therefore, this point of the eighth reform reflects the discussion about the indirect purchaser as a "victim" as mentioned above.

In Japan, the injunction claims of QCAs are provided only in the CCA, Act on Specified Commercial Transactions (ASCT), and Act against Unjustifiable Premiums and Misleading Representations (AUPMR). The injunction claim of a CA is enumerated with limitations. The object of the injunction claim is improper solicitation, unfair clauses, and misleading advertisement. Furthermore, the Food Labeling Act[21] was enacted in 2013, and the CA injunction claim was introduced into this act. Thus the area of application of the injunction claim is very limited. There are at least three problems. First of all, there are more infringements like those of the competition act and so-called SPAM[22] which should be an object of the injunction claim. Second, the damages of each consumer are not compensated by the "injunctive" claim.[23] Third, the profits that an infringer has gained by the infringement still remain with the infringer, even if the injunction claim has been exercised by a CA.

III. COLLECTIVE MONETARY CLAIM

1. The Necessity of the Opt-in Class Action and the Opt-in Collective Action by Consumer Associations

There are some reasons for the opt-in class action and the opt-in collective action by a CA in Germany and Japan. First, costs, efforts, and time to bring action by each victim amount to much more than the amounts claimed. Therefore, it is necessary to make bringing an action by each consumer easier. Second, it is very difficult for a victim to prove the infringement. The fact that many victims insist on the same aspects of an infringement in a collective action makes it easier to prove the infringement for each consumer. Third, for the defendant, an opt-in class action and opt-in collective action by a CA enable the defendant to avoid a high number of actions arising from the same infringement.[24]

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19 BGH, in: Neue Juristische Wochenschrift (NJW) 2012, 928 ff.

20 BECHTOLD, *supra* note 14, § 33 Rn. 16.

21 This act was promulgated on 28 June 2013. It comes into force on the date designated by a Cabinet Order within two years after the date of promulgation.

22 H. KÖHLER, Verbandsklagen gegen unerbetene Telefon-, Fax- und E-Mail-Werbung: Was sagt das Unionsrecht?, in: Wettbewerb in Recht und Praxis (WRP) 2013, 567 ff.

23 Commission Recommendation, *supra* note 2, 3, Recital no. 11.

24 A. STADLER, Collective Actions as an Efficient Means, in: Basedow (ed.), Private Enforcement of EC Competition Law (Alphen aan den Rijn 2007) 209.

2. Opt-in Class Action in Japan

However, there are some problems concerning the opt-in class action (Art. 30 CPA[25]) in Japan.

Costs, efforts and time to use this system are usually too high for those who want to appoint (authorize) a representative person to bring action. The system is useful only when the amount of the claim is clear. Furthermore, costs, efforts and time to gather claims and documents to prove claims and to inform victims of bringing the action are too much for an appointed party (a representative person). Likewise, Germany has the same problems with the opt-in class action that § 611 no. 1 ZPO of the bill[26] provides.

Thus there are some problems with the opt-in class action system. However, an opt-out class action system cannot be accepted in Japan and Germany. Under the system, the effect of the judgment of a class action automatically reaches to all of the victims in a certain group. Therefore, this system can violate the right of access to the court (Art. 103 (1) Constitution of Germany (*Grundgesetz*) and Art. 32 Constitution of Japan (*Nihon-koku kenpō*)[27]) of those victims in the group who did not know about the class action and did not offer to withdraw from the procedure. This point applies to opt-out collective action by a CA, too.

In a certain situation, the opt-out class action system does not violate the right of access to the court, because each member of the group of victims knows about the class action. This is the case when there is a certain group of victims in a little village, hospital, or school that has only about one hundred members. In this case, it is necessary to offer every victim the option to withdraw from the procedure. However, in the case in which victims of the infringement exist all around Japan or Germany, it is impossible to

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25 Art. 30 Japanese Civil Procedure Act:

"(1) Persons who share common interests and do not fall under the provisions of the preceding Article may appoint, from among them, one or more persons as parties to stand as plaintiffs or defendants on behalf of all.

(2) If, after a suit becomes pending before the court, a party to stand as a plaintiff or defendant is appointed pursuant to the provisions of the preceding paragraph, parties other than the one appointed shall automatically withdraw from the suit.

(3) A person who shares common interests with a plaintiff or defendant of a pending suit but who is not a party to the suit may appoint that plaintiff or defendant as a party to stand as a plaintiff or defendant on his/her behalf as well.

