The responsiveness of private law in times of globalization

I. Executive summary

Private law is both a system and a practice. As a system, it encompasses all the rules, principles and decisions that regulate the behaviour of private actors. As practice, it involves the interpretative community by which it is applied and followed. Because of this dual character private law, as any other branch of law, is characterized by a relative autonomy. It stands out as an independent system of norms and a practice of norm-guided behaviour, but it is also in constant interaction with its legal and social context. In other words, private law is simultaneously responsive to certain developments, and resistant to others.

Tilburg Private Law's research programme 2014-2018 focuses on responsiveness in private law. Private law relationships are crossing borders and so are lawmaking and, to a growing extent, adjudication in private law. Private law relationships – whether in trade, personal life, or otherwise – may involve a number of parties in different jurisdictions and they may be governed by several sets of State and non-State rules. The traditional paradigm of private law as a self-contained national system is no longer in step with current legal practice and scholarship. Nor is the focus on national institutions of the making and application of law.

This leads to three questions.
(1) To what extent, and in what ways, is private law responsive to globalization and its challenges?
(2) To what extent, and in what ways, is it resistant to these new demands and aspirations?
(3) To what extent *should* private law be responsive to them?

The responsiveness of private law
The aim of the programme is to contribute to a better understanding of lawmaking processes, adjudication and the behaviour of private actors in a post-national legal order, with particular focus on Europe (the EU and the ECHR) and on the position of the Netherlands in the European legal order. Research into the adaption of private law to developments in the post-national legal order can provide concrete guidelines on how core questions of private law – such as the enforcement of contracts or the circumstances in which liability arises – can be adapted to a post-national, technologically advanced society.

We understand private law in this context in a broad sense. It includes not only the *norms* (including rules and decisions) that are the result of lawmaking processes and adjudication at different levels of regulation, but also the practices in which these processes take place (the social context, including the interaction between private actors), and the *values* (as well as the principles and beliefs) that guide these processes and form standards for evaluating them. Development in private law is often the result of interaction between these three dimensions, that is, between its norms, practices and values. It can therefore only be fully understood if this interplay is taken into account. A proper study of private law will therefore benefit from the insights of other disciplines.

Resistance
Responsiveness in itself refers primarily to the possibility of private law (as system and as practice) to respond to changing circumstances. That response can be of varying degree, ranging from the facilitation of new circumstances to a broader capacity of private law to adapt and develop in response to changes. However, responsiveness may also involves a negative reaction,

the *resistance* to change and development. Law as a practice and as a system is to a certain extent resistant to change. This is not in itself undesirable: important legal values such as predictability, stability, and legal certainty provide some justification for upholding the present situation. Indeed, the ECJ and ECHR stress these very values, while at the same time contributing to unsettling the status quo. Furthermore, the initiatives to change by European institutions (incl. the EU institutions and the European Court of Human Rights) have to face trenchant criticism regarding competence, legitimacy, democracy, and practical capacity.

Resistance is not in itself undesirable; the existence of differing viewpoints is intrinsic to communication or dialogue between private law actors, and incorporating these differences is essential for proper interaction as distinguished from top-down command structures. In order to understand the responsiveness of lawmakers, private actors, and norms to global challenges we will therefore also need to explore the background and justification of resistance, and how to incorporate beneficial elements in a workable communication structure. The programme therefore also aims to chart resistance to globalization or Europeanization in private law.

Research projects
Specific research projects focus on: lawmaking in a pluralist legal order; responsiveness through the courts; contracts and networks; tort law in context; and banking, finance and insolvency. The aim of the programme is to explore the central questions on the responsiveness and resistance of private law in times of globalization for each of these themes.

All research themes focus on private law in national, European and international contexts – or sometimes local. The programme does not seek to give preference to either national or international oriented research: private law research in times of globalization needs both perspectives.

II. Research programme 2014-2018

What role will private law have in society in 2020? However futuristic the question – and therefore by definition impossible to predict – there are pressing reasons to ask it for private law today.[1] Private law is a cornerstone of modern developed societies, setting out the rules and norms that determine when contractual agreements can be enforced, in which cases civil liability arises, how property disputes should be resolved, how family relationships are given legal effect in society, and many more issues relating to private (i.e. non-State) interactions. The notion that these rules are developed principally if not exclusively, within the hierarchical, democratic setting of the nation-State has come under pressure in the last decades due to one process in particular: globalization.

Globalization

Globalization is an economic and social phenomenon. It can be characterized as a trend that includes 'the internationalizing of production, the new international division of labor, new migratory movements from South to North, the new competitive environment that accelerates these processes, and the internationalizing of the state ... making states into agencies of the globalizing world.'[2] Importantly, these processes are facilitated by a wealth of new technologies, such as the internet and other distance means of communication, which enable private actors to buy and sell goods and services from anywhere in the world and to set up or to outsource business anywhere.

Due to globalization, trade relationships in the world are changing,[3] as are social and family relationships. People travel, work, marry, buy, do business – often within their own country but more and more also in other parts of the world. For the Netherlands, the cooperation within the European Union has accelerated such cross-border activity even more. And with private law relationships becoming more international, the legal system has also become increasingly influenced by international and European law.

Parallel to this development, local or domestic relationships between private parties have become more complex. Businesses, producers, constructors and other private actors are more often involved in chains or networks of cooperation. This means that in many situations multiple actors are responsible for e.g. the completion of a building project, the manufacturing of a product, or the provision of health care. These processes occur within nation-States but they take on added significance as the market become more influenced by 'globalized' and private law relationships are not contained to one legal system.

To be sure, international and supranational influences on national law have always existed and have been recognised even in the heyday of national codification (thus the discipline of international private law). However, these influences were for a long time viewed as incidental

[1] The focus on 2020 fits with the time span of this research programme. It also coincides with the EU Framework Programme for Research and Innovation 'Horizon 2020'; see http://ec.europa.eu/research/horizon2020/index_en.cfm?pg=h2020.

2 Robert Cox, "Multilateralism and the Democratization of World Order", paper for the International Symposium on Sources of Innovation in Multilateralism, Lausanne, May 26-28, 1994, as cited in J.A. Scholte, "The Globalization of World Politics", in J. Baylis and S. Smith (eds.), *The Globalization of World Politics, An Introduction to International Relations* (New York: Oxford University Press, 1999), p. 15. See also William Twining, *General Jurisprudence* (CUP, Cambridge 2009).

