

Prevention through enforcement in private law

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I. Introduction

Imagine the following example. A woman has a job interview and is turned down because ultimately the employer prefers a man for the position. The woman goes to court to seek justice. The court in fact does allow the woman's claim because there is a substantive rule of equal opportunity in private law forbidding gender discrimination in employment contracts. According to the private law system that the court had to apply, the appropriate remedy is compensation for damage. However, as there was no contract between the woman and the employer, in effect the pecuniary damage that the woman suffered were the travel expenses she made in order to get to the job interview. That was all she got compensated for.

This is a silly example of a case in which the substantive rule, which aimed at preventing gender discrimination, was defeated by an inefficacious enforcement instrument. It is obvious that if private law rules aim at preventing a wrong, then the remedy should at least aspire to have a preventive effect. So, this example sounds like a bad joke about lawyers. In fact, the joke gets worse. Consider the following three less straightforward examples.

An employee of a nursing care home for the elderly walks down a narrow corridor. Alongside the corridor are a number of doors which open into the corridor. These doors are quite wide and if you open them too quickly they swing out into the corridor. This creates an obvious risk of physical injury to anyone who happens to be passing.

Indeed, the employee is struck in the face and she suffers injuries. She goes to court for several reasons, the most important one being that she wants to get compensated for the loss. But she also wants to send out a signal to the employer that he should do something about the dangerous situation so that others will not be hurt. The employee files for compensation and is indeed granted compensation. The court agrees with the employee that the combination of the narrow corridor and the wide doors opening into it is unacceptably dangerous and that the employer should have prevented the accident from happening.

A second example. A doctor is obliged to inform the patient of the inherent risks of the treatment. If the doctor fails to inform the patient, it constitutes a breach of a contractual information duty. Breach of this duty is remedied by the right to compensation of the damage suffered by consenting to the treatment without having all the relevant information. However, if the patient suffers from the inherent risk of the treatment, then the question is: would the patient have consented to the treatment [p. 32] if he had in fact been given all relevant information. So, if the patient's decision would not have been different if the information had been given or if the patient cannot prove it would have made a drastically different decision, the breach of the duty to inform did not cause any harm. So in effect, the law says: yes, there is a wrongful omission by the doctor, but no, there is no damage, and that's where civil remedies stop.

Finally, a short third example. Clients of a bank were all brought to detriment by a computer program that allowed the bank to round off some electronic payments. Each client of the bank suffered a small damage, a mere few Euro's per annum. The bank, however, gained millions of Euros by this process. The bank was in breach of a contractual duty to the clients, but the clients did

not bother to instigate claims for compensation, because the cost in legal fees, time and energy weighed too heavily on each of them.

These examples are typical of the lack of efficacious enforcement that sometimes occurs in contract law and tort law. What is meant by lack of efficacious enforcement?

Substantive rules have one or more goals. 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, either remedies in private law or sanctions in public law. To serve the goals set by the substantive rule, remedies and sanctions must have the capacity to produce the desired effect. So, in theory remedies in contract and tort can be evaluated – just as much as sanctions in public law – on the basis of their efficacy, their capacity to serve the goals of the underlying rules, to prevent infringement of rights and wrongfulness generally.

From time to time legislators, courts, and legal doctrine should address the question of whether the substantive rules of contract and tort law as such are still served by the instruments of enforcement. And if not, then perhaps we should look for alternative instruments. Evaluation of the status quo may learn that alternative remedies and sanctions or alternative designs could reach the goals set by the rule more efficaciously.

At this point, you may ask for a yardstick. How do we measure efficacy in prevention? Admittedly, this can be problematic. First, we would need to know the goal of rules. This is not always easy. Ask ten scholars what the aim is of the right to terminate a contract after breach of the contract. You will probably end up with more than ten possible answers and less than one straight answer.

So, sometimes we have to make assumptions about the goals of a specific rule. My general assumption here is that rules in private law have discernable objectives which cannot merely be of a corrective nature. Correctiveness by definition implies making right the wrong after it has happened; correctiveness is by definition backward looking. Surely, there must be more to private law than just looking back.

My simplistic approach to private law is that most rules are made with a distinction in mind – sometimes made explicit and sometimes left implicit – between right behaviour and wrong behaviour. What is considered right should be encouraged and [p. 33] what is wrong should be discouraged. So, in the end the rules of contract law and tort law are about behaviour and how to give incentives for the right behaviour and how to prevent undesirable behaviour.¹

Assuming that this approach is in essence correct, what then do we know about the efficacy of the remedy with regard to the encouragement and 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.

