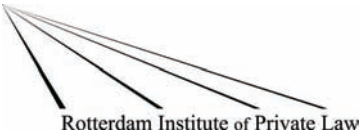
Efficacious Enforcement
In Contract And Tort



Erasmus University Rotterdam
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Efficacious Enforcement In Contract And Tort

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Inhoud

1 Introduction

Contract law and tort law are a set of organically grown rules with their roots in history. The same holds true for private law remedies ancillary to these rules, such as the right to compensation, the right to specific performance, restoration in kind, et cetera. These roots are important in understanding and explaining the present state of contract law and tort law. From a dogmatic and logical point of view, however, remedies need more than historical understanding and explaining: they are constantly in need of justification and purpose. Therefore, from time to time the rules on contract law and tort law need recalibration in order to ensure their efficacy.[1] With this lecture, I hope to contribute to that process.[2]

Substantive rules are created with one goal or more goals in mind. Theoretically speaking, these goals are supposed to be reached by means of compliance with the rule. Compliance in turn is served by instruments of enforcement, remedies. To serve the goals set by the substantive rule, remedies must have the capacity to produce the desired effect. So, remedies in contract and tort can be evaluated on the basis of their efficacy, their capacity to serve the goals of contract law and tort law.

As a rule, legislators, courts, and legal doctrine should periodically evaluate efficacy and thus address the question whether the substantive rules of contract and tort law – and, indeed, the aims of the whole body of the law of contract and tort – as such are still efficaciously served by these instruments of enforcement. And if not, then perhaps we should look for alternative remedies. The reason for this is simple: substantive rules are in need of efficacious remedies. Otherwise, what would be the point of having a substantive rule?[3] Evaluation of the status quo may reveal that alternative remedies or alternative designs for remedies could help reach the goals set by the rule more efficaciously.

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1. In this lecture 'efficacy' refers to the potency to produce a desired effect. The term is slightly more theoretically oriented than 'effectiveness', which alludes to empirical evidence of the desired effect.
2. Many opportunities were given to me to discuss drafts of this paper, enabling me to amend and refine my arguments. I owe special thanks to my colleagues at Erasmus University Rotterdam, the participants to seminars at both the Erasmus University Rotterdam and Amsterdam University (UvA), and to the following persons in particular for helpful comments: Roger Van den Bergh, Ivo Giesen, Ton Hartlief, and Siewert Lindenbergh. Melissa Moncada Castillo provided indispensible research assistance. The linguistic assistance that Suja Suryanarayanan provided is gratefully acknowledged.
3. Cf. Verheij 2002, p. 464.

An example of a rule in private law that has a clear goal and can be evaluated accordingly in terms of efficacy is the rule that debtors should pay money debts before default sets in. The basic goal of this rule is that debtors indeed pay on time. The underlying assumption probably is that business trust and thus economic growth is optimally enhanced if all debtors pay on time rather than default on their promises.[4] The rule is enforced by means of several remedies, the one sticking out being the accessory obligation to pay a statutory interest rate. With regard to this remedy the European legislature recently applied the following reasoning:

- Research shows that some 35% of the cases of late payment of money debts concern deliberate omission to pay on time;
- This is a hurdle for interstate commerce within the European Union (*problem*);
- Therefore, policy should be aimed at reducing deliberate late payment (*policy goal*) by giving an incentive to debtors to pay on time (*behavioural assumption of corporate sensitivity to financial incentives*);
- Late payment could be reduced by a high level of statutory interest (*possible remedy*) and swift recovery procedures, because the Swedish example seems to show good results in this respect (*evidence of efficacy of a solution*);
- Therefore, an EC Directive should use this remedy. The resulting Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions provides that the statutory interest rate consists of an ECB reference rate plus a margin of 7% and that recovery procedure should be swift.[5]

So, from a theoretical perspective, the efficacy of the remedy of interest payment could be measured by evaluating whether *Directive 2000/35/EC* did in fact help decrease the number of days of deferral and increase the willingness to pay on time. If efficacy is disproved or weak, alternative remedies such as more exemplary interest rates might be considered.[6]

4. This ulterior goal seems to underlie practically most rules of contract law. On theory of contract law, see, e.g., Smith 2004, p. 54 ff.
5. Note that the policy underpinning is not primarily concerned with compensating the creditor. Here, compensation is merely a remedial means to an end. Contrastingly, Law Commission 2004, p. 2 ff. stresses the compensatory function.
6. Cf. Carval 1995, p. 275 f., no. 248, referring to article 21 of the *Loi Badinter (loi no 85-677 du 5 juillet 1985)*, which states that the liability insurer's delay in prompt payment within two months increases the interest rate with 50% (and with a 100% after four months!).

At this point, some underlying assumptions need further clarification. If we want to evaluate the efficacy of substantive rules we need to have a frame of reference, a yardstick, by which we can measure efficacy. Furthermore, from a theoretical perspective efficacy can only be evaluated if the underlying goals of the rules are clear-cut. In the law of contract and tort, these goals are sometimes difficult to identify. Ask ten scholars what the aim is of the right to terminate a contract after the counterpart has not performed in conformity with the contract, or what the goals of tortious liability for accidental injury are. You will probably end up with more than ten possible answers and less than one straight answer. The debate that follows with these ten scholars can easily stand in the way of fruitful discussion on efficacy, because without agreement on the goals of specific substantive rules there is no yardstick with which to measure efficacy.[7]

> With regard to underlying assumptions, let me first admit that the underlying assumption of the following is that rules in private law have discernable goals which cannot merely be of a corrective nature. Correctiveness by definition implies making right the wrong after it has happened; it is inherently backward looking.[8]
> Surely, there must be more to private law than just looking back. My admittedly rather simplistic approach to private law is that most rules are made with a distinction in mind – sometimes explicit and sometimes left implicit – between right behaviour and wrong behaviour. What is considered right should be encouraged and what is wrong should be discouraged. This simple distinction is the basis for most rules governing human and corporate behaviour in private law. From this distinction, whatever the theory of law that underpins it, usually follows that wrong behaviour is counterbalanced by a legal remedy for the benefit of interested parties.[9]

7. This does not preclude an evaluation of the rule on the basis of some external paradigm such as a law and economics analysis (e.g., efficiency).
8. Cf. Collins 1999, p. 256.
9. Cf., in a similar vein, *Courage v. Crehan*, C-453/99, judgement of the Court of Justice of 20 September 2001, paragraphs 26 and 27. See also EU Commission 2005, p. 4.

Assuming that this approach is in essence correct,[10] what then do we know about the efficacy of the remedy with regard to the aforementioned encouragement or discouragement? In my view, the yardstick by which to measure a remedy is whether and to what extent it adds to compliance with the substantive rule. Imagine a specific rule, stating that one should not display certain behaviour. My assumption here would be that compliance with the rule is the primary concern of the rule maker. It is sometimes argued that the classical approach of the common law to performance in contract is an example which invalidates this view. This approach holds that if a debtor in contract does not perform, the creditor does not have a right to specific performance but can merely claim damages. My analysis of such a rule – if it does indeed (still) exist – is that it is not the non-performance that the law holds to be wrong, but rather the non-performance without offering and paying full compensation to the creditor.[11]

To conclude, my assumption is that compliance with the substantive rule is the primary object of the rule itself. In private law, compliance is secured by means of remedies. So, in my definition *efficacy of enforcement* of *substantive private law rules* depends on the availability of a *remedy* and how it is used in practice. Thus, a remedy ensuring maximum compliance in theory, which is hardly used in practice (for whatever reason) lacks efficacy[12] and should be replaced or supported by ancillary remedies.

Note that the aforementioned assumption does not concern itself with *efficiency* (i.e., the societal optimum of compliance and enforcement). Efficacy alludes to the goals set by the rule maker, and unless clear evidence to the contrary is available I work from the assumption that efficacy strongly resembles full compliance. Indeed, throughout this lecture I set out from the assumption that substantive rules of private law (be it court made rules or legislative rules) are to be *fully* enforced and complied with to a maximum in order to achieve full efficacy.

The previous is by no means uncontested. It reflects a predominantly instrumental approach to contract law and tort law. Those who consider remedies as values in their own right and who think of private law rights and remedies as having 'self-referent qualities',[13] will not

10. Note that the argument mainly relates to behaviour-related rules of contract and tort law, and not to, e.g., strict liability .
11. On the nature of remedies in contract in this respect, see, e.g., Smith 2004, p. 388 ff. An example of a rule in tort law that transposes the substantive rule of conduct into (merely) a rule of compensation is offered by article 6:168 of the Dutch Civil Code, stating that the civil court can dismiss a claim for injunctive relief on the basis of the overriding needs of society, provided that compensation of the ongoing wrongdoing is secured.
12. This builds on the assumption that increasing the probability of 'conviction' provides a true incentive for compliance. Seminal Becker 1968, p. 176. Cf. Wagner 2006a, p. 377.
13. On that approach, see Collins 1999, p. 37 ff. ('self reference and closure'), p. 56 ff.

adhere to this approach. Moreover, there is the practical obstacle mentioned earlier that the goals of private law rules are sometimes difficult to detect,[14] rendering assessment of efficacy extremely difficult.[15] In this paper, I do not intend to convince the sceptics. Instead, I build on the aforementioned views.

Obviously, some rules in contract and tort law are easier to define in terms of goals than others. In the following I will state what I consider to be the goal(s) of the rule at hand; if necessary an assumption will be made on the goals. Furthermore, my analysis is limited to situations in which at least one of the parties concerned is a professional, corporate player. In other words: my focus is on corporate respondents.[16] Building on this, I set out to analyse a number of rules and remedies in contract and tort law that I feel are in need of recalibration given the goals of substantive rules.

As a final introductory remark – the analysis offered here is not limited to a specific European jurisdiction. Rather, I aspire to give an overview that may be of relevance to several legal systems. Therefore, I will not dwell on details of specific legal systems. As a result, the analysis provided may not fully apply to all legal systems simply because the legal systems do not fully converge in detail. I do believe, however, that the exercise may prove a fruitful jumping board for further research on a more national level.

14. Note, however, that modern private law legislation increasingly pays attention to formulating the goals of the substantive rules and remedies. This usually is part of the explanatory memorandum, but it can also be part of the text of the rule itself. For instance, article 46 of the TRIPS Agreement (i.e., the WTO Agreement on Trade-Related aspects of Intellectual Property Rights) stipulates: "In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be (...) disposed of outside the channels of commerce (...)."
15. Cf. Collins 1999, p. 81 f.
16. Elsewhere (Van Boom 2003) I have put forward the reasons for this focus on corporate behaviour. In short, I believe that private law is likely to have more impact on (repeat) corporate behaviour compared to individual behaviour. Therefore, the more private law rules focus on corporate behaviour the more likely they will actually be effective.

2 Features and problem areas

2.1 Three features

What do the laws of contract and tort offer by means of remedies? Roughly speaking the remedies usually employed in European legal systems are the following:

- nullifying the contract that was concluded under material influence of mistake, misrepresentation, duress or undue influence;
- withdrawal from the contract in case of non-performance;
- compensation for damage suffered as a consequence of imputable non-performance of the contract;
- compensation for damage caused by imputable wrongful acts and omissions or events for which strict liability exists.

Three prominent features of the law of remedies will be introduced here, because these features play an important role in the following sections.

First, there is the *post-facto feature*. The remedies listed above tend to focus on remedying a wrong that has already materialized.[17] The underlying presumption may well be that by thus enforcing the substantive rules behind the remedy, justice will be done to the party invoking the remedy and in the process his detrimental position is more or less put right. As a result, the post-facto feature seems to indicate that the law is more concerned with putting right the wrong rather than actually preventing the wrong. However, sometimes putting right the wrong after the event is assumed to have some sort of specific or general deterrent effect.[18] We will come back to this assumption later on.