[3] See *The Future of Trade: The Challenges of Convergence*, Report of the Panel on Defining the Future of Trade Convened by Director-General of Trade Pascal Lamy (24 April 2013) 17.

'irritants', to use the famous phrase coined by Teubner.[4] These could be absorbed in a national legal system that was conceived as striving for coherence and closedness. Globalization results in continual 'irritation' or, phrased more positively, interaction, which necessitates a reconceptualisation of the relation between national and supranational law, as well as new instruments to cope with this interactive relationship.

Consequences for private law

The research programme therefore starts from the finding that the traditional paradigm of private law governed by national law is no longer in step with current legal practice and scholarship. It seeks to define new perspectives on how private law can respond to the challenges of globalization. Research in areas as diverse as post-national rulemaking,[5] self-regulation,[6] legal pluralism,[7] network theory,[8] complexity theory,[9] the harmonization of private law,[10] and transnational methodology[11] has sought to find new ways to conceptualize private law relationships. So far, however, many questions relating to the conceptual development of private law – one that fits with globalized lawmaking, transnational adjudication and with legal practice – are unanswered. The traditionally dominant vision of positive law has to be recalibrated towards the manner in which the law operates in practice, in which recent insights in complex structures and organisations can provide worthwhile instruments.

In particular the classic notion of law as involving top-down commands from the state to private individuals,[12] complemented by the interpretative practice of national courts, needs revision in a world where private law is viewed rather like material, to be used by private individuals in order to achieve their own goals. Indeed, private law itself can be seen as facilitating processes where the relation is not unidirectional or fixed a priori, but rather involves fluctuating interaction between parties in order to achieve flexibility to new and rapidly changing circumstances. This demands an extension of the traditional notion of private law as not just a system of rules and decisions, but also a practice of a diversity of lawmaking agencies, courts and private actors.

A new research-program: responsiveness

Tilburg Private Law's research programme 2014-2018 focuses on responsiveness in private law.

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[4] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', *The Modern Law Review* 61 (1998), p. 11-32.

[5] The University of Amsterdam's project on 'The Architecture of Postnational Rulemaking' brings together researchers from private law, EU law and international law. Another relevant project in this area is Hans Micklitz' ERC-funded project on European Regulatory Private Law, based at the EUI.

[6] Fabrizio Cafaggi, 'Private Regulation in European Private Law', EUI Working Paper RSCAS 2009/31, available at: http://cadmus.eui.eu/bitstream/handle/1814/12054/RSCAS_2009_31%5brev%5d.pdf?sequence=3; and Fabrizio Cafaggi (ed), *Reframing Self-Regulation in European Private Law* (Kluwer, The Hague 2006).

[7] E.g. Leone Niglia (ed), *Pluralism and European Private Law* (Hart, Oxford 2013); Paul Schiff Berman, *Global Legal Pluralism* (CUP, Cambridge 2012).

[8] Gunther Teubner, *Networks as Connected Contracts* (Hart, Oxford 2011).

[9] Cf. Albert-László Barabási, *Linked: The New Science of Networks*, Perseus: Cambridge (Mass.) 2002, Duncan J. Watts, *Six Degrees. The Science of a connected age*, Norton: New York 2003, Mark Buchanan, *Nexus. Small worlds and the groundbreaking science of networks*, Norton: New York 2002.

[10] For an overview, see Arthur Hartkamp c.s. (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International, Alphen a/d Rijn 2011).

[11] Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart, Oxford 2011).

[12] Which to some extent survives in the governance approach to law which tend to favor an instrumental vision of law.

Responsive law

In a classic study Nonet and Selznick distinguished three types of law-in-society: repressive law in pre-modern society, autonomous law in modern society, and responsive law in post-modern society.[13] Repressive law is an instrument for the ruling class. Autonomous law is the self-contained law that safeguards the freedoms and fundamental rights of citizens (the rule of law). In a rapid developing post-modern society however, this can turn into a formalistic straitjacket. Law is required to provide solutions for the needs and aspirations of society. Responsive law provides just that, but it requires interaction with society and thus creates the risk of a backlash into repressive law. Responsive law then, is law that is in open interaction with other systems of law, the political system, moral beliefs and values, practices and traditions, and thus with (transnational) society at large. Responsiveness is a relative notion though; law is responsive to a certain degree, being resistant at the same time.

The responsiveness of private law thus refers to its relative open character, which is stressed by some writers (notably Scholten[14]) and denied by others (for example Weinrib[15]), with many intermediate positions (influentially Luhmann)[16]. The study of private law in this new context can be facilitated if existing structures are reconceived as interactive processes between responsive agents. The concept of responsiveness provides a lens through which a number of processes in post-national (or transnational) private law can be viewed, in particular in relation to the changing positions of actors and the hierarchies and substance of norms.[17] This (relative) open character has several dimensions:

- open for whom? Relevant is here its openness for (a) transnational lawmakers, (b) regulatory institutions, (c) self-regulation, (d) national and supranational courts, (e) behaviour and practices of private actors.
- open for what? In this context we discuss its openness for (a) other legal systems, (b) transnational law (European law), (c) other systems of beliefs and values, and (d) other practices, traditions and social developments.
- open in what ways? Private law can be influenced on different levels, for example by its (a) concepts: legal concepts have open texture, this is the possibility to develop their meaning with changing circumstances; (b) rules: legal rules can be interpreted in various ways, depending on context; (c) principles: legal principles facilitate the flexibility of a legal system, at the same time retaining its leading motives; (d) the interplay of the levels of a multi-layered legal system: compare the various instruments of EU law and their effects on national law; (e) justification and underlying arguments.
- open with what results? It can result in (a) unification, (b) harmonization, (c) coordination, (d) co-existence, (e) conflicting norms and principles.

