Credit rating agency liability in Europe: Rating the combination of EU and national law in rights of redress

Verheij, D.J.

Author: Verheij, D.J.
Title: Credit rating agency liability in Europe: Rating the combination of EU and national law in rights of redress
Issue Date: 2021-01-28

Credit rating agency liability in Europe

Credit rating agency liability in Europe

Rating the combination of EU and national law in rights of redress

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op donderdag 28 januari 2021
klokke 16.15 uur

door

Dorine Johanna Verheij

geboren te Leiden

in 1991

Promotoren: prof. mr. drs. M. Haentjens
prof. mr. A.G. Castermans

Promotiecommissie: prof. mr. W.A.K. Rank
mr. dr. L.M. van Bochove
prof. mr. S.C.G. van den Bogaert
prof. J. Cartwright (University of Oxford, Verenigd Koninkrijk)
prof. dr. iur. U.G. Schroeter (Universität Basel, Zwitserland)

Omslagontwerp: Primo!Studio, Delft
Opmaak binnenwerk: Anne-Marie Krens – Tekstbeeld – Oegstgeest

ISBN 978-94-6236-144-7
ISBN 978-94-5454-923-9 (e-book)
NUR 828

www.elevenpub.com

Table of contents

ABBREVIATIONS XIII

1 INTRODUCTION 1

1.1 Context 1
1.2 Civil liability of credit rating agencies 2
1.3 Research questions
1.4 Methodolody 6
1.5 Scope and demarcations 9
1.6 Relevance 10
1.7 Relationship to other research 11
1.8 Outline 14

2 INFLUENCE OF EU LAW ON CIVIL LIABILITY 17

2.1 Introductory remarks 17
2.2 Competence of the European Union 18
2.3 Effects of EU law in national legal orders 21
2.3.1 Direct effect 21
2.3.2 Regulations 23
2.3.2.1 Direct applicability does not entail direct effect 23
2.3.2.2 'Sufficiently clear, precise and unconditional' 24
2.3.2.3 Provisions requiring additional (national) measures 25
2.3.3 Directives 29
2.4 Enforcement of EU law 32
2.4.1 Rights, remedies and procedures 32
2.4.2 National procedural autonomy 33
2.4.3 Equivalence and effectiveness 33
2.5 Influence of EU law on civil liability 34
2.5.1 Categorisation 34
2.5.2 Situation 1: Absence of EU law provisions on civil liability 36
2.5.2.1 Setting the scene 36
2.5.2.2 Regulations 37
2.5.2.3 Directives 41
2.5.3 Situation 2: EU law provisions on (the application of) national civil liability regimes 49
2.5.3.1 Setting the scene 49
2.5.3.2 EU law provisions (de facto) requiring application of national civil liability regimes 50

2.5.3.3 EU law provisions creating a right of redress under national law 55
2.5.4 Situation 3: EU law provisions creating directly effective rights to compensation or damages 58
2.5.4.1 Setting the scene 58
2.5.4.2 A directly effective right to damages with reference to national law: Art. 35a CRA Regulation 59
2.5.4.3 Autonomous right to compensation: Art. 82 GDPR 67
2.5.5 Overarching influence of effectiveness 68
2.6 Concluding remarks 71

3 CREDIT RATING INDUSTRY AND ITS REGULATION 75
3.1 Introductory remarks 75
3.2 Historical perspective credit rating industry and civil liability 76
3.2.1 Origins: credit reporting agencies, financial press and the first credit rating agencies 76
3.2.2 Expansion: regulatory purposes, issuer pays and structured finance 78
3.2.3 Inaccurate credit ratings and (self-)regulation 80
3.2.4 Global financial crisis, regulatory frameworks and liability threats 82
3.2.4.1 Financial crisis 82
3.2.4.2 Possible causes of inaccurate structured finance ratings 84
3.2.4.3 Aggravated effects due to overreliance 85
3.2.4.4 Legal developments 86
3.2.5 Recovery and settlements 91
3.3 Credit ratings 94
3.3.1 Character and types 94
3.3.2 Assignment of credit ratings 95
3.3.2.1 Formal proceedings 95
3.3.2.2 Rating methodologies 96
3.3.2.3 Structured finance products 98
3.3.3 Functions 100
3.3.4 Effects 102
3.3.4.1 Credit ratings, credit risk and investor compensation 102
3.3.4.2 Empirical evidence bond and structured finance markets 104
3.3.4.3 Empirical evidence from equity markets 106
3.4 EU regulatory framework 107
3.4.1 Objectives 107
3.4.2 Preliminary provisions 108
3.4.2.1 Scope of application 108
3.4.2.2 Reducing overreliance 110
3.4.3 Substantive rules 111
3.4.4 Public enforcement by ESMA 112
3.5 Private enforcement of Article 35a 114
3.5.1 Legislative history 114
3.5.1.1 Situation prior to Article 35a 114
3.5.1.2 Public Consultation on Article 35a 114

3.5.1.3 Impact Assessment 116
3.5.1.4 EC Proposal & amendments 117
3.5.2 Conditions for civil liability 118
3.5.3 Stakeholders defined and scope of application 119
3.5.3.1 'Credit rating agency' 119
3.5.3.2 'Issuer' 121
3.5.3.3 'Investor' 121
3.6 Factual perspective on credit rating agency liability 126
3.6.1 Four basic factual situations 126
3.6.2 Loss suffered by issuers 127
3.6.3 Loss suffered by investors 129
3.7 Concluding remarks 132

4 PRIVATE INTERNATIONAL LAW ASPECTS 135
4.1 Introductory remarks 135
4.2 Characterisation 137
4.3 Jurisdiction 138
4.3.1 Legal framework 138
4.3.2 Formal, material and temporal scope of Brussels I Regulation (recast) 139
4.3.3 Jurisdiction agreements 140
4.3.3.1 Remarks in advance 140
4.3.3.2 Jurisdiction agreements in favour of courts of Member States 141
4.3.3.3 Jurisdiction agreements in favour of courts of third countries 147
4.3.4 General ground for jurisdiction 153
4.3.5 Special ground for jurisdiction 154
4.3.5.1 Matters relating to tort 154
4.3.5.2 Handlungsort 156
4.3.5.3 Erfolgsort – financial loss 159
4.3.5.4 Erfolgsort – reputational loss 174
4.4 Applicable law – Rome II Regulation 177
4.4.1 Scope of application 177
4.4.2 Choice of law agreement 181
4.4.3 General rule 182
4.4.3.1 Financial loss 182
4.4.3.2 Reputational loss 186
4.4.4 Escape clause 187
4.5 Recognition and enforcement 187
4.5.1 A small sidestep to recognition and enforcement 187
4.5.2 Enforcement within EU 188
4.5.3 Depletion of assets in the EU 188
4.6 Concluding remarks 191

5 INTERPRETATION AND APPLICATION ARTICLE 35A UNDER DUTCH, FRENCH, GERMAN AND ENGLISH LAW 195
5.1 Introductory remarks 195
5.2 Methodology 196
5.2.1 Approach 196
5.2.1.1 Three parts 196
5.2.1.2 Part 2: Comparison through functional method 196
5.2.1.3 Part 3: Comparison through terms and subjects 198
5.2.1.4 Presentation of the legal comparison 199
5.2.2 Legal systems involved 200
5.2.3 Challenges in the field of legal sources and language 202
5.3 Terms and subjects of Article 35a 204
5.3.1 Article 35a (1) 204
5.3.1.1 Preliminary considerations 204
5.3.1.2 'Intentionally' or 'with gross negligence' 210
5.3.1.3 'Impact' and 'caused to', including claimant-specific requirements 211
5.3.1.4 Suffering 'damage' and claiming 'damages' 217
5.3.2 Art. 35a (3) – Limitations of liability in advance 219
5.3.3 Prescription 221
5.4 Dutch law 222
5.4.1 National private law context 222
5.4.2 National rules on credit rating agency liability 224
5.4.2.1 Little attention to credit rating agency liability 224
5.4.2.2 In the presence of a contractual relationship – issuers & investors 225
5.4.2.3 In the absence of a contractual relationship 226
5.4.3 Article 35a (1) 236
5.4.3.1 'Intentionally' or 'with gross negligence' 236
5.4.3.2 'Impact' and 'caused to', including claimant-specific requirements 245
5.4.3.3 Suffering 'damage' and claiming 'damages' 256
5.4.4 Article 35a (3) Limitations of liability in advance 263
5.4.4.1 General system 263
5.4.4.2 Limitations of liability in relation to issuers and investors 268
5.4.5 Prescription of claims 269
5.4.6 Concluding remarks 271
5.5 French law 272
5.5.1 National private law context 272
5.5.2 National rules on credit rating agency liability 275
5.5.2.1 Liability regime prior to 2018 275
5.5.2.2 In the presence of a contractual relationship – investors & issuers 282
5.5.2.3 In the absence of a contractual relationship – investors & issuers 283
5.5.3 Article 35a (1) 284
5.5.3.1 'Intentionally' or 'with gross negligence' 284

5.5.3.2 'Impact' and 'caused to', including claimant-specific requirements 287
5.5.3.3 Suffering 'damage' and claiming 'damages' 294
5.5.4 Article 35a (3) Limitations of liability in advance 303
5.5.4.1 General system 303
5.5.4.2 Limitations of liability in relation to issuers and investors 305
5.5.5 Prescription 306
5.5.6 Concluding remarks 307
5.6 German law 308
5.6.1 National private law context 308
5.6.2 National rules on credit rating agency liability 310
5.6.2.1 Much attention to credit rating agency liability 310
5.6.2.2 In the presence of a contractual relationship 311
5.6.2.3 In the absence of a contractual relationship 312
5.6.3 Article 35a (1) 327
5.6.3.1 'Intentionally' or 'with gross negligence' 327
5.6.3.2 'Impact' and 'caused to', including claimant-specific requirements 330
5.6.3.3 Suffering 'damages' and claiming 'damages' 343
5.6.4 Article 35a (3) Limitations of liability in advance 348
5.6.4.1 General system 348
5.6.4.2 Limitations of liability in relation to issuers 351
5.6.4.3 Limitations of liability in relation to investors 353
5.6.5 Prescription of claims 354
5.6.6 Concluding remarks 356
5.7 English law 358
5.7.1 National private law context 358
5.7.2 National rules on credit rating agency liability 361
5.7.2.1 Approach UK Implementing Regulations 361
5.7.2.2 In the presence of a contractual relationship – issuers & investors 362
5.7.2.3 In the absence of a contractual relationship 362
5.7.3 Article 35a (1) 374
5.7.3.1 'Intentionally' or 'with gross negligence' 374
5.7.3.2 'Impact' and 'caused to', including claimant-specific requirements 375
5.7.3.3 Suffering 'damage' and claiming 'damages' 390
5.7.4 Article 35a (3) Limitations of liability in advance 398
5.7.4.1 Limitations of liability towards issuers – solicited ratings 398
5.7.4.2 Limitations of liability towards issuers – unsolicited ratings 398
5.7.4.3 Limitations of liability towards investors – with and without subscriptions 399
5.7.5 Prescription of claims 401
5.7.6 Concluding remarks 401
5.8 Comparison 403
5.8.1 Remarks in advance 403
5.8.2 National bases for civil liability – comparison 404
5.8.2.1 In the presence of a contractual relationship 404

5.8.2.2 In the absence of a contractual relationship 405
5.8.3 Article 35a (1) CRA Regulation – comparison 407
5.8.3.1 'Intentionally' or 'with gross negligence' 407
5.8.3.2 'Impact' and 'caused to', including claimant-specific requirements 410
5.8.3.3 Suffering 'damage' and claiming 'damages' 419
5.8.4 Article 35a (3) CRA Regulation – Limitations of liability in advance – comparison 424
5.8.5 Prescription of claims (comparison) 428
5.8.6 Conclusions related to the legal comparison 429
5.9 Concluding remarks 432

6 OBSERVATIONS AND RECOMMENDATIONS 435
6.1 Introductory remarks 435
6.2 Normative framework 436
6.3 Observations within the normative framework 440
6.3.1 Limited added value Article 35a 440
6.3.1.1 Added value in theory, limited added value in practice 440
6.3.1.2 Narrow scope of application and stringent conditions 442
6.3.1.3 Structure 444
6.3.1.4 Unintended effect: decreased issuer and investor protection under French law 449
6.3.2 Private International Law rules leave uncertainty 450
6.3.2.1 Focus on three main issues 450
6.3.2.2 Exclusive jurisdiction clauses in favour of third country courts 450
6.3.2.3 Erfolgsort of financial loss 453
6.3.2.4 Erfolgsort of reputational loss 457
6.3.3 Uncertainty relating to interpretation and application terms Article 35a 457
6.3.3.1 Sources of uncertainty 457
6.3.3.2 Imprecise drafting & unclear status terms 458
6.3.3.3 Friction 460
6.3.3.4 Uncertain application of national legal concepts 462
6.3.4 Little convergence 463
6.3.4.1 Differences between four legal systems investigated 463
6.3.4.2 Continuing risks of regulatory arbitrage 466
6.4 No adequate right of redress 467
6.5 Recommendations 468
6.5.1 Remarks in advance 468
6.5.2 Possible structures of EU provisions on civil liability 469
6.5.2.1 Three options 469
6.5.2.2 Option (a) Requiring application of national civil liability regimes 470
6.5.2.3 Option (b) Imposing detailed obligations upon Member States 471

6.5.2.4 Option (c) Extending Article 35a 472
6.5.2.5 Competence, subsidiarity and proportionality 473
6.5.3 Private International Law rules 475
6.5.3.1 Continuing importance PIL 475
6.5.3.2 Limit validity exclusive jurisdiction clauses third country courts 475
6.5.3.3 Relevant connectors and location of financial loss 477
6.5.4 Further substantive guidance 487
6.5.4.1 More guidance, in a balanced manner 487
6.5.4.2 Reasoning from justification for civil liability and duty of care credit rating agencies 488
6.5.4.3 Defining standard of care and attribution (issuer claims and investor claims) 490
6.5.4.4 Amending requirement of reasonable reliance (investor claims) 491
6.5.4.5 Linking credit rating agency's duty and the recoverable loss of investors (investor claims) 492
6.5.4.6 Limitations of civil liability in advance (issuer claims and investor claims) 496
6.6 Rating the suitability of Article 35a's template for private enforcement 497
6.7 Concluding remarks 499

SUMMARY 505
SAMENVATTING (DUTCH SUMMARY) 513
REFERENCES 523
INDEX 571
CURRICULUM VITAE 577

Abbreviations

AIFMD	Directive 2011/61/EU on Alternative Investment Fund Managers
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BW	Burgerlijk Wetboek (Dutch Civil Code)
CC	Code Civil (French Civil Code)
CJEU	Court of Justice of the European Union
CPDO	Constant proportion debt obligation
CRA I	Regulation (EG) no. 1060/2009 on credit rating agencies
CRA II	Regulation (EU) no. 513/2011 on credit rating agencies
CRA III	Regulation (EU) no. 462/2013 on credit rating agencies
CRA Regulation	Regulation on credit rating agencies (consolidated version)
CRD IV	Capital Requirements Directive (Directive 2013/36/EU)
CRR	Capital Requirements Regulation (Regulation (EU) no. 575/2013)
ECJ	European Court of Justice
ESMA Regulation	Regulation (EU) no. 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority)
ESMA	European Securities and Markets Authority
GDPR	General Data Protection Regulation (EU no. 2016/679)
GG	Grundgesetz
IOSCO	International Organization of Securities Commissions
MiFID II	Directive 2014/65/EU on markets in financial instruments II
NN	Nationale-Nederlanden
NRSRO	Nationally Recognized Statistical Rating Organization
PEPP-Regulation	Regulation (EU) no. 2019/1238 on a pan-European Personal Pension Product
PEPPs	Pan-European Personal Pension Products
PRIIPs Regulation	Regulation (EU) no. 1286/2014 on key information documents for packaged retail and insurance-based investment products
PRIIPs	Packaged Retail and Insurance-based Investment Products
PSD II	Payment Services Directive II (Directive (EU) 2015/2366)
Rv	Wetboek van Burgerlijke Rechtsvordering
SPV	Special purpose vehicle
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UCITS V	Directive on Undertakings for Collective Investment in Transferable Securities (Directive 2014/91/EU)
UCTA 1977	Unfair Contract Terms Act 1977

Wft	Wet op het Financieel Toezicht
WpHG	Wertpapierhandelsgesetz
WpÜG	Wertpapiererwerbs- und Übernahmegesetz
ZPO	Zivilprozessordnung

1 Introduction

1.1 Context

The global financial crisis wreaked havoc on European financial markets and, more generally, on the welfare of the European Member States. Malpractices within the financial sector affected the real economy and duped states, companies and households. In the aftermath of the financial crisis, the Union legislature[1] developed rules addressing the parties that were considered responsible for the crisis in order to stabilise the financial markets and to avoid another financial crisis. These European rules address a wide range of subjects and differ greatly in character. Some of them have established stricter requirements for market participants, as the rules for banks[2] and the financial markets[3] do. Others focus, for example, on the competences of European supervisors.[4] Most of the European rules have a 'public law character', i.e. they focus on the relationship between the state and individuals (the market participants addressed by the rules) and they are to be enforced by financial

1 To describe the European Union legislature, European Union law etc., this dissertation uses the terms 'European', 'EU' and 'Union' interchangeably.

2 *E.g.* the Capital Requirements Regulation (CRR, in full: Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012) and the ancillary Capital Requirements Directive (CRD IV, in full: Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC).

3 *E.g.* the Directive on markets in financial instruments II (MiFID II, in full: Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU), the Regulation on markets in financial instruments (MiFIR, in full: Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012) and the European Market Infrastructure Regulation (EMIR, in full: Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories).

4 *E.g.* the regulation establishing ESMA: Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

regulators. In addition, some of these European rules influence private law relationships (between individuals, i.e. private parties).[5]

More specifically, the Union legislature introduced rules on civil liability that private parties can enforce. Consequently, private parties (e.g. issuers and investors) can sue the institution responsible for loss they suffered based on EU law, or are explicitly entitled to do so by EU law on the basis of national law.[6] This possibility represents a radical change, as non-contractual liability law and civil liability rules traditionally belonged to the competence of the Member States. A pan-European tendency can be noted towards this type of private enforcement[7] and one wonders whether the first steps to a unified civil liability regime have been taken. This study investigates the private enforcement of EU law through rights of redress established at the EU level, mainly within the financial sector. The research concentrates on the most prominent example of a pan-European rule on civil liability in the context of the financial sector: the legal basis for the civil liability of credit rating agencies under Article 35a of the Regulation on credit rating agencies ('CRA Regulation'[8]).

1.2 Civil liability of credit rating agencies

Credit rating agencies, such as Moody's Investors Service, Standard & Poor's and Fitch Ratings, produce credit ratings on the creditworthiness of issuers of debt (including states, companies, financial institutions) and debt itself (for example, fixed-income financial instruments). They perform the role of information intermediaries, aiming to bring together supply and demand of capital on the financial markets by providing information on the creditworthiness

5 *E.g.* provisions under the Prospectus Regulation (in full: Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC), MiFID II and the PRIIPs Regulation (in full: Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)).

6 *E.g.* Art. 35a (1) CRA Regulation (introduced by Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies), Art. 11 PRIIPs Regulation and Art. 11 (2) Prospectus Regulation.

7 This statement is based on the examples of EU law provided in section 2.5 of this dissertation.

8 This dissertation uses the term 'CRA Regulation' to refer to provisions in the 'consolidated' version of Regulation (EG) no. 1060/2009 (CRA I), Regulation (EU) no. 513/2011 (CRA II) and Regulation (EU) no. 462/2013 (CRA III). It specifically uses the terms 'CRA I Regulation', 'CRA II Regulation' and 'CRA III Regulation' to refer to Recitals and specific versions of the CRA Regulation.

of issuers.[9] The American journalist Friedman once described the power of credit rating agencies as follows:

> 'There are two superpowers in the world today in my opinion. There's the United States and there's Moody's Bond Rating Service. The United States can destroy you by dropping bombs and Moody's can destroy you by downgrading your bonds. And believe me, it's not clear sometimes who's the more powerful.'[10]

As this quote expresses, credit rating agencies are considered to have an important influence on financial markets. Credit ratings are used by investors, issuers and regulators and can impact the funding costs of a rated entity.[11] During the financial crisis, the great relevance of accurate credit ratings became clear. In the years prior to the financial crisis, credit rating agencies attached inaccurate credit ratings to the structured finance products that eventually triggered the financial crisis. The products were structured in such way that credit rating agencies assigned AAA ratings to them, indicating that they were creditworthy investments with a relatively low chance of default.[12] But, at the beginning of the crisis, the 'safe' AAA rated investments turned out to be worthless, and credit rating agencies were accused of having sent signals that were too positive with regard to the creditworthiness of this type of financial products to the financial markets.[13] The US Financial Inquiry Commission even concluded that 'credit rating agencies were essential cogs in the wheel of financial destruction', because the structured finance products could not be marketed and sold without 'their seal of approval'.[14]

During the financial crisis, the Union legislature developed rules regarding credit rating agencies. Until 2009, credit rating agencies in the European Union had solely been regulated by the Code of Conduct of the International Organization of Securities Commissions (self-regulation). Although the main credit rating agencies signed up for this Code, its influence on the behaviour of credit rating agencies turned out to be marginal. One of the former European Commissioners for Internal Market and Services even called the Code a 'toothless tiger'.[15] In response to the malpractices of credit rating agencies, the first

9 *Cf. e.g.* Darbellay 2013, pp. 37-39.
10 Interview comment from *The News Hour with Jim Lehrer: Interview with T.L. Friedman* (PBS television broadcast, 13 February 1996).
11 As demonstrated by multiple empirical studies, section 3.3.4.
12 Baumgartner 2015, pp. 492-493.
13 *Cf.* SEC(2008) 2745, p. 4.
14 The Financial Crisis Inquiry Report 2011, p. xxv. *Cf. also* The Financial Crisis Inquiry Report 2011, pp. 44 ff. and 146.
15 Speech former European Commissioner for Internal Market and Services C. McCreevy, press conference on credit rating agencies, 12 November 2008, available at http://europa.eu/rapid/press-release_SPEECH-08-605_en.htm?locale=EN, last accessed at 31 August 2019. *Also* Boersma 2010, p. 15, fn. 44.

Regulation on credit rating agencies entered into force in 2009 and was amended in 2011 and, again, in 2013.[16] In broad terms, the objectives of the first Regulation on credit rating agencies (CRA I – 2009) were to mitigate conflicts of interests, to ensure rating quality and to enhance transparency in the rating process.[17] The amendments of the Regulation on credit rating agencies in 2013 aimed mainly to reduce the use of credit ratings for regulatory purposes,[18] to reduce overreliance on credit ratings,[19] to further enhance the independence and integrity of credit rating agencies[20] and to increase competition between credit rating agencies.[21]

One of the amendments made to the Regulation on credit rating agencies in 2013 introduced a new provision, which aimed to establish an adequate right of redress 'for investors who have reasonably relied on a credit rating issued in breach of Regulation (EC) No 1060/2009 as well as for issuers who suffer damage because of a credit rating issued in breach of Regulation (EC) No 1060/2009'.[22] To that end, the third version of the CRA Regulation has introduced a legal basis for the civil liability of credit rating agencies under Article 35a (1) CRA Regulation. This provision reads:

> 'Where a credit rating agency has committed, intentionally or with gross negligence, any of the infringements listed in Annex III having an impact on a credit rating, an investor or issuer may claim damages from that credit rating agency for damage caused to it due to that infringement.'

Hence, Article 35a (1) CRA Regulation provides issuers and investors with the opportunity to hold a credit rating agency liable if it has committed – intentionally or with gross negligence – one of the infringements listed in Annex III of the Regulation. As indicated above, this European legal basis for the civil liability of credit rating agencies forms the main topic of this dissertation.

Although the provision for civil liability under Article 35a CRA Regulation forms only a small part of the European regulatory framework on credit rating agencies, the provision has drawn the attention of legal scholars because of its remarkable structure.[23] As noted in section 1.1, in general, rules addressing the parties responsible for the financial crisis are to be enforced by financial regulators. In contrast, Article 35a CRA Regulation introduced a basis for civil liability at the European level, which must be enforced by private parties. As

16 Regulation (EG) no. 1060/2009 (CRA I), Regulation (EU) no. 513/2011 (CRA II) and Regulation (EU) no. 462/2013 (CRA III), respectively.
17 *As summarised by* Recital 1 CRA III Regulation.
18 Recital 8 CRA III Regulation.
19 Recital 9 CRA III Regulation.
20 Recital 10 CRA III Regulation.
21 Recital 11 CRA III Regulation.
22 Recital 32 CRA III Regulation.
23 On the relationship to other research on the civil liability of credit rating agencies, section 1.7.

noted briefly above, the introduction of a right of redress at the EU level in the context of the financial sector is ground-breaking, because civil liability and, in particular, non-contractual liability law, has been one of the legal areas that traditionally belonged to the competence of Member States. From this perspective, Article 35a (1) CRA Regulation might eventually represent a change in the balance of power between the European Union and the Member States.

1.3 RESEARCH QUESTIONS

Article 35a (1) CRA Regulation represents the most prominent example of a right of redress established at the EU level within the financial sector. During the course of this research, the Union legislature introduced more rules on civil liability that private parties can enforce, and it is expected that more private law rights of redress will be introduced at the EU level over time. In November 2014, for instance, the Union legislature introduced rules on civil liability under Article 11 of the Regulation on key information documents for packaged retail and insurance-based investment products (PRIIPs).[24]

Research with regard to the exact interpretation, application and effects of European rights of redress is needed, especially because Article 35a CRA Regulation is clouded by questions and uncertainties. These questions and uncertainties might partly explain why, even though Article 35a CRA Regulation was introduced in 2013, up to now the provision has not often been used in legal proceedings. Some of the questions and uncertainties are caused by the fact that whereas a European rule on civil liability has been introduced for credit rating agencies, general tort law has not been harmonised at the EU level. Under Article 35a (4) CRA Regulation, the national laws of the Member States remain of crucial importance to interpret and apply the elements of Article 35a (1) CRA Regulation that were not defined. Consequently, essential elements of Article 35a (1) CRA Regulation such as 'gross negligence', 'damage' and 'reasonably relied' can be interpreted and applied differently depending on the applicable national law. As a result, an investor whose claim is governed by French law might have a high chance of success, while an investor whose claim is governed by English law might have little chance of success – although both claims are based on the same, pan-European provision. An in-depth analysis of Article 35a (1) CRA Regulation and of how this provision will function within different national legal systems is needed, to be able to conclude whether this European legal basis for civil liability will achieve its goal, i.e. whether it has created an adequate right of redress for investors and issuers.[25]

24 *On this example and for other examples,* Chapter 2.
25 Recital 32 CRA III Regulation.

This dissertation will search for an answer to the following main questions:

> *Will the post-crisis goal of an adequate right of redress for issuers and investors against credit rating agencies be achieved whilst Article 35a CRA Regulation has to be interpreted under various systems of national law? Should civil liability be regulated differently based on that analysis and, if so, in what manner?*

In order to answer these main questions, this study will thoroughly investigate the legal basis for civil liability established by Article 35a CRA Regulation and will also investigate other ways in which European rules influence private law relationships and (national) non-contractual liability law. The following sub-questions will be analysed:

1. *In which ways does EU law influence (national) rules on civil liability?*
2. *Which issues occur, if any, in determining the competent court and the applicable national law in respect of claims based on Article 35a CRA Regulation?*
3. *How will the conditions of Article 35a CRA Regulation be interpreted and applied under Dutch, French, German and English law?*
4. *If differences exist between the national interpretations and applications, to what extent could such differences lead to different outcomes in decisions on civil liability claims based on Article 35a CRA Regulation?*
5. *In light of the answers given to sub-questions 2-4, should Article 35a CRA Regulation be amended? If so, in what ways?*

1.4 METHODOLODY

A dissertation on the influence of EU law on (national) rules of civil liability and, more in particular, on the civil liability of credit rating agencies under Article 35a CRA Regulation, can involve many different aspects. This study approaches these topics from a legal perspective, with a focus on the interaction between EU law and national private law. To that end, the research combines the legal disciplines of EU law, Private International Law, private law and regulatory law. The research is of a descriptive and normative nature: it provides an in-depth analysis of the current functioning, interpretation and application of Article 35a CRA Regulation, and determines how the current European civil liability regime for credit rating agencies could be improved from the perspective of a normative framework.

As to answering sub-questions 1-4, research of a descriptive nature is needed. The four sub-questions require an analysis of the European influence on (national) non-contractual liability law and an in-depth analysis of Article 35a CRA Regulation in particular. These analyses will be made in accordance with the traditional legal method, namely by investigating European legislation, Member States' statutory law, European and national case law and legal academic doctrine. A significant part of this study is dedicated to a legal comparison of the interpretation and application of Article 35a CRA Regulation under Dutch, English, French and German law. English, French and German law were selected, because these legal systems are considered representative for the European Union. French and German law historically form the basis of the other European legal systems, and therefore it is useful to investigate whether major differences between these civil law systems arise in the interpretation and application of Article 35a CRA Regulation. The legal comparison involves also English law, because the English common law system functions differently from the civil law systems of the other Member States, in particular in the area of tort law. Finally, as a Dutch lawyer, the author has a home-country preference for Dutch law, since the Dutch legal system and its sources are the most accessible. The exact methodology for the legal comparison is explained in section 5.2.

Upon the completion of this research on 3 September 2019, the legal consequences of Brexit were still uncertain. Nevertheless, it was decided to include English law in this dissertation for two reasons. First, based on Article 3 (1) in conjuction with Article 3 (2) (a) European Union (Withdrawal) Bill, the Regulations on credit rating agencies will form part of English domestic law, so that Article 35a CRA Regulation and the national UK Implementing Regulations[26] will continue to exist at least for some time after Brexit.[27] One should note, however, that English courts are no longer bound by decisions of the Court of Justice of the European Union (hereafter 'CJEU'[28]) after Brexit Day.[29] Second, the English approach to Article 35a CRA Regulation differs from the other national laws investigated and demonstrates how Member States can use their discretion under Article 35a CRA Regulation to limit its scope of application. Therefore, the English interpretation and application of Article 35a CRA Regulation forms an interesting object of study.

Sub-question 5 aims to investigate possible improvements to Article 35a CRA Regulation and is of a normative nature. This dissertation developed a modest normative framework to answer sub-question 5, which serves as a yardstick to analyse Article 35a CRA Regulation and to determine whether Article 35a CRA Regulation should be amended and, if so, how. The dissertation

26 In full: The Credit Rating Agencies (Civil Liability) Regulations 2013 (2013 No. 1637), available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksi_20131637_en.pdf, last accessed at 31 August 2019.

27 The European Union (Withdrawal) Bill is available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf, last accessed at 31 August 2019.

28 From 1 December 2009, the name of the European Court of Justice (ECJ) changed into the Court of Justice of the European Union (CJEU). This dissertation uses the term CJEU, but the references to case law distinguish between the CJEU and the ECJ.

29 Art. 6 (1) (a) in conjunction with Art. 6 (2) European Union (Withdrawal) Bill.

investigates the compliance of Article 35a CRA Regulation with the normative framework from a legal, instead of an economic or an empirical, perspective.

For the purpose of designing the normative framework, the question considered was what constitutes an adequate right of redress for issuers and investors? One can approach the notion of 'an adequate right of redress' from the functions of Article 35a CRA Regulation. First, Article 35a CRA Regulation serves to compensate issuers and investors for loss caused by infringements of Annex III CRA Regulation.[30] Second, although the Recitals of the CRA III Regulation do not explicitly refer to this function, Article 35a aims to prevent credit rating agencies from committing infringements ('*eine verhaltenssteuernde Funktion*'), thereby aiming to enhance the quality of credit ratings by ensuring that they are assigned in the correct manner.[31] As this study approaches these topics from a legal perspective, with a focus on the influence of EU law on national private law, it will concentrate on the first function and not on the relationship between the private and public enforcement of EU law.

An adequate right of redress for issuers and investors must create realistic conditions for civil liability, thereby striking a balance between the interests of issuers, investors *and* credit rating agencies. Furthermore, the application of rules of Private International Law and the national interpretations and applications of Article 35a CRA Regulation must be predictable and foreseeable to the parties involved in litigation concerning credit rating agency liability. Moreover, looking at the policy objectives of the Impact Assessment, an adequate right of redress should increase the liability of credit rating agencies – as compared to the situation prior to the introduction of Article 35a CRA Regulation – and should reduce risks of regulatory arbitrage between the Member States.[32]

The normative framework designed to determine whether Article 35a CRA Regulation forms an adequate right of redress whilst it must be interpreted and applied in accordance with the applicable national law, therefore, involves three main perspectives: the added value of Article 35a – in the sense of increased protection of issuers and investors, legal certainty and convergence. When applied to the findings of Chapters 1-5, these perspectives sometimes overlap and cannot always be strictly distinguished from each other. The recommendations are made from these perspectives, and are also tested against

30 *As can be derived from* Recital 32 CRA III Regulation. *E.g.* Heuser 2019, pp. 82-83.

31 *See e.g.* Heuser 2019, p. 83. Some scholars consider the preventive function of Art. 35a CRA Regulation to be most important. For instance, Lehmann argued that the compensation of private investors is not the main goal of Article 35a CRA Regulation. He emphasised that the CRA Regulation mainly wishes to prevent credit rating agencies from assigning incorrect credit ratings (Lehmann 2016a, p. 62). According to Berger & Ryborz, Art. 35a CRA Regulation does not only have a compensatory function. They attach more importance to the regulatory function of Art. 35a CRA Regulation (Berger & Ryborz 2018, p. 1236). *Also* Dutta 2013, p. 1732.

32 SEC(2011) 1354 final, p. 23.

the principles of subsidiarity and proportionality. Inspiration for this framework was drawn from the Impact Assessments of the European Commission for the first and third version of the CRA Regulation, and from general principles of EU law.[33] Section 6.2 explains the normative framework in more detail.

1.5 Scope and demarcations

As a dissertation on credit rating agency liability can involve many different aspects, this study was delineated in several important ways. The focus of this study – credit rating agency liability from a legal perspective, with a focus on the interaction between EU law and national private law – determined three important demarcations of the research to be conducted.

First, this study does not aim to approach the desirability and (behavioural) effects of Article 35a CRA Regulation from an economic perspective. The dissertation starts from the assumption that some sort of provision on the civil liability of credit rating agencies is desirable. It must be noted, however, that there are economic arguments opposing (far-reaching) rules on the civil liability of credit rating agencies.[34] This dissertation addresses possible economic and behavioural consequences of credit rating agency liability only from the sidelines. Section 3.5.1.2, for instance, briefly discusses some economic considerations with regard to credit rating agency liability in the context of the public consultation of the third version of the CRA Regulation. Furthermore, the recommendations take possible negative economic and behavioural consequences into account. This dissertation, however, does not involve conclusions on the economic desirability of the civil liability of credit rating agencies as a regulatory tool, as compared to other possible regulatory responses.

Second, this study does not involve empirical research methods to assess the functioning of Article 35a CRA Regulation as an adequate right of redress. During the course of this research, issuers and investors did not base many legal proceedings against credit rating agencies on Article 35a CRA Regulation.[35] Furthermore, it is difficult to find conclusive empirical evidence for

33 The Impact Assessment for the first version of the CRA Regulation involved several criteria against which the European Commission tested the policy objectives: effectiveness, certainty, convergence and flexibility & efficiency (SEC(2008) 2745, p. 31). The Union legislature introduced Art. 35a CRA Regulation in the third version of the CRA Regulation, but the perspectives of the first Impact Assessment are nevertheless relevant for Art. 35a CRA Regulation. *See on general principles of EU law e.g.* Jans, Prechal & Widdershoven 2015, Reich 2014 and Groussot 2006.

34 *E.g.* Coffee 2013, pp. 106-108.

35 Issuers and investors started legal proceedings based on Art. 35a CRA Regulation before German courts. For analyses of the German cases, *see e.g.* section 3.5.3.3 (b) and section 5.6.2.

the effects of a provision on credit rating agency liability on, for instance, the quality of credit ratings. Therefore, this study investigates the civil liability of credit rating agencies in accordance with the traditional legal method (as described in section 1.4) and by means of a modest normative framework. Yet, the lack of empirical data and the lack of the use of empirical research methods does not justify the conclusion that this research has been conducted too soon. The lack of (successful) legal proceedings could also be one of the reasons why this type of research is needed.

Third, this study does not aim to investigate the civil liability of credit rating agencies under US law in depth. A dissertation on the topic of credit rating agency liability could, however, very well involve a thorough analysis or comparison with US law, because an important part of the credit rating industry is based in the US.[36] From a practical perspective, the civil liability of credit rating agencies is more relevant under US law as compared to EU law. This dissertation, nevertheless, touches upon US law only from the sidelines. The study is of a European legal nature, especially because it concentrates on the structure of the right of redress under Article 35a (1) CRA Regulation and the influence of EU law on (national) rules on civil liability, instead of on the topic of credit rating agency liability in general.

1.6 Relevance

This study will result in an analysis of the influence of EU law on (national) rules for civil liability, an in-depth analysis of the current functioning, interpretation and application of Article 35a CRA Regulation and recommendations for the improvement of the current European civil liability regime for credit rating agencies from the perspective of the normative framework. The research outcomes aim to benefit the financial sector (including credit rating agencies, issuers and investors), the judiciary, the Union legislature and national legislatures.

Stakeholders involved in litigation on credit rating agency liability, such as credit rating agencies themselves, investors, issuers and their lawyers, could benefit from the analysis of the Private International Law aspects and the legal comparison. The findings could, for instance, help them to determine the competent court and the applicable national law, and to assess whether possible claims could be successful under Dutch, French, German or English law. The study also reveals what difficulties and uncertainties could occur in relation to claims for civil liability based on Article 35a CRA Regulation. Furthermore, the research outcomes could assist the judiciary in deciding on how to deal with claims for damages based on Article 35a CRA Regulation.

36 *E.g.* dissertations of Dumont du Voitel 2018, Hemraj 2015, Von Rimon 2014 and Von Schweinitz 2007.

The study also aims to be of broader relevance to the Union legislature and national legislatures. When evaluating the CRA Regulation, the Union legislature can take account of the critical analysis of Article 35a CRA Regulation and the recommendations for the improvement of Article 35a CRA Regulation. By concentrating on the structure of the right of redress under Article 35a (1) and (4) CRA Regulation and on the influence of EU law on (national) rules on civil liability, this dissertation wishes to provide the Union legislature with insights into the consequences and usefulness of employing the structure of the right of redress established by Article 35a (1) CRA Regulation. These insights could help the Union legislature decide whether to introduce similar rights of redress for other parts of the financial sector, or in other legal areas as well. Furthermore, this dissertation explains to national legislatures to what extent they must take account of rights of redress established at the EU level, and, more concretely, to what extent such rights of redress limit the national discretion in respect of the civil liability of individuals and other private parties.

1.7 Relationship to other research

The introduction of the EU right of redress against credit rating agencies under Article 35a (1) CRA Regulation was a ground-breaking development. Therefore, it should not come as a surprise that the potential effects and disadvantages of Article 35a CRA Regulation have already been the subject of academic research. Since the first ideas for this research developed in 2014 and during the course of this research, multiple contributions and dissertations were published on the civil liability of credit rating agencies in general and on the civil liability of credit rating agencies under Article 35a CRA Regulation in particular.[37] The dissertations of the German scholars Wimmer,[38] Heuser[39]

37 *Contributions e.g.* Miglionico 2019, Deipenbrock 2018, Picciau 2018b, Getzler & Whelan 2017, Hoggard 2016, Lehmann 2016a, Deipenbrock 2015, Alexander 2015, De Pascalis 2015, Risso 2015 and Steinrötter 2015. *During or prior to 2014 e.g.* Berger & Ryborz 2014, Dutta 2014, Haar 2014, Jaakke 2014, Verständig 2014, Wanambwa 2014, Amort 2013, Atema & Peek 2013, Dutta 2013, Edwards 2013, Gietzelt & Ungerer 2013, Haentjens & Den Hollander 2013, Scarso 2013, Sotiropoulou 2013, Wagner 2013, Van der Weide 2013 and Wojcik 2013. *Dissertations e.g.* Heuser 2019, Dumont du Voitel 2018, Picciau 2018a, Rinaldo 2017, Wimmer 2017, Seibold 2016, Baumgartner 2015, Happ 2015, Hemraj 2015 and Schantz 2015. *During or prior to 2014 e.g.* Angelé 2014, Gass 2014, Miglionico 2014, Von Rimon 2014 and Von Schweinitz 2007. Furthermore, reference must be made to the *Habilitationsschrift* of Schroeter (U.G. Schroeter, *Ratings – Bonitätsbeurteilungen durch Dritte im System des Finanzmarkt- Gesellschafts- und Vertragsrecht*, Tübingen: Mohr Siebeck 2014). This footnote refers to only the most recent contributions and dissertations on the civil liability of credit rating agencies. Throughout this dissertation, reference is made to academic research published earlier as well (*e.g.* De Savornin Lohman & Van 't Westeinde 2007, Dondero, Haschke-Dournaux & Sylvestre 2004, Bertrams 1998 and Ebenroth & Dillon 1992).

and Dumont du Voitel[40] and the Austrian scholar Gass[41] deserve particular attention, as they study the functioning of Article 35a CRA Regulation from a legal perspective.

Wimmer investigated the effectiveness of Article 35a CRA Regulation,[42] and designed a reform proposal for Article 35a CRA Regulation.[43] Her study concentrated on the conditions for civil liability under Article 35a CRA Regulation and on German private law,[44] but also involved a modest legal comparison with French and English law.[45] The legal comparison, however, did not take a prominent position in the study. Furthermore, she compared Article 35a CRA Regulation to the civil liability provisions under Article 11 PRIIPs Regulation and under Article 8 and 16[46] Directive on environmental liability from the sidelines.[47]

Heuser posed three main research questions: What does Article 35a CRA Regulation provide for? How can the value of the current regime on civil liability be assessed? How can Article 35a CRA Regulation be improved? Heuser's dissertation concentrated on the first research question.[48] He investigated the conditions for civil liability under Article 35a CRA Regulation extensively, and used German law as an example to analyse whether Article 35a CRA Regulation involved an adequate right of redress.[49] The study did not involve a legal comparison with legal systems of other Member States, but did pay attention to the Private International Law aspects of credit rating agency liability.[50] Finally, Heuser provided recommendations for the improvement of Article 35a CRA Regulation.[51]

---

38 V. Wimmer, *Auswirkungen des Art. 35a der Verordnung (EU) Nr. 462/2013 auf die zivilrechtliche Haftung von Ratingagenturen* (diss. Hamburg, Bucerius Law School 2017), Baden-Baden: Nomos 2017.

39 M. Heuser, *Die zivilrechtliche Haftung von Ratingagenturen nach Art. 35a Rating-VO (EU) Nr. 462/2013* (diss. Universität Heidelberg), Berlin: Peter Lang 2019.

40 A. Dumont du Voitel, *Die zivilrechtliche Verantwortlichkeit von Ratingagenturen nach deutschem, europäischem und US-amerikanischem Recht*, Berlin: Peter Lang 2018.

41 M. Gass, *Haftung für fehlerhafte Ratings nach dem Artikel 35a der Ratingagenturverordnung*, Wien 2014, available at http://othes.univie.ac.at/33361/1/2014-04-15_9948129.pdf, last accessed at 31 August 2019.

42 Wimmer 2017, pp. 401 ff.

43 Wimmer 2017, pp. 417 ff.

44 Wimmer 2017, pp. 84-245.

45 Wimmer 2017, pp. 320-335.

46 In full: Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

47 *See e.g.* Wimmer 2017, pp. 175-176 and 229-230.

48 Heuser 2019, p. 23.

49 Heuser 2019, p. 25.

50 Heuser 2019, pp. 195-263.

51 Heuser 2019, pp. 166-271.

Dumont du Voitel investigated whether private enforcement is fruitful in the context of the credit rating industry and in which manner the civil liability of credit rating agencies is currently arranged for.[52] Dumont du Voitel took a broad approach, and investigated EU law,[53] German law[54] and US law.[55] He analysed the conditions for civil liability under Article 35a CRA Regulation extensively, using German law partly as an example to explain Article 35a CRA Regulation. The study resulted in recommendations for the improvement of Article 35a CRA Regulation and in a comparison of the civil liability of credit rating agencies under EU law and US law.[56]

Gass provided a detailed legal analysis of Article 35a CRA Regulation, and concentrated on the interpretation and application of Article 35a CRA Regulation under Austrian law.[57] He paid significant attention to the division of competences between EU and national law under Article 35a CRA Regulation, and discussed some of the aspects of Private International Law.[58] The study did not involve a legal comparison with legal systems of other Member States and did not discuss the effectiveness and possible improvement of the European system for the civil liability of credit rating agencies.

This dissertation aims to contribute to the existing academic publications in multiple respects. It aims to provide a thorough legal analysis of Article 35a CRA Regulation, which explains the Private International Law aspects of credit rating agency liability in detail and involves a more detailed legal comparison of four national legal systems (in comparison to, for instance, the dissertation of Wimmer). In comparison to the dissertations of Wimmer, Heuser, Dumont du Voitel[59] and Gass, this study adopts a broader European approach, by analysing Article 35a CRA Regulation in light of the influence of EU law on (national) rules for civil liability.[60] The emphasis of this dissertation lies on the vertical relationship between EU law and national law, rather than on the horizontal relationship between the public and private enforcement of the rules under the CRA Regulation. Furthermore, this study designed a modest normative framework to structure the analysis of Article 35a CRA Regulation and the recommendations.

52 Dumont du Voitel 2018, p. 2.
53 Dumont du Voitel 2018, pp. 99 ff.
54 Dumont du Voitel 2018, pp. 249 ff.
55 Dumont du Voitel 2018, pp. 361 ff.
56 Dumont du Voitel 2018, pp. 425 ff.
57 Gass 2014, p. 14.
58 Gass 2014, pp. 33-58.
59 Although Dumont du Voitel paid attention the competence of the CJEU and Union legislature in the context of Art. 35a CRA Regulation (Dumont du Voitel 2018, pp. 128 ff.).
60 The European perspective of this research comes closest to a contribution of Deipenbrock in 2018. Deipenbrok investigated the efficiency and effectiveness of Art. 35a CRA Regulation 'with a view to its design and implementation' and aimed to investigate 'whether or not financial markets regulation and civil liability in European law have been steering a more coordinated course' (Deipenbrock 2018, p. 549).

Although the research for this dissertation was conducted independently, some of its outcomes are similar to conclusions drawn and recommendations provided by Wimmer, Heuser, Dumont du Voitel and other legal scholars. I consider that the similarities in the conclusions and recommendations provide the Union legislature with stronger indications that it should reconsider the wording and structure of Article 35a CRA Regulation. This study, however, also resulted in different conclusions and recommendations, and does not always agree with points of view taken in other academic contributions. This dissertation will reflect on these other contributions and, in particular, on other proposals for the improvement of Article 35a CRA Regulation in Chapter 6.

1.8 Outline

The previous sections already touched upon the main elements of this study. The dissertation can roughly be divided into three main parts.

As the first part, Chapter 2 'Influence of EU law on civil liability' and Chapter 3 'Credit rating industry and its regulation' provide the context in which the specific analyses of Article 35a CRA Regulation made in Chapters 4 and 5 must be considered. Chapter 2 describes the current influence of EU law on (national) rules on civil liability. Article 35a CRA Regulation is the most prominent example of a right of redress established at the EU level in the context of the financial sector; but it is not the only manner in which EU law influences (national) rules on civil liability. Chapter 2 maps the ways in which EU law currently influences rules on civil liability in general – with a (non-exclusive) focus on examples in the area of EU financial law – in order to provide the broader European perspective in which Article 35a CRA Regulation must be considered.

Chapter 3 introduces the credit rating industry and its regulation. It describes the historical, factual and regulatory background of Article 35a CRA Regulation. Focusing on the history of credit rating agencies, the credit rating business and the background and content of the CRA Regulation, Chapter 3 provides the broader perspective needed to understand the place and purpose of Article 35a CRA Regulation in the regulatory framework for credit rating agencies created by the CRA Regulation. As a prelude to Chapters 4 and 5, the final sections of Chapter 3 pay attention to the legislative history and the material scope of application of Article 35a CRA Regulation, and to factual situations in which issuers and investors can suffer loss as a result of an infringement of Annex III CRA Regulation.

As the second part, Chapter 4 'Private International Law aspects' and Chapter 5 'Interpretation and application Article 35a under Dutch, French, German and English law' provide an in-depth analysis of the current functioning, interpretation and application of Article 35a CRA Regulation. Chapter 4 discusses the questions of Private International Law that arise with regard to the civil liability of credit rating agencies. This Chapter will centre around the three main questions of Private International Law: which national court can assume jurisdiction? What law is applicable? And, how shall any ultimate judgment be enforced? Through this broad overview of the relevant Private International Law aspects, this Chapter mainly aims to answer the question of which issues occur, if any, in determining the competent court and the applicable national law in respect of claims based on Article 35a CRA Regulation.

Chapter 5 investigates how the requirements of Article 35a (1) and Article 35a (3) CRA Regulation are interpreted under Dutch, English, French and German law respectively. The first and second section of this Chapter discuss the research method adopted for the purpose of the legal comparison and pay significant attention to the requirements and terms of Article 35a CRA Regulation that are part of the legal comparison, respectively. Subsequently, country reports for Dutch, French, German and English law are presented. Each country report starts with a description of the main features of the legal system and of legal bases available in the legal system prior to the introduction of Article 35a CRA Regulation in 2013. Afterwards, the country reports concentrate on the interpretation and application of terms such as 'intention', 'gross negligence', 'impact', 'reasonably relied', 'due care', 'caused' and 'damages'. Finally, Chapter 5 analyses which similarities and differences exist between the four national interpretations and applications and whether any differences can lead to different decisions on civil liability claims based on Article 35a CRA Regulation.

The order and substance of Chapters 3-5 deserve another introductory remark. Readers of this dissertation can see that it does not contain a specific chapter dedicated to the scope of application and the conditions of the right of redress under Article 35a (1) CRA Regulation.[61] Whereas Chapter 3 pays attention to the legislative history and the material scope of application of Article 35a CRA Regulation, Chapter 5 discusses the conditions for civil liability under Article 35a (1) CRA Regulation.[62] The description of the elements of Article 35a CRA Regulation is, hence, 'disturbed' by Chapter 4 on Private International Law. Due to the crucial importance of Private International Law in an early stage of legal proceedings on credit rating agency liability, it was, nevertheless, decided to discuss this topic prior to the legal comparison made in Chapter 5. Deipenbrock strikingly described the role of Private International Law in the context of Article 35a CRA Regulation as '[t]he layer between the European law and national substantive private law'.[63] Furthermore, it was decided to discuss the conditions for civil liability under Article 35a CRA

61 *As done by e.g.* Heuser 2019, pp. 67 ff. and Wimmer 2017, pp. 63 ff.
62 Section 3.5.2 touches upon the conditions for civil liability under Article 35a CRA Regulation, but the substantive analysis of the conditions can be found in section 5.3.
63 Deipenbrock 2018, p. 561.

Regulation in Chapter 5, so that the conditions can clearly form the main thread running through the legal comparison. The descriptions of the scope of application and the conditions for liability stated by Article 35a CRA Regulation are, hence, embedded in various Chapters of this dissertation.

As the third part, Chapter 6 aims to answer the main research questions of whether Article 35a CRA Regulation creates an adequate right of redress for issuers and investors, and of whether Article 35a CRA Regulation should be amended and, if so, how. To that end, Chapter 6 discusses the findings of Chapters 2-5 from the perspective of the normative framework. Subsequently, it formulates recommendations to improve Article 35a CRA Regulation. Part of the conclusions and recommendations concern the vertical relationship between EU law and national law; they serve to provide an insight into the Union legislature as to whether the structure of Article 35a CRA Regulation is useful for other parts of the financial sector or in other legal areas.

This research was funded by the Stichting Hazelhoff Van Huet and the Meijers Institute of Leiden Law School. The author is very grateful for their contributions. The Hazelhoff Stichting and the Meijers Institute were not in any way involved in the selection and execution of the research. The research was finalised on 3 September 2019.

2 Influence of EU law on civil liability

2.1 Introductory remarks

This study concentrates on a particular situation in which EU law influences (national) rules on civil liability: the civil liability of credit rating agencies under Article 35a CRA Regulation. The introduction of Article 35a CRA Regulation does not stand on its own, but is part of a broader tendency towards an increased influence of EU law on private law and, in particular, on the civil liability of individuals and other private parties.[1] Moreover, EU law contains an increasing amount of provisions included in regulations, which confer rights of redress upon private parties or provide private parties with rights of redress on the basis of national law.[2] This Chapter aims to map the ways in which EU law (regulations, directives and rulings of the CJEU) currently influences rules on civil liability and rights of redress,[3] with a particular focus on examples derived from EU financial law. It widens the scope of the research by providing the broader European legal context in which Article 35a CRA Regulation can be considered.[4] This broader European perspective helps to understand the status, main features and effects of Article 35a CRA Regulation.

The Chapter begins by outlining some basic concepts of EU law. To this end, section 2.2 pays attention to the legislative competences of the Union legislature. Section 2.3 subsequently explains the effects of EU law in national legal orders, concentrating on when individuals and other private parties can

1 The terms 'individual' and 'private party' will be used interchangeably. This Chapter does not discuss the topic of Member State liability. This Chapter is based on research conducted with R. de Graaff, which resulted in the publications De Graaff & Verheij 2017 and De Graaff & Verheij 2019.

2 As demonstrated by the examples provided in this Chapter. *Also* Mańko 2015, p. 14.

3 This Chapter uses the terms 'civil liability' and 'rights of redress' as 'catch-all' terms. It investigates the influence of EU law on the civil liability of private parties vis-à-vis other private parties, which could take the form of a right of redress and, more concretely, a right to compensation or a right to damages. One could also say this Chapter investigates the influence of EU law on the remedy of compensation or damages. The terminology of rights, obligations, remedies, actions, claims and procedures is complicated, and sifting out the exact differences falls outside the scope of this dissertation. *For an analysis of the terminology and distinctions e.g.* De Graaff 2020 (forthcoming).

4 Prior to the publication of this dissertation, Vandendriessche 2015, no. 62-112 paid extensive attention to the influence of EU law on private enforcement in the context of financial law already.

directly rely on provisions of EU law before national courts. It discusses, in other words, the vertical and horizontal (in)direct effect of provisions of EU law. Section 2.4 shifts the attention towards the obligations resting upon Member States in the area of the enforcement of EU law and, in particular, towards the principles of equivalence and effectiveness. Finally, section 2.5 provides an overview of the influence of EU law on rules for civil liability and rights of redress with a particular, but not exhaustive, focus on the financial sector.[5] Article 35a CRA Regulation is one of the examples referred to in section 2.5. As the civil liability of credit rating agencies forms the main subject of this dissertation, section 2.5 involves a more extensive analysis of Article 35a CRA Regulation, in comparison to the other examples discussed.

2.2 Competence of the European Union

The division of competences between the EU and the Member States and the way in which the EU should exercise its competence are important building blocks to understand where the current landscape of European influence on (national) rules on civil liability finds its basis.

In general, the division of competences between the EU and the Member States is determined by the principle of conferral under Article 5 (2) of the Treaty on European Union (hereafter 'TEU'). The principle of conferral stipulates that the EU is only allowed to take action if the Member States 'conferred [competence] upon it in the Treaties to attain the objectives set out therein.' The Member States, hence, remain competent in areas in which they did not confer competence upon the EU. The EU's competence is not necessarily exclusive,[6] but can also be shared with the Member States.[7] If the EU is competent in a specific legal area, its powers are not unlimited.[8] Under Article 5 (1) TEU, the EU should exercise its competence in accordance with the principles of subsidiarity and proportionality. Under the principle of subsidiarity, in areas which do not fall within the exclusive competence of the EU (i.e. areas of shared competence), the EU shall act only if and insofar as certain goals cannot be sufficiently achieved by the Member States, but can be better achieved at the

5 In order to complete the overview, section 2.5 also includes some examples derived from other legal areas. This Chapter, however, does not aim to discuss the influence of EU law on civil liability in other areas, such as competition law, consumer law, intellectual property law and transport law. *For a broader overview of the influence of regulations on the Dutch law of obligations, see* De Graaff & Verheij 2017. *For the influence of EU law on (the system of) private law, see* Ackermann 2018. *For the influence of EU law on civil liability, see* Alpa 2019.

6 Pursuant to Art. 3 (1) TFEU, the EU has exclusive competence in the area of, for instance, the customs union and competition law needed for the functioning of the internal market.

7 Pursuant to Art. 4 (2) TFEU, the EU and the Member States share competence, for instance, in the areas of the internal market, economic, social and territorial cohesion and consumer protection. *See also on the principle of conferral* Craig & De Búrca 2015, p. 75.

8 *Cf.* Kuipers 2014, p. 159.

EU level (Art. 5 (3) TEU). Furthermore, the principle of proportionality entails that the content and form of European rules shall not exceed what is necessary to achieve the objectives of the Treaties (Art. 5 (4) TEU).[9]

Member States have conferred competence upon the EU in 'subject areas' rather than 'legal areas'. For instance, shared competence between the EU and the Member States exists in the area of the internal market and consumer protection (Art. 4 (2) (a) and (f) of the Treaty on the Functioning of the European Union (hereafter 'TFEU')). The Member States did not explicitly confer competence upon the EU in respect of private law under the TEU and TFEU.[10] Notwithstanding the absence of explicit competence in the area of private law, the influence of EU law in the area of 'private law' and the private enforcement of obligations stemming from EU law has increased. The Union legislature, however, is not very concerned with the question of whether a rule is of a public or private law nature. Rather, it adopts a 'functionalist approach' to European legislation, and organises rules per subject area.[11] To that end, the Union legislature often combines rules of multiple legal areas necessary to achieve particular objectives in legislative instruments. Consequently, rules of a private law nature can be found in broader European legal frameworks, which contain all types of different rules.[12] The CRA Regulation forms a good example of such a broad legal framework, as it provides for rules of a public and private law nature as part of the regulatory framework for credit rating agencies.

As described by Kuipers, European legislative action in the area of private law can be based on sector-specific competences, on Article 114 TFEU or on Article 352 TFEU.[13] For the purpose of this dissertation, the (shared) competence of the EU in the area of the internal market under Article 4 TFEU in

9 *Cf. also* Vandendriessche 2015, no. 75-76. The principle of proportionality applies irrespective of whether the competence of the Union legislature is exclusive or shared between the EU and Member States.

10 *See* Kuipers 2014, p. 159. *Also* Mańko 2015, p. 4.

11 Mańko 2015, pp. 3-4. *Cf. also e.g.* Leczykiewicz & Weatherill 2013, p. 2, who stated in respect of the character of EU law: '[i]t is not 'public law' in the orthodox sense(s) understood at national level, nor is it private law. It is both and it is neither. In fact, EU law operates without any such anchor, which makes it fluid and which makes it at the same time unstable'). *Cf. also e.g.* Busch 2015, pp. 216-217, who stated that EU law seems blindfolded for the difference between public and private law regarding the enforcement of standards set at the EU level.

12 Ackermann 2018, pp. 761-762 and De Graaff & Verheij 2017, p. 992. Exceptions are the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products and the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

13 Kuipers 2014, pp. 165-185. *Cf. also* Mańko 2015, pp. 4-5.

conjuction with Article 114 (1) TFEU is most relevant.[14] The Union legislature also based its competence for all versions of the CRA Regulation in general on Article 114 TFEU.[15] More in general, the Union legislature often bases its competence to take legislative action on Article 114 TFEU.[16] Article 114 TFEU allows the Union legislature to adopt 'the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.' As the goal of the establishment and functioning of the internal market is formulated broadly and the CJEU has not developed a strict test in this regard,[17] the Union legislature can base its competence on Article 114 TFEU in a broad range of legal areas.[18] Based on Article 114 TFEU, parts of national private law can be harmonised if this is 'necessary for the functioning of the internal market'. Hence, harmonisation is allowed if differences between national legal systems would form an obstacle for the functioning of the internal market.[19]

Due to the functionalist approach of the Union legislature and the absence of a legal basis to codify private law in general, the influence of EU law on national private law often follows a 'piecemeal approach'.[20] Rules on civil liability often form part of broader packages of European rules regulating particular subject areas, forming little 'islands' of EU law.[21] This piecemeal approach of the Union legislature can be observed in relation to Article 35a CRA Regulation and in relation to the other examples discussed in section 2.5.

14 This dissertation will therefore not further discuss the sector specific competences (*in detail e.g.* Kuipers 2014, pp. 169-175 and Mañko 2015, pp. 5 ff.). Art. 352 constitutes a 'flexibility clause' (Kuipers 2014, p. 182 and Mañko 2015, pp. 5 and 12-13). If EU legislative action is required to achieve certain Treaty objectives while the Treaty did not confer competence upon the Union legislature, the Union legislature may nevertheless take the necessary legislative action to achieve the objectives. A special legislative proceeding applies: the Council must unanimously adopt a European Commission's proposal after having obtained consent of the European Parliament (Art. 352 (1) TFEU).

15 COM(2011) 747 final, p. 6.

16 *Cf. e.g.* Craig & De Búrca 2015, p. 93, Vandendriessche 2015, no. 74 and Kuipers 2014, p. 175.

17 *See* Kuipers 2014, p. 180.

18 Barents & Brinkhorst 2012, p. 606.

19 Kuipers 2014, p. 177 and Barents & Brinkhorst 2012, pp. 606-607. The broad wording of Art. 114 TFEU raised concerns. It was feared that the EU might base its competence on the sole fact that differences exist between legal systems of Member States, without considering whether such differences harm the functioning of the internal market. Craig & De Búrca 2015, pp. 93-94. *See also* Kuipers 2014, pp. 179-181.

20 *Term derived from* Kuipers 2014, p. 161. *For the same conclusion* Vandendriessche 2015, no. 80. *Cf. also* Ackermann 2018, p. 743: '*Der Orientierung an einem allgemeinen privatrechtlichen Systemvorbild kommt dabei kein großes Eigengewicht zu*' and pp. 761-762.

21 *In the context of regulations* De Graaff & Verheij 2017, p. 992. *In the context of directives* Kötz 1993, p. 97.

2.3 Effects of EU law in national legal orders

2.3.1 Direct effect

If the EU is competent in a particular subject area, it can exercise its competence through the adoption of regulations, directives, decisions and recommendations and opinions.[22] Each instrument influences national legal orders differently. For instance, whereas regulations and directives are binding upon Member States, recommendations and opinions do not have such binding force.[23] In order to explain the effects of provisions of the EU Treaties, regulations and directives in national legal orders, the concepts of direct and indirect effect of EU law are used often. If a provision of EU law has direct effect, this indicates that individuals and other private parties can directly rely on that provision before national courts.[24] If a provision of EU law lacks direct effect, it may still have 'indirect effect' (also known as the principle of harmonious interpretation).[25] Individuals and other private parties cannot rely directly on such a provision before national courts. Whereas the concept of direct effect is often associated with provisions included in the EU Treaties and regulations, the concept of indirect effect is often associated with provisions included in directives.

