

## Session 2: Comment on Collective Redress for consumers in the European Union and in Spain

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Thank you for the very informative report which covers all important issues on collective redress for consumers, including the standing of plaintiff, different types of collective redress, disclosure of evidence, collective settlement, funding and costs and etc. I would like to share you with Taiwan's collective redress system.<sup>1</sup>

### 1. The Brief Introduction of the Collective Action in Taiwan

The first attempt to deal with collective redress is the group action (Verbandsklage) for protecting consumer in the Consumer Protection Act, which was in 1994 enacted. This Act introduced a series of collective action regulations, including: (1) empowering qualified consumer protection groups (charitable association or foundation) to bring an action for damages in their own name when authorized by more than 20 consumers concerning a single incident (Article 50 of CPA)<sup>2</sup>; (2) providing a public notice system where the court may notify the other victims through public notice to claim for damages in the same representative action, which is filed and represented by one or more person of the injured consumers (Article 54 of CPA)<sup>3</sup>; (3) empowering qualified consumer protection groups to file a suit for injunction against a business operator whose conduct

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<sup>1</sup> Kuan-Ling Shen, 2019/10, The Developments of Collective Redress in Taiwan, 韓國民事訴訟法學會誌, 《民事訴訟》, 第23卷第3期, 頁167-208。

<http://www.dbpia.co.kr/journal/articleDetail?nodeId=NODE09231916>。

<sup>2</sup> Article 50, Paragraph 1 of the Consumers Protection Act: “Where a mass of consumers is injured as the result of the same incident, a consumer protection group may take assignment of the rights of claims from 20 or more consumers and bring litigation in its own name.”

<sup>3</sup> Article 54, Paragraph 1 of the Consumers Protection Act: “If a mass of parties injured out of the same consumer relationship select one or more persons to bring an action for damages in accordance with Article 41 of the Code of Civil Procedures, the court may announce by public notice after obtaining the consent of the chosen representative(s), whereby other injured parties may within a certain period of time set forth in writing the facts, evidences and declarations of claims resulting from the injury and request for damages in the same litigation proceeding.”

has constituted a material violation of the law without authorization from any consumer (Article 53 of CPA).

In 2002, Securities Investor and Futures Trader Protection Act modeled on the devices in Consumer Protection Act and laid down collective lawsuits for securities disputes.

In 2003, Article 44-1 to 44-4 were added into the Code of Civil Procedure, which could be applied to all civil cases, for example the environment action or labor disputes.

In 2012, Personal Information Protection Act also modeled on the devices in Consumer Protection Act to introduce collective litigation for the personal information infringement cases.

In 2018, Labor Disputes Proceedings Act created a special mechanism of collective redress for labor disputes.

## 2. Compensatory Relief vs. Injunctive Relief

Under these regulations, one of the common features among collective litigations is the difference between compensatory relief and injunctive relief. In the action for injunctive relief, the qualified representative entity does not need to acquire authorization from the consumers. By contrast, the assignment of rights to litigate is a requirement to the consumer collective action for compensatory damages. That is, Taiwanese law does not entitle charitable associations or foundations to sue for monetary relief without the consumers' authorization.

## 3. Small Dispersed Damages vs. Mass Damages

Apart from those types, I think that claims for damages can be further divided into the following two categories: (1) small and dispersed damage (Streuschäden) and (2) mass damage (Massenschäden). The former refers to the situation where multiple people are victimized due to the same cause or occurrence, and yet since each suffers a subtle and minute loss, they generally lack awareness of the loss they sustain. However, such minute losses aggregate to a huge amount of damage.

The mass damage refers to the situation where the victims suffer obvious and serious injuries in one cause or occurrence and are entitled to large-sum damages. They are generally more aware of their loss and are more motivated to assert their rights.

However, allowing the victims to file lawsuits individually is also inefficient, as it overloads the judiciary and raises doubts about fairness if there are conflicting results.

So far, there is no different treatment between dispersed small damages and mass damages under Taiwanese Law.

#### 4. Opt-in vs. Opt-out

In most EU jurisdictions, collective redress seeking compensation must be filed on an “opt in” basis. Likewise, in Taiwan, qualified entities may not file lawsuits for damages unless the victims assign their rights to sue. The rationale is that collective redress seeking compensation is by nature an aggregation of individual claims, whereas in suits seeking injunction there is one common claim shared by victims.

However, this system is not perfect and maybe inadequate to handle dispersive cases, i.e., cases where myriads of victims with small claims are involved. That is why some jurisdictions in the EU adopts the opt-out system, such as the draft of Spain.

In Taiwan, in the case of Chang Chi Foodstuff Factory scandal, there were more than 3772 victims all over the country. It took several months to obtain the assignment from consumers and finish preparatory works (such as compilation of the list of all victims/substantive parties) before the suit can be filed. Also, in the case of Alexander Gym, there were tens of thousands of members. Before the initiation of collective redress, the consumer representative entity must spend enormous time to confirm whether each of the (putative) victim does belong to the membership. As a result, since the initiation of the lawsuit, 10 years has passed, and yet no judgment has been made. These experiences attest to the argument that the current system for dispersive cases in Taiwan, which requires assignments of claims, faces difficulty.