(4) Persons who have appointed a party to stand as a plaintiff or defendant pursuant to the provisions of paragraph (1) or the preceding paragraph (hereinafter referred to as "appointers") may rescind the appointment or change the party thus appointed (hereinafter referred to as the "appointed party").

(5) If any of the appointed parties has lost his/her status due to death or on any other grounds, other appointed party (parties) may perform procedural acts on behalf of all."

26 Bundestag printed paper (BT-Drucksache) 17/13756.

27 Art. 32 of the Japanese Constitution: "No person shall be denied the right of access to the court."

create such a situation, for example, through the Internet. Therefore, the opt-out class action system cannot be introduced into Japan in general.

In case of a class action in the US, when a member of a class lives in Germany or Japan, the recognition and the execution of the judgment of the class action in Germany or Japan must not be accepted, because these violate the right of access to the court (Art. 103 (1) Constitution of Germany and Art. 32 Constitution of Japan) of victims in the class. This point should be discussed further.[28]

3. Opt-in Collective Action by Consumer Associations in Germany

In Germany, § 1 (3) no. 8 Legal Advice Act (Rechtsberatungsgesetz, hereinafter: RBerG) provided opt-in CA collective action since 2001. However, the RBerG was abolished by the establishment of the Legal Service Act (Rechtsdienstleistungsgesetz, hereinafter: RDG)[29] in 2008. There is not the same provision as § 1 (3) no. 8 RBerG in the RDG, because it only provides for out-of-court matters. Today, § 79 (2) sentence 1 ZPO, which was reformed in 2008, provides as follows: "The parties may have themselves represented by counsel as attorneys-in-fact. Above and beyond this, the following are authorized to represent parties as attorneys-in-fact." Moreover § 79 (2) sentence 1 no. 3 ZPO provides for "Consumer centers and other publicly subsidized consumer associations, where they are collecting claims of consumers in the context of their scope of responsibilities." Based on these provisions, CAs can bring action as attorneys-in-fact to the county court (*Amtsgericht*) when the amount sued for is under five thousand euro. When the amount sued for is more than five thousand euro, CAs cannot bring collective action as attorneys-in-fact based on these provisions. In this latter case, the consumer must be represented by an attorney. However, the limited amount sued for is too little for a CA to bring collective action for consumers. Therefore, we should interpret these provisions to naturally permit that a consumer can authorize a CA to bring action and the CA can bring a collective action as well as under § 1 (3) no. 8 RBerG. Today, § 611 no. 2 ZPO of the Bill which provides the opt-in CA collective action system reflects this interpretation.

According to the German Supreme Court's ruling of 14 November 2006[30] "for the protection of consumers' interests" in § 1 (3) no. 8 RBerG requires that the action brought serves the protection of not only individual interests but also collective interests. However, it does not say "for the protection of consumers' interests" in § 79 (2) ZPO or in § 611 no. 2 ZPO according to the bill. In § 79 (2) ZPO and § 611 no. 2 ZPO of the bill, we find instead "in the context of their scope of responsibilities." Today, it should be considered whether this condition requires that bringing an action serves the protection of consumer interests or not. Moreover, it should be considered whether this condition

28 F. HÖFFMANN, Class Action Settlements und ihre Anerkennung in Deutschland (Jena 2013).
29 Bundesrat printed paper (BR-Drucksache) 623/06, BGBl. I, 2840.
30 BGH, in: Zeitschrift für Wirtschaftsrecht (ZIP) 2006, 2359.

also requires "protection of collective interests" or not, in relation with the second merit of the system as described below.

There are at least three merits to the opt-in CA collective action system in Germany. First of all, in contrast to the confiscation of benefits (§ 10 UWG), it is possible for each victim who authorized the CA to bring action to be relieved by this system because the money collected by the CA is paid to each consumer as a victim who has authorized the CA to bring the action. Second, a consumer who is not a member of a CA can also authorize a CA to bring a collective action under certain conditions, in contrast to the general case in which a person authorizes another person to bring an action instead of him. Third, the opt-in CA collective action system serves to make the infringer disgorge interests which the infringer has unlawfully gained by the infringement, to a certain extent.