Legal doctrine has formulated a 'narrow' and a 'broad' definition of direct effect.[26] In its broad sense, direct effect is understood as 'the capacity of a provision of EU law to be invoked' by individuals and other private parties directly before national courts.[27] In its narrow sense, direct effect involves 'the capacity of a provision of EU law to confer rights on individuals which they may enforce before national courts'.[28] Provisions of EU law have direct effect in the broad sense if they are 'sufficiently clear, precise, and unconditional'.[29] For a provision to have direct effect in the narrow sense, it must also intend to confer rights on individuals. Whether a provision has direct effect depends on the concrete case in which a party invokes the provision. A party can only invoke a certain provision if that provision is relevant to the situation of that party.[30] For example, the person who invokes a right

22 Art. 288 TFEU. Craig & De Búrca 2015, p. 106.
23 Art. 288 TFEU.
24 Hartkamp 2014, p. 60.
25 Craig & De Búrca 2015, p. 184. *Cf.* Prechal 2005, p. 181. In detail, in the context of directives, section 2.3.3.
26 *E.g.* Craig & De Búrca 2015, pp. 186-187 and Hartkamp 2014, p. 60. *Cf.* Prechal 2000, p. 1050.
27 Craig & De Búrca 2015, p. 185. *See* Prechal 2005, p. 231 and Prechal 2000, p. 1050.
28 Craig & De Búrca 2015, p. 186.
29 Craig & De Búrca 2015, p. 192. *Also e.g.* McDonnell 2018, p. 430, Fairhurst 2016, p. 276 and Pescatore 2015, p. 151. The CJEU has used several different, yet similar, types of wordings to describe the conditions for direct effect, Pescatore 2015, p. 140.
30 *Cf.* Opinion A-G L.A. Geelhoed, ECLI:EU:C:2001:697, para 47, with ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*).

must be addressed by that right. Section 2.3.2.2 discusses the conditions for direct effect in detail.

The difference between the broad and the narrow definition of direct effect becomes visible in relation to provisions, which individuals and other private parties can rely upon in legal proceedings, but which do not confer directly effective rights upon those individuals and other private parties. As an example, Prechal refers to provisions that set a standard for the legality of national measures.[31] As a more specific example, Article 30 (1) Market Abuse Regulation provides that Member States must 'provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures' in relation to certain infringements of the Market Abuse Regulation. This provision imposes obligations upon Member States in respect of the enforcement of EU law, but does not confer directly effective rights upon individuals and other private parties. In this situation, application of the broad or the narrow definition of direct effect makes a difference: the former leads to the conclusion that Article 30 (1) Market Abuse Regulation has direct effect – as individuals and other private parties may rely on Article 30 (1) Market Abuse Regulation in legal proceedings for review of the legality of Member State's action in administrative proceedings,[32] whereas the latter leads to the opposite conclusion – as an individual cannot invoke Article 30 (1) Market Abuse Regulation as a right to an administrative action.

Within the concept of direct effect, one can further distinguish between vertical and horizontal direct effect of provisions of EU law. The terms 'vertical' and 'horizontal' indicate in which relationship private parties can directly invoke provisions of EU law. Private parties can invoke provisions with vertical direct effect directly against Member States and provisions with horizontal direct effect directly against other private parties. Hartkamp considers that a provision with horizontal direct effect 'directly influences the validity, substance or interpretation of legal relationships between individuals' and 'creates, modifies or extinguishes rights and obligations between the parties'.[33]

As stated at the beginning of this section, the concept of direct effect is often associated with provisions included in the EU Treaties and regulations, while the concept of indirect effect is often associated with provisions included in directives. Even though these associations are generally correct, one must keep in mind that provisions of regulations are not always capable of having direct effect and that provisions of directives can sometimes have vertical direct effect.[34] Whether a provision of EU law has direct or indirect effect ultimately depends on its content and wording and on whether the Union legislature

31 Prechal 2000, p. 1050.
32 *Also, on Art. 30 (1) Market Abuse Regulation,* section 2.3.2.3.
33 Hartkamp 2014, pp. 65-66.
34 For instance, individuals and other private parties can invoke provisions of directives directly against Member States in proceedings for Member State liability.

formulated the provision sufficiently clearly, precisely and unconditionally. As this Chapter concentrates on the influence of provisions of regulations and directives on civil liability and rights to damages, the following subsections look in more detail at the effects in national legal orders of provisions included in these legislative instruments.[35]

2.3.2 Regulations

2.3.2.1 Direct applicability does not entail direct effect

Regulations automatically take effect in national legal orders. They have general application, are binding in their entirety and are directly applicable in all Member States under Article 288 TFEU. The sole fact that a regulation is directly applicable, however, does not automatically entail the direct effect of all its provisions.[36] Each provision included in a regulation must have a sufficiently clear, precise and unconditional wording and, to be invoked by a specific party, must be relevant to the situation of that party.[37]

The CJEU acknowledged the (vertical) direct effect of regulations in the cases *Leonensio v Minstero dell' Agricoltura e Foreste*[38] and *Commission of the European Communities v Italian Republic* (the *Slaughtered Cow* case).[39] The CJEU held that provisions of regulations can have direct effect and are 'capable of creating individual rights which national courts must protect' because of their nature

35 This Chapter does not pay attention to the direct effect of provisions included in the EU Treaties. For the purpose of this dissertation, it suffices to remark that such provisions can have both direct vertical and horizontal direct effect. The concept of vertical direct effect originates from the ECJ's decision *Van Gend en Loos* (ECJ 5 February 1963, C-26/62, ECLI:EU:C:1963:1 (*Van Gend en Loos*)). The ECJ introduced this concept in relation to negatively phrased obligations of Member States included in EU Treaty provisions. Subsequently, the concept of vertical direct effect was applied to EU Treaty provisions, which left discretion to the Member States and which imposed positive obligations upon Member States, *see, e.g.* ECJ 21 June 1974, C-2/74, ECLI:EU:C:1974:68 (*Reyners v Belgian State*) (*cf.* Chalmers, Davies & Monti 2014, p. 296 and Craig & De Búrca 2015, p. 190). Private parties can invoke EU Treaty provisions in vertical and horizontal relationships (Schütze 2018, pp. 86-88). *See, e.g.* ECJ 8 April 1976, C-43/75, ECLI:EU:C:1976:56 (*Defrenne v SABENA*), ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), ECJ 11 December 2007, C-438/05, ECLI:EU:C:2007:772 (*ITWF v Viking Line ABP*) and ECJ 18 December 2007, C-341/05, ECLI:EU:C:2007:809 (*Laval un Partneri*).

36 Schütze 2018, pp. 80 and 90-91, Woods, Watson & Costa 2017, p. 114 and p. 118 and Winter 1972, p. 435. *Cf.* McDonnell 2018, p. 428 and Opinion A-G L.A. Geelhoed, ECLI:EU:C:2001:697, para 46, with ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*).

37 Craig & De Búrca 2015, p. 198. *See also* Woods, Watson & Costa 2017, p. 118 and the Opinion A-G L.A. Geelhoed, ECLI:EU:C:2001:697, para 37, with ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*).

38 ECJ 17 May 1972, C-93/71, ECLI:EU:C:1972:39 (*Leonensio v Minstero dell' Agricoltura e Foreste*).

39 ECJ 7 February 1973, C-39/72, ECLI:EU:C:1973:13 (*Commission of the European Communities v Italian Republic*). *As referred to by* Craig & De Búrca 2015, pp. 198-199.

and purpose within the system of sources of EU law.[40] In general, Member States are not even allowed to implement regulations in their national legal orders if implementation would affect the regulation's direct effect.[41]

The distinction between vertical and horizontal direct effect is often less relevant in relation to regulations (as compared to directives). As regulations are directly applicable in national legal orders, individuals and other private parties can often invoke provisions, which are relevant to their situation, directly against parties to whom the provisions are addressed, whether the addressees are Member States, individuals or other private parties.[42]

2.3.2.2 'Sufficiently clear, precise and unconditional'

The direct effect of a provision of EU law (in the broad sense) depends on whether a provision's wording qualifies as being sufficiently clear, precise and unconditional. The CJEU elaborated upon these conditions in its case law.[43] A provision is sufficiently precise if it creates an obligation 'in unequivocal terms'.[44] A provision is unconditional if the obligation, and its effects, does not depend on additional measures taken either by the Union institutions or by Member States[45] and if it does not leave discretion to Member States.[46]

---

40 ECJ 17 May 1972, C-93/71, ECLI:EU:C:1972:39 (*Leonensio v Minstero dell' Agricoltura e Foreste*), para 5. *Also* ECJ 10 October 1973, C-34/73, ECLI:EU:C:1973:101 (*Fratelli Variola Spa v Amministrazione delle finanze dello Stato*), para 8. *Also* Craig & De Búrca 2015, pp. 198-199.

41 ECJ 7 February 1973, C-39/72, ECLI:EU:C:1973:13 (*Commission of the European Communities v Italian Republic*), para 17. *Cf. also* ECJ 10 October 1973, 34/73, ECLI:EU:C:1973:101 (*Fratelli Variola Spa v Amministrazione delle finanze dello Stato*), para 11. Craig & De Búrca 2015, pp. 189-199.

42 Opinion A-G L.A. Geelhoed, ECLI:EU:C:2001:697, paras. 39, 45 and 47, with ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*). *See* Woods, Watson & Costa 2017, p. 118 and Fairhurst 2016, p. 279.

43 The conditions for direct effect apply to provisions included in the EU Treaties, regulations and directives. Therefore, this section combines decisions of the CJEU in relation to all EU legislative instruments. It was decided to discuss the conditions for direct effect in the context of regulations, because of this dissertation's focus on Art. 35a CRA *Regulation*.

44 *E.g.* CJEU 1 July 2010, C-194/08, ECLI:EU:C:2010:386 (*Gassmayr*), para 45 and ECJ 17 September 1996, C-246/94, C-247/94, C-248/94 and C-249/94, ECLI:EU:C:1996:329 (*Co-operativa Agricola Zootecnica S. Antonio a.o. v Amministrazione delle Finanze dello Stato*), para 19. McDonnell 2018, p. 430.

45 *E.g.* CJEU 1 July 2010, C-194/08, ECLI:EU:C:2010:386 (*Gassmayr*), para 45 and ECJ 17 September 1996, C-246/94, C-247/94, C-248/94 and C-249/94, ECLI:EU:C:1996:329 (*Co-operativa Agricola Zootecnica S. Antonio a.o. v Amministrazione delle Finanze dello Stato*), para 18. *See* the Opinion A-G L.A. Geelhoed, ECLI:EU:C:2001:697, para 37, with ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*). *E.g.* McDonnell 2018, p. 430, Fairhurst 2016, pp. 276-277 and Pescatore 2015, p. 151.

46 ECJ 12 December 1990, C-100/89 and C-101/89, ECLI:EU:C:1990:456 (*Kaefer and Procacci v French State*), para 26.

Legal scholars have stated that direct effect requires a provision to be 'self-executing'.[47] The Union legislature must have formulated a provision in such a manner that national courts do not need further European or national rules to be able to apply the provision to a case at hand.[48] 'Vague' terms do not necessarily preclude a provision from having direct effect, as long as national courts can apply the provision to the case at hand after interpretation.[49] Also, references to national legislation or national practice do not necessarily preclude the direct effect of a provision, as long as the reference does not affect the precise and unconditional nature of the right or obligation created by the provision.[50] However, it is problematic if a provision leaves actual discretion to Member States. Prechal considers that discretion involves a provision being able to be interpreted in several ways, while it is up to Member States to choose in which way they interpret the provision.[51] Such provisions can require, for instance, taking certain policy choices. Policy choices ought not to be taken by national courts, but by the Union legislature or national legislatures instead.[52] Therefore, national courts cannot apply such EU law provisions to concrete cases without further rules set by the Union legislature or by national legislatures. Such EU law provisions hence do not have direct effect.

2.3.2.3 Provisions requiring additional (national) measures

Considering the reference to the applicable national law under Article 35a (4) CRA Regulation, it is interesting to discuss in more detail what types of provisions included in regulations perhaps do not fulfil the conditions of being sufficiently clear, precise and unconditional. We do so by discussing several types of provisions included in regulations that require additional implementing measures taken by national legislatures and the effect of these measures on the clear, precise and unconditional character of these types of provisions. In terms of legislative techniques, such provisions exhibit features that traditionally are characteristic of directives (section 2.3.3) rather than regulations. Král categorised four types of national normative implementing measures, which can be required by regulations: concretising and/or complementing substantive measures; institutional and/or competence measures; procedural, controlling or penal measures; and adapting and/or derogating measures.[53] For the purposes of this dissertation, provisions included in regulations that require concretising and/or complementing substantive measures

47 McDonnell 2018, p. 431 and Craig & De Búrca 2015, p. 190.
48 *Cf.* McDonnell 2018, p. 431, Pescatore 2015, pp. 152-153 and Prechal 2005, p. 244.
49 Prechal 2005, p. 244.
50 CJEU 1 July 2010, C-194/08, ECLI:EU:C:2010:386 (*Gassmayr*), paras. 47-48.
51 Prechal 2005, p. 248, *based upon* Kapteyn & VerLoren van Themaat 1998, p. 532.
52 *Cf.* Prechal 2005, p. 250.
53 Král 2008, p. 245. Adam & Winter 1996 classified the types of provisions differently.

and procedural, controlling or penal measures are most relevant and will, therefore, be discussed in more detail.

(a) Concretising and complementing substantive measures

Provisions included in regulations can leave gaps, to such an extent that they are not sufficiently detailed or complete to qualify as 'self-executing'. Such provisions require Member States to take additional concretising and complementing substantive measures.[54] They do not have direct effect – at least not in the narrow sense, but can be used in proceedings on Member State liability for the non-transposition or non-conform transposition of EU law.

The case of *Azienda Agricola Monte Arcosu Srl v Regione Autonoma della Sardegna* (*Monte Arcosu*) involved examples of provisions that require additional national substantive measures to such an extent that the provisions did not create directly effective rights for a private party.[55] In this case, the CJEU had to decide whether Article 2 (5) of the Regulation on improving the efficiency of agricultural structure[56] (and the identical Art. 5 (5) Regulation No 2328/91[57]) had vertical direct effect.[58] Monte Arcosu, an Italian company that carried out farming activities, applied to Italian regional authorities for entry in the 'Register of Farmers Practising Farming as their Main Occupation'. The Italian regional authorities rejected the application because the Italian regional rules did not allow commercial companies like Monte Arcosu to enter the register.[59] The reason why Monte Arcosu could not enter the register was that at the time Monte Arcosu applied for registration, the Italian regional authorities had not yet established the criteria under which a commercial company could enter the register.[60] The Italian regional authorities had failed to establish a definition of the term 'farmer practicing farming as his main occupation', which they were obliged to do under Regulation No 797/85 and Regulation No 2328/91. Article 2 (5) of Regulation No 797/85 and Article 5 (5) Regulation No 2328/91 provided:

> 'Member States shall, for the purposes of this regulation, define what is meant by the expression farmer practising farming as his main occupation. This definition shall, in the case of a natural person, include at least the condition that the proportion of income derived from the agricultural holding must be 50% or more of the farmer's total income and that the working time devoted to work unconnected

54 Král 2008, p. 246.
55 *Example derived from* Král 2008, p. 246.
56 Council Regulation (EEC) No 797/85 of 12 March 1985 on improving the efficiency of agricultural structures.
57 Council Regulation (EEC) No 2328/91 of 15 July 1991 on improving the efficiency of agricultural structures.
58 ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*).
59 ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*), para 12 and paras. 14-15.
60 Kronenberger 2001, p. 1546.

> with the holding must be less than half of the farmer's total working time. On the basis of the criteria referred to in the foregoing subparagraph, the Member States shall define what is meant by this same expression in the case of persons other than natural persons.'

Upon the rejection of its application to the register, Monte Arcosu started proceedings against the Italian regional authorities to enforce registration on the basis of these provisions of EU law,[61] thereby in essence claiming that the provisions had vertical direct effect. The CJEU came to the conclusion that Monte Arcosu could not base its claim on the relevant EU law provisions. The CJEU held that 'by virtue of the very nature of regulations and of their function in the system of sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems'. Nevertheless, as stated by the CJEU, some provisions 'necessitate, for their implementation, the adoption of measures of application by the Member States'.[62] Subsequently, the CJEU qualified Article 2 (5) Regulation No 797/85 and Article 5 (5) Regulation No 2328/91 as provisions that require the adoption of national measures. The provisions left discretion to the Member States in respect of their exact implementation to such an extent that the CJEU concluded that 'it cannot be held that individuals may derive rights from those provisions in the absence of measures of application adopted by the Member States'.[63] Consequently, these provisions were not directly effective and Monte Arcosu was not able to base its claim on Article 2 (5) Regulation No 797/85 and Article 5 (5) Regulation No 2328/91.[64]

In *Monte Arcosu*, the magnitude of the margin of discretion left to the Member States was decisive for the CJEU's decision that the provisions lacked direct effect. As a result of the discretion, the provisions were not a source of sufficiently clear, precise and unconditional rights that could be invoked directly before national courts. It was, however, not decisive that national implementation measures were necessary in themselves.[65] One should also be aware of the importance of the context of the *Monte Arcosu* case.[66] Monte Arcose could not derive rights from the relevant provisions, but in another context a private party may be able to rely on the provisions.

61 ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*), para 16.

62 ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*), para 26 (for both quotations). *Repeated in* CJEU 28 October 2010, C-367/09, ECLI:EU:C:2010:648 (*SGS Belgium and Others*), para 33.

63 ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*), paras. 27-28.

64 ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*), para 29.

65 Kronenberger 2001, p. 1550. *As can also be derived from* CJEU 1 July 2010, C-194/08, ECLI:EU:C:2010:386 (*Gassmayr*), paras. 47-48 (in the context of provisions included in directives). *Cf.* Adam & Winter 1996, p. 519.

66 *On the importance of the context of the case in general,* Prechal 2005, p. 250.

(b) Procedural, controlling or penal measures

Král also distinguished provisions included in regulations that require Member States to take procedural, controlling or penal implementing measures 'aimed primarily at securing full enforcement' of those regulations.[67] These provisions impose obligations upon Member States in the area of enforcement, but have such a broad wording that they do not create clear and precise rights for private parties or that they require additional measures taken by the Union legislature or by national legislatures.[68] They bear features of directives, in the sense that they require Member States to achieve a certain goal (e.g. enforcement of the regulation) and leave the manner in which this goal is achieved to the Member States.[69] An example can be found in Article 30 (1) Market Abuse Regulation:[70]

> 'Without prejudice to any criminal sanctions and without prejudice to the supervisory powers of competent authorities under Article 23, Member States shall, in accordance with national law, provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to at least the following infringements: […].'

The content and wording of this provision impose obligations upon Member States in respect of administrative sanctions and measures, but, at the same time, leave discretion to Member States. The provision addresses Member States, but does not create rights to a certain administrative sanction, which individuals and other private parties can directly invoke against other individuals and other private parties before national courts (direct effect in the narrow sense). Yet, again, the context of the concrete situation in which a party relies on a provision is of importance.[71] Individuals and other private parties may rely on Article 30 (1) Market Abuse Regulation, for instance, in legal proceedings for review of the legality of a Member State's action in administrative proceedings.

Provisions aimed at the full enforcement of the regulation codify (and specify) the division of competences between the EU and Member States in the area of enforcement of EU law. They leave the enforcement of EU law to

67 Král 2008, p. 249.
68 *For examples of provisions that require additional measures,* CJEU 28 October 2010, C-367/09, ECLI:EU:C:2010:648 (*SGS Belgium and Others*), para 43.
69 This statement must be qualified, as the Union legislature can also introduce far more detailed directives over time. These directives in their turn bear features of regulations.
70 Král refers, amongst others, to Art. 9 Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods (Codified version): 'The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.' *As derived from* Král 2008, p. 250. *For other examples,* Adam & Winter 1996, pp. 514-515.
71 *On the importance of the context of the case,* Prechal 2005, p. 250.

the national procedural autonomy of Member States (see also section 2.4.2), but do not provide Member States with unlimited discretion. In *Ebony Maritime v Loten Navigation*, the CJEU confirmed that even when a provision leaves the choice for certain manners of enforcement (in this case, the choice of penalties) to the discretion of Member States, Member States must ensure that infringements of EU law 'are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive'.[72] One could also say that the discretion of Member States is restricted by the wording of the regulation itself and by the principles of equivalence and effectiveness (section 2.4.3).

This section discussed two types of provisions included in regulations that require additional implementing measures taken by national legislatures: concretising and complementing substantive measures and procedural, controlling or penal measures. The sole fact that a provision included in a regulation needs further implementation at the national level does not affect this. It is rather the amount of discretion left to Member States which causes provisions not to be self-executing and to lack a sufficiently clear, precise and unconditional nature to create directly effective rights for individuals and other private parties. Such provisions can have indirect effect (in the sense of the principle of harmonious interpretation, section 2.3.3) and can be used in proceedings for Member State liability for the non or non-conform transposition of EU law.[73] Furthermore, the context of the case is of crucial importance. A provision may not create directly effective rights (direct effect in the narrow sense), but can nevertheless be relied on by individuals and other private parties in a different factual context (direct effect in the broad sense).

2.3.3 Directives

In contrast to regulations, directives do not automatically take effect in national legal orders. Article 288 TFEU stipulates that directives are binding upon Member States as regards the result that they prescribe, but Member States may choose the form and methods in which they wish to achieve that result. The legislative instrument of a directive was, therefore, conceived to entail a lower level of harmonisation than the legislative instrument of a regulation. Directives could be said to 'not [be] directed to the world at large but at Member States'[74] and to confer the obligation upon Member States to ensure that national legal regimes accord with the results prescribed by directives.

---

72 ECJ 27 February 1997, C-177/95, ECLI:EU:C:1997:89 (*Ebony Maritime and Loten Navigation*), paras. 35 and 39. Král 2008, pp. 250-251.

73 Král 2008, p. 254.

74 Fairhurst 2016, p. 279.

To that end, Member States must implement EU law into their national legal regimes.

Due to the nature of directives and the obligation resting upon Member States to implement provisions included in directives into national legal regimes, individuals and private parties must generally rely on the national provisions in which EU law was implemented before national courts. Exceptionally, if a Member State failed to properly or timely implement a directive, provisions included in directives are capable of having vertical direct effect (see hereafter).[75] However, provisions included in directives do not have horizontal direct effect. As the CJEU decided in *Marshall v Southampton and South-West Hampshire Area Health Authority*, provisions included in directives cannot impose obligations upon individuals (namely upon Member States only), and can, therefore, not be directly relied upon against individuals.[76] In *Pfeiffer*, the CJEU confirmed that 'even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.'[77]

In order to ensure the effectiveness of provisions included in directives, national courts must interpret national law in conformity with EU law (the principle of harmonious or consistent interpretation).[78] Provisions included in directives, hence, at least have indirect effect. The principle of harmonious interpretation was developed by the CJEU and mitigated the differences in effects between directives and regulations.[79] In *Von Colson and Kamann v Land Nordrhein-Westfalen* and *Harz v Deutsche Tradax*, the CJEU held that, as directives impose an obligation upon all authorities of Member States to achieve the result prescribed by EU law, national courts 'are required to interpret their

75 *Cf.* Schütze 2018, p. 95.

76 ECJ 26 February 1986, C-152/84, ECLI:EU:C:1986:84 (*Marshall v Southampton and South-West Hampshire Area Health Authority*), para 48. *Also e.g.* ECJ 13 November 1990, C-106/89, ECLI:EU:C:1990:395 (*Marleasing v Comercial Internacional de Alimentación*), para 6 and ECJ 14 July 1994, C-91/92, ECLI:EU:C:1994:292 (*Faccini Dori v Recreb*), para 20. *E.g.* Schütze 2018, pp. 98-99 and Prechal 2005, p. 255.

77 ECJ 5 October 2004, C-397/01, ECLI:EU:C:2004:584 (*Pfeiffer and Others*), para 109. The fact that provisions included in directives do not have horizontal direct effect is undermined by the fact that they can influence relationships between private parties through the concepts of indirect effect or harmonious interpretation, triangular direct effect and incidental direct effect. A discussion of the concepts of triangular direct effect and incidental direct effect falls outside the scope of this dissertation. *On these concepts e.g.* Schütze 2018, pp. 101-103, Craig & De Búrca 2015, pp. 216-220 and Chalmers, Davies & Monti 2014, pp. 313-316.

78 *E.g.* ECJ 5 October 2004, C-397/01, ECLI:EU:C:2004:584 (*Pfeiffer and Others*), paras. 114-115. *E.g.* Schütze 2018, pp. 103-106, Craig & De Búrca 2015, pp. 209-213 and Prechal 2005, pp. 180 ff.

79 *Cf.* Schütze 2018, p. 105.

national law in the light of the wording and the purpose of the directive'.[80] The obligation of harmonious interpretation has its limits. As the CJEU explained in *Dominguez*, the principle of harmonious interpretation is limited by the general principles of law and cannot lead to a *contra legem* interpretation of national law.[81]

If it is impossible for a national court to interpret national law in accordance with the directive, it should consider whether the provisions included in the directive are capable of having vertical direct effect so that they could be invoked directly against a Member State.[82] Whether provisions included in directives are capable of having direct effect depends on their wording and content, namely, again, on whether they are formulated sufficiently clear, precise and unconditional – the general test to determine whether provisions are capable of having direct effect.[83] As already stated in the context of regulations (section 2.3.2.2), the fact that directives provide discretion to Member States – as regards the form and method of implementation – does not in itself preclude their provisions from being capable of having (vertical) direct effect, as long as the content (minimum) of the right of the claimant 'can be determined with sufficient precision on the basis of the provisions of the directive alone'.[84] If a provision included in a directive is sufficiently clear, precise and unconditional, an individual can directly invoke it against a Member State who failed to implement a directive correctly or timely – if the individual started legal proceedings against the state. Alternatively, individuals and other private parties can use the provision in proceedings concerning Member State liability.[85]

---

80 ECJ 10 April 1984, C-14/83, ECLI:EU:C:1984:153 (*Von Colson and Kamann v Land Nordrhein-Westfalen*), para 26 and ECJ 10 April 1984, C-79/83, ECLI:EU:C:1984:155 (*Harz v Deutsche Tradax*), para 26. *Repeated in e.g.* ECJ 13 November 1990, C-106/89, ECLI:EU:C:1990:395 (*Marleasing v Comercial Internacional de Alimentación*), para 7 and CJEU 24 January 2012, C-282/10, ECLI:EU:C:2012:33 (*Dominguez*), para 24.

81 CJEU 24 January 2012, C-282/10, ECLI:EU:C:2012:33 (*Dominguez*), para 25. *E.g.* Schütze 2018, p. 106 and Craig & De Búrca 2015, p. 213.

82 CJEU 24 January 2012, C-282/10, ECLI:EU:C:2012:33 (*Dominguez*), paras. 32-33.

83 *Cf.* ECJ 12 February 2009, C-138/07, ECLI:EU:C:2009:82 (*Belgische Staat v Cobelfret NV*), para 58.

84 ECJ 12 February 2009, C-138/07, ECLI:EU:C:2009:82 (*Belgische Staat v Cobelfret NV*), paras. 61-62. *Also e.g.* CJEU 17 July 2008, C-226/07, ECLI:EU:C:2008:429 (*Flughafen Köln v Bonn*), para 30 and ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 17. *See also* Woods, Watson & Costa 2017, pp. 119-120.

85 Craig & De Búrca 2015, p. 222. *E.g.* ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*). *Also* Prechal 2005, pp. 259 and 271 ff.

2.4 Enforcement of EU law

2.4.1 Rights, remedies and procedures

The previous section discussed the effects of provisions included in regulations and directives in national legal orders and the extent to which individuals and other private parties can invoke provisions included in regulations and directives directly before national courts. One must however realise that the EU does not involve a complete legal order, and relies on national legal orders and national courts for the enforcement of EU law.

Van Gerven's distinction between 'rights', 'remedies' and 'procedures' helps to clarify the relationship between EU law and national law in relation to the enforcement of EU law. According to Van Gerven: 'The concept of right refers […] to a legal position which a person recognized as such by the law – thus a legal "subject" (hence the name "subjective" right) – may have and which in its normal state can be enforced by that person against (some or all) others before a court of law by means of one or more remedies, those are classes of action, intended to make good infringements of the rights concerned, in accordance with procedures governing the exercise of such classes of action and intended to make the remedy concerned operational.'[86] Hence, Van Gerven in principle separates the subjective right of a party from remedies and procedures available to enforce this subjective right, although he admits the lines between these three categories are sometimes difficult to draw.[87]

One can also apply this distinction to the context of credit rating agency liability. For example, issuers and investors have a 'right' to a credit rating which is not affected by a credit rating agency's failure to ensure a credit rating was based on 'a thorough analysis of all the information that is available to it' under the CRA Regulation.[88] This right mirrors the obligation of credit rating agencies to comply with the CRA Regulation. If a credit rating agency violates this 'right', issuers and investors are entitled to compensation: the right of redress under Article 35a CRA Regulation.[89] In order to effectuate this right, issuers and investors must resort to national 'procedures' before national courts.

Rights, remedies and procedures are not necessarily established entirely at the EU level or entirely at the national level. EU law does not involve a

86 Van Gerven 2000, p. 502 (references were removed).

87 Van Gerven 2000, p. 503. There is much more to say about the distinction between rights, remedies and procedures. Other authors have adopted different distinctions and have used different concepts. However, a more extensive discussion of these other approaches and the surrounding debates falls outside the scope of this research.

88 Under Art. 8 (2), I.42 Annex III and Art. 35a (1) CRA Regulation.

89 In addition to the remedy of compensation, Van Gerven refers to three other remedies: 'the general remedy of setting aside national measures' and 'the specific remedies of restitution (and specific performance) [and] interim relief […]' (Van Gerven 2000, p. 503).

complete legal order and often only establishes 'rights', which are to be enforced by means of national remedies and procedures.

2.4.2 National procedural autonomy

The starting point that EU law does not involve a complete legal order and may choose to only create certain 'rights' also explains the 'default' division of competences between the EU and its Member States regarding the enforcement of EU law: in the absence of EU law on the matter of enforcement, 'rights' created by EU law must be enforced by means of national remedies and procedures.[90] The enforcement of such EU rights then belongs to the 'national procedural autonomy' of Member States. The so-called 'principle of national procedural autonomy' entails that available remedies and procedural rules belong to the competence of Member States.[91] Provisions creating rights and obligations are established at the EU level, but have to be enforced by competent national public authorities, or before national courts through national legal proceedings. The CJEU developed this fundamental principle in *Rewe*, holding that 'in the absence of Community rules […], it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law […]'.[92]

The national procedural autonomy of Member States is not without limitations. As described, the national procedural autonomy is only relevant where provisions of EU law on enforcement are absent or in as far as such provisions of EU law leave discretion to Member States. Furthermore, Article 19 (1) TEU and the principles of equivalence and effectiveness restrict the national procedural autonomy. Article 19 (1) TEU requires Member States to ensure the effective legal protection of the rights established by EU law: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' Furthermore, the principles of equivalence and effectiveness as developed by the CJEU should provide minimum thresholds with which Member States must comply.[93]

90 Van Gerven 2000, p. 502. *Also* Craig & De Búrca 2015, pp. 226-227.
91 Wilman 2014, no. 25.
92 ECJ 16 December 1976, C-33/76, ECLI:EU:C:1976:188 (*Rewe v Landwirtschaftskammer für das Saarland*), para 5.
93 *Also* Vandendriessche 2015, no. 90-91.

2.4.3 Equivalence and effectiveness

The principles of equivalence and effectiveness (as developed by the CJEU) provide restrictions to the national procedural autonomy and minimum thresholds with which Member States must comply.[94] These principles can influence the existence and conditions of a remedy and national procedural rules. In *Wells*, the CJEU held that '[t]he detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)'.[95] Hence, the principle of equivalence entails that national remedies and procedural rules must be applied in the same way to infringements of national law and EU law 'where the purpose, cause of action and essential characteristics are similar'.[96] The principle of effectiveness, also described as 'practical possibility'[97] or *effet utile*, entails that national remedies and procedural rules shall not have the effect that it is virtually impossible or excessively difficult to exercise rights conferred by EU law.[98] Prechal and Wilman describe the principle of effectiveness as 'a principle of minimum protection', as this principle aims to ensure national courts guarantee a minimum standard of protection for private parties who enforce their EU rights.[99] For the purpose of this dissertation, the principle of equivalence has less relevance. Hereafter, the dissertation will mainly concentrate on the principle of effectiveness.

2.5 Influence of EU law on civil liability

2.5.1 Categorisation

The enforcement of EU law builds on the default position that, in the absence of EU law on this matter, 'rights' created by EU law must be enforced by means

94 *Also* Vandendriessche 2015, no. 90-91. In *Von Colson*, the ECJ referred to the benchmark of 'real and effective judicial protection' (ECJ 10 April 1984, C-14/83, ECLI:EU:C:1984:153 (*Von Colson and Kamann v Land Nordrhein-Westfalen*), paras. 22-23). *Also* Craig & De Búrca 2015, p. 230. This dissertation only pays attention to the principles of equivalence and, mostly, effectiveness.

95 ECJ 7 January 2004, C-201/02, ECLI:EU:C:2004:12 (*Wells*), para 67. Prior to *Wells*: ECJ 16 December 1976, C-33/76, ECLI:EU:C:1976:188 (*Rewe v Landwirtschaftskammer für das Saarland*), paras. 5-6.

96 Wilman 2014, no. 36.

97 By Craig & De Búrca 2015, p. 228.

98 ECJ 9 November 1983, C-199/82, ECLI:EU:C:1983:318 (*Amministrazione delle finanze dello Stato v San Giorgio*), para 14 and Wilman 2014, no. 37.

99 Wilman 2014, no. 37 and Prechal 2001, p. 40.

of national remedies and procedures.[100] Article 35a CRA Regulation differs from this default position, in the sense that the provision not only creates rights and obligations at the EU level, but also determines the remedy, namely compensation by means of a right of redress, at the EU level. The introduction of Article 35a CRA Regulation does not stand on its own. It forms part of a broader tendency towards an increased influence of EU law in the area of private law in general and on the civil liability of individuals and other private parties in particular. Moreover, EU regulations contain an increasing amount of provisions conferring rights to compensation or damages upon individuals or private parties, which can be directly invoked and enforced against other individuals or private parties before national courts.[101] This section maps the ways in which EU law[102] influences (national) rules on the civil liability of individuals and other private parties and rights of redress. In doing so, it aims to provide a broader perspective of the European legal context in which Article 35a CRA Regulation can be considered.

To analyse the current influence of EU law on civil liability, three situations are distinguished: (1) situations in which EU law leaves the enforcement of rights established at the EU level to Member States completely; (2) situations in which EU law imposes obligations upon Member States in respect of their rules on civil liability or requires the application of their national civil liability regimes; and (3) situations in which EU law creates directly effective rights to damages or compensation for individuals and private parties at the EU level for the violation of EU rights and obligations.[103]

This categorisation is based on the way in which and the extent to which EU law influences the existence and conditions of rights to compensation or damages. The first situation in fact involves the 'default' situation described in section 2.4.2: EU law creates rights and obligations only, while the enforcement is left to the national procedural autonomy of Member States. In both situation 2 and 3, EU legislation does contain provisions and imposes obligations in the field of civil liability. It is important to note that the distinction between these situations is drawn on the basis of whether eventual claims for compensation or damages must be filed in accordance with the applicable national law (situation 2) or can be based directly on a right of redress established at the EU level (situation 3). The second situation involves examples

100 *Cf.* Van Gerven 2000, p. 502.

101 *See on this development* Ackermann 2018 and De Graaff & Verheij 2017. *Cf. also* Alpa 2019.

102 Meaning provisions included in regulations and directives and general principles as effectiveness and equivalence.

103 A description of the ways in which EU law influences civil liability can be structured in other manners as well. *For a slightly different presentation of part of the examples described in this section, see* Vandendriessche 2015, no. 62 ff. *For part of the examples provided in section 2.5, see also* Moloney 2014, pp. 969-970. *See also* Alpa 2019 and Ackermann 2018. *For part of the examples analysed in the context of the civil liability of credit rating agencies, see* Wimmer 2017, pp. 119 ff.

of all sorts of different provisions included in regulations and directives. Notwithstanding the different legal instruments used, the effects of these provisions are similar in the sense that they entitle individuals and other private parties to bring claims for compensation or damages under the applicable national law in certain situations.

In advance, it must be noted that it is sometimes difficult to draw the line between situation 2 and 3 and that the effects of provisions falling in these categories can be similar. In fact, the examples discussed in situation 2 and 3 form part of a sliding scale. At the one end, there are provisions such as Article 11 (2) Prospectus Regulation (to be discussed in section 2.5.3.2), which impose obligations upon Member States in respect of civil liability. At the other end, there is Article 82 General Data Protection Regulation, which creates an autonomous and horizontal directly effective right to damages at the EU level (to be discussed in section 2.5.4.3). One can even wonder whether the Union legislature intentionally employed different wordings and templates, or whether the fragmentation simply stayed unnoticed because of the piecemeal approach adopted by the Union legislature in civil liability matters.[104]

The categorisation does not make a distinction on the basis of whether the influence of EU law stems from European legislative instruments or decisions of the CJEU.[105] Consequently, in each of the three situations described below, the influence of EU law on civil liability and rights to damages is determined by the content of the provision (if present), its (in)direct effect and the influence of the principles of equivalence and effectiveness on the national procedural autonomy of Member States. The examples used throughout this section have mainly been derived from EU financial law. However, to be able to complete[106] this overview of the types of influence, examples were sometimes derived from other legal areas as well. As the civil liability of credit rating agencies forms the main subject of this dissertation, this section involves a more extensive analysis of Article 35a CRA Regulation under subsection 2.5.4.2, as compared to the other examples discussed in section 2.5.

2.5.2 Situation 1: Absence of EU law provisions on civil liability

2.5.2.1 Setting the scene

The first situation in which the influence of EU law is analysed concerns situations in which EU legislative instruments create rights and obligations,

104 Section 2.2.
105 In contrast, Vandendriessche clearly distinguished between the influence of provisions of European legal instruments and of the CJEU (Vandendriessche 2015, no. 62 ff.).
106 Although this section does not intend to provide an exhaustive overview of all specific situations and examples in which EU (financial) law influences (national) rules on civil liability.

while leaving the enforcement of these rights and obligations (remedies and procedures) to the Member States. As described in section 2.4.2, in the absence of provisions of EU law addressing the matter of enforcement, the enforcement of EU law belongs to the national procedural autonomy of Member States. This section analyses to what extent the principle of effectiveness restricts the national procedural autonomy and requires Member States to entitle individuals and other private parties to a right to damages for infringements of rights and obligations established by EU law.

2.5.2.2 Regulations

Individuals and other private parties can invoke directly effective provisions established in regulations immediately before national courts. But, in the absence of specific provisions on the (private) enforcement of the rights created at the EU level, the question arises whether the principle of effectiveness requires Member States to allow individuals and private parties to start civil proceedings or to entitle individuals and other private parties to a right to damages under the applicable national law.

The CJEU decided on this matter in *Courage v Crehan* and *Muñoz v Frumar* in relation to Treaty provisions and provisions of regulations, respectively. In *Courage v Crehan* the question arose whether the claimant (Crehan) was entitled to claim damages from the defendant (Brewery Courage) under English law for the infringement of Article 85 (1) EC Treaty (currently Art. 101 (1) TFEU).[107] Brewery Courage and its tenant Crehan had entered into an agreement which was contrary to Article 85 (1) EC Treaty. As English law did not allow a party to an illegal agreement to claim damages from the other party, Crehan's claim for damages against Courage was barred.[108]

The CJEU held that Crehan should have been entitled to claim damages on the basis of Article 101 (1) TFEU as 'the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals' and that 'the practical effect of the prohibition laid down in 101(1) TFEU would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to

107 ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*). In 2014, a directive was adopted (Directive 2014/104/EU) laying down rules governing actions by private parties for damages under national law for infringements of competition law provisions of the Member States and of the European Union. *See also* section 2.5.3. Art. 101 (1) TFEU stipulates that 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market' 'shall be prohibited as incompatible with the internal market'.

108 ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), para 11.

restrict or distort competition'.[109] An absolute bar to the claim for damages under English law was therefore not permissible.[110] But, as Article 85 EC Treaty did not provide relevant provisions on enforcement, English law had to 'lay down the detailed procedural rules governing actions for safeguarding rights which individuals can derive directly from Community law' in accordance with the principles of equivalence and effectiveness.[111] Also, Member States were allowed, although not in an absolute manner, to limit the right of damages of a claimant in specific situations.[112] The full effect of EU law hence required Member States to allow claims for damages for violations of Article 85 (1) EC Treaty, but left the detailed rules governing such actions to the Member States.

In *Muñoz v Frumar*, the question arose whether a private party was entitled to start civil proceedings under the applicable national law on the basis of the violation of a provision in a regulation committed by another private party.[113] The dispute centred around violations of quality standards under Regulations no. 1035/72 and no. 2200/96[114] by the English company Frumar in the sale of table grapes. The Spanish company Muñoz wished to bring civil proceedings against Frumar before the English courts in order to force Frumar to comply with the regulations. The English lower court concluded that Frumar violated the regulations, but dismissed Muñoz' claim because the rules on the quality standards of table grapes would not entitle private parties to claim enforcement on the basis of the violation of these Regulations.[115] The Court of Appeal asked the CJEU whether these Regulations created a legal duty 'which a national court should enforce in civil proceedings brought at the suit of a person who is a substantial grower within the Community of the fruit or vegetable concerned [Muñoz]?'[116] In essence, the Court of Appeal hence posed the question of whether Muñoz was entitled to claim enforcement through civil proceedings based on the violation of these EU regulations. The CJEU held that it lies in the nature of regulations 'to confer rights on indi-

109 ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), paras. 25 and 26.
110 ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), para 28.
111 ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), para 29.
112 *Cf.* ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), para 31 in which the ECJ held that 'Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past (see Case 39/72 Commission v Italy [1973] ECR 101, paragraph 10), a litigant should not profit from his own unlawful conduct, where this is proven.'
113 ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*).
114 Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organization of the market in fruit and vegetables.
115 ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*), para 22.
116 ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*), para 23.

viduals' which must be protected by the national courts.[117] The full effectiveness of the quality standards required Member States to make it possible for Muñoz 'to enforce that obligation by means of civil proceedings' against Frumar.[118] The CJEU hence decided that Muñoz was entitled to enforce EU law through civil proceedings.

A general application of *Courage v Crehan* and *Muñoz v Frumar* to provisions of regulations is debated amongst scholars. Leczykiewicz argued that *Courage v Crehan* does not entail 'a general regime of private party liability analogous to the principle of Member State liability'.[119] Leczykiewicz indicated that the actual introduction of a principle of private party liability would require a clarification of some core principles of EU law first, such as direct and horizontal effect and the concept of effective judicial protection.[120] Another argument to support a limited application of *Courage v Crehan,* was that the decision concerned EU competition law, which Leczykiewicz argued to be a very specific legal area that would not be representative of other areas of EU law.[121] However, the latter argument might have lost its relevance, as the reasoning of *Courage v Crehan* was applied in *Muñoz v Frumar* though that case did not involve competition law. Other scholars, however, did not agree with Leczykiewicz' restrictive approach. For instance, Sieburgh argued that *Courage v Crehan* showed that 'the liability is enshrined in Community law' as the decision referred to the full effectiveness and the practical effect of Article 101 (1) TFEU.[122] In addition, Wilman stated that '(t)he question whether the possibility of claiming damages or bringing other civil proceedings for a breach of EU law by a private party is also a proper 'EU law remedy' must probably be answered in the affirmative'.[123] Hence, scholars as Sieburgh and Wilman did assume that the decisions of *Courage v Crehan* and *Muñoz v Frumar* have a broad scope of application.

117 ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*), para 27.

118 ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*), para 30. Unlike AG Geelhoed, the ECJ did not give a further explanation for the reason that the provisions have direct effect. Advocate General Geelhoed provided an overview of the standing of the law in respect of the direct effect of provisions of EU law. Subsequently, he concluded that it is 'beyond dispute' that Art. 3 (1) Regulation No 2200/96 has direct effect as it is 'unconditional and sufficiently precise and no national implementing measures are needed for it to be effective in regard to persons' (para 38). Also, in his opinion, it is clear that the system of quality standards 'serves to protect both dealers in fruit and vegetables and consumers' (para 30). In addition, Advocate General Geelhoed remarked that the ECJ has already expressly held that provisions of regulations on the common organisation of the market in fruit and vegetables have direct effect (para 38 and ECJ 13 December 1983, C-222/82, ECLI:EU:C:1983:370 (*Apple and Pear Development Council v K.J. Lewis Ltd and others*)).

119 Leczykiewicz 2009-2010, p. 259.

120 Leczykiewicz 2009-2010, p. 259.

121 Leczykiewicz 2009-2010, p. 260.

122 Sieburgh 2014, pp. 522 ff.

123 Wilman 2014, no. 64.

If the decisions in *Courage v Crehan* and *Muñoz v Frumar* have general application and thus apply in the context of EU financial law as well, they have the potential of requiring Member States to allow (at the least) civil proceedings on multiple occasions. The relevance of a general application is even larger when one takes into consideration that there is a tendency in EU law to turn directives into regulations.[124] If a provision is sufficiently clear, precise and unconditional and relevant to the situation of an individual litigant, private parties are entitled (at least) to start civil proceedings if required for the full effectiveness of EU law.[125]

An example of such a provision can be found in the Market Abuse Regulation.[126] The Market Abuse Regulation requires Member States to ensure that competent authorities can take appropriate administrative sanctions and other administrative measures against the persons responsible for certain infringements of the Market Abuse Regulation under Article 30 (1), but does not require Member States to apply their civil liability regimes to infringements of the regulation. Nevertheless, individuals and private parties may be entitled to civil proceedings under the applicable national law in order to enforce their rights under the Market Abuse Regulation on the basis of an analogue interpretation of *Muñoz v Frumar*.[127]

As the CJEU held in *Muñoz v Frumar*, it lies in the nature of regulations 'to confer rights on individuals' which must be protected by the national courts.[128] One could argue that the same applies to the Market Abuse Regulation: it lies in its nature to confer rights on individuals, which must be protected by the national courts. As argued by Tountopoulos, provisions of the Market Abuse Regulation can be sufficiently precise and unconditional and can confer rights upon private parties, so that they can be relied upon directly

124 *In the context of EU financial law e.g.* the Market Abuse Regulation (Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC) and the Prospectus Regulation (Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC). The European Commission expressed this intention in a Communication – A Europe of Results – Applying Community Law /* COM/2007/0502 final */, p. 5 and fn. 12. *See also* M. Monti, 'A New Strategy for the Single Market –At the Service of Europe's Economy and Society' (Brussels, 2010) https://ec.europa.eu/docsroom/documents/15501/attachments/1/translations/en/renditions/pdf, last accessed at 31 August 2019.

125 Tountopoulos 2014, p. 325.

126 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. As argued by the contribution of Tountopoulos 2014.

127 As argued by Tountopoulos 2014. *See also* Busch 2016 *on the private law effects of the MAR.*

128 ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*), para 27.

before national courts by the private parties they aim to confer rights upon.[129] This may especially apply to investors, as the improvement of investor protection and confidence in the financial markets is one of the primary goals of the Market Abuse Regulation.[130] The prohibition for persons to engage, or attempt to engage, in market manipulation under Article 15 Market Abuse Regulation, for instance, can serve as an example of a directly effective provision that investors can directly invoke before the national courts.

The key question is whether the full effect of the rules established by the Market Abuse Regulation requires Member States to allow enforcement by individuals and private parties through civil proceedings.[131] As appears from *Muñoz v Frumar*, the fact that a national authority exists that exercises the public enforcement of the regulation does not necessarily ensure the 'full effectiveness' of EU law.[132] In addition, Tountopoulos argued that it is generally accepted that private enforcement contributes to the effectiveness of the rules on market abuse.[133] One can therefore argue that Member States must allow private parties, such as investors, to bring civil proceedings under the applicable national law against other private parties for violations of rules established by the Market Abuse Regulation.[134] If required by the full effect of EU law, Member States must allow a private party to bring proceedings for the enforcement of EU law or to bring a claim for damages. As appears from *Courage v Crehan*, the detailed rules on such actions are left to the Member States, subject to the principles of equivalence and effectiveness.[135]

2.5.2.3 Directives

In the absence of specific provisions on (private) enforcement established in a directive, matters relating to (private) enforcement for breaches of the national provisions in which the directive has been implemented are left to the Member States. Nevertheless, the question arises whether the principle of effectiveness requires Member States to allow individuals and private parties to start civil proceedings or to provide individuals and private parties with a right to damages under the applicable national law for violations of provi-

129 Tountopoulos 2014, pp. 312 and 317.
130 Art. 1 MAR.
131 Tountopoulos 2014, p. 323.
132 In *Muñoz v Frumar*, the ECJ did not pay attention to the fact that the English Horticultural Marketing Inspectorate was responsible for the public enforcement of Regulation No 2200/96. Advocate General Geelhoed stated that 'the regulation grants no monopoly in regard to enforcement' and that '[c]ommunity law does not operate on the notion that enforcement by means of private law is precluded where provisions is made *expressis verbis* solely for the enforcement under public law' (Opinion A-G L.A. Geelhoed, ECLI:EU:C:2001:697, para 55, with ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*).
133 Tountopoulos 2014, pp. 323-328.
134 As done by Tountopoulos 2014, p. 328.
135 ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), para 29.

sions of national law which implement directives. This question must essentially be answered in the same way as already done for regulations in section 2.5.2.2. Member States must therefore allow private enforcement if (1) a directive confers rights upon individuals for which Member States must ensure effective protection; and (2) if private enforcement is required for the full effectiveness of the directive. Yet, as decisions of the CJEU demonstrate, Member States are allowed more discretion in relation to the enforcement of directives, as compared to regulations.[136]

To start with, it must be determined whether a directive confers rights upon individuals for which Member States need to provide sufficient remedies in order to ensure the effective protection of those rights. In section 2.3.3, it was remarked that directives can impose directly binding obligations upon Member States only. However, as remarked by Prechal, '[t]his in no way precludes that directives may *formulate* obligations; it is, however, only upon transposition that the obligations become enforceable', so that directives can form an indirect source of rights and obligations for individuals.[137] The CJEU has not defined exactly when a directive confers rights upon individuals; however, some parameters can be derived from its case law.[138] According to Prechal, relevant parameters are the wording and aim of the provision, the parties to the relationship for which the rule is meant, the objectives of the provision (protecting private or public interests) and whether the directive explicitly requires effective judicial protection (although the absence of such a requirement is not conclusive).[139] In *Paul and Others*, for instance, the CJEU held that the mere fact that the recitals of a directive stipulate that one of its objectives is to protect depositors, does not necessarily entail that the directive seeks to confer rights upon depositors.[140] In academic literature, it is however doubted whether the CJEU would still come to the same conclusion today.[141]

If a specific provision confers rights upon individuals, it must be analysed whether the effective judicial protection of those rights and/or the principles of equivalence and effectiveness require Member States to allow private enforcement. Again, this all boils down to the influence of the principle of effectiveness. In theory, if the rights are fully secured without the availability of civil proceedings,[142] Member States are not required to allow civil proceed-

136 *See, for the relevance of the difference between regulations and directives,* Ackermann 2018, p. 776.
137 Prechal 2005, p. 96.
138 Prechal 2005, p. 111.
139 Prechal 2005, pp. 113, 115, 118 and 124, respectively.
140 ECJ 12 October 2004, C-222/02, ECLI:EU:C:2004:606 (*Paul and Others*), paras. 38 and 40.
141 Tegelaar 2016, pp. 708-711 and pp. 714-715, Van Praag 2014, pp. 217-218, Sahtie 2012, p. 277 and Athanassiou 2011, p. 21. *See also* CJEU 4 October 2018, C-571/16, ECLI:EU:C:2018:807 (*Kantarev*), para 101.
142 For instance through government funded relief funds, *see* Van de Bunt 2016 on government funded disaster relief funds, or through compensation schemes arranged for by financial supervisors, such as the Dutch Herstelkader rentederivaten.

ings.[143] In the context of the financial sector, the decisions *Genil 48 SL*[144] and *Alfred Hirmann v Immofinanz AG*[145] have demonstrated that the CJEU leaves the Member States a wide margin of discretion in this regard.

Genil 48 SL concerned the national contractual consequences of breaches of Article 19 (4) and (5) of the Markets in Financial Instruments Directive (hereafter 'MiFID'). Genil 48 SL and Comercial Hostelera de Grandes Vinos SL (hereafter: 'Genil 48 SL') had concluded swap agreements with Bankinter SA and Banco Bilbao Vizcaya Argentaria SA (hereafter: Bankinter SA), but the banks omitted to carry out the assessments required under Article 19 (4) and (5) MiFID.[146] Genil 48 SL argued that the swap agreements were void *ab initio* because of this failure.[147] The Court of First Instance (No 12, Madrid) referred to the CJEU for a preliminary ruling on the question of whether the failure to comply with Article 19 (4) and (5) MiFID would cause the contracts to be void *ab initio.*[148] The CJEU stated that MiFID does not state 'either that the Member States must provide for contractual consequences in the event of contracts being concluded which do not comply with the obligations under national legal provisions transposing Article 19(4) and (5) of Directive 2004/39, or what those consequences might be.'[149] In the absence of EU law on contractual consequences, 'it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness'.[150] In this way, the CJEU left a large margin of discretion to the Member States to determine the contractual consequences of infringements of MiFID.

Subsequently, the CJEU delivered a similar judgment in *Alfred Hirmann v Immofinanz AG* concerning the interpretation of enforcement provisions of the Prospectus Directive, the Transparency Directive and the Market Abuse Directive. Hirmann purchased shares in Immofinanz, but subsequently accused Immofinanz of market manipulation and of having distributed an incomplete, false or misleading prospectus. Hirmann claimed the annulment of the purchase contract and damages. Immofinanz argued that Hirmann's claim violated overriding principles of national and EU law (the Second Council Directive

143 See Wallinga 2014, par. 5.
144 CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*).
145 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG).*
146 CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*), paras. 13 and 16.
147 CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*), para 17.
148 CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*), para 22.
149 CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*), para 57.
150 CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*), para 57.

77/91/EEC[151]) with regard to the liability of limited liability companies.[152] The Handelsgericht Wien referred the case to the CJEU for a preliminary ruling on the question whether the Second Council Directive 77/91/EEC precluded national legislation – based on the enforcement provisions under the Prospectus Directive, the Transparency Directive and the Market Abuse Directive – (1) that allows liability from a public liability company to an investor; and (2) that, if the public company is liable, allows for the payment of a sum equivalent to the purchase price of the shares to the purchaser.[153] The CJEU held that in the absence of rules of EU law, Member States have 'a wide discretion in the choice of penalties' for violations of EU law as long as they 'act in accordance with European Union law'.[154] If an issuer is held liable, Member States may 'choose a civil measure to provide compensation'.[155] As long as they comply with the principles of equivalence and effectiveness, Member States may set the criteria for determining the extent of the damages.[156] In this specific situation, the CJEU concluded that the national civil liability regime constituted an appropriate remedy.[157] The CJEU did not impose an obligation upon Member States to apply their civil law systems to infringements of the directive. Yet, if a Member State chooses to apply its civil law system, it has to comply with the principles of equivalence and effectiveness.

In *Genil 48 SL* and *Alfred Hirmann v Immofinanz AG*, the CJEU affirmed that in the absence of EU law on the matter, Member States are free to decide on the type of private enforcement measure employed – as long as they comply with the principles of equivalence and effectiveness. If Member States choose to allow private law remedies, they have to comply with the principles of equivalence and effectiveness. The CJEU has shown a reluctant approach towards interference with the national procedural autonomy of the Member

151 Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Art. 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

152 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*, paras. 16-20.

153 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*, para 22.

154 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*, para 41.

155 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*, para 42.

156 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*, para 40.

157 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*, para 43.

States[158] and did not provide specific guidance on the circumstances in which the principle of effectiveness entails that private parties should be entitled to civil proceedings. If Member States can safeguard the indirect rights conferred upon individuals and private parties by other legal mechanisms, the full effect of EU law does not require them to allow for civil proceedings.[159]

Thus far, this section concentrated on the obligations imposed upon Member States to ensure a minimum level of protection in respect of the enforcement of EU law. Some EU legislative instruments, however, might also arrange for a maximum standard of protection. In the context of EU financial law, the conduct of business rules under MiFID II (the Markets in Financial Instruments Directive II)[160] provide an example of a situation in which EU law might not only require a minimum standard of protection, but also a maximum standard of protection. Conduct of business rules for investment firms have been established to protect clients of investment firms (investors) when investment firms provide services to them.[161] For instance, under Article 24 and 25 MiFID II, Member States must ensure investment firms conduct suitability or appropriateness tests if they provide clients with information or investment advice. These rules aim to protect private interests of investors and to regulate the relationship between an investment firm and its client. They can therefore qualify as an indirect source of rights for individuals or private parties.

MiFID II, however, does not impose specific obligations upon Member States in respect of civil liability. Under Article 69 (2) MiFID II, Member States must ensure 'mechanisms are in place to ensure that compensation may be paid or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of this Directive or of Regulation (EU) No 600/2014'.[162] In theory, Member States are not required to allow investors to start civil proceedings to claim damages if they

158 In particular, the exact meaning of *Genil 48 SL* is a topic of debate between scholars. Wallinga concentrated on the autonomy of the Member States (Wallinga 2015, p. 269 and Wallinga 2014, par. 6), while Busch, Della Negra and Grundmann concluded that the conduct of business rules of MiFID influence horizontal relationships (Busch 2015, p. 211, Della Negra 2014, p. 578 and Grundmann 2013, p. 287).

159 The approach is less strict as compared to regulations. *On the difference between regulations and directives,* Ackermann 2018, p. 776.

160 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. MiFID (I): Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC. MiFID II replaced MiFID (I) as from 3 January 2018.

161 Recital 3, 4 and 7 MiFID II.

162 In addition to Art. 69 MiFID II, Art. 70 (1) MiFID II requires Member States to ensure that 'effective, proportionate and dissuasive' administrative measures or sanctions are available to the national competent authority against persons responsible for infringements of national provisions adopted in the implementation of MiFID II.

are able to fully realize the result prescribed by the Directive in accordance with the principles of equivalence and effectiveness. However, with regard to the conduct of business rules of investment firms, it seems difficult to imagine how Member States would not allow civil proceedings without breaching EU law[163] (possibly through a public fund or scheme arranging for investor compensation). Yet, in practice, Member States have often accepted that national provisions which have implemented the conduct of business rules of MiFID II can be enforced through civil proceedings.[164]

In academic literature, the question arose whether the conduct of business rules established by MiFID II can impose maximum standards in the area of civil liability.[165] The decision in *Nationale-Nederlanden Levensverzekering Mij NV v Van Leeuwen* involved the capability of national private law to gold-plate a provision of a directive with the character of maximum harmonisation. In this case, Van Leeuwen took out a life assurance policy with the Dutch insurance company Nationale-Nederlanden ('NN').[166] When the life assurance contract ended, a dispute arose between NN and Van Leeuwen on the costs and premiums deducted by NN and about whether the information provided by NN before the conclusion of the contract had been sufficient.[167] NN complied with the requirements referred to in Article 2 (2) (q) and (r) of the Dutch Regulation regarding the provision of information to policy-holders 1998 (the RIAV 1998) which implemented Article 31 of the Third Life Insurance Directive.[168] Still, the question arose whether the open norms and unwritten rules under Dutch law – in particular, the duty of care as a condition for non-contractual liability – could require NN to have provided additional information to Van Leeuwen. Article 31 (3) Third Life Insurance Directive provides that '[t]he Member State of the commitment may require assurance undertakings

163 *Cf.* Tison 2010, p. 2624.

164 *See in respect of German, Dutch, Belgian and French law* Vandendriessche 2015, no. 103 and Tison 2010, pp. 2630-2632. *See in respect of Dutch law* Busch 2015, p. 209.

165 *As addressed by e.g.* Busch 2012, Busch 2015, Busch & Arons 2015, Busch 2017, Janssen 2017a, Janssen 2017b, Tison 2010, Cherednychenko 2012, Wallinga & Cherednychenko 2016, Wallinga 2014, Wallinga & Pijls 2018 and Verbruggen 2018. This question is not relevant when EU law stipulates that the rights and obligations established at the EU level provide for minimum standards. Examples of such provisions can be found under Art. 11 (4) PRIIPs Regulation which states that it 'does not exclude further civil liability claims in accordance with national law' and Art. 35a (5) CRA Regulation which states that '[t]his Article does not exclude further civil liability claims in accordance with national law.' As the topic of maximum harmonisation therefore has no direct relevance in relation to credit rating agency liability, this topic is only mentioned briefly in this dissertation.

166 CJEU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelmus van Leeuwen*), para 10.

167 CJEU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelmus van Leeuwen*), paras. 13-14.

168 Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC.

to furnish information in addition to that listed in Annex II only if it is necessary for a proper understanding by the policyholder of the essential elements of the commitment'. In the words of AG Sharpston, '[t]he issue here is therefore whether that option could be exercised through the application of rules of law other than legislation',[169] and in this specific case whether additional information duties could be required through the open/general clauses of Dutch non-contractual liability law. The CJEU held that Member States have to ensure that additional information is required 'in accordance with the principle of legal certainty, [so that] it enables insurance companies to identify with sufficient foreseeability what additional information they must provide and which the policyholder may expect'.[170] Furthermore, the CJEU held that it is for the national courts to determine whether open clauses and unwritten rules comply with those requirements.[171] Hence, the CJEU accepted that open and general clauses under national law can require the provision of additional information under Article 31 (3) Third Life Insurance Directive.[172] Again, the CJEU showed reluctance to interfere with national civil liability law and allows Member States a wide margin of discretion to adopt additional requirements as long as EU law itself provides for such opportunities.

So, what general lessons can be derived from the decision in *Nationale-Nederlanden Levensverzekering Mij NV v Van Leeuwen* and how can these lessons be applied in the context of the conduct of business rules of MiFID II? It is generally accepted that the conduct of business rules of MiFID II involve maximum harmonisation,[173] but scholars are divided on the question of whether national courts are bound by these maximum standards when deciding on claims for damages brought in accordance with the applicable national law. Legal scholars as Busch and Janssen concluded that national courts may neither be less stringent nor more stringent than the standards set by MiFID II. They argued that, due to the lack of a distinction between private and public law at the EU level, maximum harmonisation applies to all national courts and

169 Opinion of A-G E.V.E. Sharpston, ECLI:EU:C:2014:1921, para 57 with CJEU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelmus van Leeuwen*).

170 CJEU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelmus van Leeuwen*), para 29.

171 CJEU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelmus van Leeuwen*), para 33.

172 Wallinga and Cherednychenko concluded that the CJEU did not fully realise that the District Court Rotterdam in fact asked whether national private law could adopt stricter rules than national public law in which EU law had been implemented (see Wallinga & Cherednychenko 2016, para 3). However, EU law is solely concerned with the effectiveness of EU law and is not concerned with the distinction between public law and private law. Therefore, from the perspective of the CJEU, it might not be considered remarkable that the CJEU has not approached the issue from a national – public and private law – perspective. *Cf.* Kalkman 2016, p. 187, responding to Wallinga & Cherednychenko 2016.

173 Tison 2010, pp. 2632-2633.

to both national public and private law.[174] Scholars such as Tison, Cherednychenko, Wallinga and Pijls, however, adopted a different approach in respect of the effects of the MiFID II rules on national private law.[175] Tison believes that care must be taken when translating the character of maximum harmonisation to the private law context, especially because the private law effects of MiFID II 'are only indirectly assumed on the basis of the objectives of the directive'.[176] As argued by Wallinga and Cherednychenko, it can be derived from *Nationale-Nederlanden Levensverzekering Mij NV v Van Leeuwen* that, rather than putting emphasis on MiFID II's character of maximum harmonisation, it is more useful to look at the margin of discretion that the wording of the relevant provisions leaves to the Member States.[177] For instance, Article 24 (1) MiFID II requires Member States to ensure that, when providing investment/ancillary services to clients, 'an investment firm act[s] honestly, fairly and professionally in accordance with the best interests of its clients and [complies], in particular, with the principles set out in this Article and in Article 25'.[178] In addition, Article 24 (12) allows Member States, in exceptional situations, to 'impose additional requirements on investment firms' that 'must be objectively justified and proportionate so as to address specific risks to investor protection or to market integrity which are of particular importance in the circumstances of the market structure of that Member State'.[179] Hence, one could say that Article 24 (1) itself forms an open clause allowing for flexibility if needed in particular circumstances and that Article 24 (12) forms an escape clause for Member States to adopt stricter requirements for investment firms. When these provisions are read in light of the CJEU's approach in *Nationale-Nederlanden Levensverzekering Mij NV v Van Leeuwen*, Member States can adopt stricter requirements through national open and general clauses and, in particular, through the duty of care under national non-contractual liability law.[180]

Overall, the influence of the principle of effectiveness on civil liability and the availability of rights to damages is less far-reaching and clear as compared to situations in which explicit provisions of EU law on these matters exist. The principle of effectiveness mainly requires Member States to provide individuals or private parties with the possibility to start 'civil proceedings'. The term 'civil

174 *E.g.* although with reservations in respect of the general clauses of MiFID II as discussed hereafter, Busch 2012, p. 395, Busch 2015, pp. 216-218, Busch & Arons 2015, paras. 5-6 and Busch 2017, p. 1014. *Also* Janssen 2017a, pp. 289-290 and Janssen 2017b, p. 1035.
175 Tison 2010, Cherednychenko 2012, Wallinga & Cherednychenko 2016, Wallinga 2014 and Wallinga & Pijls 2018. *Cf. also* Verbruggen 2018.
176 Tison 2010, p. 2633.
177 Wallinga & Cherednychenko 2016, para 5. *Cf. also e.g.* Busch 2017, p. 1015 and Busch 2015, pp. 217-218.
178 Busch 2015, pp. 217-218 and Tison 2010, p. 2633.
179 Wallinga & Cherednychenko 2016, para 5. *Also* Wallinga & Pijls 2018, p. 16.
180 As defended by Wallinga & Cherednychenko 2016, para 5. *Also* Wallinga & Pijls 2018, p. 16.

proceedings' does not only relate to civil liability or rights to compensation, but also includes other sanctions, such as the sanction to declare contracts null and void.