Besides opt-in and opt-out systems, there is one new form of collective litigations, that is, multi-stage trial. Specifically, in the first stage, the court hears and adjudicates on common issues shared by the victims. In the second stage, the court addresses individual issues (such as the extent of damages), and then make judgments on individual claims of damages.

#### 5. Lump-sum judgment and distribution agreement

One of the innovative designs under collective redress of Taiwan Code of Civil Procedure is the “lump-sum judgment and distribution agreement”. According to

Article 44-1(2) of CCP<sup>4</sup>, the court may, based on the agreement of the entire appointing parties, award a lump sum to the entire appointing parties. This is evidently different from the traditional representative party system, which requires the appointed plaintiff to specify the sum paid to each appointing parties while the court is also required to specify the amount that the defendant must pay to each of the appointing parties. This paragraph, on one hand, allows the injured people to dispose of his or her substantive rights and, on the other hand, lessens parties' burden of proof or other relevant procedural burdens and alleviating the court's burden. The decision might not be in conformity with the objective compensation rights of the appointing parties; however, it is the result obtained by each of the appointing party disposing of his or her own substantive rights through the agreement above.

With respect to the distribution agreement, the appointing parties may arrange to distribute the sum to the individual appointing party according to a certain proportion and method; or, the appointing parties may agree not to distribute the sum to the individuals but donate it to an incorporated charitable association or authorize the use of the compensation such as establishing a public interest fund. The approach which separates the determination of compensation from its distribution is not only economical for the judgment procedure but also more efficient in the enforcement procedure.

However, lump-sum judgment and distribution agreement do not play an important role in the judicial practice yet, because it is difficult to reach consensus of all appointing parties.

## 6. Collective (Group) Right for Consumers?

So far, an efficient way to deal with small dispersed damages cases still do not exist in Taiwan. So, I would like to raise a question, whether a collective right for the consumers should be admitted.

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<sup>4</sup> Article 44-1, Paragraph 2 of the CCP: "Where an incorporated association initiates an action for monetary damages on behalf of its members in accordance with the provision of the preceding paragraph, if the entire body of the appointing parties agrees to allow the court to grant the full amount of a monetary award to them as a whole body and prescribes how such total award shall be distributed, and furthermore, if the entire body has filed a pleading to such effect, then the court may award a total sum of money to the entire body of the appointing parties without specifying the amount that the defendant must pay to each of the appointing parties respectively."

Collective injunctive relief is one of the examples that attests to Taiwanese law's acknowledgment collective rights<sup>5</sup>, because the plaintiff is asserting the right of the consumers as a whole (including all consumers and consumer advocacy groups), not the rights of individual consumers. This is an action against infringement on the interests of the "public" or the violation of the relevant provisions of the "protection of consumers". The nature of a group action for injunction relief shall be regarded as the representative action for the public interests or consumer interests.

Taiwanese tort law is based on the principle of damage recovery. However, if the benefits that can be obtained from illegal acts are far greater than the recovery of the damages, enterprises would take the risk to engage in illegal activities. In view of this, a civil collective remedy system for the wrongful act against the public should not be limited to injunctive actions only; instead, it should be expanded to include collective monetary relief, so as to make up for the insufficiency redress for the subjective rights (claim for damages), to stop the perpetrators from profiting from their illegal acts, and to maintain sound order of transaction.

Although such illegal acts cause consumer rights damage or disrupt transaction order, due to the fact that the damages are mostly minor, dispersed or undetectable, consumers are generally unaware of their damages or do not intend to sue on their own, which is not easy for them. It is also difficult to expect them to assign their rights to sue. Thus, it should be necessary to allow qualified entities to litigate without the assignment from individual consumers, and to let them sue in their name so long as they meet certain requirements.<sup>6</sup> However, this is limited under current Taiwanese law to injunctive claims against continuance of wrongful acts, because the monetary claim for damages has always been defined as the individual consumer rights, and there is no so-called group right. Therefore, the consumer groups may litigate for damages only when the victims assign their rights to sue, and after the consumer groups receive the compensation, they shall deliver the payment to the consumers (Article 50, paragraph 5 of CPA).

However, in my opinion, there should be a distinction between the plaintiff's standing for massive damages and dispersive small damages. It should be considered that the qualified entities may file a collective action for the small dispersive damages as a whole group right of consumers, because that can be regarded as collective right belonging to all consumers, and therefore do not require authorisation of individual

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<sup>5</sup> Cheng-Shan Lee (2007), *Collective Rights as Constitutional Guarantee, Collective Rights, Diversity, Tolerance, and Human Rights: With a specific focus on rights not enumerated in the Constitution*, 304, 307.

<sup>6</sup> Lian-gong Chiou (1996), *The Aim of Civil Litigations: Using Consumer Protection Litigations as an Example, On the Function of Procedural Systems*, pp169-172.

consumers. The compensation could be awarded to the special fund and not be distributed to individual consumers due to a reasonable distribution of judicial resources and balancing the procedural protection for consumers.

Thank you for your listening.