The second characteristic is the *restoration feature*. By focussing on putting right the wrong, the law tries to put the injured party as much as possible in the position that he would have been in, had the wrong not been committed. This perspective has led to an ever more refined system aimed at virtually turning back the clock: by reinstating property rights with retroactive effect, by giving claims for restoration, by repairing the defective goods, and by compensating lost profits and

17. Cf. Ogus 1994, p. 261: "The passive and residual nature of the legal control – action is taken by the courts only after the 'event' and only at the initiative of the harmed party – limits its effectiveness."

18. Cf. Lindblom 1997, p. 809, stating that "civil procedure aims mainly at retrospective conflict resolution and compensation (reparation) at the individual level, and at prospective behavior modification (prevention), through deterrence and moral building, at the general level."

other future benefits that would have accrued if the breach of contract or tort had not been committed. In tort law, this restoration feature is usually dubbed the paradigm of *full compensation* (*restitutio in integrum*), but the underlying principle can be recognized in contract law rules as well. The claimant is entitled to be brought in the position in which he would have been but for the wrongful act. The mirror image is that the other party will not have to restore more than what was lost: the restoration feature in principle does not allow either a duty to pay punitive damages or a duty to disgorge profits obtained from the wrongful act.

> Disgorgement of profits exceeding the damage suffered is sometimes allowed in specific legislation or with regard to specific wrongful behaviour (*e.g.*, in some jurisdictions in case of intellectual property infringement or in case of unfair trade practices).[19] Punitive damages as such, however, are virtually non-existent on the European continent. Although the concept is known in the common law (under the heading of 'exemplary damages') its ambit and practical use is limited.[20] Note, however, that under specific circumstances some remedies can mimic punitive damages.[21] Some jurisdictions for instance find the degree of fault of the liable person (negligent or intentional wrongdoing) relevant for the calculation of the award for non-pecuniary loss, thus allowing a punitive element to enter the law of damages. Notably, the sums paid in non-pecuniary loss in cases of press liability seem to serve a deterrence goal.[22]

The third feature is closely linked – or at least, historically so – to the previous two: the *specificity feature*. Private law remedies are aimed at providing redress in a *specific* case, to a *specific claimant*, fitted to *his* purposes, to do justice to *his* case and the factual circumstances that regard *him*. Courts obviously consider it to be their task to adjudicate rights and duties to the parties present in the procedure instead of delivering broadly phrased decisions that may surpass the interests implicated in the procedure. Specificity in principle implies that enforcement is dependent on private parties instigating claims.

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19. See, e.g., article 13 *Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights* Cf. § 9-10 *Gesetz gegen den unlauteren Wettbewerb UWG* (Germany). Cf. Van Boom and Wissink 2002, p. 73 ff. See also McKendrick 2003, p. 93 ff.
20. See The Law Commission 1997, p. 1 ff. Cf. Bolt and Lensing 1993, p. 48 ff.; Lindenbergh 1998, p. 23 ff.; Mulheron 2004, p. 75.
21. On punitive private law, see, e.g., Dreier 2002, p. 515 ff.
22. Cf. Verheij 2002, p. 412 f. Note that in some jurisdictions which tend to award small sums in case of liability of entertainment media, there is a growing call for a more punitive stance of the judiciary. See, e.g., Harinxma thoe Slooten 2006, p. 225 ff. and Wagner 2006a, p. 462 f.

> Admittedly, some (higher) courts do consider it to be their task to take the specific case to a more abstract level and to regulate society on the basis of the specific case, by taking directorship of legal innovation and adjusting the law to new and upcoming societal needs where the legislator remains inactive. In this respect, e.g, the German Bundesverfassungsgericht and the Bundesgerichtshof seem to be among the most active of European supreme (civil) courts.
> Nevertheless, my impression is that courts predominantly tend to confine their rulings to the specific case at hand and reserve the right to adjust their next ruling to the specific case at hand, *e.g.*, by using general phrases as "in cases such as these", "this rule applies in principle to..." et cetera. This reserve is understandable given the inability of courts to consider the full consequence of their decisions in future cases.[23]

Obviously, the post-facto feature, the restoration feature and the specificity feature do not necessarily converge nor do they necessarily come about simultaneously. There may even be other relevant features. There is, however, good reason to focus on the three features mentioned here: in certain cases they seem to constitute a major impediment to efficacious enforcement of private law. In the next paragraphs, I will give three examples of possible problem areas.

2.2 Example: preventing death and injury

With regard to liability for death and personal injury, my assumption is that the primary goal of liability is to prevent wrongful harm from occurring. In practice, however, the law's focus is on compensating damage after the event. Some authors even go so far as to state that tortious liability can only exist by grace of the accident: without damage there is no tortious liability, they argue.[24] This, however, does not hold true if we consider the duty to act diligently (i.e., with due regard to the interests of the potential victim) to be the pivotal concept in tort law and not the damage itself. The duty to act diligently in view of the potential harm to others logically precedes the liability to compensate those others. Therefore, tort law must either aspire to help preventing wrongs or surrender this task to other instruments of behaviour modification.[25]

23. Cf. Collins 1999, p. 73 f. See also Kaplow 1992, p. 612 f.
24. Cane 2002, p. 429 ff., 434 f. Contra: Collins 1999, p. 42.
25. I realise that from a historical point of view in some jurisdictions there may be much to be said for the distinction between remedies in contract and tort law (i.e., damages) and procedural remedies (sc., in equity, e.g., injunction, court order, et cetera). Working from this particular distinction, the idea that tortious liability is non-existent if no damage has occurred may not seem anomalous. Cf. Wightman 1999, p. 271 ff.; Rogers 2002, p. 796.

> In tort, duties work from the idea that people are obliged to act according to a certain standard in order to prevent others from succumbing to death and injury, property damage or some form of pure economic loss. The substantive rules can be supposed to be set at an efficient level either by the legislator or the courts. With respect to courts one can sometimes doubt whether the rules are indeed set with full compliance in mind or merely with compensation of the sustained injuries in mind. My assumption here – and the powerful phrasing with which courts tend to condemn wrongful corporate behaviour of the plaintiff seems to support this assumption – is that the standards set by the law are in fact supposed to be fully complied with.

Negligent or malicious failure to exercise the duty to act diligently is remedied with a claim for compensation in tort. In this respect, the remedy of full compensation is the tool by which legal systems try to achieve the primary aim of preventing and the secondary aim of compensating undesired externalities.[26]

Claims in tort are by nature accidental: they are usually filed by individuals that have actually been harmed by the wrongful act at hand. The mere risk that precedes the materialization hardly ever seems to be litigated in a civil court, neither in a procedure concerning an injunctive order nor by means of a declaratory judgement. Thus, if an employer's negligence compromises workshop safety standards a certain risk of occupational injury is created. The wrongful behaviour of the employer as such, however, is usually only debated in a civil court if the risk indeed materializes and kills or maims. It is only then that, with the use of the post-facto feature and the restoration feature, the court addresses the question whether the employer had in fact acted diligently and reasonably at the time of the accident.[27]

To my knowledge, courts are rarely invited *before an accident* occurs to judge whether *the risk* of personal injury is the produce of some negligent act.[28] Actually reducing the risk of death and personal injury by forcing corporations to comply with safety and health standards *ex ante* is usually considered to be the domain of public agencies such as occupational health and safety agencies, public health authorities, food agencies et cetera.[29] So, notwithstanding the lip service paid by tort law to

26. On these objectives (and their extent and hierarchy), see, e.g., Schäfer and Ott 2004, p. 107 ff. Cf. Van Boom 2006 (forthcoming).
27. Note that in some jurisdictions employers' liability is excluded in principle and replaced by compulsory social security compensation. The essence of the problem arises in products liability cases as well.
28. There are, however, examples of court cases in which declaratory judgement is sought after exposure to a source of potential damage with long latency.
29. Seminal with regard to this dichotomy is Shavell 1984, p. 357 ff.

deterrence goals, this field of private law, to my knowledge, is hardly ever truly used as a direct instrument of risk reduction before the event.[30]

2.3 Example: breach of information duties

Both in the general law of contracts and more specifically in consumer contract law, there are a number of general or specific duties to provide the other party with information held to be crucial or highly relevant to his decision to enter into the contract. Contract law offers a number of remedies in cases where the information is not given.

> By withholding the information, sometimes the contract can be said to be concluded under the influence of mistake, misrepresentation et cetera. Usually, invoking this rule ends the contract with some sort of retroactive effect (nullification, rescission et cetera). The restoration feature will usually lead to the full restoration of the *status quo ante*.[31] In other cases the withholding of information is remedied by the prolongation of a waiting period of some sort (*viz.*, a cooling off period).[32]

Sometimes, information duties in contract are remedied by the right to compensation of the damage suffered by entering into the contract. When a physician is under the duty to inform the patients of the risks inherent to the proposed treatment, he will be liable to compensate the patient if he fails to secure informed consent from the patient. In principle, however, the available remedy of damages only grants compensation if the lack of information caused detriment. Hence, if the patient's decision would not have been different if the information had been given or if the patient cannot prove he would have made a drastically different decision, usually the remedy of damages will not grant redress. So in effect, the law says: yes, there is a wrongful omission, but no, there is no damage, and that's where legal remedies end.[33]

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30. With regard to the common law, there is the historical explanation that injunctive relief (as is specific performance) is not available as a claimant's *right* but merely as a discretionary power of the court. On discretion, see, e.g., Zakrzewski 2005, p. 85 ff.
31. In this respect it has been argued that private law cannot but provide "second best remedies" that will hardly encourage markets to move toward information disclusore. Cf. Schwartz and Wilde 1979, p. 679.
32. Cf. Rekaiti and Van den Bergh 2000, p. 371 ff.
33. Possibly the restoration feature does necessitate the undoing of legal effects of contracts concluded without essential information available (mistake etc.), but the decision itself and its factual consequences cannot always be redressed efficaciously.

A similar problem was dealt with in the well known European Court of Justice case of *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*.[34] This gender discrimination case concerned *Directive 76/207/EEC* (equal treatment) and the question was – from a European law perspective – what private law remedy the Directive necessitated. The Directive was in fact silent on this point, so, in principle the member states were free to choose between different remedies. The ECJ ruled, however, that if a member state chooses the remedy of compensation for damage, "then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application."[35]

2.4 Example: trifle damage

In society, every individual is faced with minor shortcomings of partners in contract. Examples abound. A newspaper is late once a week; a telephone service invoice has been rounded with a few cents to the detriment of the consumer; energy suppliers inadvertently use rights of automatic debit even after clients have terminated the contract; a major company unilaterally postpones payment of its creditors with a few days, et cetera.[36] A health insurance company charges everyone of its clients € 7,50 per annum too much, in violation of a statutory pricing scheme.[37]

Each of these minor failures to perform in accordance with the contract usually causes trifle damage which is too insignificant to justify commencing civil proceedings. A simple phone call usually is enough to correct the wrong. Usually, though, and not always. Moreover, not all clients are aware of the non-performance. Conversely, the damage to society as a whole or a specific group within society (clients, shareholders, et cetera) can be substantial, and the flip side of trifle damage thus may well be an aggregate profit of considerable size for the wrongdoer.

34. ECJ 10 April 1984, Case 14/83, ECR [1984] 1891.
35. On the dogmatic problems that the case presented under German law, see, e.g., Brüggemeier 1999, p. 171 ff. and Wagner 2006a, p. 389 ff.
36. More examples are given by Schaefer 2000, p. 185. Cf. Asser et al. 2003, p. 175 and Tzankova 2005, p. 17 ff. See also Micklitz and Stadler 2003a, p. 10 ff.
37. The example is based on a Dutch case; see Hoge Raad 2 September 1994, Nederlandse Jurisprudentie 1995, 369.