There are at least four problems about the opt-in CA collective action system in Germany. First, it is necessary in this system for the amount claimed to be proved clearly. Therefore, the system is not useful if the amount claimed tends to be unclear. Second, it is necessary for the consumer to authorize a CA to bring an action. Therefore, it is getting more difficult to use this system when the amount claimed is getting smaller and smaller. Third, the CA must bear the costs and efforts to inform victims of bringing action, for example. Fourth, because it is necessary for a consumer to authorize the CA to bring an action, it cannot bring an action on its own initiative.

4. The Opt-in Collective Action by Consumer Associations in Japan

In Japan, there is a "two-step procedure" in the collective action by CA in the SRCPCMD.

In the first step of the procedure, a specific qualified consumer association (SQCA) brings an action seeking that the court establishes a "common obligation" concerning a consumer contract. Moreover, the court establishes an existence of a common obligation in the procedure. The object of the first step in the procedure is the obligation of the enterprise to pay the consumer arising from claims related to the consumer contract. These claims should be a 1) claim to fulfill an obligation of a contract, 2) claim concerning the obligation to return unjust enrichment, 3) claim concerning default on obligations, 4) damages claim based on warranty against defects, or 5) damages claim concerning torts based on the articles of the Civil Code (CC).

In the second step of the procedure, each consumer authorizes the SQCA to bring an action (Art. 31 (1) SRCPCMD). Furthermore, only an SQCA that has pleaded fast-track procedure can notify the court of the claims, and the court establishes each claim and the amounts claimed for each consumer by a new simple (quick) procedure.

The effect of the judgment of the first step reaches to the plaintiff, the defendant, and not only the consumer who notifies the court of his own claim in the second step but also other SQCAs that are not a plaintiff of the first step of the procedure.

What is the improvement or merit of this new system in comparison with the opt-in class action in Japan? There are at least five improvements.

First of all, a plaintiff SQCA can bring an action by self-initiative without appointment (Art. 30 CPA). Second, when the first step of the procedure in the new CA collective action ends, parties can reach a settlement based on the judgment of the first step, which means saving time. Third, in the second step of the procedure, the plaintiff can gather more claims than under the opt-in class action system. Fourth, in the case of the opt-in class action, the representative person (appointed party) is one of the victims. Therefore, this person is an "ad hoc" existence and he/she is not well known to victims around Japan. Consequently, it is hard for him/her to collect more claims. In the case of the CA collective action, the CA is not a victim and is a "constant" existence. Therefore, the CA is well known to victims around Japan. Consequently, the CA can easily provide information about the infringements that can cause harm to the consumer, for example, on its web site. It is a little easier to inform victims of bringing an action and to gather more claims, though in a case of over 100 victims, for example, it is still difficult for a CA to gather claims and documents for proving the claims. Fifth, the problem of costs, efforts, and time has improved in the new CA collective action system because it is not necessary for each consumer as a victim to authorize the CA to bring an action in the first step of the procedure, and the new simple "fast-track" procedure in the second step of the procedure was introduced.

However, there are some problems with collective action by SQCAs in Japan.

The first point is whether it violates the right of access to the court that an SQCA can bring action in the first step of the procedure without the appointment of a victim. It seems that this problem was already resolved because the effect of the judgment of the first step of the procedure reaches to the plaintiff, defendant, and not only the consumer who notified the court of his/her own claim in the second step of the procedure, but also other SQCAs which are not a plaintiff of the first step of the procedure. However, in fact, when each consumer as a victim exercises his/her claim against an infringer as an ex-defendant out of the court after an SQCA lost a case, more difficulty is to be expected in negotiation. This point becomes obvious when a consumer in the area "B" exercises his/her claim out of the court after an SQCA in the area "A" lost a case in the first step of the procedure. In this case, though the result of the action in the area "A" has no meaning for the consumer in the area "B", the ex-defendant will insist that it was already settled that the claim does not exist by the judgment of the first step of the procedure in the area "A".

Second, a QCA must conform to certain requirements to become an SQCA (Art. 65 (4) SRCPCMD). Therefore, the scope of persons who can become a plaintiff is very limited.

Third, the object of the collective action is very limited. The extended damages, lost profits, bodily injuries, and consolation money[31] are excluded from the object of the action (Art. 3 (2) SRCPCMD). Moreover, an individual investor is usually not a consumer (Art. 2 (1) CCA). If an investor is not a consumer, an investment contract is not a consumer contract (Art. 3 (1) SRCPCMD). Therefore, such an investment contract is not included in the object of the action. In Germany, there is a Model Procedure Act (Kapitalanlegermusterverfahrensgesetz, hereinafter: KapMuG) for the protection of the investor.