My proposition is that the remedies of private law seem outdated when it comes to enforcing compliance by – in particular – corporate wrongdoers. Roughly speaking the remedies usually employed in private law systems are the following:

- Nullification of the contract that was concluded under material influence of mistake, 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 imputable wrongful acts and omissions suffered outside contract.

¹ I refer to W.H. van Boom, *Efficacious Enforcement in Contract and Tort*, The Hague: BJU 2006, for further references and extension of the arguments.

Although there is little empirical evidence regarding the efficacy of these remedies, there are some impressions from studying the law in action that we need to focus on.

II. Three features of private law remedies

These impressions lead us to three prominent features of the law of remedies.

First, there is the *ex post feature*. Private law remedies focus on remedying a wrong that has already materialized. The underlying presumption may well be that by thus enforcing the substantive rule, justice is done to the party invoking the remedy and in the process his detrimental position is more or less put right. As a result, the *ex post* feature seems to indicate that the law is more concerned with putting right the wrong rather than actually preventing the wrong.

The second feature 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 other future benefits that would have accrued if the breach of contract or the tort had not been committed. The claimant is entitled to be brought in the position in which he would have been but for the wrong. The mirror image is that the other party will not have to restore more [p. 34] than what was lost: the restoration feature in principle does not allow either a duty to pay punitive damages or a duty to disgorge corporate profits obtained from the wrong.

The third feature is 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.

There is good reason for focussing on the three features of *ex post*, restoration and specificity: in certain cases they seem to constitute a major impediment to efficacious enforcement of private law.

First, remember the example of the narrow corridor and the wide doors. It is an example of the *ex post* feature combined with the 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 rights, there is no private enforcement either. In some parts of private law this seems to strongly amplify the *ex post* feature. For instance, tortious liability for accidental death and injury seems very much based on the *ex post* 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 of 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.

And even after the event, in legal terms the victim cannot be said to be concerned with preventing the accident from happening again: in legal terms, his concern is the compensation of his own injuries. This may seem obvious to the legal practitioner, but it is not to the lay man. Research shows that the motives of people going to court are not exclusively financial: they typically also want to ensure that others will not suffer from a similar future event.

There are several objections that can be raised against the *ex post* feature.

In short, the *ex post* feature concentrates on restoring after the event, not on installing safe-

guards to prevent the accident from happening again. 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 ex post 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 ex post feature is employed. Whether or not [p. 35] it actually will, depends, inter alia, on the deterrence value of the ex post compensation in the specific case.

The employee claiming damages from her employer, the court stating that the employer was wrong and should have prevented the accident, all started from the idea that the accident should never have happened. But who makes sure that it will in fact never happen again?

Third, the longer the lapse of time between the wrong and the remedy, the weaker the preventive effect will be. This dilution of incentives as a result of long latency is a well-known problematic issue: corporate policy may have evolved after the wrong, scientific or social insights may already have changed over time, et cetera.

Furthermore, the ex post 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. This uncertainty may play in the hands of unnecessary defensive behaviour.

To conclude, the ex post 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 inefficient defensiveness.

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.

Remember the patient that was wronged by the physician who did not disclose material information about the risks of the treatment. There was no claim for compensation because the patient would not have decided otherwise. It is an example of the problem of causation and the restoration feature.

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 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 increasingly shows correlative relationships between agent and effect, the law usually sticks to concrete chains of causation – it asks itself the question whether in this concrete case the causation is more probable than not. Originally, most legal systems do not consider a 33 percent increased risk of cancer due to some toxic agent to be a head of damage in its own right. However, the good news is that an increasing number of legal systems opened the possibility of claiming a proportionate part of damage that can never be proved to be (solely) caused by a specific agent.

The battle over acknowledgement of increased risks of damage and loss of a chance as heads of damage in their own right is ongoing. The focal point here is that in [p. 36] principle 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 – in which damage and causation are plausible on a statistical level but hard to substantiate in a concrete case – without remedy. Leaving deserving claimants without compensation as a consequence of obstacles in substantive or procedural rules may give rise to a state of inefficacy.

There are several objections that can be raised against 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 oust deserving claims.

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 the mere compensatory function.

Third, rudimentary standards on how to assess the right amount of damage 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. Moreover, the consequence of flexible and open textured private law values with regard to, for instance, 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.

Now, remember the third example, where clients of the bank did not bother to instigate individual claims in court. This is an example of trifle damage combined with the specificity feature. 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 a complete lack of enforcement of the underlying private law values.

What causes this state of affairs is the specificity feature which encourages potential claimants to show 'rational apathy'. The possible benefits of claiming in case of trifles 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, turning enforcement into what economists would consider a 'public good'.