A specific problematic example of trifle damage concerns certain infringements of competition law. Price fixing for instance may cause economic harm, e.g. in the sense of decreasing consumer surplus. Assessing the extent of this harm is problematic, identifying the victims even more so. As we will see later on, some attempts have been made to empower consumers to pursue injunctive relief and profit disgorgement.

3 Causes and why to address them

3.1 Rule, goal, instrument, efficacy

As stated earlier, before we can assume that in some aspects private law is in a state of inefficacious enforcement we first have to make a rough assessment of the goals of the various contract and tort law remedies. Then we can more or less judge whether these goals are in fact efficaciously served by the remedies and their practical use. So what ís the purpose of remedies? Although there is no firm agreement among private law theorists and philosophers, I feel that a number of recurring underpinnings of remedies in contract and tort can be distinguished:

- doing justice to a wronged individual;
- providing a disincentive to the wrongdoer and others tempted to commit similar wrongs;
- reinstating the wronged individual into the position he would have been in without the wrong.

Although surely this enumeration of goals is an oversimplification, and other corollary goals can be distinguished (such as *cost spreading* in case of compensation), in essence the goals mentioned are generally assumed to be the main goals of remedies in contract and tort. Working from that assumption, a rough assessment can be made of the efficacy of the current private law remedies in light of the three prominent features we dealt with in § 2.1. To engage in this assessment, the next three paragraphs will focus on three relevant obstacles in relation to the three mentioned features.

3.2 The post-facto feature and ownership of the problem

The idea of *ownership of a problem* alludes to a specific consequence of the private law paradigm of autonomy, namely that where individuals do not feel the urge or lack the resources to go to court and exercise their private

law rights, there is effectively no private enforcement either.[38] In some parts of private law this seems to strongly amplify the post-facto feature. For instance, tortious liability for accidental death and injury seems very much based on the post-facto feature. Victims usually do not own the problem until after the risk materializes and strikes them. Potential victims rely on manufacturers to carefully contemplate the design and production of the product, on employers to contemplate the safety of the working process, and on owners of premises to ensure safety of the structure. Only after wrongful omission by the manufacturer, employer or owner has in fact caused injury, will private law concern itself with the question whether the injury should have been prevented.

Even after the event, the victim cannot be said to be concerned in legal terms with preventing the accident from reoccurring: in legal terms, his concern is the financial compensation of his own injuries. This may seem obvious to the legal practitioner, but the effect is nonetheless that private law remedies in cases like these are not truly called in for preventive goals but first and foremost for compensatory goals. Furthermore, it is not so obvious to the lay man. Research shows that the motives of victims of personal injury to claim damages are not exclusively financial: the victim may well want to ensure that similar accidents will not happen again to others.[39] In this respect claiming compensation may not have a bearing on the prevention of (future) wrongdoing.

There are several drawbacks concerning the post-facto feature.

In short, the post-facto feature concentrates on restoring after the event, not on installing safeguards to prevent the accident from happening again.[40] This flies in the face of the goal of prevention. First, it may not adequately satisfy the needs of those motivated to use contract and tort remedies with specific deterrence objectives in mind. Second, the post-facto feature hardly ever focuses on monitoring behaviour after the court decision. In essence, court decisions tend to be financially oriented. Therefore, the risk itself may materialize again if the post-facto feature is employed. Whether or not it actually will, depends, inter alia, on the deterrence value of the post-facto compensation in the specific case.[41] So, it is the deterrent effect – often presumed rather than proved – of the

38. Cf. Collins 1999, p. 69.
39. See, e.g., Genn 1999, p. 179 ff., Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Ministerie van Justitie 2004, p. 142.
40. Cf. Shavell 1993, p. 258; Shavell 2004, p. 585 f.

post-facto remedy that seems decisive for the efficacy with regard to the goal of accident prevention and reduction. Third, the longer the lapse of time between the act or omission and the remedy, the weaker the preventive effect can be expected to be.[42] This dilution of incentives as a result of long latency seems plausible with regard to corporate behaviour: corporate policy may have evolved after the act or omission, scientific or social insights may already have changed over time, et cetera.[43]

Furthermore, the post-facto feature combined with vague standards of substantive law rather than clear cut rules may cause uncertainty ex ante with regard to the appropriate line of behaviour.[44] This uncertainty may account for both unnecessary defensive behaviour and undesirable negligent behaviour.[45]

To conclude, the post-facto feature may not be efficacious in reaching the goals of the substantive rule. It may lack specific deterrence value if the court decision is not followed by some monitoring activity, it may lack general deterrence value in cases of long latency, and it may fuel the wrong level of care.[46]

3.3 Causation, damage, and the restoration feature

Another potential obstacle to efficacious enforcement of a more fundamental nature seems to be an inherent trait of many legal systems: the law of damages.

Restoration presupposes proof that something has in fact been lost. In this respect the causation requirement is known to be a serious threshold for any claimant to succeed in claiming. There are good reasons for this formidable threshold. The causation requirement as such is the legal fence between compensation of the truly injured and overcompensation of the randomly selected. However, in practice, where science has increasingly shown correlative relationships between agent and effect, the law usually demanded concrete chains of causation – it asked

41. Admittedly, whether the accident will happen again may depend on numerous, largely non-legal factors (sc. corporate culture, internal corporate structure, state of the relevant market, et cetera).
42. Cf. Koch 1998, p. 806.
43. On long latency and the problems it poses in tort and insurance law, see, with further references, Faure 2003, p. 46 ff.
44. Cf. Collins 1999, p. 266 ff; Shavell 1993, p. 264. On the advantages and disadvantages of standards and rules in this respect, see Kaplow 1992, p. 557 ff., p. 622; cf. Ulen 1999, p. 340 ff.
45. See, e.g., Kolstad et al. 1990, p. 894 f.; Miceli 1997, p. 45.
46. Note that I use 'may' to underline the hypothetical rather than the factual character of these assertions.

itself the question whether in the concrete case causation is more probable than not. Originally, most legal systems did not consider a 33 % increased risk of cancer due to some agent to be a head of damage in its own right.

> An increasing number of legal systems has, however, opened the possibility of claiming a proportionate part of damage that can never be proved to be (solely) caused by a specific agent. For instance, whereas lung cancer can be caused by smoking on the one hand, asbestos dust exposure on the other, and synergetically so by a combination of both causes, it is impossible to prove what caused a specific case of lung cancer in a smoking asbestos worker. Courts have shown to be willing to rule in favour of these workers by awarding a proportional compensation.[47]

The battle over acknowledgement of increased risks of damage and loss of a chance as heads of damage in their own right is ongoing.[48] The focal point here is that the classic remedy of compensation is only available to those who can prove damage and causation *in their specific case*. That feature is worthwhile in theory, but in practice it may leave deserving cases – e.g., cases in which damage and causation are plausible on a more statistical level but hard to substantiate in a concrete case – without remedy.[49]

Leaving deserving claimants without compensation as a consequence of obstacles in substantive or procedural rules may give rise to a state of inefficacy. An underexposed area in which this may be the case relates to pure economic loss in which either damage or causation is difficult to prove in the concrete sense but nevertheless seems plausible on a more abstract level. For this reason, compensation for unlawful restriction of competition (antitrust) may thus well be practically nonexistent.

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47. See, e.g., Hoge Raad der Nederlanden 31 March 2006, case C04/303 (proportionate employer's liability in case of lung cancer in case of smoking and asbestos dust exposure). Cf. article 3:103 ff. of the Principles of European Tort Law (PETL) and EGTL 2005, p. 49 ff.
48. See, e.g., Wagner 2006b, p. A53 ff.
49. Obviously, generally speaking the burden of proof can weigh heavily on deserving claimants. Shifting the burden of proof in order to effectuate the substantive rule may be one of the solutions. On that theme, e.g., Giesen 2001, p. 449 ff. Cf. Verheij 2002, p. 474.

> Take the example of a company entering a national market and being confronted with suppliers reluctant to offer their goods to the newcomer. With some luck the newcomer obtains evidence of colluding competitors and an informal framework of vertical competition restriction. The company may want to claim for compensation. However, this type of illicit competition practices tends to influence turnover and profits of the targeted company indirectly, and as a result a direct causal link between business results and the wrongful acts is extremely difficult to establish. Especially in the case of newly established enterprises the courts will wisely not want to use a presumption of causation, because this would greatly increase the chance of compensating for the inherent risk of bankruptcy. The downside of this reluctance is that it inevitably leaves deserving claimants without compensation.

Another aspect of the restoration feature can easily lead to problems of enforcement. Most legal systems are based on the overarching principle that every case is unique and every claimant should have 'his' restitutio in integrum fitted to *his* case. As a consequence legal standards on the calculation of damages tend to be very rudimentary.

There are several drawbacks concerning the restoration feature.

As long as civil courts cherish the connectedness of enforcement and restoration, some loopholes in enforcement may never be properly addressed. First, there are the cases in which the damage requirement and the causation requirement systematically oust deserving claims from court. If we agree upon the assertion that unfair competition practices cause undesirable damage to individual competitors and if we conclude on the basis of scientific evidence that some toxic agent severely increases the number of statistical deaths among exposed populations, then we should question why the restoration feature allows the law to turn a blind eye to these cases.

Second, if restoration is to be an instrument of efficacious prevention of wrongs, then we should consider using disgorgement of profits more intensely than has been the case until now. The reticence to allow disgorgement of profits seems to stem from the classical approach to restoration: nothing more and nothing less than the claimant's loss. Efficacy may demand, however, that we shift the focus to the preventive goals of private law rules rather than merely addressing the compensatory function.

Third, rudimentary standards on how to assess the right amount of 'restitutio in integrum' are beautiful in a dogmatic sense, but in a practical sense they may turn out to be inefficacious. Parties negotiating a settlement may have little concrete rules to fall back on, which may increase the cost of reaching a settlement. Furthermore, without clear cut rules on calculation of damages, one-shot players may suffer from serious lack of information and settle for less than the substantive rule may have to offer.[50] Moreover, the consequence of flexible and open textured private law values with regard to, *e.g.*, calculating damages, may well be that repeat players strategically protract settlement. In this respect, the uninformed individual may be better off with clear-cut rules rather than with open textured standards. In any event, making concrete rules of restoration standards should be on the legislative agenda.[51]

3.4 Trifle damage and the specificity feature

Contract and tort law, based as they are on individual autonomy and responsibility, usually go hand in hand with the paradigm of individual access to justice. With regard to trifle damage this may be the cause of a state of inefficacy. Whenever a wrong – either in contract or in tort – gives rise to a dispersal of detriment to a great number of individuals that are individually endowed with individual but uneconomically viable claims, the specificity feature may lead to inefficacious enforcement of the underlying private law values.[52]

What causes this state of affairs is the specificity feature which encourages potential claimants to show 'rational apathy'.[53] The possible benefits of claiming in case of trifle damage are outweighed by the cost in terms of time, energy, and legal costs. Not claiming then seems the rational thing to do. The result may be that substantive rules of private law are not enforced at all by individuals,[54] turning enforcement into what economists would consider a 'public good'.

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50. I leave aside the cost of standardising the application of standards by means of analysing and systemising court decisions (cost in the sense of scholars writing handbooks, courts and law offices systematically ordering case law et cetera).
51. Trebilcock 2003, p. 86 f. rightly observes an analogy with 'wholesale rather than retail' compensation in workers' compensation schemes.
52. Schaefer 2000, p. 185. Note, however, as a counterweight that non-deserving small claims may have nuisance value for individuals. See, e.g., Lempert 1976, p. 183.
53. Landes and Posner 1975, p. 33; Schaefer 2000, p. 195. Cf. Howells and Weatherill 2005, p. 604 f.; Picod and Davo 2005, p. 321. For empirical underpinning of the 'apathy', see, e.g., Genn 1999, p. 67 ff. Note that the extent of the 'apathy' in part depends on financial arrangements concerning legal aid, litigation fees and civil procedure cost allocation. Cf. Wetenschappelijke Raad voor het Regeringsbeleid 2002, p. 205 ff.
54. Cf. Duggan 2003, p. 48 ff; Frenk 1994, p. 286.