2.5.3 Situation 2: EU law provisions on (the application of) national civil liability regimes

2.5.3.1 Setting the scene

The second situation in which the influence of EU law is analysed concerns situations in which EU legislative instruments create rights and obligations, and also impose obligations upon Member States in respect of civil liability and the applicability of national civil liability regimes. EU law requires that Member States entitle private parties to rights to compensation or damages, but the actual enforcement of EU rights nevertheless continues to take place through national remedies and procedures.

The second situation involves examples of all sorts of different provisions included in regulations and directives. Notwithstanding the different legal instruments used, the effects of these provisions are similar in the sense that they entitle individuals and other private parties to claims for compensation or damages under the applicable national law in certain situations. Because of these similar effects, it was not considered useful to make a further distinction based on the legislative instrument in which the provision was included. The distinction made between section 2.5.3.2 ('EU law provisions (*de facto*) requiring application national civil liability regimes') and section 2.5.3.3 ('EU law provisions creating a right of redress under national law') is a matter of different wording and degree. Section 2.5.3.3 discusses examples of provisions that directly refer to a right to damages, while section 2.5.3.2 discusses examples of provisions that involve less direct wording and leave somewhat more discretion to Member States.

Outside the area of EU financial law, multiple examples of directives impose detailed obligations upon Member States in respect of the civil liability of individuals and other private parties and the remedy of compensation. Well-known examples are the Directive on competition law damages,[181] the Product Liability Directive,[182] the Directive on the enforcement of intellectual

181 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

182 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

property rights[183] and the Directive on environmental liability.[184] These examples are not discussed further in this dissertation, but serve as examples to show that the level of harmonisation entailed by provisions falling within this second category can be higher than the examples discussed hereafter in the context of EU financial law. For instance, the Directive on Competition Law Damages imposes detailed obligations upon Member States with regard to the compensation of parties duped by infringements of EU competition law. It codifies the rules established in *Courage v Crehan* by requiring Member States to ensure that natural and legal persons can obtain full compensation for loss caused by an infringement of competition law.[185] Furthermore, it codifies the principles of equivalence and effectiveness by stipulating that 'all national rules and procedures relating to the exercise of claims for damages' must comply with these principles[186] and imposes further obligations upon the Member States in respect of, for instance, the quantification of harm, causation and limitation periods.[187]

2.5.3.2 *EU law provisions (de facto) requiring application of national civil liability regimes*

Although EU financial law does not involve regulatory frameworks that impose such detailed obligations upon Member States on the remedy of compensation as done by the Directive on Competition Law Damages, one can find provisions that require or require *de facto* Member States to apply their national civil liability regimes to infringements of rights and obligations established at the EU level.

To start with, one can find examples of provisions under the Alternative Investment Fund Managers Directive (AIFMD[188]), the Directive on Undertakings for Collective Investment in Transferable Securities (UCITS V[189]) and

183 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.
184 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.
185 Art. 3 (1) Directive on Competition Law Damages. *See* section 2.5.2.2 on ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*).
186 Art. 4 Directive on Competition Law Damages.
187 Art. 17 and Art. 10 Directive on Competition Law Damages, respectively.
188 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.
189 Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions.

the Payment Services Directive II (PSD II[190]), which stipulate when private parties are liable vis-à-vis other private parties and, thereby, impose obligations upon Member States in the area of civil liability.[191] The AIFMD and UCITS V contain rules on investment funds[192] and on their managers and depositaries. They do not impose a general obligation upon Member States to apply their national civil liability regimes to infringements of their national implementing provisions.[193] Instead, AIFMD and UCITS V have introduced specific provisions on the liability of depositaries of investment funds towards investment funds and investors. Under Article 21 (12) AIFMD and Article 24 (1) UCITS V, Member States must ensure that the depositary is liable to the UCITS or AIF and to the investors for loss caused by the depositary or a third party to whom the custody has been delegated:

> Article 21 (12) AIFMD – 'The depositary shall be liable to the AIF or to the investors of the AIF, for the loss by the depositary or a third party to whom the custody of financial instruments held in custody in accordance with point (a) of paragraph 8 has been delegated.
>
> In the case of such a loss of a financial instrument held in custody, the depositary shall return a financial instrument of identical type or the corresponding amount to the AIF or the AIFM acting on behalf of the AIF without undue delay. The depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

---

190 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

191 *Cf. also for the same type of construction, included in a regulation* Art. 7 (4) of the Regulation (EU) 2017/1131 on Money Market Funds: 'The manager of an MMF shall be responsible for ensuring compliance with this Regulation and shall be liable for any loss or damage resulting from non-compliance with this Regulation' in conjunction with Art. 40 (1) of the Regulation (EU) 2017/1131 on Money Market Funds: 'Member States shall lay down the rules on penalties and other measures applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented'. Hence, the Regulation stipulates when a manager is liable, but leaves the enforcement of this obligation to the Member States. *Cf. also for the same type of construction, included in a regulation e.g.* Art. 7 (2) Regulation (EU) 2015/760 on European long-term investment funds (ELTIFs), which refers the liability of managers of ELTIFs back to the rules under AIFMD.

192 Investment funds gather assets from multiple investors and collectively invest these assets in the financial markets. *Cf. e.g.* Armour, Awrey, Davies et al. 2018, p. 250 and Moloney 2014, pp. 196-197.

193 Under Art. 48 (1) AIFMD and Art. 99 (1) UCITS V, Member States are required to ensure that the competent authorities can take appropriate administrative measures/sanctions against persons responsible for infringements of national provisions adopted in the implementation of AIFMD and UCITS V. *Cf. also on the liability rules in the context* Vandendriessche 2015, no. 64.

> The depositary shall also be liable to the AIF, or to the investors of the AIF, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to this Directive.'
>
> Article 24 (1) UCITS V – 'Member States shall ensure that the depositary is liable to the UCITS and to the unit-holders of the UCITS for the loss by the depositary or a third party to whom the custody of financial instruments held in custody in accordance with point (a) of Article 22(5) has been delegated.
>
> In the case of a loss of a financial instrument held in custody, Member States shall ensure that the depositary returns a financial instrument of an identical type or the corresponding amount to the UCITS or the management company acting on behalf of the UCITS without undue delay. The depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.
>
> Member States shall ensure that the depositary is also liable to the UCITS, and to the investors of the UCITS, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to this Directive.'

Both Article 21 (12) AIFMD and Article 24 (1) UCITS hence impose an obligation upon Member States to ensure that depositaries are liable towards investment funds and investors in certain situations. Also, the preambles of both directives[194] explicitly state that a depositary will be liable towards investment funds and investors in certain situations. AIFMD and UCITS are both directives, so that Member States are free to decide which form and method they adopt to achieve the objectives set by the directives. In the absence of other arrangements for the compensation of investment funds investors, one could imagine that Member States must allow investment funds and investors to enforce the national provisions in which the directives have been implemented through civil proceedings and to bring claims for damages. Such an obligation may also be derived from Article 21 (15) AIFMD and Article 24 (5) UCITS V which suggest Member States must ensure that investors are able to bring proceedings against a depositary directly under the national regimes of civil liability:

> Article 21 (15) AIFMD – 'Liability to the investors of the AIF may be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the depositary, the AIFM and the investors.'

> Article 24 (5) UCITS V – '*Unit-holders in the UCITS may invoke* the liability of the depositary directly or indirectly through the management company or the investment company provided that this does not lead to a duplication of redress or to unequal treatment of the unit-holders.'[195]

194 Recital 44 AIFMD and Recitals 26-28 UCITS V.
195 Emphasis added [DJV].

Another provision that imposes obligations upon Member States in respect of the application of national civil liability regimes can be found under Article 73 Payment Services Directive II (PSD II[196]). The Payment Services Directive requires Member States to ensure that payers will be compensated for unauthorised payment transactions under Article 73 (1):

> '(1) *Member States shall ensure that*, without prejudice to Article 71, in the case of an unauthorised payment transaction, *the payer's payment service provider refunds the payer the amount of the unauthorised payment transaction immediately*, and in any event no later than by the end of the following business day, after noting or being notified of the transaction, except where the payer's payment service provider has reasonable grounds for suspecting fraud and communicates those grounds to the relevant national authority in writing. Where applicable, the payer's payment service provider shall restore the debited payment account to the state in which it would have been had the unauthorised payment transaction not taken place. This shall also ensure that the credit value date for the payer's payment account shall be no later than the date the amount had been debited.'[197]

Furthermore, PSD II sets some additional rules in respect of civil liability. Under Article 74 (1) PSD II, a payment services provider is not liable if the payer incurred its loss because the payer acted fraudulently or failed to fulfil one or more of the obligations set out in Article 69 PSD II intentionally or with gross negligence. Recital 72 PSD II explicitly refers the term 'gross negligence' back to the applicable national law, and only stipulates that 'gross negligence should mean more than mere negligence, involving conduct exhibiting a significant degree of carelessness; for example, keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties.' Hence, PSD II leaves the actual enforcement of EU rights at the national level, but shapes the national enforcement by imposing obligations upon Member States in this respect.[198]

Whereas provisions under AIFMD, UCITS V and PSD II stipulate in which situations private parties are liable vis-à-vis other private parties and, thereby, impose obligations upon Member States in the area of civil liability, one can also find provisions included in directives *and* regulations, which more directly formulate the obligation resting upon Member States to apply their national civil liability regimes for certain infringements of EU law. The latter type of provision resembles what Král described as provisions requiring Member States

196 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

197 Emphasis added [DJV].

198 Although Member States must implement these provisions into national law, the incorporation in national systems of private law may still be difficult. In the context of PSD II and Dutch private law, Rank 2019, p. 111.

to take procedural, controlling or penal implementing measures 'aimed primarily at securing full enforcement' (section 2.3.2.3).[199]

Article 11 (2) Prospectus Regulation (applicable as from July 2019)[200] and Article 6 (2) Prospectus Directive serve as other examples of provisions that impose obligations upon Member States in respect of the enforcement of EU law only.[201] The Prospectus Directive and the Prospectus Regulation harmonise the requirements for the drawing up, approval and distribution of prospectuses that have to be published if securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State[202] in order to ensure investor protection and market efficiency.[203] Article 6 (2) Prospectus Directive and Article 11 (2) Prospectus Regulation require Member States to apply their national rules on civil liability to the persons responsible for the information given in a prospectus:

> Article 6 (2) Prospectus Directive – 'Member States shall ensure that their laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus. However, Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus, or it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities. The summary shall contain a clear warning to that effect.'

> Article 11 (2) Prospectus Regulation – 'Member States shall ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus. However, Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary pursuant to Article 7 or the specific summary of an EU Growth prospectus pursuant to the second subparagraph of Article 15(1), including any translation thereof, unless:
> (a) it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus; or
> (b) it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in the securities.'

199 Král 2008, p. 249.
200 Art. 49 (2) Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.
201 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC as amended.
202 Art. 1 (1) Prospectus Directive.
203 Recital 10 Prospectus Directive.

Even though the Union legislature changed the legislative instrument from a directive to a regulation, Article 6 (2) Prospectus Directive and Article 11 (2) Prospectus Regulation have the same effect: they require Member States to apply their regimes of civil liability to persons responsible for the information given in a prospectus, rather than create EU rights to damages that are directly enforceable by individuals and other private parties. Individuals and private parties must hence base claims for damages against the persons responsible on the applicable national law. They can invoke Article 11 (2) Prospectus Regulation and Article 6 (2) Prospectus Directive directly against Member States only (see section 2.3.2.3). Overall, EU law hence influences the applicability of national civil liability regimes in the context of prospectuses.

2.5.3.3 EU law provisions creating a right of redress under national law

Other provisions of EU law directly provide individuals and other private parties with a right of redress under the applicable national law. As compared to the examples listed in section 2.5.3.2, the examples provided in this section explicitly create a right to compensation or damages for individuals and other private parties under the applicable national law. Article 11 PRIIPs Regulation, and Article 31 and 55 of the Regulation on a pan-European Personal Pension Product (PEPP Regulation) are examples of provisions that explicitly provide individuals and other private parties with a right to damages under the applicable national law.[204]

The PRIIPs Regulation creates harmonised standards for key information documents relating to packaged retail and insurance-based investment products (PRIIPs).[205] It requires the manufacturers of PRIIPs to provide retail investors with key information documents on which they can base their investment decisions.[206] Article 11 PRIIPs Regulation arranges for the civil liability of PRIIP manufacturers for inaccurate key information documents:

204 *On the similarities between Art. 11 PRIIPs Regulation and Art. 35a CRA Regulation*, Wimmer 2017, pp. 121-122.

205 Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs). The PRIIPs Regulation imposes the obligation upon manufacturers of PRIIPs to publish a key information document, providing retail investors with key information about these products in a clear and understandable way. Under Art. 4 (3) PRIIPs Regulation, the definition of PRIIPs involves investment products (packaged retail investment products) and insurance products (insurance-based investment products) for retail investors of which the amount payable to the investor depends on the performance of reference values, the performance of other assets not bought by the investor or market fluctuations. Examples of PRIIPs are structured finance products, derivatives, shares of a UCITS and unit-linked life insurance products. *On the civil liability of PRIIP manufacturers cf. also* Vandendriessche 2015, no. 67.

206 Art. 1 PRIIPs Regulation.

> '(1) The PRIIP manufacturer shall not incur civil liability solely on the basis of the key information document, including any translation thereof, unless it is misleading, inaccurate or inconsistent with the relevant parts of legally binding pre- contractual and contractual documents or with the requirements laid down in Article 8.
> (2) A retail investor who demonstrates loss resulting from reliance on a key information document under the circumstances referred to in paragraph 1, when making an investment into the PRIIP for which that key information document was produced, may claim damages from the PRIIP manufacturer for that loss *in accordance with national law*.
> (3) Elements such as 'loss' or 'damages' as referred to in paragraph 2 of this Article which are not defined shall be interpreted and applied in accordance with the applicable national law as determined by the relevant rules of private international law.'[207]

The mixture of EU and national law was initially not intended by the European Commission. As pointed out by Vandendriessche, the European Commission's proposal did not include the reference to the applicable national law and wished to harmonise the rules on the civil liability of PRIIP manufacturers. Article 11 of the Proposal of the European Commission initially provided a directly effective right to damages at the EU level, without any reference to the applicable national law:

> 'Where an investment product manufacturer has produced a key information document which does not comply with the requirements of Articles 6, 7 and 8 on which a retail investor has relied when making an investment decision, such a retail investor may claim from the investment product manufacturer damages for any loss caused to that retail investor through the use of the key information document.'

Whereas the Union legislature amended this proposed provision, the Recitals of the PRIIPs Regulation did not change at this point. Recital 22 still expresses the intention to harmonise the rules on civil liability and states that 'rules regarding the civil liability of the PRIIP manufacturers should be harmonised.'[208] The course of the legal proceedings might explain this discrepancy, but the result is a bit of a peculiar mixture of EU and national law.

The PEPP Regulation sets a regulatory framework for voluntary, cross-border and long-term pension products.[209] The PEPP Regulation explicitly pays attention to its relationship with national law. It aims to harmonise the core features of pan-European Personal Pension Products (PEPPs), and expressly states that

207 Emphasis added [DJV].

208 Vandendriessche 2015, no. 67. This statement was not amended as compared to the initially proposed Recital 16 of the Proposal for a Regulation of the European Parliament and of the Council, COM(2012) 352 final.

209 *See* Recital 8 Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP).

it leaves other matters to national law.[210] Furthermore, it states explicitly that its provisions are without prejudice to national contract law.[211] At the same time, the PEPP Regulation involves multiple provisions on liability.[212] Under Article 31 (which is similar to Article 11 PRIIPs Regulation), a PEPP provider can be liable for inaccurate key information documents on PEPPs:

> '1. The PEPP provider shall not incur civil liability solely on the basis of the PEPP KID, including any translation thereof, unless it is misleading, inaccurate or inconsistent with the relevant parts of legally binding pre-contractual and contractual documents or with the requirements laid down in Article 28.
> 2. A PEPP saver who demonstrates loss resulting from reliance on a PEPP KID under the circumstances referred to in paragraph 1, when concluding a PEPP contract for which that PEPP KID was produced, may claim damages from the PEPP provider for that loss *in accordance with national law*.
> 3. Elements such as 'loss' or 'damages' as referred to in paragraph 2 which are not defined shall be interpreted and applied in accordance with the applicable national law as determined by the relevant rules of private international law.'[213]

Furthermore, the PEPP Regulation creates another provision on civil liability under Article 55 in respect of the liability of PEPP providers for non-compliance with its obligations under the PEPP Regulation:

> '1. Any financial loss, including fees, charges and interest, incurred by the PEPP saver and resulting directly from the non-compliance of a PEPP provider involved in the switching process with its obligations under Article 53 shall be refunded by that PEPP provider without delay.
> 2. Liability under paragraph 1 shall not apply in cases of abnormal and unforeseeable circumstances beyond the control of the PEPP provider pleading for the application of those circumstances, the consequences of which would have been unavoidable despite all efforts to the contrary, or where a PEPP provider is bound by other legal obligations covered by Union or national legislative acts.
> 3. Liability under paragraph 1 shall be *established in accordance with the legal requirements applicable at national level*.'[214]

Article 11 PRIIPs Regulation, and Article 31 and Article 55 PEPP Regulation stipulate when a private party has a right to claim damages from a PRIIP manufacturer or a PEPP provider, but, at the same time, stipulate that private parties must claim damages in accordance with the applicable national law. The provisions entitle private parties to a right to damages under, for instance,

210 *See* Recital 22 PEPP Regulation.
211 *See* Recital 23 PEPP Regulation.
212 The PEPP Regulation refers the liability of depositories of PEPPs back to the provisions under AIFMD under Article 48 (2) PEPP Regulation, discussed under section 2.5.3.2.
213 Emphasis added [DJV].
214 Emphasis added [DJV].

Article 6:162 of the Dutch Burgerlijk Wetboek. But for the reference to the applicable national law, these provisions of EU law could have served as rights to damages with horizontal direct effect. They stipulate sufficiently clear, precise and unconditional when individuals and other private parties have a right to damages.

The wording of the provisions entails that the right to damages must nevertheless be based on the applicable national law. Moreover, the wording causes the conditions for civil liability not to be harmonised.[215] The provisions do not have any intention to do so, except for determining when damages may be claimed as a matter of principle. In this respect, Article 11 (2) PRIIPs Regulation, Article 31 (2) PEPP Regulation and Article 55 (3) PEPP Regulation are ambivalent: they stipulate when an investor may claim damages, but the concrete action is referred to the applicable national law.[216] As a result, national law should foresee in a right to damages, with its origin in EU law, and individuals and other private parties must eventually base claims for damages on the applicable national law. If national law does not foresee in such a right to damages, the wording of the provisions might entail that private parties can only start proceedings for Member State liability and cannot base their claim for damages on EU law directly. However, one must realise that the wordings of Article 11 (2) PRIIPs Regulation, Article 31 (2) PEPP Regulation and Article 55 (3) PEPP Regulation are ambivalent and that the provisions rub up against rights to compensation or damages with horizontal direct effect.

2.5.4 Situation 3: EU law provisions creating directly effective rights to compensation or damages

2.5.4.1 Setting the scene

The third situation in which the influence of EU law is analysed concerns situations in which EU legislative instruments create rights and obligations, and attach directly effective remedies to the violation of those rights and obligations for individuals and other private parties. This category involves examples of EU legislation, which explicitly arranges for the remedy of compensation in the form of a right to damages or compensation at the EU

215 *Cf.* Heiss 2015, pp. 56-57.

216 In relation to Art. 11 PRIIPs Regulation, this ambivalence is explained by the legislative procedure. Initially, the European Commission had proposed an EU ground for non-contractual liability, however, the European Parliament added the reference to the applicable national law in a later stage. See Art. 11 and recital 16-17 of the Proposal for the PRIIPs Regulation (COM(2012) 352 final).

level.[217] The third situation hence forms the largest deviation of the 'default' division of competences described in section 2.4.2.

Outside the area of EU financial law, regulations in the field of transport law had already arranged for the compensation of passengers since 1991.[218] In EU financial law, Article 35a CRA Regulation was the first provision to create a directly effective right to damages that private parties could invoke directly against other private parties (section 2.5.4.2). In the General Data Protection Regulation (GDPR), the Union legislature went a step further in the influence of EU law on the private enforcement of EU rights (section 2.5.4.3). Whereas Article 35a CRA Regulation created a right of redress at the EU level that refers matters back to the interpretation and application under the applicable national law, Article 82 GDPR is an autonomous right to damages established at the EU level.

2.5.4.2 *A directly effective right to damages with reference to national law: Art. 35a CRA Regulation*

(a) Combination of EU and national law

Article 35a CRA Regulation took the European influence on civil liability a small step further in comparison to Article 11 PRIIPs Regulation, and Article 31 and 55 PEPP Regulation. The provision entitles private parties (issuers and investors) to a right of redress that can be enforced directly against other private parties (credit rating agencies), and does not stipulate that a claim for damages must subsequently be brought under or in accordance with the applicable national law. Instead, Article 35a CRA Regulation sets the conditions for civil liability at the EU level:

> Article 35a (1) CRA Regulation – 'Where a credit rating agency has committed, intentionally or with gross negligence, any of the infringements listed in Annex III having an impact on a credit rating, an investor or issuer may claim damages from that credit rating agency for damage caused to it due to that infringement. […]'

At first glance, Article 35a (1) CRA Regulation appeared to be a breakthrough. It was the first provision to create an EU legislative basis for the civil liability

---

217 This dissertation refers to both 'the right to damages' and 'the right to compensation', because the Union legislature uses both terms in European legislative instruments.

218 Art. 4 Council Regulation (EEC) No 295/91 establishing common rules for a denied-boarding compensation system in scheduled air transport (currently Art. 7 (1) Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91). *See for other examples e.g.* Art. 15 Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 and Art. 17 Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004.

of credit rating agencies for infringements of the CRA Regulation. Moreover, it was the first provision to incorporate a directly effective right to damages[219] in an EU regulation.

Notwithstanding its EU basis, the remedy created by Article 35a CRA Regulation greatly depends on the applicable national law and cannot be interpreted and applied autonomously. Article 35a (4) CRA Regulation combines EU and national law in the right to damages, by stipulating that:

> 'Terms such as "damage", "intention", "gross negligence", "reasonably relied", "due care", "impact", "reasonable" and "proportionate" which are referred to in this Article but are *not defined*, shall be interpreted and applied in accordance with the *applicable national law as determined by the relevant rules of private international law*. Matters concerning the civil liability of a credit rating agency which are not covered by this Regulation shall be governed by the applicable national law as determined by the relevant rules of private international law. […]'[220]

This combination of EU and national law resulted from the legislative proceedings. Similar to the proposed Article 11 PRIIPs Regulation, the European Commission did not include a reference to the applicable national law in the initial proposal for Article 35a CRA Regulation.[221] The reference created a remedy in which EU law and national law are combined, and, thereby, largely precludes an autonomous interpretation and application of the right to damages.[222]

The way in which Article 35a CRA Regulation combines EU and national law within the remedy of compensation is unique. Legal scholars came up

219 This dissertation describes Art. 35a CRA Regulation as a 'right of redress', a 'right to damages' or a 'right to compensation'. However, one must realise that the wording of several language versions of Art. 35a CRA Regulation is not consistent in this regard. As discussed in section 5.3.1.4 as well, the English version of Art. 35a CRA Regulation (used in the main text) gives issuers and investors a right to claim 'damages'. Other versions investigated employ more generic terms to describe the remedy available, namely '*een belegger of uitgevende instelling [mag] een vordering wegens alle aan hem c.q. haar ten gevolg van die inbreuk toegebrachte schade tegen dat ratingbureau instellen*', '*un investisseur ou un émetteur peuvent demander réparation à cette agence de notation de crédit pour le préjudice qu'ils ont subi du fait de cette infraction*' and '*so kann ein Anleger oder Emittent von dieser Ratingagentur für den ihm aufgrund dieser Zuwiderhandlungen entstandenen Schaden Ersatz verlangen.*' The terms '*vordering wegens toegebrachte schade*' (Dutch version), '*réparation*' (French version) and '*Ersatz*' (German version) are generic terms for compensation and do not point towards damages in the form of a monetary award directly – although compensation in the form of a monetary sum will be awarded in practice. As the compensation awarded will often involve damages, this dissertation mostly simply describes Art. 35a CRA Regulation as a right to damages.

220 Emphasis added [DJV].

221 *In detail,* section 3.5.1.4.

222 *Cf.* Gass 2014, pp. 47-48 and 56. Gass described in more detail that Art. 35a CRA Regulation must be interpreted autonomously, except for the terms and subjects covered by Art. 35a (4) CRA Regulation. *Also e.g.* Deipenbrock 2018, p. 564.

with many metaphors to describe the current structure of Article 35a CRA Regulation. Lehmann described it as 'a colouring page that must be filled in by the Member States'.[223] Baumgartner used the term '*Janusköpfigkeit*' to describe the character of Article 35a CRA Regulation.[224] Deipenbrock called Article 35a a 'torso provision'.[225] One can also compare the structure with a mould into which one must 'pour' the applicable national law. The structure also brings to mind directives and harmonious interpretation, but in reverse: EU law must be interpreted in accordance with national law, instead of national law being interpreted in accordance with EU law. Lehmann described this construction as 'nationally autonomous interpretation'.[226]

(b) Direct effect of Article 35a

This dissertation assumes that Article 35a CRA Regulation created a right to damages with horizontal direct effect, so that issuers and investors can directly invoke Article 35a CRA Regulation against credit rating agencies before national courts. The direct effect of Article 35a CRA Regulation is, however, not self-evident, because the right to damages depends on the interpretation and application under the applicable national law. In this context, Lehmann questioned whether Article 35a CRA Regulation does not miss two essential characteristics of regulations, namely a binding nature and direct applicability.[227]

(i) – Doubts on direct effect

The legislative history of Article 35a CRA Regulation[228] and the broad reference to the applicable national law raise doubts as to whether the Union legislature initially intended to introduce a directly effective right of redress at the EU level. During the preparations of the third version of the CRA Regulation, the Impact Assessment investigated several options to ensure a right of redress for investors: (1) 'no policy change' (not taking action in the area of civil liability); (2) 'introduce civil liability of CRAs into EU legislation' (a remedy at the EU level); and (3) 'ensure civil liability of CRAs towards users of credit ratings before national courts' (a remedy at the national level).[229] The Impact Assessment expressed a preference as to the third option. It concluded that both the second and the third option would ensure the existence of a right

223 Lehmann 2016a, p. 76.
224 Baumgartner 2015, p. 507. The term '*Janusköpfigkeit*' refers to the 'ambivalent' or 'double-sided' nature of Art. 35a CRA Regulation.
225 Deipenbrock 2018, p. 561.
226 Lehmann 2016a, p. 75. On the similarities between directives and Art. 35a CRA Regulation, Dumont du Voitel 2018, pp. 154-155.
227 Lehmann 2016a, p. 77.
228 *In detail* section 3.5.1.
229 SEC(2011) 1354 final, pp. 45-48 and, *see also*, pp. 150 and 156. The Impact Assessment and the Proposal of the European Commission initially proposed to introduce a right of redress for investors only. During the legislative proceedings, the scope of the right of redress was expanded to also cover issuers.

of redress, but that the third option had the advantage that it respected the specific features of national civil liability regimes. Moreover, the Impact Assessment warned that, by regulating the civil liability of credit rating agencies at the EU level, the second option could increase the complexity of civil liability regimes of Member States. The third option was, eventually, preferred from the perspective of the principle of subsidiarity.[230]

The third option proposed to codify the principle of and some conditions for the civil liability of credit rating agencies at the EU level.[231] The Impact Assessment did not consider it to be legally necessary, practical and proportionate to propose an additional directive on civil liability in addition to the CRA Regulation,[232] so that the subject could be included in the CRA Regulation itself. The European Commission explained that:

> '[a]ccording to the settled case-law of the ECJ (Eridania, judgement of 27.9.1979 – case 230/78) the fact that a regulation is directly applicable does not prevent the provisions of that regulation from requiring Member States to take implementing measures. For instance, Art 36 of the first CRA Regulation (2009) required Member States to "...lay down the rules on penalties applicable to infringements of the provisions of this Regulation and ... to take all measures necessary to ensure that they are implemented."'[233]

The latter remark suggests that civil liability would be ensured before national courts by explicitly requiring Member States to adopt national implementing measures in this field. Therefore, one would have expected a provision without direct effect to be introduced in the CRA Regulation, namely a provision similar to what Král described as 'procedural, controlling or penal measures'[234] (see section 2.3.2.3).

Instead, the European Commission issued a proposal for the civil liability of credit rating agencies, which resembled policy option 2 rather than policy option 3 of the Impact Assessment. The proposal of Article 35a CRA Regulation provided for the conditions for civil liability, without any reference to the applicable national law. It was proposed that Article 35a (1) would read:

> 'Where a credit rating agency has committed intentionally or with gross negligence any of the infringements listed in Annex III having an impact on a credit rating on which an investor has relied when purchasing a rated instrument, such an investor may bring an action against that credit rating agency for any damage caused to that investor.'[235]

230 SEC(2011) 1354 final, pp. 46-47.
231 SEC(2011) 1354 final, p. 47.
232 SEC(2011) 1354 final, p. 64, fn. 136.
233 SEC(2011) 1354 final, p. 64, fn. 136.
234 Král 2008, pp. 249-251.
235 COM(2011) 747 final, p. 33.

The role of the applicable national law was only described in the proposed Recital 27: 'Regarding matters concerning the civil liability of a credit rating agency and which are not covered by this regulation, such matters should be governed by the applicable national law.'[236] The wording of this Recital suggested that only matters concerning credit rating agency liability that were not covered by the CRA Regulation were left to the applicable national law. Moreover, the Recitals did not explain that Article 35a CRA Regulation imposed any (explicit) obligation upon Member States to adopt national implementing measures to ensure the enforcement of Article 35a CRA Regulation. In this way, the proposal dedicated a much smaller role to the applicable national law in comparison to the preference expressed in the Impact Assessment. The current explicit reference to the applicable national law under Article 35a (4) CRA Regulation was proposed by the European Parliament's rapporteur and was eventually adopted by the European Parliament.[237]

(ii) – A right to damages with horizontal direct effect

Notwithstanding the initial intentions of the European Commission expressed in the Impact Assessment, this dissertation takes the position that Article 35a CRA Regulation resulted in a directly effective cause of action for private parties at the EU level, which must be complemented by the applicable national law.[238] The remedy under Article 35a (1) CRA Regulation forms a unique combination of EU and national law. The wording of the right of redress indicates that the right can be used directly by issuers and investors.

The reference to the applicable national law under Article 35a (4) CRA Regulation does not take away the horizontal direct effect of the right of redress under Article 35a (1) CRA Regulation. As discussed in sections 2.3.2.2 and 2.3.2.3, provisions included in regulations can have direct effect, even if they leave some discretion to Member States and require Member States to adopt additional national implementing measures. A provision does not have direct effect if it leaves too much discretion to Member States. For example, if the effects of a provision depend on actual policy choices that the Union legislature or national legislatures must make. In the context of Article 35a CRA Regulation, the policy choice in favour of the responsibility and civil liability of credit rating agencies vis-à-vis issuers and investors was made at the EU level by the Union legislature. Member States are left with discretion in concrete cases, but not in respect of the policy choice of the desirability of the civil liability of credit rating agencies in general.

236 COM(2011) 747 final, p. 21.

237 *See* A7-0221/2012, pp. 32 and 68 and P7_TA-PROV(2013)0012, respectively.

238 Baumgartner stated that Art. 35a (4) CRA Regulation '*entfremdet*' the character of the CRA Regulation as a regulation and that Art. 35a (4) CRA Regulation introduced characteristics of a directive into the CRA Regulation. Nevertheless, he concluded Art. 35a CRA Regulation provides a basis for civil liability at the EU level (Baumgartner 2015, p. 506).

Guidance on the direct effect of EU law provisions, which contain terms that are referred back to the applicable national law, can be derived from the case *Francovich and Bonifaci v Italy*.[239] In this case, one of the questions that arose was whether former employees of two insolvent Italian companies could directly invoke provisions of Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer against Italy (vertical direct effect).[240] Under Article 3 (1) Directive 80/987/EEC, Member States needed to ensure that guarantee institutions guaranteed payment of outstanding claims of employees from insolvent employers. Italy failed to implement the Directive in time.[241] What makes this case interesting for the purposes of this dissertation[242] is that, similar to the structure of Article 35a CRA Regulation, Directive 80/987/EEC referred certain terms back to the applicable national law. Article 2 (2) Directive 80/987/EEC stipulated that '[t]his Directive is without prejudice to national law as regards the definition of the terms "employee", "employer", "pay", "right conferring immediate entitlement" and "right conferring prospective entitlement"'.

As we have already seen, the sole fact that a provision requires national implementing measures or leaves some discretion to Member States does not necessarily preclude a provision from having direct effect.[243] In order to decide whether the provisions of Directive 80/987/EEC were sufficiently precise and unconditional, the CJEU considered: (1) the identity of the persons entitled to the right; (2) the content of the right; and (3) the identity of the person liable to provide the right.[244] In respect to 'the identity of the persons entitled to the right', we can conclude that the reference of the term 'employee' to the applicable national law under Article 2 (2) Directive 80/987/EEC did not preclude the direct effect of the provisions of Directive 80/987/EEC. In respect of the term 'employee', the CJEU held that '[a] national court need only verify

239 ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*). *Example derived from* Prechal 2005, p. 249.

240 In full: Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 10 ff.

241 ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 4.

242 One must realise, however, that the case of *Francovich and Bonifaci v Italy* concerned the vertical direct effect of provisions included in a directive, while this section concentrates on the horizontal direct effect of Art. 35a CRA Regulation.

243 *Cf.* ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 11. *Cf. also* CJEU 1 July 2010, C-194/08, ECLI:EU:C:2010:386 (*Gassmayr*), para 44 and Adam & Winter 1996, p. 519.

244 *See* ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 12.

whether the person concerned is an employed person under national law […]'.[245] Therefore, the CJEU held that the Directive was sufficiently clear and unconditional 'to enable the national court to determine whether or not a person should be regarded as a person intended to benefit under the directive.'[246] Hence, one must distinguish between provisions that refer back to applicable national law in such way that a national court only needs to verify the meaning of terms and provisions that require national legislatures to introduce implementing measures to implement policy choices.[247]

If we consider again the reference to the applicable national law under Article 35a (4) CRA Regulation, one can argue that the reference does not preclude the direct effect of the right of redress under Article 35a (1) CRA Regulation. The identity of the persons entitled to the right (issuers and investors), the content of the right (a right to compensation), and the identity of the person liable to provide the right (credit rating agencies) can be established on the basis of the CRA Regulation. Furthermore, national courts must verify the requirements for civil liability under the applicable national law, but national legislatures are not required to make policy choices. The remedy under Article 35a (1) CRA Regulation forms a unique combination of EU and national law, but the policy choice in favour of credit rating agency liability was made at the EU level.[248]

In conclusion, even though one can doubt whether the Union legislature initially intended to create a directly effective right of redress at the EU level and even though the reference to the applicable law leaves discretion to Member States, this dissertation takes the position that the sufficiently clear, precise and unconditional wording of the main features of the right of redress under Article 35a (1) CRA Regulation tip the balance in favour of the horizontal direct effect of Article 35a (1) CRA Regulation.

(c) Further claims under the applicable national law

The previous section discussed how EU law and national law are combined in the right of redress under Article 35a (1) CRA Regulation. Article 35a (5) CRA Regulation explains the relationship between the right of redress under Article 35a (1) CRA Regulation and rights or redress under purely national regimes of civil liability. It allows Member States to impose stricter rules upon credit rating agencies as regards their civil liability, by stipulating that '[t]his

245 ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 14.

246 ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 14.

247 *For such a situation*, ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*), para 12 (section 2.3.2.3 (a)).

248 Even though it must be admitted that one can also argue that the reference under Art. 35a (4) CRA Regulation makes it difficult to establish a minimum level of protection so that the provision might be derived from its direct effect after all.

Article does not exclude further civil liability claims in accordance with national law'. Recital 35 CRA III Regulation adds that 'Member States should be able to maintain national civil liability regimes which are more favourable to investors or issuers or which are not based on an infringement of Regulation (EC) No 1060/2009.' In my opinion, this Recital entails that Member States are allowed to impose more favourable rules on civil liability in respect of infringements of Annex III and for other types of misconduct by credit rating agencies and for inaccurate credit ratings issued by credit rating agencies.[249] From that perspective, you could say that Article 35a CRA Regulation creates some sort of 'minimum' right of redress and, thus, does not constitute maximum harmonisation.[250] However, Recital 35 CRA III Regulation has been interpreted differently as well. Heuser concluded the opposite: '*Art. 35 a Abs. 5 Rating-VO erlaubt zwar weitere mitgliedstaatliche Haftungsansprüche, aber gilt dies nach Erwägungsgrund 35 nicht für solche zivilrechtliche Haftungsansprüche, die sich auf Verstöße gegen die Rating-VO stützen* […].'[251] Yet, in my opinion the use of the word 'or' in Recital 35 CRA III Regulation speaks against the conclusion of Heuser.[252] This dissertation therefore assumes that Article 35a (5) CRA Regulation allows Member States to adopt stricter rules on civil liability in respect of the infringements of Annex III CRA Regulation, and that Member States are allowed to interpret and apply the terms of Article 35a CRA Regulation more favourably for issuers and investors as well.[253]

(d) Comparison with other examples

One can question whether the actual effects of Article 35a CRA Regulation differ much from the effects of directives and 'limping' regulations involved with civil liability. Article 35a CRA Regulation's structure bars the harmonisation of the application of the conditions for civil liability in the context of credit rating agency liability. The explicit reference to the applicable national law leaves the CJEU with little room for manoeuvre to prescribe the interpretation and application of Article 35a CRA Regulation in an autonomous way.[254] The CJEU can still employ the principle of effectiveness to lay down minimum standards, but, as will be discussed in section 2.5.5, the current impression is that not much can be expected from this tool. At the same time, Article 35a

249 *Also* Schantz 2015, p. 357. *Cf. e.g.* Dumont du Voitel 2018, p. 339 and Maier 2017, p. 386.
250 *Also* Schantz 2015, p. 357.
251 Heuser 2018, p. 84. *Also* Heuser 2019, pp. 85-86.
252 Heuser explained the use of the term 'or' in the opposite way, Heuser 2019, p. 86.
253 This assumption explains the approach to Art. 35a CRA Regulation taken in this dissertation. On the basis of this assumption, for instance, section 5.6.2.3 (a) (ii) and 5.6.2.3 (b) (ii) conclude that Art. 35a CRA Regulation allows claims for compensation based on § 823 (2) BGB and section 5.3.1.3 (c) (ii) concludes Member States are allowed to adopt a flexible approach towards the requirement of reasonable reliance. *For the same reasoning in respect of § 823 (2) BGB*, Dumont du Voitel 2018, pp. 338-341.
254 Lehmann 2016a, p. 77.

CRA Regulation takes the influence of EU law on civil liability a step further as compared to the examples described in the previous sections. It provides a mould into which the national laws must be poured, and thereby leaves less discretion to the Member States. Also, it has the capacity of converging national regimes by setting the main conditions at the EU level.

2.5.4.3 Autonomous right to compensation: Article 82 GDPR

Subsequent to the introduction of Article 35a CRA Regulation, the Union legislature went one step further and created a right to damages at the EU level without a reference to the applicable national law under Article 82 (1) GDPR.[255] In the absence of such a reference to national law, this ground can be interpreted autonomously[256] and provides room to the CJEU to provide for autonomous interpretation of private law concepts. Article 82 (1) GDPR[257] currently provides for the most far-reaching directly effective right to damages ('compensation') under EU law:

> 'Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.'

The other sections of Article 82 GDPR complement this right to compensation with rules on when the controller or processor shall be exempt from liability

---

255 Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). *See for a similar right to compensation against Union institutions in relation to the processing of personal data,* Art. 65 Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC: 'Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the Union institution or body for the damage suffered, subject to the conditions provided for in the Treaties.'

256 *Cf. e.g.* Lenaerts & Guttiérrez-Fons 2014, p. 16. *See e.g.* ECJ 29 October 2009, C-174/08, ECLI:EU:C:2009:669 (*NCC Construction Danmark*), para 24, ECJ 17 July 2008, C-66/08, ECLI:EU:C:2008:437 (*Szymon Kozlowski*), para 42 and ECJ 18 October 2007, C-195/06, ECLI:EU:C:2007:613 (*Österreichischer Rundfunk (ORF)*), para 24, ECJ 14 December 2006, C-316/05, ECLI:EU:C:2006:789 (*Nokia*), para 21, ECJ 17 March 2005, C-170/03, ECLI:EU:C:2005:176 (*Feron*), para 26, ECJ 19 September 2000, C-287/98, ECLI:EU:C:2000:468 (*Linster*), para 43 and ECJ 18 January 1984, C-327/82, ECLI:EU:C:1984:11 (*Ekro*), para 11. For the examples, reference is made to Lenaerts & Guttiérrez-Fons 2014, p. 16. It is remarkable that a Dutch District Court continued to seek the connection with the Dutch law of damages to determine the type of recoverable loss, Rechtbank Overijssel 28 May 2019, ECLI:NL:RBOVE:2019:1827 (*X v College B&W Deventer*), para 5.

257 Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

'if it proves that it is not in any way responsible for the event giving rise to the damage', the joint and several liability of controllers and processors and a right of redress between the controllers or processors. Also, Article 82 (6) in conjunction with Article 79 (2) GDPR provides a rule for determining jurisdiction of courts. Claimants shall bring proceedings against controllers and processors before the courts of the Member State where the controller or processor has an establishment – which corresponds with the general rule under Article 4 Brussels Ibis Regulation (see Chapter 4). Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers – which forms a severe deviation of the general rules under the Brussels Ibis Regulation (see Chapter 4).

As Article 82 GDPR does not refer to the applicable national law, an autonomous right to claim damages was created. Recital 146 GDPR even explicitly confirms that the 'concept of damage should be broadly interpreted in the light of the case law of the CJEU in a manner which fully reflects the objectives of this Regulation'. Article 82 GDPR hence paves the way for a uniform and autonomous interpretation of private law concepts. At the same time, the applicable national law does not entirely lose its relevance. The General Data Protection Regulation provides no rules on procedural aspects, such as the burden of proof and limitation periods. Moreover, Article 82 GDPR does not provide any guidance on whether such matters are to be governed by the applicable national law. Therefore, one can assume that in the absence of specific EU rules on these matters, procedures and other matters not addressed by the GDPR are left to the national procedural autonomy of the Member States.

Overall, the third situation hence forms the largest deviation of the 'default' division of competences described in section 2.4.2, and restricts the national procedural autonomy of the Member States in respect of the remedy available for violations of EU rights and obligations the most. Whereas Article 35a CRA Regulation combines EU and national law within the remedy (right to damages) created, Article 82 GDPR created an autonomous right to damages that paves the way for the uniform and autonomous interpretation of private law concepts at the EU level. The applicable national law, however, has not lost its relevance completely. As EU law does not involve a complete system of private law, matters not addressed by the GDPR continue to fall within the national procedural autonomy of the Member States.

2.5.5 Overarching influence of effectiveness

The previous sections analysed the influence of EU law on civil liability and the remedy of compensation in three situations. Although the influence of EU law on civil liability and the remedy of compensation in the area of EU financial law increases, national law continues to play a large role in the remedies and procedures necessary to enforce rights and obligations established at the EU level. Article 82 GDPR currently forms the only European legislative basis for an autonomous EU right to damages.

In the situations in which national law continues to play a large role in the remedies and procedures necessary to enforce rights and obligations established at the EU level, Member States do not have *carte blanche* in respect of the remedies and procedures. Even where EU law explicitly leaves matters to the applicable national law, the national procedural autonomy of the Member States is restricted by the principles of equivalence and effectiveness. Hence, the influence of the principles of equivalence and effectiveness also extends to the national conditions for rights to damages and procedural aspects.[258] This applies in case the conditions were left to the Member States completely (e.g. Art. 11 (2) Prospectus Regulation) as well as in case the conditions have been set at the EU level with a reference back to the applicable national law (e.g. Art. 35a CRA Regulation[259]).

The principle of effectiveness requires Member States – national legislatures and courts – to ensure that national remedies and procedural rules do not have the effect that it is impossible in practice or excessively difficult to exercise rights conferred by EU law.[260] On the basis of the principle of effectiveness, the CJEU can strike out national conditions for civil liability if they render the enforcement of rights conferred by EU law virtually impossible or excessively difficult.[261] That said, the fact that Member States must comply with the principles of equivalence and effectiveness does not mean that Member States may not impose limitations on the right to damages. Member States are allowed to subject the remedies for violations of EU rights to certain conditions, such as the existence of causation, loss and relativity.[262] As stated by AG Kokott, 'it is perfectly legitimate, for the purposes of examining the existence of a causal link, to lay down criteria which ensure that cartel members are not subject to unlimited liability'.[263]

258 In the view of Vandendriessche, Member States must ensure their general rules on liability provide for the full effect of EU law, so that it is not necessarily sufficient for Member States to only declare that their national rules on civil liability apply to certain infringements of EU law (*cf.* Vandendriessche 2015, no. 100). As described in section 2.4.3, the Member States must comply with the principles of equivalence and effectiveness. This dissertation mostly concentrates on the principle of effectiveness.

259 *See, for the same conclusion in respect of Art. 35a CRA Regulation,* Heuser 2019, p. 81.

260 ECJ 7 January 2004, C-201/02, ECLI:EU:C:2004:12 (*Wells*), para 67. Prior to *Wells*: ECJ 16 December 1976, C-33/76, ECLI:EU:C:1976:188 (*Rewe v Landwirtschaftskammer für das Saarland*), para 5.

261 This section only discusses a limited number of examples.

262 *Cf.* Opinion of A-G J. Kokott, ECLI:EU:C:2014:45, para 33 with CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*).

263 Opinion of A-G J. Kokott, ECLI:EU:C:2014:45, para 33 with CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*).

The conditions, however, must be compatible with the effectiveness of EU law. In the case law of the CJEU, multiple examples can be found of situations in which the CJEU limited the national autonomy of the Member States in respect of substantive conditions for right to damages based on the principle of effectiveness. Both *Kone and Others* and *Manfredi* concerned competition law, so that one must make some reservations as to whether they can be applied directly to other legal areas as well. In *Kone and Others,* the CJEU repeated that the national legal systems are allowed to lay down rules 'governing the application of the concept of the 'causal link'',[264] but the requirement of the causal link needs to comply with the principles of equivalence and effectiveness. National requirements are not permissible if they form an absolute bar that applies regardless of the particular circumstances of the case.[265] In *Kone and Others,* a general policy under Austrian law which stipulated that 'an undertaking not party to a cartel takes advantage of the effect of umbrella pricing, there is no adequate causal link between the cartel and the loss potentially suffered by a buyer, since it consists of an indirect loss: a side effect of an independent decision that a person not party to a cartel has taken on the basis of his own business considerations'[266] was precluded by the principle of effectiveness for forming an absolute bar on civil liability.[267] In *Manfredi*, the CJEU set a minimum level regarding the loss for which a victim of the violation of competition law rules could claim compensation. It held that 'it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest'.[268] In the field of transport law, in *Cuadrench Moré*, the CJEU repeated that Member States must respect the principles of equivalence and effectiveness in relation to matters not addressed in the CRA Regulation, such as the prescription of claims in this specific case. The CJEU held that 'the time-limits for bringing actions for compensation under Articles 5 and 7 of Regulation No 261/2004 are determined by the national law of each Member State,

264 CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*), para 32. *Cf. also* CJEU 6 June 2013, C-536/11, ECLI:EU:C:2013:366 (*Donau Chemie and Others*), paras. 43 and 49 in relation to an absolute bar on access to documents.

265 CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*), para 33. *See also* CJEU 6 June 2013, C-536/11, ECLI:EU:C:2013:366 (*Donau Chemie and Others*), paras. 43-44 and 49.

266 CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*), para 14.

267 CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*), para 33.

268 ECJ 13 July 2006, C-295/04, ECLI:EU:C:2006:461 (*Manfredi)*, para 100. *Cf.* Vandendriessche 2015, no. 94. *As repeated in* CJEU 6 June 2013, C-536/11, ECLI:EU:C:2013:366 (*Donau Chemie and Others*), para 24.

provided that those rules observe the principles of equivalence and effectiveness'.[269]

Furthermore, national courts can also apply requirements of rights to damages in accordance with the principle of effectiveness on their own accord. The most well-known example is the case *World Online*, decided by the Dutch Supreme Court. In *World Online*, the Dutch Supreme Court decided that, in light of the full effectiveness of EU law and in light of the objective of investor protection of the Prospectus Directive, it had to be assumed that there was a *condicio sine qua non* relationship (causal relationship) between the misleading information and the decision to invest.[270] The principle effectiveness caused the Dutch Supreme Court to relax the *condicio sine qua non* test under Dutch private law to the benefit of investors, because their legal protection would otherwise become 'illusory'.[271]

2.6 Concluding remarks

This Chapter aimed to map the ways in which EU law (regulations, directives and decisions of the CJEU) currently influences rules on civil liability and rights of redress, with a particular focus on examples derived from EU financial law. By providing the broader European legal context, it aimed to contribute to the understanding of the status, main features and effects of Article 35a CRA Regulation.

To analyse the influence of EU law on civil liability, section 2.5 distinguished three situations: (1) situations in which EU law leaves the enforcement of rights established at the EU level to Member States completely; (2) situations in which EU law imposes obligations upon Member States in respect of their rules on civil liability or requires the application of their national civil liability regimes; and (3) situations in which EU law creates directly effective rights to damages or compensation for individuals and other private parties at the EU level for the violation of EU rights and obligations. In each situation, the influence of EU law on civil liability is determined by the content of relevant provisions of EU law, their (in)direct effect and the influence of the principles of equivalence and effectiveness. The categorisation is based on the extent to which EU law influences the remedy of compensation, and, more in particular, the existence and conditions of rights to damages (or compensation). It must be emphasised once again that difference in result between situations 2 and 3 is a matter of degree; it is sometimes difficult to draw a line between situ-

269 CJEU 22 November 2012, C-139/11, ECLI:EU:C:2012:741 (*Cuadrench Moré*), para 26.
270 Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), paras. 4.11.1-4.11.2.
271 *Cf.* Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), para 4.11.1.

ation 2 and 3 and the influence of the provisions falling in these categories can be similar.

As a first category, section 2.5 described the situation in which EU law leaves the enforcement of rights established at the EU level to Member States completely. The first situation in fact described the 'default' division of competences between the EU and its Member States in the area of EU law enforcement: EU law creates rights and obligations which are to be enforced at the Member State level, in the absence of EU law on this matter. The Union legislature thus left remedies and procedures for violations of EU law to the national procedural autonomy of Member States. The discretion of Member States, however, is not unlimited. For instance, the principle of effectiveness can restrict the national procedural autonomy by requiring Member States to entitle private parties to some sort of remedy. Compared to regulations, the CJEU is more reluctant in imposing obligations upon Member States in relation to directives. Overall, the principle of effectiveness can require the application of national civil liability regimes for violations of EU law, but it should be realised that Member States have a large discretion in ensuring the effective enforcement of EU law.

In both the second and third situation distinguished, provisions of EU law explicitly address the issue of civil liability and influence rules on civil liability to a larger extent. In the second situation, provisions of EU law impose obligations upon Member States in respect of civil liability or require Member States to apply their national civil liability regimes. The provisions gathered in this section entitle private parties to the enforcement of EU rights and obligations through national civil liability regimes and to the specific remedy of compensation or to damages in accordance with the applicable national law. Hence, private parties must still base any claims on national law – even though they are entitled to do so by EU law. Irrespective of whether such provisions are included in regulations or directives, the provisions of EU law do not harmonise the conditions for civil liability, but rather determine to which violations of EU law national liability regimes apply.[272]

The third category encompasses situations in which the Union legislature has created rights of redress for private parties that can be invoked against other private parties before national courts, i.e. rights to compensation or damages with horizontal direct effect. EU law, hence, does not only create rights and obligations, but also entitles private parties to directly effective remedies if those rights and obligations are violated. We have seen that currently, two examples of such horizontal direct effective rights of redress exist: Article 35a CRA Regulation, which refers the majority of its terms back to the interpretation and application under the applicable national law and Article 82 General Data Protection Regulation, which created an autonomous right to compensation at the EU level. The main difference between Article 35a CRA Regulation and

272 *Cf.* Vandendriessche 2015, no. 68.

Article 82 GDPR is that Article 82 GDPR paves the way for harmonised conditions for civil liability at the EU level.

The road map demonstrates that the introduction of the right of redress for issuers and investors under Article 35a CRA Regulation does not stand on its own. One can find a growing number of provisions of a private law nature in regulations and directives.[273] EU law leaves its traces on (national) civil liability rules mainly by setting common (mostly minimal) standards of conduct for private parties at the EU level and by requiring Member States to apply their national regimes for civil liability to violations of EU law.[274] However, the Union legislature has not developed a uniform approach to civil liability matters and regulates civil liability in a 'fragmented' way.[275] Provisions of EU law that explicitly arrange for civil liability and rights of redress do so in all sorts of wordings and are often included in a broader package of rules to achieve certain objectives set at the EU level (functionalistic approach).[276] From this perspective, Article 35a CRA Regulation is exemplary for the approach taken by the Union legislature in private law matters. The structure of Article 35a CRA Regulation is unique, and Article 35a CRA Regulation was included in a broader regulatory package for credit rating agencies. Furthermore, Article 35a CRA Regulation is exemplary for the approach to civil liability taken by the Union legislature in the area of EU financial law: the influence of EU law is increased, but national civil liability regimes continue to play a large role.[277] Issuers and investors can base a claim directly on Article 35a CRA Regulation, but Article 35a CRA Regulation is not an independent and autonomous EU legal basis for civil liability. Consequently, even though Article 35a CRA Regulation takes the European influence on civil liability one step further, it is doubtful whether Article 35a CRA Regulation has a very different effect in terms of the harmonisation of the conditions for civil liability, as compared to some examples of provisions of EU law that lack horizontal direct effect (as described in section 2.5.3.3).

273 *E.g.* Ackermann 2018 and, *focusing on regulations*, De Graaff & Verheij 2017.

274 *Cf.* Vandendriessche 2015, no. 71. Vandendriessche concluded that liability rules 'have been harmonized in a fragmented fashion and to a very limited degree only', but, at the same time, that 'some impact nevertheless has been felt' (Vandendriessche 2015, no. 72 and no. 71, respectively).

275 Vandendriessche 2015, no. 71. *Also e.g.* Ackermann 2018, pp. 743 and 761-762 and Kuipers 2014, p. 161.

276 *See* Ackermann 2018, 761-762 and De Graaff & Verheij 2017, p. 992.

277 *Cf. in general (i.e. not in the specific context of credit rating agencies)* Vandendriessche 2015, no. 71.

3 Credit rating industry and its regulation

3.1 Introductory remarks

The previous Chapter broadened the scope of the study to the European legal context in which Article 35a CRA Regulation can be considered. This Chapter zooms in on the credit rating industry and its regulation in particular. It forms the basis for the other parts of this dissertation, by providing relevant background information on the credit rating industry and its history, credit ratings, the EU regulatory framework for credit rating agencies and the factual side of credit rating agency liability. The information provided in this Chapter was deemed necessary due to the peculiar features of the credit rating industry and its effects on the discussion around credit rating agency liability.

The Chapter begins with describing the credit rating industry, its regulation and its civil liability from a historical perspective (section 3.2). The historical perspective serves to contribute to the understanding of the current features of the credit rating industry, the functions of credit ratings and the sequence of events leading to the currently established regulatory framework in the EU and the US. It demonstrates that the criticism of the credit rating industry and the debate on civil liability in the aftermath of the financial crisis was not new. On the contrary, since their establishment, credit rating agencies have been discredited at various points in time, which has led to debates on their regulation and their civil liability.[1] Section 3.3 concentrates on credit ratings, including a discussion of their functions and effects on the financial markets. Section 3.4 describes part of the EU regulatory framework established by the CRA Regulation, providing the broad regulatory picture in which Article 35a CRA Regulation can be understood.

Sections 3.5 and 3.6 serve as a prelude to Chapters 4 and 5, by concentrating on Article 35a CRA Regulation and by providing a factual perspective on credit rating agency liability. Section 3.5 describes the legislative history of Article 35a CRA Regulation and refers to the conditions for civil liability under Article 35a CRA Regulation.[2] Furthermore, it pays attention to the scope of application of Article 35a CRA Regulation by describing the stakeholders that

1 Horsch 2014, p. 232 on the 'crisis-driven' pattern of credit rating agency regulation since 2000.

2 Section 5.3 discusses the conditions for civil liability under Art. 35a CRA Regulation in detail in the context of the legal comparison.

could be involved in litigation based on Article 35a CRA Regulation (credit rating agencies, issuers and investors). Section 3.6 provides a factual perspective on credit rating agency liability, by describing various factual scenarios in which issuers and investors could suffer loss as a result of an incorrect credit rating.

3.2 Historical perspective credit rating industry and civil liability[3]

3.2.1 Origins: credit reporting agencies, financial press and the first credit rating agencies

The credit rating industry arose in the mid-19th century in the United States from a need for independent reviews of creditworthiness of American merchants. The importance of such independent information became clear after the outbreak of the 'Panic of 1837' – a financial crisis in the US starting in 1837. Prior to this financial crisis, American merchants used their personal connections to gather information on the creditworthiness of counterparties they did not know personally.[4] This method, however, proved to be ineffective when American merchants realised they should not have trusted part of their counterparties.[5] Credit reporting agencies such as the Mercantile Agency and the Bradstreet Agency responded to the need for independent credit information by gathering information on potential borrowers and summarising this information in credit reports.[6]

With the establishment of credit reporting agencies, debates on their liability and regulation arose as well. As from the 1840s, the credit reporting agencies were confronted with liability claims brought by parties who were reviewed by the reports and parties who relied on the reports.[7] The debate on the balance between defamation and freedom of speech already came up in early cases such as *Beardsley v Tappan* (proceedings started in 1951),[8] *Billings v Russell* (1855)[9] and *Ormsby v Douglass* (1868).[10] The credit reporting agencies invoked

3 *More extensive overviews are provided by e.g.* Simon 2017, pp. 38 ff., Horsch 2014, pp. 231 ff., Darbellay 2013, pp. 13 ff., Gaillard 2010, Coffee 2006, pp. 283 ff., Sylla 2001 and Madison 1974. As credit rating agencies originate from the US, the description of their history will mainly be situated in the US, but some attention will also be paid to the history of credit rating activities in the EU.
4 Madison 1974, pp. 165-166. *See also* Sylla 2001, p. 7.
5 Madison 1974, p. 166.
6 Madison 1974, pp. 166-168. *See also* Sylla 2001, pp. 7-8.
7 *For a detailed analysis see e.g.* Madison 1974, pp. 177 ff. and Lipartito 2013.
8 *Beardsley v Tappan*, 5 Blatchf. 498 (1867).
9 Supreme Judicial Court of Massachusetts, November 1855, *Boston Law Reporter* vol. 8, new series, pp. 699 ff. (*Billings v Russell*) as published by the Reports of the Four Leading Cases Against The Mercantile Agency for Libel and Slander, New York: Dun, Barlow & Co. 1873,

the defence of 'privileged communication' and argued that their credit reports should not be subject to the rules of libel and slander in claims brought by parties reviewed by the reports because they qualified as 'privileged communication' between the credit reporting agency and the party who made use of the reports.[11] Although the US courts did not accept an appeal to this defence in *Beardsley v Tappan*, the US courts did accept appeals to this defence in other subsequent cases.[12] By invoking this defence, credit reporting agencies often successfully defended themselves against liability claims brought by the parties who were reviewed in their credit reports. In these early days of the credit reporting industry, the US courts also decided that the inaccuracy of credit reports was not sufficient to establish the liability of credit reporting agencies towards the users of credit reports. Even though reports contained inaccurate information, the US courts rejected claims for liability when the credit reporting agencies had exercised reasonable diligence.[13] The first attempts to arrange for the civil liability of credit reporting agencies by statute date back to the 1870s, when the US states Missouri, Illinois, New York and Pennsylvania proposed bills to hold credit reporting agencies liable for loss 'suffered by businessmen as a result of inaccurate credit reports'.[14] However, none of the bills entered into force after strong opposition by the Dun Agency (the successor of the merged Mercantile Agency and the Bradstreet Agency).[15]

In addition to credit reporting agencies, the financial press also provided independent credit information.[16] Moody's, Standard & Poor's and Fitch initially started as publishers. Whereas Henry Varnum Poor gathered information on the US railroads and published the *Manual of the Railroads of the United*

---

p. 132. The jury rejected the claim for damages because the claimant did not succeed in proving slander or libel.

10 Court of Appeals of the State of New York 1 January 1868, 37 N.Y. 477 (N.Y. 1868) (*Ormsby v Douglass*), 486.

11 *See* Madison 1974, pp. 177-178.

12 Madison 1974, p. 178, explaining the US courts changed their approach in Court of Appeals of the State of New York 1 January 1868, 37 N.Y. 477 (N.Y. 1868) (*Ormsby v Douglass*). *See on Ormsby v Douglass* Lipartito 2013, pp. 666 ff.

13 Madison 1974, p. 179.

14 Madison 1974, p. 180. Madison based his findings on the following sources: 'Journal of the House of Representatives of the States of Missouri, at the Adjourned Session of the Twenty-Seventh General Assembly, Commencing January 7, 1874 (Jefferson City, 1874), 145; Journal of the House of Representatives of the Commonwealth of Pennsylvania, for the Session Begun at Harrisburg, on the 6th Day of January, 1874 (Harrisburg, 1874), 397, 445; Journal of the House of Representatives of the Twenty-Eighth General Assembly of the State of Illinois, at the Adjourned Regular Session, Begun and Held at Springfield, January 6, 1874 (Springfield, 1874), 191, 196, 334, 489; Journal of the Senate of the State of New York: At their Ninety-Seventh Session Begun and Held at the Capitol in the City of Albany, on the Sixth Day of January, 1874 (Albany, 1874), 275, 288'.

15 Madison 1974, pp. 181-182.

16 *See* Sylla 2001, p. 8.