[p. 37] There are several objections that can be raised against 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 chain of retailers using onerous general clauses. If a specific consumer is faced with these clauses he may successfully contest the fact that the clauses are at all invocable. However, that is just one consumer. Others may not challenge the small print, and the one who does will not request an injunction forbidding the seller to use similar clauses in future transactions with other consumers. As a result, the onerous clauses may remain in circulation, thus sustaining illicit practices with regard to other, less-informed or less-persistent consumers. This is unique to the specificity feature: the individual may have been helped, but society as a whole is left untouched. A more efficacious instrument of enforcement of the underlying private law values – although not necessarily a perfect one – would be a procedure facilitating and monitoring forced erasure of the clauses altogether.

In short, it can be argued that specificity tends to ignore the bigger picture and may thus be merely fighting symptoms rather than curing the disease.

III. Inefficacy

So, what do we have so far? We have introduced three basic features of contract and tort and we have seen that sometimes they can be an obstacle for efficacy. Although this point would need further research, I suggest that we work from the assumption that inefficacy arises as soon as :

1) there are strong indications that the goals of the substantive rule are not met by the available and commonly applied remedies and

2) enforcement of the rule is hampered by any of the following three reasons:

- The ex post feature may result in too much or too little precaution to prevent wrongs
- The restoration feature presents obstacles to a deserving class of claimants and as a result claims are typically not brought to court
- The specificity feature may constitute an obstacle to preventing trifling damage

The next question is: what can be done to improve efficacy?

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

Occupational health and safety agencies, food safety agencies, local authority supervisors on building activity, competition authorities, equal treatment boards, health care quality boards, you name it, public law has it. Public law uses regulatory permits, [p. 38] criminal prosecution, disciplinary boards, administrative penalties, forced closure of business, and depriving professional license.

So, there are myriad public enforcement efforts to regulate corporate behaviour with similar goals as private law institutions. Essentially, we should ask ourselves: Who needs private law anymore?

Obviously, this question does not need an answer. The arguments in favour of *combined* public and private enforcement efforts are easily articulated. Public enforcement agencies lack information, have limited resources, need to prioritise and therefore cannot enforce all rules with similar efficacy; agencies may or may not maximize enforcement efforts; they may suffer from 'agency capture'; the public law rules are inflexible as opposed to private law standards. Moreover, a lot of problems are not subject to public law regulation, leaving enforcement entirely to private law standards and initiatives.

IV. Innovating private law

So, there is much to be said in defence of private law. Against the background of a growing number of public authorities assigned with the duty to monitor and enforce compliance, we should not doubt the relevance of private law but ask ourselves how we can achieve innovation in order to rediscover the balance between private law and public law.

So, private law remedies should be innovated. Before turning to the 'how', let us not forget that a lot of innovation has already been going on over the last decades. Unfortunately, most of these innovations concerned the law of damages. This is unfortunate because it proves that the focus of private law enforcement is on the compensatory function of private law remedies while neglecting the improvement 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 probably continue to carry the burden of the ex post feature, the restoration feature and the specificity feature.

Instead, I feel that the focus of attention for the coming years should be on innovating other remedies than individual compensatory damages actions. In my opinion, three possible routes to innovation deserve further attention.

In the first place, the use of ex post incentive payments. In the second place, we should consider how to enhance collective action by interest groups. And finally, we should consider whether we can turn a number of cases under the ex post feature into an ex ante feature.

[p. 39] Given the limited space available, I will not discuss the concept of collective interest group action but instead focus on ex post incentive payments and ex ante prevention.

First, the ex post incentive payments.

In Europe, use of the concept of exemplary or punitive damages is not widespread. Instead, the remedy of damages 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 is underway. If we define punitive damages as some form of ex post incentive payments exceeding the actual pecuniary loss and aimed at specific deterrence, then the moderated idea of punitive damages could perhaps fit better into European legal culture. This concept of ex post incentive payments seems worth further consideration.

Naturally, the drawbacks of punitive damages in the U.S.A. are well documented. The empirical evidence for all these drawbacks, however, originate from a legal system that is in many ways different from the European legal systems. If we truly want to know whether some form of pan-European ex post 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, 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, ex post incentive payments 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 award should be limited. Both restrictions would help preventing inefficacious side effects such as overdeterrence. Third, the amounts would have to be either limited or set according to an objective standard. Fourth, the legislature would have to decide on whether these damages may be claimed by individual claimants or merely by interest group actions and to whom the proceeds would accrue. Finally, the idea would have to be limited to areas in which public enforcement efforts are below an optimal level.

A further point that seems worth considering here, is the disgorgement of corporate profits. In my opinion, there is a strong relationship between the concept of ex post 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 ex post 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 likely.