There are several drawbacks concerning the specificity feature.

Specificity relies on specific claimants to instigate a claim. The net effect of these individual claims on corporate behaviour may be substantial, but may also turn out to be insignificant. Imagine for instance a retail chain of consumer electronics sellers using onerous general clauses. If a specific consumer is faced with these clauses he may successfully contest the invocability of the clauses. However, he will typically not request an injunction restraining the seller from using similar clauses in future transactions with other consumers. As a result, the onerous clauses remain in circulation, thus sustaining illicit practices with regard to other, less informed or persistent consumers.[55] This is typical for the specificity feature in contract and tort: the individual has been helped, but society as a whole may be left untouched. A more efficacious instrument of enforcement of the underlying private law values – although not necessarily a perfect one – would be an ex ante evaluation of clauses either by a government agency or private interest group or a procedure facilitating forced erasure of the clauses altogether.[56]

> E.g., in France the governmental *commission des clauses abusives* can recommend erasing or adjusting onerous clauses. Although the commission does not have regulatory powers, it can publish its findings and it has some informal influence over courts and legislature.[57] Authorized consumer interest groups are allowed to request injunctive relief.[58] In the United Kingdom, the Unfair Contract Terms Unit of the OFT has a supervisory role, can investigate on complaint and negotiate or enforce compliance. The OFT is a so-called "general enforcer" with regard to *Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*.[59] Indeed, article 7 of the Directive provides that the member states ensure that 'adequate and effective means exist to prevent the continued use' of onerous general clauses.[60]

55. Collins 1999, p. 233. Cf. Beale 1995, p. 254. See also the example mentioned by Mölenberg 2002, p. 86.
56. Cf. Beale 1995, p. 251 ff.; Bradgate 1999, p. 29. On this problem, see also European Commission 2000a, p. 20 ff.
57. Calais-Auloy and Steinmetz 2003, p. 208 f., no. 185; no. 548. Moreover, authorised consumer interest groups can instigate an 'action civile'; Calais-Auloy and Steinmetz 2003, p. 597 ff., no. 556 ff.
58. Calais-Auloy and Steinmetz 2003, p. 211 ff., no. 188.
59. Howells and Weatherill 2005, p. 597.
60. See Weatherill 2005, p. 126.

It can be argued that specificity tends to ignore the bigger picture and may thus be merely fighting symptoms rather than curing the disease. Essentially, the question arises whether private law should concern itself with 'curing the disease'. Is this not a matter of 'public goods' that should be generated by public law? I will turn to this matter shortly. For now, suffice to say that I think private law will only be able to produce this 'public good' if it abandons the specificity feature, and second, I feel that it should do so at least in areas of private law in which public enforcement is in a state of underdevelopment or in an obvious need of ancillary enforcement efforts.

3.5 Rough analysis

At first sight, the three obstacles that may stand in the way of efficacious enforcement, seem unrelated. On a more abstract level, however, they do have two qualities in common. First, all three obstacles either potentially frustrate the underlying goals of contract and tort law rules or bring about a state of less than full enforcement of these rules. Second, all three obstacles are caused by or amplified by fundamental features of private law.

Admittedly, it is quite difficult to empirically measure inefficacy of enforcement.

> The first shared quality necessarily refers to an empirical underpinning that is difficult to provide. Both sub-optimal, optimal, and excessive enforcement are difficult to measure, even if – as we assumed at the beginning – the yardstick is full compliance in accordance with the aims of substantive law. From a theoretical angle, any remedy can only effectively serve the goal of deterrence if the remedy does in fact deter from non-compliance. In practice, it is extremely difficult to test the empirical underpinning of this assumption and thus to establish firm evidence on the efficacy of the law of remedies.[61]

Furthermore, prerequisite to assessing efficacy is factual information on the actual level of compliance; perhaps the substantive rule is fully complied with voluntarily (or for whatever other reason) and enforcement is not needed. In some instances, however, there is more firm evidence that, e.g., the post-facto feature does not build efficacious instruments of enforcement. In this paper, I will not present a detailed

61. Cf. Cane 2002a, p. 306.

argument on the need of interdisciplinary research to ascertain efficacy and inefficacy. I will work with the available, admittedly sketchy material.

For now, I suggest that we work from the assumption that inefficacy arises as soon as there are strong indications that the goals of the substantive rule are not met by the available and commonly addressed remedies and enforcement of the rule is structurally hampered by any of the following three reasons:

- The post-facto feature may result in too much or too little precaution to prevent wrongs (also referred to as underdeterrence or overdeterrence).
- The restoration feature presents obstacles to the claimant: the proof of damage and causation are typically too difficult to deliver, and as a result claims are not brought to court.
- The specificity feature may constitute an obstacle to recovering or stopping trifle damage.

4 Restoring routes to efficacy of private law enforcement

4.1 Counterweights outside the private law domain

In economic theory some of the problems we have identified so far, are in some respects connected to the phenomenon of 'public goods'.[62] Theory holds that public goods need to be generated by public law and some kind of public enforcement.[63] And indeed, the three examples presented in § 2 seem to be the subject of some sort of public enforcement scheme.

First, with regard to preventing death and injury – the example given in § 2.2 – we can surmise that those are the ultimate goals of institutions such as occupational health and safety agencies, food safety agencies, local authority supervisors on building activity, quality controls in health care, et cetera.

62. On 'public goods', see, e.g., Stiglitz 2000, p. 127 ff.; Parsons 1995, p. 207 ff.
63. Cf. Collins 1999, p. 75 f. In this respect, one might prophesise that civil law is evolving into public law (in this vein, see Lindblom 1997, p. 819). See also, with further references, Wagner 2006a, p. 422 ff.

Public law instruments such as regulatory permits, criminal prosecution, disciplinary boards, administrative penalties, as well as forced closure of business, witholding professional license, are usually employed to enforce rules aimed at prevention of wrongs. So, there are myriad public enforcement efforts with goals similar to those of private law institutions. The difference between private and public enforcement in this respect is that private enforcement usually works from the post-facto feature whereas public enforcement seems more focussed on ex ante enforcement.

> Indeed, private law remedies are sometimes intended to be a mere ancillary instrument for sustaining public law enforcement efforts. For instance, 'public good' rules on European product quality are primarily enforced by means of public law but are also 'backed up' by private enforcement efforts such as competitors' claims for damage and injunctive relief.[64] Equally, a private law right to compensation can serve as a deliberate policy instrument of strengthening public policy goals.[65] Admittedly, in the areas where private law remedies are ancillary to public law remedies, the levels of both enforcement systems somehow have to be balanced. For instance, there does not seem to be a need for treble damage under a private law enforcement system in competition law infringements if the public prosecution of such cases is maximal and the fines are extremely high.[66]

Unsurprisingly, it is sometimes argued that as a result of the clear and concrete rules it is based on, public law regulation is more apt for monitoring and recurring enforcement effort rather than the one-off event of a claim for compensation in private law proceedings. Furthermore, whereas substantive contract and tort law rules have proved valuable because of their generality and flexibility, these features are increasingly thought of as lacking the focus and concreteness that a regulatory purposive approach needs.[67] This may lead some to argue

64. ECJ 17 September 2002, Case C-253/00, ECR [2002] I-7289 (Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd.); cf. Wagner 2006a, p. 414 f.
65. See also ECJ 20 September 2001, Case C-453/99, ECR [2001] I-6297 (Courage Ltd. v Bernhard Crehan). On that case, see, e.g., Komninos 2002, p. 460 ff.; Jones and Beard 2002, p. 246 ff.; Odudu and Edelman 2002, p. 327 ff.; Monti 2002, p. 282 ff.; Wagner 2006a, p. 402 ff.
66. Cf. Baker 2004, p. 382 ff. Moreover, treble damages may not even always fully compensate the true damage suffered by the injured competitors (e.g., because the legal system at hand does not allow for prejudgement interest!); cf. Jones 2003, p. 102 ff.
67. On these perceptions, see, e.g., Collins 1999, p. 55.

that private law – notably tort law – can merely play a subsidiary role in prevention of wrongs and that true prevention can only be achieved with public regulation.[68] On the other hand, however, there are those stressing the need for the *joint use* of public law regulation and private law because of their respective inherent restraints.[69]

The second example with which we dealt in § 2.3, information duties and their enforcement, is increasingly the 'natural habitat' of regulatory agencies. For example, with regard to information duties in financial services contracts, within a decade or so we have experienced a shift from regulation by means of private law arrangements (either in the form of simple contract court cases or a more sophisticated set of rules, private codes of conduct, et cetera) towards a more government-driven regulatory state of affairs. Although in substance still the domain of private contract law, information duties are experiencing a wave of public regulation of ever increasing precision and detail. This is not only the case in financial services (banking, investment business, insurance, et cetera), but also in consumer sales and credit transactions. Transparency through dissemination of information is used in oligopolistic markets and former public utility markets to the same end. Enforcement of these pseudo-public information duties is picked up by new and old agencies: Consumer Authorities, Financial Markets Authorities, Banking Authorities, Energy Authorities et cetera. Instruments of enforcement include retraction of permits and administrative fines.

At the core of these developments is the idea that a claim in contract may be the least efficacious instrument to secure compliance. A party that is damaged by the fact he did not receive relevant information before concluding a contract, can try to dissolve the contract or claim for damages. In both cases, courts are bound to apply the restoration feature – together with the specificity feature – which forces them to assess to the best of their abilities what the situation would have been if there had not been wrongful contracting behaviour, mistake or misrepresentation.

> The process can generate very dissimilar outcomes. Moreover, the damage can only be restored in the financial sense, and in practice there is no guarantee of full compensation. This has been shown by

68. On this debate, see, e.g., the contributions of M. Faure and A. Ogus, to: Van Boom, Kissling and Lukas (forthcoming).
69. Cf. Shavell 1984, p. 365.