Fourth, it is expected that victims do not want to give an appointment in consideration of the costs and efforts of the appointment. Therefore, there is a possibility that the result of the first step of the procedure will become meaningless.

Fifth, it is very difficult or almost impossible to disgorge all of the profits that the infringer has gained by infringement, even if "the appointed party action" (Art. 30 CPA) and this new system would fulfill their function.

Sixth, cooperation of consumers as victims who will make an appointment later in the second step is necessary for a plaintiff to confirm the common obligation in the first step of the procedure. If the cooperation was a burden as well as the appointment in the case of the appointed party action system (Art. 30 CPA) and large efforts to collect evidence were necessary for a plaintiff in the first and second step of the procedure, there is no improvement compared to the appointed party action.

5. Comparing the Consumer Association Collective Action System in Japan with the Same System in Germany

As shown in the following, the opt-in collective action system by CA in Japan has some merits compared to the same system in Germany.

First, in Germany, in case of a collective monetary claim action by a CA (§ 79 (2) no. 3 ZPO), the CA (*Verbraucherverband*) cannot bring an action without the authorization by a consumer to bring an action. In Japan, in case of a collective monetary claim action by a CA, the CA can bring an action in the first procedure without being authorized. Therefore, in Japan, a CA can take the initiative in bringing an action easier than in Germany.

Second, there is the fast-track procedure for collective consumer action by a CA in Japan. However, there is no such fast-track procedure in Germany. The fast-track procedure can reduce costs, effort, and time arising from the collective action.

Third, in Germany, even if a CA brought the action in form of the first step of the procedure in the form of a so-called step action (*Stufenklage*, § 254 ZPO) to seek that the defendant releases information about the amount claimed in order to prove the amount claimed in the collective monetary action later, and the CA won the suit in the first step of the procedure in the step action, the defendant never releases the infor-

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31 Consolation money is the translation of the Japanese term *isharyō* which corresponds to damages for pain and suffering *(the editors)*.

mation and only has to pay some money as a punishment (non-criminal fine) to the court instead. In Germany, there is no general obligation to submit documents in the civil procedure. Also the court cannot order the holder of the document to submit the document as the following in a "rough form." An enterprise as a defendant is obligated to disclose a document in which the name and the address or the contact address of a consumer that has authorized a SQCA to bring action is written (Art. 28 SRCPCMD), the court can order to disclose the document, and there is a penalty when a person or third party does not comply with the order (Art. 29 SRCPCMD). In this case, it is necessary that a document which has to be disclosed is specified, because the indication of the document must be clarified. However, in Japan, there is a special system[32] of specification of the document in the CPA (Art. 222 CPA). Therefore, the court can order that a document be submitted in the form of "any matters by which the holder of the document can identify the document," because the holder of the document is obligated to submit the document based on the principle of good faith.[33] If a party does not comply with an order to submit a document, the court may recognize that the opponent's allegations concerning the statements in the document are true (Art. 224 (1) CPA). If a third party does not comply with an order to submit a document, the court, by an order, shall punish him/her by a non-criminal fine of not more than two hundred thousand yen (Art. 225 (1) CPA).

The opt-in collective action by a CA in Japan compares with the Model Procedure of the KapMuG in Germany.

There are some common points. First, both of them are a procedure for a case in which there are a large number of victims. Second, both of them can lighten the burden of proof of victims and contribute the judicial economy. Third, both of them adopt the two-step procedure system and a court establishes a "common obligation" in the first step of the procedure.

There are some points of difference. First, it is necessary for each victim to bring action in the Model Procedure in Germany. Second, over ten same-oriented actions are necessary to start the Model Procedure. Third, the object of the Model Procedure is lim-

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32 Art. 222 CCP:

"(1) Where a person files a petition for an order to submit a document, if it is extremely difficult to clarify the matters set forth in paragraph (1), item (i) or (ii) of the preceding Article, it is sufficient when filing the petition to clarify, in lieu of said matters, any matters by which the holder of the document can identify the document pertaining to the petition. In this case, the person shall request the court to request the holder of the document to clarify the matters set forth in item (i) or item (ii) of said paragraph.