[p. 40] The final and most promising route to explore is the route of turning the ex post feature into an ex ante feature.

It has been argued that clear-cut rules are better at modifying behaviour than open textured standards. If this holds true, both contract law and tort law can hardly be considered to be efficacious in reaching behaviour modification given the ex post, 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 add to efficacy of private law.

Naturally, this abstract notion needs further elaboration. Furthermore, it is obvious that it cannot be considered to be a solution to all enforcement problems in private law. In the framework of this paper I will limit myself to some general observations.

Consider an investment 'product' involving considerable inherent financial risks being marketed on the consumer market. After widespread sales of this contract the stock exchange plummets

and the risk materializes. A civil court then 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 ex post feature the civil court rules that the financial contracts are void or voidable, forcing all parties involved to apply the restoration and specificity features. Other courts go over the same individual process. This is laborious and inefficient.

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 in an abstract sense the validity of the financial contract under private law standards of disclosure and voidability. Certainty on the validity of the financial product as such at an early stage – as a result of the 'advance determination' by means of the declaratory judgement – could certainly be a more efficacious remedy. Theoretically speaking, it resembles the abstract evaluation of general contract clauses available in some legal systems. Practically speaking we must ensure that it is more successful than that example.

Furthermore, consider a workplace 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. By that time statutory duties have been designed, company policy has changed and compensation will not serve any prevention goals.

Now consider a civil court procedure in which a labour union seeks prohibitory injunctive relief for the benefit of the exposed employees at an early stage and on the basis of negligence based standards of private law.

[p. 41] If courts could be called upon to decide at an early stage, and thus give guidance to the conduct of the parties involved, the underlying private law standards in these cases could be turned into clear-cut rules for corporate behaviour at a very early stage. By doing so, the ex post feature could be traded in for an ex ante instrument of more efficacious enforcement.

IV. Conclusion

Clearly, this sketchy outline needs further thinking. Nevertheless I do believe that the ex ante approach may combine the strong points of private law – 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.

The previous implies that civil courts would need to take a different approach towards injunctions and declaratory judgements. 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, whereas civil courts are reticent in rendering broadly applicable declaratory judgements, they would need to carefully consider the extent of their decision. There is also 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 be too expensive and inefficient. Therefore, incentives have to be built into civil procedure for voluntary compliance by the respondent and some level of 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 serious system of *penalty payments* ancillary to injunctive relief.

Clearly, all this would assign a more central role to civil courts. That brings me to a more general point: the future of civil courts. Undeniably, civil courts have always been at the core of enforce-

ment, but they do show inherent restraints.

Courts lack important information on other cases and on the effects of their judgements on third parties. Civil courts are not specialised in particular fields of the law but instead they are equipped to judge individual cases of varying nature. 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. Conversely, most civil courts have not been 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 [p. 42] that contract law and tort law are operationalised largely through court decisions but there is no institutional mechanism for measuring efficacy and 'client satisfaction'. These restraints seem to play in the hands of those in favour of specialised agencies that can use sophisticated instruments of enforcement. Nevertheless, in a sense civil courts have been and will always be 'enforcement officers'. In the years to come they will be increasingly challenged to manage claims rather than merely adjudicate rights and duties.

One specific area where courts will be increasingly at the centre of enforcement, is in the managing of mass claims. For this purpose, some European jurisdictions have either recently devised or are currently considering specific procedural rules on court-managed settlement of mass (injury) claims. 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.

On a more general level, civil courts should embrace the challenge to take a more active role in enforcing the substantive rules of private law. In this sense courts should consider their task in private law to be not merely the specific adjudication of rights and duties after wrongdoing, but also the more general task of providing more specific guidelines to potential claimants and respondents on how to act and how not to act to prevent wrongdoing.

Perhaps then we would know whether the wide doors in the narrow corridor were indeed removed or adjusted. Perhaps then the hospital where the physician worked that did not bother to obtain informed consent, would be forced to monitor physician behaviour and report after a fixed period about the incidence rate and how it dropped. Perhaps then we would see that the bank that skimmed cents from their clients' accounts is forced to disgorge profits into a public fund.

Naturally, it would be too radical a step to suggest that the ex post, restoration and specificity features should be outright abandoned. However, I do think that some modifications or alternative approaches are in order. My position is that private law can do better in achieving its goals and in preventing wrongs. Private law is not just about designing fair rules for society, it is also about daring to innovate and experiment with enforcement instruments.

The routes I just sketched are there to be discovered, not merely 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 the efficacy of the routes suggested here can only be truly measured by putting them into practice and evaluating the results. After all, through experiment comes innovation. We need more understanding of the possible effects; evaluation will help design lasting solutions.