> the recent 'securities lease case' in The Netherlands. This was a case in which commercial banks had offered complex financial products to the general public without explicitly informing them of the risk of being obliged to repay more than they had invested. Civil courts decisions in these cases were extremely diverse. Some courts ruled that the banks had made material misrepresentations, others decided that consumers should have realised that there were extreme risks to their investment decision. A lot of cases went to several courts with varying outcomes: some consumers were reimbursed, others were not. Ultimately, these financial products were regulated by law and the specific rules were laid down in official guidelines by the Dutch Financial Markets Authority AFM. These guidelines are now enforced with administrative law powers.[70]

The third example, with which we dealt in § 2.4, is a prime example of an overall lack of enforcement in private law: the dispersal of the damage over society as a whole renders enforcement a public good. Given the specificity feature, individual claims will have to be dealt with on a case-to-case basis, which will prevent most claimants from bringing a claim at all: the costs of submitting the claim are not outweighed by the prospects of the award. The classical approach taken here is that these trifle damages should be dealt with by means of public law instruments.[71]

> The liberalisation of the Dutch energy market for consumers has produced some examples of disruptive trifle damage. Due to the administrative problems of energy companies after the coming into force of the liberalisation of the consumer market, a considerable number of clients ran into trouble with their energy suppliers.
> One of the disruptive trifles that occurred was the lack of prompt issuance of final invoices to consumers switching from one supplier to another. Most consumers did consider this a serious shortcoming of the energy suppliers in their contractual duties, but none of them actually considered bringing the issue to the civil court: the claim was uneconomically viable for individual consumers.[72] Contrastingly, the liberalisation process as such was likely to be damaged (e.g., by the decrease in consumer trust in the process itself by the negative publicity). The situation was such that private law did not offer a strict rule on the number of days within which the final invoice had to

70. On this case and its aftermath, see, e.g., Marx 2004, p. 44 ff.
71. Cf. Shavell 1993, p. 279 f.
72. Note that the Dutch Energy and Water Consumer Disputes Commission does deal with these issues out of court.

be issued. In response to the obvious state of underenforcement, the Office of Energy Regulation finally decreed that energy companies are obliged to issue a final invoice within two months. Compliance with the decree may now be enforced by means of administrative penalties by the Office.[73] The rule is enforced with some sort of compensation for nominal damages before the Energy and Water Consumer Disputes Commission.[74]

In-between solutions for the benefit of 'public goods' exist as well. A notable form of such a solution is the power of public agencies to enforce private law rights for the benefit of the public. For instance, under English law the Office of Fair Trading (OFT) can file for injunctive relief with regard to unfair terms in consumer contracts for the benefit of consumers at large.[75]

4.2 Getting private enforcement back in the limelight

There is no need for strict adherence to either public law or private law with regard to enforcement issues.[76] In public policy theory as well as in law and economics, the arguments in favour of *combined* public and private enforcement efforts are well articulated. These arguments, which need not be repeated at length,[77] include the following considerations: public enforcement agencies lack information, have limited resources, need to prioritise and therefore cannot enforce all rules with similar efficacy;[78] agencies may or may not maximise enforcement efforts (we cannot really know as a result of the principal/agent phenomenon),[79] therefore additional efforts should be welcomed; agencies are in danger of suffering from 'agency capture',[80] which could be corrected with the ancillary instrument of private enforcement; with follow-on actions, private parties can finish what agencies started.

73. See article 3 *Beleidsregel 101977 d.d. 11 februari 2005 van de Dienst uitvoering en Toezicht Energie*.
74. On this alternative dispute settlement board, see European Commission 2000a, p. 25.
75. Regulation 8 Unfair Terms in Consumer Contracts Regulations 1994; Regulation 12 of the Unfair Terms in Consumer Contracts Regulations 1999; Part 8 of the Enterprise Act 2002. Cf. Basedow et al. 1999, p. 15, p. 126; Office of Fair Trading 2003, p. 18 ff., p. 76 f. Usually, the threat of OFT seeking an order is sufficient to prompt businesses to change their general clauses.
76. Cf. Koch 2001, p. 360. See also Wagner 2006a, p. 435 ff.
77. Seminal Shavell 1984a, p. 271 ff. Cf. Rose-Ackerman 1991, p. 80 ff.
78. Cf. Ayres and Braithwaite 1992, p. 103.
79. On that topic, e.g., Stiglitz 2000, p. 202 ff. Cf. Hawkins 2002, p. 16 ff., p. 415 ff.
80. See, e.g., Faure and Bergh 1989, p. 148; Simpson 2002, p. 86 ff.

In recent times, there seem to be additional arguments in favour of strengthening instruments of enforcement in private law. First, there are myriad of problems that are not (or not yet) subjected to public law regulation but rather to unwritten private law standards, leaving enforcement entirely to private law initiatives. There are good examples of cases in which civil courts generated rules on the basis of broad private law standards that were subsequently transposed into public regulation and subsequently enforced by public agencies. So, by enhancing efficacy of private law enforcement, there may be less cause for developing public regulations in the first place.

Second, private law standards could be more flexible than rules under public law. If civil courts could effectively turn flexible standards into concrete rules for specific cases and then efficaciously enforce these rules, much could be gained in terms of efficacy. We will return to this argument later.

An additional argument may be the following. Private law has roots in society in the sense that private autonomy to instigate a private enforcement effort may well have serious idealistic or symbolic value surpassing strict added enforcement value. For instance, a claim – however insignificant in financial terms from the respondent's corporate view – may have lasting effects on corporate behaviour by, e.g., the intermediary effect of media exposure. In this sense the use of private law instruments may help 'empowerment'.

Finally, there is the future of private law itself. Against the background of a growing number of public authorities assigned with the duty to monitor and enforce compliance, we should ask ourselves whether we should not strive for innovation in private law remedies in order to rediscover the balance between private law and public law. By tuning the instruments of enforcement in private law, we may preserve private law as a serious alternative for public regulation. And as choice between alternatives is a basic notion that ensures competition, it would be unwise to depart from this notion when it comes to choice of regulatory instruments.

> This argument seems to gain relevance in light of a recent development to make government agencies responsible for instigating collective private actions on behalf of specific groups in society. This in-between solution amounts to public enforcement of private law values by ascribing private law collective action rights to government

institutions.[81] For instance, in the Netherlands a proposal is currently pending before parliament to give the Consumer Authority the right to settle mass claims on behalf of damaged consumers.[82] There are many drawbacks to such government involvement in private law enforcement. For one, such an intervention deviates from the basic notion that private self-help has primacy over public intervention. However, there may be severe market failure – *e.g.*, as a result of inherent information asymmetry – prompting government to step in. This assumption would need empirical underpinning in the case at hand. On the other hand, by assigning to a government agency the right to act on behalf of individual consumers, the business community might be more or less compelled to settle more swiftly and leniently with 'genuine' class representatives.

4.3 Building on what has already been achieved

4.3.1 Activating individual action

In this part, I will present some examples in which private law remedies seem to have evolved into more efficacious instruments of enforcement. With regard to the position of individual claimants, most jurisdictions have to some extent adhered to modifications to their legal systems allowing more leeway for efficacious enforcement.

With regard to causation, sometimes use is made of a preponderance of evidence or a shift of the burden of proof. With regard to damage, sometimes a rough assessment of the extent of the damage is allowed in case of impossibility to calculate precisely. Additionally, some jurisdictions explicitly acknowledge loss of a chance as separate head of damage.[83] Moreover, occasionally some form of compensation is awarded in case of breach of a fundamental duty (e.g., the duty to obtain informed consent prior to a medical operation even if it is clear that the claimant would probably not have decided otherwise if he had in fact obtained the information).[84]

Unfortunately, most of these novelties have been introduced with regard to the law of damages. This is unfortunate because it proves that the

81. Cf. Hodges 2001a, p. 323.
82. See Bill no. 30 411 ('Wet Handhaving Consumentenbescherming'). Cf. art. 3 (a) *Directive 98/27/EC on injunctions for the protection of consumers' interests*, defining 'independent public bodies' which are specifically responsible for protecting consumer interests.
83. See supra, § 3.3. On the policy arguments in favour of sustaining claims for loss of a chance, see, e.g., Jansen 1999, p. 293 ff.
84. Cf. Magnus 2004, p. 576 ff.

private law enforcement focus is mostly on the compensatory function of private law remedies while neglecting the amelioration of remedies that can provide possibly more efficacious incentives for compliance with the underlying substantive rules.

Therefore, if we are to build on what has already been achieved in this respect we should seriously ask whether further improving or intensifying individual damages actions really adds to the preventive goals of the underlying substantive rules. Damages actions will continue to carry the burden of the post-facto feature, the restoration feature and the specificity feature.

> In this respect it can be doubted whether the *EC Green Paper on damages actions in antritrust cases*[85] holds any promise of a relevant extension of private law enforcement. There is little evidence – but no evidence to the contrary either – that improving the conditions for damages actions for individual businesses will enhance the policy goal of minimising antitrust infringements.[86] This does not mean that it would be wrong to improve the procedural position of the individual claimant,[87] but simply that it would be wrong to focus *all* legislative attention on that specific remedy. I feel it would be more deserving to focus attention on enhancing the legal and factual possibilities for injunctive relief and group action.

Instead, I feel that the focus of attention should be on innovating other remedies than individual damages actions. For one, declaratory judgements, prohibitory and mandatory injunctions and recurring penalty payments (i.e., *l'astreinte, Zwangsgeld*) for not complying with injunction orders should be higher on the list of contract and tort law remedies. I will turn to this point in § 5.

4.3.2 Activating interest group action

It has been said that individual and private claims differ in many respects from public enforcement schemes. A relevant difference is that the latter does not concern itself with redressing the wrongs committed vis-à-vis individual persons, but with protecting the general

85. EU Commission 2005.
86. On the arguments in favour of private enforcement of EC Competition law, see, e.g., Jones 2004, p. 13 ff., in response to Wils 2003, p. 473 ff.
87. Moreover, individual damages claims are considered to be part of the whole structure of enforcement of European competition law; see *Courage v. Crehan*, C-453/99, Judgement of the Court of Justice of 20 September 2001, paragraphs 26 and 27.

interest. This does not imply, however, that it is impossible for private law to focus on collective well-being.[88] In fact, in recent years a number of jurisdictions have given interest groups standing in court to file specific claims, notably claims for declaratory and injunctive relief. On a European level *Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests* has indeed prompted debate on extension of the model used in this Directive for other purposes as well.[89]

> The European picture with regard to interest group actions is one of diversity.[90] For instance, in the Netherlands there is already a very generous position on interest group standing with regard to both mandatory and prohibitory injunctions and declaratory relief.[91] In Germany, *Verbandsklagen* are only allowed to file for injunctive relief on the basis of specific statutory provisions.[92] Suggestions for a more general statutory framework, however, have recently been voiced.[93] A similar picture emerges from England and Wales.[94] In France, specific statutory provisions (mostly concerning consumer law) present interest group associations with the right to file an 'action civile' or a request for injunctive relief.[95] In theory, this 'action civile' can be the basis of a group claim for compensation, but in practice the 'action' is confined to cases of criminal offences and the damage may not consist of the total of individual damage.[96] It seems that with regard to multi-party *compensation* proceedings, up to now England and Wales seem to be the most receptive.[97]

Another major difference, at least at first sight, seems to be the fact that public enforcement is based on clear and codified rules rather than

88. Collins 1999, p. 8, even goes as far as to argue that 'welfarist regulation' is transforming contract law regulation.
89. On this Directive, see, e.g., Rott 2001, p. 401 ff.; Howells and Weatherill 2005, p. 592 ff.
90. For an in-depth comparative review of these jurisdictions, see Micklitz and Stadler 2005.
91. Van Gerven et al. 2000, p. 273-275. An example of this generous position is a case in which the Dutch Consumer Association successfully filed for a declaratory judgement for the benefit of victims of a mass tort (legionnaires disease outbreak at a flower exposition); see Rechtbank Alkmaar 12 december 2002, Nederlandse Jurisprudentie 2003, 68.
92. Van Gerven et al. 2000, p. 272 f. See currently the *Unterlassungsklagengesetz (UKlaG)*, outlining the specific cases in which injunctive relief can be pursued.
93. See, e.g., Micklitz and Stadler 2005. Cf. several authors in Österreichisches Anwaltsblatt 2006/2 discussing the "Sammelklage".
94. Office of Fair Trading 2003.
95. Picod and Davo 2005, p. 330 ff.
96. See, e.g, Putman 2005, p. 322; Calais-Auloy and Steinmetz 2003, p. 597 ff., no. 556; Picod and Davo 2005, p. 332, no. 529. Cf. Howells and Weatherill 2005, p. 593.
97. Hodges 2001a, p. 328; Howells and Weatherill 2005, p. 647 f.

vague standards that courts sometimes use (or even invent on the spot) in contract and tort cases. At a closer look, this distinction between private and public rules is less clear-cut, whereas public law avails itself more and more of delegating broad statutory powers to regulatory agencies, which in turn use these powers to formulate abstract duties of care next to concrete rules and guidelines.