(2) Upon the request made under the provisions of the preceding paragraph, the court, except where it is obvious that the petition for an order to submit a document is groundless, may request the holder of the document to clarify the matters set forth in the second sentence of said paragraph."

33 T. NAKANO, *Kaisetsu shin-minji soshō-hō* [Einführung in das neue Zivilprozessrecht] (Tōkyō 1997) 54.

ited only to financial law matters. Fourth, the second step of the procedure in the Model Procedure is not a fast-track procedure like in the second step of the procedure of the SRCPCMD in Japan.

6. Damages Claim of Consumer Associations

As shown, there are some problems about the CA collective action in Japan and Germany. Is it possible to introduce a damages claim of a CA in Japan and Germany? In case of a damages claim of a CA, it is not necessary that a consumer authorize a CA to bring an action. Therefore, there is no problem of costs, effort, and time arising from it. However, it is very difficult to imagine that damages of a CA itself can be caused by which collective consumer interests represented by the CA are injured. Furthermore, even if such damages of a CA cannot be denied, it may be rather difficult to calculate such damages. Therefore, it is almost impossible to introduce a damages claim of a CA in Germany and Japan.

IV. Unlawful Profits Claim and Punitive Damages Claim

Therefore, it is necessary to introduce the unlawful profits claim, the punitive damages claim, and/or the disgorgement of the unlawful profits or punishment by an administrative body. In Germany, the unlawful profits claim of a CA has been introduced into the UWG in 2004 and into the GWB in 2013. Furthermore, the repayment order of the Competition Authority (*Kartellbehörde*) was introduced into the GWB in 2013 (§ 32 (2a) GWB). Moreover, the unlawful profits claim of EA were introduced into the UWG in 2004 and into the GWB in 2005. In Japan, there are no such systems yet. This problem should be resolved in some years in Japan.

There are at least five merits to the unlawful profits claim in Germany – in other words, the claim for a confiscation of profits (*Gewinnabschöpfungsanspruch*).

First, compared to the injunction claim, it is possible to disgorge the interests that the infringer has gained by infringement from the infringer.

Second, compared to the individual monetary claim, in theory, it is possible to stop increasing interests earlier because the unlawful profits are not made by accumulation of each individual monetary claim, and hence the unlawful profits claim can arise without an individual monetary claim. Moreover, as well as the injunction claim, a CA which represents the collective interests is able to have the unlawful profits claim when the collective interests are infringed by an infringement. Therefore, the unlawful profits claim can arise before an individual monetary claim arises. Compared to the individual monetary claim, in theory, it is possible to stop increasing interests earlier. In addition, compared to the individual monetary claim, it is easier to prove the unlawful profits claim because it is not necessary to prove each individual monetary claim and each amount claimed. However, in practice, it is not easy for a CA to prove “interests”.

Third, compared to the damages claim of a CA, in theory it is possible to avoid the problem about the theoretical reason why the damages claim of the CA arises from vio-

lation of the collective interests which the CA represents, and how the damages can be calculated. In a case of an unlawful profits claim, compared to the damages claim of a CA, it is easier to have the collected money paid to the National Treasury because the damages of a CA are not compensated by the unlawful profits claim. By payment to the National Treasury, it is easier to prevent abuse of the claim than with the damages claim of a CA in which the collected money is paid to the CA itself.

Fourth, compared to the opt-in CA collective action, the CA can bring action on its own initiative without being authorized by a consumer to bring an action. Further, in case of the unlawful profits claim, it is possible to avoid the problems about efforts and costs to inform consumers as victims of bringing an action.

Fifth, the CA can negotiate with the infringer by stronger force than a CA which has only the injunction claim and does not have the unlawful profits claim. Therefore, this point can serve as a deterrence of the infringement.

In Germany, the claim for confiscation of profits (*Gewinnabschöpfungsanspruch*) of a CA was introduced into the UWG in 2004 as the unlawful profits claim system (§ 10 UWG). The claim has also been provided in the GWB since 2005 (§ 34a GWB). There are at least eight problems with the claim, though, including the following:

First of all, it is difficult for a CA to prove "the intention." However, about this point it should be noted that the willful negligence is enough for a CA to prove the intention. Moreover, the secondary burden of assertion (insistence) and the *prima facie* evidence can serve to prove the intention. These elements help to resolve this problem.

Second, it is difficult for a CA to prove "the causal relationship" between the intentional infringement and the profits because § 287 (1) ZPO that provides reduction of proof does not apply to this causal relationship.