Resistance

Responsiveness has two sides. On the one hand it refers to the possibility of private law (as system and as practice) to respond to changing circumstances. That response can be of varying degree, ranging from the facilitation of new circumstances to a broader capacity of private law to adapt and develop in response to changes. On the other hand it refers to its resistance to change

[13] Nonet and Selznick, *Law and society in transition: towards responsive law*, New York 1978.
[14] J.B.M. Vranken, *Algemeen Deel* **, Zwolle 1995.
[15] Weinrib, *The idea of private law*, Cambridge MA 1995.
[16] N. Luhmann, *Das Recht der Gesellschaft*, Frankfurt a/M, Suhrkamp 1993.
[17] On this focus on 'actors, norms and processes', compare Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism', in: Gunther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Brill, The Hague 2012).

and development. The setting within which lawmaking in Dutch and European private law occurs is to a certain extent resistant to change. Lawmakers, courts and legal practitioners within a national legal system tend to uphold the legal system as they know it. Indeed, to a certain extent this is what they are institutionally required to do. Besides written provisions[18] also legal values like predictability and legal certainty[19] necessitate a careful and slow-moving approach to adopting new directions. At the same time, European institutions (incl. the EU institutions and the European Court of Human Rights) face challenges of competence, legitimacy, democracy, and practical capacity.

Resistance is not in itself undesirable; the existence of differing viewpoints is intrinsic to communication or dialogue between private law actors, and incorporating these differences is essential for proper interaction as distinguished from top-down command structures. In order to understand the responsiveness of lawmakers, private actors, and norms to global challenges we will therefore also need to explore the background and justification of resistance, and how to incorporate beneficial elements in a workable communication structure. The programme therefore also aims to chart resistance to globalization or Europeanization in private law.

Research themes and approach
The focus of the research programme is on three central questions:

(1) To what extent, and in what ways, is private law responsive to globalization and its challenges?
(2) To what extent, and in what ways, is it resistant to these new demands and aspirations?
(3) To what extent *should* private law be responsive to them?

These questions will form the starting point for research in several selected areas of expertise within the Private law research programme:
a. lawmaking in a pluralist legal order;
b. responsiveness through the courts;
c. contracts and networks;
d. tort law in context; and
e. banking, finance and insolvency.

For each of these areas, we will seek to identify to what extent and in what ways private law responds to the challenges of globalization. Whilst the three leading questions will form our focal point, they will be given more specific content by reference to the catalogue of viewpoints deducted from the relatively open character of responsive private law (see above, p. 5): for whom, for what, and in what ways is private law open, and with which results?

Projected output
The aim of the programme is to contribute to a better understanding of lawmaking processes, the dialogue between courts, and the behaviour of private actors in a post-national legal order, with particular focus on the EU and the position of the Netherlands in the EU. The development of new and innovative research can provide concrete guidelines on how core questions of private law – such as the enforcement of contracts or the circumstances in which liability arises – can be adapted to a post-national, technically advanced society.

[18] For example by constitutional provisions requiring a civil code (such as art. 107 Grondwet), statutary provisions requiring courts to uphold the coherence and quality of the national legal system.
[19] Such values are also stressed by the ECJ and ECHR.

All topics below focus on private law in national, European and international contexts – or sometimes local. The programme does not seek to give preference to either national or international oriented research: private law research in times of globalization needs both perspectives.

1. Lawmaking in a pluralist legal order

Responsiveness: for whom, for what, and in what ways is private law open, and with which results?

Under this theme heading, we explore responsiveness and resistance between lawmaking actors in European private law. Although the proliferation of lawmaking actors outside the nation state can be observed globally, the main focus of the research will be on European private law. The EU is one of the most advanced examples of regional cooperation between nations with regard to economic, but also political and social issues. Using the EU framework as a case study can provide good testing ground for other post-national lawmaking projects.

Challenges of lawmaking in the EU multilevel legal order
Strategies for lawmaking in Europe in recent decades have sought to decrease divergence between Member States' private laws in two ways: through top-down legislation and bottom-up through 'spontaneous harmonization'. Although the debate continues, it appears that neither strategy has been successful in actually harmonizing private laws in the EU.

A particular challenge for harmonization is that the EU market is made up of an assembly of Member States which diverge in economic, cultural, social and political outlook. Efforts at harmonization or even just convergence of laws have been hampered by these differences. An important barrier is that existing strategies for lawmaking tend to start from a particular view on which main goals should be pursued through law. Two goals that are often emphasized are that laws should pursue economic efficiency and/or that they should pursue (social) justice. A range of legal systems or lawmakers, however, will balance these goals differently. This divergence makes it hard if not impossible to create rules that fit each cultural and socio-economic context in Europe. Not surprisingly, efforts from the EU towards harmonization are often met by resistance from the Member States. The multicultural and otherwise multi-faceted nature of the EU can therefore get in the way of the integration of the internal market through law.

New strategies for lawmaking
Acknowledging these problems, we explore new strategies for lawmaking in European private law. In what ways can they accommodate legal, cultural and socio-economic differences between EU Member States whilst at the same time actively enabling the further integration of the internal market through law? And how can they facilitate private law transactions by increasing legal certainty for private parties?

The main proposed strategy explores the idea that standards in European private law can offer an alternative model for legal integration (Mak). Standards – which in this context are defined as 'open' norms to which more concrete legal rules can be attached – can function as reference points for lawmaking and for the application of norms. An example is the 'average consumer' of EU law, or 'responsible lending'. Such standards can function as normative benchmarks for lawmakers at different levels of regulation. Although differentiation may be justified, such as greater consumer protection with complex products, or differentiation between local markets, the use of standards as reference points can enhance transparency in lawmaking, and thereby legal certainty.

It should be noted that the research combines private law research with a regulatory perspective. Regulation is normally studied in public law as rules that can be used to steer parties towards behaviour that they would otherwise not adopt. It influences private law in

areas where mandatory rules are created to achieve specific policy goals, e.g. the protection of weaker parties (consumers, employees). To add regulation in the study of lawmaking in European private law, however, is necessary to get a complete understanding of lawmaking processes, as many are steered by policy objectives from the EU. Concrete studies in which this will be explored will be mainly in consumer law and labour law.

Resistance
The introduction of a new strategy for lawmaking is likely to be hampered by processes of resistance within the national and the European legal order. Subthemes that will be explored is how legal practice – including legal practitioners and the courts – can be stimulated to open up to a new, communicative way of applying national law and norms from other sources (e.g. the EU or self-regulation) that could contribute to lawmaking in the European legal order (Mak).

Aims and objectives
The aim of this subgroup is to substantively contribute to the development of a theoretical framework for European private law. The focus will in this regard be on the challenges posed to national, EU and non-state lawmakers in the economic regulation of the EU internal market. If the EU Member States can find a way to successfully structure lawmaking processes within their territory, that is likely to be a strong contributing factor to building up the economy and getting out of the current economic crisis. Obtaining a better understanding of lawmaking processes and the interaction between lawmakers can help achieve that goal.