Moreover, by acknowledging private interest group standing with regard to injunctive relief, policymakers may well stimulate the transition of private law standards into ex ante rulemaking by the courts. We will return to this point soon.

5 New and newly rediscovered concepts

5.1 Post-facto incentive damages

In Europe, use of the concept of exemplary or punitive damages is not widespread.[98] Instead, European private law is said not to be of a punitive nature but of a compensatory nature. There are some indications, however, that a modest shift in paradigm may be near.[99] On the other hand, it is rather unlikely that European jurisdictions would adhere to the concept of punitive damages to the extent to which it is used in the United States of America.

However, if we redefine punitive damages as some form of post-facto incentive damages exceeding the actual loss and aimed at specific deterrence, then the moderated idea of post-facto incentive damages could perhaps fit better into European legal culture.[100] This concept seems worth further consideration.

> In England and Wales, the Law Commission has in fact prompted this debate with their recommendation that the remedy of exemplary damages be used as an efficacious instrument where other remedies fail (e.g., because there is insufficient pecuniary damage) or where the respondent's behaviour is in outrageous disregard of the law.[101]

98. See, e.g., Bar and Drobnig 2004, p. 109 ff.
99. See, e.g., Viney and Jourdain 2001, p. 4 ff. E.g., some court decisions seem to stress the need for deterrence by means of exemplary damages; cf. Bar and Drobnig 2004, p. 111. Cf. The Law Commission 1997, p. 5. See also Wagner 2006b, p. A68 ff.
100. In a similar vein Wagner 2006a and Wagner 2006b, p. A68 ff. Cf. Bolt and Lensing 1993, p. 78 ff, Hartlief 2005, p. 830 ff.
101. The Law Commission 1997, p. 5 ff.

The drawbacks of punitive damages are well documented. In theory, punitive damages can be just and fair from a corrective justice point of view. This justification would probably restrict the ambit of punitive damages to cases of malicious and intentional wrongdoing. In practice, however, respondents may turn out to be judgement-proof, the deep pockets that are not may well turn out to be corporate wrongdoers without clear intent to harm. Thus, combined with ex ante uncertainty on the substantive law and jury behaviour, punitive damages can result in overdeterrence of corporate wrongdoers.[102]

The empirical evidence for all these drawbacks, however, originates from the U.S.A. legal system. If we truly want to know whether some form of pan-European post-facto incentive for prevention has potential for efficacy, then perhaps specific experiments within the European legal context should be performed in order to generate data which are more relevant to Europe. Obviously, there are practical obstacles that stand in the way of such an experiment,[103] but I do feel that it would be worth trying with regard to specific areas.

Important conditions that could keep such an 'experiment' orderly are the following. First, post-facto incentive damages would have to be limited to breach of clear-cut statutory duties and repetitive non-compliance with previous civil court decisions. Second, the lapse of time between the commission of the wrong and the adjudication of the claim should be limited. Both restrictions would help preventing inefficacious side effects such as overdeterrence. Third, the amounts would have to be either limited or calculable by means of an objective standard.[104] Fourth, the legislature would have to decide on whether these damages may be claimed by individual claimants or merely by interest group actions.[105] Finally, the idea of private fining would have to be lim-

102. Cf. Wagner 2006b, p. A82.

103. Rather more principal although not insurmountable is the obstacle of the Human Rights Convention. See, e.g., *Tolstoy Miloslavsky v. the United Kingdom*, case 8/1994/455/536, Judgement of the European Court of Human Rights of 13 July 1995, which does not seem to preclude the use of incentive damages as such.

104. E.g., legislation could limit 'incentive damages' to full compensation of all legal and paralegal cost of the claimant interest group and then double or triple this amount to provide a 'piggy bank' for future litigation. In a similar vein on the 'Schadens-multiplikator' Wagner 2006a, p. 464 f. and Wagner 2006b, p. A98 f.

105. In connection with this, the legislature would have to decide whether to implement some form of contingency fee, because such instruments will stimulate rather than discourage self-interested behaviour by lawyers and class representatives. On lawyers' behaviour in multi-party actions see Schaefer 2000, p. 192 ff. Cf. Department for Constitutional Affairs 1996, nr. 17-71 ff.

ited to areas in which public enforcement efforts are below an optimal level – e.g., because of deliberate government priority setting.[106]

A further point that seems worth considering here, is the disgorgement of profits. In my opinion, there is a strong relationship between the concept of post-facto incentive damages and the idea that wrongfully obtained profits should be disgorged. Admittedly, this is an idea that is not central to European legal systems, although there are specific statutory provisions allowing disgorgement.

In my view, for similar reasons stated with regard to post-facto incentive damages, the idea of disgorgement should be considered, both from a corrective point of view and from a deterrence point of view. Especially in areas where the calculation of damages is difficult but detriment as such is nevertheless plausible.

5.2 Supporting collective self-help

Now and again, politicians feel that private initiative should be emphasised more and the policy emphasis should be on civilians being left to their own devices regarding enforcing the law.[107] Usually, this policy gives cause for retracting financial support from one government budget, meanwhile hoping that other public budgets will not be burdened instead. In other instances, there may be a true effort by policymakers to support self-help, *e.g.*, by stimulating self-regulation rather than pursuing a 'command and control' policy. In some jurisdictions, the use of self-regulation within specific areas of economic activity adds to private and individual enforcement.[108]

> On a European level, codes of conduct seem very popular: in EU private law policy trade associations and professional associations are encouraged to develop such codes.[109] This instrument may not only help empower interest groups, but can also facilitate concrete rule-making from vague private law standards. An example is offered by the Dutch Advertising Code Foundation, which is based on voluntary arrangement by the advertising industry. Any consumer can lodge

106. For a similar call for coordination of enforcement by private and public agents, see The Law Commission 1997, p. 5 ff.
107. See, e.g., Ministerie van Justitie 2005.
108. For an overview of self-regulation amidst possible alternative instruments of regulation, see, e.g., Ogus 2004, p. 146 ff. (p. 157 ff.); Ogus 1994, p. 107 ff. Cf. Cartwright 2004, p. 121 ff.
109. See, e.g., article 17 *Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights*. Cf. Office of Fair Trading 2003, p. 5 ff.

> complaints against misleading advertisements; the board decides whether the advertisement is in fact misleading and if so, the industry has obliged itself to retract the advertisement.[110]

Self-regulation may be useful in more than one respect. It may cure some of the drawbacks of the restoration feature, for instance by customising some of the vague standards of contract and tort law, which makes legal decision making easier and better fitted to the purpose of collective relief.

There is widespread belief that self-regulation is the prime solution to the private law enforcement deficiencies.[111] This, however, only holds true under specific circumstances, such as the level of organisation within the relevant branch of trade. Perhaps self-regulation is not always the likeliest of instruments to use in highly competitive or novel markets. In any case, when self-regulation falters or fails, legislative intervention seems to be the obvious policy.

This intervention can take various forms. Acknowledgement of *interest group standing in civil litigation* is one of these forms. In theory, interest groups could help avoiding risks from materialising by using their powers to apply for injunctive relief (i.e., the right to seek an order requesting the cessation or prohibition of specific wrongful acts).[112] By allowing this 'collective relief' legislators can curb the specificity feature and the post-facto feature to meet the needs of modern society.

In practice, however, interest groups have little resources to spend on costly litigation.[113] In a sense this is fortunate because limitless resources will not help finding the enforcement equilibrium. However, from a political perspective there might be good reason for supporting 'collective relief' in areas where private enforcement lags behind and political pressure to intensify public enforcement is mounting.

> For instance, it has been suggested that interest groups should be allowed to claim exemplary damages or some other form of damage in excess of individual damage (e.g., damage to 'consumer inter-

110. The available data show that complaints are usually lodged by individual consumers (88%), and that private companies (notably competitors; 9%) and consumer associations (1%) hardly ever lodge complaints. See RCC 2004, p. 13.

111. See, e.g., the Enterprise Act 2002, according to which the OFT is assigned the task of promoting 'good consumer practice' and approving consumer codes; cf. Office of Fair Trading 2003, p. 5 ff. and Howells and Weatherill 2005, p. 586 ff.

112. On the regulatory role of interest groups see, e.g., Ayres and Braithwaite 1992, p. 54 ff. Cf. Howells 1998, p. 101.

113. Viitanen 1999, p. 552. Contra: Tzankova 2005, p. 92 f.

> ests') and put these into a fund. With this fund these interest groups could then finance future litigation in the common interest. To some extent this is allowed by § 10 of the German *Gesetz gegen den unlauteren Wettbewerb UWG*, according to which consumer interest groups can claim profit disgorgement in some cases of unfair trade practice. The disgorged profits accrue to the State after deducting the cost of claiming.[114]

So, rational policy may demand that governments identify in which areas private enforcement could add to or substitute public enforcement, and then provide incentives – be it financial or other – for private enforcement. This seems an under-developed area of public policy.[115] Even more so considering that most European jurisdictions have some sort of national scheme helping *individuals* in need of legal aid, but obviously forgetting the economy of scale when refusing interest groups to benefit from similar arrangements.[116]

Moreover, more can be done to stimulate self-help. Group action is usually associated with injunctive relief, but there is a growing call for legislators to consider group action for *damages* as well. Few European jurisdictions in fact allow compensation claims instigated by interest group associations, but there can be good reasons for allowing such claims. Indeed, some sort of European group action for damages could unite the best of both the civil law and common law worlds.

> There is serious scepticism concerning the phenomenon of *class actions*. The US example indeed seems to show that with class actions lawyers win and consumers and businesses lose out.[117] However, this unfair distribution of proceeds may well be caused by traits of the legal system (*e.g.*, contingency fees, punitive damages, settlement practice and jury bias) rather than by the phenomenon 'class action' as such.[118]

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114. On this topic, see, e.g., Sack 2003, p. 549 ff.; Burckhardt 2005, p. 36 ff.; Micklitz and Stadler 2003b, p. 559 ff.; Wagner 2006b, p. A111 ff. Note that § 34a Gesetz gegen Wettbewerbsbeschränkungen GWB restricts group actions for profit disgorgement to industry associations; cf. Wagner 2006a, p. 408.
115. Cf. Viitanen 1999, p. 561 ff.
116. Cf. Collins 1999, p. 89.
117. Cf. RAND Institute for Civil Justice 1999. For a recent overview of advantages and drawbacks, see, e.g., Underwood 2004, p. 397 ff.
118. Cf. Basedow et al. 1999, p. 49; Lindblom 1997, p. 822 ff.; Mulheron 2004, p. 72 ff.; on fundamental differences between the U.S.A. and Europe in this respect, see, e.g., Hodges 2001a, p. 339 ff.

The concept of class action does not seem to enjoy popularity in Europe. The gap left by failing private enforcement is usually filled with some form of public enforcement rather than with the post-facto class action for damages.[119] This alternative intervention may take the form of state-driven intervention, but there are a number of examples from self-regulation as well.

> Note that creative in-between solutions are employed as well. By subsidising private claims or the setting up of alternative dispute resolution boards, small claims courts with low financial thresholds, governments sometimes successfully activate private enforcement.[120]

The problems that we dealt with in the previous paragraphs are very much at the centre of legislative attention in Europe.[121] All in all, this evolution should be applauded. *Group* actions instigated by authorised interest groups – rather than class actions instigated by lawyers – may overcome the lack of enforcement in cases of trifle damage and may empower large groups of people otherwise suffering from rational apathy.[122] Having said that, the actual design of a European group action should be carefully contemplated and adverse experience in other jurisdictions should be heeded.