States (as from 1849),[17] John Moody published *Moody's Manual of Industrial and Miscellaneous Securities* (as from 1900)[18] and, in 1913, the Fitch Publishing Company was founded which published *The Fitch Stock and Bond Manual* and *The Fitch Bond Book*. In 1909, Moody's was the first modern credit rating agency to be established. Moody's began to translate the credit information into a single symbol (a credit rating).[19] Afterwards, the other publishers started to issue credit ratings as well: Poor's Publishing Company in 1916,[20] the Standard Statistics Company in 1922[21] (in 1941, Poor's Publishing Company merged with Standard Statistics and became Standard & Poor's) and Fitch in 1924.[22] During this period, Moody's and Standard & Poor's began to issue credit ratings attached to European companies, European financial instruments and states as well.[23] During this first period, credit rating agencies based their business model on subscriptions paid for by investors. The use of credit ratings increased and credit rating agencies built up their reputational capital, as investors realised they could save research costs by using credit ratings and could access the capital markets more easily.[24]

3.2.2 Expansion: regulatory purposes, issuer pays and structured finance

After a period of growth and success, the reputation of credit rating agencies deteriorated and the use of credit rating decreased subsequent to the beginning of the Great Depression in 1929.[25] Issuers defaulted and credit rating agencies had to downgrade many credit ratings below investment grade.[26] The credit rating industry ended up in a downwards spiral: research showed the inaccuracy and lack of timeliness of credit ratings,[27] credit rating agencies were losing their reputation so that investors were no longer relying on credit ratings and were no longer prepared to pay for them.[28]

17 Sylla 2001, pp. 8-9.
18 *See* www.moodys.com/Pages/atc001.aspx, last accessed at 31 August 2019.
19 *See* www.moodys.com/Pages/atc001.aspx, last accessed at 31 August 2019. *Also e.g.* Darbellay 2013, pp. 17-18 and White 2009, p. 1.
20 Sylla 2001, p. 9. *Also* White 2009, p. 1.
21 White 2009, p. 1.
22 Coffee 2006, p. 293. *Also* White 2009, p. 1.
23 *See* www.moodys.com/pages/default_em.aspx, last accessed at 31 August 2019 and Moody's Investors Service European Union Transparency Report 2014, p. 2, available at www.moodys.com/sites/products/ProductAttachments/SP33094_MIS_EU_TransparencyReport_2015.pdf, last accessed at 31 August 2019. *Cf. also* Bhatia 2002, p. 5. *In respect of sovereign ratings*, Gaillard 2010, p. 45.
24 Darbellay 2013, pp. 18-19.
25 *See* Darbellay 2013, p. 22.
26 Flandreau, Gaillard & Packer 2010, pp. 10-11.
27 *E.g.* a study conducted by Hempel, discussed by Sylla 2001, p. 20. Flandreau, Gaillard & Packer 2010 confirmed these research outcomes.
28 Darbellay 2013, p. 22.

Yet, during the same period, the US legislature started to make use of credit ratings in legislation.[29] As a consequence, credit ratings no longer only served informational functions, but also began to serve regulatory functions. In 1931, the Office of the Comptroller of the Currency encouraged banks to invest in bonds with an investment grade rating, by stating that bonds with a speculative grade rating would be 'written down to market value and 50 percent of the resulting book losses were to be charged against capital'.[30] Furthermore, under the US Banking Act of 1936, banks were prohibited from investing in bonds lacking an investment grade rating.[31] The US legislature in fact 'outsourced'[32] creditworthiness assessments to credit rating agencies, rather than developing its own methodologies.

In the 1970s, the US and the Union legislature and the Basel Committee intensified the regulatory function of credit ratings by incorporating credit ratings further in financial regulation.[33] Regulators used credit ratings, for instance, as a method to determine the amount of capital to be held by financial institutions.[34] In order to establish which credit ratings could be used for regulatory purposes, in 1975, the SEC introduced the 'NRSRO concept' (the Nationally Recognized Statistical Rating Organization concept).[35] Solely credit rating agencies with an NRSRO status could issue credit ratings that were allowed to be used for regulatory purposes. From this perspective, the legislatures empowered the credit rating industry and the large credit rating agencies of Moody's, Standard & Poor's and Fitch in particular.

As from the 1970s, the credit rating industry in both the United States and Europe went through a period of growth.[36] Having caused the financial markets to place more reliance on credit ratings, the increased regulatory use of credit ratings contributed to this growth. Also, credit rating agencies increased their revenues by changing from the 'subscription based model' to the 'issuer pays model'.[37] Whereas, originally, investors paid for credit ratings through a subscription, issuers started to pay for the assignment of credit ratings after the introduction of the issuers pay model. Up until today, most credit rating agencies issue credit ratings on their websites which are freely available to the public. Although the subscription based model is more inde-

29 *E.g.* Coffee 2006, p. 288 and Darbellay 2013, p. 20.
30 Darbellay 2013, pp. 20-21 and Partnoy 2002, p. 8. *Cf. also e.g.* Coffee 2006, pp. 288-289 and Cantor & Packer 1994, p. 6.
31 Darbellay 2013, p. 20, White 2009, p. 2 and Coffee 2006, p. 289.
32 This term is used, amongst others, by Darbellay 2013, p. 40 and by White 2010, p. 91.
33 *Cf.* Darbellay 2013, p. 23.
34 *See* Cantor & Packer 1994, p. 5.
35 Darbellay 2013, p. 23.
36 Darbellay 2013, p. 23.
37 Darbellay 2013, p. 24 and Coffee 2006, p. 295. As issuers used credit ratings for regulatory purposes, they were prepared to pay for the assignment of credit ratings. Some smaller credit rating agencies, such as Egan-Jones Ratings, still generate revenues on a subscription basis.

pendent, it was less profitable to credit rating agencies due to the public good character of the information provided by credit ratings.[38] The public good character of the information provided by credit ratings means that once published to a few investors, it is difficult to exclude other non-paying investors from receiving and using the information given by the credit rating, because the information provided by credit ratings can be easily copied by other investors.[39] As a consequence, investors were not prepared to pay (high) fees for credit ratings. Finally, since the 1970s, credit rating agencies have managed to increase their revenues by assigning credit ratings to structured finance products.[40] Due to the complexity of structured finance products and the fact that issuers needed credit ratings to be able to sell the structured finance products in the financial markets, credit rating agencies could ask high fees for the assignment of those ratings. Eventually, credit rating agencies started to generate major parts of their revenues from rating structured finance.[41]

3.2.3 Inaccurate credit ratings and (self-)regulation

Credit rating agencies became discredited during the 1990s and 2000s, for having assigned inaccurate credit ratings to legal entities such as Enron, WorldCom and Parmalat.[42] The US entities Enron and WorldCom and the Italian entity Parmalat defaulted at the beginning of the 2000s. Prior to the defaults, these legal entities had gone through periods of massive growth, in which financial frauds were committed.[43] In the aftermath of these defaults, it was questioned how these frauds could have escaped the attention of boards of directors and gatekeepers such as accountants and credit rating agencies.[44] Credit rating agencies had, for instance, downgraded their credit ratings only days prior to Enron, WorldCom and Parmalat filing for bankruptcy.[45] Investors brought proceedings against credit rating agencies (and other gatekeepers) in relation to these defaults. Succeeding in claims for credit rating agency liability under US law proved, however, difficult for investors. First, because rule 436 (g) of the Securities and Exchange Commission under the Securities Act 1933 excluded credit rating agencies from expert liability for

38 Langohr & Langohr 2008, p. 411. *See for a detailed description on the reasons why credit rating agencies changed to the issuer pays model* Simon 2017, pp. 35-36.
39 Langohr & Langohr 2008, p. 412. *Cf.* Coffee 2006, p. 295.
40 Darbellay 2013, p. 25 and Coffee 2006, p. 296.
41 Coval, Jurek & Stafford 2008, p. 4.
42 *See* Coffee 2006, p. 297.
43 Coffee 2006, pp. 15 ff. and Ferrarini & Giudici 2005, especially pp. 12-13.
44 Coffee 2006, pp. 15-16.
45 *See* Coffee 2006, p. 34. *On Enron and WorldCom in particular*, US Senate Report on the Credit Rating Agency Reform Act of 6 September 2006, no. 109-326, p. 8, available at www.congress.gov/109/crpt/srpt326/CRPT-109srpt326.pdf, last accessed at 31 August 2019. *On Enron in particular*, Hemraj 2015, p. 55.

false statements included in registration statements under Section 11 Securities Act of 1933.[46] Second, because credit rating agencies in some proceedings successfully claimed that rating activities were comparable to journalism and, therefore, qualified as opinions that deserved protection based on freedom of speech under the First Amendment of the US Constitution.[47]

In the 2000s, the credit rating industry became more heavily regulated. The International Organization of Securities Commissions (IOSCO) published a Code of Conduct Fundamentals for Credit Rating Agencies in 2004. This Code of Conduct aimed to improve investor protection, to enhance the fairness, efficiency and transparency of financial markets and to reduce systemic risk at the financial markets.[48] The influence of the Code on the behaviour of credit rating agencies turned out to be limited. One of the former European Commissioners for Internal Market and Services even called the Code a 'toothless tiger' in 2008.[49] Furthermore, in 2006, the US legislature introduced the Credit Rating Agency Reform Act of 2006 in response to the defaults of Enron and WorldCom and to the struggles of the SEC to properly arrange for regulatory standards concerning NRSROs.[50] The US legislature aimed to protect investors and to serve the public interest by improving the quality of credit ratings and by enhancing the credit rating industry's accountability, transparency and competition.[51] The Credit Rating Agency Reform Act of 2006, however, neither deleted SEC rule 436 (g) nor arranged for rights of redress for issuers and investors. Moreover, when the Credit Rating Agency Reform Act of 2006 entered into force mid-2007, the subsequent wave of public and political commotion on credit rating agencies would already present itself shortly after the outbreak of the global financial crisis.

---

46 Darbellay & Partnoy 2012, p. 17, Partnoy 2006, pp. 83-84 and Partnoy 2002, pp. 18-19. A registration statement is a set of documents, including a prospectus, that issuers must file with the SEC in order to offer or sell securities to the public in the US (Vidal & Joosten 2011, p. 11). *In detail* section 3.2.4.4 (b).

47 Darbellay & Partnoy 2012, pp. 16-17, Partnoy 2006, p. 84 and Partnoy 2002, p. 20. As explained by Partnoy, some courts refused to protect credit rating agencies under the freedom of speech and the right to freedom of speech was not absolute (Partnoy 2006, pp. 86-87).

48 Code of Conduct Fundamentals for Credit Rating Agencies, Technical Committee of IOSCO, December 2004, p. 1, www.iosco.org/library/pubdocs/pdf/IOSCOPD180.pdf, last accessed at 31 August 2019. *Cf. also* Hemraj 2015, p. 73.

49 The speech in the press conference on credit rating agencies of former European Commissioner for Internal Market and Services C. McCreevy on 12 November 2008 that can be found on http://europa.eu/rapid/press-release_SPEECH-08-605_en.htm?locale=EN, last accessed at 31 August 2019.

50 *Cf.* US Senate Report on the Credit Rating Agency Reform Act of 6 September 2006, no. 109-326, p. 1, available at www.congress.gov/109/crpt/srpt326/CRPT-109srpt326.pdf, last accessed at 31 August 2019. *Cf. also* Horsch 2014, p. 232.

51 US Senate Report on the Credit Rating Agency Reform Act of 6 September 2006, no. 109-326, p. 2, available at www.congress.gov/109/crpt/srpt326/CRPT-109srpt326.pdf, last accessed at 31 August 2019.

3.2.4 Global financial crisis, regulatory frameworks and liability threats

3.2.4.1 *Financial crisis*

Credit rating agencies became discredited again during the global financial crisis, which started in 2007. The global financial crisis started off in the United States with a crisis in the housing market,[52] and eventually spread across the entire world. In the years prior to the outbreak of the crisis, in the US, the financial markets were not heavily regulated and financial institutions took on large amounts of debts.[53] Banks provided mortgages to households on a large scale, and cleaned their balance sheets by reselling the mortgages on the financial markets. To be able to sell the mortgages, they were pooled and Special Purpose Vehicles issued structured finance products such as collateralised debt obligations and, more in particular, mortgage-backed securities (section 3.3.2.3).[54] However, when the housing bubble burst in the US, the mortgages – some of which had been supplied to borrowers who were insufficiently creditworthy and were even described as 'toxic mortgages'[55] – defaulted and the structured finance products backed by those mortgages generated huge losses. As a response, banks transferred the mortgages from the Special Purpose Vehicle back to their balance sheets,[56] which turned the housing crisis into a banking crisis.

Credit rating agencies attached credit ratings to the structured finance products. The products were structured in such way that credit rating agencies assigned AAA ratings to these products, indicating that they were creditworthy investments with a relatively low chance of default.[57] But, at the beginning of the crisis, the 'safe' AAA rated investments turned out to be worthless, and credit rating agencies were accused of having sent signals that were too positive with regard to the creditworthiness of this type of financial products to the financial markets.[58] The US Financial Inquiry Commission even concluded that 'credit rating agencies were essential cogs in the wheel of financial destruction', because the structured finance products could not be marketed and sold without 'their seal of approval'.[59] Studies have shown that credit rating agencies assigned inaccurate credit ratings to structured finance

52 Rogge 2016, p. 74.
53 *Cf.* 'The Financial Crisis Inquiry Report. Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States', 25 February 2011, pp. xviii-xx, available at www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf last accessed at 31 August 2019.
54 *Cf.* The Financial Crisis Inquiry Report 2011, p. xvii.
55 *Cf.* The Financial Crisis Inquiry Report 2011, pp. xxiii-xxiv.
56 Rogge 2016, p. 72.
57 Baumgartner 2015, pp. 492-493.
58 *Cf.* SEC(2008) 2745, p. 4.
59 The Financial Crisis Inquiry Report 2011, p. xxv. *Cf. also* The Financial Crisis Inquiry Report 2011, pp. 44 ff. and 146.

products. Subsequent to the outbreak of the crisis, the big three had to downgrade their structured finance credit ratings massively.[60] For instance, Moody's downgraded 83% of the AAA mortgage securities assigned in 2006.[61] A key flaw in the structured finance rating models was that they assumed securitisations created safer financial products by pooling various mortgages (diversification), while there was in fact a strong correlation between the mortgages.[62] Moreover, the US Financial Inquiry Commission concluded that credit rating agencies valued market share and profit considerations over rating quality and integrity.[63]

Intentional malpractice within the credit rating industry has been implied, but concrete evidence of the existence of such intentional malpractice remained limited.[64] A well-known statement by an employee of Standard & Poor's reads that a transaction 'could be structured by cows and we would rate it.'[65] In 2014, however, the SEC more carefully stated that credit rating agencies 'might' have had an incentive to generate their revenues 'by relaxing rating standards, inflating credit ratings, facilitating the sale of asset-backed securities by a small number of large issuers, and reducing due diligence in the presence of investors that solely rely on credit ratings'.[66] Empirical research conducted by, for instance, Griffin & Tang showed that credit rating agencies did not always abide by their quantitative models when they assigned credit ratings.[67] They found that only part of the AAA ratings of CDOs could be explained by the credit risk models of credit rating agencies, and that adjustments amounted 'to an additional 12.1% AAA for the average CDO'. Moreover, the adjustments were 'positive predictors of future downgrades'.[68] Furthermore, they concluded that '1.3% of AAAs [meaning AAA rated CDOs] comply with the publicized AAA criterion, 4.8% comply with the publicized AA+ criterion, and 92.5% comply with the publicized AA criterion',[69] implying that part of the

60 The Financial Crisis Inquiry Report 2011, p. 242 and SEC(2008) 2745, p. 4. *Also cf. e.g.* Baumgartner 2015, pp. 494-495 and Coffee 2013, pp. 88 ff.

61 The Financial Crisis Inquiry Report 2011, p. xxv.

62 The Financial Crisis Inquiry Report 2011, pp. 149-150.

63 The Financial Crisis Inquiry Report 2011, p. 212.

64 *Cf. e.g.* SEC(2008) 2745, p. 6 and SEC, Federal Register 15 September 2014, pp. 55082-55083, both carefully making such allegations. Griffin & Tang 2010, p. 2 and *cf.* Ashcraft, Goldsmith Pinkham & Vickery 2010, p. 1.

65 Opening Statement of Rep. H.A. Waxman Chairman, Committee on Oversight and Government Reform Credit Rating Agencies and the Financial Crisis, 22 October 2008, available at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/20081022102221.pdf, last accessed at 31 August 2019. *Also* Baumgartner 2015, p. 495.

66 SEC, Federal Register 15 September 2014, pp. 55082-55083.

67 Griffin & Tang 2010. *Also* SEC, 'Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies', July 2008, pp. 14 and 19, available at www.sec.gov/news/studies/2008/craexamination070808.pdf, last accessed at 31 August 2019.

68 Griffin & Tang 2010, p. 27.

69 Griffin & Tang 2010, p. 20.

senior tranches of structured finance transactions should not have received AAA ratings in the first place. Griffin & Tang's study also demonstrated that the deviations could not be explained by manager experience or credit enhancement.[70] However, it did not confirm the underlying reasons for the deviations of the models by credit rating agencies.[71]

3.2.4.2 Possible causes of inaccurate structured finance ratings

The underlying causes of the inaccurate structured finance ratings are generally sought in the inadequate 'incentivisation' of credit rating agencies, which did not encourage them to ensure the assignment of high quality credit ratings. Coffee remarked that 'the major credit rating agencies simply had too little incentive to "get it right"'.[72] A combination of the functions of credit ratings (section 3.3.3) and certain features of the credit rating industry contributed to the incorrect 'incentivisation' of credit rating agencies and the assignment of inaccurate structured finance ratings.[73]

First, the independence of the credit rating industry was compromised by multiple conflicts of interest of credit rating agencies and their rating analysts.[74] The earning model of credit rating agencies forms the main source of conflicts of interest. The dominance of the issuer pays model indeed entails that the entity who pays for the credit rating is the entity that is to be rated. Thereby, this earning model provides incentives to inflate credit ratings to the benefit of rated entities or its financial instruments in order (to continue) to attract business.[75] The risks of conflicts of interests are exacerbated by ancillary services provided by credit rating agencies[76] and by the ownership structure of credit rating agencies.[77]

Second, the lack of competition in the credit rating industry did not incentivise credit rating agencies to ensure the assignment of high quality credit

70 Griffin & Tang 2010, p. 27.
71 *As indicated by the SEC, see* SEC, Federal Register 15 September 2014, p. 55082 (fn. 37).
72 Coffee 2013, p. 84. *Also e.g.* Darbellay 2013, p. 120 and Pagano & Volpin 2010, p. 404. It is generally agreed upon that credit rating agencies did not have sufficient incentives to ensure the assignment of accurate credit ratings, but there is less agreement on how to solve this problem. One of the main questions is whether one should focus on credit rating agencies' conflicts of interest or on the regulatory use of credit ratings. *See again,* Coffee 2013, p. 84.
73 *For another overview, reference is made to the problem tree of the European Commission*, SEC(2011) 1354 final, p. 10.
74 *E.g.* SEC(2011) 1354 final, p. 10, SEC(2008) 2745, p. 11 ff. and SEC Summary Report 2008, p. 22.
75 SEC(2011) 1354 final, p. 10, SEC(2008) 2745, pp. 11-12 and SEC Summary Report 2008, p. 23. *Also e.g.* Darbellay 2013, pp. 120-122 and Pagano & Volpin 2010, pp. 412-413.
76 SEC(2008) 2745, pp. 12-13. *Also e.g.* Darbellay 2013, pp. 122-124, Pagano & Volpin 2010, p. 413.
77 SEC(2011) 1354 final, p. 10 and p. 20.

ratings.[78] The oligopoly of Fitch Ratings, Moody's Investors Service and Standard & Poor's Ratings Services indeed practically ensures them of clients. The lack of competition is caused by the nature of credit rating activities. The credit rating industry is reputation based, so that newcomers face high (reputational) entry barriers.[79] Building up a good reputation is difficult because issuers and investors will have a preference for credit ratings assigned by credit rating agencies that already have a good reputation, while, in order to get such a good reputation, the credit rating agencies have to assign good ratings first. These high entry barriers have been exacerbated by the regulatory licence system – for example, the US NRSRO system.

Third, the regulatory use[80] of credit ratings in legislation incentivised credit rating agencies and financial markets in a wrong way. The regulatory use of credit ratings effectively requires issuers to apply for credit ratings, thereby providing credit rating agencies with clients. The guarantee of clientele does not incentivise credit rating agencies to ensure the quality of their credit ratings. Moreover, issuers do not care so much about the quality of credit ratings and may not control the work done by credit rating agencies properly, as long as they receive certain credit ratings to comply with regulatory requirements. Furthermore, the regulatory use has the negative side effect of encouraging overreliance on credit ratings by the financial markets (section 3.2.4.3).[81]

The combination of the three factors described caused credit rating agencies to have too little incentive to ensure the assignment of high quality credit ratings. This problem was exacerbated by a lack of liability threats.[82] Credit rating agencies faced hardly any negative consequences from assigning incorrect credit ratings.

3.2.4.3 Aggravated effects due to overreliance

Although it was the credit rating agencies who assigned inaccurate structured finance ratings, one must not lose sight of the fact that the effects of the inaccurate credit ratings were aggravated due to an overreliance on credit ratings by the financial markets.[83] Market participants sometimes blindly relied on

---

78 SEC(2011) 1354 final, p. 10 and p. 17. Although too little competition may cause credit rating agencies not to care about their reputational capital (because issuers have limited choice to turn to other credit rating agencies), too much competition in combination with the issuer pays model will not improve the quality of credit ratings either. Such a combination might lead to 'rating shopping' (*cf.* SEC(2008) 2745, pp. 13-14) by issuers and 'a race to the bottom': issuers can threaten to turn to another credit rating agency which incentivises credit rating agencies to inflate credit ratings in order to keep up their revenues (Darbellay 2013, pp. 124-125 and 127 and Coffee 2013, p. 86). *Also* Pagano & Volpin 2010, pp. 415-416.

79 SEC(2011) 1354 final, p. 17. *Also* Coffee 2013, p. 86.

80 Section 3.3.3.

81 SEC(2011) 1354 final, p. 11. *Also* Darbellay 2013, p. 136.

82 *Cf.* SEC(2011) 1354 final, pp. 10 and 18. *Also* Pagano & Volpin 2010, p. 413.

83 *Cf.* SEC(2011) 1354 final, pp. 10-11 ff. *Also cf.* Darbellay 2013, pp. 134-137.

credit ratings and did not conduct their own assessments of issuers' creditworthiness. Overreliance was stimulated by the regulatory use of credit ratings,[84] the lack of transparency on the limits of structured finance ratings[85] and the large complexity of structured finance products.[86] Overreliance is problematic because it can negatively affect market stability. When investors only rely on credit ratings, the financial markets respond strongly to credit ratings and changes to these, which could create market bubbles or downward spirals.[87]

3.2.4.4 Legal developments

(a) European Union

In the aftermath of the global financial crisis, legislatures aimed to increase the accountability of credit rating agencies, and investors started legal proceedings against credit rating agencies for civil liability. Whereas, prior to the financial crisis, self-regulation under the IOSCO Code was thought to be sufficient in the EU, the Union legislature now decided to develop a regulatory framework for credit rating agencies: the first Regulation on credit rating agencies entered into force in 2009 and was amended in 2011, and again in 2013.[88] The regulatory framework provides comprehensive rules for the industry and serves a wide range of objectives (detailed in section 3.4). As regards the enforcement of the rights and obligations created, the regulation foresees in supervisory powers for ESMA, but also in the right of redress for issuers and investors under Article 35a CRA Regulation. The acknowledgment and creation of a right to damages under Article 35a CRA Regulation is a major breakthrough in the history of credit rating agencies. The historical analysis has indeed shown that credit rating agencies were successfully shielded against liability claims in the US on the basis of their freedom of speech and the codification of such a right remained out of the question for a long time.[89]

84 Darbellay 2013, p. 136.
85 SEC(2008) 2745, p. 17.
86 Darbellay 2013, p. 135.
87 *Cf.* SEC(2011) 1354 final, p. 11.
88 Regulation (EC) no. 1060/2009, Regulation (EU) no. 513/2011 and Regulation (EU) no. 462/2013, respectively.
89 Upon the first version of the CRA Regulation, the French legislature introduced a special right of redress for issuers and investors under Art. L. 544-5 Code monétaire et financier (section 5.5.2.1).

(b) United States[90]

The US legislature amended the Credit Rating Agency Reform Act of 2006 by the Dodd-Frank Act 2010. At first sight, these amendments appeared to have serious consequences for the opportunities to hold credit rating agencies liable under the Securities Act of 1933[91] and the Securities Exchange Act of 1934[92] as well.

Prior to the introduction of the Dodd-Frank Act 2010, rule 436 (g) of the Securities and Exchange Commission under the Securities Act 1933 exempted credit rating agencies from expert liability for false statements included in registration statements under Section 11 Securities Act of 1933. Credit rating agencies, hence, were not liable for inaccurate credit ratings included in registration statements filed by issuers, such as prospectuses, needed for public offerings. Section 939G Dodd-Frank Act 2010 repealed SEC rule 436 (g), subjecting credit rating agencies to increased liability risks.[93] However, under pressure from the credit rating industry, the repeal eventually did not have any effect. Upon the introduction of Section 939G Dodd-Frank Act 2010, credit rating agencies no longer allowed issuers to include credit ratings in registration statements.[94] This refusal was highly problematic for asset-backed securities issuers, because they were required to include credit ratings in their registration statements by SEC rules.[95] In order to enable issuers to issue asset-backed securities nevertheless and to avoid the disruption of the securitisation market,[96] the Securities Exchange Commission announced it would not enforce issuers' obligations to include credit ratings in their registration statements

90 As indicated in section 1.5, this dissertation does not cover credit rating agency liability under US law. This section, as well as the section on the Australian case *Bathurst Regional Council* (section 3.2.4.4 (c)), serve as a brief description of developments in the context of credit rating agency liability only. For a more detailed overview e.g. Miglionico 2019, no. 4.01 ff. and no. 8.01 ff. and Dumont du Voitel 2018, pp. 361 ff.

91 The Securities Act of 1933 provides rules on the issue of securities at primary markets (*cf.* Vidal & Joosten 2011, p. 8).

92 The Securities Exchange Act of 1934 provides rules on the trading of securities and financial markets (*cf.* Vidal & Joosten 2011, p. 8).

93 In full: Rule 17 CFR 220.436 (g). Haar 2014, p. 321. *Also e.g.* De Bruyne 2019, p. 153, Cash 2019, p. 117, Miglionico 2019, no. 4.25 and no. 8.40, Picciau 2018b, pp. 355 and 374-375, Schantz 2015, pp. 43-45, Darbellay & Partnoy 2012, p. 21 and Brownlow 2011, pp. 111-112 and p. 125.

94 Report from the Committee on Financial Services on the 'Asset-Backed Market Stabilization Act of 2011', 12 August 2011, no. 112-196, p. 2, available at www.congress.gov/112/crpt/hrpt196/CRPT-112hrpt196.pdf, last accessed at 31 August 2019 and www.sec.gov/divisions/corpfin/cf-noaction/2010/ford072210-1120.htm, last accessed at 31 August 2019. *Also e.g.* De Bruyne 2019, p. 153, Cash 2019, p. 122, Haar 2014, p. 322, Brownlow 2011, p. 130 and Martin & Franker 2011, p. 20.

95 Under Items 1103 (a) (9) and 1120 of Regulation AB. *See* Brownlow 2011, p. 131 and Martin & Franker 2011, p. 20.

96 *Cf.* Report from the Committee on Financial Services on the 'Asset-Backed Market Stabilization Act of 2011', 12 August 2011, no. 112-196, p. 2, available at www.congress.gov/112/crpt/hrpt196/CRPT-112hrpt196.pdf, last accessed at 31 August 2019.

in November 2010.[97] Thus, issuers could issue asset-backed securities without including the previously required credit ratings in their registration statements. Moreover, in the same year as the US Financial Inquiry Commission concluded that 'credit rating agencies were essential cogs in the wheel of financial destruction',[98] Section 939G Dodd-Frank Act 2010 was even completely repealed by the Asset-Backed Market Stabilization Act of 2011.[99] As a result, the exception under SEC rule 436 (g) was revived and credit rating agencies could not be held liable under Section 11 Securities Act 1933. The increased civil liability risks resulting from Section 939G Dodd-Frank Act 2010 vanished again into thin air.

Furthermore, Section 933 (a) and (b) Dodd-Frank Act 2010 amended the Securities Exchange Act of 1934. Under Article 15E (m) Securities Exchange Act of 1934, the enforcement and penalty provisions of the Securities Exchange Act of 1934 should 'apply to statements made by a credit rating agency in the same manner and to the same extent as such provisions apply to statements made by a registered public accounting firm or a securities analyst under the securities laws'. If a claim for damages was brought against a credit rating agency, the claimant had to provide facts 'giving rise to a strong interference that the credit rating agency knowingly or recklessly failed' to conduct a reasonable investigation or to obtain reasonable verification.[100] Even though the Securities Exchange Act of 1934 now mentioned the opportunity of claims for civil liability against credit rating agencies, the threshold for civil liability remained challenging for investors.

As already mentioned, credit rating agencies managed to escape civil liability under US law by arguing that their rating activities qualified as opinions, which deserved protection based on freedom of speech under the First Amendment of the US Constitution.[101] Prior to the introduction of the Dodd-Frank Act 2010, however, US courts already seemed to approach the freedom of speech argument in a more sceptical manner.[102] The right to freedom of speech of credit rating agencies was not absolute. Although credit ratings represent a credit rating agency's 'own judgment about the quality

97 Available at www.sec.gov/divisions/corpfin/cf-noaction/2010/ford072210-1120.htm, last accessed at 31 August 2019. *Also e.g.* Picciau 2018b, p. 375, Haar 2014, p. 322, Lehmann 2016a, p. 70 and Brownlow 2011, p. 132.

98 The Financial Crisis Inquiry Report 2011, p. xxv. *Cf. also* The Financial Crisis Inquiry Report 2011, pp. 44 ff. and p. 146.

99 Report from the Committee on Financial Services on the 'Asset-Backed Market Stabilization Act of 2011', 12 August 2011, no. 112-196, p. 2, available at www.congress.gov/112/crpt/hrpt196/CRPT-112hrpt196.pdf, last accessed at 31 August 2019. *Also* De Bruyne 2019, p. 153.

100 *Also* De Bruyne 2019, p. 154.

101 Darbellay & Partnoy 2012, pp. 16-17, Partnoy 2006, p. 84 and Partnoy 2002, p. 20. As explained by Partnoy, some courts refused to protect credit rating agencies under the freedom of speech and the right to freedom of speech was not absolute (Partnoy 2006, pp. 86-87).

102 *For this approach cf.* Darbellay & Partnoy 2012, p. 17 and Brownlow 2011, pp. 116-117.

of the bond',[103] they were actionable on the basis of common law fraud if the credit rating agency 'does not believe the opinion and the opinion is not factually well-founded'.[104] Furthermore, if credit ratings were disseminated to a select group of investors, credit rating agencies were not entitled to the same level of protection as in situations in which credit ratings were disseminated to the public at large.[105]

(c) Australia

In November 2012, the Australian case *Bathurst Regional Council v Local Government Financial Service Pty Ltd (No 5)* formed a breakthrough in respect of the civil liability of credit rating agencies. The Federal Court of Australia (New South Wales District Registry) held that Standard & Poor's owed a duty of care to investors under the tort of negligence and breached the required standard of care.[106] In comparison to the English law approach to credit rating agency liability (see section 5.7.2), the decision of the Australian court was quite surprising.

In *Bathurst,* Australian local councils had collectively invested in constant proportion debt obligations (CPDOs) issued by ABN AMRO.[107] Standard & Poor's had assigned an AAA rating to the CPDOs but the CPDOs turned out to be extremely volatile and lost 90% of their value in two years.[108] The Federal Court of Australia held that Standard & Poor's owed a duty of care to the

103 *In Re National Century Financial Enterprises, Inc., Investment Litigation*, 580 F. Supp. 2d 630 (S.D. Ohio. Jul. 22, 2008), 639 and *Compuware Corp. v Moody's Investors Services, Inc.*, 499 F.3d 520 (6th Cir. 2007), 522.

104 *Cf. In Re National Century Financial Enterprises, Inc., Investment Litigation*, 580 F. Supp. 2d 630 (S.D. Ohio. Jul. 22, 2008), 639.

105 *In Re National Century Financial Enterprises, Inc., Investment Litigation*, 580 F. Supp. 2d 630 (S.D. Ohio. Jul. 22, 2008), 640 and *Abu Dhabi Commercial Bank v Morgan Stanley & Co.*, 651 F. Supp. 2d 155 (S.D.N.Y. 2009), 176. *As derived from* Darbellay & Partnoy 2012, p. 17 and Brownlow 2011, p. 117. *Also* De Bruyne 2019, p. 156 and Hemraj 2015, pp. 186-187.

106 *Bathurst Regional Council v Local Government Financial Service Pty Ltd* (No 5) [2012] FCA 1200, paras. 2758 and 2787. This section concentrates only on the parts of *Bathurst* on the existence of a duty of care and the required standard of care under the tort of negligence. *For a broader overview of Australian law and other Australian decisions e.g.* Miglionico 2019, no. 10.01 ff.

107 Constant proportion debt obligations are highly complex derivatives. In *Bathurst*, the investors (protection sellers) entered into synthetic credit default swaps with ABN AMRO (protection buyers). Under the credit default swap contracts, the investors sold protection against potential defaults by entities listed on the Globoxx index (a combination of the indices CDX and iTraxx). Hence, the investors would earn or lose money depending on the creditworthiness of the companies listed on the Globoxx index. See the summary of *Bathurst* published by the Federal Court, available at www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2012/2012fca1200, last accessed at 31 August 2019, paras. 3-5. The CPDOs were structured in such way that they would receive a high credit rating while paying a coupon rate that could be compared with the coupon rate paid on high risk junk bonds. See S.M. Ishmael, 'A PIK of the ABCDS of arcane credit derivative terminology', *Financial Times* 29 June 2007.

108 Lehmann 2016a, p. 71.

Australian local councils under the tort of negligence.[109] The Federal Court distinguished this case from cases concerning accountant's liability in which the existence of a duty of care was not accepted, since 'a rating is assigned to a financial instrument for the very purpose of communication to the class of potential investors for them to take into account, and rely upon, in deciding whether or not to invest', while '[t]he same cannot be said of a financial audit of a company which is undertaken by an auditor for the company's own purposes and to comply with the company's statutory obligations'.[110] Moreover, Standard & Poor's was assumed to have known that investors would rely on its credit rating because the business of rating structured finance products is dependent upon the idea that investors need credit ratings to assess the creditworthiness of CPDOs – the court concluded 'it is difficult to conceive of any other purpose for the rating'.[111] The fact that credit ratings could be qualified as opinions, did not preclude the existence of a duty of care to exercise reasonable care and skill in the assignment of the credit rating. Furthermore, it was 'immaterial' that Standard & Poor's was not aware of the precise identity of the investors.[112] Standard & Poor's was held to have possessed sufficient information to define the class of potential investors to whom it might be liable.[113]

Moreover, the Federal Court held that Standard & Poor's breached the required standard of care. Standard & Poor's was considered not to have 'a reasonable basis to conclude that the notes had an "extremely strong capacity to meet financial commitments"' and failed to act with reasonable care as a credit rating agency.[114] Furthermore, the Federal Court found:

> 'These matters do not involve mere matters of judgment upon which reasonable experts might differ. They do not involve mere mistakes or errors of judgment in a complex and difficult area. They involve failures of such a character that no reasonable ratings agency exercising reasonable care and skill could have committed in the rating of the CPDOs. Contrary to S&P's submissions the problem is not that

109 *Bathurst Regional Council v Local Government Financial Service Pty Ltd (No 5)* [2012] FCA 1200, paras. 2814-2819. *See also* Sahore 2015, p. 444.

110 *Bathurst Regional Council v Local Government Financial Service Pty Ltd (No 5)* [2012] FCA 1200, para 2758.

111 *Bathurst Regional Council v Local Government Financial Service Pty Ltd (No 5)* [2012] FCA 1200, para 2759.

112 *Bathurst Regional Council v Local Government Financial Service Pty Ltd (No 5)* [2012] FCA 1200, para 2778.

113 *Bathurst Regional Council v Local Government Financial Service Pty Ltd (No 5)* [2012] FCA 1200, para 2754.

114 *Bathurst Regional Council v Local Government Financial Service Pty Ltd (No 5)* [2012] FCA 1200, paras. 2829-2830. *See also* Sahore 2015, p. 440.

> the analysis was not rigorous. The problem is that the analysis was fundamentally flawed, unreasonable and irrational in numerous respects as identified.'[115]

The decision of the Federal Court of Australia was upheld on appeal. While Standard & Poor's argued that adopting a duty of care 'would be to turn predictions about the future into guarantees', the Federal Court of Appeal of Australia rejected this submission for ignoring principles established by law.[116] It decided that Standard & Poor's owed a duty 'to exercise reasonable care in forming and expressing the relevant opinion about the credit risk of the Rembrandt notes', because Standard & Poor's 'knew of an ascertainable class of persons "who is or are reliant, and therefore vulnerable"'. The duty did not involve the obligation to assign the correct credit rating or to protect the Australian local councils from suffering loss.[117] The Court of Appeal rejected the submission that Standard & Poor's did not owe a duty of care, because they did not know the identity of the investors. The class was considered not indeterminate, because Standard & Poor's knew that each member of the class was an investor in the specific CPDOs.[118]

Legal scholars concluded that the outcome in *Bathurst* was strongly influenced by the specific circumstances of the case, such as the fact that the CPDOs were bespoke for certain institutional investors[119] and that the CPDOs could not be traded on the secondary markets.[120] Be this as it may, the rulings nevertheless indicate that credit rating agency liability under the tort of negligence under Australian law is not impossible. In particular circumstances, credit rating agencies owe a duty of care to exercise reasonable care and skill in assigning credit ratings, and cannot escape civil liability on the sole basis of the fact that credit ratings are opinions.

3.2.5 Recovery and settlements

At the time this dissertation is published, the outbreak of the global financial crisis lies more than ten years behind us. The regulatory changes made in the aftermath of the crisis have been in force for some years, and the credit rating industry has recovered from the crisis.

---

115 *Bathurst Regional Council v Local Government Financial Service Pty Ltd (No 5)* [2012] FCA 1200, para 2836.

116 *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, para 572. Harding-Farrenberg & Donovan 2015, p. 94.

117 *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, paras. 566, 600, 1250, 1255 ff. and 1302. *Also* De Bruyne 2019, p. 156.

118 *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, paras. 587 and 593.

119 Lehmann 2016a, p. 71. *Cf.* Harding-Farrenberg & Donovan 2015, pp. 97-98.

120 Sahore 2015, pp. 446 and 451.

ESMA Reports show that by 2013 revenues and operating profits of credit rating agencies had returned to the same level as before the financial crisis.[121] The credit rating industry continues to be a large business: revenues and profits are high and the amount of outstanding credit ratings is enormous.[122] Over 2014, the total revenue of the rating business of McGraw Hill Financial (the holding company of Standard & Poor's) and Moody's Corporation were EUR 1,851 million and EUR 1,708 million, respectively.[123] At the end of June 2015, the amounts of outstanding structured finance ratings of Standard & Poor's, Moody's and Fitch were 61,038, 61,937 and 41,303, respectively.[124] Notwithstanding the efforts made to increase competition by the regulatory frameworks in force, the credit rating industry remains dominated by three credit rating agencies: Fitch Ratings, Moody's Investors Service and Standard & Poor's Ratings Services.[125] ESMA's market share calculations (based on credit rating agencies' revenues) even show an increase in the combined market share of these three credit rating agencies: 90.44% (in 2013), 91.89% (in 2014), 92.85% (in 2015), 93.18% (in 2016) and 93.40% (in 2017).[126] Hence, the remaining 20 smaller credit rating agencies all together had a combined market share of 6.82% in 2017. Nevertheless, some of the smaller credit rating agencies did develop larger market shares in specific rating areas.[127]

Credit rating agencies settled multiple civil liability claims brought against them for the assignment of inaccurate structured finance ratings prior to the global financial crisis. Following the Australian decisions in *Bathurst*, credit rating agencies settled disputes with several Australian local councils in 2016,

121 ESMA/2015/280, p. 12 and *see* ESMA/2015/1472, p. 32. Over 2014, Standard & Poor's Rating Services suffered an operating loss caused by, amongst others, USD 1,6 billion spent on legal and regulatory settlements. *See* 2014 Annual Report McGraw Hill Financial, p. 20, available at http://investor.spglobal.com/Cache/1500085839.PDF?O=PDF&T=&Y=&D=&FID=1500085839&iid=4023623, last accessed at 31 August 2019.

122 Details can be found in the Annual Reports published by credit rating agencies (or their holding companies) and on the website of CEREP, a central repository set up by ESMA that publishes the rating activity statistics and rating performance statistics of credit rating agencies.

123 ESMA/2015/1472, p. 33.

124 Available at http://cerep.esma.europa.eu/cerep-web/statistics/ratingActivity.xhtml, last accessed at 31 August 2019.

125 *On the corporate structure of the Big Three*, Simon 2017, pp. 14-18. *Also* Cash 2019, pp. 6-8.

126 ESMA/2014/1583, p. 6, ESMA/2015/1879, p. 8, ESMA/2016/1662, p. 6, ESMA33-5-209, p. 6 and ESMA33-9-281, p. 6, respectively.

127 *Cf.* SEC, 'Annual Report on Nationally Recognized Statistical Rating Organizations', December 2018, www.sec.gov/files/2018-annual-report-on-nrsros.pdf, last accessed at 31 August 2019, p. 7 and the calculations of ESMA33-9-281, pp. 8-9. Examples of these smaller credit rating agencies are CERVED Group S.p.A. (an Italian credit rating agency), DBRS Ratings Limited (headquartered in Canada), AM Best Europe Rating Services (with a focus on the insurance sector), The Economist Intelligence Unit Ltd (the research and analysis division of The Economist Group, sister company to The Economist newspaper – assigning unsolicited ratings only) and Egan Jones (working on the basis of paid subscriptions).

for an amount of USD 142 million,[128] and 2018, for an amount of USD 157 million.[129] The largest post-crisis settlements were concluded in the United States. Standard & Poor's agreed on paying USD 1.5 billion to the US Department of Justice, 19 states and the District of Columbia in 2015.[130] Moody's agreed on paying USD 864 million to the US Department of Justice, 21 states and the District of Columbia in 2017.[131] From a European perspective, the global financial crisis did not lead to large settlements. Italian prosecutors started criminal proceedings against analysts of Standard & Poor's and Fitch for market manipulation relating to downgrades of Italian sovereign credit ratings in 2011 and 2012. However, the Tribunale Penale di Trani dismissed the accusations in 2017.[132] Finally, up to now, Article 35a CRA Regulation[133] has not proved itself as a harbinger of change for the number of successful claims for damages against credit rating agencies within the EU. Claims based on Article 35a CRA Regulation were brought in Germany, but all claims were rejected thus far.[134]

128 In February 2016, Standard & Poor's agreed on this settlement with 92 Australian groups, www.reuters.com/article/us-australia-s-p-court-idUSKCN0VT04T, last accessed at 31 August 2019.

129 In August 2018, Standard & Poor's agreed on this settlement with pension funds and Australian local governments, www.reuters.com/article/us-australia-s-p/sp-settles-landmark-derivatives-rating-lawsuit-in-australia-idUSKBN1KV09O and www.reuters.com/article/us-australia-s-p/sp-others-paid-157-million-to-settle-landmark-australian-lawsuit-idUSKCN1LF0U9, last accessed at 31 August 2019.

130 *See* www.reuters.com/article/us-s-p-settlement/sp-reaches-1-5-billion-deal-with-u-s-states-over-crisis-era-ratings-idUSKBN0L71C120150203, last accessed at 31 August 2019.

131 *See* www.reuters.com/article/us-moody-s-credit-idUSKBN14X2LP, last accessed at 31 August 2019.

132 Tribunale Penale di Trani 26 September 2017, no. 837/17 Reg.Sent. Furthermore, several civil proceedings were started in Italy. This dissertation does not discuss Italian case law. *For an Italian dissertation on credit rating agency liability e.g.* Picciau 2018a. *For a dissertation on credit rating agency liability involving a comparison between German and Italian law* Rinaldo 2017.

133 Noting that Art. 35a CRA Regulation only became applicable as from 20 June 2013, Art. 2 CRA III Regulation and *OJ* 31 March 2013, L 146.

134 *E.g.* Amtsgericht Neuss 28 December 2016, 80 C 3954/15, ECLI:DE:AGNE:2016:1228.80C3954.15.00, *BeckRS* 2016, 130332, Landgericht Düsseldorf 17 March 2017, 10 O 181/15, ECLI:DE:LGD:2017:0317.10O181.15.0A and Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321. *See e.g.* section 3.5.3.3 (b).

3.3 Credit ratings

3.3.1 Character and types

Credit ratings are expert opinions on creditworthiness assigned to fixed income financial instruments and issuers of such financial instruments.[135] Credit rating agencies assign credit ratings to entities such as companies and financial institutions, but also to states, municipalities, universities and hospitals, for instance. Credit ratings can also concern specific financial instruments, as long as they are of a fixed income nature. Examples are debts in general, other financial obligations, debt securities (bonds)[136] and preferred shares.[137] Credit rating agencies hence do not rate normal shares, which belong to equity capital of the issuer.

Credit rating agencies can assign credit ratings at an issuer's request or on their own motion. Credit ratings of the first category are called 'solicited credit ratings'. A credit rating agency and an issuer enter into a rating contract for the assignment of a solicited credit rating, and the issuer pays the credit rating agency for the assignment. In contrast, credit rating agencies assign 'unsolicited credit ratings' on their own motion, without a request or permission from the rated entity or financial instruments. These credit ratings serve to complete the palette of solicited credit ratings. Unsolicited credit ratings are assigned to states, for instance ('sovereign ratings').

Difficult questions are what involves an accurate credit rating, and what makes a credit rating inaccurate. The complexity is related to the character of credit ratings. Credit ratings provide opinions and information on the relative chance that an issuer will default on its financial obligations in general, or will default on a particular fixed income financial instrument ('credit risk').[138] The character of credit ratings, therefore, is 'fundamentally forward looking'. Furthermore, they qualify as opinions about creditworthiness rather than recommendations, advice or guarantees in respect of creditworthiness.[139] As credit ratings indicate relative chances and probabilities, the default of an issuer (on its financial instruments) does not determine the accuracy of a credit rating. A high credit rating indicates a small chance of default, but indeed

135 Art. 3 (1) (a) CRA Regulation. Under Recital 8 CRA III Regulation, credit ratings are 'not mere' opinions. Credit rating agencies assign all different types of credit ratings, *cf. e.g.* Standard & Poor's rating definitions, available at www.standardandpoors.com//en_US/web/guest/article/-/view/sourceId/504352, last accessed at 31 August 2019 and Moody's rating definitions, available at www.moodys.com/sites/products/ProductAttachments/AP075378_1_1408_KI.pdf, last accessed at 31 August 2019.

136 Such as government bonds, corporate bonds and municipal bonds.

137 Art. 3 (1) (a) CRA Regulation and IOSCO Report 2003, p. 1.

138 *E.g.* IOSCO Report 2003, p. 3. The exact definition of a credit rating differs slightly per credit rating agency (Gaillard 2010, pp. 16-19).

139 *See* Langohr & Langohr 2008, p. 85.

even a small risk can materialise. If a highly rated entity defaults, the question arises whether the credit rating was inaccurate or whether a small risk at default simply materialised.[140]

3.3.2 Assignment of credit ratings

3.3.2.1 Formal proceedings[141]

Each credit rating agency uses its own formal proceedings and methodologies to assign credit ratings to issuers and financial instruments. Therefore, this section only provides a general impression of how the assignment takes place. The rating process often starts upon the request from an issuer for the assignment of a solicited credit rating.[142] After the conclusion of a rating contract, a team of rating analysts – under the responsibility of a lead analyst – investigates what credit rating must be assigned. A rating committee must approve the credit rating proposed by the team of analysts.[143] Upon the completion of this procedure, a credit rating agency submits the credit rating, corresponding reports and press releases to the issuer. If substantial changes in the state of the issuer have occurred, the issuer can ask the credit rating agency to reconsider the credit rating.[144] Finally, the credit rating is published on the website of the credit rating agency and is often freely available to the public.[145] Subsequent to the publication, credit rating agencies monitor issuers and their financial instruments to ensure credit ratings remain accurate.[146]

A credit rating agency's fee for the assignment of credit ratings depends on the particular features of an issuer or its financial instruments.[147] The fee can involve a fixed sum or a percentage expressed in basis points. To provide an impression of the sums and percentages involved, Standard & Poor's for instance specifies that they charge 'up to 6.95 basis points for most transactions' and a minimum fee of $100,000 for most transactions for the sectors 'corporate'

---

140 *Cf. on the incorrectness of credit ratings e.g.* Schantz 2015, p. 54.
141 *Information for this description of the formal proceedings is mainly derived from* Garciìa Alcubilla & Ruiz del Pozo 2012, pp. 18 ff.
142 Darbellay 2013, p. 34 and Garciìa Alcubilla & Ruiz del Pozo 2012, p. 18. Some issuers even appoint a 'rating adviser'. A rating adviser acts as an intermediary between the issuer and the credit rating agency. Langohr & Langohr 2008, pp. 165-166.
143 Darbellay 2013, p. 34, Garciìa Alcubilla & Ruiz del Pozo 2012, pp. 20-21 and *see* AMF Report 2007, p. 40.
144 Garciìa Alcubilla & Ruiz del Pozo 2012, p. 21.
145 Although the underlying reports often disappear behind a paywall after a certain period of time, Garciìa Alcubilla & Ruiz del Pozo 2012, p. 22 and, *more extensively*, Langohr & Langohr 2008, pp. 173-174.
146 Langohr & Langohr 2008, pp. 174 ff. *Cf.* Darbellay 2013, pp. 36-37 and Garciìa Alcubilla & Ruiz del Pozo 2012, p. 22.
147 *Cf.* Langohr & Langohr 2008, p. 413.

and 'sovereigns'. The fees for credit ratings in the field of structured finance 'range up to 12 basis points'. Yet, Standard & Poor's explains that higher fees apply to more complex transactions.[148]

3.3.2.2 *Rating methodologies*

Credit rating agencies employ their own rating methodologies, models and underlying key assumptions. These methodologies, models and assumptions vary per type of issuer or financial instruments. Taking the long-term issue credit ratings of Standard & Poor's as an example, important components for the assignment of such credit ratings are (1) 'the likelihood of payment', i.e. whether the issuer is able and willing to fulfil its obligations in accordance with the terms of the obligations; (2) the nature and terms of the obligations; and (3) the protection offered to credit ratings in the event of bankruptcy.[149] Credit rating agencies that are registered in the EU cannot keep information on methodologies, models and assumptions entirely secret; they are required to disclose their rating methodologies, models and key rating assumptions under Article 8 (1) CRA Regulation. Annex I Section E (I) (5) CRA I Regulation specifies that, for instance, mathematical and correlation assumptions used must be available to the public. The Union legislature introduced this obligation to empower investors to decide whether they wish to rely on credit ratings, but the Union legislature did not wish to require credit rating agencies to publish sensitive business information or to bar innovation.[150]

Assessments of creditworthiness combine quantitative data with qualitative factors.[151] Quantitative data involve, for instance, an issuer's revenues, cash flows and dividends.[152] Qualitative factors involve, for instance, an issuer's commercial strategies, growth potential, financial policy and structure, management quality, ownership structure, corporate governance, and existing competition and the surrounding regulatory environment.[153] The political climate in a state can also involve a qualitative factor. As a result, credit ratings do not only reflect objective raw data, but also reflect a more subjective consideration of qualitative components. Credit rating agencies gather their information from publicly available sources, but also receive information from issuers.

---

148 www.standardandpoors.com/en_US/delegate/getPDF?articleId=2148688&type=COMMENTS&subType=REGULATORY, last accessed at 31 August 2019. To my knowledge, fee schedules of Moody's and Fitch were not publicly available.
149 *See* www.standardandpoors.com/en_US/web/guest/article/-/view/sourceId/504352, last accessed at 31 August 2019.
150 Recital 25 CRA I Regulation.
151 Darbellay 2013, p. 34, Garciìa Alcubilla & Ruiz del Pozo 2012, p. 18 and AMF Report 2007, p. 41.
152 *As derived from* AMF Report 2007, p. 41. *Also* Garciìa Alcubilla & Ruiz del Pozo 2012, pp. 19-20.
153 *As derived from* AMF Report 2007, p. 41. *Also* Garciìa Alcubilla & Ruiz del Pozo 2012, p. 20.

Credit ratings can reflect non-public (inside) information provided by the issuer.[154] Credit rating agencies do not (thoroughly) scrutinise whether the information received is accurate.[155] The CRA Regulation, however, does oblige them to take measures to ensure the information used is reliable and of sufficient quality.[156]

Credit rating agencies turn all information gathered into a single symbol at a rating scale. Rating scales differ per credit rating agency and per issuer or financial obligation. For instance, the long-term issue credit rating scale of Standard & Poor's is AAA, AA, A, BBB, BB, B etc., while Moody's uses a different long-term issue credit rating scale of Aaa, Aa, A, Baa, Ba, B etc. The precise meaning of a certain symbol can vary (slightly) per credit rating agency.[157] The highest ratings can indicate that '[t]he obligor's capacity to meet its financial commitment on the obligation is extremely strong' (AAA-rating, as defined by Standard & Poor's)[158] or that the obligation rated is 'judged to be of the highest quality, with minimal risk' (Aaa-rating, as defined by Moody's).[159]

Credit ratings provide information on the relative chance that an issuer will default on its financial obligations in general or will default on a particular fixed income financial instrument.[160] As a credit rating provides information on relative chances of default, a specific credit rating must be valued in light of the meaning of the other symbols at the rating scale.[161] In general, one can say that the worse the credit rating, the less the capacity of the issuer to meet its financial obligations and the higher the credit risk for investors. For instance, an issuer rated AAA is far less likely to default than an issuer rated B, but the precise difference in chance between the credit ratings is not made explicit.[162] An important distinction is made between investment grade ratings and speculative grade (non-investment grade) ratings. An investment grade rating (for instance, BBB or above pursuant to the long-term issue credit rating scale of Standard & Poor's) indicates high or medium credit quality, which means that the credit risk involved is relatively low. Speculative grade ratings (BB-C ratings pursuant to the long-term issue credit rating scale of Standard & Poor's) are attached to obligations with 'significant speculative characteristics'. This means that the quality and protective characteristics of

154 Garciìa Alcubilla & Ruiz del Pozo 2012, p. 19.
155 Garciìa Alcubilla & Ruiz del Pozo 2012, p. 19. *Cf.* Hemraj 2015, p. 29.
156 Art. 8 (2) CRA Regulation and Recital 35 CRA I Regulation.
157 Gaillard 2010, pp. 16-19.
158 *See* www.standardandpoors.com/en_US/web/guest/article/-/view/sourceId/504352, last accessed at 31 August 2019.
159 *See* www.moodys.com/sites/products/ProductAttachments/AP075378_1_1408_KI.pdf, last accessed at 31 August 2019.
160 *E.g.* IOSCO Report 2003, p. 3.
161 *See* AMF Report 2007, p. 20.
162 *See* Langohr & Langohr 2008, p. 44 and *cf.* AMF Report 2007, p. 20.

these obligations might be 'outweighed by large uncertainties or major exposures to adverse conditions'. The lowest ratings (D ratings pursuant to the long-term issue credit rating scale of Standard & Poor's) are attached to obligations already in default.[163]

3.3.2.3 *Structured finance products*

Credit rating agencies have been involved in rating structured finance products since the emergence of structured finance transactions in the 1970s. The assignment of structured finance ratings is considered a difficult exercise due to the (highly) complex structures of structured finance transactions. It was the assignment of inaccurate structured finance ratings and the role of credit rating agencies in structured finance transactions prior to the global financial crisis that caused the public and political indignation that led to the CRA Regulation.[164] The role of credit rating agencies in structured finance can be demonstrated by securitisations, which are a particular type of structured finance transactions.[165]

Securitisation transactions can be instigated by parties that hold large amounts of receivables, such as mortgages, car loans, credit card receivables and other debt obligations. This so-called 'originator' wishes to transfer the risks associated with these receivables and to remove the receivables from its balance sheet, while generating profits from trading these risks in the financial markets.[166] To that end, the originator sells receivables associated with different credit risks to a special purchase vehicle (SPV). The SPV finances this sale by issuing notes – bonds, also called asset-backed securities[167] – to the financial markets. The SPV is entitled to the proceedings of the receivables, and uses these proceedings to pay holders of the notes (investors) a fixed amount and interest.[168] The SPV issues notes with different risk profiles, the

163 *See* www.standardandpoors.com/en_US/web/guest/article/-/view/sourceId/504352, last accessed at 31 August 2019.

164 Section 3.2.4.1.

165 Another example of a typical structured finance transaction is a covered bonds transaction (Haentjens & De Gioia-Carabellese 2015, p. 228). This dissertation provides a brief and simplified explanation of securitisations only. *See in more detail on structured finance transactions* Wood 2008, no. 28-01 ff. and Haentjens & De Gioia-Carabellese 2015, pp. 228 ff. *See in more detail on credit ratings and structured finance e.g.* Simon 2017, pp. 59 ff. and Angelé 2014.

166 *On the objectives of securitisations* Haentjens & De Gioia-Carabellese 2015, p. 232.

167 The notes are referred to as 'asset-backed securities' because they are collateralised/backed by the pool of underlying assets (the collateral). Depending on the type of receivables, there are different types of asset-backed securities such as collateralised loan obligations (CLOs), collateralised debt obligations (CDOs) and commercial or residential mortgage-backed securities (CMBS or RMBS). *See, also for more examples*, Wood 2008, no. 28-06.

168 *Description derived from* Haentjens & De Gioia-Carabellese 2015, p. 228 and Wood 2008, no. 28-01. *Cf. also e.g.* Simon 2017, pp. 57-58 and CGFS Report 2005, p. 4. Banks are the most common example of originators.

so-called tranches (senior, mezzanine and junior tranches).[169] If losses are borne, the proceeds of the receivables are paid to senior note holders first. The junior note holders will be paid only if there are proceeds left. As losses are borne by the junior tranches first, junior notes receive a lower credit rating than senior notes and holders of junior notes receive a higher coupon than the holders of senior notes.

By pooling the receivables and by dividing the notes into different tranches, the originator can transfer the risks of the receivables to the noteholders and can generate profits if the total amount of coupon paid to the noteholders is less than the total amount of coupon the SPV receives from the receivables – as this difference is often returned to the originator because the SPV pays a service fee to the originator.[170] To this end, it must be ensured that less coupon is paid to the senior noteholders than is received from the pool of receivables together. Credit rating agencies are indispensable in securitisation transactions, as this goal can be achieved by ensuring senior notes have a better credit rating than the individual receivables.[171] From the investor side, there also is a demand for structured finance products. Structured finance products allow (institutional) investors to diversify their investment risks, by allowing them to invest their assets in segments that would otherwise not be available to them. Moreover, structured finance products provide a high coupon for relatively safe investments.[172]

As compared to the rating of 'simple' financial instruments and entities, credit rating agencies are often more involved in the structuring of securitisations. The credit rating is not the 'outcome', but the 'target' of the rating process.[173] The focus on receiving the highest possible credit ratings for the tranches influences the relationship between a credit rating agency and an issuer. A credit rating agency and an issuer can have prior contact to maximise the size of a tranche, to minimise the quality of the receivables used or to minimise the amount of credit enhancement.[174] Hence, the size of the tranches and their position in the loss distribution is constructed carefully. Contrary to most rating proceedings, the SPV can be allowed to change the structure of the transaction after the assignment of preliminary credit ratings in order to receive a certain credit rating.[175] As a result, the rating process regarding

169 Haentjens & De Gioia-Carabellese 2015, p. 228 and Wood 2008, no. 28-09.
170 Haentjens & De Gioia-Carabellese 2015, p. 232.
171 CGFS Report 2005, pp. 1 and 17.
172 Haentjens & De Gioia-Carabellese 2015, p. 232.
173 *As written by* Garcìa Alcubilla & Ruiz del Pozo 2012, p. 24. *Cf. also e.g.* IOSCO Report 2008, p. 5, Coffee 2006, pp. 296-297 and CGFS Report 2005, p. 15.
174 *See* Garcìa Alcubilla & Ruiz del Pozo 2012, p. 24. *Cf. Cf.* Simon 2017, pp. 59-61, the Financial Crisis Inquiry Report 2011, p. 150 and IOSCO Report 2008, p. 6.
175 Langohr & Langohr 2008, p. 185. Garcìa Alcubilla & Ruiz del Pozo 2012, p. 24, Gaillard 2010, p. 78 and IOSCO Report 2008, pp. 5-6.

structured finance products can be flexible,[176] but can raise concerns regarding, for example, the existence of conflicts of interests in comparison to the concerns raised regarding the rating process of traditional financial instruments.

3.3.3 Functions

The historical perspective on the credit rating industry and its civil liability revealed the two functions of credit ratings: providing information on creditworthiness to the financial markets and serving as a tool to comply with regulatory requirements.

The first function of credit ratings is to provide information on the creditworthiness of issuers and their financial instruments to the financial markets. This function can be traced back to the founding of the first credit reporting agencies: the need for independent reviews of creditworthiness of American merchants. Up to this day, the financial markets still need 'gatekeepers' or 'information intermediaries' who provide an indication of parties and projects that could be worth investing in, to the benefit of both issuers and investors.[177] Issuers use credit ratings to signal their creditworthiness to the financial markets and to attract funding, while investors can rely on credit ratings to distinguish the issuers and projects that suit their purposes best.[178] The facts that credit rating agencies qualify their credit ratings as 'opinions' only and the fact that credit ratings are not the only form of information intermediation investors can rely on, do not affect this main function of credit ratings in itself.

Overall, credit ratings are meant to reduce information asymmetries and can be said to thereby increase the transparency of the financial markets.[179] In the absence of proper alternatives, this information function causes credit ratings to be indispensable for the functioning of the financial markets. Without credit ratings or proper alternatives, investors must conduct their own creditworthiness assessments. Such internal, individual assessments are expensive and not manageable for smaller or inexperienced investors.[180] As a consequence, the overall funding costs would increase to compensate investors for

176 Garcìa Alcubilla & Ruiz del Pozo 2012, p. 24.

177 *See e.g.* Wimmer 2017, p. 42, Happ 2015, pp. 18-19, Schantz 2015, p. 67, Schroeter 2014, p. 51, Coffee 2013, pp. 84-85, Darbellay 2013, pp. 37-38 and Coffee 2006, p. 283. *Cf. also* Simmon 2017, p. 33.

178 *Cf.* Schroeter 2014, pp. 52-53 and Impact Assessment accompanying the Proposal for a Regulation on Credit Rating Agencies, COM(2008) 704 final, SEC(2008) 2745, p. 2. *Cf. also* IOSCO Report 2003, pp. 6-7.

179 Darbellay 2013, p. 38. *Cf.* Schroeter 2014, p. 51.

180 *Cf.* Darbellay 2013, pp. 38-39.

research costs and uncertainty. In the worst-case scenario, some investors will not invest at all, causing eligible projects and parties not to receive funding.