Research projects include:

- Strategies for lawmaking / private law theory (Vanessa Mak)
  The aim of the research is to explore *in what ways* lawmaking in private law can respond to the proliferation of lawmaking actors in a post-national setting. The main proposed strategy explores the idea that standards in European private law can offer an alternative model for legal integration.
- Private actors: citizens, consumers, employees, legal practice (Vanessa Mak)
  Projects under this heading explore how private actors can be involved in lawmaking. The question explored relates to the process of lawmaking, but on a more fundamental level also to the question *who* can be regarded as lawmaking actors in private law in times of globalization, and who should be.
- Self-regulation / codes of conduct (Marie-Claire Menting)
  Starting from an empirical inquiry into the functions of codes of conduct in a multi-layered European and Dutch private law, the research aims to identify whether there is a need for a framework for the use of codes of conduct in private law and, if so, what it could look like.
- The calculation of damages for breach of contract (Zihan Niu)
  The aim of the project is to identify in which ways damages for breach of contract are calculated in English and in Chinese law, and in the CISG. Further, the research aims to assess how the calculation of damages is influenced by cultural factors.
- Digital content and contract law (Daniëlle Op Heij)
  The project examines whether the current remedies in Dutch contract law can provide an appropriate response to cases of delivery or functioning problems with digital content, and if not, which regulatory changes should be made to improve the applicable remedies for different types of consumers.
- Law as a signaling system (Eric Tjong Tjin Tai)

The aim of the project is to approach the system and practice of law from the notion of 'signals'[20] in a network of actors, instead of as a rule-driven hierarchical command structure. The hypothesis is that this approach may explain and predict certain contemporary legal phenomena and developments better than the traditional view of law.

Some projects in other research themes described below also connect with questions of lawmaking and pluralism in (European or transnational) private law. Examples are: highest courts (Marc Loth); consumer credit regulation (Jurgen Braspenning); financial collateral arrangements (Yael Diamant).

Example: The law market
Researcher: Vanessa Mak

The idea of a 'law market' has become popular in recent years. Scholarship suggests that private parties, in particular businesses, have incentives to choose the law that is most favourable to their corporate activities or contracting. By exercising that choice, a competition of rules comes about which should in theory lead to the adoption of rules that best fit the market. Hotly debated questions in European contract law are whether it is indeed the most appropriate strategy for European contract law and, from an empirical perspective, whether this kind of competition actually occurs. A question for research is therefore: is competition of rules ('regulatory competition') a constructive way forward for European contract law? I will consider theoretical arguments in relation to choice of law and regulatory competition to determine whether the conditions for such competition are present in the EU. Further, I will consider empirical data on legal reform in EU member states to see whether there is evidence of regulatory competition in contract law. In a broader perspective, the outcomes of this study will be taken on board in the exploration of new strategies for lawmaking in European private law (part 1 of the research programme).

[20] A provisional term; what is meant is closer to the legal analogue of the concept of 'speech act' (Searle), cf. Loth (diss.).

2. Responsiveness through the courts?

Responsiveness: for whom, for what, and in what ways is private law open, and with which results?

The changing role of highest courts
Highest national courts in a pluralist legal order are not just responsible for the uniformity and the development of national law, they have become responsible for the application of transnational and European law within the national legal system as well. This changes their position from that of a highest court the top of the pyramid of the national judicial organisation into that of, metaphorically speaking, the spider in a seamless web of (trans)national adjudication.

How do they adapt to this changing position? In what sense and to what degree are they responsive to their new tasks and responsibilities? And in what sense are they resistant or ineffective as courts of transnational and European law? How could their functioning as such be improved?

Research into these questions necessarily presupposes a comparative and interdisciplinary approach. Comparative, since the highest courts from different (European) legal systems can best be assessed from this perspective (how do they do, relatively speaking?). Interdisciplinary, because this involves research of an institutional, legal, and empirical kind (what kind of institutional, legal and empirical characteristics and circumstances are responsible for the differences in performance?).

Interaction and proceedings in court
Globalisation and the increased complexity of (contractual) relations also have their reflection on legal disputes and on court proceedings. The claims that are brought before the courts are more complex, and so are the underlying conflicts. In literature, there is a debate on how responsive the judge should be in dealing with these more complex claims and their underlying conflicts (e.g. Zarisky & Sourdin 2013). This approach receives criticism, in particular from lawyers. But more and more judges from different fields of law, from different legal systems, seem to have embraced a more responsive attitude, in terms of looking beyond the legal dispute. This new approach, however, brings along new challenges that need further study. Many of these challenges are related to the interaction between judges on the one hand and parties/litigants and lawyers on the other hand. What is the role and meaning of core values as neutrality and independency if judges become more responsive? Also, special requirements are needed for the interaction between judges, lawyers, children and other vulnerable parties (with the aid of representatives) who seek justice. Until now, we know only little about the kind of special requirements that are needed.

At the same time, the question of how to improve the process of negotiating in the shadow of the law is still relevant. Going to court is one way to get a legal decision that (hopefully) will end the legal dispute between the parties involved. In family disputes, the court is more and more the end of the road, because people know that the court's decision will usually not satisfy both litigants. Besides this, legal procedures before the court may take a long time, they cost a lot of money and the result is not always predictable. Therefore, people are looking for other ways to find a solution, e.g. by way of mediation, disciplinary tribunals, arbitration, etc. Besides this, courts are also trying to look for other procedural modernisations (by creating 'sharing rules', triage, early arbitration in neighbour disputes, special rooms for mediation in court, or for the hearings of children, etc.). The overarching goal of all these efforts is to improve the access to justice.

We also mention the challenges of collective redress in terms of responsiveness. In cases where many individuals have suffered damages, collective redress is an efficient way to deal with these mass claims. But convenient standards for interaction between judges, lawyers and litigants seem to be unsuitable to address the often complex issues that come along with mass disputes.