Third, it is very difficult for the plaintiff to prove the amount of profits. § 287 (1) ZPO can be applied to the amount of profits. However, the plaintiff must prove the sales that the plaintiff could acquire under fair competition, which is complicated. Fourth, even if the plaintiff brings the action of claim for information about the amount of profits in the first step of the procedure in the step action (*Stufenklage*, § 254 ZPO) and wins the suit, it is possible for the defendant not to comply with the judgment and only to pay the penalty. In this case, the plaintiff cannot obtain the information. Otherwise, even if the plaintiff obtains the information by the judgment, the plaintiff cannot always prove the amount of profits based on the information. Therefore, it is necessary for the defendant to cooperate with the plaintiff to submit more information.

Fifth, while the plaintiff spends the time and effort to collect evidence, the defendant can conceal his property or go into bankruptcy. Nevertheless, § 916 ZPO that provides the temporary attachment system (Arrest) cannot be applied to the case of the claim for confiscation of profits in general because its conditions are extremely strict.

Sixth, there is a problem with the money being paid to the National Treasury. The reason why the money is paid to the Treasury has not yet been clarified, though the

claim for confiscation of profits is a claim in private law. The victims of the infringement cannot be compensated by the claim for confiscation of profits because the money is paid to the Treasury. Furthermore, the money that is paid to the Treasury is not always used for consumer protection. Further, although a lot of time and effort collecting the evidence for the calculation of the profits is necessary for a CA, the money is paid to the Treasury and not to the CA. Therefore, it is very difficult for a CA to exercise the claim for confiscation of profits financially.

Seventh, it is necessary to widen the area of the application of the claim for confiscation of profits. For example, a CA should also be able to use the claim in cases concerning the obligation to return unjust enrichment based on the infringement of an "act for consumer protection." Therefore, it is necessary to reform the provision of the claim for confiscation of profits so a CA can use the claim in such cases as well.

Eighth, because of these problems mentioned above, a CA can hardly win the suit in Germany today. In addition, the amount paid in a winning case and reconciliation is very small. Thus, using the claim for confiscation of profits is very difficult for a CA.

In the unlawful profits claim system, such a claim belongs to the CA as a claim under private law. If the profits must be paid to the Treasury as in Germany, a relation between the nature of the claim and the payment to the Treasury must be clearly explained in order to introduce the claim into Japan. In relation to this aspect, two problems need to be referred to.

First, there is "the malfunction of the market": While each victim of the infringement does not want to bring an action because of the cost and effort to bring the action, the infringer can gain profits by the infringement in the field of the UWG, and the unlawful profits claim (*Gewinnabschöpfungsanspruch*) can improve the malfunction of the market. Recently, Professor *Köhler* pointed this out very convincingly.[34] Therefore, the aim of the unlawful profits claim is the deterrence of the infringement "by the improvement of the malfunction of the market." The reason why the aim of the unlawful profits claim is the deterrence of the infringement is that the enforcement systems, which include the private law system in the UWG and GWB, have not been sufficient to deter the infringement.

Second, the discussion about the unlawful profits claim in the UWG during the law-making process[35] has a very important meaning for this point. At the early stage of the law-making process, it was considered that money must be paid to the CA. Therefore, in the bills (§ 9 (4) Referent Bill and § 10 (4) Cabinet Bill), it was suggested that the CA must pay the money to the Treasury in order to avoid abuse of this system, after money had been paid to the CA from an infringer. However, this process is very complicated.

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34 KÖHLER, *supra* note 11, UWG § 10 Rn. 4.

35 Draft of the Federal Ministry of Justice (Referentenentwurf des BMJ), 8; Bundestag printed paper (BT-Drucksache) 15/1487, 7; SODA, *supra* note 12, 80–94.

Therefore, the process has been changed so that an infringer must pay directly to the Treasury only to make the process more convenient. In consideration of this discussion during the law-making process, the unlawful profits claim is originally a claim in which the CA demands an infringer to pay the profits to the CA itself. Consequently, the unlawful profits claim is not a claim under administrative law, criminal law, or a special claim under public law, but a claim under "private" law.