Furthermore, credit ratings serve as a tool for issuers and other parties to comply with regulatory requirements.[181] This function developed in the US, when the US legislature prohibited banks from investing in bonds lacking an investment grade rating[182] and the SEC introduced the 'NRSRO concept' (the Nationally Recognized Statistical Rating Organization concept).[183] Up to this day, legislation still refers to credit ratings so that the addressees of the legislation can use credit ratings to comply with certain regulatory requirements.[184] The use of credit ratings increased to such an extent that some scholars argued that credit ratings mainly fulfil a regulatory function rather than the function of information intermediaries.[185] In the aftermath of the global financial crisis, efforts have been made to reduce the importance of the regulatory function of credit ratings as the regulatory use was believed to have caused the overreliance on credit ratings and to have affected the quality of credit ratings. The Union legislature introduced rules to eliminate the use of credit ratings in financial regulation over time in the CRA Regulation.[186] However, reports of ESMA in 2014 have shown there are still many references to credit ratings in national and EU legislation[187] so that the regulatory function of credit ratings is still important. Examples of rating-based regulation can for instance still be found in the Basel III framework and in the European CRD IV framework,[188] under which credit ratings can be used to determine capital requirements for banks under the standardised approach (Art. 111 ff. CRR). More specifically, credit ratings can be used to determine the risk weight of an exposure under Article 135 (1) CRR which eventually determines how much capital the bank must hold against the exposure. However, also in respect of determining capital requirements, the European legislature has begun to exercise restraint in the use of credit ratings. For instance, Recital 70 and 71 of CRD IV state that '[o]wn funds requirements for credit risk and market

181 *E.g.* Wimmer 2017, p. 43.
182 Darbellay 2013, p. 20, White 2009, p. 2 and Coffee 2006, p. 289.
183 Darbellay 2013, p. 23.
184 *Cf.* Darbellay 2013, pp. 39-40, *see also* Garciìa Alcubilla & Ruiz del Pozo 2012, pp. 16 ff. and The Joint Forum 2009.
185 *See, on the different perspectives,* Coffee 2013, pp. 85-86 and Coffee 2006, pp. 288-289. *As stated by e.g.* Darbellay 2013, p. 27 and *cf.* Partnoy 2002, pp. 1-2, who stated that credit ratings have great market value but little informational value.
186 Art. 5a, 5b and 5c CRA Regulation.
187 European Securities and Markets Authority, *Technical Advice. On reducing sole and mechanistic reliance on external credit ratings*, 30 September 2015, ESMA/2015/1471, available at www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-1471_technical_advice_on_reducing_sole_and_mechanistic_reliance_on_external_credit_ratings.pdf, last accessed at 31 August 2019, p. 36.
188 CRD IV consists of the Capital Requirements Regulation 575/2013 (CRR) and the Capital Requirements Directive 2013/36 (CRD IV).

risk should be based on external credit ratings only to the extent necessary' because the former EU rules on capital requirements (Directives 2006/48/EC and 2006/49/EC) 'are one of the pillars upon which the overreliance on external credit ratings was built'. Therefore, according to the Union legislature, institutions should be encouraged 'to use internal ratings rather than external credit ratings'.

Finally, although being more a manner in which credit ratings are used rather than a function of credit ratings, parties make use of credit ratings in private law agreements, such as loan documentation.[189] Parties can draft agreements in such a manner that if a credit rating agency downgrades the credit rating of the borrower to a certain level (e.g. under AA), certain contractual terms are triggered. A downgrade can, for example, lead to a lender's right 'to terminate the credit availability, to accelerate credit obligations, or [to] have the borrower post collateral'.[190] Rating triggers aim to protect the lender, but can weaken the position of the borrower. Consider the situation in which the borrower is downgraded due to a liquidity crisis and, as a consequence of a rating trigger, must post more collateral.[191] Another way in which credit ratings are used by investors is in investment mandates. An investment mandate can involve the term that the assets shall not be invested in financial instruments of issuers rated below a certain level.[192]

3.3.4 Effects

3.3.4.1 Credit ratings, credit risk and investor compensation

Credit rating agencies are regarded as powerful players in the financial markets. Downgrades, and even warnings of potential future downgrades, of states and companies make the news on a regular basis.[193] This media attention stems from the potential consequences of downgrades. A downgrade suggests a decreased creditworthiness of the issuer. Investors can respond to a downgrade by demanding additional compensation for the increased risk affiliated with their investments, causing an issuer's funding costs to increase.

189 *E.g.* Schantz 2015, pp. 92 ff., Darbellay 2013, pp. 40-41 and Garciìa Alcubilla & Ruiz del Pozo 2012, p. 13.
190 Garciìa Alcubilla & Ruiz del Pozo 2012, p. 13.
191 Garciìa Alcubilla & Ruiz del Pozo 2012, p. 13. *Also* Schantz 2015, p. 93.
192 Schantz 2015, pp. 93-94.
193 *See e.g. in relation to Brexit,* The Guardian 'Moody's warns Brexit would risk UK's credit rating', 22 February 2016, available at www.theguardian.com/business/2016/feb/22/moodys-warns-on-brexit-risk-to-uk-credit-rating-eu-referendum, last accessed at 31 August 2019 and 'Brexit vote would affect UK's top credit score, says Standard & Poor's', 25 February 2016, available at www.theguardian.com/business/2016/feb/25/brexit-vote-would-affect-uks-top-credit-score-says-standard-and-poor, last accessed at 31 August 2019.

How can one explain the link between credit ratings and issuers' funding costs?[194] Credit rating agencies assess 'credit risk', i.e. the risk that the issuer will not fulfil its financial obligations in general or its financial obligations in respect of a particular fixed income financial instrument.[195] The underlying economic assumption is that the amount of credit risk determines the height of the compensation demanded by investors for the risks affiliated with their investments. The lower the credit rating, the higher the relative credit risk, and the more compensation investors demand for their investments in the form of higher coupon rates or higher yield.[196]

Credit ratings, rating changes and rating outlooks can influence amongst others coupon rates, current yield, credit spreads,[197] and prices of financial instruments. Empirical studies tend to measure such influence by analysing credit spreads and prices of financial instruments (mostly corporate, sovereign bonds and structured finance products). A multitude of empirical studies found evidence of some sort of influence of credit ratings on bond prices.[198] However, not all empirical studies point in the same direction and a few empirical studies have not found evidence of influence at all.[199] Furthermore, one must

194 This section only explains the link between credit ratings and issuer's funding costs in brief outline and from a factual perspective. A more detailed analysis of the empirical effects of credit ratings as well as of the economic reasons why credit rating agencies constitute these effects in light of the efficient market hypothesis falls outside the scope of this research.

195 IOSCO Report 2003, p. 3.

196 *Cf.* IOSCO Report 2003, p. 3. *Cf. also* Heiser 2019, p. 61, Gass 2014, p. 117, Nye 2014, p. 7 and Dalton 2008, p. 354. The 'coupon rate' is the fixed interest rate an issuer pays on a bond – in other words: 'the amount the bond pays out annually expressed as a percentage of the face value of the bond' (Dalton 2008, p. 152). For the sake of convenience, this dissertation refers to the term 'yield' only. However, one must realise that yield (or income) can be calculated in different manners. For instance, the 'current yield' is the expected average rate of return on a bond (or 'the total annual coupon income expressed as a percentage of the face value of the bond') and the 'yield to maturity' is the expected average rate of return for the duration of the bond (Dalton 2008, pp. 152-153).

197 The 'credit spread' is the difference between the yield of a specific bond and the yield of a benchmark risk-free bond, expressed in basis points. Dalton 2008, p. 351.

198 *See hereafter* section 3.3.4.2 for references to empirical studies.

199 This dissertation generally describes the main conclusions that can be drawn from these empirical studies. The exact (value of the) findings depends on the research method adopted, i.e. on the size and composition of the sample of newly issued credit ratings, credit rating changes or credit rating outlooks, the type of credit rating (attached to e.g. corporate bonds, structured finance products or states), the type of financial market (for e.g. corporate bonds, collateralised debt obligations or shares) and the geographical market (e.g. to the EU as a whole or to specific countries) to which the empirical study relates. Moreover, this section only reflects a small part of the empirical studies available in this field. For a more detailed analysis, reference is made to *e.g.* Schroeter 2014, pp. 60-71, Matthies 2013, pp. 6 ff. and Gaillard 2010, pp. 108 ff. *For another overview see also* Gass 2014, pp. 116 ff.

keep in mind that credit ratings and credit risk do not exclusively determine coupon rates, yield and prices of financial instruments.[200]

3.3.4.2 *Empirical evidence bond and structured finance markets*

(a) Primary markets

If an issuer issues bonds or structured finance products on the primary markets, the height of the credit rating determines the height of the coupon rate and yield.

Especially in structured finance markets, the height of the credit rating attached to the tranches is of crucial importance (see also section 3.3.2.3). The originator bundles the receivables in the SPV in order to ensure that the senior tranches receive a higher credit rating than the credit ratings of the separate receivables. This difference in the credit rating and corresponding coupon rate and yield make securitisation profitable for the originator: the coupon paid to the holders of the structured finance products is lower than the coupon received over the separate receivables.[201]

Compared to the influence of credit ratings on the secondary markets, there is less empirical evidence available on the influence of credit ratings on the primary bond markets.[202] Empirical research by Gabbi & Sironi in the field of Eurobond issues showed that 'the ratings of corporate bonds whether provided by Moodys' or Standard & Poors' are the most important factor determining the spreads between the yield to maturity of corporate bonds and that of equivalent Treasury securities'.[203] Hence, the height of the credit rating explained the difference (spread) in the return (yield) demanded by investors between the specific bonds measured and its benchmark bond. The height of the credit rating hence influenced the height of the issuer's funding costs.[204]

(b) Secondary markets

If a bond or a structured finance product is subsequently traded on the secondary market, a newly issued credit rating or a rating outlook or change can influence the price of the financial instrument. As empirical evidence discussed below showed, downgrades can cause the prices of financial instruments to move. The theoretical background of this causal relationship lies in the system of bond pricing. The financial markets determine the price or value of a bond

200 In pricing financial instruments, the financial markets do not only consider credit risk, but also e.g. supply and demand, maturity and interest rate risk. Nye 2014, p. 22. *See also* Dalton 2008, pp. 146-148, describing the influence of interest rates, creditworthiness and maturity.
201 *Cf.* Wood 2008, no. 28-14.
202 *See* Schroeter 2014, p. 60.
203 Gabbi & Sironi 2005, p. 72.
204 *Cf. also* Dalton 2008, p. 354.

by analysing 'the present value of all future cash payments made by the bond.'[205] If the financial markets conceive a downgrade to signal increased credit risk, investors wish additional compensation for the increased credit risk. To achieve increased compensation, the price of the bond decreases so that the yield increases and investors receive additional compensation. Hence, as rating downgrades suggest a relative deterioration of creditworthiness, the financial markets responded by requiring increased returns on downgraded bonds (so that bond prices decrease and yields and yield spreads increase).

The majority of the empirical studies on credit ratings concentrated on the influence of newly issued credit ratings and rating changes in the secondary bond markets.[206] Numerous empirical studies found evidence of the influence on bond prices and yields.[207] In a 2013 ECB Working Paper, for instance, Grothe found a significant reaction of the financial markets to downgrades: '[t]he specification differentiating between the direction of rating changes shows that the systematic and statistically reaction of spreads to rating changes is driven by downgrades.'[208] Grothe did not find a significant reaction to upgrades. Her empirical research also demonstrated that the magnitude of the reaction also depended on the economic state of the market.[209] As another example, in a 2011 ECB Working Paper, Afonso, Furceri & Gomes also found significant market responses of 'government rating yield bond spreads' and CDS spreads, especially in relation to negative announcements (downgrades or negative outlooks).[210] In contrast, some other empirical studies, mainly

205 Dalton 2008, p. 143. *Also* Heuser 2019, p. 61.
206 Schroeter 2014, p. 60.
207 *Cf. e.g.* Grothe 2013, pp. 14 and 17.
208 Grothe 2013, p. 14.
209 Grothe 2013, pp. 14-15 and 17.
210 Afonso, Furceri & Gomes 2011, pp. 20-21. *Cf. also in relation to the bond markets e.g.* May 2010, p. 2835: May found 'statistically significant abnormal bond returns' for both upgrades and downgrades in the two-day and the monthly bond returns; Kisgen & Strahan 2009, p. 24: Kisgen & Strahan investigated the influence of the NRSRO status of credit rating agency DBRS and found the bond yields decreased of entities to which DBRS had assigned a better credit rating than other credit rating agencies; Kliger & Sarig 2000, pp. 2881-2880: Kliger & Sarig found bond prices responded to amended credit ratings by Moody's in 1982 upon a refinement of their rating methods, while the issuers' risks had not changed substantially; Hand, Holthausen & Leftwich 1992, p. 734: Hand, Holthausen & Leftwich found significant responses to unexpected additions to Credit Watch Lists and significant responses to actual rating changes on both the bond and the equity markets. Furthermore, empirical studies were conducted as regards the influence of credit ratings on competitors, *e.g.* Caton & Goh 2003 (who only found significant results in relation to non-investment grade debt). *Cf. also in relation to the structured finance markets, e.g.* Micu, Remolona & Wooldridge 2004, p. 61: Micu, Remolona & Wooldridge demonstrated the influence of downgrades on credit default swap spreads, Hull, Predescu & White 2004, p. 2809 and Bedendo, Cathcart, El-Jahel & Evans 2013, p. 4. *See also* Schroeter 2014, p. 63. *See also* Micu, Remolona & Wooldridge 2006 on the influence of rating announcement on credit default swap spreads.

dating from the 1970s, did not find evidence of such reactions.[211]

As observed by Schroeter, one can draw some general conclusions from the empirical research, such as that downgrades cause stronger market reactions than upgrades[212] and that market reactions are the heaviest in relation to financial instruments and issuers rated on the border of investment/non-investment grade.[213] Furthermore, empirical studies showed that the more leveraged the rated entity is, the stronger the financial markets react to rating changes[214] and that the response of the financial markets is stronger in times of economic downturns.[215] Additionally, the empirical studies suggest that rating events preceding a downgrade[216] mitigate, but do not single out, the effects of downgrade on the financial markets.[217]

3.3.4.3 Empirical evidence from equity markets

The response to credit ratings is not limited to the bond and structured finance markets. Although credit rating agencies only rate issuers and financial instruments with a fixed income or debt obligatory nature, multiple empirical studies also found a relationship between rating changes and prices on the equity markets. Some studies concluded downgrades cause negative price reactions on the equity markets.[218] Yet, as pointed out by Goh & Ederington, the reason

211 *E.g.* Weinstein 1977, p. 345. *Cf. also* Gropp & Richards 2001, p. 5: Gropp & Richards did not find significant results, but they warn 'against concluding that ratings have little or no impact on bond prices and therefore, ratings may contain little or no informational value.'

212 Schroeter 2014, pp. 68-69. *Cf. e.g.* Grothe 2013, p. 17, Afonso, Furceri & Gomes 2011, pp. 20-21, May 2010, p. 2835 and Hand, Holthausen & Leftwich 1992, p. 744. *Cf. in relation to the structured finance markets* Micu, Remolona & Wooldridge 2004, p. 61.

213 Schroeter 2014, pp. 70-71 ff.

214 Kliger & Sarig 2000, p. 2881.

215 Grothe 2013, p. 17.

216 Such as credit rating outlooks and downgrades of credit ratings issued by other credit rating agencies.

217 *Cf. in relation to the structured finance markets* Micu, Remolona & Wooldridge 2004, pp. 61-62. *Furthermore, in relation to the influence of split-rated bonds* Cantor, Packer & Cole 1997, p. 15: Cantor, Packer & Cole found that, in case of 'split-rated' bonds by Moody's and Standard & Poor's, 'both ratings affect their yield'.

218 *E.g.* Labão, Pacheco & Campos 2018, p. 17, Abad-Romero & Robles-Fernández 2007, p. 102, Dichev & Piotroski 2001, p. 202, Barron, Clare & Thomas 1997, p. 508 and Hand, Holthausen & Leftwich 1992, p. 744. Some studies generally reported far less or no significant reactions to upgrades of credit ratings, other studies did suggest reactions to upgrades as well (Abad-Romero & Robles-Fernández 2007, p. 102 in relation to the Spanish equity market and Barron, Clare & Thomas 1997, p. 508 in relation to positive Credit Watch announcements on the UK equity market and Labão, Pacheco & Campos 2018, p. 17 in relation to credit ratings attached to European banks). *For a broad overview of the empirical findings,* Schroeter 2014, pp. 64-66. However, Kliger & Sarig 2000, p. 2881 found a positive price reaction of the equity markets on downgrades, which they explain by the 'asset-substitution theory'. According to Schroeter 2014, p. 64, fn. 46, these research outcomes however do not occur often. Furthermore, research of *e.g.* Bissoondoyal-Bheenick & Brooks 2015, p. 22, suggested changes of sovereign credit ratings influence equity markets as well.

why a credit rating agency decided to downgrade a credit rating determines the type of reaction of the equity markets. Goh & Ederington found evidence of the claim that equity markets respond negatively to downgrades 'due to a deterioration in the firm's financial prospects'.[219] But, whereas they expected bond prices to fall and equity prices to rise if 'the bonds are downgraded because the rating agencies foresee an increase in leverage that will transfer wealth from bondholders to stockholders', they did not find empirical evidence to support this expectation. Instead, they did not discover a reaction of the equity markets to such downgrades at all.[220] Overall, this research shows that care is needed when deriving general conclusions from rating changes, and the background of the change must be taken into consideration to determine the effects on the equity markets.[221]

3.4 EU REGULATORY FRAMEWORK

3.4.1 Objectives

In the aftermath of the global financial crisis, the Union legislature created a regulatory framework for credit rating agencies at the EU level.[222] This framework has a broad range of objectives. The first version of the CRA Regulation targeted the integrity, transparency, responsibility, governance and independence of the credit rating industry, so that the quality of credit ratings, the functioning of the internal market and the protection of consumers and investors is ensured.[223] The second and third versions broadened these objects, so as to promote credit rating agencies' independence, to increase the competition between credit rating agencies, to reduce the overreliance on credit ratings and to reduce (and eventually eliminate) the use of credit ratings for regulatory purposes.[224] The CRA Regulation consists of five titles which establish: rules on the subject matter, scope and definitions of the CRA Regulation (Title I); substantive rules on the issuing of credit ratings (Title II); rules on the supervision of credit rating agencies by ESMA (Title III); rules regarding the civil liability of credit rating agencies (Title IIIA); and, rules on the competences of ESMA with regard to the enforcement of the CRA Regulation (Title IV). Under Article 38a CRA Regulation, the European Commission can adopt delegated acts in relation to several elements of the CRA Regulation. In this

219 Goh & Ederington 1993, p. 2007. *See also for a description of these research outcomes* Schroeter 2014, p. 65.
220 Goh & Ederington 1993, pp. 2001 and 2007.
221 *Cf.* Goh & Ederington 1993, p. 2007. *See also* Gropp & Richards 2001, pp. 23-24, who explicitly confirmed the findings of Goh & Ederington.
222 *For detailed analyses of the European regulatory framework e.g.* Deipenbrock 2014.
223 Art. 1 CRA Regulation.
224 Recital 11, 9 and 8 CRA III Regulation, respectively.

section, a description will be provided of the most relevant aspects of the CRA Regulation for the purpose of this dissertation. The right to damages under Article 35a CRA Regulation is discussed separately in section 3.5.

3.4.2 Preliminary provisions

3.4.2.1 Scope of application

(a) Credit rating agencies registered in the EU

Pursuant to Article 2 (1) CRA Regulation, the CRA Regulation applies to credit ratings issued by credit rating agencies registered in the EU that are disclosed publicly or distributed by subscription.[225] The territorial scope of the CRA Regulation is hence limited, and the regulatory framework does not apply to credit ratings issued by the headquarters of Standard & Poor's and Moody's (established in the US).[226] The limited scope of the CRA Regulation is somewhat mitigated by the fact that the CRA Regulation encourages credit rating agencies to be established and registered in the EU.[227] Indeed, credit rating agencies should be established and registered in a Member State in order for their credit ratings to be allowed to be used for regulatory purposes by certain issuers (amongst others, credit institutions, investment firms and insurance undertakings).[228] As credit ratings are still used for regulatory purposes,[229] credit ratings of unregistered credit ratings agencies are rather useless to issuers so that issuers will not be prepared to pay for those credit ratings. In this way, the rules on registration encourage credit rating agencies to register themselves in the European Union and to become subject to the regulatory regime of the CRA Regulation.

In order to apply for registration under Article 14 (1) CRA Regulation, a credit rating agency must be 'a legal person established in the Community'. As explicitly stated by Recital 55 CRA I Regulation, credit rating agencies headquartered outside the EU must establish subsidiaries in the EU to be able

225 ESMA publishes a list of registered and certified rating agencies (available at www.esma.europa.eu/page/List-registered-and-certified-CRAs, last accessed at 31 August 2019).

226 *Cf. in respect of the civil liability regime under Art. 35a CRA Regulation* Steinrötter 2015, p. 111, Dutta 2014, pp. 34 and 40, Dutta 2013, pp. 1731-1732 and Gietzelt & Ungerer 2013, p. 339. *Contra* Lehmann 2016a, pp. 81-82, who argued the scope of the liability regime is unclear. *Cf. on the application of the CRA Regulation in general* Happ 2015, pp. 63-68 and Gass 2014, pp. 24-25.

227 *See* Dutta 2014, p. 34 and Dutta 2013, p. 1732.

228 Art. 4 (1) CRA Regulation. Pursuant to Art. 3 (1) (g) CRA Regulation, the term 'regulatory purposes' means 'the use of credit ratings for the specific purpose of complying with Union law, or with Union law as implemented by the national legislation of the Member States'. *See also* Moloney 2014, pp. 655-656.

229 On the regulatory function of credit ratings, section 3.3.3.

to apply for registration.[230] The subsidiaries can issue their own credit ratings or can endorse credit ratings of their parent companies.[231] As subsidiaries are fully responsible for both types of credit ratings,[232] the credit ratings of parent companies established in third countries are indirectly brought under the scope of the CRA Regulation.

(b) Credit rating agencies certified in the EU

As an alternative to registration, the CRA Regulation provides a credit rating agency established, registered and supervised in a third country the opportunity to apply for certification with ESMA.[233] Certified credit rating agencies can issue credit ratings that can be used for regulatory purposes in the EU without these credit rating agencies being physically present in the EU.[234] Certification is intended to be an exception for small credit rating agencies that are 'not systemically important for the financial stability or integrity of the financial markets of one or more Member States'.[235]

The question can be raised whether the liability regime under Article 35a CRA Regulation applies to certified credit rating agencies. Lehmann argues that '[i]t would make no sense to consider ratings that emanate from agencies in third countries as 'equivalent' to European ratings under Article 5 CRA Regulations, and then not subject them to civil liability under the same act.'[236] However, if one accepts that certification is based on equivalence, it is not that evident that the regime of Article 35a CRA Regulation should apply to certified credit rating agencies.[237] The idea behind certification is that physical presence (and registration) is not required because the legal and supervisory system of the third country can be considered equivalent to the CRA Regulation already, so that some sort of equivalent of Article 35a CRA Regulation could be assumed to exist.

---

230 *See* Recital 55 CRA I Regulation. *See also* Dutta 2014, p. 34 and Dutta 2013, p. 1732. *Cf.* Gietzelt & Ungerer 2013, p. 339.

231 *Cf.* Art. 4 (3) CRA Regulation and *cf.* Lehmann 2015b, no. 444.

232 Under Art. 4 (4) CRA Regulation, an endorsed credit rating is considered to have been issued by the registered credit rating agency. Under Art. 4 (5) CRA Regulation, a registered credit rating agency will be fully and unconditionally responsible for an endorsed credit rating (*see also* Recital 18 CRA I Regulation). *See also* Gietzelt & Ungerer 2013, p. 339.

233 *See* Art. 5 (2) in conjunction with Art. 5 (1) CRA Regulation.

234 *Cf.* Recital 15 CRA I Regulation.

235 Recital 14 CRA I Regulation. At present, ESMA certified four credit ratings agencies, namely Japan Credit Rating Agency Ltd (Japan), Kroll Bond Rating Agency (US), HR Ratings de México, S.A. de C.V. (HR Ratings) (Mexico) and Egan-Jones Ratings Co. (EJR) (US), www.esma.europa.eu/page/List-registered-and-certified-CRAs/, last accessed at 31 August 2019.

236 Lehmann 2016a, p. 82.

237 *See* Dutta 2013, p. 1732. *Cf. also* Happ 2015, p. 67.

3.4.2.2 Reducing overreliance

An important objective of the third version of the CRA Regulation was to reduce the excessive reliance on credit ratings by financial markets and legislatures. To reduce the overreliance of market participants, Article 5a CRA Regulation prohibits so-called professional market participants, such as banks and insurers,[238] from solely or mechanistically relying on external credit ratings. Instead, they must carry out their own risk assessment, so that external credit ratings serve a complementary role. As will be discussed, this measure to reduce overreliance conflicts with Article 35a CRA Regulation, because Article 35a explicitly requires investors to provide evidence of their reasonable reliance on a particular credit rating.[239]

The Union legislature also tried to reduce the reliance on credit ratings by avoiding their regulatory use as much as possible. Under Article 5b, the European Supervisory Authorities (EBA, EIOPA and ESMA) shall not refer to or shall remove references to credit ratings in guidelines, recommendations and draft technical standards 'where such references have the potential to trigger sole or mechanistic reliance on credit ratings'. Sole and mechanistic reliance occurs 'when an action or omission is the consequence of any type of rule based on credit ratings (or credit rating outlooks) without any discretion', according to the European Supervisory Authorities.[240] It is, however, easier said than done to reduce the overreliance on credit ratings, especially because there are not always clear alternatives to using credit ratings.[241] In 2015, ESMA concluded: '[t]he process to reduce reliance on ratings in a European context can […] be said to be at an early stage'.[242]

---

238 Under Art. 5a (1) in conjunction with Art. 4 (1) CRA Regulation, such entities are credit institutions, investment firms, insurance undertakings, reinsurance undertakings, institutions for occupational retirement provision, management companies, investment companies, alternative investment fund managers and central counterparties.

239 Section 5.3.1.3 (c) (iii).

240 EBA, EIOPA & ESMA, *Final Report on Mechanistic references to credit ratings in the ESAs' guidelines and recommendations*, JC 2014 004, 6 February 2014, available at www.eba.europa.eu/documents/10180/534414/JC+2014+004+%28Final+Report+Mechanistic+References+to+Credit+Ratings%29.pdf/0262d0a1-dd1a-42af-ab4b-14cea710e876, p. 8, last accessed at 31 August 2019. The CRA Regulation does not involve a definition of 'sole and mechanistic reliance'.

241 *Cf.* Veil 2017, p. 567.

242 European Securities and Markets Authority, *Technical Advice. On reducing sole and mechanistic reliance on external credit ratings*, 30 September 2015, ESMA/2015/1471, available at www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-1471_technical_advice_on_reducing_sole_and_mechanistic_reliance_on_external_credit_ratings.pdf, last accessed at 31 August 2019, p. 36.

3.4.3 Substantive rules

Title II 'Issuing of credit ratings' established substantive rules on the issuing of credit ratings for credit rating agencies and for issuers, originators and sponsors[243] of structured finance instruments. The infringements listed in Annex III CRA Regulation are based on these substantive rules.

The CRA Regulation established stringent rules to guarantee the independence of credit rating agencies and their employees and to avoid conflicts of interests from arising under Articles 6-6b. It requires credit rating agencies to ensure 'effective internal control structure[s]' are in place to guarantee the independence of credit ratings, rating analysts and rating teams.[244] In addition, a party that holds 5% of the capital or voting rights of a credit rating agency is restricted in its involvement in other credit rating agencies.[245] Furthermore, Article 6b CRA Regulation addresses the independence in the relationships between credit rating agencies and structured finance issuers by introducing a mandatory rotation system. This mandatory rotation of credit rating agencies entails that '[w]here a credit rating agency enters into a contract for the issuing of credit ratings on re-securitisations, it shall not issue credit ratings on new re-securitisations with underlying assets from the same originator for a period exceeding four years'.[246]

Furthermore, the CRA Regulation created other rules to avoid conflicts of interest and to guarantee the quality of credit ratings. For instance, Article 7 CRA Regulation places credit rating agencies under the general obligation to ensure that 'rating analysts, its employees and any other natural person whose services are placed at its disposal or under its control and who are directly involved in credit rating activities have appropriate knowledge and experience for the duties assigned'. Also, rating analysts shall not be involved in negotiating a credit rating agency's fee and the compensation of a rating analyst shall not depend on the revenue that the credit rating agencies earns from rated entities.[247] In order to reduce chances of conflicts of interests and inflated credit ratings even further, Article 7 (4) requires credit rating agencies to introduce mandatory rotation systems for rating analysts.

---

243 Under Art. 3 (1) (v) CRA Regulation, a 'sponsor' means a sponsor as defined under Art. 4 (42) of Directive 2006/48/EC, i.e. a 'credit institution other than an originator credit institution that establishes and manages an asset backed commercial paper programme or other securitization scheme that purchases exposures from third party entities.' This definition can currently be found in Art. 4 (1) (14) CRR (Regulation (EU) No 575/2013).

244 Art. 6 (4) CRA Regulation.

245 Art. 6a CRA Regulation.

246 Under Art. 6b (5) CRA Regulation, the obligation of a mandatory rotation system does not apply to 'small' credit rating agencies that have fewer than 50 employees at group level involved in the provision of credit rating activities, or that have an annual turnover generated from credit rating activities of less than EUR 10 million at group level.

247 Art. 7 (2) and (5) CRA Regulation.

In addition, the CRA Regulation involves rules on credit rating methodologies and their disclosure under Article 8-8a. Credit rating agencies are for instance required to disclose their methodologies, models and key rating assumptions[248] to the public.[249] Also, rating analysts must assign credit ratings in accordance with these methodologies and, if they wish to deviate from the model, explain why they intend to do so.[250] Furthermore, credit rating agencies are under the obligation to properly monitor issued credit ratings.[251]

Finally, the CRA Regulation introduced specific requirements on the disclosure and presentation of credit ratings under Article 10-12. Specific presentation requirements apply, for instance, to the issue of structured finance ratings and sovereign ratings. The CRA Regulation requires credit rating agencies to state clearly that the credit rating is attached to a structured finance product or that the rated entity did not participate in the rating process by means of different colour codes for the rating category or by means of additional symbols.[252] As another obligation, if a credit rating agency decides to discontinue a certain credit rating, it has to disclose the reason for that decision.[253] Furthermore, credit rating agencies are subject to disclosure requirements on a general and periodic basis,[254] must submit information on their credit ratings and rating outlooks to ESMA for the purpose of the European Rating Platform (ERP)[255] and must publish transparency reports annually.[256]

3.4.4 Public enforcement by ESMA

The enforcement of the obligations created by the CRA Regulation is achieved through public enforcement by ESMA and through private enforcement by issuers and investors. The supervision of credit rating agencies was transferred from the national supervisors to ESMA in 2011 by the amendments of the second

248 Examples of key assumptions are mathematical, or correlation assumptions used.
249 Art. 8 (1) CRA Regulation.
250 Art. 8 (2a) and (4) CRA Regulation.
251 Art. 8 (5) CRA Regulation.
252 Art. 10 (3) and (5) CRA Regulation, respectively.
253 Art. 10 (1) CRA Regulation.
254 Art. 11 and Part I of Section E of Annex I CRA Regulation.
255 The ERP has been introduced by the third version of the CRA Regulation. The ERP is a central website on which ESMA gathers all credit ratings of an issuer or a financial instrument (under Recital 31 CRA III Regulation) that allows investors to easily compare those credit ratings. For additional requirements, see the Commission Delegated Regulation (EU) 2015/2 of 30 September 2014 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards for the presentation of the information that credit rating agencies make available to the European Securities and Markets Authority.
256 Art. 12 CRA Regulation.

version of the CRA Regulation. ESMA governs the registration procedure as established under Article 14-20 and has several supervisory powers under Article 21-35 to ensure credit rating agencies comply with the regulatory framework.[257] More specifically, ESMA's supervisory measures are linked to the infringements of Annex III. If ESMA concludes that one or more of the infringements listed in Annex III have been committed, the ESMA Board of Supervisors[258] can impose a fine under Article 23e (5) or, under Article 24 (1), can (1) withdraw the registration of the credit rating agency; (2) temporarily prohibit the credit rating agency from issuing credit ratings that have effect within the European Union; (3) suspend the use of credit ratings of the credit rating agency for regulatory purposes; (4) require the credit rating to bring the infringement to an end; or (5) issue a public notice. Credit rating agencies can appeal against these supervisory measures to the Board of Appeal[259] and, subsequently, can bring proceedings before the CJEU to contest the decision of the Board of Appeal.[260]

The powers of ESMA to impose fines and periodic penalty payments on credit rating agencies are worked out in detail under Title IV 'Penalties, fines, periodic penalty payments, committee procedure, delegated powers and reporting'.[261] Article 36a forms the 'public equivalent' of Article 35a. Under Article 36a, ESMA can impose fines for infringements of Annex III that have been committed intentionally or negligently[262] (in accordance with Art. 23e).[263] Under Article 36a (1), an infringement has been committed 'intentionally' when ESMA finds objective factors which demonstrate that the credit rating agency or *its senior management* acted deliberately. Under Article 36a (2), the height of the fine depends on the type of infringement that has been committed, on the annual turnover of the credit rating agency (also, the fine shall not exceed 20% of the annual turnover concerned in the preceding business year and, where the credit rating agency has directly or indirectly benefitted financially from the infringement, the fine shall be at least equal to that fi-

257 *See, more extensively,* Flinterman & Santella 2013, pp. 263 ff.

258 The voting members of the ESMA Board of Supervisors are the heads of the national competent authorities with regard to credit rating agencies (Art. 40 (1) (b) Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC) (hereafter: ESMA Regulation).

259 Art. 60 (1) ESMA Regulation.

260 Art. 61 (1) ESMA Regulation.

261 *Also* Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit rating agencies by the European Securities and Markets Authority, including rules on the right of defence and temporal provisions.

262 The requirement of intention or negligence forms a lower threshold than required by Art. 35a CRA Regulation.

263 ESMA has imposed fines on e.g. Standard & Poor's (ESMA/2014/596) and DBRS Rating Ltd. (ESMA 2015/1050) both for internal control failings.

nancial benefit under Article 36a (4)) and on aggravating/mitigating factors listed in Annex IV. In addition, under Article 36b, ESMA can impose periodic penalty payments to compel the supervisory measures that ESMA can impose under Article 24 (1). Under Article 36d (1), both imposed fines and periodic penalty payments will be disclosed to the public unless such a disclosure would disproportionately damage the financial markets or parties involved. Article 36e explicitly stipulates that the CJEU has 'unlimited jurisdiction to review decisions whereby ESMA has imposed a fine or a periodic penalty payment'.

3.5 Private enforcement of Article 35a

3.5.1 Legislative history

3.5.1.1 Situation prior to Article 35a

Upon the introduction of the third version of the CRA Regulation, private enforcement began to complement the public enforcement of the CRA Regulation by ESMA. The civil liability of credit rating agencies, however, was already addressed in the first version of the CRA Regulation. Under Recital 69 CRA I Regulation, 'any claim against credit rating agencies in relation to any infringement of the provisions of this Regulation should be made in accordance with the applicable national law on civil liability'. Hence, EU law already prescribed the possibility of a right of redress for private parties in 2009. The French legislature acted upon this Recital by introducing special rules on the civil liability of credit rating agencies under Article L. 544-5 and L. 544-6 Code monétaire et financier.[264]

3.5.1.2 Public Consultation on Article 35a

The Public Consultation issued prior to the proposal for the third version of the CRA Regulation explicitly addressed the civil liability of credit rating agencies.[265] The respondents were divided on the desirability of introducing rules on civil liability at the EU level and the potential effects of such rules

264 *See* section 5.5.2.1 (a).

265 European Commission, Public Consultation on Credit Rating Agencies, 5 November 2011, pp. 24-25, available at http://ec.europa.eu/finance/consultations/2010/cra/docs/cpaper_en.pdf, last accessed at 31 August 2019. The Public Consultation closed at 7 January 2011, http://ec.europa.eu/finance/consultations/2010/cra/index_en.htm, last accessed at 31 August 2019.

on credit rating activities.[266] Moody's, Standard & Poor's, DBRS Ratings, the United Kingdom authorities (the FSA, HM Treasury and the Bank of England) and the Swedish Ministry of Finance, for instance, objected strongly to the idea of civil liability. Most importantly, it was argued that EU rules on civil liability (1) could lead to increased fees and could negatively affect the availability and quality of public ratings which could hamper market efficiency;[267] (2) could increase overreliance or could be contrary to the attempts to reduce overreliance on credit ratings;[268] (3) could weaken competition;[269] (4) would face many implementing issues;[270] (5) would not be as effective as financial sanctions;[271] and (6) would be unnecessary or undesirable as credit rating agencies were already subject to national general civil liability regimes.[272] Furthermore, it was emphasised that credit ratings are opinions about risks instead of guarantees of outcomes for which a credit rating agency should not be liable.[273] In contrast, other respondents did reply positively to the idea of civil liability in principle, although some respondents warned about the danger of negative consequences of civil liability as well.[274]

The different responses demonstrate the dilemma of introducing civil liability for credit rating agencies in general. On the one hand, one may wish to compensate issuers and investors who suffered loss as a consequence of misconduct committed by a credit rating agency. Such a wish can be rooted

266 The responses are no longer available at the website of the European Commission. Therefore, reference is made only to the respondent and, if possible, the date of the response. This section does not reflect all responses to the Public Consultation.

267 *Cf. e.g.* Response Standard & Poor's, 12 January 2011, p. 13, Response Moody's, 7 January 2011, para 4.11, Response Swedish Ministry of Finance, 7 January 2011, p. 8, Response Association of British Insurers, January 2011, p. 3, Response BlackRock, 7 January 2011, p. 8, Response DBRS Ratings, 7 January 2011, pp. 7-8, Response European Association of Credit Rating Agencies, 7 January 2011, p. 5, Response German Insurance Association, 7 January 2011, p. 25 and Response Association Française des Trésoriers d'Entreprise, 7 January 2011, p. 6.

268 *Cf. e.g.* Response Standard & Poor's, 12 January 2011, p. 12, Response Swedish Ministry of Finance, 7 January 2011, p. 8 and Response BlackRock, 7 January 2011, p. 8.

269 *Cf. e.g.* Response Standard & Poor's, 12 January 2011, p. 14, Response Open Source Investor Service, p. 4 and Response BlackRock, 7 January 2011, p. 8.

270 *Cf. e.g.* Response United Kingdom authorities, p. 19, Response Swedish Ministry of Finance, 7 January 2011, p. 8, Response Wirtschaftskammer Österreich, 7 January 2011, p. 2.

271 *Cf. e.g.* Response Swedish Ministry of Finance, 7 January 2011, p. 8 and Response German Insurance Association, 7 January 2011, p. 2 and pp. 24-25.

272 *Cf. e.g.* Response German Insurance Association, 7 January 2011, p. 2 and pp. 24-25, Response European Association of Public Banks, 7 January 2011, p. 7 and Response Fitch Ratings, 6 January 2011, p. 4. Although, as Chapter 5 will show, this point of view does not apply to each Member State.

273 *Cf. e.g.* Response Fitch Ratings, 6 January 2011, p. 4.

274 *Cf. e.g.* Response AFG, 7 January 2011, p. 3, Response Association Française des Investisseurs Institutionnels, p. 9, Response Association of German Banks, p. 14, Response BDI, 7 January 2011, pp. 4-5, Response CFA Institute, 7 January 2011, p. 11, Response European Banking Federation, 7 January 2011, p. 13, Response EuroRating Services, 6 January 2011, p. 8 and Response RBS, 4 January 2011, p. 14.

in the possible preventive effects of civil liability threats or in motives of corrective justice. On the other hand, arranging for the civil liability of credit rating agencies involves serious challenges. Too far-reaching arrangements for civil liability may have negative effects on credit rating agencies and the financial markets as a whole. However, it is difficult to quantify the extent to which these potential negative effects could occur. It was hence up to the Union legislature to find a delicate balance between the interests of issuers, investors *and* credit rating agencies.

3.5.1.3 Impact Assessment

The Impact Assessment of the European Commission tipped the balance in favour of the introduction of stronger rules on the civil liability of credit rating agencies in 2011. The European Commission concluded that investors did not have a sufficient right of redress under the laws of the Member States. It stated that whether and, if so, under what conditions, investors could claim compensation varied 'largely' amongst the Member States. In Member States such as Sweden and Poland, civil liability claims based on infringements of the CRA Regulation were not even possible at all. Furthermore, national laws generally posed strict conditions to civil liability in the absence of a contractual relationship. These conditions were often vague and left to the discretion of national courts. According to the European Commission, the impression that investors do not have a sufficient right of redress was confirmed by the limited amount of case law available. The Impact Assessment concluded that this situation leads to different levels of investor protection and encourages forum shopping by credit rating agencies.[275]

Overall, the problem tree included in the Impact Assessment showed that investors did not have a sufficient right of redress due to a lack of civil liability regimes in some Member States (such as Sweden and Poland) and a risk of regulatory arbitrage (due to the large differences between the Member States). The lack of a sufficient right of redress was conceived to contribute to the more global problems of the credit rating industry: risks to market stability, low confidence in the financial markets, undermined investor confidence and undermined ratings quality.[276] The Impact Assessment concluded that action at the EU level was required in addition to public enforcement: 'The possibility of sanctioning CRAs is not a substitute for an efficient right of redress for investors. Sanctions imposed in the public interest do not compensate investors for their losses; a functioning sanctioning system and efficient right of redress for investors allowing for private enforcement are complementary instruments.'[277]

275 SEC(2011) 1354 final, pp. 18-19. *See also* SEC(2011) 1354 final, pp. 141-144.
276 SEC(2011) 1354 final, p. 10. *See also* SEC(2011) 1354 final, p. 23.
277 SEC(2011) 1354 final, p. 22. *Cf. also* Baumgartner 2015, pp. 498-500.

As already stated in section 2.5.4.2, the Impact Assessment investigated several options to ensure a right of redress for investors: (1) 'no policy change'; (2) 'introduce civil liability of CRAs into EU legislation'; and (3) 'ensure civil liability of CRAs towards users of credit ratings before national courts'.[278] Considering the problems indicated in the Impact Assessment, the first option was abandoned.[279] The Impact Assessment preferred the third option over the second option. Both options could ensure a sufficient right of redress, but the third option was less intrusive upon the Member States.[280] The principle of subsidiarity hence determined the choice in favour of the third option. Moreover, the Impact Assessment warned that the second option could 'increase the complexity of civil law systems of the Member States' if the sole topic of credit rating agency liability were regulated at the EU level.[281] The idea of the third option would 'set the principle and some conditions under which civil liability of CRAs should be possible'.[282]

3.5.1.4 EC Proposal & amendments

The Proposal of the European Commission resembled policy option 2 rather than policy option 3 of the Impact Assessment. The proposal of Article 35a CRA Regulation read:

> 'Article 35a – Civil liability
> 1. Where a credit rating agency has committed intentionally or with gross negligence any of the infringements listed in Annex III having an impact on a credit rating on which an investor has relied when purchasing a rated instrument, such an investor may bring an action against that credit rating agency for any damage caused to that investor.
> 2. An infringement shall be considered to have an impact on a credit rating if the credit rating that has been issued by the credit rating agency is different from the rating that would have been issued had the credit rating agency not committed that infringement.
> 3. A credit rating agency acts with gross negligence if it seriously neglects duties imposed upon it by this Regulation.
> 4. Where an investor establishes facts from which it may be inferred that a credit rating agency has committed any of the infringements listed in Annex III, it will be for the credit rating agency to prove that it has not committed that infringement or that that infringement did not have an impact on the issued credit rating.

278 SEC(2011) 1354 final, pp. 45-48. *See also* SEC(2011) 1354 final, pp. 150 and 156. The Impact Assessment and the Proposal of the European Commission initially introduced a right of redress for investors only. During the legislative proceedings, the right of redress was expanded to issuers as well.

279 SEC(2011) 1354 final, p. 46.

280 SEC(2011) 1354 final, pp. 46-47.

281 SEC(2011) 1354 final, p. 46.

282 SEC(2011) 1354 final, p. 47.

> 5. The civil liability referred to in paragraph 1 shall not be excluded or limited in advance by agreement. Any clause in such agreements excluding or limiting the civil liability in advance shall be deemed null and void.'[283]

The role of the applicable national law was described initially only in the proposed Recital 27: 'Regarding matters concerning the civil liability of a credit rating agency *and which are not covered by this regulation*, such matters should be governed by the applicable national law.'[284] An explicit reference to the applicable national law in the wording of Article 35a CRA Regulation was proposed by the European Parliament's rapporteur and was eventually adopted by the European Parliament.[285] Lehmann derived from these amendments that the final version of Article 35a CRA Regulation was a political compromise.[286] No one could object to the final version because, on the one hand, the civil liability of credit rating agencies was addressed at the European level, and, on the other hand, detailed harmonisation of national non-contractual liability law was avoided.

3.5.2 Conditions for civil liability[287]

The legislative proceedings described in the previous section resulted in a right of redress for issuers and investors, which is available in the presence and in the absence of a contractual relationship entered into with a credit rating agency.[288] Article 35a CRA Regulation serves two functions. First, the provision aims to compensate issuers and investors for loss caused by infringements of Annex III CRA Regulation.[289] Second, although not explicitly stated in the Recitals of the CRA III Regulation, it can be argued that Article 35a aims to prevent credit rating agencies from committing infringements ('*eine verhaltenssteuernde Funktion*'), thereby aiming to enhance the quality of credit ratings.[290]

283 COM(2011) 747 final, p. 33.
284 COM(2011) 747 final, p. 21. Emphasis added [DJV].
285 *See* A7-0221/2012, pp. 32 and 68 and P7_TA-PROV(2013)0012, respectively.
286 Lehmann 2016a, p. 78. *Also e.g.* Deipenbrock 2018, p. 561 and Haar 2014, p. 329.
287 This section briefly describes the conditions for civil liability under Art. 35a CRA Regulation. Section 5.3 discusses these conditions in detail, as they are the main thread running within the legal comparison.
288 *As stated explicitly by* Recital 32 CRA III Regulation.
289 *As can be derived from* Recital 32 CRA III Regulation. *E.g.* Heuser 2019, pp. 82-83.
290 *See e.g.* Heuser 2019, p. 83. Some scholars consider the preventive function of Art. 35a CRA Regulation to be most important. For instance, Lehmann argued that the compensation of private investors is not the main goal of Article 35a CRA Regulation. He emphasised that the CRA Regulation mainly wishes to prevent credit rating agencies from assigning incorrect credit ratings (Lehmann 2016a, p. 62). According to Berger & Ryborz, Art. 35a CRA Regulation does not only have a compensatory function. They attached more import-

Article 35a (1) CRA Regulation establishes five conditions for the civil liability of credit rating agencies:

1. A credit rating agency must have committed one of the infringements listed in Annex III CRA Regulation;
2. The infringement must have been committed intentionally or with gross negligence;
3. The infringement must have had an impact on the credit rating;
4. An issuer or investor must have suffered loss because of the infringement; and
5. With regard to an issuer: The infringement must not have been caused by misleading and inaccurate information provided by the issuer to the credit rating agency, directly or through information publicly available.
With regard to an investor: An investor must have reasonably relied on the credit rating in accordance with Article 5a (1) or otherwise with due care.[291]

In addition, Article 35a (3) CRA Regulation provides that credit rating agencies may not completely exclude their civil liability and may only limit their liability in advance as far as that limitation is reasonable and proportionate and allowed by the applicable national law in accordance with Article 35a (4) CRA Regulation.

Credit rating agencies, issuers and investors are the most important stakeholders that could be involved in legal proceedings based on Article 35a CRA Regulation.[292] The next section investigates the scope of application of Article 35a CRA Regulation by describing which credit rating agencies, issuers and investors could be involved in such legal proceedings.

3.5.3 Stakeholders defined and scope of application

3.5.3.1 'Credit rating agency'[293]

Article 35a CRA Regulation creates a right of redress against 'credit rating agencies' who committed infringements listed in Annex III CRA Regulation. The CRA Regulation defines credit rating agencies as legal persons 'whose occupation includes the issuing of credit ratings on a professional basis'.[294]

ance to the regulatory function of Art. 35a CRA Regulation (Berger & Ryborz 2018, p. 1236). *Also* Dutta 2013, p. 1732.

291 Recital 36 CRA III Regulation stipulates that the fact that certain categories of investors must make their own assessments of the creditworthiness of entities and financial instruments under Art. 5a (1) CRA Regulation, should not prevent courts from holding credit rating agencies liable. *See also on civil liability and overreliance e.g.* Lehmann 2016a, pp. 63-64.

292 Competitors of issuers who argue to have suffered loss by an infringement and an affected credit rating cannot base claims for damages on Art. 35a CRA Regulation.

293 *See for similar descriptions* Heuser 2019, pp. 88-90 and Wimmer 2017, pp. 87-94.

294 Art. 3 (1) (b) CRA Regulation.

The general scope of application of the CRA Regulation determines which credit rating agencies can be held liable under Article 35a CRA Regulation. As discussed in section 3.4.2.1 (a), the scope of application of the CRA Regulation is limited to credit ratings issued by credit rating agencies registered in the EU.[295] Article 35a CRA Regulation therefore only applies to such EU credit rating agencies and does not apply to the headquarters of Standard & Poor's and Moody's, located in the US.[296]

The consequences of the limited scope of the CRA Regulation are mitigated somewhat by the fact that the CRA Regulation encourages credit rating agencies to be established and registered in the EU.[297] Credit rating agencies must indeed be established and registered in a Member State in order for their credit ratings to be allowed to be used for regulatory purposes by certain issuers (amongst others, credit institutions, investment firms and insurance undertakings).[298] This way, the rules on registration encourage credit rating agencies to register themselves in the European Union and to become subject to the regulatory regime of the CRA Regulation.

In order to apply for registration, under Article 14 (1) CRA Regulation, a credit rating agency must be 'a legal person established in the Community'. As explicitly stated by Recital 55 CRA I Regulation, credit rating agencies headquartered outside the EU must establish subsidiaries in the EU in order to be able to apply for registration.[299] The subsidiaries can issue their own credit ratings or can endorse credit ratings of their parent companies.[300] As subsidiaries are fully responsible for both types of credit ratings,[301] the credit ratings of parent companies established in third countries are brought under the scope of the CRA Regulation.

295 ESMA publishes a list of registered and certified rating agencies (available at www.esma.europa.eu/page/List-registered-and-certified-CRAs, last accessed at 31 August 2019).

296 *Cf. in respect of the civil liability regime under Art. 35a CRA Regulation* Heuser 2019, pp. 90 and 93, Miglionico 2019, no. 9.04, Dumont du Voitel 2018, pp. 102-104, Wimmer 2017, p. 93, Schantz 2015, p. 356, Steinrötter 2015, p. 111, Dutta 2014, p. 40, Dutta 2013, pp. 1731-1732 and Gietzelt & Ungerer 2013, pp. 339-340. *Contra* Lehmann 2016a, pp. 81-82, who argued the scope of the liability regime is unclear, and Gass 2014, pp. 52-53. *See for the debate and arguments in favour of a broad scope of application of Art. 35a CRA Regulation* Wimmer 2017, pp. 87-89.

297 *See* Dutta 2014, p. 34 and Dutta 2013, p. 1732. *Also* Baumgartner 2015, p. 511.

298 Art. 4 (1) CRA Regulation. Pursuant to Art. 3 (1) (g) CRA Regulation, the term 'regulatory purposes' means 'the use of credit ratings for the specific purpose of complying with Union law, or with Union law as implemented by the national legislation of the Member States'. *See also* Moloney 2014, pp. 655-656.

299 *See* Recital 55 CRA I Regulation. *See also* Dutta 2014, p. 34 and Dutta 2013, p. 1732. *Cf.* Gietzelt & Ungerer 2013, p. 339.

300 *Cf.* Art. 4 (3) CRA Regulation and *cf.* Lehmann 2015b, no. 444.

301 Under Art. 4 (4) CRA Regulation, an endorsed credit rating is considered to have been issued by the registered credit rating agency. Under Art. 4 (5) CRA Regulation, a registered credit rating agency will be fully and unconditionally responsible for an endorsed credit rating (*see also* Recital 18 CRA I Regulation). *See also* Gietzelt & Ungerer 2013, p. 339.

Overall, issuers and investors can only bring claims for damages under Article 35a CRA Regulation against credit rating agencies established and registered in the EU and the scope of application of the civil liability regime is, therefore, limited.[302]

3.5.3.2 'Issuer'[303]

The CRA Regulation refers the term 'issuer' back to Article 2 (1) (h) Prospectus Directive.[304] Under this provision, an issuer 'means a legal entity which issues or proposes to issue securities'. It is remarkable that Article 35a CRA Regulation does not use the term 'rated entity', which 'means a legal person whose creditworthiness is explicitly or implicitly rated in the credit rating, whether or not it has solicited that credit rating and whether or not it has provided information for that credit rating'.[305] The term 'issuer' is too limited, because it is linked to the issue of 'securities' only and does not cover financial obligations such as loans.[306]

3.5.3.3 'Investor'

(a) Types of investors[307]

The CRA Regulation does not provide a definition of the term 'investor'.[308] This dissertation starts from the assumption that investor-claimants invested in fixed-income financial instruments or other types of debt, but Article 35a CRA Regulation does not exclude equity-shareholders as a matter of principle. Investors can involve both professional investors and retail investors.[309] Article 4 (1) (a) CRA Regulation provides examples of professional investors that can make use of credit ratings: credit institutions, investment firms, insurance undertakings, reinsurance undertakings, institutions for occupational retirement provision, management companies, investment companies, alternative investment fund managers and central counterparties. Under Article 35a (2) and Article 5 (a (1) CRA Regulation, the civil liability of credit rating agencies towards these professional parties is limited. They must make their own assessments of the creditworthiness of issuers and are not allowed to

302 *For the same conclusion*, Heuser 2019, p. 89, Wimmer 2017, pp. 93-94 and Baumgartner 2015, pp. 511-512.
303 *See, for a similar type of description*, Wimmer 2017, pp. 86-87, Baumgartner 2015, pp. 521-522, Gass 2014, p. 58, Dutta 2013, p. 1730 and Gietzelt & Ungerer 2013, p. 340.
304 Art. 3 (1) (s) CRA Regulation.
305 Art. 3 (1) (f) CRA Regulation.
306 *Cf.* Heuser 2019, p. 104 who argues the term 'issuer' must therefore be interpreted broadly.
307 *See, for similar descriptions*, Heuser 2019, pp. 108-111, Wimmer 2017, pp. 84-86, Baumgartner 2015, pp. 517-521 and Gass 2014, pp. 58-61.
308 Heuser 2019, p. 108 and Baumgartner 2015, p. 517.
309 Wimmer 2017, p. 85 and Baumgartner 2015, p. 518.

'solely or mechanistically' rely on credit ratings in making their investment decisions. Furthermore, the term 'investor' does not only cover investors who decided to invest or continued to invest in the issuer, but also those investors who decided to disinvest in the issuer. This can be derived from the second sentence of Article 35a (1) CRA Regulation, which describes that investors must establish that they reasonably relied on a credit rating for a decision 'to invest into, hold onto or divest'.[310]

(b) Limitations from the investor-specific requirement

The second sentence of Article 35a (1) CRA Regulation stipulates that '[a]n investor may claim damages under this Article where it establishes that it has reasonably relied, in accordance with Article 5a(1) or otherwise with due care, on a credit rating for a decision to invest into, hold onto or divest from a financial instrument covered by that credit rating'. This investor-specific requirement suggests two further limitations to the scope of application of Article 35a (1) CRA Regulation in respect of investors. Yet, one can seriously doubt whether the Union legislature meant to limit the scope of application of Article 35a CRA Regulation, or whether the drafting of this investor-specific requirement was too imprecise.

First, the investor-specific requirement seems to limit the eligible investors to investors who invested in financial instruments of a fixed income or debt obligatory nature only. The second sentence of Article 35a (1) CRA Regulation indeed stipulates that an investor may claim damages 'for a decision to invest into, hold onto or divest *from a financial instrument* covered by that credit rating'.[311] This wording implies that only investors who invested into, held onto or divested from financial instruments with a fixed income nature are entitled to the right of redress under Article 35a CRA Regulation (because credit ratings do not cover other financial instruments). Consequently, equity investors cannot claim damages under this provision. But this wording also implies that investors who provide normal loans to issuers cannot claim damages under Article 35a CRA Regulation, if those debts do not qualify as financial instruments.[312] Whereas the limitation in respect of equity investors is imaginable, I doubt whether the Union legislature intended to limit the right of redress to investors who invested into, held onto or divested from financial instruments only.

Second, it can be questioned whether the second sentence of Article 35a (1) CRA Regulation limits the type of 'credit rating' that can trigger civil liability

310 Wimmer 2017, p. 86. *In more detail,* Heuser 2019, pp. 111-113.
311 Emphasis added [DJV].
312 Art. 3 (1) (k) CRA Regulation refers the term 'financial instrument' back to Section C of Annex I to Directive 2004/39/EC (MiFID I).

in respect of investors: financial instrument ratings only, or both financial instrument ratings and issuer ratings?[313]

Article 3 (1) (a) CRA Regulation defines a 'credit rating' as 'an opinion regarding the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, or of an issuer of such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories'. The right of redress under Article 35a (1) CRA Regulation stipulates that '[w]here a credit rating agency has committed, intentionally or with gross negligence, any of the infringements listed in Annex III having an impact on a credit rating, an investor or issuer may claim damages from that credit rating agency for damage caused to it due to that infringement'. Both provisions do not indicate any limitation to the type of affected credit rating for which compensation can be claimed.

Nevertheless, German lower courts interpreted and applied this investor-specific requirement grammatically and thereby limited the scope of application of Article 35a CRA Regulation in another important, but possibly unforeseen, way.[314] The provision stipulates explicitly that an investor must reasonably rely on a credit rating 'for a decision to invest into, hold onto or divest from a financial instrument *covered by that credit rating*'.[315] This wording has led the German courts to restrict the scope of application of Article 35a (1) CRA Regulation. The German version of Article 35a (1) CRA Regulation states that '*[e]in Anleger kann nach diesem Artikel Schadenersatz verlangen, wenn er nachweist,* dass er sich bei seiner Entscheidung, in ein Finanzinstrument, auf das sich dieses Rating bezieht, *zu investieren, dieses Instrument weiter zu halten oder zu veräußern*'.[316] On the basis of this wording, German courts concluded that Article 35a (1) CRA Regulation does not apply to situations in which an investor invested on the basis of an issuer rating.

The local District Court Neuss adopted this restrictive approach to the application of Article 35a CRA Regulation in 2016. On the facts of the case, an investor provided a loan to a company on the basis of an allegedly incorrect BBB rating.[317] The investor claimed damages (amongst others) on the basis of Article 35a (1) CRA Regulation. The local District Court Neuss, however, held that Article 35a CRA Regulation did not apply to this situation:

> '*Die Vorschrift des Art. 35 a der Rating-VO ist jedoch auf den vorliegenden Fall nicht anwendbar. Unstreitig hat die Beklagte vorliegend ein Unternehmensrating erstellt. Zu*

313 *See, prior to the case law of the German courts on this question already,* Baumgartner 2015, pp. 519-520.
314 *On part of these German decisions also* Deipenbrock 2018, pp. 571-574.
315 Emphasis added [DJV].
316 Emphasis added [DJV].
317 Amtsgericht Neuss 28 December 2016, 80 C 3954/15, ECLI:DE:AGNE:2016:1228.80C3954.15.00, *BeckRS* 2016, 130332, paras. 2-5.

> *Recht führt die Beklagte aus, dass Art. 35 a der Ratingagentur-VO unterscheidet zwischen Ansprüchen des Anlegers und Ansprüchen des Emittenten. So kann ein Anleger dann Schadensersatz verlangen, wenn er nachweist, dass er sich bei seiner Entscheidung, in ein Finanzinstitut, auf das sich dieses Rating bezieht, zu investieren, dieses Institut weiter zu halten oder zu veräußern, vertretbarer Weise in Einklang mit Art. 5 a Abs. 1 oder sonstiger Weise mit gebührender Sorgfalt auf dieses Rating verlassen hat.* Erforderlich ist mithin ein Finanzinstrument, auf das sich das Rating bezieht. Ein Unternehmen selbst ist kein Finanzinstrument. *Dies ergibt sich insbesondere aus der Differenzierung zu den Ansprüchen eines Emittenten. Ein Emittent kann nach Art. 35 a Abs. 1 unter Abs. 3 Schadensersatz verlangen, wenn er nachweist, dass das Rating sich auf ihn oder seine Finanzinstrumente bezieht,* während ein Anleger ein solchen Anspruch nur hat, wenn sich das Rating auf ein Finanzinstrument bezieht, *was vorliegend unstreitig nicht der Fall ist, Aus dieser Unterscheidung zwischen den Anspruchsvoraussetzungen für einen Anleger und einen Emittenten folgt das vorliegend ein Anspruch aus Art. 35a Rating – VO 1060/2009 nicht gegeben ist. Hierfür spricht auch die Begriffsbestimmung von Finanzinstrumenten im Sinne des § 1 Abs. 11 KWG.'*[318]

Hence, the local District Court Neuss held that Article 35a CRA Regulation distinguishes between issuers and investors. Whereas issuers can bring a claim for damages relating both to issuer ratings and ratings attached to specific financial instruments, investors can only bring a claim for damages relating to ratings attached to specific financial instruments.

In subsequent proceedings, the Regional Court Düsseldorf and the Higher Regional Court of Düsseldorf followed the approach taken by the local District Court Neuss. In these proceedings, the claimant had invested in bonds issued by a certain company. The claimant argued that it based its investment decision on a solicited BBB rating attached to the company by the defendant.[319] Both in first and second instance, the German courts held that Article 35a (1) CRA Regulation did not apply. The Regional Court Düsseldorf repeated the reasoning of the local District Court Neuss. In addition, it stated that the wording of the provision is actually clear and that there is no room for a lenient application: '*[d]enn die Rating-VO hat diesbezüglich eine klare Differenzierung getroffen. Für eine dem klaren Wortlaut dieser Vorschrift widersprechende Auslegung, die ein ungleich höheres Haftungsrisiko für die Ratingagentur nach sich zöge, ist somit kein Raum.*'[320] The Higher Regional Court of Düsseldorf also held that there is clearly no room for a lenient application, on the basis of a grammatical, historical and teleological interpretation of Article 35a (1) CRA Regulation.[321]

---

318 Amtsgericht Neuss 28 December 2016, 80 C 3954/15, ECLI:DE:AGNE:2016:1228.80C3954.15.00, *BeckRS* 2016, 130332, para 23. Emphasis added [DJV].

319 Landgericht Düsseldorf 17 March 2017, 10 O 181/15, ECLI:DE:LGD:2017:0317.10O181.15.0A, paras. 3-5 and 7.

320 Landgericht Düsseldorf 17 March 2017, 10 O 181/15, ECLI:DE:LGD:2017:0317.10O181.15.0A, para 34.

321 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, paras. 18-20.

The Higher Regional Court attached importance to the text of the Proposal of the European Commission, which created a right of redress for investors when a credit rating agency committed an infringement that impacted the credit rating 'on which an investor has relied when purchasing a rated instrument'.[322] It concluded that the scope of application qualifies as '*acte claire*' so that no preliminary questions needed to be asked to the CJEU.[323]

German scholars both applauded and criticised the restrictive approach of the German courts. On the one hand, Berger and Ryborz consider the wording of Article 35a (1) CRA Regulation to clearly involve a restriction to investments related to financial instruments only. Furthermore, they consider the restrictive approach to the civil liability of credit rating agencies in general justified, because of the important information function of credit ratings and the uncertainties associated with rating activities.[324] On the other hand, Arne Maier emphasised it is not certain that Article 35a CRA Regulation wishes to make a distinction between issuers and investors, especially because Recital 32 CRA III Regulation does not mention this distinction at all.[325] Heuser points to the fact that Article 5a (1) CRA Regulation – to which the investor-specific requirement of reasonable reliance under Article 35a (1) CRA Regulation refers explicitly – does not distinguish between issuer and financial instrument ratings.[326] Schroeter *inter alia* pointed to the unjustified distinction between issuers and investors resulting from the limitation to financial instrument ratings of the German courts.[327] Finally, Deipenbrock approached the restrictive German approach from a different perspective. He was of the opinion that the facts of these cases did not form a typical scenario of credit rating agency liability (because they concerned issuer ratings and not financial instrument ratings) and, therefore, that the relevance of these decisions is limited.[328]

The wording of Article 35a CRA Regulation does not excel in clarity. One can doubt whether the Union legislature actually meant to limit the right of redress to investors who invested in, held onto or divested from financial instruments in reliance on financial instrument ratings only. Such a restriction should then have already been addressed in the first sentence of Article 35a (1) CRA Regulation, or in the Recitals of the CRA III Regulation. Moreover, such a restriction seriously limits the scope of the right to damages under Article

322 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 19, COM(2008) 704 final, p. 33.