> With regard to the introduction of a European group action, several relevant questions would need answering.[123] First, who should be representing the class?[124] A class action would empower private individuals and/or their lawyers, whereas a group action would authorise acknowledged interest groups with a certain degree of representation to instigate claims. The former approach seems the more cautious one to take. Second, should these group actions be allowed with regard to damages? And if so, how would damages be calculated? Would it include heads of damage that are usually not considered to be individual damage, such as damage to 'consumer surplus'

119. Koch 2001, p. 358.
120. Duggan 2003, p. 50 ff.
121. Cf. Frenk 1994, p. 289 ff.; Asser et al. 2003, p. 173 ff.; Stadler 2005, p. 939 ff. See also European Commission 2000b, p. 34: "Other areas where the Commission intends to launch initiatives concern measures to make it easier for consumers to take legal action collectively and the definition of the applicable law to non-contractual obligations." See also Yeazell 1987, p. 10 f.
122. In a similar vein (with regard to trifle damage), Tzankova 2005, p. 128 ff. Cf. Wagner 2006b, p. A107 ff.
123. Generally, see Andrews 2001, p. 263 ff.
124. Cf. Putman 2005, p. 322.

or 'the environment'?[125] A pressing argument against such a possibility would be that scheduled fees would give lawyers rather than stakeholders the incentive to instigate claims. Moreover, possibly the problem of frivolous claims or settling claims prematurely at a 'bargain' could rise.[126] Furthermore, opting out in cases of trifle damage is illusory: 'rational apathy' will probably also lead to acceptance of the default position (i.e. opt-in).[127] Perhaps the best way to proceed here is to experiment with group actions for specific types of trifle damage and to evaluate after a period of some years what the added value of group actions is in that particular field. In this respect, the recent changes to the German UWG present a possibility of experimenting with group actions for profit disgorgement.[128]

5.3 Expanding the protectionary ambit of declaratory judgements

One of the options for stimulating a more central role of civil courts in the enforcement of private law is the expansion of the protectionary ambit of declaratory judgements. The classical rule of procedural law, strongly related to the specificity feature, holds that a judgement can only confer rights and duties to the parties legally involved in the proceedings.[129] However, in practice a decision in one case can be of utmost relevance in similar cases. If a product is held to be unreasonably unsafe in one case, it can be presumed to be unreasonably unsafe in other cases as well. So, in effect, there is much to be said in favour of generalising court decisions on mass products, services, general clauses, et cetera.

On an even more general level, it could be argued that it would be inefficacious for private law to hold on to the specificity feature while modern society not only treats individuals as such but also – as a result of, e.g., automated processes and statistical analyses – as members of several *reference groups* (*e.g.*, consumers with a specific spending behaviour, pensioners, holders of a bank account, et cetera).

125. On this point, see, e.g., Jones 1999, p. 153 ff. With regard to environmental damage, see the elaborate work by Brans 2001. Note that the 2003 Swedish Group Proceedings Act – considered by some to be the most inclusive of European statutes on class action – is very cautious in allowing claims for damages.
126. Cf. Schaefer 2000, p. 204; Basedow et al. 1999, p. 27 f.
127. Cf. Schaefer 2000, p. 195.
128. For references, see footnote 114.
129. Traditionally, procedural law in civil law countries is badly equipped for involving third parties into the proceedings. In recent years some adjustments have been made but in principle the basis still is two-party litigation. Cf. Koch 1998, p. 804 f.

Against this background, extending a verdict as to confer rights to other parties than the ones involved in the proceedings can be quite efficacious.[130] Courts should at least be able to extend declaratory judgements stating that a specific product was unreasonably unsafe, that specific general conditions are onerous, and a specific feature of a service renders it defective, to cases of possible other claimants. In this respect, the judgement has mass relevance for mass products, services, and behaviour towards the general public, et cetera, and should be treated as such.

There are, however, significant obstacles which need overcoming before such a transposition of individual court decisions into generally applicable decisions can be realised.[131]

> The instrument of giving priority to lead cases or test cases under English law (CPR 19.III) consists of measures of procedural economy that may solve some of the problems put forward here. Moreover, S. 29 of the Swedish *Lag om grupprättegång* (Group Proceedings Act 2003) stipulates that "the determination of the court in group proceedings has legal force in relation to all members of the group who are subject to the determination."[132]
>
> Conversely, according to Dutch law a declaratory judgement in favour of an interest group cannot confer rights to individual claimants in subsequent procedures.[133] So, in theory at least, a declaratory judgement stating that company A has acted wrongfully vis-à-vis its customers has no nominal value in subsequent claims for compensation filed by individual injured parties.[134] This is counterintuitive and seems a disincentive for interest group enforcement. So, while the law does facilitate the possibility of a declaratory judgement provoked by an interest group, it does not acknowledge the value of these judgements beyond the parties between which it was decided.

130. Cf. Schaefer 2000, p. 186.
131. See, e.g., Department for Constitutional Affairs 1996, Chapter 17.
132. Note that this only applies to group members that have opted in. See S. 14 of the *Lag om grupprättegång*, stating: "A member of the group who does not give notice to the court in writing, within the period determined by the court, that he or she wishes to be included in the group action shall be deemed to have withdrawn from the group." Cf. Stadler 2005, p. 947.
133. Indeed, a recent French proposal considers the *de jure* extension of the ambit of court decisions in consumer cases to the benefit of third party-consumers. See Rapport Groupe de travail préside par Guillaume Cerutti et Marc Guillaume 2005, p. 25 and Putman 2005, p. 324.
134. Hoge Raad 7 november 1997, *Nederlandse Jurisprudentie* 1998, 268. Cf. Frenk 1994, p. 313 ff. On this problem, see also Mölenberg 2002, p. 63.

My argument here is that if we could design a specific procedure that would ensure a full consideration of the interests involved, then the *de iure* extension of the declaratory features of a court decision to other interested parties is feasible. I believe it could add to efficacy.

A further step would be the expansion of injunctive relief to cover possible other parties in similar circumstances. This option has been explored in some legal systems, but there is no shared evolutionary line in European private law. Obviously, there is the procedural principle that like cases should be decided alike, but in practice variance may and does occur. If a clear-cut decision can be delivered between two parties, why not allow some sort of expansion of the decision – be it with a possibility of opting out or challenging the decision – for other parties in similar circumstances?

5.4 Turning the post-facto feature into an ex ante feature

It has been argued that clear-cut rules are better at modifying behaviour than open textured standards.[135] If this holds true, both contract law and tort law can hardly be considered to be efficacious in reaching behaviour modification given the post-facto, restoration, and specificity features. Therefore, turning abstract contract and tort *standards* into concrete *rules* by shifting these features into an effective ex ante instrument of behaviour modification may indeed enhance efficacy of private law.

Naturally, this abstract notion needs further elaboration. Furthermore, it cannot be considered to be a panacea for all enforcement problems in private law. Having said that, in the framework of this lecture I will limit myself to some general observations. I feel that the ex ante feature is feasible and worthwhile exploring with regard to corporate behaviour. Consider an investment 'product' involving considerable inherent financial risks being marketed on the consumer market. After widespread sales of this product a civil court reaches the conclusion that this 'product' has in fact a design defect in the sense that the advertising and marketing strategy employed by the investment bank in fact neglected the duty under contract law standards to properly warn consumers of the inherent risks of the 'product'. Under the post-facto feature the civil court rules that the financial contracts are void or voidable, forcing all parties involved to apply the restoration and specificity features.

135. Cf. Ramsay 2003, p. 39, referring to Leff 1970, p. 356. Trebilcock 2003, p. 86 refers to 'wholesale justice'.

Now consider the alternative, where the investment bank turns to the civil court before or soon after marketing the product, or is implied in a request to the court submitted by a consumer association to ascertain the validity of the financial contract under private law standards of disclosure and voidability. Certainty on the validity of the contract at an early stage – as a result of the 'advance determination' by means of the declaratory judgement – could certainly be a more efficacious remedy.[136]

Furthermore, consider a workshop where intensive use is made of noxious substances which are not subject to public regulation but which are known by specialized personnel to be harmful to employees exposed to these substances. Due to long latency some years onwards claims for compensation may arise. Now consider a civil court procedure in which a labour union seeks injunctive relief for the benefit of the exposed employees at an early stage.[137]

If courts could be called upon to render these decisions at a very early stage, and thus give guidance to the conduct of the parties involved, the underlying private law standards in these cases (viz., the duty to disclose essential information on risks of the contract 'product' and the duty to protect employees from occupational hazards which are known to the employer respectively) would be turned into clear-cut rules (viz., give the information and protect the employees respectively) for corporate behaviour at a very early stage. By doing so, the post-facto feature could be traded in for an ex ante instrument of more efficacious enforcement.[138]

> In theory, such an approach could even make the need for ex ante public law regulation less obvious.[139] In fact, the ex ante approach in contract and tort would mimic public law regulation in the sense that it has the potential to generate clear-cut rules at an early stage.[140] On the other hand, however, it could be argued that this approach would leave civil courts with wide semi-legislative discretion without democratic legitimacy. My argument would be that this is not so much an inherent trait of the ex ante approach but rather of the fact that civil

136. Consider by analogy the example of the pre-validation service under the 1982 Isreali Standard Contracts Law, as described by Beale 1995, p. 259 f.
137. In the English legal context a mandatory *quia timet* injunction under common law for probable and imminent damage probably comes close to what is meant here. Cf. Murphy 2003, p. 588; Rogers 2002, p. 800 f.
138. Obviously, the court would have to explicitly address the question whether denying the injunction would have any effect on the right to compensation if the risk materialises afterwards.
139. Compare the conclusions of Kolstad et al. 1990, p. 900.
140. Cf. Shavell 1984, p. 373, referring to the advantages of injunctions.

> courts in effect have been bestowed with the right to design concrete rules by making use of open-textured standards. This would lead me to conclude that courts are under a duty to carefully balance their decisions relative to the extent of the decision: if a court decision can be expected to govern many cases, the court should invest proportionate efforts in deciding the case.[141]

Clearly, this sketchy outline needs elaboration. First, I think that interest groups would have to take up the idea that proactive injunctive or declaratory relief efforts on behalf of the prospective injured may be more efficacious – and therefore in the interest of their backing – than individual redress seeking after the accident.

> Consider the example of enforcement of intellectual property rights. Individual copyright holders usually join forces in organisations that actively hunt to discover infringements, pursue prohibitive injunctions and profit disgorgement for the benefit of copyright holders as a whole. Naturally, the publishing, music, and software industry stand to gain from actively pursuing wrongdoers and they therefore willingly co-finance these private control and enforcement activities. In some countries, the private enforcement of specific copyrights has indeed been monopolised by means of exclusive appointment of a compulsory trustee operating under state supervision.[142]

Second, there would have to be a procedural instrument by which potential respondents themselves could file for a declaratory judgement of a civil court. Consider for instance a bank which would like to be certain whether the information given with a specific banking product complies with the civil law standard of, e.g., mistake. By filing a request with a specialised civil court, the bank could obtain some certainty on the validity of the 'product' and whether the information accompanying it is sufficient. Obviously, a bank – being a repeat player with regard to a standardised financial product – would have a clear interest in filing for such an ex ante declaratory judgement. This would apply to any repeat player.

Third, the foregoing implies that civil procedure would need recalibrating as well. Prohibitory and mandatory injunctive relief are not as widespread and generally applicable in all European jurisdictions as would be necessary for the purposes dealt with here. Furthermore,

141. Cf. Kaplow 1992, p. 595; p. 621 f.

142. Moreover, in the Netherlands, e.g., the public law enforcement of copyrights infringement is construed as operated by a semi-state operated agency financed by the private industry.

whereas civil courts are reticent in rendering generalising declaratory judgements, they would need to carefully consider the extent of their decision. In this respect, the judgement could be rendered with a limited scope, e.g., by stating that the corporate behaviour in the given circumstances constitutes wrongdoing of some sort or is not contrary to the substantive rule at hand. Afterwards, claimants who have sound arguments invalidating the declaratory ex ante judgement could be allowed to *opt out* from the declaratory judgement.