The punitive damages claim is a private law claim in the US. However, it is theoretically impossible to punish an infringer by this "private law" claim because of the theory of the separation of public law and private law in continental law countries such as Germany, France, and Japan. The German Supreme Court (*Bundesgerichtshof*) denied the recognition of the judgment of a punitive damages action in the US in its judgment of 4 June 1992,[36] because the judgment of a punitive damages action violates public order in Germany. Likewise, the Japanese Supreme Court denied the execution of the judgment of a punitive damages action in the US in its judgment of 11 July 1997[37] because the judgment of a punitive damages action violates public order in Japan. Thus, there is an extremely serious problem with the punitive damages claim in the US. Therefore, it is impossible to introduce the punitive damages claim into Japan and Germany.

Finally, in Japan, a criminal sanction was imposed on an e-mail advertisement without the consent of the receiver. In Germany, in recent years, an administrative monetary sanction on a telephone advertisement without the explicit consent of the receiver was introduced into the UWG. Moreover, an administrative sanction on an e-mail advertisement without the explicit consent of the receiver was introduced into the Tele Media Act, and the administrative monetary sanction on an abuse of a telephone number was introduced into the Telecommunication Act in recent years. Thus, in Germany and Japan, sanctions of public law have already been introduced to a certain degree today.

V. CONCLUSION

The compensation of damages for all victims is very difficult and nowadays almost impossible in practice. This problem still remains in both countries today. In Japan, bank transfer scams have been a serious social problem. Therefore, an Act of Aid to the Victims of a Bank Transfer Scam[38] entered into force on 21 June 2008. Based on the act, a bank account that is used for a fraud (a bank transfer scam) will be blocked and money paid to the victims from the account. Today, money is already being paid to victims based on the act in many cases. This system can aid the damages of victims. Therefore, it serves to resolve the problem mentioned above.

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36 BGH, in: Neue Juristische Wochenschrift (NJW) 1992, 3096.
37 Minshū 51, 2573.
38 Law No. 133/2007.

Furthermore, the profits that an infringer has gained by infringement can remain with the infringer. This problem is not resolved yet in both countries at present. Therefore, the Japanese government is considering introducing a system of disgorgement of the unlawful profits by an administrative body or a sanction by administrative body into the consumer law in addition to the current Anti-Trust Law and Financial Law.

SUMMARY

This paper compares the collective legal protection system in Germany with that of Japan in order to examine both the merits and demerits of both systems. First, this paper describes the Injunction Claim of a CA (Consumer Association). In order to examine some problems about this claim, this paper discusses the theoretical reason why a CA has the injunction claim. Moreover, this paper describes whether the requirements in the provision regarding the injunction claim have a "double nature." Second, this paper discusses the Collective Monetary Claim Systems: "the appointed party action system" in Japan and the collective action system by CA in which a CA collects claims of consumers as victims and brings an action in Germany and Japan. Third, this paper describes the merits and demerits of the Unlawful Profits Claim (claim for confiscation of profits: Gewinnabschöpfungsanspruch*) in Germany. The author concludes that full compensation of damages of all victims is not possible within these systems. Moreover, the profits that the infringer has acquired by infringement can remain with him/her. Therefore, these systems are not sufficient to deter infringements and it is necessary to reform them in both countries.*

ZUSAMMENFASSUNG

Der Autor vergleicht die Mechanismen kollektiven Rechtsschutzes in Deutschland und Japan und zeigt deren jeweilige Vor- und Nachteile auf. Zunächst beschreibt der Beitrag den Unterlassungsanspruch von Verbraucherverbänden und geht bei der Problemanalyse auf die theoretische Begründung für einen solchen Anspruch sowie die „Doppelnatur" seiner Voraussetzungen ein. Im Anschluss wird die Regelung kollektiver Zahlungsansprüche behandelt. Zum einen die „opt-in class action" *in Japan und zum anderen die* „opt-in collective action" *von Verbraucherverbänden in Japan und Deutschland, bei welcher der Verband Fälle betroffener Verbraucher bündelt und selbst Klage einreicht. Als drittes werden Vor- und Nachteile des Gewinnabschöpfungsanspruchs in Deutschland beschrieben. Der Autor kommt zu dem Schluss, dass im Rahmen der vorhandenen Regelungen letztendlich eine vollständige Entschädigung aller Opfer nicht möglich ist. Darüber hinaus verbleiben die Vorteile, die sich der Schädiger verschafft hat, bei diesem. Die bestehenden Systeme sind folglich nicht ausreichend, um Verletzungen zu verhindern und müssen in beiden Ländern reformiert werden.*

(Die Redaktion)