323 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 36.

324 Berger & Ryborz 2018, p. 1236.

325 See Landgericht Düsseldorf 17 March 2017, 10 O 181/15, ECLI:DE:LGD:2017:0317.10O181.15.0A, *VuR* 2017, pp. 383-387 annotated by R.A. Arne Maier, pp. 385-386 and Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *EWiR* 2018, pp. 273-274 annotated by R.A. Arne Maier, p. 274.

326 Heuser 2018, p. 83. *Cf. also* Schroeter 2018, p. 355.

327 Schroeter 2018, p. 355.

328 Deipenbrock 2018, p. 574.

35a CRA Regulation, as it rules out compensation in case of general investments in the issuer and investments in financial instruments based on issuer ratings. Especially in the case of smaller issuers, one could imagine these two situations occurring. Therefore, I do not agree with the Court of Appeal Düsseldorf that this issue can be considered an '*acte claire*', so that no preliminary questions needed to be asked to the CJEU.[329] The first part of Article 35a (1) CRA Regulation does not provide a restriction to financial instruments, and one can see no reason why the Union legislature intended to restrict the scope of application of Article 35a in this manner.

3.6 Factual perspective on credit rating agency liability

3.6.1 Four basic factual situations

The interpretation and application of Article 35a is strongly intertwined with the factual circumstances of concrete cases. Prior to the following Chapters on the Private International Law aspects of Article 35a CRA Regulation (Chapter 4) and the legal comparison (Chapter 5), it is, therefore, useful to provide a factual perspective on credit rating agency liability.

Chapters 4 and 5 are (implicitly[330]) based on four basic factual situations.[331] These situations can be distinguished from each other on the basis of the type of claimant involved (issuer or investor) and the type of relationship between the claimant and the credit rating agency (contractual or non-contractual):

1. An issuer brings a claim against a credit rating agency based on Article 35a CRA Regulation, while a contractual relationship (in the form of a rating contract for a solicited credit rating) exists between the credit rating agency and the issuer.
2. An issuer brings a claim against a credit rating agency based on Article 35a CRA Regulation, while no contractual relationship exists between the credit rating agency and the issuer. The dispute, hence, is about civil liability for the assignment of an unsolicited credit rating.

329 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 36.

330 The distinction is not systematically made in Chapter 4, because, for Private International Law purposes, this dissertation considers claims based on Art. 35a CRA Regulation to be of a non-contractual nature (section 4.2). One should, however, always keep in mind whether contractual relationships between credit rating agencies and issuers or investors exist. Indeed, the fact that claims based on Art. 35a CRA Regulation are considered of a non-contractual nature for Private International Law purposes does not mean that existing contractual relationships between credit rating agencies and issuers or investors are not relevant for Private International Law purposes (as explained in section 4.2).

331 Deipenbrock 2018, p. 561. Deipenbrock also explicitly distinguishes between these four basic factual scenarios.

3. An investor brings a claim against a credit rating agency based on Article 35a CRA Regulation, while a contractual relationship (in the form of a subscription contract) exists between the credit rating agency and the investor.
4. An investor brings a claim against a credit rating agency based on Article 35a CRA Regulation, while no contractual relationship exists between the credit rating agency and the investor.

A multitude of different fact patterns can occur within these four basic factual situations. One of the most important variables is the capacity of the claimant. As touched upon in section 3.3.1, issuers can involve companies, financial institutions, states, municipalities, universities, hospitals etc. Investors can be institutional or professional investors, but they can also be retail investors. Furthermore, there are multiple ways in which affected credit ratings can cause loss to issuers and investors. Hereafter, sections 3.6.2 and 3.6.3 describe possible sequences of events leading up to loss suffered by issuers and investors, respectively.[332]

In advance, it must be remarked that the possible sequences of events have been oversimplified since the main purpose of these sections is to show how impacted credit ratings can cause loss and how credit ratings, coupon rates, yield and prices can interrelate. One should keep in mind, however, that credit ratings, and changes to credit ratings, do not necessarily influence prices of financial instruments traded on the financial markets.[333] Furthermore, one should keep in mind that the height of a credit rating is not the only factor that determines coupon rates, yield or prices of financial instruments. A multitude of other factors can influence these elements as well. Finally, one should keep in mind that the scenarios only involve the example of bonds traded on the financial markets. Yet, the broad mechanisms of the influence of credit ratings are similar for normal loans and other fixed-income financial instruments. All these caveats can cause the calculation of the effects of credit ratings and the loss suffered by issuers and investors to be very difficult.

3.6.2 Loss suffered by issuers

Issuers can claim to have suffered financial (pure economic) loss and/or reputational loss due to affected credit ratings.[334] The most likely line of argu-

---

332 *Cf. for similar descriptions of possible factual scenarios* Heuser 2019, pp. 62 ff., Baumgartner 2015, pp. 336 ff., Happ 2015, pp. 48 ff. and Gass 2014, pp. 61 ff.

333 For instance, market prices rather respond to downgrades than to upgrades (section 3.3.4.2). As pointed out by Heuser, market prices sometimes do not respond to credit rating(s) (changes) at all (Heuser 2019, p. 62).

334 Recital 32 CRA III Regulation implies that both types of loss fall under the scope of Art. 35a CRA Regulation by stating that it is important to provide issuers with a right of redress

ment put forward by issuers will involve that, one way or another, the issuer or its financial instruments ended up with a too negative credit rating. The credit rating can initially be too negative, or can be downgraded to a too negative rating category.[335] The issuer can argue that the too negative credit rating has caused reputational loss amongst customers and suppliers – which is difficult to calculate – or increased funding costs.[336]

How can a credit rating that is too negative lead to increased funding costs? As explained in section 3.3.4, the lower the credit rating, the more investors fear for the issuer's creditworthiness and the higher investors consider their credit risk to be, i.e. the risk that the issuer will not fulfil its obligations. Investors then demand a higher compensation for their investment, in the form of an increased coupon rate or a higher yield (return on their investment).[337] Hence, the issuer must pay a higher coupon rate on its financial obligations to its investors.[338] A credit rating that is downgraded to a too negative rating category can lead to increased funding costs in a similar manner. For instance, an issuer downgrade can cause the coupon rate on new financial obligations to increase.[339]

As an example of increased funding costs caused by a downgrade, reference can be made to the downgrades of ThyssenKrupp and its bonds by Standard & Poor's in 2003.[340] At the beginning of 2003, Standard & Poor's announced it would downgrade, and subsequently did downgrade, ThyssenKrupp from an investment grade credit rating to a non-investment grade credit rating and its bonds to a BB status. In a press release, ThyssenKrupp strongly criticised the decision of Standard & Poor's, stating that '[t]he facts concerning Thyssen-Krupp have not changed; the only thing that has changed is S&P's view of the way it assesses pension obligations'.[341] The downgrades were indeed a consequence of changes in Standard & Poor's rating model.[342] The financial markets nevertheless responded heavily to the downgrades; the downgraded

as an impacted credit rating 'can impact negatively the reputation and funding costs of an issuer.'

335 *E.g.* Gass 2014, p. 77 and Schroeter 2014, p. 791.

336 Heuser 2019, p. 63 and Gass 2014, p. 77.

337 *See e.g.* Heuser 2019, p. 63, Lehmann 2016a, p. 80, Dutta 2014, p. 35 and Dutta 2013, p. 1729. *Also* Dalton 2008, pp. 353-354.

338 Also, the value of the bond is lower, Dalton 2008, p. 146. *Cf. also* Gass 2014, p. 120.

339 *Cf.* Heuser 2019, p 64 and Gass 2014, p. 77.

340 *Example derived from* Schroeter 2014, pp. 85-86, Micu, Remolona & Wooldridge 2004, p. 55 and Empelmann 2007, pp. 177-178.

341 Press release of 21 February 2003, available at www.thyssenkrupp.com/en/newsroom/press-releases/standard---poor-s-downgrades-thyssenkrupp-two-notches-to-bb---loss-of-investment-grade-status-2221.html, last accessed at 31 August 2019.

342 Schroeter 2014, p. 85 and Empelmann 2007, p. 177.

bond price lost 8% of its value, while the share price lost 6% of its value.[343] Rough estimates of the increased funding costs diverged from EUR 20,000,000[344] to EUR 30,000,000.[345]

As credit rating agencies consult issuers when assigning a solicited credit rating – especially in relation to structured finance products – loss is most likely caused in relation to unsolicited credit ratings or announcements of downgrades, and subsequent downgrades. Furthermore, issuers can try to argue that a credit rating agency has failed to positively adjust an already existing credit rating in time, so that an issuer's credit rating remained too negative for an unnecessarily long time. However, gathering empirical evidence for this claim is difficult, especially if one considers that bond markets in general respond less to upgrades (see section 3.3.4).

3.6.3 Loss suffered by investors

When investors claim to have suffered pure economic loss[346] due to credit rating activities, a wider range of possible factual scenarios exists that could underlie such claims, in comparison to the case of issuers. These scenarios may often be of a complex factual nature.[347] If investors claim to have suffered loss due to credit rating activities, the loss is most likely to be caused by a too positive credit rating. This section concentrates on this situation only.[348]

---

343 *As derived from* Schroeter 2014, p. 86. *See also* Empelmann 2007, p. 178: Empelmann provided a chart of the spread in basis points of ThyssenKrupp's bonds. Subsequent to the announcement of the downgrades and the actual downgrades, the chart shows massive increases of the spread in basis points.

344 *As referred to by* Veil 2017, p. 552.

345 *As referred to by* Schroeter 2014, p. 86, fn. 187.

346 This dissertation employs the terms 'pure economic loss' and 'financial loss' interchangeably to describe the loss suffered by investors.

347 *Cf. also* Gass 2014, pp. 63 ff.

348 *Cf. also* Heuser 2019, pp. 65 ff., Baumgartner 2015, pp. 337-363, Happ 2015, p. 49 and Gass 2014, pp. 64-65. An investor can also purchase bonds to which a credit rating agency assigned a too negative credit rating. Let us assume the investor bought bonds on the primary market, to which (or to which' issuer) a too negative credit rating was assigned. A negative credit rating sends a negative signal of creditworthiness to the financial markets, so that investors demand a higher interest rate or yield or return on their investment. The inaccurate credit rating hence causes the investor to take less risk, while receiving a higher return. At the same time, one must realise the price of the bond will probably be too low (had the credit rating been higher, the interest rate would have been lower and the value of the bond would have been higher (Dalton 2008, p. 146)), so that the investor paid a too low price. If the investor decides to sell the bonds against the same price, it sold the bonds underneath their value. One can however doubt whether the investor suffered loss, if we assume that the investor initially paid this price for the bonds as well. Gass does consider the investor to have suffered loss, Gass 2014, pp. 66-67. *Also* Heuser 2019, pp. 65-66 and Baumgartner 2015, pp. 346-350. Furthermore, investors can suffer loss when the initially

Let us assume that an investor purchased bonds on the primary market, to which (or to the issuer of which[349]) a too positive credit rating was assigned. A positive credit rating sends a positive signal of creditworthiness to the financial markets, so that investors could demand a lower coupon rate or yield or return on their investment. The inaccurate credit rating, hence, may cause an investor to take more risk and to receive a lower return on its investment. At the same time, the price of the bond will probably be too high (had the credit rating been lower, the coupon rate would have been higher and the value of the bond would have been lower[350]), so that the investor paid an inflated price for the bond. Alternatively, let's say that an investor bought bonds on the secondary market, to which (or to the issuer of which[351]) a too positive credit rating was assigned. Assuming a causal relationship exists between the height of the credit rating and the bond price, a too positive credit rating can cause the bond price to be too high. The investor, hence, bought the bond for an inflated price and against a too low coupon rate.

In both scenarios, the investor possesses financial instruments that are in fact worth less than the inflated price paid for by the investor. Up to this point, it is not certain the loss will materialise. The investor will not suffer loss if it decides to sell the bonds prior to the discovery of the fact that the credit rating was too positive. But, say that the investor did not sell the bonds in time and it is discovered the credit rating is too positive. Say the credit rating is downgraded, and the bond price drops. The investor can then decide to sell the bonds against the lower price. But the investor might also possess bonds that have become completely worthless because the bond price has collapsed completely or because the issuer defaulted.[352] In hindsight, the investor can submit two factual lines of argument upon which to base its claim for damages:[353]

- Had the credit rating agency not assigned the too positive credit rating, the investor would have made a different investment decision. For instance, the investor would have invested in different financial instruments or would not have invested at all. The loss could then consist of the difference in value between the purchase price of the bond and the selling price of

assigned credit rating was accurate, but the credit rating agency subsequently inaccurately downgrades a credit rating or publishes an incorrect announcement of a downgrade. Say the credit rating is downgraded, and the price of the financial instruments drops. The investor will suffer loss if it decides to disinvest in the issuer and sells the bonds against the lower price.

349 Depending on how the scope of Art. 35a (1) CRA Regulation is defined, section 3.5.3.3 (b).

350 Dalton 2008, p. 146.

351 Depending on how the scope of Art. 35a (1) CRA Regulation is defined, section 3.5.3.3 (b).

352 *Cf.* Baumgartner 2015, p. 337.

353 *See also for these scenarios in the same context of the description of investors' loss,* Heuser 2019, p. 65.

the bonds (if we assume the investor has sold the bonds at that point) and missed potential benefits of an alternative investment.[354]

- Had the credit rating agency not assigned the too positive credit rating, the investor would have completed the transaction(s) against more beneficial terms, i.e. at a lower price and for a higher yield or against a higher coupon rate. The investor then in fact claims to have relied on the integrity of the financial markets. The loss could then consist of the difference in value between the purchase price of the bond and the real value of the bond and missed returns on the bond.

One must keep in mind that the scenarios and possible lines of argument described are oversimplified and face factual challenges in practice.

The scenario and the second line of argument are oversimplified where they assumed that there is a causal relationship between a credit rating, or a downgrade of a credit rating, and bond prices. First, it was assumed that the bond price drops subsequent to the downgrade, while the bond price might have shifted earlier in time. The downgrade was too little too late, and the financial markets could have already discovered and replied to the new findings on the creditworthiness of the issuer. Second, it assumed the downgrade was an isolated event, while the bond price can be affected by a multitude of different factors. In such situations, it can be difficult to isolate the effects of a credit rating from the effects of other events, such as a general economic crisis. Third, the scenario does not take into account the possibility that it is discovered far later that the credit rating has been affected by an infringement of Annex III CRA Regulation. Such an infringement is most likely to be revealed by sanctions imposed by ESMA. The causal link between a credit rating, or a downgrade of a credit rating, and bond prices thus exists in theory, but may be more difficult in practice.

Furthermore, the first line of argument was oversimplified in terms of causation by the fact that investors often do not base their investment decisions only on a single credit rating. A retail investor can decide to invest in the bonds after consulting several types of financial information – the prospectus, multiple credit ratings and reports, annual reports, recommendations of financial analysts etc. – or on the basis of advice from an investment advisor (or family and friends), or on the basis of portfolio restrictions (in the case of asset management). Professional investors can make their own analysis and can use credit ratings as an additional tool. Again, the causal link between a credit rating and an investment decision thus exists in theory, but may turn out to be difficult to establish in practice.

Overall, investors are mostly likely to claim loss allegedly caused by a too positive credit rating. The factual scenarios underlying such claims may be of a complex factual nature. The question that will also come up several times

354 Dutta 2014, p. 35 and Dutta 2013, p. 1729.

in subsequent chapters, is what loss is eligible – and should be eligible – for compensation.

3.7 Concluding remarks

This Chapter provided relevant background information on the credit rating industry and its history, credit ratings, the EU regulatory framework for credit rating agencies and the factual side of credit rating agency liability. Against this background, the other parts of this dissertation can be better understood.

The historical analysis provided in section 3.2 demonstrated that debates on the position of the credit rating agency industry and, in particular, on its civil liability have taken place since the establishment of the first credit reporting agencies in the mid-19th century. The storm of criticism credit rating agencies received in the aftermath of the recent financial crisis was not a new type of criticism, and, instead, a pattern throughout history can be identified. Despite the recurring commotion on the inaccuracy of credit ratings, credit rating agencies have faced very little civil liability threats throughout their existence. From this perspective, the introduction of Article 35a CRA Regulation was a breakthrough. It was also observed that since the period of economic recovery after 2015, the attention for credit rating agency liability seems to have somewhat decreased. When the research for this dissertation was completed, the credit rating industry had recovered from the financial crisis, the regulatory frameworks in the EU and US have been in place for several years and the fear that Article 35a CRA Regulation would open the floodgates for civil liability claims has turned out to be unjustified thus far.

Section 3.3 concentrated on credit ratings and, in particular, on their functions and effects. Credit ratings were described as opinions on the creditworthiness of fixed income financial instruments and issuers of such financial instruments.[355] They provide information on the relative chance that an investor will recover its investment from an issuer. The nature of credit rating activities renders it difficult to assess the accuracy of a particular credit rating, sometimes even in hindsight. The function of credit ratings is twofold: credit ratings provide the financial markets with information on the creditworthiness of issuers and financial instruments and serve as a tool for issuers to comply with regulatory requirements. These functions render credit ratings very important for the functioning of the financial markets. Although

355 Art. 3 (1) (a) CRA Regulation. Under Recital 8 CRA III Regulation, credit ratings are 'not mere' opinions. Credit rating agencies assign all different types of credit ratings, *cf. e.g.* Standard & Poor's rating definitions, available at www.standardandpoors.com//en_US/web/guest/article/-/view/sourceId/504352, last accessed at 31 August 2019 and Moody's rating definitions, available at www.moodys.com/sites/products/ProductAttachments/AP075378_1_1408_KI.pdf, last accessed at 31 August 2019.

credit ratings, and changes to these, do not always contain new information, empirical studies found that the financial markets nevertheless respond to credit ratings and changes to credit ratings, or announcements of changes. These effects were measured on bond markets, structured finance markets and even equity markets, demonstrating the importance the financial markets attach to credit ratings.

Section 3.4 described the regulatory framework for credit rating agencies under the CRA Regulation. The CRA Regulation has a limited scope of application, as it only applies to credit rating agencies registered and established within the EU. For its practical relevance, it is, therefore, important that the CRA Regulation encourages credit rating agencies to create and continue an establishment on EU territory by stipulating that credit ratings may only be used for EU regulatory purposes if the credit rating agency is registered and established within the EU. Nevertheless, one must realise that the CRA Regulation does not apply to the headquarters of Moody's and Standard & Poor's, which are situated in the US. Furthermore, it was discussed that the substantive rules under the CRA Regulation are subject to public and private enforcement. The emphasis lies on public enforcement by ESMA, which is complemented by the private right of redress for issuers and investors under Article 35a CRA Regulation.

As a prelude to Chapters 4 and 5, section 3.5 paid attention to the legislative history of Article 35a CRA Regulation and investigated the scope of application of Article 35a CRA Regulation by describing which credit rating agencies, issuers and investors could be involved in legal proceedings based on Article 35a CRA Regulation.[356] The analysis revealed that the scope of application of Article 35a CRA Regulation is limited in several respects. Issuers and investors can only bring claims for damages under Article 35a CRA Regulation against credit rating agencies established and registered in the EU, and not against the headquarters of Moody's and Standard & Poor's in the US. Furthermore, the strictly grammatical interpretation of the investor-specific requirement of reasonable reliance of the German lower courts severely limits the scope of application of Article 35a CRA Regulation, namely to investors who relied on a financial instrument for the decisions to invest, hold onto or divest from financial instruments only. Even though the first sentence of Article 35a (1) CRA Regulation, which creates the right of redress, does not provide for such restrictions, and one cannot see why the Union legislature would restrict the scope of application of Article 35a in this manner, the wording of the investor-specific requirement does not excel in clarity.

Finally, section 3.6 took a factual perspective on credit rating agency liability. The other parts of this dissertation, sometimes implicitly, take the four basic factual situations described as a starting point. As regards claims

356 Section 5.3 discusses the conditions for civil liability under Art. 35a CRA Regulation in detail in the context of the legal comparison.

for damages brought by issuers, this study makes a distinction on the basis of whether or not a contractual relationship exists between a credit rating agency and an issuer. In a similar manner, as regards claims for damages brought by investors, this study makes a distinction on the basis of whether or not a contractual relationship exists between a credit rating agency and an investor. One can design a multitude of different fact patterns in which affected credit ratings cause loss to issuers and investors. Issuers can suffer financial and reputational loss due to credit rating activities. Issuer claims can be based on the line of reasoning that, one way or another, the issuer or its financial instruments ended up with a too negative credit rating, which caused the issuer's funding costs to increase because investors fear for the issuer's creditworthiness and demand higher yields in return for their investments. Furthermore, investors can suffer financial loss due to credit rating activities. Investor claims can be based on the line of reasoning that, one way or another, the issuer or its financial instruments ended up with a too positive credit rating, which created an unjustified image of a certain level of creditworthiness so that an investor's investment decision was affected or the transaction was conducted against less beneficial terms for the investor.

4 Private International Law aspects

4.1 Introductory remarks

Rules of Private International Law are of crucial importance to the functioning of Article 35a CRA Regulation. Indeed, disputes over credit rating agency liability between credit rating agencies and issuers or investors will often involve 'international elements', while Article 35a (4) CRA Regulation reserves a prominent place for the applicable national law.[1] Due to the global character of the credit rating industry, one can easily imagine a cross-border dispute in which, for instance, a credit rating agency established in France has rated an issuer established in Italy, while German investors invested in financial instruments of the Italian issuer in reliance on the credit rating published on the credit rating agency's website.

This Chapter centres around the three main questions of Private International Law: which national court has jurisdiction to decide on a claim based on Article 35a CRA Regulation? What law is applicable to a dispute over credit rating agency liability involving a claim based on Article 35a CRA Regulation? And, how can eventual judgments be enforced? Through this broad overview of the relevant Private International Law aspects, this Chapter mainly aims to answer the question of which issues occur, if any, in determining the competent court and the applicable national law in respect of claims based on Article 35a CRA Regulation.[2] Due to the crucial importance of Private International Law in an early stage of legal proceedings on credit rating agency liability, it was decided to discuss this topic prior to the legal comparison made in Chapter 5.

To start with, this Chapter pays attention to a preliminary matter: the characterisation of the rights and obligations under Article 35a CRA Regulation

---

1 Deipenbrock strikingly described the role of Private International Law in the context of Article 35a CRA Regulation as '[t]he layer between the European law and national substantive private law' (Deipenbrock 2018, p. 561).

2 Prior to the publication of this dissertation, multiple contributions addressing these issues were published already. *E.g.* Heuser 2019, pp. 195 ff., Deipenbrock 2018, pp. 562-571, Dumont du Voitel 2018, pp. 156 ff., Wimmer 2017, pp. 96 ff. and 246 ff., Baumgartner 2015, pp. 593 ff., Happ 2015, Schantz 2015, pp. 342 ff., Steinrötter 2015, Dutta 2014, Gass 2014, pp. 52 ff. and Dutta 2013. The majority of the contributions followed the order of applicable Private International Rules. This dissertation follows this order as well, which explains similarities in terms of structure.

(section 4.2). Subsequently, sections 4.3 and 4.4 explain on which grounds a national court can assume jurisdiction and in which way a national court must determine the law applicable to disputes over credit rating agency liability involving claims based on Article 35a CRA Regulation, respectively. This Chapter discusses the topic of jurisdiction most thoroughly, as most case law exists in relation to jurisdiction. Subsequently, section 4.4 applies the findings relating to jurisdiction and, more in particular, relating to the location of the *Erfolgsort* of financial loss in the context of the assessment of the applicable national law. To complete the overview of the Private International Law aspects, section 4.5 briefly discusses the rules on the recognition and enforcement of judgments, which award compensation to issuers and investors.

This Chapter approaches the first and the second main questions of Private International Law from a European perspective. It departs from the assumption that issuers and investors start proceedings before the courts of Member States, and that national courts must apply European rules of Private International Law.[3] Furthermore, this Chapter assumes that the defendants are credit rating agencies established and registered in the EU.[4] In practice, however, legal proceedings on credit rating agency liability are not necessarily brought before Member State courts. Issuers and investors can start proceedings before the courts of third countries. Also, credit rating agencies could seek a declaratory judgment from the courts of third countries. This study, however, takes a European perspective on the topic of credit rating agency liability and, therefore, analyses the Private International Law aspects from a European perspective. Section 4.5 briefly investigates recognition and enforcement from a European perspective as well, assuming that an issuer or investor must enforce a judgment of a court of a Member State in a third country, in particular in the US.

3 The application of European or national rules of Private International Law depends on whether disputes involve 'international' elements. Although the analysis made in this Chapter is limited to European rules of Private International Law as a matter of principle, section 4.3.3.3 (a) discusses the application of the Hague Choice of Court Convention. Furthermore, it deserves to be remarked that this dissertation does not discuss the validity and effects of arbitration clauses. Finally, as this dissertation starts from the assumption that national courts must apply European rules of Private International Law, this section does not pay attention to rules and case law concerning national Private International Law rules in the context of credit rating agency liability (*e.g.* Bundesgerichtshof 13 December 2012, III ZR 282/11, *NJW* 2013, pp. 386-387, *BeckRS* 2013, 1088 (appeal of Oberlandesgericht Frankfurt 28 November 2011, 21 U 23/11, ECLI:DE:OLGHE:2011:1128.21U23.11.0A, *BeckRS* 2011, 27061)).

4 As concluded in section 3.5.3.1, the CRA Regulation applies to credit rating agencies established and registered in the EU only.

4.2 Characterisation

The characterisation of rights and obligations determines what rules and legislative instruments apply to establish jurisdiction and the applicable law.[5] In the context of Article 35a CRA Regulation, one must determine whether claims based on and obligations under Article 35a CRA Regulation qualify as matters relating to contract, as matters relating to tort, as contractual obligations or as non-contractual obligations. When a certain obligation qualifies as 'contractual', national courts can assume jurisdiction under Article 7 (1) (a) Brussels I Regulation (recast) and can determine the applicable law by means of the Rome I Regulation. When a certain obligation qualifies as 'tort' or 'non-contractual', national courts can assume jurisdiction under Article 7 (2) Brussels I Regulation (recast) and can determine the applicable law by means of the Rome II Regulation. The application of these rules can lead to different outcomes in respect of jurisdiction and applicable law.

For Private International Law purposes, this dissertation considers claims based on Article 35a CRA Regulation to be of a non-contractual nature, irrespective of the existence of an agreement between a credit rating agency and an issuer or an investor. Scholars have also often argued that claims based on Article 35a CRA Regulation qualify as matters relating to tort.[6] This qualification finds its basis in the fact that Article 35a CRA Regulation imposes statutory obligations upon credit rating agencies under Annex III CRA Regulation. As stated in the Recitals of the CRA III Regulation, issuers and investors can base a claim for damages on Article 35a CRA Regulation *irrespective* of the existence of a contractual relationship between the credit rating agency and the issuer or investor.[7] The obligations imposed upon credit rating agencies are hence not based on the existence of a contract and the remedy of the right to damages does not presuppose the existence of a

5 For Private International Law purposes, the terms of contractual and non-contractual obligations are interpreted autonomously. The characterisations under the applicable national law are not taken into consideration *e.g.* ECJ 17 June 1992, C-26/91, ECLI:EU:C:1992:268 (*Handte v TMCS*), para 10, CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), para 27, CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 37 and CJEU 21 January 2016, C-359/14, ECLI:EU:C:2016:40 (*Ergo Insurance SE*), para 43.

6 *See e.g.* Heuser 2019, pp. 82 and 195 ff., Deipenbrock 2018, p. 564, Dumont du Voitel 2018, pp. 158-159, Wimmer 2017, pp. 100-101, Deipenbrock 2015, p. 9, Steinrötter 2015, pp. 112-113, Berger & Ryborz 2014, p. 2246 and Dutta 2013, p. 1731. *Contra* Happ 2015, pp. 69-70, who characterised Art. 35a CRA Regulation as contractual and non-contractual matters, depending on the existence of a rating or a subscription contract. Due to this qualification, the dissertation of Happ also paid attention to the rules of Private International Law applicable to contractual obligations. *Contra* Miglionico 2019, no. 9.16.

7 Recital 32 CRA III Regulation. *Also* Heuser 2019, pp. 197-198 and Wimmer 2017, pp. 100-101.

voluntary act or a voluntary assumed obligation by a credit rating agency.[8] Therefore, claims based on Article 35a CRA Regulation are considered of a non-contractual nature for Private International Law purposes. The consequences of this characterisation are that section 4.3.5 on special jurisdiction discusses jurisdiction under Article 7 (2) Brussels I Regulation (recast) on special jurisdiction for matters relating to tort and that section 4.4 on applicable law discusses the application of the Rome II Regulation on non-contractual obligations.

The fact that claims based on Article 35a CRA Regulation are considered of a non-contractual nature for Private International Law purposes does not mean that an existing contractual relationship between a credit rating agency and an issuer or investor is not relevant for Private International Law purposes at all. As we will see, the existence of a contractual relationship is for instance of relevance because the contract can include a valid jurisdiction clause[9] and because the contract can trigger the escape clause under Article 4 (3) Rome II Regulation.[10]

4.3 Jurisdiction

4.3.1 Legal framework

At the start of legal proceedings, a national court must determine whether it is competent to decide on the particular claim(s). If proceedings are brought before a court of a Member State, the court has to decide on its jurisdiction under, for instance, international treaties as the Convention of 30 June 2005 on Choice of Courts Agreements (also known as the Hague Choice of Court Convention), the Brussels I Regulation (recast)[11] or the rules of Private International Law of the forum (*lex fori*). Claims for credit rating agency liability based on Article 35a CRA Regulation brought against EU credit rating agencies or EU subsidiaries before Member State courts will normally fall within the

---

8 *Cf. e.g.* Wimmer 2017, pp. 100-101, Deipenbrock 2015, p. 9 and Dutta 2013, p. 1731. As stated by Lehmann, a claim for damages however might be a matter relating to contract if the claim has been based 'on a rule to be found in case law or statute' which presupposes 'a voluntary act of the defendant' (Lehmann 2015a, no. 4.40). Similarly, in *ÖFAB v Koot*, obligations derived from a statutory rule were qualified as matters relating to tort without 'being dependent on the nature of the debts of the company concerned', *see* CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), paras. 39-41. *Cf. also* Baumgartner 2015, pp. 529, 605 and 612.

9 *See* section 4.3.3.

10 *See* section 4.4.4.

11 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

formal, material and temporal scope of the Brussels I Regulation (recast).[12] Therefore, the framework of the Brussels I Regulation (recast) serves as a basis for this section on jurisdiction.[13] Depending on the circumstances of the case, a national court can assume jurisdiction under Article 25 (on jurisdiction agreements), Article 4 (1) (on the domicile of the defendant) or Article 7 (2) Brussels I Regulation (recast) (on matters relating to tort).

4.3.2 Formal, material and temporal scope of Brussels I Regulation (recast)

A national court can only base its competence on the Brussels I Regulation (recast) if the dispute falls within the formal scope, the material (subject matter) scope, and the temporal scope of the Regulation.[14]

In order to fall within the formal scope of the Brussels I Regulation (recast), a defendant (viz. a credit rating agency) must be 'domiciled' in a Member State.[15] If a defendant is not domiciled in a Member State, the jurisdiction of a court 'shall, subject to Article 18 (1), Article 21 (2) and Articles 24 and 25, be determined by the law of that Member State' (*lex fori*).[16] Consequently, unless one of these exceptions applies, the Brussels I Regulation (recast) only applies to credit rating agencies or their subsidiaries established in one of the Member States.[17] The Brussels I Regulation (recast) hence does not apply to claims for damages brought against the US holding companies of, for instance, Moody's and Standard & Poor's.[18] In such situations, Member State courts must apply their national rules of Private International Law.

In order to fall within the material (subject matter) scope of the Brussels I Regulation (recast), the dispute must concern a 'civil and commercial' matter under Article 1 (1) Brussels I Regulation (recast) and shall not fall under the categories described in Article 1 (2) Brussels I Regulation (recast).[19] The term 'civil and commercial matters' can involve 'an action between a public authority and a person governed by private law', except for situations in which 'the

12 Assuming the dispute is characterised by an international, cross-border element. *See* section 4.3.2.
13 Although section 4.3.3.3 (a) discusses the Hague Choice of Court Convention as well in the context of jurisdiction clauses.
14 Briggs 2013, p. 60 and *see generally* Strikwerda & Schaafsma 2019, no. 40.
15 *See* Art. 4, 5 and 6 Brussels I Regulation (recast). *Cf.* Baumgartner 2015, p. 593.
16 Art. 6 (1) Brussels I Regulation (recast).
17 For the domicile of a legal entity, see Art. 63 (1) Brussels I Regulation (recast). As a consequence, it will be complex to bring proceedings against a credit rating agency established in a third country before the courts of a Member State. For an argument in favour of extending the Brussels I Regulation (recast) to defendants not established or domiciled in the EU in the context of credit rating agencies, Risso 2016.
18 *Cf.* Happ 2015, p. 94.
19 *See also e.g.* Briggs 2013, p. 60 and Strikwerda & Schaafsma 2019, no. 40.

public authority is acting in the exercise of its public authority powers'.[20] Claims concerning the civil liability of credit rating agencies qualify as civil and commercial matters. This qualification equally applies to claims for damages brought by sovereign states or other governmental institutions (e.g. municipalities), as long as the particular state or governmental institution acts in its capacity of issuer or investor who suffered loss due to an affected credit rating.

Finally, a dispute has to fall under the temporal scope of the Brussels I Regulation (recast). Under Article 66 (1) Brussels I Regulation (recast), the Regulation applies to legal proceedings instituted on or after 10 January 2015. If legal proceedings were instituted before that date, the rules of the old Brussels I Regulation[21] apply.

As stated already, claims for credit rating agency liability based on Article 35a CRA Regulation brought against EU credit rating agencies or EU subsidiaries before Member State courts, will normally fall within the formal, material and temporal scope of the Brussels I Regulation (recast).[22] If so, Member State courts will apply the rules of the Brussels I Regulation (recast) to the dispute between the credit rating agencies and the issuer or investor.

4.3.3 Jurisdiction agreements

4.3.3.1 Remarks in advance

In concrete situations, credit rating agencies can have entered into jurisdiction agreements with issuers or investors.[23] Jurisdiction agreements can be included in contracts for solicited ratings or paid subscription contracts.[24] Furthermore, credit rating agencies can include jurisdiction clauses in their Terms of Use, which an investor (or another person) must accept before being able to access the part of the website that displays credit ratings.[25] The question can arise whether such agreements and clauses are binding upon issuers and investors. For the answer to this question, it is necessary to distinguish between jurisdiction agreements that confer jurisdiction upon the courts of

20 ECJ 16 December 1980, C-814/79, ECLI:EU:C:1980:291 (*Netherlands v Rüffer*), para 8.
21 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
22 Assuming the situation is characterised by an international, cross-border element.
23 Parties do not necessarily have to make explicit choices of forum. They can also tacitly agree on a choice of forum, for instance, under Art. 26 (1) Brussels I Regulation (recast), when the defendant appears before a court of a Member State and does not dispute the jurisdiction of the court. This dissertation, however, concentrates on explicit choices of forum only.
24 Steinrötter 2015, p. 112. *Cf. also* Dumont du Voitel 2018, pp. 186-187, Baumgartner 2015, p. 600 and Happ 2015, pp. 98 ff.
25 After having accepted the Terms of Use, the credit ratings are often available free of charge. This applies to Moody's, Standard & Poor's and Fitch.

Member States (section 4.3.3.2) and jurisdiction agreements that confer jurisdiction upon the courts of third countries (section 4.3.3.3).[26]

As noted in section 4.1, this Chapter is based on the assumption that the defendant is a credit rating agency established and registered in the EU. Any jurisdiction agreement for the purpose of this section is assumed to be concluded between an issuer or investor and an EU credit rating agency. One needs to be aware that this is not necessarily always the case. In disputes over credit rating agency liability, attention should be paid to the exact contracting parties. Are the defendant and the contracting credit rating agency the same party? Or, is the defendant credit rating agency the EU subsidiary and the contracting credit rating agency the (US) holding company? For the assignment of a credit rating meant to be used for EU regulatory purposes, an issuer can enter into a contract with an EU subsidiary of a credit rating agency, but also with a US credit rating agency. For instance, Standard & Poor's stipulates that 'S&P Global Ratings' business operations in the European Union are currently conducted through S&P Global Ratings Europe Limited', but also that newly assigned credit ratings are 'generally subject to' a rating contract concluded between the issuer and S&P Global Ratings.[27] In such situations, I would argue that the issuer can nevertheless bring a claim against the EU credit rating agency that eventually issued or endorsed the credit rating for EU regulatory purposes. If not, credit rating agencies could easily bypass the application of Article 35a CRA Regulation.

4.3.3.2 Jurisdiction agreements in favour of courts of Member States

A court of a Member State can assume jurisdiction based on a valid jurisdiction agreement that confers jurisdiction upon that court.[28] Under Article 25 (1) Brussels I Regulation (recast), credit rating agencies, issuers and investors are

26 The distinction may suggest that jurisdiction agreements in favour of courts of Member States are always governed by the Brussels I Regulation (recast). Yet, one can think of situations in which the Hague Choice of Court Convention applies to jurisdiction agreements in favour of courts of Member States, as explained in footnote 726.

27 *See* www.standardandpoors.com/en_EU/delegate/getPDF?articleId=2097399&type=COMMENTS&subType=REGULATORY, last accessed at 31 August 2019. S&P Global Ratings headquartered in New York. *For a description of the group structure of S&P Global*, Simon 2017, pp. 14-16.

28 If, contrary to an exclusive jurisdiction clause, a claimant starts legal proceedings before a court of another Member State, the defendant must contest the jurisdiction of that court upon its appearance. Otherwise, the appearance is considered a tacit prorogation of jurisdiction so that the court seised is competent under Art. 26 (1) Brussels I Regulation (recast). Art. 26 (1) applies irrespective of whether an exclusive jurisdiction clause conferred jurisdiction upon the courts of a Member State or a third country. *E.g. in respect of Art. 24 (1) Brussels I Regulation*, CJEU 17 March 2016, C-175/15, ECLI:EU:C:2016:176 *(Taser International)*, paras. 23-25.

generally allowed to decide that the courts of a Member State[29] are (exclusively) competent to settle disputes that might arise in connection with their particular legal relationship. As Article 25 (1) Brussels I Regulation (recast) does not impose any restrictions as to which parties can conclude jurisdiction agreements, parties domiciled in both Member States and third countries can confer jurisdiction upon the courts of Member States.[30] If a jurisdiction clause confers jurisdiction upon the courts of a Member State, a court must examine the validity and the enforceability of the clause (under (a) and (b), respectively). Furthermore, a court must examine the scope of the clause in order to determine whether it covers a claim for damages based on Article 35a CRA Regulation (under (c)).

(a) Validity

(i) – Formal validity

From the perspective of formal validity, jurisdiction agreements between credit rating agencies and issuers or investors must comply with the requirements under Article 25 (1) and (2) Brussels I Regulation (recast). These requirements serve to check whether there is an actual agreement between the parties.[31] Under Article 25 (1) Brussels I Regulation (recast), a jurisdiction agreement is valid if the agreement is: '(a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.' In the case of *El Majdoub v CarsOnTheWeb.Deutschland GmbH*, the CJEU held that courts must interpret these conditions restrictively, because a valid jurisdiction agreement precludes the jurisdiction of other courts under

29 Art. 25 (1) Brussels I Regulation (recast) applies only if the parties have conferred jurisdiction upon the courts of a Member State. However, jurisdiction clauses in the context of the credit rating industry will often confer jurisdiction upon the US courts. In such situations, it not always clear whether the other provisions of the Brussels I Regulation (recast) apply (*see* section 4.3.3.3 (b) in detail).

30 Garcimartín 2015, no. 9.10. *In the context of credit rating agencies* Happ 2015, p. 99. Concurrence between the Brussels I Regulation (recast) and the Hague Choice of Court Convention occurs when one or both of the parties that confer jurisdiction upon a court of a Member State is or are domiciled in a third state that is a party to the Hague Choice of Court Convention. In those situations, the Hague Choice of Court Convention applies under Art. 26 (6) Hague Choice of Court Convention and Art. 71 (1) Brussels I Regulation (recast). Art. 25 (1) Brussels I Regulation also allows these parties to confer jurisdiction upon a court of a Member State. This section only discusses the application of Art. 25 Brussels I Regulation (recast). Section 4.3.3.3 (a) discusses the application of the Hague Choice of Court Convention.

31 CJEU 7 July 2016, C-222/15, ECLI:EU:C:2016:525 (*Höszig*), para 37.

the rules for general and special jurisdiction.[32] If contracts are concluded online, the requirement that a jurisdiction agreement must be in writing or evidenced in writing is replaced by Article 25 (2) Brussels I Regulation (recast), which stipulates that '[a]ny communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing' [under Article 25 (1) (a) Brussels I Regulation (recast)]'.

For jurisdiction clauses included in general terms and conditions to be binding upon the other party, the electronic communication must include an explicit reference to the general terms and conditions.[33] Furthermore, under Article 25 (2) Brussels I Regulation (recast), the other party should be able to make a durable record of the terms. According to Garcimartín, the other party must be able to access and save the terms prior to the conclusion of the contract. A reference on a website that cannot be downloaded does not suffice for this purpose.[34] In the case of *El Majdoub v CarsOnTheWeb.Deutschland GmbH*, the CJEU held that the formal requirements under Article 23 Brussels I Regulation are met if 'it is possible to create a durable record of an electronic communication by printing it out or saving it to a backup tape or disk or storing it in some other way'.[35] The validity of the terms does not depend on whether such durable record has actually been made.[36]

From the perspective of formal validity, credit rating agencies are hence able to include jurisdiction clauses in contracts for solicited ratings and in standard terms and conditions of subscription contracts, as long as they comply with the conditions explained above. Furthermore, jurisdiction clauses included in general Terms of Use of a website can be valid as well, as long as an express reference to the general terms is made and a durable record of the general terms can be made prior to the registration.[37]

(ii) – Material validity

Furthermore, courts must assess the material validity of a jurisdiction clause. Courts will do so in accordance with the applicable national law. Indeed, under Article 25 (1) Brussels I Regulation (recast), a jurisdiction agreement shall not be 'null and void as to its substantive validity under the law of that Member

32 CJEU 21 May 2015, C-322/14, ECLI:EU:C:2015:334 (*El Majdoub v CarsOnTheWeb.Deutschland GmbH*), para 25, in respect of Art. 23 Brussels I Regulation. *Cf.* Magnus & Mankowski 2016, p. 605.

33 *Cf.* Garcimartín 2015, no. 9.43.

34 Garcimartín 2015, no. 9.43. *See also* Magnus & Mankowski 2016, pp. 650-651 and Tang 2015, pp. 124-125.

35 CJEU 21 May 2015, C-322/14, ECLI:EU:C:2015:334 (*El Majdoub v CarsOnTheWeb.Deutschland GmbH*), paras. 33-34.

36 CJEU 21 May 2015, C-322/14, ECLI:EU:C:2015:334 (*El Majdoub v CarsOnTheWeb.Deutschland GmbH*), paras. 33-34.

37 In order to register and access credit ratings, often, the relevant box on the website must be clicked, confirming that the person who wishes to register accepted the general terms and conditions.

State', viz. under the law of the Member State designated in the agreement including its rules of Private International Law.[38]

If a credit rating agency and an investor concluded a paid subscription contract that included a jurisdiction clause under the general terms used by the credit rating agency, an investor can attempt to dispute the substantive validity of such a jurisdiction clause under the Unfair Terms in Consumer Contracts Directive.[39] The Unfair Terms in Consumer Contracts Directive applies to contracts concluded between sellers or suppliers and consumers.[40] In practice, the Directive will only be of limited relevance in disputes over credit rating agency liability, because it applies only to investors who qualify as 'consumers' under Article 2 (b) Unfair Terms in Consumer Contracts Directive. If at all, investors qualify as consumers only if they are natural persons who do not act in the scope of their profession or business.[41]

Under the Unfair Terms in Consumer Contracts Directive, '[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.[42] Member States need to ensure that unfair terms are not binding upon consumers.[43] A term is not individually negotiated if it has been drafted in advance and if the consumer had no influence on the

38 Recital 20 Brussels I Regulation (recast). *Also* Garcimartín 2015, no. 9.32 and 9.55 and Tang 2015, p. 129. Under the concept of severability (Art. 25 (5) Brussels I Regulation (recast)), the validity of a jurisdiction clause and the law applicable to it shall be assessed irrespective of the validity of and the law applicable to the main contract. When determining the applicable national law, it must be kept in mind that the Rome I Regulation does not apply because jurisdiction clauses have been excluded from the scope of the Rome I Regulation under Art. 1 (2) (e) Rome I Regulation. Therefore, the applicable law has to be determined in accordance with national rules of Private International Law. At first sight, Art. 25 (1) Brussels I Regulation (recast) seems to have established a clear rule as regards the substantive validity of jurisdiction clauses. However, a close reading of the provision reveals that the applicable national law will only be used to determine whether a jurisdiction clause is null and void, while it remains unclear whether other aspects of substantive validity have to be determined autonomously or in accordance with the applicable national law. As Magnus & Mankowski indicated, if national law would apply as a whole, unclear doctrines, such as the doctrine of consideration under English law, would have to be considered in order to determine matters of jurisdiction, which would lead to complications and uncertainty. Magnus & Mankowski 2016, p. 628.

39 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. *Cf. in the context of electronic contracts and consumers* Tang 2015, pp. 129-130 and Gillies 2008, p. 99. Gargantini remarked that the relationship between the Brussels I Regulation (recast) and the Unfair Terms in Consumer Contracts has not been clarified by means of an express provision, Gargantini 2016, p. 22. *Cf. also* Knigge 2012, p. 95, Gillies 2008, p. 100 and Kuypers 2008, p. 707.

40 Art. 1 (1) Unfair Terms in Consumer Contracts Directive.

41 Art. 2 (b) Unfair Terms in Consumer Contracts Directive.

42 Art. 3 (1) Unfair Terms in Consumer Contracts Directive.

43 Art. 6 (1) Unfair Terms in Consumer Contracts Directive.

term.[44] Therefore, general terms and conditions used by credit rating agency that have to be accepted in order to complete a paid subscription can fall within the scope of the Unfair Terms in Consumer Contracts Directive. Yet, the simple fact that certain terms falls within the scope of the Unfair Terms in Consumer Contracts Directive, does not automatically entail that those terms are unfair.[45] Terms, and more specifically, jurisdiction clauses qualify as unfair if they fall into one of the categories listed in the Annex of the Unfair Terms in Consumer Contracts Directive. For instance, under Annex 1 (q), terms that have the objective or effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy' might be unfair if they cause a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer and contrary to the requirement of good faith.[46]

In the case of *Océano Grupo Editorial and Salvat Editores*, the CJEU held that an exclusive jurisdiction clause conferring jurisdiction upon the courts of the principal place of business of the seller or supplier, while the consumer was domiciled in another place, had to be considered unfair within the meaning of Article 3 (1) Unfair Terms in Consumer Contracts Directive and, contrary to good faith, caused a significant imbalance in the parties' rights and obligations.[47] The imbalance was caused by the fact that the jurisdiction clause required the consumer to start legal proceedings a long way from his domicile. The claim against the defendant concerned a small amount of money, especially in relation to the travel costs that needed to be made to appear before the courts designated in the jurisdiction clause. The CJEU concluded that these travel costs hindered the claimant in seeking any legal remedy.[48] In concrete disputes over credit rating agency liability, it will depend on the circumstances of the case whether one could apply the reasoning of *Océano Grupo Editorial and Salvat Editores*. Only in exceptional situations, it might occur that natural persons, who wish to start legal proceedings against a credit rating agency for relatively small claims, are hindered in seeking a legal remedy by a jurisdiction clause that requires them to start proceedings before the courts of another Member State.

---

44 Art. 3 (2) Unfair Terms in Consumer Contracts Directive.

45 *See* Tang 2015, p. 130.

46 Art. 3 (3) Unfair Terms in Consumer Contracts Directive. As the Annex constitutes an indicative and non-exhaustive list, other clauses can also be considered unfair under the Directive. Tang 2015, p. 130.

47 ECJ 27 June 2000, C-240/98, ECLI:EU:C:2000:346 (*Océano Grupo Editorial and Salvat Editores*), para 24. Tang 2015, p. 130. The CJEU confirmed its approach in subsequent decisions e.g. CJEU 9 November 2010, C-137/08, ECLI:EU:C:2010:659 (*VB Pénzügyi Lízing*), paras. 53-55 and ECJ 4 June 2009, C-243/08, ECLI:EU:C:2009:350 (*Pannon GSM*), paras. 40-44.

48 ECJ 27 June 2000, C-240/98, ECLI:EU:C:2000:346 (*Océano Grupo Editorial and Salvat Editores*), para 22.

(b) Enforceability

Even if the jurisdiction agreement is valid, the designated court cannot assume jurisdiction if another court has exclusive jurisdiction under Article 24 Brussels I Regulation (recast) or if one of the jurisdiction grounds under Chapter II, section 3, 4 or 5 of the Brussels I Regulation (recast) applies.[49] These sections create special grounds of jurisdiction for disputes in which weaker parties – policyholders of insurance, consumers or employees – are involved. If such a weaker party is involved, jurisdiction clauses are allowed only if the conditions under Article 15, 19 and 23 Brussels I Regulation (recast) have been satisfied.

In the context of credit rating agency liability, the special grounds of jurisdiction under Chapter II, section 3, 4 or 5 of the Brussels I Regulation (recast) do not play a large role in relation to claims for damages based on Article 35a CRA Regulation. It is only when an investor, who qualifies as a consumer,[50] entered into a paid subscription contract with a credit rating agency that one can wonder whether the special rules relating to consumer contracts (Section 4 Brussels I Regulation (recast)) apply. Scholars however assumed that Article 17 Brussels I Regulation (recast) does not cover claims based on Article 35a CRA Regulation, because Article 17 involves matters relating to contract instead of matters relating to tort.[51] As claims based on Article 35a CRA Regulation qualify as matters relating to tort, this approach accords with the system of the Brussels I Regulation (recast). At the same time, however, this approach feels artificial, because the claim based on Article 35a CRA Regulation is closely connected to the existence of the paid subscription in this particular case.

(c) Scope

Finally, a national court must determine whether the valid jurisdiction clause covers claims based on Article 35a CRA Regulation. Under Article 25 (1) Brussels I Regulation (recast), jurisdiction clauses cover disputes 'which have arisen or which may arise in connection with a particular legal relationship'. As appeared from the CJEU's decision in *Powell Duffryn plc*, the effect of jurisdiction clauses is limited in order to avoid that a party is surprised that jurisdiction has been conferred upon a certain court.[52] Furthermore, the scope of a jurisdiction clause depends on the intention of the parties and wording of the clause[53] and, if the wording leaves room for interpretation, the interpretation

49 *Cf.* Gargantini 2016, p. 20, Magnus & Mankowski 2016, pp. 592 ff., Tang 2015, pp. 131 ff. and Knigge 2012, p. 97.

50 Dutta questioned when subscribers qualified as consumers, Dutta 2014, p. 36.

51 *See e.g.* Steinrötter 2015, p. 112 and Dutta 2013, p. 1731.

52 ECJ 10 March 1992, C-214/89, ECLI:EU:C:1992:115 (*Powell Duffryn plc v Wolfgang Petereit*), para 31. *Cf.* Briggs 2008, no. 7.89.

53 Magnus & Mankowski 2016, p. 655.

of the clause under the applicable national law.[54] Tort claims arising in connection with the relationship between a credit rating agency and an issuer or investor could fall under the scope of broadly formulated jurisdiction agreements.[55] For instance, if an issuer brings a claim for damages based on Article 35a CRA Regulation while the issuer had concluded a contract for a solicited rating with a credit rating agency, which contains a valid jurisdiction agreement, the claim for damages can be covered by the jurisdiction agreement.

Overall, this section analysed the validity, enforceability and the scope of jurisdiction agreements in favour of the courts of Member States. In the context of credit rating agency liability, broadly formulated jurisdiction clauses in favour of the courts of Member States included in contracts for solicited credit ratings, can cover claims for damages brought by issuers under Article 35a CRA Regulation. Furthermore, broadly formulated jurisdiction clauses in favour of the courts of Member States and concluded in paid subscription contracts between credit rating agencies and professional investors, can cover claims for damages brought by those investors under Article 35a CRA Regulation. Retail investors may, however, be protected under the Unfair Terms in Consumer Contracts Directive. Credit rating agencies can include jurisdiction clauses in their Terms of Use, which an investor (or another person) must accept prior to being able to access the part of the website that displays credit ratings.

4.3.3.3 Jurisdiction agreements in favour of courts of third countries

Jurisdiction clauses can also confer jurisdiction upon the courts of third countries. In the context of the credit rating industry, the importance of this type of jurisdiction clause should not be underestimated. The big three credit rating agencies often include jurisdiction clauses in favour of the courts of New York in their general terms and conditions (of their websites).[56] Article 25 Brussels I Regulation (recast) does not determine the validity of jurisdiction agreements

54 *See* Briggs 2008, no. 7.89 and Garcimartín 2015, no. 9.87. The reference to the applicable national law might lead to differences between the Member States. For instance, English and French courts could be said to interpret jurisdiction clauses less broadly than other courts, Magnus & Mankowski 2016, p. 656.

55 *Cf.* Steinrötter 2015, p. 112. *Cf. generally* Magnus & Mankowski 2016, p. 660 and Garcimartín 2015, no. 9.88.

56 *See e.g.* the Terms of Use of Standard & Poor's' website, available at www.standardandpoors.com/en_US/web/guest/regulatory/termsofuse, which state that: 'The parties agree that the State and Federal courts of New York shall be the exclusive forums for any dispute arising out of this Agreement and the parties hereby consent to the personal jurisdiction of such courts', the Terms of Use of Moody's' website, available at www.moodys.com/termsofuseinfo.aspx (also involving an arbitration clause) and the Terms of Use of Fitch's website, available at www.thefitchgroup.com/site/termsofuse. The Terms of Use of DBRS submit jurisdiction to the courts of Ontario (Canada), www.dbrs.com/terms-and-conditions/. All websites were last accessed at 31 August 2019.

conferring jurisdiction upon the courts of third countries.[57] In such situations, the question arises of how the court seised has to determine its competence: in accordance with the other rules of the Brussels I Regulation (recast) or in accordance with national rules of Private International Law (under (b)). Yet another possibility is that the jurisdiction clause falls within the scope of the Hague Choice of Court Convention (under (a)).

(a) Hague Choice of Court Convention

The Convention of 30 June 2005 on Choice of Courts Agreements (also known as the Hague Choice of Court Convention) arranges, amongst others, for the international validity of exclusive jurisdiction clauses between the contracting states. The Convention stipulates that courts of the contracting states shall suspend or dismiss proceedings to which an exclusive jurisdiction agreement applies which confer jurisdiction upon the courts of another contracting state.[58] States, such as China, the US, Mexico, Singapore, and the EU signed the Convention, but, up to 1 April 2019, the Convention had only entered into force in the EU, Denmark, Mexico, Montenegro and Singapore.[59]

In the context of this dissertation, courts of Member States will often have to decide on jurisdiction clauses in favour of US courts. An important consequence of the fact that the Convention did not enter into force in the US, however, is that Member State courts are not required to deny jurisdiction under the Hague Choice of Court Convention when confronted with an exclusive jurisdiction clause in favour of the US courts. From this perspective, the Hague Choice of Court Convention currently does not have much practical implications in the area of credit rating agency liability. Yet the Hague Choice of Court Convention does have potentially far-reaching consequences in this regard and has already grown in importance as from 1 April 2019. On that date the Hague Choice of Court Convention entered into force in the United Kingdom of Great Britain and Northern Ireland.[60]

Even though the courts of contracting states are under the general obligation to respect exclusive jurisdiction in favour of the courts of other contracting states, the contracting states have multiple opportunities to derive from this general obligation. Under Article 6 Hague Choice of Court Convention, the

57 Strikwerda & Schaafsma 2019, no. 60.
58 Art. 6 Hague Choice of Court Convention.
59 *See* www.hcch.net/en/instruments/conventions/status-table/?cid=98 last accessed at 31 August 2019. Denmark separately joined the Hague Choice of Court Convention, because Denmark was excluded from the entry by the European Union. Denmark takes a special position in this respect as Denmark is not bound by European legislative measures to develop judicial cooperation in civil matters under Art. 81 TFEU. J.J. Kuipers, 'The European Union and the Hague Conference on Private International Law – Forced Marriage or Fortunate Partnership', in: H. de Waele & J.J. Kuipers, *The European Union's Emerging International Identity*, Leiden: Brill Nijhoff 2013, pp. 177-178.
60 *See* www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn, last accessed at 31 August 2019.

courts do not need to stay or dismiss proceedings when: '(a) the agreement is null and void under the law of the State of the chosen court; (b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised; (c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised; (d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or (e) the chosen court has decided not to hear the case.' In particular, options (b) and (c) provide contracting states with a tool to limit the validity of jurisdiction agreements anyway.

(b) Brussels I Regulation (recast) or national rules of Private International Law?

When the Hague Choice of Court Convention and Article 25 Brussels I Regulation (recast) do not apply, the question arises of how the court seised must determine its jurisdiction. The Brussels I Regulation (recast) itself does not provide guidelines.[61] Under the current state of EU law, it is uncertain which rules apply when the defendant has its domicile (viz. if the credit rating agency is established) in a Member State: the other rules of the Brussels I Regulation (recast) or national rules of Private International Law.[62] This section provides a brief overview of the different approaches adopted by scholars.[63]

On the one hand, it is possible to take the approach that the Brussels I Regulation (recast) should not apply if the parties conferred jurisdiction upon third country courts.[64] Member State courts would then have to determine jurisdiction in accordance with their national rules of Private International Law. The CJEU seems to have adopted this approach in *Coreck Maritime GmbH v Handelsveem BV and Others*, where it held that: 'Article 17 of the Convention [currently article 25 Brussels I Regulation (recast)] does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits.'[65] In order to prevent each court from applying its

61 *E.g.* Kistler 2018, p. 67, Magnus & Mankowski 2016, p. 608 and *see* Briggs 2008, no. 7.98. Assuming the defendant is 'domiciled' in a Member State.

62 *Cf. e.g.* Kistler 2018, p. 94, Van Bochove 2017, p. 4, Magnus & Mankowski 2016, p. 610 and Hartley 2013, no. 5.08 and no. 5.19.

63 *As based on recent overviews provided by* Kistler 2018 and Van Bochove 2017, pp. 4 ff. In the context of credit rating agency liability, *see also* the brief overview provided by Happ 2015, pp. 100-101.

64 *See e.g.* Garcimartín 2015, no. 9.13, Briggs 2008, no. 7.99 and the Schlosser Report 1979, para 176. *Cf.* Strikwerda & Schaafsma 2019, no. 60. *As described by e.g.* Kistler 2018, pp. 71 ff. and Van Bochove 2017, pp. 4-5. In the context of credit rating agency liability, Happ concluded that the validity of the jurisdiction clause must be determined under the applicable national law (Happ 2015, pp. 100-101).

65 ECJ 9 November 2000, C-387/98, ECLI:EU:C:2000:606 (*Coreck Maritime GmbH v Handelsveem BV and Others*), para 19. *See also* Kistler 2018, pp. 71-74 and Van Bochove 2017, pp. 4-5,

national rules of Private International Law – which could lead to differences between the Member States, some scholars have proposed awarding 'reflective effect' to Article 25 Brussels I Regulation (recast). Jurisdiction clauses in favour of the courts of third countries are then valid when they satisfy the requirements under Article 25 (1) Brussels Regulation (recast) anyway.[66]

On the other hand, the approach can be taken that the other provisions of the Brussels I Regulation (recast) apply if the defendant has its domicile in a Member State, irrespective of the existence of a jurisdiction clause in favour of the courts of a third country.[67] Then, the existence of a jurisdiction clause in favour of the courts of a third country would solely entail that Article 25 Brussels I Regulation (recast) does not apply to the dispute. Hartley stated that this approach might be derived from the opinion of the CJEU on the new Lugano Convention in 2006 – published subsequent to the CJEU's decision in *Coreck Maritime GmbH v Handelsveem BV and Others*. The CJEU stated: 'Thus, where the new Lugano Convention contains articles identical to Articles 22 and 23 of Regulation No 44/2001 and leads on that basis to selection as the appropriate forum of a court of a non-member country which is a party to that Convention, where the defendant is domiciled in a Member State, in the absence of the Convention, that latter State would be the appropriate forum, whereas under the Convention it is the non-member country'.[68] The CJEU hence seems to have indicated that, if parties made a jurisdiction choice in favour of the courts of a state that is a party to the Lugano Convention, the Lugano Convention entails that this court is competent, while, otherwise, the courts of the Member State where the defendant is domiciled would have jurisdiction. It could be derived from that statement that, if a jurisdiction clause has conferred jurisdiction upon the courts of a third country (viz. a country not party to the Lugano Convention), the courts of Member States might still be competent if the defendant is domiciled in a Member State, which would

Magnus & Mankowski 2016, p 609, Hartley 2015, p. 196, Briggs 2008, no. 7.98 and Fentiman 2006, p. 708.

66 *This approach was described by e.g.* Kistler 2018, p. 89, Van Bochove 2017, p. 5, Hartley 2013, no. 5.05 and Fentiman 2006, pp. 721-722. In favour of reflective effect: Magnus & Mankowski 2016, p 610 and Garcimartín 2015, no. 9.15. Against reflective effect: Briggs 2008, no. 7.103 and Kuypers 2008, p. 229.

67 *See* Hartley 2015, pp. 196-198 and Hartley 2013, no. 5.12-5.15 and no. 5.19. *This approach was described by* Van Bochove 2017, pp. 5-6. Kistler 2018, p. 76 stated 'there is the strong presumption that third state choice-of-court agreements are regulated by the BRR'.

68 ECJ 7 February 2006, Opinion 1/03, [2006] ECR I-1145, para 135. Hartley 2015, pp. 196-198. *As described by* Van Bochove 2017, p. 5. *Also* Kristler 2018, pp. 80 ff. The Lugano Convention (the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in 2007) is concluded between the Member States and Iceland, Norway and Switzerland. There is no agreement upon whether the practice of the CJEU has changed after *Coreck Maritime GmbH v Handelsveem BV and Others*, *see* Briggs 2008, no. 7.99-7.101.

justify Hartley's conclusion that the other provisions of the Brussels I Regulation (recast) continue to apply.