Fourth, there is the practical point of monitoring. Injunctive relief is by no means a guarantee that the court decision will be complied with voluntarily. So who will monitor the implementation of the court decision? Full monitoring by private or public agents will probably be too expensive and inefficient.[143] Therefore, incentives have to be built into civil procedure for voluntary compliance by the respondent and some monitoring by the claimant at the same time. There are several instruments in the various jurisdictions that can help in this respect. Legislatures could start by introducing a *recurring penalty payment* ancillary to injunctive relief (that is, if they have not done so already).[144] As a result, the respondent will forfeit a considerable sum of money clearly exceeding the value of his obligation if he does not comply with the court order.[145]

> In some legal systems injunctive relief is already combined with the *recurring penalty payment*, i.e, the provisional obligation to pay a designated sum of money in the event of non-compliance with the original court decision. This has proved to be a useful incentive for compliance, even more so in conjunction with media attention.[146] On the other hand, incentives for the respondent to comply may not be enough. Then, the claimant interest group may be given financial or reputational incentives to develop monitor activities. Finding the appropriate incentive for private interest groups to develop the right level of monitoring activity is one of the more challenging assignments for European legal doctrine.

143. Shavell 1993, p. 271 f.; Becker 1968, p. 193.
144. Cf. *Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights*.
145. Bar and Drobnig 2004, p. 114.
146. Perhaps media attention (e.g., publication of the court decision) should also be a more prominent part of the private law enforcement toolbox.

All in all, there are a number of practical obstacles to be cleared before any ex ante instrument of enforcement grows into a true alternative to the post-facto feature. Nevertheless I do believe that the ex ante approach may combine the strong points of private law – viz., flexibility, open texture standards, and generality – with a higher degree of legal certainty at an early stage. By clearing up possible uncertainties about the law beforehand and thus providing more clarity on the required corporate behaviour the degree of compliance may increase. Clearly, this approach would assign a more central role to civil courts at an earlier stage of the enforcement process.

5.5 A challenge for civil courts

Courts have always been at the core of enforcement, but they show inherent restraints.[147] Courts lack important information on other cases and on the effects of their judgements on third parties.[148] Civil courts are not specialised in particular fields of the law but instead they are equipped to judge individual cases of varying nature.[149] Courts cannot choose the cases that are put to them (although most jurisdictions do have some sort of mechanism to refuse unimportant cases). Courts are relatively immune to political agendas and pressures.[150] Conversely, most civil courts have not been not set up to shift between policy goals and to prioritise. Moreover, courts do not have a feedback system that allows them to respond to calls from society; this is worrying in the sense that contract and tort law are operationalised largely through court decisions but there is no institutional mechanism for measuring quality or 'customer satisfaction'.

These restraints seem to play in the hands of specialised regulatory agencies that can boast their superior prioritising capabilities, investigation facilities and penal instruments to ensure compliance.[151] Nevertheless, in a sense civil courts have been and will always be 'enforcement officers'. One specific area where courts will be increasingly at the centre of enforcement, is in the handling of mass claims. For this purpose, some European jurisdictions have either recently devised or are currently considering specific procedural rules on court-managed

147. Cf. Schwartz and Wilde 1979, p. 679.
148. Cane 2002a, p. 313 ff.
149. Cf. Schaefer 2000, p. 202.
150. Collins 1999, p. 84.
151. Ayres and Braithwaite 1992, p. 19 ff.

settlement of mass (injury) claims.[152] This will challenge civil courts to take a more active role in managing complicated litigation, be it multi-party damage litigation, injunctive relief for the benefit of numerous people, or declaratory judgements in an ex ante procedure.[153]

> Consider, for instance, the English Civil Procedure Rules (CPR) on the so-called 'group litigation order' (GLO).[154] A GLO is an instrument to be used in case of common or related issues among multiple claimants and/or multiple respondents. A GLO encompasses a so-called group register set up and maintained in the 'managing court'. Although so far the GLO has not been used intensely, it increasingly seems to serve its purposes for those 'opting in'.[155] For instance, in 2001 a GLO concerning "McDonalds Hot Drinks" was ordered before the Royal Courts of Justice acting as managing court. The defining issues here were, inter alia, whether the respondent McDonalds was negligent in dispensing and serving hot drinks at the temperature at which it did. Other cases involved claims varying from industrial nuisance, public authority liability for harsh conditions at children's homes, defective medicine, to cases of restitution of dividend tax.

Furthermore, we can observe that civil courts are already increasingly subject to specialisation processes. Although there are inherent drawbacks to specialised courts, it must be conceded that the intricacies of 21st century private law may well force the judiciary to split itself up (or continue to do so) into several specialised courts. In a sense this may help increase efficacy because specialisation tends to go hand in hand with a more active enforcement policy.

> Examples of specialisation of courts are the *Technology and Construction Court* in England and Wales, *Le Conseil des prud'hommes* and the *Arbeitsgerichte* in employment issues, and the *Tribunaux paritaires des baux ruraux* for agricultural lease disputes. Note that specialised administrative courts may also take over some of the responsibilities

152. See, e.g., the recent Dutch statute on mass claim settlements (Wet van 23 juni 2005 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de collectieve afwikkeling van massaschades te vergemakkelijken, *Staatsblad* 2005 no. 340).
153. Cf. Stadler 2005, p. 950. One of the reasons for stressing the need for active courts in this respects lies in the experience that U.S. courts have had with class action settlements; courts need to scrutinise settlement proposals more closely in order to prevent selling out by claimant lawyers and respondents. See RAND Institute for Civil Justice 1999, p. 32 ff.
154. See Hodges 2001b, p. 29 ff. Cf. Andrews 2001, p. 258 ff.
155. For a critical evaluation, see, e.g., Mulheron 2004, p. 94 ff.

> of civil courts. Examples of this trend include the power of the Competition Appeal Tribunal to decide consumer claims for damages in case of competition law infringements (S. 47A and 47B Competition Act 1998).

On a more general level, civil courts should be challenged to take a more active role in enforcing the substantive rules of private law. In this sense courts should consider their task in civil law to be not merely the specific adjudication of rights and duties after wrongdoing, but also the more general task of giving of more specific guidelines to potential claimants and respondents how to act and how not to act to prevent wrongdoing.[156] Conversely, some incentives should be built into procedural law for potential claimants and respondents – be it individuals, businesses or interest groups – to put their case to the court at an early stage.

6 Considerations for future research

Legal solutions are at best part of a solution to the problems of society. Obviously, enforcement is not merely a matter of legal rules and forcing society to comply with them. Enforcement is fundamental to the rule of law. In this respect the analysis offered here is modest in intent. There is much more to the rule of law than efficacy. Moreover, in this lecture I merely scratched at the surface of enforcement problems.

What I did intend was to identify some of the features that potentially stand in the way of efficacious enforcement of private law rules and values. My position is that private law can do better in achieving its goals. This process starts out with the acknowledgement that some features of private law enforcement need recalibrating.

> It seems that some parts of private law have been the subject of intense recalibration over the past decades while others seemingly have not evolved at all. Compare for instance private enforcement of intellectual property law with private enforcement of medical liability law. A short look at *Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights* tells us that all kinds of procedural novelties have been developed (e.g., information duties, seizure, provisional measures, recall and removal, et cetera) for the

156. In fact, this compels courts to carefully draft their decisions in view of the fact that claimants and respondents have to know exactly what to do in order to comply with the decision.

> benefit of the claimant. Conversely, procedural innovation regarding medical negligence has been piecemeal. In essence, this field of law has merely evolved (and is still evolving) into an ever more refined mechanism for compensation. Within *private* medical law no ancillary remedies – e.g., for quality improvement or monitoring the implementation of court decisions – have been developed.

Naturally, it would be too radical a step to suggest that the post-facto, restoration and specificity features of contract and tort law should be outright abandoned. Nonetheless we should also take into account that private law is not just about designing fair substantive rules for society, it is also about daring to innovate and experiment with enforcement instruments if they fail their purposes. In that respect I feel that some modifications and alternative approaches in private law are worth further research. I feel that the possible routes to explore are the following:

- Allowing post-facto incentive damages for negligent breach of a clear-cut statutory duty or for repetitive corporate wrongdoing, not to be awarded to individuals but exclusively to authorised private interest groups for the benefit of litigating other cases.
- Allowing group damages actions for trifle damages, to be instigated by authorised private interest groups.
- Remodelling injunctive and declaratory relief to such an extent as to overcome the drawbacks of the post-facto feature and the specificity feature.
- If necessary, intensifying the use of ex ante interest group action in specific areas where public law enforcement is suboptimal. Intensifying clearly means investing public funds in this enforcement method.
- Rethinking the role of civil courts, e.g., with regard to declaratory judgements and their ex ante role in regulating corporate behaviour. In this respect, courts should be challenged to render judgements that surpass the concrete case at hand and that guide future behaviour instead of merely playing the role of condemning past behaviour.

These seem to be more or less safer routes to explore. Less safe but perhaps even more efficacious would be the innovation of a more drastic set of remedies, for instance by expanding the use of mandatory publication of court decisions, or by composing quality scoring lists for repeat wrongdoers. I feel that the routes suggested here should be the subject of further research. In any case, I intend to follow this path

myself for the coming years. Moreover, the routes suggested here should not only be explored by academics but by legislative bodies as well. Although the concept of experimental legislation seems to be unfamiliar to private law legislatures, I feel that some of the efficacy of the routes suggested here can only be measured by putting them into practice and evaluating the result. After all, through experiment comes innovation. We need more understanding of the possible effects of altering the focus in private law remedies from post-facto, restoration and specificity towards 'collective and ex ante' before we convert to innovative enforcement. The evaluation of the experiment will help design lasting solutions.

7 Word of thanks

Having come to the final part of this lecture, there are some personal comments that I would like to make. In some ways, this inaugural lecture is not very original. Some parts of the analysis presented here, were already the subject of the inaugural lecture by professor Hulsman at this very University some forty years ago.[157] There are others having expressed similar thoughts before and after him. So, I can only hope that you have found some original thoughts in the past three quarters of an hour. If not, I console myself with the thought that preparing this lecture has given me enough ideas to keep me busy for some time to come.

From a different angle, however, this lecture has been unusual in at least two aspects. First, there is the language: why not in Dutch? For one, English is the language of international, interdisciplinary and comparative private law. So, it is the language I will be trying to speak in the coming years. Besides, by speaking this language I have provided you, the audience, with a 'level playing field'. Whether or not you originate from the Netherlands or from a foreign country, you can now all complain over drinks that the lecture was incomprehensible without having to blame the language barrier. You can now really blame me.

Second, it is rather unusual for a law professor to hold an inaugural lecture some three years after having done so at another excellent university. Therefore, I would like to thank my former colleagues at Tilburg University for continuously pressing me to look beyond the obvious. By accepting this position in Rotterdam, I think I did.

157. Hulsman 1965.

By appointing me, this University has demonstrated the ability to look beyond the obvious as well. I would like to thank the University's Executive Board for appointing me. Moreover, I would like to express my deep gratitude to the Law Faculty's Dean Professor Marc Loth, for giving me the opportunity to embark on a new adventure.

In addition, I would like to pay special tribute to the private law department, and the members of the civil law section in particular, for their cordial welcome and the generous cooperativeness with which they started a new future with Siewert Lindenbergh and myself. Thank you, professor Lindenbergh, for accepting partnership in this section's enterprise. I hope and trust it will be a profitable partnership.

Finally, words of thanks to my family, who always seem to ask the right questions that put life in perspective, such as: 'what is the most relevant sentence of your lecture?'

Ik heb gezegd.

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