Research projects include:

- Family law procedures, the role of judge and other participants: how can this procedure be improved to reach long lasting solutions? (Paul Vlaardingerbroek).
- Hearing of children (Veronica Smits).
- E-mediation (Paul Vlaardingerbroek, Veronica Smits, Corry van Zeeland).
- Legal needs of individuals in collective redress (Karlijn van Doorn, Ianika Tzankova).
- Claims resolution facilities (Ianika Tzankova).
- Negotiation (Alain Verbeke).
- The declaratory judgement (Nadine Tijssens)
  Many practitioners of law struggle with the declaratory judgement. They do not know exactly when to ask for a declaratory judgement nor how to do so. The goal of the project is 1) to explain which function(s) the declaratory judgement currently has in our national system and 2) to decide whether these function(s) suffice or whether they should be expanded or limited. The second question is considered with reference to comparative sources from other legal systems.
- Civil procedure (Bert van Schaick).

Example: Judicial dialogue
Researcher: Marc Loth

One answer to the question into the changing role of highest courts is the notion of a judicial dialogue. Highest courts enter in an increasing degree into a dialogue with each other, sharing arguments and solutions to common problems. This happens especially in issues of a global nature, such as the protection of the environment, the combat against terrorism, and the problem of asylum seekers. After 9/11, for example, the UN took measures to combat terrorism, which were translated into national law by governments worldwide. Of course, they took the risk of violating human rights and courts across the globe had to strike the balance between the policy of combatting terrorism and the protection of the rights of the citizens. In this process they looked towards each others' solutions and arguments, thus entering into a judicial dialogue, and developing a transnational checks and balances against politics and the administration.

3. Contracts and networks

Responsiveness: for whom, for what, and in what ways is private law open, and with which results?

In the classic view of contracts, contractual arrangements work because they provide legal certainty of the precise responsibilities that are assumed by parties. With the act of contractually specifying what is agreed on, parties fixate and communicate their respective positions. However, as modern contract theory recognises, such fixation is only possible to a very limited extent, and actually is not even desired to such an extent by the contract parties themselves. This does not mean that there is no need for legal certainty, only that this is a merely a limited virtue. In modern contract practice parties rather wish to have a certain flexibility to adapt to unforeseeable developments, while still having sufficient guarantees that fair results will be obtained. This means that contractual communication should not solely occur *through* the contract but rather *beside and outside* the contract, thereby influencing the contract itself. Hence contracts themselves should become responsive.

On the one hand, courts have responded by allowing contractual and pseudo-contractual constructs to create ties between parties that were not explicitly made (connected contracts). On the other hand, in certain areas a reconceptualisation of contract theory is required to allow interacting parties to modulate their positions according to growing insights in their relationship. There are a number of lines of research to be pursued.

- Interactive contract design (Eric Tjong Tjin Tai).
  In certain areas, in particular those involving uncertain results (such as innovative processes), there is a need to contract without too much fixity, while allowing for fair outcomes in case the contractual cooperation has profitable or valuable results. Modern research suggests that in such cases what is needed is not a detailed contract but rather a framework in which parties interact and communicate in order to work during the lifetime of the relationship towards filling in the details as necessary. The question is what kind of framework would be appropriate, and how traditional or new forms of legal regulation come into play.
- Connected contracts (Eric Tjong Tjin Tai, Stéphanie van Gulijk).
  Contracts are traditionally considered on the model of simple two-party contracts that have in principle only effect between parties. Modern theory and case law has increasingly recognised the existence of multi-party contracts and connected (groups of) contracts, which have issues peculiar to these kinds of contracts. In a fixated view of contracts, an analysis of this problem field would necessitate a concentration on legal consequences. From the point of view of communication, it appears more fruitful to consider such contracts as involving communication obligations and structures between parties, that require and allow changes of position during the life of the contract. This can also explain the possibility that changes to one contract can influence another contract.
- Compliance to professional codes of ethics and organisational structure, applied to banking (Reinout Wibier, Eric Tjong Tjin Tai).
  One reaction to the role of banks in the credit crunch is to stimulate or even make mandatory explicit allegiance to professional codes of conduct. There is however significant doubt about the effectiveness of such codes, as they merely communicate a symbolic allegiance that need not lead to compliant conduct, in particular where the surrounding organisation stimulates contrary behaviour. The mixed signals individuals receive lead to unsatisfactory results. Insights from other disciplines such as ethics and organisation theory are hypothesised to

help in redesigning more effective structures that reinforce positive communication and shield from contrary information.

- Communication in complex building contracts (Stéphanie van Gulijk).
  Several national and international cases of failed building cooperations have led to investigations that concluded that the causes of failure were largely due to a lack of successful communication between the building partners. Complex construction contracts, where different actors cooperate, either in vertical or horizontal relations, are typical examples of connected contracts. Instead of traditional bilateral (often reactive and static) obligations between contracting parties, multilateral and interactive obligations between contracting and third parties are required.
- Obligations, remedies and liability in multi-party contracts (Stéphanie van Gulijk).
  The project explores whether private law is sufficiently responsive to the enforcement of statutory and contractual remedies in multi-party (construction) contracts.
- Liability in health care networks (Charlotte Zegveld).
  The research concerns the question whether social network analysis can be an aid / a tool with regard to allocating civil liability in cases of inadequate coherent health care provided by multiple health care providers.
- European private law and building contracts (Chris Jansen)

Example: Signals
Researcher: Eric Tjong Tjin Tai

Courts and legislators regularly make use of what economists call 'signals' as a substitute for a full investigation and assessment of the facts. This may be an effective manner to overcome the problem of transaction costs, incorporate specialist expertise and allow for private regulation, but may also have undesirable consequences, such as a dependence on the objectivity of external agencies who may have divided loyalties (as in the case of credit rating agencies). Nonetheless law cannot avoid relying to a certain extent on signals, within and without law. This research project will investigate signals as a form of regulation. The research will consist of a theoretical and a practical study. The theoretical part will connect economic insights into pros and cons of signaling with other disciplines. In particular connections will be sought with the philosophical topic of epistemic virtue. The practical part will consist of three case studies regarding signaling in private law:
- The use of signaling as a harmonisation instrument in EU directives on private law;
- Higher court supervision as a signaling system;
- Legal recognition of signals of private agencies.