Fentiman found support for the latter approach in the CJEU's more recent case law. He referred to the CJEU's ruling in *Andrew Owusu v N.B. Jackson.*[69] In *Andrew Owusu v N.B. Jackson*, the CJEU held that a national court cannot decline jurisdiction under Article 2 Brussels Convention (Art. 4 Brussels I Regulation (recast)) if the defendant is domiciled in that Member State 'on the ground that a court of a non-Contracting State would be a more appropriate forum' to deal with the case.[70] The CJEU did not clarify the relationship between *Owusu* and *Coreck Maritime*,[71] so that the effect of the CJEU's decision in *Owusu* on jurisdiction clauses in favour of third countries remained uncertain. However, this judgment can be argued to show that the application of the rules of the Brussels Convention (and the Brussels I Regulation (recast)) is mandatory, even if the courts of a third country could be regarded as a more appropriate forum (for instance, because of a jurisdiction clause in favour of the courts of that third country).[72]

This conclusion was, to some extent, confirmed by the decision of the CJEU in *Ahmed Mahamdia v People's Democratic Republic of Algeria*.[73] The CJEU held that the special rules on the protection of employees apply despite the existence of a jurisdiction clause in favour of the courts of a third country. In *Ahmed Mahamdia*, Mahamdia (domiciled in Germany) had concluded a contract of employment with the Ministry of Foreign Affairs of Algeria. The employment contract contained an exclusive jurisdiction clause for the courts of Algeria.[74] When Mahamdia was dismissed in 2007, he started proceedings before the *Arbeitsgericht* Berlin, contrary to the jurisdiction clause.[75] The German lower court referred to the CJEU for a preliminary ruling on the question whether the exclusive jurisdiction clause could fall under the scope of Article 21(2) Brussels I Regulation (old) and whether it could preclude the German courts from assuming jurisdiction based on Articles 18 and 19 Brussels I Regulation (old).[76] Under Article 21(2) Brussels I Regulation (old), a jurisdiction agreement stipulated in an employment contract is valid if it 'allows the employee to bring proceedings in courts other than those indicated in [Article 19 Brussels I Regulation (old)]'. Hence, the German lower court asked whether an

69 Fentiman 2006, p. 712. *See also* Van Bochove 2017, p. 5, fn. 51.
70 ECJ 1 March 2005, C-281/02, ECLI:EU:C:2005:120 (*Andrew Owusu v N.B. Jackson*), para 46. Fentiman 2006, p. 712.
71 Fentiman 2006, p. 714.
72 *Cf.* Fentiman 2006, pp. 714-715. Briggs argued strongly against this conclusion, Briggs 2008, no. 7.99 and no. 7.100.
73 CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*). *Cf.* Kistler 2018, pp. 75 and 83.
74 CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*), paras. 18-19.
75 CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*), paras. 22-23.
76 CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*), para 36.

exclusive jurisdiction agreement for a third country could set aside the protection under Article 18 and 19 Brussels I Regulation (old).

The CJEU held that 'it does not follow either from the wording or from the purpose of article 21 of Regulation No 44/2011 [Article 23 Brussels I Regulation recast] that' a jurisdiction agreement 'may not confer jurisdiction on the courts of a third State, provided that it does not exclude the jurisdiction conferred on the basis of the articles of the regulation'.[77] Hence, a jurisdiction clause can confer jurisdiction upon the courts of a third country, but that it cannot exclude the jurisdiction of the courts of a Member State under the special rules for the protection of employees.[78] More broadly, *Ahmed Mahamdia* might entail that a jurisdiction agreement in favour of the courts of a third country cannot exclude the application of the special rules on the protection of weaker parties under the Brussels I Regulation (old)/(recast).[79] However, it seems a bridge too far to conclude that *Ahmed Mahamdia* entails that all other provisions of the Brussels I Regulation (old)/(recast) (such as the rules for general and special jurisdiction under Chapter III Section 1 and 2, respectively) continue to apply.[80] Thus, at present, it is still not entirely clear in which way national courts have to deal with jurisdiction clauses in favour of the courts of third countries.

In the context of the credit rating industry, the current lack of certainty in this respect is unfortunate, because agreements concluded by credit rating agencies will often include jurisdiction clauses in favour of the US courts.[81] Moreover, in practice, it can make a difference whether a national court applies the other rules of the Brussels I Regulation (recast) or its national rules of Private International Law. If the other provisions of the Brussels I Regulation (recast) apply, a court can base its jurisdiction on the other grounds of the Brussels I Regulation (recast), without giving effect to the choice of the parties. It can however be seriously questioned whether this approach accords with the system of the Brussels I Regulation (recast), that attaches great importance to the autonomy of the parties and to the principle of legal certainty.[82] Alternatively, national courts determine jurisdiction in accordance with their national rules of Private International Law. Although, in general, courts of the Member

77 CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*), para 65.
78 *Cf.* CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*), para 66. Magnus & Mankowski 2016, p. 609.
79 *Cf.* Hartley 2013, no. 5.18-5.19.
80 *Cf.* Magnus & Mankowski 2016, p. 610.
81 See, for instance, the Terms of Use of Standard & Poor's, available at www.standardandpoors.com/en_US/web/guest/regulatory/termsofuse, which state that: 'The parties agree that the State and Federal courts of New York shall be the exclusive forums for any dispute arising out of this Agreement and the parties hereby consent to the personal jurisdiction of such courts', last accessed at 31 August 2019.
82 *Cf.* Fentiman 2006, p. 721. *On the importance of party autonomy, see also* Kistler 2018, pp. 85-86.

States seem to uphold jurisdiction clauses,[83] the particularities of each legal system might constitute differences between the Member States and cause uncertainties. The main advantage of this approach is that national courts can decide to respect the autonomy of the parties so that jurisdiction agreements are not sidestepped by applying the other provisions of the Brussels I Regulation (recast).

Overall, this section analysed the validity of jurisdiction clauses conferring exclusive jurisdiction upon the courts of third countries. Member State courts must investigate whether the Hague Choice of Court Convention applies. If so, courts must respect the exclusive jurisdiction clause and cannot assume jurisdiction. Currently, the importance of the Hague Choice of Court Convention is still rather limited in the context of credit rating agency liability and contracting states have several possibilities to derive from the general obligation to respect exclusive jurisdiction clauses. If the Hague Choice of Court Convention is not applicable, it is uncertain how Member State courts must determine the validity of a jurisdiction agreement. Should a national court (1) apply the other remaining provisions of the Brussels I Regulation (recast) or (2) apply its national rules of Private International Law? The different approaches can lead to different decisions on the validity of exclusive jurisdiction clauses in favour of the courts of third countries. Whereas the first approach sidesteps party autonomy, the second approach respects party autonomy. Consequently, it is currently difficult for parties to predict whether a jurisdiction clause in favour of the courts of a third country is valid.

4.3.4 General ground for jurisdiction

In the absence of a (valid) jurisdiction agreement, a national court is competent when the defendant is domiciled in the Member State of that court. Under the general rule of Article 4 (1) Brussels I Regulation (recast), the defendant

83 For instance, under Dutch, English, French and German law, jurisdiction clauses are likely to be upheld. For the Dutch rules on jurisdiction clauses, see Art. 8 and 9 Wetboek van Burgerlijke Rechtsvordering (*see also* Strikwerda & Schaafsma 2019, no. 60 and Kuypers 2008, pp. 232 ff.). Under English law, jurisdiction clauses will usually be upheld 'in the absence of strong reasons for departing from it' (*Donohue v Armco* [2001] UKHL 64, [2002] 1 All ER 749, [2002] 1 All ER (Comm) 97, [2002] 1 Lloyd's Rep 425, para 24 by Lord Bingham). Under French law, a jurisdiction clause can be upheld as long as it has been made in the context of an international dispute ('*un litige internationale*') and as long as it is not contrary to the '*compétence territoriale impérative*' of the French courts (Cour du Cassation (Chambre Civile 1) 17 December 1985, 84-16338, Bulletin 1985, I, no. 354, p. 318 (*CSEE v SORELEC*) and Audit & d'Avout 2013, no. 454, Loussouarn, Bourel & De Vareilles-Sommières 2013, no. 714 and *see also* Kuypers 2008, p. 238). For the German rules on jurisdiction clauses, see § 38-39 Zivilprozessordnung (ZPO). Under § 38 ZPO, a jurisdiction clause will be allowed if the parties have complied with several conditions. The conditions vary depending on the specific circumstances of the situation (*see* Kuypers 2008, p. 237).

shall be summoned to appear before the court that is based in the Member State in which the defendant has its domicile (*forum rei*). If the defendant is a legal person, the domicile is considered to be the place where the legal person has its statutory seat, its central administration or its principal place of business under Article 63 (1) Brussels I Regulation (recast).[84]

In the context of credit rating agency liability, it is important to note that the CRA Regulationprovides for a mechanism that ensures issuers and investors can sue credit rating agencies before the national courts of Member States. As discussed in section 3.5.3.1, the CRA Regulation requires credit rating agencies to be established and registered in a Member State in order for their credit ratings to be allowed to be used for regulatory purposes (by, amongst others, credit institutions, investment firms and insurance undertakings).[85] In order to apply for registration, under Article 14 (1) CRA Regulation, a credit rating agency must be 'a legal person established in the Community'. As stated by Recital 55 CRA I Regulation, credit rating agencies headquartered outside the EU must establish subsidiaries in the EU in order to be able to apply for registration.[86] Hereby, credit rating agencies have an incentive to establish separate legal entities with their statutory seats in the EU. Hence, if a claim is brought against a credit rating agency established and registered in the EU in the sense of the CRA Regulation,[87] the courts of the Member State in which the credit rating agency is established can assume jurisdiction on the basis of Article 4 (1) jo. Article 63 (1) Brussels I Regulation (recast).

4.3.5 Special ground for jurisdiction

4.3.5.1 Matters relating to tort

If a defendant credit rating agency is registered and established in a Member State, national courts can assume jurisdiction on the basis of the 'special'

84 *Also e.g.* Heuser 2019, p. 251, Baumgartner 2015, p. 596 and Happ 2015, pp. 169-170.

85 Art. 4 (1) CRA Regulation. Pursuant to Art. 3 (1) (g) CRA Regulation, the term 'regulatory purposes' means 'the use of credit ratings for the specific purpose of complying with Union law, or with Union law as implemented by the national legislation of the Member States'. *See in more detail* section 3.4.2.1 (a). *Cf. also* Wimmer 2017, p. 247.

86 *See* Recital 55 CRA I Regulation. *See also* Dutta 2014, p. 34 and Dutta 2013, p. 1732. *Cf.* Gietzelt & Ungerer 2013, p. 339.

87 The CRA Regulation uses the term 'established' to indicate that a (separate) legal entity needs to be established at European territory. This use of the term 'established' must be distinguished from the meaning of the term 'establishment' in the context of Article 7 (5) Brussels I Regulation (recast), which does not necessarily require a separate legal entity to be established. Article 7 (5) Brussels I Regulation (recast) creates a special ground for jurisdiction in case a dispute arises out of 'the operations of a branch, agency or other establishment' when the main legal entity is domiciled in the EU. In particular circumstances, this rule could be relevant in disputes concerning credit rating agency liability. This dissertation, however, does not discuss this rule in further detail.

ground for jurisdiction regarding matters relating to tort under Article 7 (2) Brussels I Regulation (recast).[88] Article 7 Brussels I Regulation (recast) creates bases for jurisdiction that exist alongside the general ground for jurisdiction under Article 4 Brussels I Regulation (recast). A claimant can choose to start proceedings before the courts competent under Article 4 or under Article 7 Brussels I Regulation (recast).[89] As Article 7 Brussels I Regulation (recast) forms an exception to the general ground for jurisdiction, the special grounds have to interpreted restrictively.[90] National courts can only assume jurisdiction based on Article 7 Brussels I Regulation (recast) if there is 'a close connection between the court and the action or in order to facilitate the sound administration of justice'.[91] The requirement of a close connection is meant to 'ensure legal certainty' and to enhance foreseeability, so that the defendant will not be sued in a court 'he could not reasonably have foreseen'.[92]

Under Article 7 (2) Brussels I Regulation (recast), disputes involving matters relating to tort can be heard in the courts of the place where the harmful event occurred or may occur. As held by the CJEU, the place where the harmful event occurred must be understood 'as being intended to cover both the place where the damage occurred [the *Erfolgsort*] and the place of the event giving rise to it [the *Handlungsort*]'.[93] The claimant may choose to start proceedings before the courts of the *Handlungsort* or the *Erfolgsort*.[94] The term 'damage' under Article 7 (2) Brussels I Regulation (recast) covers direct loss only. National courts cannot base their jurisdiction on Article 7 (2) Brussels I Regulation (recast) if indirect or consequential (financial) loss occurred within their territory, which was in fact the result of initial loss suffered in another Member State.[95]

The types of loss that issuers and investors could suffer as a result of an affected credit rating, does not form an obstacle for the application of Article 7 (2) Brussels I Regulation (recast). Financial loss and reputational loss can flow directly from affected credit ratings, and both do not qualify as indirect loss

88 The special grounds for jurisdiction do not apply to credit rating agencies established in third countries. *Also* Baumgartner 2015, pp. 597 ff.

89 Dumont du Voitel 2018, p. 188, Lehmann 2015a, no. 4.02 and Strikwerda & Schaafsma 2019, no. 44.

90 ECJ 27 September 1988, C-189/87, ECLI:EU:C:1988:459 (*Kalfelis v Bank Schröder*), para 19.

91 Recital 16 Brussels I Regulation (recast).

92 Recital 16 Brussels I Regulation (recast). Special jurisdiction does not serve to protect the claimant or the defendant, CJEU 25 October 2012, C-133/11, ECLI:EU:C:2012:664 (*Folien Fischer AG*), paras. 45-46.

93 ECJ 30 November 1976, C-21/76, ECLI:EU:C:1976:166 (*Handelskwekerij Bier v Mines de Potasse d'Alsace*), para 24.

94 CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), para 51.

95 ECJ 19 September 1995, C-364/93, ECLI:EU:C:1995:289 (*Marinari v Lloyd's Bank*), paras. 20-21. Furthermore, Art. 7 (2) Brussels I Regulation does not apply to indirect victims (ECJ 11 January 1990, C-220/88, ECLI:EU:C:1990:8 (*Dumez France and Others v Hessische Landesbank and Others*), para 20).

resulting from another source of initial loss. In this context, however, reference should be made to an Italian decision of 2012 on credit rating agency liability, in which the Italian Court of Cassation incorrectly seems to have qualified financial loss suffered by Italian investors as a consequence of credit rating activities as indirect loss.[96] The Italian Court of Cassation held that the Italian courts could not assume jurisdiction based on Article 5 (3) Brussels I Regulation in a case in which Italian investors purchased financial instruments in London. It considered irrelevant both the place of establishment of the bank where the financial instruments were deposited (Bologna) and the place where the credit rating was issued for determining jurisdiction.[97] From the assumption that Article 5 (3) Brussels I Regulation does not cover the place of future consequence of initial loss, the Italian Court of Cassation concluded that Italian courts did not have jurisdiction over claims for the compensation of financial loss caused by an incorrect credit rating for financial instruments purchased outside of Italy, brought against a credit rating agency which was not established or active on Italian territory.[98] This position of the Italian Court of Cassation does not seem apt in the context of case law of the CJEU[99] or, at least, was superseded by case law of the CJEU. As discussed in section 4.3.5.2, the place where the credit rating was issued could be relevant to determine the *Handlungsort*. As discussed in section 4.3.5.3 and 4.3.5.4, the place of financial loss or reputational loss (issuer's only) is relevant to determine the *Erfolgsort*.

4.3.5.2 Handlungsort

When a claim for damages has been based on Article 35a CRA Regulation, the *Handlungsort* can be determined by locating the act or omission that caused the losses suffered by an issuer or investor. For that purpose, it has to be identified whether a liability claim is based on (1) an issue of an initially

96 Corte di Cassazione Civile, Sezioni Unite 22 March 2012, no. 8076.

97 Corte di Cassazione Civile, Sezioni Unite 22 March 2012, no. 8076, p. 6.

98 Corte di Cassazione Civile, Sezioni Unite 22 March 2012, no. 8076, p. 6: '*In conclusione, va affermato il principio secondo cui l'art. 5, n. 3, del Regolamento CE n. 44 del 2001 (il quale stabilisce il criterio di collegamento per individuare la giurisdizione in materia di illeciti civili dolosi o colposi nel "luogo in cui l'evento dannoso è avvenuto o può avvenire") va interpretato nel senso che per tale luogo deve intendersi quello in cui è avvenuta la lesione del diritto della vittima, senza avere riguardo al luogo dove si sono verificate o portano verificarsi le conseguenze future di tale lesione; ne consegue che l'azione proposta contro una società di "rating", che non ha sede e non opera in Italia, per il risarcimento del danno conseguente all'ipotizzato errore nella valutazione di titoli finanziari acquistati fuori dal territorio nazionale è sottratta alla giurisdizione del giudice italiano.*'

99 In 2012, one could already doubt whether the decision of the Italian Court of Cassation was correct in light of the decision in *Kronhofer v Maier* in 2004 (ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier*)). In this case, the ECJ decided were the *Erfolgsort* of financial loss could not be located but did not treat the financial loss as indirect loss. *See* section 4.3.5.3.

incorrect credit rating; or (2) a failure to have adjusted a credit rating in time. As a consequence, the *Handlungsort* shall be located in (1) the place where the credit rating has been issued; or (2) the place where an adjustment of the credit rating should have been decided on. Even though these places can coincide, the underlying difference between these types of claims should not be neglected.

(a) Acts

If a credit rating agency has issued an incorrect credit rating, the *Handlungsort* can be located in the place where the credit rating was issued. A credit rating is deemed to have been issued 'when the credit rating has been published on the credit rating agency's website or by other means or distributed by subscription'.[100] Commonly, credit rating agencies issue their credit ratings through press releases on their websites. A press release contains the exact date of release and the credit rating agency (or the exact subsidiary) that issued the credit rating. Therefore, the *Handlungsort* will be located in the place where the credit rating agency that issued the credit rating is established and registered.[101] In such situations, the application of Article 7 (2) Brussels I Regulation (recast) might not have added value to the general ground for jurisdiction under Article 4 (1) Brussels I Regulation (recast).

A credit rating agency that is established and registered in the EU can issue credit ratings through a branch established in a third country. A credit rating agency established and registered in Ireland can for instance issue a credit rating by a Russian branch. However, according to Guidelines and Recommendations on the scope of application of the CRA Regulation published by ESMA, credit ratings issued by branches are deemed issued by their EU parent, as branches 'do not have a separate legal personality from their parent'.[102] The fact that a credit rating was issued by a branch hence does not seem to affect the location of the *Handlungsort* in the place where an EU credit rating agency is established and registered.

100 Art. 4 (2) CRA Regulation.

101 *Cf.* Steinrötter 2015, p. 113. *Cf. also* Dumont du Voitel 2018, p. 188 and Happ 2015, p. 195. In relation to credit rating agencies headquartered outside the EU which have subsidiaries in the EU, two situations must be distinguished. First, if an EU subsidiary released its own credit rating, the press release will state which subsidiary issued the credit rating. The *Handlungsort* will be the place where that subsidiary has been established and registered. Second, an EU subsidiary can endorse credit ratings issued initially by the parent company under Art. 4 (3) CRA Regulation (see section 3.4.2.1 (a)). Under Art. 4 (4) and (5) CRA Regulation, the subsidiary is fully responsible for endorsed credit ratings, because the endorsed credit rating is considered to have been issued by the subsidiary itself. Therefore, the *Handlungsort* of an endorsed credit rating might be the place where the credit rating agency that endorsed the credit rating is established and registered.

102 ESMA, Guidelines and Recommendations on the Scope of the CRA Regulation, para 16, available at www.esma.europa.eu/sites/default/files/library/2015/11/2013-720_en.pdf, last accessed at 31 August 2019.

(b) Omissions

Furthermore, issuers and investors can suffer losses if a credit rating agency has failed to adjust an existing credit rating (in time). Such a failure can occur if a credit rating agency omits to monitor and update a credit rating (in time). In such situations, the *Handlungsort* of an omission has to be determined.

To that end, national courts must locate the 'place of the relevant inactivity' by assessing the place where the 'activity ought to have taken place'.[103] For instance, in *ÖFAB v Koot*, creditors brought a claim against a member of the board and the main shareholder of the company Copperhill 'on the ground that they neglected their legal obligations with respect to that company'.[104] They alleged that the defendants had omitted to fulfil their legal obligation to monitor the financial situation of the company.[105] The CJEU located the *Handlungsort* in the place where the information on the financial situation and activities of Copperhill – which the defendants would have needed to fulfil their legal obligations – should have been available.[106]

In accordance with *ÖFAB v Koot*, the place where a credit rating should have been adjusted seems relevant. But how do you locate the place where a credit rating should have been adjusted? As mentioned in section 3.3.2.1, after publication, credit rating agencies monitor issuers and their financial instruments in order to keep credit ratings up to date.[107] Usually, the team of rating analysts that prepared the initial credit rating is responsible for the monitoring of that rating as well.[108] If such a monitoring team decides that the rating must be changed or reconsidered, a rating committee is called upon to decide on the proposal of the monitoring team.[109] Hence, the place where the activity ought to have taken place could be situated in the place where the relevant monitoring team operates, because the information needed to decide on whether a credit rating has to be adjusted is available and concentrated at that place.

As Article 7 (2) Brussels I Regulation (recast) only provides a ground for jurisdiction for Member State courts, the provision may not be useful if an EU credit rating agency has endorsed a credit rating while the monitoring team of that credit rating is established in the third country. However, it could also be argued that, as the EU credit rating agency is fully responsible for the endorsed credit rating, the *Handlungsort* could be located in the place where the EU credit rating agency is established and registered because the EU credit

103 Van Calster 2016, p. 162 (who refers to CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), para 54) and Magnus & Mankowski 2016, p. 287.
104 CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), para 52.
105 CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), para 53.
106 CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), paras. 53-54.
107 *See* Langohr & Langohr 2008, pp. 174-175.
108 Garciìa Alcubilla & Ruiz del Pozo 2012, p. 22 and Langohr & Langohr 2008, p. 175.
109 Garciìa Alcubilla & Ruiz del Pozo 2012, p. 22.

rating agency should have ensured that the endorsed credit rating remained up to date.

In concrete cases, it does not always make a difference whether a claim for damages is based on an act or omission of a credit rating agency. In both situations, the *Handlungsort* will often be located in the place where a credit rating agency is established and registered.[110] Consequently, Article 7 (2) Brussels I Regulation will not always add value compared to the general ground for jurisdiction under Article 4 (1) Brussels I Regulation (recast).

4.3.5.3 Erfolgsort – financial loss

In relation to claims based on Article 35a CRA Regulation, national courts must determine the *Erfolgsort* by locating the place where financial loss suffered by an issuer or investor occurred. The location of financial loss is, however, a complex exercise; not only because financial loss is hard to pin down to a physical place,[111] but also because one can differ on the exact moment in time financial loss occurs. Location and timing are to some extent intertwined. If one considers financial loss to occur at the moment the occurrence of the loss become ineluctable ('out of pocket money loss'), the relevant connecting factor could be the place at which a contract was signed or another event which caused the loss to become ineluctable. If one considers financial loss to occur when a credit rating is published or changed, the relevant connecting factor could be the location of the financial market in which the affected securities are traded. If one considers financial loss to occur when it physically materialises, the relevant connecting factor could be the location of the securities account.

The CJEU provided some decisions on the location of financial loss. Hereafter, this section pays attention to the decisions in the cases *Kronhofer v Maier*,[112] *Kolassa v Barclays Bank*,[113] *Universal Music*[114] and *Helga Löber v Barclays Bank* (under (a)).[115] Subsequently, it discusses the current approach to the location of financial loss under (b) and attempts to construct the *Erfolgsort* in cases concerning credit rating agency liability under (c).

110 *For a similar approach* Heuser 2019, p. 256.

111 *In the words of* Garcimartín 2011, p. 452: 'their location is fictitious.' *Cf. also* Heuser 2019, p. 222 and, *in general on financial loss,* Haentjens & Verheij 2016, p. 346.

112 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier). Cf. also in the context of credit rating agency liability* Heuser 2019, pp. 223-226, Deipenbrock 2018, p. 568 and Happ 2015, pp. 192 ff.

113 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*). *Cf. also in the context of credit rating agency liability* Heuser 2019, pp. 223-226 and Deipenbrock 2018, p. 568.

114 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*). *Cf. also in the context of credit rating agency liability* Deipenbrock 2018, pp. 568-569.

115 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

(a) Case law CJEU

(i) – Kronhofer v Maier

In *Kronhofer v Maier*, Maier (domiciled in Germany) persuaded Kronhofer (domiciled in Austria) to enter into a call option contract relating to shares, but failed to warn him against the risks of his investment. Kronhofer transferred money to an investment account in Germany and, afterwards, the money was invested in highly speculative call options in London. Eventually, the investment turned out to be a failure and Kronhofer suffered huge financial losses.[116] Kronhofer brought a claim before an Austrian court against Maier for the sustained losses. He argued that the Austrian court was competent under Article 7 (2) Brussels I Regulation (recast) because the losses occurred in his centre of assets, that could be located in his domicile. The Austrian *Oberster Gerichtshof* referred to the CJEU for a preliminary ruling on the following question:

> 'Is the expression "place where the harmful event occurred" contained in Article 5 (3) of the Convention ... to be construed in such a way that, in the case of purely financial damage arising on the investment of part of the injured party's assets, it also encompasses in any event the place where the injured party is domiciled if the investment was made in another Member State of the Community?'[117]

The CJEU interpreted the question to be whether the *Erfolgsort* can be qualified as the place where the claimant is domiciled and where 'his assets are concentrated'.[118] The CJEU concluded that 'the place where the harmful event occurred' could not be considered the place where the claimant is domiciled or where his assets are concentrated 'by reason only of the fact that he has suffered financial damages there resulting from the loss of part of his assets which arose and was incurred in another Contracting State'.[119] Thus, the CJEU decided which court could not assume jurisdiction, but did not clarify where the *Erfolgsort* could be situated. It could be derived from the reasoning of the CJEU that the *Erfolgsort* could be situated in Germany as the investment account could be located there.[120]

(ii) – Kolassa v Barclays Bank

More than ten years later, in 2015, the CJEU decided again on the question of how financial losses could be located in prospectus liability cases. In *Kolassa v Barclays Bank*, Barclays Bank Plc (registered in the UK register of companies

116 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier*), paras. 5-6.
117 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*, para 10.
118 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*, para 11.
119 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*, para 21.
120 Haentjens & Verheij 2016, p. 348. *See also* ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)* annotated by P. Vlas, *NJ* 2006/335, para 4.

and maintaining a branch office in Frankfurt am Main, Germany)[121] issued certificates that, in principle, could only be purchased by institutional investors. When the certificates had been sold to institutional investors, they could be sold on to private investors.[122] Kolassa (domiciled in Austria) invested in the certificates through the online bank *direktanlage.at* (established in Austria). *Direktanlage.at* had ordered the certificates from its parent company DAB Bank AG (established in Germany) which had purchased them from Barclays Bank. The certificates acquired by Kolassa were credited to a securities account held by *direktanlage.at* with DAB Bank. Kolassa could solely claim 'the delivery of the certificates from the corresponding share of the covering assets', which the CJEU explained to mean that 'those certificates could not be transferred into his name'.[123]

After a trading manager had injected the capital invested in the certificates into a pyramid fraud system,[124] the certificates became worthless and Kolassa suffered financial losses. Kolassa brought a claim against Barclays Bank before an Austrian court (the *Handelsgericht Wien*). The *Handelsgericht Wien* referred to the CJEU for a preliminary ruling on the interpretation and application of Article 7 (1), 7 (2) and 17 (1) Brussels I Regulation (recast). For the purposes of this dissertation, the second part of the third preliminary question is most relevant:

> 'Is the wording "the place where the harmful event occurred or may occur" in Article 5(3) of Regulation No 44/2001 to be interpreted as meaning that, when a security is purchased on the basis of deliberately misleading information, […] the place where the damage occurred is taken to be the domicile of the person suffering the loss, being the place where his assets are concentrated?'[125]

The CJEU held that special jurisdiction based on Article 7 (2) Brussels I Regulation (recast) must be justified by a close connection between the action and the court of the Member State for the place where the harmful event occurred.[126] Furthermore, it emphasized that 'the place where the harmful event occurred' cannot be located in the applicant's place of domicile 'by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Member State',[127] showing the reluctance of the CJEU to accept jurisdiction of the *forum actoris.* Subsequently, the CJEU considered that the court of the

121 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 12.
122 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 15.
123 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 15.
124 Opinion AG 3 September 2014, C-375/13, ECLI:EU:C:2014:2135 (*Kolassa v Barclays Bank*), para 19.
125 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 19.
126 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 46.
127 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 48.

applicant's domicile has jurisdiction 'if the applicant's domicile is in fact the place in which the events giving rise to the loss took place or the loss occurred'.[128] With regard to the place where the damages occurred or might occur, the CJEU held:

> 'The courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, to hear and determine such an action, in particular when that loss occurred itself directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts.'[129]

The CJEU's reasoning was criticised for being vague.[130] Scholars were divided upon whether the CJEU, by making use of the term 'bank account', meant to refer to the cash account from which the securities were paid or the securities account on which the securities were credited.[131] Cash accounts and securities accounts could be held with the same bank and could be located in the same place; however, their locations do not necessarily coincide.[132]

On the one hand, Lehmann has argued that the CJEU meant to refer to Kolassa's cash account.[133] First, Lehmann remarked that the term 'bank account' is commonly used to refer to a cash account.[134] Second and more importantly, Lehmann argued that financial losses resulting from an incorrect prospectus do not occur in a securities account, but in a cash account, because, when an investor purchases securities, their 'intrinsic value is already diminished'.[135] So if the value of the securities decreases eventually, the decrease could simply be considered the 'revelation of their worthlessness by the public'.[136] Therefore, an investor suffers losses immediately when the securities are purchased so that the losses can be located in the cash account.

On the other hand, Arons and Haentjens & Verheij have argued that the CJEU meant to refer to Kolassa's securities account.[137] This conclusion accords with the CJEU's decision in *Kronhofer v Maier*, where the CJEU indicated that the place of the cash account would not be a relevant connecting factor, by stating that the *Erfolgsort* could not be located in the place where the claimant is domiciled or where his assets are concentrated 'by reason only of the fact that he has suffered financial damages there resulting from the loss of part

128 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 50.
129 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*), para 55.
130 *See* Haentjens & Verheij 2016, pp. 352-354.
131 For the opinion that the CJEU meant to refer to the term cash account *e.g.* Lehmann 2016b, p. 330. For the opinion that the CJEU meant to refer to the term bank account *e.g.* Haentjens & Verheij 2016, pp. 352-353 and Arons 2015, p. 379.
132 Haentjens & Verheij 2016, pp. 352-353.
133 Lehmann 2016b, pp. 329-330.
134 Lehmann 2016b, pp. 329-330.
135 Lehmann 2016b, p. 330.
136 Lehmann 2016b, p. 330.
137 Haentjens & Verheij 2016, p. 352 and Arons 2015, p. 379.

of his assets which arose and was incurred in another Contracting State'[138] Furthermore, Haentjens & Verheij argued that the losses materialised 'most directly in respect of the certificates themselves' which were credited on the securities account.[139] As a consequence, the loss could be said to have materialised for the first time at the place of the securities account. The debate in legal doctrine, however, fell silent after the decisions in *Universal Music* and *Helga Löber v Barclays Bank.*

(iii) – Universal Music

In June 2016, the CJEU decided on how financial loss should be located in *Universal Music*. Contrary to *Kronhofer v Maier* and *Kolassa v Barclays Bank*, *Universal Music* did not concern prospectus liability. In *Universal Music*, Universal Music concluded a contract with B&M according to which Universal Music would purchase the shares of B&M. In respect of part of the shares,[140] Universal Music and the shareholders of B&M entered into a share purchase option agreement, which was drafted by the Czech law firm Burns Schwartz International.[141] As a result of a mistake made by an employee of Burns Schwartz International (Bro_), the price of the shares under the share purchase option agreement was set five times higher than the price Universal Music was prepared to pay to B&M's shareholders.[142] In subsequent arbitration proceedings, Universal Music and the shareholders of B&M concluded a settlement according to which Universal Music had to pay EUR 2,654,280.03 to the shareholders.[143] In the *Universal Music* case, Universal Music attempts to recover its financial losses from Bro_ and two ex-partners of Burns Schwartz International before the Dutch courts.

All elements of the case could be situated in the Czech Republic. Universal Music, however, was established in Baarn (the Netherlands) and paid the costs of the arbitration proceedings and the settlement costs by transfer from an account that Universal Music held in the Netherlands.[144] For that reason, Universal Music claimed that the Dutch courts could assume jurisdiction under Article 7 (2) Brussels I Regulation (recast). The Dutch Supreme Court (*Hoge Raad*) referred to the CJEU for a preliminary ruling on the question whether:

138 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*, para 21.

139 Haentjens & Verheij 2016, pp. 352-353.

140 Universal Music would acquire 70% of the shares directly and the remaining 30% of the shares in 2003. CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 8.

141 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), paras. 9-11.

142 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 13.

143 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 14.

144 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 14.

> 'Must Article 5(3) of Regulation No 44/2001 be interpreted as meaning that the 'place where the harmful event occurred' can be construed as being the place in a Member State where the damage occurred, if that damage consists exclusively of financial damage which is the direct result of unlawful conduct which occurred in another Member State?'[145]

The Dutch Supreme Court asked whether the *Erfolgsort* of financial losses could be located at the place where the bank account is held at which the losses have materialised. Advocate General Szpunar proposed to answer the question in the negative. The Advocate General argued that the difference between *Handlungsort* and *Erfolgsort* should not automatically be employed in cases concerning financial losses.[146] In such cases, the *Erfolgsort* often depends on the place where the financial assets are situated 'which is usually the same as the place of residence or, in the case of a legal person, the place in which it has its registered office'.[147] As the Advocate General argues, this place 'is often uncertain and connected with considerations which are unrelated to the events at issue'.[148]

The CJEU took a less radical approach than the Advocate General, but eventually came to the same conclusion: in the absence of other connecting factors, the 'place where the harmful event occurred' (the *Erfolgsort*) shall not be construed as being the place in a Member State where the damage occurred (under Art. 7 (2) Brussels I Regulation (recast)), 'when that damage consists exclusively of financial damage which materialises directly in the bank account of the applicant and is the direct result of an unlawful act committed in another Member State'.[149]

Contrary to the Opinion of the Advocate General, the CJEU appears to continue to apply the distinction between *Handlungsort* and *Erfolgsort*,[150] but refuses to locate the *Erfolgsort* in the place where the bank account is held in the absence of other connecting factors with the Member State of that place. The CJEU argues that the place where the bank account is held not necessarily qualifies as a relevant nor a reliable connecting factor, because companies such as Universal Music could have 'the choice of several bank accounts from which

145 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 20.
146 Opinion A-G M. Szpunar, ECLI:EU:C:2016:161, para 38, with CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
147 Opinion A-G M. Szpunar, ECLI:EU:C:2016:161, para 38, with CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
148 Opinion A-G M. Szpunar, ECLI:EU:C:2016:161, para 38, with CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
149 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 40.
150 *Cf.* Van Bochove 2016, p. 458.

to pay the settlement amount'.[151] Instead, the CJEU seems to have implicitly located the *Erfolgsort* in the Czech Republic, by stating that the damage occurred in the Czech Republic because the settlement was concluded there and the obligation to pay placed an irreversible burden on Universal Music's assets as from the conclusion of the settlement.[152]

The Advocate General and the CJEU explicitly stated that the decision in *Universal Music* does not overrule the decision in *Kolassa v Barclays Bank*. The CJEU stated that the outcome in *Kolassa v Barclays Bank* was based on the specific context of the case[153] and, along the same lines, the Advocate General considered that it would not be possible to deduce a general rule from *Kolassa v Barclays Bank*.[154] When reading the Opinion, it seems that the decision in *Kolassa v Barclays Bank* is justified because the defendant (Barclays Bank) published the prospectus of the certificates in Austria and because an Austrian bank sold the certificates to the claimant.[155] In other words, the decision in *Kolassa v Barclays Bank* might have distinguished itself from the situation in *Universal Music* because there were other connecting factors that could be situated in Austria. Yet, the CJEU neglected another Dutch component in the case of *Universal Music*, namely that Universal Music was established in Baarn. This neglect may demonstrate the reluctance of the CJEU to accept jurisdiction of the *forum actoris*.

The decision in *Universal Music* leaves the impression that the CJEU intends to return to the initial justification of the special ground for jurisdiction. Therefore, the most important rule that can be derived from this decision is that the special ground for jurisdiction under Article 7 (2) Brussels I Regulation (recast) shall not lead to the jurisdiction of courts that lack a close connection with the claim, the competence of which is accidental or the competence of which can be manipulated by one of the parties.

(iv) – Helga Löber v Barclays Bank

The CJEU again emphasised the importance of the initial justification for the existence of special grounds for jurisdiction in its decision in *Helga Löber v Barclays Bank*, which was another case on the question of how national courts shall locate financial loss in prospectus liability cases.[156] Similar to Kolassa,

151 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 38.
152 *See* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 31.
153 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 37.
154 Opinion A-G M. Szpunar, ECLI:EU:C:2016:161, para 45, with CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
155 Opinion A-G M. Szpunar, ECLI:EU:C:2016:161, para 45, with CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
156 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

Löber (domiciled in Vienna) invested in certificates issued by Barclays Bank on the secondary markets that lost their value because of a pyramid fraud scheme. Löber invested in the certificates through two Austrian banks, with seats in Salzburg and Graz.[157] The Supreme Court of Austria turned to the CJEU again with the question of how 'the place where the harmful event occurred or may occur' under Article 5 (3) Brussels I Regulation must be determined in case of prospectus liability.

As remarked by Advocate General Bobek, reading the CJEU's judgments in *Kronhofer v Maier*, *Kolassa v Barclays Bank* and *Universal Music* all together left uncertainties on how the *Erfolgsort* must be determined in prospectus liability cases.[158] Advocate General Bobek applied the reasoning of the CJEU in *Universal Music* to prospectus liability cases.[159] He concentrated on the specific event that triggered the loss and the nature of the alleged wrong, which was the tort of misrepresentation resulting in the claimant's investment decision.[160] As investors are protected against 'harm in the sense of *direct* damage […] consists in making an investment decision based on misleading information that the person would not have taken had he been in possession of the correct information', Advocate General Bobek concluded that 'the direct damage appears at the moment (and in the place) when, based on misleading information in the prospectus, the investor enters into a legally binding and enforceable obligation to invest in the financial instrument in question'.[161] He suggested that the CJEU qualify the place where the damage occurred as the place where 'a legally binding investment obligation is factually assumed'.[162] This approach is hence in line with the idea of the 'irreversibility' of the loss as expressed already in *Universal Music*.

The CJEU did not follow the approach of Advocate General Bobek. It held that the place where the damage occurred is the place 'where the alleged damage actually manifests itself'.[163] The CJEU aimed to unite the decision in *Kolassa v Barclays Bank* with the decision in *Universal Music*, by explaining that the outcome in the former case must be considered 'within a specific

157 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), paras. 9-10.
158 Opinion A-G M. Bobek, ECLI:EU:C:2018:310, para 45, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).
159 *Cf.* Opinion A-G M. Bobek, ECLI:EU:C:2018:310, para 74, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).
160 Opinion A-G M. Bobek, ECLI:EU:C:2018:310, para 50, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).
161 Opinion A-G M. Bobek, ECLI:EU:C:2018:310, paras. 70 and 72, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).
162 Opinion A-G M. Bobek, ECLI:EU:C:2018:310, para 78, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).
163 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 27, *referring to* CJEU 21 May 2015, C-352/13, ECLI:EU:C:2015:335 (*CDC Hydrogen Peroxide*), para 52.

context, the distinctive feature of which was the existence of circumstances contributing to attributing jurisdiction to those courts'.[164] The CJEU hence confirmed that the fact that a bank account is located at a certain place forms an insufficient connecting factor to assume jurisdiction, but did not explain what these circumstances involved exactly in *Kolassa v Barclays Bank*.

In the specific case of *Helga Löber v Barclays Bank*, the CJEU considered that 'taken as a whole, the specific circumstances of the present case contribute to attributing jurisdiction to the Austrian courts'.[165] The CJEU subsequently enumerated the specific factors of the case: Helga Löber was domiciled in Austria, all payments for the investment were made from Austrian bank accounts, the certificates were acquired on the Austrian secondary market, the prospectus of the certificates was notified with the Austrian supervisory bank and the contract 'obliging her to make the investment' and which 'resulted in a definitive reduction in her assets' was signed in Austria.[166] Contrary to the proposition of Advocate General Bobek, the securities purchase contract is only one of the relevant circumstances to determine jurisdiction. According to the CJEU, jurisdiction of the Austrian courts meets the objectives set out in the recitals of the Brussels I Regulation of a predictable place of jurisdiction, proximity between the competent court and the dispute and the sound administration of justice.[167] Furthermore, with this outcome, the objective of Regulation No 44/2001 – to strengthen the legal protection of persons established in the European Union by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued – is met by upholding as the place where the damage occurred the place where the bank is established in which the applicant possessed the bank account in which the damage occurred.'[168]

(b) From tracing bank accounts to a helicopter view

The location of financial loss for the purposes of the *Erfolgsort* has occupied the CJEU for many years. Subsequent to the cases of *Kronhofer v Maier* and *Kolassa v Barclays Bank*, the discussion concentrated on the tracing of cash accounts and securities accounts as connecting factors to find the place where financial loss materialised. *Universal Music* put the importance of bank accounts as connecting factor into perspective, and, although implicitly, on the moment

164 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), paras. 28-30.

165 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 31.

166 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), paras. 32-33.

167 *Cf.* CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 34.

168 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 35.

at and the place in which the financial loss became irreversible. In *Helga Löber v Barclays Bank*, the CJEU added yet another shade to its reasoning in *Universal Music* by stating that the courts of an investor's domicile can be competent if the financial loss 'occurred directly in that investor's bank account with a bank established within the jurisdiction of those courts' and 'the other specific circumstances of that situation also contribute to attributing jurisdiction to those courts'.[169]

The CJEU hence refused to appointment a single, decisive connecting factor for locating the *Erfolgsort* of financial loss. As the dividing decisions of the CJEU and conclusions of the Advocate Generals show, it is simply impossible to find a single, satisfying solution for the location of financial loss. In its latest decisions, one could say that the CJEU returned to the basic principles underlying special jurisdiction and looked at cases from a helicopter view, so as to conclude whether the national court was closely connected to the action brought before it.[170] The decision in *Helga Löber v Barclays Bank*, read in conjunction with the other decisions of the CJEU and, in particular, *Universal Music*, provides several insights:

- Special jurisdiction must be justified by the objectives of the Brussels I Regulation (recast), so that national courts can only assume jurisdiction based on Article 7 Brussels I Regulation (recast) if there is 'a close connection between the court and the action or in order to facilitate the sound administration of justice'.[171] The close connection must ensure legal certainty and foreseeability, so that the defendant is not sued in a court 'he could not reasonably have foreseen'.[172]
- A combination of specific circumstances must justify the assumption of special jurisdiction, so that (1) the locations of bank accounts themselves, whether cash or securities accounts, do not justify jurisdiction in the absence of other connecting factors; and (2) claimants' domiciles themselves do not justify jurisdiction in the absence of other connecting factors.

This helicopter view guarantees the underlying ratio of special jurisdiction under Article 7 (2) Brussels I Regulation (recast) prevails. It puts the close connection between the court and the claim at the forefront in determining special jurisdiction. Moreover, by requiring a combination of relevant connecting factors, the helicopter view diminishes the risk that special jurisdiction is purely coincidental and can be easily manipulated by the parties – mostly by the claimants. Indeed, relevant connecting factors such as the place where

169 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 36.
170 In Dutch doctrine, Rutten described the approach as an '*omstandigheden catalogus*' (catalogue of circumstances), *JOR* 2018/307, para 9. Lehmann used the term 'multi-factor test', Lehmann 2018, p. 18.
171 Recital 16 Brussels I Regulation (recast).
172 Recital 16 Brussels I Regulation (recast).

financial instruments have been purchased and the location of bank accounts can easily be coincidental or subject to manipulation.

Another interesting observation is that the helicopter view may often point to the jurisdiction of the courts of the claimant's domicile or place of establishment. For instance, in case of retail investors in prospectus liability cases, the relevant specific circumstances can often coincide with the domiciles or places of establishment of claimants. In this way, the legal protection of retail investors is strengthened as they can start proceedings before the courts of the Member States in which they are domiciled. Although the CJEU justified this approach by requiring the combination of relevant factors, this approach remains somewhat remarkable in light of earlier decisions such as *Kronhofer v Maier* in which the CJEU strongly denied the competence of the *forum actoris*.[173]

Universal Music and *Helga Löber v Barclays Bank* however do not form a conclusive framework for the location of financial loss. The CJEU did not provide guidance on what circumstances qualify as 'specific circumstances' and what combination of specific circumstances lead to jurisdiction. In the context of prospectus liability, the CJEU looked, amongst other things, at the place where financial instruments were bought, the countries in which a prospectus was notified, the place where any relevant contracts were concluded so that the loss became in fact irreversible, the domicile of the claimant and the location(s) of the bank account(s) employed.[174] Yet, in different factual circumstances, these circumstances may not be present or relevant. Moreover, the CJEU did not make a fundamental decision on where to locate the financial loss.[175] Advocate General Bobek suggested applying the 'irreversibility' test, but the CJEU did not follow this approach in *Helga Löber v Barclays Bank.* Because of the lack of a fundamental decision, the helicopter view does not provide a solution for cases in which connecting factors are spread over multiple countries. One can, however, question whether it was the CJEU's task to make such a fundamental choice, or whether the CJEU should leave such fundamental choices to the Union legislature.[176] In addition, one can question whether it is possible to make a fundamental choice on the location of financial loss at all.

173 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*, para 21.

174 As concluded by Van Bochove 2016, p. 459 in relation to *Universal Music*. In *Universal Music*, the CJEU has located the *Erfolgsort* in the Czech Republic because the settlement was agreed there and, from that moment on, the obligation to pay 'placed an irreversible burden on Universal Music's assets'. CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 31.

175 *Cf. in the context of credit rating agency liability* Deipenbrock 2018, p. 569.

176 *Cf. in the context of credit rating agency liability* Deipenbrock 2018, p. 569.

(c) Application to credit rating agency liability

Assuming that the helicopter view applies by analogy in the context of credit rating agency liability, what effect does this view have on the way in which national courts determine the *Erfolgsort* of financial loss relating to claims brought by issuers and investors against credit rating agencies?

(i) – Claims brought by issuers

From a factual perspective, claims based on Article 35a CRA Regulation brought by issuers show most resemblance with the case of *Universal Music*. In the absence of other connecting factors, the general rule of *Universal Music* applies so that the 'place where the harmful event occurred' (the *Erfolgsort*) shall not be construed as being the place in a Member State where the damage occurred (under article 7(2) Brussels I Regulation (recast)), 'when that damage consists exclusively of financial damage which materialises directly in the bank account of the applicant and is the direct result of an unlawful act committed in another Member State'.[177] Two crucial questions arise when determining jurisdiction: (1) which and how many connecting factors justify that the place of the bank account is identified as the *Erfolgsort*?; and (2) if the place of the bank account is not relevant for the purposes of determining the *Erfolgsort* due to the absence of other connecting factors, how should the *Erfolgsort* then be located? Under the current state of the law, it is difficult to answer these questions. The main problem is that *Universal Music* only clarifies where the *Erfolgsort* cannot be located, while there are no useful guidelines on where the *Erfolgsort* can be located instead.

An analogue application of the helicopter view could render a combination of the following connectors relevant to determine the *Erfolgsort*:

- the place where the issuer is established, especially because the credit rating was attached to that issuer or one of its financial instruments;
- the place of the cash account in which the loss materialised;
- the place of the market(s) on which the financial instruments were sold; and
- if applicable, the place where the credit rating agency and the issuer entered into a contract for the assignment of a solicited credit rating or the place where the obligation to pay increased funding costs began to rest unequivocally upon the issuer, viz. the moment the issuer entered into a contract with an investor that stipulates certain interest rates and clauses on the interest rates.

These connecting factors are foreseeable to both issuers and credit rating agencies, as the relationship between a credit rating agency and an issuer is characterised by a certain degree of proximity. Most importantly, the credit

177 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 40.

rating agency chooses to which issuers or financial instrument it attaches credit ratings. In ordinary situations, the *Erfolgsort* of the financial loss will hence locate in the place, or, more in general, the country of establishment of the issuer.

Yet if the connecting factors are spread over multiple Member States, the helicopter view does not indicate which connecting factor is decisive. In *Universal Music*, the CJEU seems to have attached much importance to the place where the loss became irreversible.[178] In relation to claims brought by issuers, the place where the loss puts an irreversible burden on the assets of the issuer can be the moment and the place where the obligation to pay increased funding costs began to rest unequivocally upon the issuer. But, when and where would that moment be: (1) at the moment the credit rating is issued – which is in fact the *Handlungsort*; (2) or at the moment the issuer entered into a contract with an investor that stipulates certain interest rates and clauses on the interest rates? However, both options do not provide a relevant and reliable connecting factor and can be manipulated by one of the parties.[179] Therefore, it is uncertain whether, when confronted with such a case, the CJEU would accept the place where parties entered into a contract as the place where the loss occurred.

(ii) – Claims brought by investors

From a factual perspective, claims based on Article 35a CRA Regulation brought by investors show most resemblance with the prospectus liability or securities litigation cases of *Kronhofer v Maier*, *Kolassa v Barclays Bank* and *Helga Löber v Barclays Bank*. A single infringement committed by a credit rating agency caused loss to a potentially large group of investors spread over multiple countries. From this perspective, claims brought against credit rating agencies by investors differ from the case of *Universal Music*, in which the tort of the defendant duped the claimant only. A difference with the prospectus liability or securities litigation cases is that, in the context of credit rating agency liability, the investors' losses were not caused by the issuer, but by the credit rating agency as a third party.

An analogue application of the helicopter view could render a combination of the following connectors relevant to determine the *Erfolgsort*:

- the domicile or place of establishment of the investor;
- the location(s) of the bank account(s) employed by the investor;
- the primary or secondary market in which the financial instruments were bought (or sold?);

178 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 31.

179 *Cf.* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), annotated by M.F. Müller, *NJW* 2016, p. 2170.

- the place where any relevant contracts were concluded as a consequence of which the loss became irreversible (i.e. the contract by which the relevant financial instruments were bought or sold); and
- the place where the credit rating agency and the investor entered into a contractual relationship (if applicable).

In *Helga Löber v Barclays Bank*, the CJEU attached great importance to the interest of the defendant as well: 'In this connection, given that the issuer of a certificate who does not comply with his legal obligations in respect of the prospectus must, when he decides to notify the prospectus relating to that certificate in other Member States, anticipate that inadequately informed operators, domiciled in those Member States, might invest in that certificate and suffer damage, the objective of Regulation No 44/2001 – which is to strengthen the legal protection of persons established in the European Union by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued – is met by upholding as the place where the damage occurred the place where the bank is established in which the applicant possessed the bank account in which the damage occurred […].'[180] Hence, in prospectus liability cases, the notification of the prospectus caused the *Erfolgsort* to be foreseeable to the defendant as well and justified the jurisdiction of the Austrian courts.

As opposed to the prospectus liability cases decided on by the CJEU, these connecting factors are not necessarily highly foreseeable and predictable to credit rating agencies. Indeed, there is often no contact or any form of relationship between the credit rating agency and investors at all. These concerns are mitigated somewhat by the fact that the credit rating agency deliberately issued its credit ratings for the European markets, by establishing and registering in a Member State in order for their credit ratings to be allowed to be used for regulatory purposes by certain issuers (e.g. credit institutions, investment firms and insurance undertakings).[181] It remains however doubtful whether this is sufficient justification for Member State courts to assume jurisdiction.[182]

Furthermore, if the relevant circumstances referred to spread over multiple Member States, the helicopter view does not indicate the relationship between these circumstances and which circumstance is decisive. The decision in *Helga*

180 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 35.

181 Art. 4 (1) CRA Regulation. Pursuant to Art. 3 (1) (g) CRA Regulation, the term 'regulatory purposes' means 'the use of credit ratings for the specific purpose of complying with Union law, or with Union law as implemented by the national legislation of the Member States'.

182 In his Opinion for the Dutch case *VEB v BP*, Advocate General Vlas did not consider the fact that oil company BP directs itself to investors worldwide is a sufficient specific circumstance to justify special jurisdiction under Art. 7 (2) Brussels I Regulation (recast). Opinion A-G P. Vlas, ECLI:NL:PHR:2019:115, para 2.18. The same could apply to the fact that credit rating agencies establish themselves and register in the EU.

Löber v Barclays Bank provides no guidance in this regard, except for that bank accounts and claimant's domiciles are not decisive. In *Universal Music*, the CJEU seems to have attached much importance to the place where the loss became irreversible. Applying the 'reversibility test'[183] to loss suffered by investors in the context of credit rating agency liability, the loss can be located at two places: (1) the place where the investor entered into the contract to purchase the financial instruments;[184] or (2) the place where the investor lost control over his assets in the performance of the contract to purchase the financial instruments, viz. the cash account from which the financial instruments where paid for.[185] As the latter connecting factor lost its independent importance after *Universal Music* and *Helga Löber v Barclays Bank*, the place where the investor entered into the contract to purchase the financial instruments seems then the most important connecting factor. Yet, the place of the contract does not necessarily provide a relevant and reliable connecting factor and can be manipulated by one of the parties.[186] Moreover, in *Helga Löber v Barclays Bank*, the CJEU did not follow the approach of Advocate General Bobek who suggested qualifying the place where the damage occurred as the place where 'a legally binding investment obligation is factually assumed'.[187] Consequently, it is uncertain whether, if confronted with such a case, the CJEU would accept the place where parties have entered into a contract as the place where the loss occurred.

In conclusion, with regard to both claims brought by issuers and investors, the decisions of the CJEU in *Universal Music* and *Helga Löber v Barclays Bank* point national courts back to the basic principles underlying special jurisdiction, without providing a single, decisive connecting factor in cases concerning financial loss. This multi-factor approach or helicopter view is comprehensible in light of all disadvantages associated with choosing a single, decisive connecting factor. At the same time, it is still impossible to derive a clear and certain rule from the case law in relation to financial torts such as Article 35a CRA Regulation. In itself, the reasoning of the CJEU in *Universal Music* and *Helga Löber v Barclays Bank* resulted in reasonable outcomes, but, in particular cases, the lack of a fundamental decision as to how and where the *Erfolgsort* can be located can be problematic in future cases. The most important lesson that can be derived from *Universal Music* and *Helga Löber v Barclays Bank*, is that the underlying ratio of the special ground for jurisdiction of Article 7 Brussels I Regulation (recast) must be kept in mind when determining jurisdiction. However, at present, it is not clear, foreseeable and predictable where the

183 Van Bochove 2016, p. 459 and Dickinson 2008, no. 4.67.
184 *Cf.* Dickinson 2008, no. 4.67.
185 *Cf.* Dickinson 2008, no. 4.67.
186 *Cf.* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), annotated by M.F. Müller, *NJW* 2016, p. 2170.
187 Opinion A-G M. Bobek, ECLI:EU:C:2018:310, para 78, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

Erfolgsort of financial loss suffered by issuers and investors due to incorrect credit ratings must be located in situations in which relevant connecting factors are spread over different Member States.[188]

4.3.5.4 *Erfolgsort – reputational loss*

In addition or as an alternative to financial loss, issuers could argue that an impacted credit rating caused reputational loss. Although it may be complex to quantify reputational loss, this opportunity should not be ruled out in advance.[189] National courts may find locating reputational loss for the purpose of the *Erfolgsort* complicated.[190] Due to the fact that credit ratings are commonly published on the Internet, incorrect credit ratings are available all over the world after publication and reputational loss might spread all over the world.[191] For example, if a credit rating agency (established in France) downgrades a credit rating attached to Italian government bonds as a result of infringing Annex III CRA Regulation, the Italian government might suffer reputational loss amongst investors domiciled all over the EU. When considering how national courts should determine the *Erfolgsort* of reputational loss, one could wonder whether to draw parallels with the CJEU's case law on the location of the *Erfolgsort* of reputational loss caused by physical and online defamatory publications.[192]

In the case of *Shevill and Others v Presse Alliance* – on reputational loss caused by a libel by a newspaper article distributed on paper in several Member States, the CJEU held that the victim of the libel could claim damages (1) before the courts of the Member State where the publisher is established for the total amount of loss (the *Handlungsort*); and (2) before the courts of each Member State in which the loss occurred for the part of the loss that has been suffered in that Member State (the *Erfolgsort*).[193] Following this general rule, an issuer can, hence, bring a claim against a credit rating agency before the courts of each Member State in which the loss occurred; however, only for

188 *Cf.* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), annotated by I. Bach, *NZG* 2016, p. 795.

189 Especially because Recital 32 CRA III Regulation implies that both types of loss fall under the scope of Art. 35a CRA Regulation by stating that it is important to provide issuers with a right of redress as an impacted credit rating 'can impact negatively the reputation and funding costs of an issuer.'

190 *For a similar analysis with an opposite conclusion,* Happ 2015, pp. 150 ff. Section 3.6.2 on reputational loss suffered by issuers.

191 *Cf.* Happ 2015, p. 151.

192 Although, as stated in section 4.4.1 as well, I would not equate infringements of Annex III CRA Regulation with violations of rights relating to personality (such as defamation).

193 ECJ 7 March 1995, C-68/93, ECLI:EU:C:1995:61 (*Shevill and Others v Presse Alliance*), para 33.

the part of the loss that has been suffered in that Member State.[194] As a consequence, an issuer may have to start proceedings in several Member States if it wishes to sue in the courts of the *Erfolgsorts*. Before the courts of the Member State where the credit rating agency is established, the issuer can bring a claim for the total amount of loss (the *Handlungsort*).[195]

In respect of online publications, the CJEU formulated a different rule for jurisdiction in the case of *eDate Advertising and Others.* In this case, the CJEU decided where a victim – a natural person – can hold a publisher liable for reputational loss suffered in various states and caused by a publication spread over the Internet.[196] The CJEU held that a victim cannot only claim damages for all its loss before the court of the place where the publisher is established, but also before the court of the place in which the victim has its centre of interests. The CJEU justified this exception to the rule of *Shevill and Others v Presse Alliance* by the difference in the manner of publication: in contrast to the case of *Shevill and Others v Presse Alliance*, the publication in *eDate Advertising and Others* was spread online.[197] In line with *Shevill and Others v Presse Alliance*, a victim can still bring a claim before the courts of each Member State in the territory of which content placed online is or has been accessible; however, 'those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised'.[198] Uncertainty existed on the scope of application of the exception made in *eDate Advertising and Others*, such as whether the exception applied to natural persons only, or to natural and legal persons.

In the case of *Bolagsupplysningen and Ilsjan*, the CJEU confirmed that the rule of *eDate Advertising and Others* can apply to legal persons.[199] The CJEU held that a legal person who claims its personality rights were infringed by an online publication of incorrect information – the claimant was put on an online 'blacklist' of the defendant stating that it carried out acts of fraud and

---

194 *Cf.* ECJ 7 March 1995, C-68/93, ECLI:EU:C:1995:61 (*Shevill and Others v Presse Alliance*), para 33. *Also* Lehmann 2015a, no. 4.111.

195 *For this general rule of Shevill and Others v Presse Alliance*, Lehmann 2015a, no. 4.111.

196 CJEU 25 October 2011, C-509/09 and C-161/10, ECLI:EU:C:2011:685 (*eDate Advertising and Others*). Baumgartner, Happ and Dutta also discussed the application of *eDate Advertising and Others* in the context of credit rating agency liability (Baumgartner 2015, p. 597, Happ 2015, pp. 152-155 and Dutta 2014, p. 38).

197 CJEU 25 October 2011, C-509/09 and C-161/10, ECLI:EU:C:2011:685 (*eDate Advertising and Others*), paras. 46-48.

198 CJEU 25 October 2011, C-509/09 and C-161/10, ECLI:EU:C:2011:685 (*eDate Advertising and Others*), para 52.

199 CJEU 17 October 2017, C-194/16, ECLI:EU:C:2017:766 (*Bolagsupplysningen and Ilsjan*). Prior to the decision of the CJEU, the Dutch Supreme Court already applied the rule of *eDate Advertising and Others* to a legal person in Hoge Raad 3 June 2016, ECLI:NL:HR:2016:1054, *NJ* 2016/354 annotated by Th.M. de Boer (*A. v Dahabshiil*) and Happ already concluded that it could not be derived from the case law of the CJEU that such a broad application to legal persons (as in the context of credit rating agency liability) was not allowed (Happ 2015, p. 155).

deceit[200] – can bring a claim for damages before the courts of the Member State in which its centre of interests is located.[201] The centre of interests of a legal person lies in the place where the commercial reputation 'is most firmly established and must, therefore, be determined by reference to the place where it carries out the main part of its economic activities.'[202] However, the exception of *eDate Advertising and Others* does not apply if it is not possible to locate the main part of the legal person's economic activities in a certain Member State.[203] The case of *Bolagsupplysningen and Ilsjan*, hence, clarified that the capacity of the victim is not decisive for the application of the exception made in *eDate Advertising and Others*.

The rule formulated in *eDate Advertising and Others*, however, does not apply to all types of loss caused online and is confined to infringements of personality rights only. The CJEU refused to apply the rule of *eDate Advertising and Others* in the case of *Wintersteiger*, which concerned loss caused by the online violation of a trade mark.[204] The CJEU explained that the exception of *eDate Advertising and Others* does not apply to infringements of intellectual property rights such as those at stake in *Wintersteiger*, because such an application would not lead to a foreseeable solution.[205] In this context, Advocate General Cruz Villalón remarked that intellectual property rights differ from personality rights because they are 'protected on a territorial basis and are concerned with the commercial exploitation of a product'.[206]

Eventually, the application of the rule of *eDate Advertising and Others* to claims for credit rating agency liability brought by issuers under Article 35a CRA Regulation stands or falls on the answer to the question of whether reputational loss caused by an impacted credit rating qualifies as the violation of an issuer's personality right. Although one can draw parallels between the two situations, one cannot escape the impression that a commercial case concerning credit rating agency liability based on Article 35a CRA Regulation fundamentally differs from typical defamation cases such as *eDate Advertising and Others* and *Bolagsupplysningen and Ilsjan*. The exact scope of 'personality rights' is not clear, but it seems that violated personality rights involve cases of defamation (libel and slander) (caused by the mass media) and not com-

200 CJEU 17 October 2017, C-194/16, ECLI:EU:C:2017:766 (*Bolagsupplysningen and Ilsjan*), para 10.
201 CJEU 17 October 2017, C-194/16, ECLI:EU:C:2017:766 (*Bolagsupplysningen and Ilsjan*), para 44.
202 CJEU 17 October 2017, C-194/16, ECLI:EU:C:2017:766 (*Bolagsupplysningen and Ilsjan*), para 41.
203 CJEU 17 October 2017, C-194/16, ECLI:EU:C:2017:766 (*Bolagsupplysningen and Ilsjan*), para 43.
204 CJEU 19 April 2012, C-523/10, ECLI:EU:C:2012:220 (*Wintersteiger*).
205 CJEU 19 April 2012, C-523/10, ECLI:EU:C:2012:220 (*Wintersteiger*), paras. 23-24 and Opinion AG 16 February 2012, C-523/10, ECLI:EU:C:2012:90 (*Wintersteiger*), para 20.
206 Opinion A-G P. Cruz Villalón, ECLI:EU:C:2012:90, para 20, with CJEU 19 April 2012, C-523/10, ECLI:EU:C:2012:220 (*Wintersteiger*).

mercial disputes on the violation of regulatory obligations under Annex III CRA Regulation. Hence, although reputational loss caused by incorrect credit ratings is to some extent comparable to reputational loss in defamation cases, the rule of *eDate Advertising and Others* seems not to apply to claims for credit rating agency liability based on Article 35a CRA Regulation.[207] Therefore, this section concludes that an issuer can only hold a credit rating agency liable for the total amount of reputational loss before the courts of the Member State in which the credit rating agency has been established (*Handlungsort*). Furthermore, an issuer can only hold a credit rating agency liable before courts of other Member States for the amount of reputational loss that occurred within that Member State in case the reputational loss occurred in various countries (the *Erfolgsorts*). This result can be criticised for leading to a fragmentation of claims and, therefore, one could argue that application by analogy of the rule of *eDate Advertising and Others* is desirable, but this does seem to be the way in which the law currently stands.

4.4 Applicable law – Rome II Regulation

4.4.1 Scope of application

If a Member State court has assumed jurisdiction, it must decide which law is applicable to the dispute and, in the particular context of this dissertation, to a dispute over credit rating agency liability involving a claim based on Article 35a (1) CRA Regulation. Especially because Article 35a (4) CRA Regulation stipulates that terms and subjects not defined in the CRA Regulation must be interpreted and applied in accordance with the applicable national law, the assessment of the applicable national law is of crucial importance for the functioning of Article 35a CRA Regulation.