Example: Construction networks
Researcher: Stéphanie van Gulijk

In Dutch construction projects several major accidents occurred the past decade causing great (im)material damages. The research reports published afterwards on constructive safety all indicate that a lack of communication between the building participants that were involved in these construction projects was one of the main causes of the accidents. Communication between construction parties needs to be improved urgently. However, the existing rules (in laws and standard conditions) that govern the legal relationship between Dutch construction parties are insufficiently equipped to respond to the existing lack of communication. This has two reasons, first these traditional rules are bilateral and therefore do not acknowledge the complex and multilateral character of the construction process. Secondly, they strongly focus on the distribution of responsibility and liability among the construction parties instead of establishing a culture in which parties are encouraged to act proactive before. As a result, in the construction industry too often ad hoc communication takes place instead of a structured communication process. Every party just feels responsible for the tasks that were specifically attributed to him, whereas the complexity of a construction process (which is project-based, has to coop with strict time- and cost frames, and where a lot of different participants have to work together in all kinds of (contractual) relations with all kinds of laws, rules and norms that apply) requires a mutual responsibility of all parties involved combines with multilateral obligations. The traditional statutory and standard form of contract provisions do no longer respond to the complex relationships and mutual obligations parties in construction networks have to cope with nowadays. Taking into account the nowadays multiparty and complex construction networks, interactive and multilateral communication has to be introduced. Therefore I will examine communication theories in order to apply communication-specific elements to the current Dutch laws and rules applicable on construction projects in order to improve communication between building participants and therewith improve constructive safety. In the future, such research on communication theories can easily spin off to other civil law area's in which contracting parties are closely related to each other in contractual networks, such as health care, franchise or distributor agreements that often reflect multi-party relations.

4. Tort law: the dynamics of tort law and society

Responsiveness: for whom, for what, and in what ways is private law open, and with which results?

The main objectives of tort law are to compensate those who have suffered personal injury (compensation function), deter future wrongdoing (deterrence function), and to appease and acknowledge those injured by wrongful conduct (acknowledgement function, [21] with compensation lying at the heart of tort law. At the same time, research has showed that victims, tort victims in particular, have other needs than merely financial needs. They, for example, desire information about what happened, want to prevent the mistake from happening again to themselves or others, or wish that wrongdoers apologize for their actions. Similarly, consumers may respond differently to duties to inform than tort law, and private law in general, expects or assumes them do to. With respect to financial products, for example, it is clear that current regulation does not prevent many consumers from making poor financial decisions. Perhaps consumers would decide differently if they would receive different types of information, which would prevent (tort) liability afterwards.

The studies and examples illustrate the tension that exists between tort law and the societal needs. They suggest that tort law's response to what society (or their citizens) need(s) may not be optimal, and should perhaps be fundamentally reformed in order to respond better to those needs. One way of thinking is that tort law, the fear of tort liability in particular, can positively or negatively affect individuals' or organizations' behavior. However, research carried out under the previous research program as well as previous empirical studies indicate that the effects of tort law on behavior of, for instance, the police regarding the maintenance of public order (Van Tilburg 2012), financial regulators (Dijkstra), and physicians (Van Dijck 2013, Van Dijck (in preparation)) are limited or even seemingly non-existent. Consequently, this research challenged one of tort law's underlying concept, that is that the fear of tort liability impacts persons' behavior and actions.

The proposed research challenges other classical ideas that lie at the heart of tort law, seeks alternatives and aims to test those alternatives, preferably empirically.

Research projects that will be conducted include:

- Apology as a Remedy (Van Dijck). Developing a theory of when apologies are successful and when they are not. The acknowledgement function is often represented through financial compensation (e.g. awarding damages in case of immaterial losses).[22] There is a growing recognition among legal scholars that the tort system should be fundamentally reformed in order to address plaintiffs' emotional needs in another way than through awarding tort damages.[23] One way is to allow parties to seek apologies and court to order apologies. This research seeks how to assess/evaluate apologies if a court would want to take it into consideration.
- 'Mea culpa' and civil justice: towards an apology-friendly tort system (Lianne Wijntjens). Many tort defendants (and potential tort defendants) cite the fear of litigation or liability

[21] A.S. Hartkamp & C.H. Sieburgh, Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Verbintenissenrecht. Deel IV*. De verbintenis uit de wet, Deventer: Kluwer 2011, nr. 18-20; J. Spier et. al., Verbintenissen uit de wet en schadevergoeding, Deventer: Kluwer 2012, nr. 9.

[22] For example, art. 6:106 BW. In the Netherlands the legislative proposal on 'affectionate damages' (Kamerstukken II 2000/01, 27 400 VI, nr. 7-, p.4, Wetsvoorstel Affectieschade) has been rejected in the First Chamber of the Dutch Parliament (Kamerstukken I 2009/10, 28 781, nr. 23, p. 1013-1014).

[23] See, for example, See among others C.E. Du Perron, 'Genoegdoening in het civiele aansprakelijkheidsrecht', in: A.C. Zijderveld, C.P.M. Cleiren & C.E. du Perron, Het opstandige slachtoffer. Genoegdoening in strafrecht en burgerlijk recht (Preadvies Nederlandse Juristenvereniging 2003, deel I), Deventer: Kluwer 2003 and G. van Maanen (ed.), De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed, Den Haag: Boom Juridische Uitgevers 2003.

as preventing them from apologizing, since judges may interpret apologies as evidence tending to prove liability if a case goes to court. In contrast, psychological research shows that apologies can have many positive effects for both the person offering it and the recipient. This research tests whether apologies impact the risk of an adverse liability determination. Second, this research seeks to identify existing legal instruments that can be used to prevent that apologies result in liability, and to determine if and how these legal instruments can be implemented in tort law.

- Analyzing apologies as a remedy (Van Dijck). Some countries, like the U.S., have apology protection laws. Other countries allow parties to seek an apology and courts to order them. This research, that relates to the previous research and builds upon it, identifies which remedy is preferable under which circumstances, while taking into consideration the effects apologies have on the receiver as well as on the harmdoer.
- Shifting patterns of justification in tort law (Marc Loth)
  How do we justify liability in tort law? Traditionally liability has played a compensatory role in social interaction; it served the compensation of damage suffered by one person caused by another, justified by a logic of corrective justice. This comprehensible picture has been distorted by an extensive proliferation of tort law to almost every segment of social life; from face to face contacts between individuals, and b2b contacts between corporations, to the liability of institutions like the State itself or even of transnational institutions.

  At the same time the logic of corrective justice has developed into an amalgam of diverging considerations, policies and practices. What are the major patterns in the justification of liability in different legal systems? And what shifts have taken place in those patterns? How are they to be assessed from different perspectives, such as that of unifying principles or cost efficient regulation? Can the answers to these questions bring some coherence in the justification of liability in tort law, of even set some limits to its ongoing proliferation?

  Research into these questions presupposes a comparitive and interdisciplinary approach. Comparitive, since the shifts in justification can best be assessed from the perspective of different legal systems. Interdisciplinary, because this involves research into the legal, moral and economic dimensions of unifying principles and policies.
- Preventing Liability for Consumer Credit Providers. An empirical legal analysis (Jurgen Braspenning). The consumer credit market is currently regulated by EU legislation[24] and by more specific rules of national legislation. The central concept consists of duties to inform, which predominantly consist of providing information about product characteristics. Despite the existing regulatory framework, consumer debt remains problematic. Nowadays, various alternatives to the current 'information paradigm' (e.g. nudging) have been suggested. However, hardly any of them is yet empirically tested within the context of consumer credit. This research analyzes how consumer decision making can be improved through modifications in current regulation in order to improve consumer decision making when it comes to financial products and to prevent claims against consumer credit providers.
- Supervisory Liability in Europe (Robert Dijkstra). The topic of financial supervisory liability is becoming increasingly important from a European perspective due to the ongoing process of 'Europeanisation' of financial law and supervision. This research analyzes how the current financial supervisory liability landscape in the European Union responds to a seemingly increasing pressure on supervisory regulators to improve their supervisory duties.
- Do Causality Rules Matter? (Christel van der Kop). Causality rules (art. 6:98 BW) are another foundation that underlie tort law. The fact that a number of causality rules, such as foreseeability and type of the loss (tangible / intangible), have been developed and have been applied suggests that the application of these criteria results in outcomes which are

[24] EC Directive 2008/48/EC (on consumer credit)), EC Directive 2006/73 (implementation directive MiFID), EC Directive 2004/39/EC (MiFID), and EC Directive 2005/29/EC (Unfair Commercial Practices directive).

more fair than when these criteria are not applied. The existence of causality rules at least suggests that they are considered to be adequate predictors of the outcome. It has, however, not been empirically tested whether the application of the causality rules actually produces different outcomes. This research project aims to identify whether or which causality rules impact case outcomes. For this, case law is systematically analyzed and experiments are conducted.

5. Banking, finance and insolvency

Responsiveness: for whom, for what, and in what ways is private law open, and with which results?

The research in the banking & finance team will focus on a number of topics that all have a close connection to the global debt- and banking crisis that still has not been resolved. The responsiveness of private law to the new reality[25] created by this crisis is an important question. Developments include:

- the continuing economic crisis which leads to further efforts from the European legislator in relation to banks and other financial institutions. The European legislature is slowly moving towards a banking union which, among other things means that national legal systems continue to be confronted with new legislation.
- continued efforts to modernize Dutch insolvency law as a tool for efficient restructuring of companies in financial difficulties. In times of economic downturn questions of the ability of insolvency legislation to restructure companies in financial difficulties often arise. This economic crisis is no exception.

The main question is whether Dutch private law will be able to be sufficiently responsive in light of these external developments. At the end of this research period, this question will be answered for a number of key areas of property and insolvency law with a special emphasis on the ability of private law to respond to regulatory developments where regulation (public law) slowly seems to invade the field of private law.

Research projects include:

- Financial Collateral arrangements (Yael Diamant):
Is there indeed an actually harmonized legal European regime, which averts high costs and severe delays for cross-border transactions and brings about legal certainty and predictability regarding the validity and enforceability of financial collateral arrangements?

- The instrumental use of mortgage rights against value destruction of commercial real estate to help maintain the stability of the financial system (Suzanne van Bergen):
Is there a need to modify the Dutch right of mortgage in order to meet the challenges of a financial crisis?

- Islamic finance (Omar Salah):
How can sukuk[26] transactions be structured under Dutch law and what legal issues arise when structuring sukuk under Dutch law?

- Insolvency of insurance undertakings (Noortje Lavrijssen):
Is there a need to amend insolvency law in relation to insurance undertakings from the perspective of consumers?

- Present and future claims under Dutch law (Jurian Snijders):
What are the criteria for determining whether a claim is present or future under Dutch law and can these criteria be improved form a systematic point of view?

- The balance between debtors and creditors in distressed situations (Reinout Vriesendorp):

[25] More regulation in the field of banking, the creation of a European banking union, stricter capital requirements, lower economic growth for at least the foreseable future, more alternative forms of finance, etc.
[26] Sukuk are bonds issued in accordance with Islamic law.

How does private law and insolvency law influence the respective positions and solutions of the debtor towards his creditors; which factors (legal or otherwise) determine the options for restructuring or liquidation inside or outside formal insolvency proceedings?

- Property and insolvency law after the crisis (Reinout Wibier):
The research tries to come to terms with the rapid changes in the financial world in relation to property & insolvency law and the regulatory framework surrounding the financial world. This includes changing perspectives on national insolvency law due to rapidly evolving supreme court judgements and the (mainly European driven) revolution in regulating financial institutions, primarily banks and insurance undertakings.

- Insolvency and multi-party construction contracts (Stéphanie van Gulijk/Reinout Wibier)
The project explores the effects of bankruptcy on different parties in multi-party construction contracts, and seeks to identify in which circumstances insolvency law and construction law are not attuned to dealing with these effects.

- What is 'responsible lending'? (Vanessa Mak)
The project assesses if and how the recently adopted EU Directive concerning consumer mortgage credit agreements (Directive 2014/17/EU) contributes to defining a common "responsible lending" policy in the varied contexts of the Member States' mortgage markets. It addresses that question by analysing how the Directive's rules will complement or change the regulatory regimes of the UK and the Netherlands.

III. Projected output and cross-fertilization between themes

We come back to the central questions of the Tilburg Institute of Private Law's research programme 2014-2018. To what extent, and in what ways, is private law responsive to globalization and its challenges? And to what extent, and in what ways, is it resistant to these new demands and aspirations? To what extent *should* private law be responsive to them?

Each of the research themes above will explore these questions, taking account of the catalogue of viewpoints that we identified: *for whom, for what, and in what ways is private law open, and with which results?*

The projects described in this document indicate specific areas for which we aim to research the responsiveness of private law in times of globalization. A broader aim of the programme is to try to identify common threads in the individual projects of the researchers and research teams. Cross-fertilization between themes may help us tease out similarities in the responsiveness of private law across different areas (contract, tort, property and insolvency, and family law) and topics (lawmaking, adjudication, the behaviour of private actors). The question then is, can we draw broader conclusions on the ways in which globalization impacts upon private law relationships? How 'open' is private law to the new challenges posed by globalization if we take account of each of the fields that we researched? In which ways is it resistant? And which conclusions can we draw on whether private law *should* be responsive to these challenges?

Framework for evaluation

To answer these questions the programme will need to develop a framework for evaluation. That framework should define on the basis of which criteria we decide that private law – in specific areas – is regarded as responsive or resistant, and on which basis one can say that it should be responsive. Considering the feasibility of the programme, we do not intend to come up with an all-inclusive new theory or perspective. The aim is more modest.

Foremost, we seek to identify specific features, or intimations, of responsiveness that can be observed in current law. As a starting point, the criteria for assessing whether private law is responsive can be assessed on the basis of the four viewpoints. The questions for 'whom' and for 'what' private law is open translate into an exploration of institutional changes and substantive legal changes in response to the challenges of globalization. Where changes can be observed, for example to facilitate new developments or to adapt private law according to the needs of a globalized and more complex society, private law can be regarded as responsive. Outcomes may also show resistance to change in specific areas. The other two viewpoints, the ways in which private law is open and the results of responsiveness, can – for as far as can be determined at this point in time – result in an overview of the outcomes of responsiveness in private law as observed in current law.

Projected output

Although the output of the research will have to be awaited, we can identify a number of lines of research that will bring the different themes together. We list them here with reference to the catalogue of viewpoints regarding the 'openness' of private law:

- *For whom?*
  Relevant is here is the openness of private law for (a) transnational lawmakers, (b) regulatory institutions, (c) self-regulation, (d) national and supranational courts, (e) behaviour and practices of private actors. In the research themes described above, we see that Dutch private law is increasingly confronted with these various actors and institutions.

Common threads can be discerned in at least two aspects: the involvement of these actors in the *practice* of private law and their involvement in the *study of private law* as a discipline, or its methodology.

With regard to the practice, we can observe a proliferation of actors in lawmaking in private law with a particular new relevance for self-regulation and transnational lawmakers (theme 1 on lawmaking in a pluralist legal order; theme 3 on contracts and networks; and theme 5 on banking, finance and insolvency). In addition, globalization asks (highest) courts to take on new approaches in their role as transnational courts (theme 2 on responsiveness of courts, which relates to theme 1 on lawmaking and pluralism). Furthermore, the increasing complexity of private law relationships asks courts and lawmakers to take account of the needs and interests of private actors (also theme 2, as well as theme 3 on contracts and networks, and theme 4 on tort law and society). Relevant questions throughout the programme, therefore, are which actors should be considered as part of lawmaking and adjudication in private law in times of globalization and whether it is possible to discern similar patterns for the roles of actors in each of the fields considered (e.g. contract, tort and property law) or whether there are significant differences. It may be, for example, that private actors have a greater role in lawmaking through self-regulation in contract law than in other areas.

From the disciplinary perspective, globalization and the increasing complexity of private law relationships require that new solutions are informed by a range of factors, which include current positive law but also other practices and values. Private law can therefore only be studied from an interdisciplinary point of view. Not only does this have an impact on the ways in which private law should be considered 'open' but also on the question for whom it is open. The proposed research seeks alternatives for existing norms and rules and aims to test those alternatives, in some instances empirically (in particular theme 4 on tort law and society). That requires study of the behaviour and practices of private actors. Relevant questions from a methodological point of view are which actors and which practices should be taken into account in adjudication and lawmaking, and how should their behaviour be translated into norms, rules, regulation or other values. These questions are relevant for each of the research themes in the programme.

- *For what?*
  In this context we discuss its openness for (a) other legal systems, (b) transnational law (European law), (c) other systems of beliefs and values, and (d) other practices, traditions and social developments. As we study private law 'in context', the interplay between rules of private law and other practices or beliefs and values will be present throughout. In this regard, it is particularly significant to see how responsive – or how resistant - Dutch private law as codified in legislation and interpreted by the courts is to other sources of norms, practices and values. We address these questions with regard to lawmaking (e.g. the influence of transnational law and self-regulation) and adjudication. As with the question for whom private law is 'open', different degrees of openness to other legal norms, practices or values may be observed for different fields of private law.

- *In what ways?*
  Private law can be influenced on different levels, namely by its (a) concepts: legal concepts have open texture, this is the possibility to develop their meaning with changing circumstances; (b) rules: legal rules can be interpreted in various ways, depending on context; (c) principles: legal principles facilitate the flexibility of a legal system, at the same time retaining its leading motives; (d) the interplay of the levels of a multi-layered legal system: compare the various instruments of EU law and their effects on national law. The programme focuses on ways in which private law is open from a *substantive* perspective and from an *institutional* perspective.

  With regard to substantive private law, the interplay between different levels of regulation (point d) will be a connecting question throughout the programme. A particular

question to be answered is whether alternative strategies – besides top-down harmonization or spontaneous integration of legal norms – can be devised that can improve legal certainty for private parties in times of globalization (theme 1 on lawmaking in a pluralist legal order). More specific questions on the interplay between Dutch law and other concepts, rules and principles come up in the research for specific areas of private law (contract, tort, property and family law) and in the way that courts handle their function as interpreters of transnational law (theme 2 on responsiveness of courts).

From an institutional perspective, globalization as well as the increasing complexity of private law relationships have an effect on the way that highest courts function as transnational courts and on the way that proceedings are conducted to take account of the needs and interests of parties (theme 2 on responsiveness of courts).

- *With which results*?

Responsiveness of private law can result in (a) the unification of norms, (b) harmonization, (c) coordination, (d) co-existence, (e) conflicting norms and principles. The research programme will not be able to predict the outcome of processes of responsiveness in private law, and will not seek to do so. It can however formulate views on the desirability of each of the various results, their feasibility, and their potential effects on the system and practice of private law. The question that we address under this heading, therefore, is if private law is responsive to the challenges of globalization, which form that responsiveness can and should take.

Again, these questions are relevant for each part of the programme. They will be addressed from the perspective of private law theory (theme 1 on lawmaking in a pluralist legal order; theme 3 on contracts and networks), the perspective of comparative law (all themes), and from the perspective of interdisciplinary and empirical research (in particular theme 4 on tort law and society, but also theme 1 on lawmaking and theme 2 on courts).