Which legislative instrument a national court must apply to determine the applicable national law depends on the characterisation of the rights and obligations involved in a concrete dispute.[208] For Private International Law

207 Dutta rejected the application of the rule of *eDate Advertising and Others*, because he considered credit rating agency liability to concern a financial tort rather than a violation of a personality right (Dutta 2014, p. 38). *Contra* Happ 2015, p. 155: '*Wie soeben erörtert, hat der EuGH allgemeine Grundsätze zur Bestimmung des Deliktsgerichtsstands bei Persönlichkeitsrechtsverletzungen aufgestellt. Diese sind mithin auch grundsätzlich bei der Geltendmachung eines Reputationsschadens gegenüber der Ratingagentur anzuwenden.*' *Also* Happ 2015, pp. 157-158. *Contra* Baumgartner 2015, p. 597, who concluded that the rule of *eDate Advertising and Others* does apply in case of credit rating agency liability.

208 Section 4.2. For Private International Law purposes, the terms of contractual and non-contractual obligations are interpreted autonomously. The characterisations under the applicable national law are not taken into consideration, *e.g.* ECJ 17 June 1992, C-26/91, ECLI:EU:C:1992:268 (*Handte v TMCS*), para 10, CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), para 27, CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa*

purposes, this dissertation qualified the obligations of credit rating agencies under Article 35a CRA Regulation as non-contractual obligations.[209] Non-contractual obligations in civil and commercial matters fall within the scope of the Rome II Regulation.[210] Therefore, Member State courts must determine the law applicable to disputes over credit rating agency liability involving claims based on Article 35a CRA Regulation in accordance with the provisions of the Rome II Regulation.[211] In advance, two remarks must be made on the application of the Rome II Regulation in the context of credit rating agency liability.[212]

The first remark to be made is that the 'regulatory' and 'Private International Law' elements of Article 35a CRA Regulation lead to uncertainty in the assessment of the applicable national law.[213] On the one hand, from a regulatory perspective, Article 35a (1) CRA Regulation applies to credit rating agencies established and registered in the EU, as entailed by the general scope of application of the CRA Regulation (section 3.5.3.1). The CRA Regulation, hence, entitles issuers and investors to base a claim for compensation on Article 35a CRA Regulation against credit rating agencies established and registered in the EU. On the other hand, from a Private International Law perspective, Article 35a (4) CRA Regulation requires national courts to determine 'the applicable national law as determined by the relevant rules of private international law'.

The existence of potential complications becomes clear when taking into account that the Rome II Regulation has 'universal application', so that it applies 'whether or not' the law specified by the Rome II Regulation is the

v Barclays Bank), para 37 and CJEU 21 January 2016, C-359/14, ECLI:EU:C:2016:40 (*Ergo Insurance SE*), para 43.

209 Section 4.2. *See* Deipenbrock 2018, p. 564, Wimmer 2017, p. 101, Deipenbrock 2015, p. 10, Steinrötter 2015, p. 114, Dutta 2014, pp. 37-40, Dutta 2013, p. 1731 and Gietzelt & Ungerer 2013, p. 338. The Rome I Regulation (on the law applicable to contractual obligations) is not applicable to obligations flowing from Art. 35a CRA Regulation, but can be applicable to claims for damages for breach of contract, for instance, in case of a solicited rating (Dutta 2014, p. 37) or subscriptions. As this dissertation concentrates on liability claims based on Art. 35a CRA Regulation, this Chapter does not discuss the rules of the Rome I Regulation.

210 Art. 1 (1) Rome II Regulation (in full: Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations). If a harmful event took place before 11 January 2009, the rules of the Rome Convention (in full: the Convention on the law applicable to contractual obligations of 19 June 1980, 80/934/EEC) will apply to the dispute.

211 This dissertation assumes Art. 35a CRA Regulation does not qualify as an 'overriding mandatory provision' under Art. 16 Rome II Regulation. Under Recital 32: 'Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. […]' The application of this provision is reserved for a limited number of situations.

212 Heuser made the same remarks in his dissertation (Heuser 2019, pp. 208-215).

213 *Cf. for the same remark from a slightly different perspective* Heuser 2019, pp. 208-209.

law of a Member State.[214] This universal application entails that if a Member State court has jurisdiction to decide on a dispute, the law applicable to that dispute is not necessarily the law of a Member State. In the concrete context of credit rating agency liability, as stated by Heuser as well, one can imagine situations in which an issuer or investor based a claim against an EU credit rating agency, while a Member State court concludes that the law of a third country applies to the dispute.[215] For example, when the dispute involves investors or issuers not domiciled or established in the European Union, who bring claims against EU credit rating agencies.[216] The question then arises what a national court should do: (1) using the non-Member State law to interpret and apply the claim based on Article 35a CRA Regulation; (2) applying the non-Member State law so that the claim based on Article 35a CRA Regulation is no longer on the table.[217]

The CRA Regulation does not provide guidance in this regard. From a regulatory perspective, one could argue in favour of the former approach, because the right of redress under Article 35a CRA Regulation should have a broad scope of application and Article 35a (4) CRA Regulation provides no restrictions in this regard.[218] From a Private International Law perspective, one could argue in favour of the latter approach, because the substantive rules of a third country law apply to the dispute. Even though the latter approach limits the scope of application of Article 35a CRA Regulation, I would argue in favour of the latter approach from a dogmatic point of view.[219] If the applicable private law is the law of a third country, Article 35a CRA Regulation does not form part of the national legal system of that country and should not find application – even though that is difficult to reconcile with the scope of application of Article 35a CRA Regulation to EU credit rating agencies. Moreover, the European Commission already seemed to have realised the importance of the applicable law being the law of a Member State in the stage of the Impact Assessment:

> 'An efficient right of redress under this option (and also option 2) presupposes that the applicable law under private international law rules (Rome II Regulation) would be the law of a Member State. Under Art. 4 of Rome II the applicable law is the law of the country where the damage occurs, which could be in case of

214 Art. 3 Rome II Regulation. *Also* Heuser 2019, pp. 208-209.
215 Heuser 2019, p. 208.
216 If the loss occurred in a non-Member State under Art. 4 (1) Rome II Regulation (section 4.4.3).
217 *Cf. for the latter scenario* Heuser 2019, pp. 208-209.
218 *Cf. for the latter argument* Heuser 2019, p. 209.
219 *Contra* Heuser 2019, p. 212. Although Heuser doubted whether the Union legislature intended not to limit the applicable national law, Heuser took the position that the law of a third country can apply to claims based on Art. 35a (1) CRA Regulation. In contrast, to my opinion, if the law of a third country applies, the claim based on Art. 35a (1) CRA Regulation is no longer on the table at all.

> financial instrument purchases either the place of purchase, the place where the securities are deposited or where the account is located. Following these criteria purchases by EU investors on EU markets will in most cases lead to the application of the law of a Member State which will ensure an efficient right of redress under this option.'[220]

The second remark to be made is that some attention should be paid to the applicability of the Rome II Regulation to situations in which issuers claim compensation for reputational loss caused by an incorrect credit rating.[221] Under Article 1 (2) (g) Rome II Regulation, claims for non-contractual liability arising 'out of violations of privacy and rights relating to personality, including defamation' are excluded from the scope of the Rome II Regulation. As the situation in which an issuer has suffered reputational loss shows some resemblance to the situation of a victim of defamation, one can question whether claims for reputational loss brought by issuers fall inside or outside the scope of the Rome II Regulation. However, it seems unlikely that credit rating agency liability claims for reputational loss brought by issuers are excluded from the scope of application of the Rome II Regulation.[222] Reputational loss suffered by issuers can result from infringements of regulatory obligations under Annex III CRA Regulation, which are not framed as 'rights relating to personality' as meant under Article 1 (2) (g) Rome II Regulation.[223] An indication can also be found in the proposal of the Rome II Regulation of the European Commission. This proposal initially involved a conflict of laws rule on violations of privacy and rights relating to personality under Article 6, which was 'particularly' meant for defamation by the mass media.[224] Eventually, Article 6 was not adopted and resulted in the limitation under Article 1 (2) (g) Rome II Regulation. It seems, however, that this limitation – with a similar scope of application as the initial proposal for Article 6 Rome II Regulation – means to exclude from the scope of the Rome II Regulation claims relating to other types of situations than credit rating agency liability. Therefore, the location of reputational loss under Article 4 (1) Rome II Regulation will be discussed in section 4.4.3.2. If claims of issuers for reputational loss were to fall outside the scope of the Rome II Regulation, the applicable national law must be

220 SEC(2011)1354 final, p. 47, fn. 119.

221 *As done in the context of credit rating agency liability by* Heuser 2019, pp. 212-215, Wimmer 2017, p. 102 and Happ 2015, pp. 223-233.

222 *Cf.* Heuser 2019, pp. 212-215 (who argued the exception under Art. 1 (2) (g) Rome II Regulation does not apply) and Wimmer 2017, p. 102 (who argued the exception under Art. 1 (2) (g) Rome II Regulation does not apply). *Contra* Happ 2015, pp. 223-233 (who argued the exception under Art. 1 (2) (g) Rome II Regulation does apply, so that claims for reputational loss brought by issuers fall outside the scope of the Rome II Regulation).

223 *See* Heuser 2019, pp. 214-215. *See also* section 4.3.5.4.

224 Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II"), 22 July 2003, COM(2003) 427 final, p. 17. *Also* Dickinson 2008, no. 3.226.

determined in accordance with the national rules of the *lex fori*, which differ widely at this point.[225]

4.4.2 Choice of law agreement

Under Article 14 (1) Rome II Regulation, parties can agree to submit their dispute to the law of a certain country as long as their choice has been expressed or demonstrated with reasonable certainty by the circumstances of the case. This provides parties involved in a dispute on credit rating agency liability with the opportunity to submit their dispute to the law of a certain country[226] and, thereby, with the opportunity to manipulate the interpretation of Article 35a CRA Regulation.

Article 14 Rome II Regulation imposes some limitations on the ability of parties to choose the law that applies to their dispute. It provides that a choice of law agreement can be entered into only after the event that gave rise to the damages occurred.[227] An exception has been made for commercial parties that can enter into a freely negotiated choice of law agreement before the event that gave rise to the damages occurred.[228] By imposing these limitations, the Rome II Regulation balances the objective of party autonomy against the objective of protecting weaker parties against each other.[229]

As a consequence of these rules, credit rating agencies can agree with other commercial parties (most likely issuers[230] or institutional investors[231]) to submit future disputes to the laws of a (non-)EU country. For instance, a rating contract for a solicited credit rating can stipulate that any disputes involving non-contractual liability will be solved in accordance with English law.[232] However, one should keep in mind that choice of law clauses must be freely negotiated. Therefore, choice of law clauses in the standard Terms of Use of

225 Final Report of a Comparative Study on the Situation in the 27 Member States as regards the Law Applicable to Non-Contractual Obligations arising out of Violations of Privacy and Rights relating to Personality, JLS/2007/C4/028, Final Report, February 2009, p. 6, available at http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/09/study_privacy_en.pdf, last accessed 31 August 2019. *Contra* Happ 2015, p. 232, who concluded that the Rome II Regulation does not apply when an issuer claims to have suffered reputational loss due to an affected, unsolicited credit rating.

226 As Art. 14 Rome II Regulation does not impose any restrictions, parties can choose to submit their dispute to the law of a third country.

227 Art. 14 (1) (a) Rome II Regulation.

228 Art. 14 (1) (b) Rome II Regulation.

229 Mandery 2014, pp. 96-97. Under Art. 14 (2) and Art. 14 (3) Rome II Regulation, additional rules have been established in order to protect weaker parties.

230 *See* Deipenbrock 2015, p. 11 and Steinrötter 2015, p. 114.

231 *See* Steinrötter 2015, p. 114. *Cf. also* Happ 2015, pp. 253-254.

232 *Cf. also on choice of law clauses and credit rating agency liability,* Deipenbrock 2018, pp. 565-566.

credit rating agencies might not be valid under the regime of the Rome II Regulation.

4.4.3 General rule

4.4.3.1 Financial loss

(a) Main rule and helicopter view

If parties have not concluded a valid choice of law agreement, a national court must determine the law applicable to a claim for credit rating agency liability in accordance with the general rule of Article 4 (1) Rome II Regulation. Under Article 4 (1) Rome II Regulation, the law applicable to the dispute is the law of the country in which the damage occurs (the *loci damni* or *Erfolgsort*). It is irrelevant where the event giving rise to the damage occurred (the *Handlungsort*) and where indirect damage occurred.[233] The general rule under Article 4 (1) Rome II Regulation assumes loss can always be located at a physical place. However, the same problems arise as compared to Article 7 (2) Brussels I Regulation Recast, because it is often complex, if not impossible, to locate intangible financial loss in a physical place.[234]

The yardstick of the *Erfolgsort* under Article 7 (2) Brussels I Regulation and the *loci damni* under Article 4 (1) Rome II Regulation are similar. The case law of the CJEU in the context of Article 7 (2) Brussels I Regulation (recast) is therefore used for interpreting Article 4 (1) Rome II Regulation as a matter of principle.[235] Section 4.3.5.3 (a) involved an analysis of the case law of the CJEU in respect of the *Erfolgsort* of financial loss – *Kronhofer v Maier*,[236] *Kolassa*

233 *In the context of credit rating agencies,* Deipenbrock 2018, p. 567. *See in general* Strikwerda & Schaafsma 2019, no. 241 and Fröhlich 2008, pp. 40 ff. If both parties to the dispute have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply under Art. 4 (2) Rome II Regulation. This provision can be useful if the losses occurred in another country than in the country in which the investor/issuer and the credit rating agency are established. For instance, if the securities account is located in another country.

234 *Cf.* Haentjens & Verheij 2016, p. 346. *In the context of credit rating agencies cf.* Deipenbrock 2018, p. 567 and Wimmer 2017, p. 107.

235 *Cf.* Recital 7 Rome II Regulation, where it is explained that the EU legislature aimed to create consistency between the substantial scope and the provisions of the Brussels I Regulation and the Rome II Regulation. *Also* CJEU 21 January 2016, C-359/14 and C-475/14, ECLI:EU:C:2016:40 (*ERGO Insurance*), para 43, *as repeated in e.g.* CJEU 28 July 2016, C-191/15, ECLI:EU:C:2016:612 (*Verein für Konsumenteninformation*), para 36. However, some caution should be exercised, *cf.* CJEU 16 January 2014, C-45/13, ECLI:EU:C:2014:7 (*Kainz v Pantherwerke*), para 20, where the CJEU held that 'the objective of consistency' of Recital 7 Rome II Regulation cannot lead to an interpretation of the Brussels I Regulation that is not connected to the scheme and objectives of the Brussels I Regulation. This could also apply to the interpretation of the Rome II Regulation in light of the Brussels I Regulation (recast).

236 ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier).*

v Barclays Bank,[237] *Universal Music*[238] and *Helga Löber v Barclays Bank*.[239] In the most recent decisions of *Universal Music* and *Helga Löber v Barclays Bank*, the CJEU did not appoint a single, decisive connecting factor, and refrained from making fundamental choices as regards the way in which financial loss must be located. Instead, the CJEU returned to the basic principles underlying special jurisdiction and looked at cases from a helicopter view so as to conclude whether a certain national court was closely connected to the action brought before it.

Following the reasoning of the CJEU in *Universal Music* and *Helga Löber v Barclays Bank*, one should take the objectives underlying Article 4 (1) Rome II Regulation as a starting point. Recital 16 of the Rome II Regulation provides that '[u]niform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability'. Translating the helicopter view to the context of applicable law, a combination of multiple connecting factors must indicate the loss was suffered in a particular Member State whilst respecting the general objectives of foreseeability and a reasonable balance between the interests of claimants and defendants. Bank accounts alone, whether cash or securities accounts, do not form a relevant connecting factor in the absence of other connecting factors and claimants' domiciles (*forum actoris*) alone do not form a relevant connecting factor.

(b) Claims brought by issuers

From a factual perspective, claims based on Article 35a CRA Regulation brought by issuers show most resemblance with the case of *Universal Music*. An analogue application of the helicopter view renders a combination of the following connecting factors relevant to determine the *loci damni* under Article 4 (1) Rome II Regulation:

- the place where the issuer is established, especially because the credit rating was attached to that issuer or one of its financial instruments;
- the place of the cash account in which the loss materialised;
- the place of the market(s) on which the financial instruments were sold; and
- if applicable, the place where the credit rating agency and the issuer entered into a contract for the assignment of a solicited credit rating or the place where the obligation to pay increased funding costs began to

237 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*).
238 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
239 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

rest unequivocally upon the issuer, viz. the moment the issuer entered into a contract with an investor that stipulates certain interest rates and clauses on the interest rates.

As the relationship between credit rating agencies and issuers is characterised by more proximity, these connecting factors are foreseeable to both credit rating agencies and issuers. In particular, the helicopter view will not cause problems in relation to sovereign ratings, attached to sovereign states or their financial instruments: the loss will probably locate within that sovereign state. This outcome is foreseeable to both parties and strikes a reasonable balance between the interests of both the credit rating agency and the sovereign state.

Yet, when the connecting factors referred to are spread over multiple Member States, the helicopter view does not indicate which connecting factor is decisive. In *Universal Music*, the CJEU seems to have attached much importance to the place where the loss became irreversible.[240] In relation to claims brought by issuers, the place where the loss puts an irreversible burden on the assets of the issuer can be the moment and the place where the obligation to pay increased funding costs began to rest unequivocally upon the issuer. But, when and where would that moment be: (1) at the moment the credit rating is issued – which is in fact the *Handlungsort*; (2) or at the moment the issuer entered into a contract with an investor that stipulates certain interest rates and clauses on the interest rates? Both options, however, do not provide a relevant and reliable connecting factor and can be manipulated by one of the parties.[241] Therefore, it is uncertain whether, when confronted with such a case, the CJEU would accept the place where parties have entered into a contract as the place where the loss occurred as the decisive connecting factor.

(c) Claims brought by investors

In respect of claims brought by investors against credit rating agencies, the Impact Assessment stated that '[u]nder Art. 4 of Rome II the applicable law is the law of the country where the damage occurs, which could be in case of financial instrument purchases either the place of purchase, the place where the securities are deposited or where the account is located'.[242] This approach benefits EU based investors, but has become obsolete subsequent to the CJEU's latest decisions. An analogue application of the general guidelines described above renders a combination of the following connecting factors relevant to determine jurisdiction:

240 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 31.

241 *Cf.* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), annotated by M.F. Müller, *NJW* 2016, p. 2170.

242 SEC(2011) 1354 final, p. 47, fn. 119.

- the domicile or place of establishment of the investor;
- the location(s) of the bank account(s) employed by the investor;
- the primary or secondary market in which the financial instruments were bought;
- the place where any relevant contracts were concluded as a consequence of which the loss became irreversible (i.e. the contract by which the relevant financial instruments were bought); and
- the place where the credit rating agency and the investor entered into a contractual relationship (if applicable).

Yet, as opposed to the facts of *Universal Music* and *Helga Löber v Barclays Bank*, these connecting factors are not necessarily foreseeable to credit rating agencies because there will often be no contact and any form of relationship between the credit rating agency and investors at all. These concerns are however somewhat mitigated by the fact that the credit rating agency deliberately issued its credit ratings for the European markets, by establishing and registering in a Member State in order for their credit ratings to be allowed to be used for regulatory purposes by certain issuers (e.g. credit institutions, investment firms and insurance undertakings).[243]

When the connecting factors are spread over different Member States, the question still arises of what connecting factor is decisive. The decision in *Helga Löber v Barclays Bank* provides no guidance in this regard, except for the fact that bank accounts and claimant's domiciles are not decisive. In *Universal Music*, the CJEU seems to have attached much importance to the place where the loss became irreversible. Applying the 'reversibility test'[244] to loss suffered by investors in the context of credit rating agency liability, the loss can be located at two places: (1) the place where the investor entered into the contract to purchase the financial instruments;[245] or (2) the place where the investor lost control over his assets in the performance of the contract to purchase the financial instruments, viz. the cash account from which the financial instruments were paid for.[246] As the latter connecting factor lost its independent importance after *Universal Music* and *Helga Löber v Barclays Bank*, the place where the investor entered into the contract to purchase the financial instruments then seems the most important connecting factor. Yet, the place of this contract does not necessarily provide a relevant and reliable connecting factor and can be manipulated by one of the parties.[247] Moreover, one can question

243 Art. 4 (1) CRA Regulation. Pursuant to Art. 3 (1) (g) CRA Regulation, the term 'regulatory purposes' means 'the use of credit ratings for the specific purpose of complying with Union law, or with Union law as implemented by the national legislation of the Member States'.
244 Van Bochove 2016, p. 459 and Dickinson 2008, no. 4.67.
245 *Cf.* Dickinson 2008, no. 4.67.
246 *Cf.* Dickinson 2008, no. 4.67.
247 *Cf.* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), annotated by M.F. Müller, *NJW* 2016, p. 2170.

whether this approach is foreseeable to credit rating agencies and strikes a reasonable balance between the interests of both the credit rating agency and investors. Therefore, it is uncertain whether, if confronted with such a case, the CJEU would accept the place where parties have entered into a contract as the place where the loss occurred.

In conclusion, with regard to both claims brought by issuers and investors, an analogue application of the decisions of the CJEU in *Universal Music* and *Helga Löber v Barclays Bank* points national courts back towards the basic principles underlying the rules of the Rome II Regulation, without providing a single, decisive connecting factor in cases concerning financial loss. This multi-factor approach or helicopter view is comprehensible in light of all the disadvantages associated with choosing a single, decisive connecting factor. At the same time, it is still impossible to formulate a clear and certain rule in relation to financial torts such as Article 35a CRA Regulation. However, at present it is not clear (or foreseeable) where the *Erfolgsort* of financial losses suffered by issuers and investors due to incorrect credit ratings shall be located in situations in which relevant connecting factors are spread over different Member States.[248]

4.4.3.2 Reputational loss

As described in section 4.4.1, this study takes the position that civil liability claims brought by issuers in relation to reputational loss fall within the scope of application of the Rome II Regulation. If they do, and the credit rating agency and the issuer have not made a choice of law, the place where the damages have occurred (*lex loci damni*) must be located in order to determine the applicable law under Article 4 (1) Rome II Regulation. Section 4.3.5.4 made a more detailed analysis of the location of reputational loss for the purposes of the *Erfolgsort* under Article 7 (2) Brussels I Regulation and solely the main conclusions will be repeated here.[249] As credit ratings are issued online and investors and suppliers can be domiciled all over the world, reputational loss suffered by issuers can spread over the world. For the purpose of Article 4 (1) Rome II Regulation, the loss can therefore occur all over the world as well.

---

248 *Cf.* CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), annotated by I. Bach, *NZG* 2016, p. 795.

249 *Cf.* Recital 7 Rome II Regulation, which explains that the Union legislature aimed to create consistency between the substantial scope and the provisions of the Brussels I Regulation and the Rome II Regulation. *Also* CJEU 21 January 2016, C-359/14 and C-475/14, ECLI:EU:C:2016:40 (*ERGO Insurance*), para 43, *as repeated in e.g.* CJEU 28 July 2016, C-191/15, ECLI:EU:C:2016:612 (*Verein für Konsumenteninformation*), para 36. However, some caution should be exercised, *cf.* CJEU 16 January 2014, C-45/13, ECLI:EU:C:2014:7 (*Andreas Kainz v Pantherwerke AG*), para 20, where the CJEU held that 'the objective of consistency' of recital 7 Rome II Regulation cannot lead to an interpretation of the Brussels I Regulation that is not connected to the scheme and objectives of the Brussels I Regulation. This might also apply to the interpretation of the Rome II Regulation in light of the Brussels I Regulation (recast).

Consequently, a situation can occur in which a civil liability claim brought by an issuer is governed by different national laws depending on the Member States in which the reputational losses were suffered,[250] creating a rather unclear and inconvenient situation for both issuers and credit rating agencies.

4.4.4 Escape clause

As an exception to the general rule of Article 4 (1) Rome II Regulation, Article 4 (3) Rome II Regulation provides an 'escape clause' if it is evident from all the circumstances of the case that the tort is 'manifestly more closely connected' with a country other than that indicated in Article 4 (1) or 4 (2) Rome II Regulation. If a manifestly closer connection with another country exists, the law of that country will apply. The European Commission emphasised that Article 4 (3) Rome II Regulation can only be used to ensure that the law of 'the centre of gravity of the situation' is applied.[251]

Article 4 (3) Rome II Regulation states that a manifestly closer connection can 'be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question'. Credit rating agencies and issuers frequently enter into contractual relationships. Hence, the escape clause can actually play a role in determining the applicable law to liability claims based on Article 35a CRA Regulation. For instance, in the case of a solicited rating, a dispute on non-contractual liability might strongly relate to a contractual relationship between the credit rating agency and the issuer. Then, the law that governs the contract might also govern the liability claim.[252]

4.5 Recognition and enforcement

4.5.1 A small sidestep to recognition and enforcement

As the final part of this Chapter, this section pays attention to the recognition and enforcement of European judgments that award damages to issuers and investors based on Article 35a CRA Regulation. This section does not seamlessly fit the main structure of this dissertation, because the topic of 'recognition and enforcement' falls outside the scope of the subquestion to be answered mainly in Chapter 4 – namely, which issues occur, if any, in determining the competent court and the applicable national law in respect of claims based on Article 35a CRA Regulation. Moreover, this section does not only concentrate

250 *Cf.* Dicey, Morris & Collins 2012, no. 35-027.
251 Dickinson 2008, no. 4.84. *See also* Lehmann 2016b, p. 339. *Cf. also* Lehmann 2018, p. 23.
252 *See, for the same approach,* Heuser 2019, p. 237 and Wimmer 2017, p. 110.

on EU rules of Private International Law, but also on US rules of Private International Law. It was decided to include this section nevertheless, because of its importance for the functioning of Article 35a CRA Regulation. Section 4.5.2 describes the rules on the recognition and enforcement of European judgments within the EU. Subsequently, section 4.5.3 elaborates on the legal consequences of practical issues that issuers and investors might experience if they wish to enforce a judgment against an EU credit rating agency: the depletion of assets of EU subsidiaries of credit rating agencies headquartered outside the EU.[253]

4.5.2 Enforcement within EU

The European rules on the recognition and enforcement of judgments awarding compensation to issuers and investors are rather straightforward. Article 36 Brussels I Regulation (recast) stipulates that Member States must recognise judgments provided in other Member States without special procedures being required. Therefore, judgments of Member State courts on credit rating agency liability will be automatically recognised by other Member States.[254] Furthermore, Article 39 Brussels I Regulation (recast) stipulates that judgments provided by Member State courts are enforceable in other Member States 'without any declaration of enforceability being required'. Hence, judgments of Member State courts awarding damages to issuers and investors will be automatically enforceable in other Member States.[255]

4.5.3 Depletion of assets in the EU

The enforcement of European judgments awarding compensation in the form of damages to issuers and investors is hindered if a European credit rating agency does not have sufficient assets available. Although examples are currently lacking, Lehmann feared that international credit rating agency groups would minimise the assets of their EU subsidiaries.[256] Lehmann's fear was exacerbated by the fact that the CRA Regulation does not oblige an EU subsidiary to hold a certain amount of assets.[257] Enforcement issues could occur, for example, when a Member State court provided a judgment awarding damages against an EU subsidiary whose parent is established in the United States. If the parent company were to deplete the EU subsidiary's assets, issuers

253 *As raised by* Lehmann 2016a, p. 81. *Cf. also* Dutta 2014, p. 40.
254 Except if a ground for refusal under Art. 45 (1) Brussels I Regulation (recast) applies.
255 Except if a ground for refusal under Art. 46 in conjunction with Art. 45 (1) Brussels I Regulation (recast) applies.
256 Lehmann 2016a, p. 81. *Cf. also* Dutta 2014, p. 40.
257 *See* Lehmann 2016a, p. 81.

and investors would need a new judgment directed at the parent company, which, subsequently, would need to be enforced in the US.

If a parent company actually depleted the assets of an EU subsidiary, issuers and investors face a complex road towards compensation. The options to attempt forcing credit rating agency groups to pay the damages awarded involve additional litigation, and hence more time and money. Moreover, they are likely to involve litigation with an unforeseeable outcome before third country courts. Issuers and investors can bring two types of claims in order to obtain a new judgment against the parent company: (1) a claim for non-contractual liability against the parent company before the courts of a third country (in our example, a US court); or (2) a claim for non-contractual liability against the EU subsidiary and the parent company before Member State courts. The wrongful act would consist of the depletion of assets of the EU subsidiary so that damages could not be paid to the issuer or investor. As the first option immediately requires litigation before third country courts, this section does not elaborate upon this option.

Concentrating on the second option, at first sight, might seem pointless: why would investors and issuers bring proceedings against an EU subsidiary, while the assets of that subsidiary were depleted? But by suing the subsidiary, investors and issuers can try to sue the parent company in a Member State as co-defendant, thereby keeping the legal proceedings before the courts of a Member State. As the grounds for jurisdiction under Article 4 and Article 7 Brussels I Regulation (recast) do not apply to defendants that are not domiciled in the EU,[258] whether it is possible to bring proceedings before the courts of a Member State in this type of cases depends on national rules of Private International Law.[259] If a Member State court assumed jurisdiction, it must

258 Art. 6 (1) Brussels I Regulation (recast). A national court can assume jurisdiction under Art. 26 (1) Brussels I Regulation (recast) if a defendant appeared before court voluntarily.

259 *See* Dutta 2014, p. 36. For instance, under Art. 6 (e) Wetboek van Burgerlijke Rechtsvordering, Dutch courts can assume jurisdiction in matters relating to obligations arising from wrongful acts, if the harmful event occurred or may occur in the Netherlands. Furthermore, Dutch courts can assume jurisdiction over other defendants if the claims against a defendant in relation to which the Dutch courts are competent and the other defendants are connected to such an extent that joint consideration is justified from the perspective of efficiency (Art. 7 (1) Wetboek van Burgerlijke Rechtsvordering). An EU Study on Residual Jurisdiction has shown that the legal systems of most Member States involve rules on the consolidation of claims, so that the opportunity could exist for issuers and investors to sue a parent company of a credit rating agency established in a non-EU country before the courts of a Member State together with the EU subsidiary (*cf.* General Report prepared by A. Nuyts, *Study on Residual Jurisdiction*, 3 September 2007, p. 50, available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf, last accessed at 31 August 2019). However, there are differences between the Member States. Under German law, for instance, the possibilities for the joinder of defendants are limited. The 'international joinder' of parties is allowed only in exceptional situations (the study on German law, p. 13, available at http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_germany_en.pdf, last accessed at 31 August 2019). But, see also on the jurisdiction of German courts in relation

determine the national law applicable to the claim under the Rome II Regulation. In the absence of European or international rules on group liability,[260] the national laws of Member States might differ in the area of group liability.[261] Overall, issuers and investors must overcome many hurdles to obtain a judgment awarding damages against the parent of an EU subsidiary of a credit rating agency headquartered outside the EU.

Subsequently, upon obtaining a European judgment against the parent company, issuers and investors must enforce a judgment against a parent company in the United States (according to the example provided at the beginning of this section). This all boils down to whether a judgment of a court of a Member State could be recognised and enforced in the US.[262] The recognition and enforcement of foreign 'money' judgments in the US is regulated by the 2005 Uniform Foreign Money-Judgments Recognition Act ('2005 Uniform Act') and by its former version, the 1962 Uniform Foreign Money-Judgments Recognition Act ('1962 Uniform Act'),[263] which have been implemented by the states. Considering the fact that the parent companies of Standard & Poor's and Moody's are established in the state of New York, the implementation of the 1962 Uniform Act in the Civil Practice Law & Rules of New York (2012) are most important in practice.

For a US court to consider the recognition of a foreign-country judgment, the judgment shall 'grant or deny recovery of a sum of money' and shall be final, conclusive and enforceable under the law of the foreign country.[264] The courts of New York can refuse to recognise foreign-country judgments on several grounds. For instance, because a foreign court did not have personal jurisdiction over the defendant.[265] § 5305 (a) Civil Practice Law & Rules of New York (2012) lists six categories of situations in which a court shall not refuse recognition for lack of personal jurisdiction.[266] The example described

to claims brought against credit rating agencies established in third countries, Bundesgerichtshof 13 December 2012, III ZR 282/11, *NJW* 2013, pp. 386-387, *BeckRS* 2013, 1088 (appeal of Oberlandesgericht Frankfurt 28 November 2011, 21 U 23/11, ECLI:DE:OLGHE:2011:1128.21U23.11.0A, *BeckRS* 2011, 27061)). For an argument in favour of extending the Brussels I Regulation (recast) to defendants not established or domiciled in the EU in the context of credit rating agencies, Risso 2016.

260 *See* Olaerts 2014, p. 11.

261 For instance, under Dutch law, a parent company and a subsidiary company are separate legal entities, so that liability of a parent company must often find its basis in a wrongful act of the parent company (*cf.* Kroeze, Timmerman & Wezeman 2013, p. 230). If a parent company deliberately minimised the assets of its subsidiary in order to prejudice creditors, a victim might succeed in bringing a claim against a parent company based on Art. 6:162 BW (*see* Asser/Maeijer/Van Solinge & Nieuwe Weme 2-II* 2009/839).

262 This section provides only a brief overview of US Private International Law.

263 Brand 2018, pp. 11-12 and *cf.* Symeonides 2008, no. 730.

264 § 3 (a) 2005 Uniform Act and § 3 1962 Uniform Act.

265 § 5304 and § 5304 (a) (2) Civil Practice Law & Rules of New York (2012). *Cf.* Symeonides 2008, no. 735.

266 *Cf.* Symeonides 2008, no. 735.

above – in which a judgment has to be enforced against a parent company of a credit rating agency headquartered in New York – will, however, not often fall within one of these six categories.[267] Yet, the list of § 5305 (a) Civil Practice Law & Rules of New York (2012) is not exhaustive. On the contrary, courts may also recognise other 'bases of jurisdiction' under § 5305 (b) Civil Practice Law & Rules of New York (2012).[268] In the state of New York, this 'catch-all provision'[269] is understood to mean that the courts of New York are entitled to recognise a foreign-country judgment in situations in which the foreign court assumed jurisdiction based on a ground that is recognised in internal New York law as well.[270] In *Sung Hwan Co.*, the Court of Appeals of New York held that 'the inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction, and if so, whether that foreign jurisdiction shares our notions of procedure and due process of law'.[271] Hence, the key question for recognition is whether the exercise of jurisdiction of the court of a Member State is consistent with New York law.

Overall, if a parent company of an EU subsidiary were to actually minimise the assets of its EU subsidiary, issuers and investors must overcome many hurdles to receive the damages awarded. Not only will they have to face more litigation, the legal proceedings may also take place before third country courts and have an unforeseeable outcome. As a result, the effects of Article 35a CRA Regulation would be hindered because issuers and investors are not able to easily enforce an EU judgment against an EU credit rating agency.

4.6 Concluding remarks

Through a broad overview of relevant Private International Law aspects, this Chapter aimed to answer the question of which issues occur, if any, in determining the competent court and the applicable national law in respect of claims based on Article 35a CRA Regulation. It must be emphasised that this Chapter was based on three assumptions. First, it was assumed that issuers and

267 For instance, under § 5305 (a) (5) Civil Practice Law & Rules (2012), if 'the defendant had a business office in the foreign country and the proceeding in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign country', recognition shall not be refused due to a lack of personal jurisdiction. However, as the parent companies of credit rating agencies have established subsidiaries (and not branches), the situation of credit rating agency liability will not fall within this category.

268 *See* Symeonides 2008, no. 735.

269 Sorkowitz 1991, p. 64.

270 Marino 2016, p. 4 in West's McKinney's Forms Civil Practice Law and Rules § 8:452 (CPLR art. 53) 2016.

271 *Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78, 83 (N.Y. 2006). *Cf.* Marino 2016, p. 4 in West's McKinney's Forms Civil Practice Law and Rules § 8:452 (CPLR art. 53) 2016, p. 4.

investors start proceedings before the courts of Member States, and that national courts must apply European rules of Private International Law. Second, it was assumed that the defendants are credit rating agencies established and registered in the EU. Third, for Private International Law purposes, this dissertation considers claims based on Article 35a CRA Regulation to be of a non-contractual nature, irrespective of the existence of an agreement between a credit rating agency and an issuer or an investor (section 4.2). The overview of relevant Private International Law aspects revealed multiple issues, which mainly originate from uncertainty as regards the application of general rules of Private International Law to disputes over credit rating agency liability and claims based on Article 35a CRA Regulation. Section 6.3.2 provides a more detailed analysis of these issues from the perspective of the normative framework.

Section 4.3 investigated on which legal basis Member State courts can assume jurisdiction in relation to claims based on Article 35a CRA Regulation. Depending on the concrete circumstances of the case, national courts can assume jurisdiction under Article 25 (1), Article 4 (1) or Article 7 (2) Brussels I Regulation (recast). It is, however, not always clear in which manner national courts must apply these rules to disputes over credit rating agency liability and to claims based on Article 35a CRA Regulation. Most issues – in terms of foreseeability and predictability for the stakeholders involved – will arise: (1) if a jurisdiction clause exists in favour of the courts of a third country (a non-Member State); and (2) if a national court must determine the *Erfolgsort* of financial loss under Article 7 (2) Brussels I Regulation (recast).

If a jurisdiction clause exists in favour of the courts of a third country, European rules of Private International Law do not provide guidance as to how national courts must assess the validity of such clauses: in accordance with national Private International Law or in accordance with the other – i.e. not Art. 25 Brussels I Regulation (recast) – provisions of the Brussels I Regulation (recast).[272] The latter option in fact ignores the existence of the jurisdiction clause and leads to the application of the other rules of the Brussels I Regulation (recast). The different options can lead to different decisions on the validity of exclusive jurisdiction clauses in favour of the courts of third countries. Whereas the first option leaves this matter to national rules of Private International Law, the second option sidesteps party autonomy. As contracts concluded by credit rating agencies can often include jurisdiction clauses in favour of the US courts, it is, hence, currently difficult for parties to predict whether Member State courts will uphold an exclusive jurisdiction clause in favour of third country courts. This lack of clarity is very unfortunate for credit rating agencies, issuers and investors.

272 Assuming that the Hague Choice of Court Convention does not apply.

In addition, uncertainty occurs if national courts must determine the *Erfolgsort* of financial loss under Article 7 (2) Brussels I Regulation (recast). The intangible nature of financial loss lies at the heart of the current uncertainty. Indeed, the main rule under Article 7 (2) Brussels I Regulation (recast) and the CJEU's distinction between *Handlungsort* and *Erfolgsort*[273] assume that loss occurs at a physical place, while the intangible nature of financial loss renders it difficult, if not impossible, to pin financial loss down to a physical place. In its recent decisions in *Universal Music*[274] and *Helga Löber v Barclays Bank*,[275] the CJEU did not designate a single, decisive connecting factor to locate financial loss. Instead, it emphasised that special jurisdiction under Article 7 (2) Brussels I Regulation (recast) must first and foremost be justified by a close connection between the national court and the action brought before it. Thereby, the CJEU returned to the basic principles underlying special jurisdiction and looked at the cases from a 'helicopter view'. This helicopter view provides room for manoeuvre and helps to avoid accidental and manipulated jurisdiction. Yet, applied to disputes over credit rating agency liability, its outcomes seem relatively favourable to issuers and investors. Other relevant connectors may indeed often coincide with the claimant's domicile or place of establishment, so that issuers and investors can bring proceedings before the courts of the Member States in which they are domiciled or established. Another problem associated with the helicopter view is that it does not help to solve cases in which the relevant connectors are spread over multiple countries, because it does not make a fundamental choice on the location of financial loss. In those situations, uncertainty continues as regards the manner in which national courts should locate the *Erfolgsort* of financial loss. As both issuer claims and investor claims based on Article 35a CRA Regulation involve financial loss, this uncertainty can also occur in cases involving credit rating agency liability and claims based on Article 35a CRA Regulation.

Section 4.4 investigated how national courts must determine the law applicable to claims based on Article 35a CRA Regulation. Whereas Article 35a (4) CRA Regulation refers to the applicable national law with ease, the analysis made in section 4.4 demonstrated that determining the applicable national law is anything but easy. Under the current state of the law, if parties have not made a choice of law, the law applicable to claims based on Article 35a CRA Regulation must be determined in accordance with Article 4 Rome II Regulation. Under Article 4 (1) Rome II Regulation, the law applicable to the dispute is the law of the state in which the losses occurred (*lex loci damni*), which corresponds to the connector of the *Erfolgsort* under Article 7 (2) Brussels

273 ECJ 30 November 1976, C-21/76, ECLI:EU:C:1976:166 (*Handelskwekerij Bier v Mines de Potasse d'Alsace*), para 24.

274 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).

275 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

Regulation (recast). The unforeseeability and unpredictability stemming from the CJEU's case law in the context of the *Erfolgsort* of financial loss has more problematic effects in relation to the assessment of the applicable national law, as the *loci damni* is the main rule. An analogue application of the case law of the CJEU in *Universal Music* and *Helga Löber v Barclays Bank* entails that national courts must return to the basic principles underlying the Rome II Regulation and must look at cases from a helicopter view. This helicopter view however does not help to solve cases in which the relevant connecting factors are spread over different countries, because it does not make a fundamental choice on the location of financial loss. In those situations, uncertainty continues. In the context of Article 35a CRA Regulation, the lack of certainty is unfortunate, as the applicable national law is the cornerstone for stakeholders to structure their claims and defences and is essential for stakeholders involved to assess whether a claim may be successful.

Slightly outside the scope of the main question posed in this Chapter, section 4.5 provided a brief oversight of issues that could occur at the stage of recognition and enforcement of European judgments awarding compensation in the form of damages to issuers and investors. As the CRA Regulation does not require credit rating agencies established and registered in the EU to hold certain amounts of capital, credit rating agency groups could hinder the enforcement of European judgments by minimising the assets of their EU subsidiaries. Investors and issuers might end up in new proceedings (possibly before third country courts) with unforeseeable outcomes, so that the effects of Article 35a CRA Regulation may be hindered. This issue is, however, not discussed further in the other parts of this dissertation.

5 Interpretation and application Article 35a under Dutch, French, German and English law

5.1 Introductory remarks

Article 35a CRA Regulation creates a right of redress for issuers and investors, which they can invoke directly against credit rating agencies. The Union legislature combined EU and national law in this right of redress: the conditions are set at the EU level and the interpretation and application of the majority of these conditions is left to the Member States under Article 35a (4) CRA Regulation (in detail, section 2.5.4.2). As a result of this structure, national courts cannot apply Article 35a CRA Regulation without assistance of the applicable national law. In fact, except for the infringements listed in Annex III, Article 35a CRA Regulation submits all terms used in the provision to the interpretation and application of the applicable national law. To be able to conclude whether Article 35a CRA Regulation has created an adequate right of redress for issuers and investors, an understanding of the meaning of its terms under Member State laws is, therefore, crucial.

Chapter 5 aims to contribute to this understanding by means of a legal comparison in respect of the interpretation and application of the terms of Article 35a CRA Regulation under four Member State laws. The object of this legal comparison is to explain how the requirements of Article 35a CRA can be interpreted and applied under the four national laws selected – namely Dutch, French, German and English law – and to compare the outcomes, concentrating on both similarities and differences. If the comparison reveals differences, this research aims to analyse to what extent these differences can lead to different outcomes in decisions of national courts on claims for compensation based on Article 35a CRA Regulation.

This rather voluminous Chapter essentially comprises four parts. Section 5.2 describes the research method adopted for the purpose of the legal comparison, and accounts for methodological choices made in respect of the legal comparison. Section 5.3 provides an analysis of the conditions and terms of Article 35a CRA Regulation. These conditions and terms form the main thread running through the legal comparison. At section 5.3, we thus pick up where we left off in the analysis of Article 35a CRA Regulation at the end of Chapter 3 (section 3.5.3 'Stakeholders defined and scope of application'). Subsequently, sections 5.4 – 5.7 present country reports for Dutch, French, German and English law. Each national law report starts by describing the main features of the legal system and the legal bases available in the legal system prior to the introduction of Article 35a CRA Regulation in 2013. Afterwards, the national law reports concentrate on the interpretation and application of terms such as 'intention', 'gross negligence', 'impact', 'reasonably relied', 'due care', 'caused' and 'damages'. Finally, section 5.8 investigates which similarities and differences exist between the four national interpretations and applications and concludes whether any existing differences can lead to different decisions on civil liability claims based on Article 35a CRA Regulation.

5.2 METHODOLOGY

5.2.1 Approach

5.2.1.1 Three parts

Methods for legal comparative research are 'goal-oriented', in the sense that the object of the comparison largely determines which method shall be employed.[1] The goal of this Chapter is to explain how the requirements of Article 35a CRA Regulation be interpreted and applied under the four national laws selected – namely Dutch, French, German and English law – and to compare the outcomes, concentrating on both similarities and differences. Bearing this goal in mind, the reports of the national laws will involve three parts: (1) a general introduction into the national system of private law; (2) a description of the national rules relating to the civil liability of credit rating agencies and the remedies available to issuers and investors under the national legal system; and (3) the interpretation and application of the terms of Article 35a CRA Regulation under the national law. The first and second part are auxiliary to the third part. They explain the core principles of the national systems of private law and aim to clarify the national approach to credit rating agency liability and remedies available to issuers and investors in brief outline, respectively. The third part, on the interpretation and application of the terms of Article 35a CRA Regulation under that national law, must be read against the background provided by the first and second parts.

5.2.1.2 Part 2: Comparison through functional method

The research method applied in the second part of the national law reports is of a 'functional' nature. Having been developed by famous legal comparatists such as Zweigert and Kötz, 'functionality' was traditionally considered 'the

1 *The importance of the object of the comparison is emphasised by e.g.* Oderkerk 2015, p. 622 and Örücü 2012, p. 573. *The importance of the wording of the research question is emphasised by e.g.* Van Hoecke 2015, p. 29 and Adams & Bomhoff 2012, pp. 6-7.

basic methodological principle' of legal comparative research.[2] The functional method requires a legal comparatist to start from a specific problem or set of facts and to subsequently investigate how a legal system deals with that problem or what rules apply to that set of facts.[3] It takes as a starting point that countries experience similar problems and solve those problems in similar manners.[4] The functional method received severe criticism over the years, for presuming that states solve similar problems in similar manners and for concentrating on black letter law without taking (legal) culture and context into consideration.[5] Nevertheless, being aware of its pitfalls, the functional method suits the purpose of the second part of the legal comparison made in this dissertation best. In an attempt to avoid its pitfalls, a broad introduction of the underlying national principles of private law is provided and the analysis concentrates on both similarities and differences between the national laws.

The second part of the national law reports takes the broad factual situation as a starting point in which a credit rating agency issued an 'incorrect' or 'inaccurate' credit rating, as a consequence of which an issuer or investor has suffered (reputational or) pure economic loss. It is assumed that the incorrect or inaccurate credit rating was the result of a lack of reasonable care and skill exercised by a credit rating agency. The second parts involve analyses of various legal bases for compensation available under the four national laws. The second parts concentrate on common legal bases referred to in national academic literature and are not exhaustive.[6] They serve to provide background to the private law context in which the interpretation and application of the terms of Article 35a CRA Regulation must be read.

As announced in section 3.6.1, the national law reports distinguish between four basic factual situations. As regards claims for damages brought by issuers, this study makes a distinction on the basis of whether or not a contractual relationship exists between a credit rating agency and an issuer. In a similar manner, as regards claims for damages brought by investors, this study makes

2 Zweigert & Kötz 1998, p. 34. Although, prior to Zweigert & Kötz, Rabel's work already developed the first thoughts on functionality in comparative research, Dannemann 2006, p. 386.
3 Zweigert & Kötz 1998, pp. 34-35.
4 Zweigert & Kötz 1998, p. 34.
5 *E.g.* Siems 2018, pp. 33 ff., Van Hoecke 2015, pp. 9-11, Samuel 2014, pp. 79-81, Dannemann 2006, p. 388, Michaels 2006, p. 342 and Husa 2003, who criticised other aspects of the functional method as well. *For alternative methods see e.g.* Siems 2018, Van Hoecke 2015, p. 8, Örücü 2012, pp. 563-564, Michaels 2006, p. 341 and Husa 2003, p. 2.
6 This Chapter does not discuss legal bases for vicarious liability of credit rating agencies for loss caused by employees.

a distinction on the basis of whether or not a contractual relationship exists between a credit rating agency and an investor.[7]

5.2.1.3 Part 3: Comparison through terms and subjects

The third part of the national law reports is difficult to grasp in terms of a specific legal comparative method. It does not take a problem or specific set of facts as a starting point, but instead departs from the wording of Article 35a CRA Regulation, and investigates how the selected national laws interpret and apply certain terms and subjects in the context of credit rating agency liability. Following Article 35a (4) CRA Regulation, the description of the national laws will take the form of a *reversed* method of harmonious interpretation: EU law is interpreted and applied in light of national law.[8] One could also say that Article 35a CRA Regulation is treated as a general ground for civil liability that needs interpretation in order to be applied in practice, which forms a civil law approach.

The following terms and subjects form the main threads running through the four national law reports:

1. Article 35a (1):
- Culpability: 'Intentionally' or 'with gross negligence'.
- Causation: 'impact' and 'caused to', including claimant-specific requirements.
- Loss and compensation: Investors and issuers must suffer 'damage' and can claim 'damages'.
2. Article 35a (3): Limitation of liability
3. Prescription

The national law reports focus on 'terms' and 'subjects', which may seem somewhat imprecise at first sight. It would, however, be artificial to concentrate only on the terms used by Article 35a CRA Regulation, and some general subjects could be discerned in the wording of Article 35a CRA Regulation.

This dissertation made a selection as to which 'terms' and 'subjects' would be compared. Such a selection was necessary, because, due to the fact that Article 35a (4) CRA Regulation refers all matters not covered by the CRA Regulation back to the applicable national law, a legal comparison could otherwise involve all sorts of different elements of national law relating to the civil liability of credit rating agencies. It was decided to restrict the comparison to terms and subjects mentioned by Article 35a CRA Regulation, with the

7 With regard to the legal bases for compensation available in the presence of contractual relationships, this dissertation will focus on general principles and norms of the national laws of contract, notwithstanding the power of the (commercial) parties involved to create their own terms that may expand the responsibility of credit rating agencies.

8 *As described in* section 2.5.4.2 (a). Lehmann described the structure of Art. 35a CRA Regulation as requiring 'nationally autonomous interpretation' (Lehmann 2016a, p. 75).

notable exception of the rules on prescription. The rules on prescription are dealt with because of their importance in practice and, moreover, because of the extremely short prescription period of one year introduced by the UK legislature in respect of claims based on Article 35a CRA Regulation.[9]

The substantive conditions for civil liability set by Article 35a CRA Regulation are closely related to aspects of civil procedure law. Article 35a CRA Regulation does not stipulate that the burden of proof in principle lies with issuers and investors as claimants, but only explicitly addresses a few specific aspects relating to the burden of proof and the standard of care.[10] The national law reports pay attention to evidentiary rules mainly in respect of the burden and standard of proof in respect of the condition of 'causation'. Due to the close connection between the substantive rules on causation and evidentiary law, it was decided to address the relevant rules together.

5.2.1.4 Presentation of the legal comparison

Choices had to be made on how the reports of national laws would be presented. In terms of structure, there are at least two different manners in which the legal comparison as a whole and the national law reports in particular could have been presented: successively and simultaneously. A successive presentation would involve: (1) a general introduction of the terms and subjects of Article 35a CRA Regulation; (2) four separate, complete reports of the national laws; and (3) a final comparative section structured per term or subject. A simultaneous presentation would first and foremost be structured per term or subject, with each term or subject involving an introduction, four (integrated) oversights of the national laws and comparative section per term or subject.[11] Both successive and simultaneous presentation have their advantages and disadvantages. The successive manner of presentation creates coherent oversights per national law, but the final comparative section needs to be read in strong conjunction with separate parts of the national law reports. The simultaneous manner of presentation can result in a clear comparison of the national laws per term or subject, but the general oversight of the national legal systems is rather easily lost. In light of the object of the legal comparison, this dissertation presents the reports on the national laws in a successive manner. The fact that the general terms and subjects investigated often relate to national doctrines which are strongly interrelated was of crucial influence

9 Art. 16 UK Implementing Regulations.
10 Art. 35a (2) CRA Regulation, for instance, places the burden of proof on issuers and investors in respect of the commitment of infringements and the impact of infringements on credit ratings. Courts may facilitate issuers and investors somewhat, as they are allowed to take into account that issuers and investors do not have access to information that is purely within the sphere of the credit rating agency. *See* section 5.3.1.3 (a).
11 *Cf.* Oderkerk 2015, p. 617.

in deciding to make use of the successive manner of presentation.[12] The alternative of discussing the national doctrines separately per term or subject bears the risk of taking these doctrines out of their national legal context. Instead, by offering four separate country reports, the reader is provided with a complete overview of the state of the law in each of the legal regimes investigated.

Despite the choice for a successive manner of presentation, the third parts of the national law reports nevertheless run the risk of taking national concepts out of their legal context. This risk follows from the fact that the third parts are structured in accordance with Article 35a CRA Regulation, while the structure of Article 35a CRA Regulation does not necessarily accord with the structure of the national legal systems investigated. The defence of contributory negligence can serve as an example. In all Member States investigated, a successful appeal to this defence entails a reduction of the amount of damages awarded to the claimant. However, the place of this defence in the systems of national tort law differs. Under French law, it would be apt to discuss this defence in the context of causation. French law considers contributory negligence to involve situations in which causation is shared between the claimant's and the defendant's conduct. Under English law, however, it would be apt to discuss this defence in the context of the calculation of damages. Hence, the successive manner of presentation could not avoid that choices in terms of structure had to be made for the purpose of the comparison, and that the systems of national tort law could not always be precisely reflected in the national law reports.

5.2.2 Legal systems involved

For the purpose of the legal comparison made in this Chapter, four national laws were selected: Dutch, French, German and English law.[13] The object of the comparison played an important role in selecting these national laws.[14] This dissertation takes Dutch law as a starting point, being the legal system the author is most familiar with. For the same reason, the report of the inter-

12 *In respect of this consideration cf.* Oderkerk 2015, p. 617.

13 This dissertation refers to the term 'English' law, but also refers to the UK legislature and to the Credit Rating Agencies (Civil Liability) Regulations 2013 as the UK Implementing Regulations. The United Kingdom involves the legal systems of England and Wales, Scotland and Northern Ireland. It was the legislature of the United Kingdom who implemented Art. 35a CRA Regulation in the UK Implementing Regulations, but this dissertation only looked at the interpretation and application of Art. 35a CRA Regulation from the perspective of the UK Implementing Regulations under the legal systems of England and Wales.

14 *For the importance of the comparison's object to determine which legal systems to include,* Oderkerk 2015, p. 604 and *cf.* Van Hoecke 2015, p. 5.

pretation and application of the terms and subjects under Dutch law eventually turned out to be the most extensive report. As this comparison aims to reveal similarities and differences in the interpretation and application of Article 35a CRA Regulation between the Member States and as it was impossible to investigate all Member State laws, it was decided to include the 'parent legal systems' that are representative of the European Union.[15] This decision led to the traditional selection of the civil law systems of France and Germany, and of the common law system of England.[16] This limited selection does not justify the conclusions of this dissertation to be generalised in respect of the European Union as a whole. At the same time, this limitation is not problematic in the context of this research, because the private law systems of other Member States are often based on French, German or English law or on a combination of these legal systems.[17] In a study on credit rating agency liability, Italian law could also provide interesting insights because, similar to German courts, Italian courts have dealt relatively often with cases on credit rating agency liability.[18] In the selection of the national laws for this study, however, Italian law was excluded because of the author's lack of knowledge of the Italian language.[19]

Upon the completion of this research on 3 September 2019, there was not yet certainty as regards the legal consequences of Brexit. Nevertheless, it was decided to include English law in this dissertation for two reasons. First, based on Article 3 (1) and Article 3 (2) (a) European Union (Withdrawal) Bill, the Regulations on credit rating agencies will form part of UK domestic law, so that Article 35a CRA Regulation and the national UK Implementing Regulations[20] will continue to exist at least for some time after Brexit.[21] One should

15 *In respect of this choice,* Oderkerk 2015, p. 608.

16 *See for this taxonomy e.g.* Zweigert & Kötz 1998, p. 41. *For an overview of taxonomies see* Siems 2018, p. 89. As part of UK law, this dissertation concentrates on the law of England. *For a more detailed explanation*, section 5.7.1.

17 *Cf.* Van Hoecke 2015, p. 24. In Dutch private law, for instance, elements of French, German and English law can be found, Van Hoecke 2015, p. 26.

18 *In civil proceedings e.g.* Tribunale di Roma 27 March 2015, Sez. Giurisprudenza, 13654 (on the standard of care and causation under Italian national private law), Tribunale Catanzaro 2 March 2012, no. 685, Sez. Giurisprudenza, 7041. *In civil proceedings on jurisdiction e.g.* Corte di Cassazione Civile, Sezioni Unite 22 March 2012, no. 8076 and Tribunale di Roma 7 February 2014. The Italian courts denied jurisdiction in both cases. *In criminal proceedings e.g.* Tribunale Penale di Trani 26 September 2017, no. 837/17 Reg.Sent. The Italian court rejected the criminal charges against analysts Standard & Poor's.

19 *For an Italian dissertation on credit rating agency liability e.g.* Picciau 2018a. *For a dissertation on credit rating agency liability involving a comparison between German and Italian law* Rinaldo 2017.

20 In full: The Credit Rating Agencies (Civil Liability) Regulations 2013 (2013 No. 1637), available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksi_20131637_en.pdf, last accessed at 31 August 2019.

21 The European Union (Withdrawal) Bill is available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf, last accessed at 31 August 2019.

note, however, that UK courts are no longer bound by decisions of the CJEU as from Brexit Day.[22] Second, the English approach to Article 35a CRA Regulation differs from the other national laws investigated and demonstrates how Member States can use their discretion under Article 35a CRA Regulation to limit its scope of application. Therefore, the English interpretation and application of Article 35a CRA Regulation forms an interesting study object.

5.2.3 Challenges in the field of legal sources and language

The variety in the types of legal sources available in the Member States and the different languages involved posed several challenges to this legal comparison. In respect of the legal sources used, the national law reports involve analyses of underlying national legal principles, statutory law, case law and academic legal literature. The reports describe the relevant general private law concepts and rules per term or subject first, and, subsequently, describe or predict their application in the context of credit rating agency liability as far as possible. The types and number of legal sources available in the field of credit rating agency liability varied from the one Member State to another, posing two main challenges.

First, the variety in the types of legal sources available made it challenging to make a well-balanced comparison between the national interpretations and applications of Article 35a CRA Regulation.[23] A multiplicity of examples illustrates this variety. Whereas the UK legislature adopted specific legislation in respect of credit rating agency liability, no such legislation exists under Dutch, French and German law. Furthermore, with the exception of German law, relevant case law is extremely scarce or simply non-existent. And although literature is available in all Member States investigated, German legal scholars produced by far the most in-depth analyses of Article 35a CRA Regulation and its interpretation and application.[24] As a consequence of this variety, the national law reports may put emphasis on statutory law and case law, or on academic literature predicting the interpretation and application of Article 35a CRA Regulation.

Second, the at times scarce amount of legal sources in the specific field of credit rating agency liability rendered it challenging to determine the exact interpretation and application of Article 35a CRA Regulation on some occasions. On such occasions, this study drew analogies with comparable factual situations in order to predict the way in which general private law rules may apply to disputes over credit rating agency liability. The scarcity of legal sources caused this approach to be commonly used among contributions in

22 Art. 6 (1) (a) and Art. 6 (2) European Union (Withdrawal) Bill.
23 *Cf. for this point in general* Dannemann 2006, p. 408.
24 *As explained in* section 5.6.2.

this field.[25] The comparable factual situations involve mostly other types of professional liability cases in which incorrect or incomplete information was disseminated to the public at large or to specific persons. Concrete examples involve the liability of credit scoring agencies, credit reference agencies, securities or financial analysts, auditors, valuers of property, issuers and banks in relation to misleading prospectuses and, occasionally, investment advisers and journalists. One should be cautious about deriving firm conclusions from these analogies. The extent to which it can be done depends on the exact circumstances of the case, and may also differ depending on the legal tradition. Sometimes, uncertainty on the application and interpretation continues to exist anyway. Needless to say, some uncertainty is inherent to a system of general rules that need to be applied to specific factual situations. But more general uncertainty relating to interpretation and application of Article 35a CRA Regulation will be considered in light of the normative framework employed in Chapter 6.

In respect of the languages involved, the comparative study required the translation of statutory law, case law and academic literature written in Dutch, French and German into the English language. Similar to other comparative research projects, this study had to face the challenge of providing adequate translations in English.[26] Difficulties arose in particular if English law and the other national laws investigated attached different meanings to the same English term or if the English language simply did not provide an adequate translation for a doctrine of another Member State investigated. To avoid national nuances from being lost in translation as much as possible, this dissertation often refers to terms in their original language and provides an accompanying translation in English. If the translation was derived from another source, reference to that source is made in the footnotes.

25 Most prominently in Dutch and English literature. *For Dutch literature e.g.* Atema & Peek 2013, De Savornin Lohman & Van 't Westeinde 2007 and Bertrams 1998. *For English literature e.g.* Getzler & Whelan 2017 and Ebenroth & Dillon 1992.

26 *This point was addressed by e.g.* Van Dam 2013, no. 103-3.

5.3 Terms and subjects of Article 35a

5.3.1 Article 35a (1)

5.3.1.1 Preliminary considerations

(a) Infringements[27]

Starting off the introduction of the terms and subjects involved in the legal comparison by paying attention to a part of Article 35a CRA Regulation that was actually harmonised at the EU level, might raise some eyebrows. Nevertheless, the infringements stated in Annex III of the CRA Regulation deserve special attention here, as claims for damages based on Article 35a (1) CRA Regulation must be first and foremost based on at least one of these infringements. This infringement-based liability provides Article 35a (1) CRA Regulation with its non-contractual character, as liability is linked to a violation of the Annex irrespective of whether a contract was concluded between issuers and credit rating agencies or investors and credit rating agencies.

Annex III CRA Regulation divides the infringements into three sections: (I) infringements related to conflicts of interest, organisational or operational requirements; (II) infringements related to obstacles to the supervisory activities; and (III) infringements related to disclosure provisions. Each of the infringements is linked to specific provisions of the CRA Regulation. The Union legislature formulated the infringements in accordance with the same pattern: the credit rating agency infringes a provision of the CRA Regulation by failures to adopt proceedings to avoid certain events from occurring or by failures to monitor its credit ratings, rating outlooks and rating analysts. For instance, infringement I.27 states that '[t]he credit rating agency infringes Article 7(1) by not ensuring that rating analysts, its employees or any other natural person whose services are placed at its disposal or under its control and who are directly involved in credit rating activities have appropriate knowledge and experience for the duties assigned'. Furthermore, infringement I.47 states that '[t]he credit rating agency infringes the second sentence of Article 8(5) by not establishing internal arrangements to monitor the impact of changes in macroeconomic or financial market conditions on credit ratings'. Hence, the infringements primarily relate to the conduct of the credit rating agency in general – e.g. not having established certain internal arrangements, and only in second instance to the conduct of the credit rating agency's employees and subordinates.

The infringements under Annex III serve two purposes, namely forming the basis for public enforcement by ESMA and forming the basis for private enforcement by issuers and investors. Initially, the infringements only served

27 *In more detail* Heuser 2019, pp. 124 ff., Dumont du Voitel 2018, pp. 105 ff., Wimmer 2017, pp. 130 ff. and Gass 2014, pp. 79 ff.

as a legal basis for fines imposed by ESMA under Article 36a (1) CRA Regulation. Upon the introduction of the third version of the CRA Regulation, the infringements also became the legal basis for civil liability under Article 35a (1) CRA Regulation. This double function explains why some of the infringements listed in Annex III mainly concern a credit rating agency's obligations towards ESMA and are not useful to issuers and investors in claims for civil liability.[28] Infringement II.5 for instance states that '[t]he credit rating agency infringes Article 11 (3), in conjunction with point 2 of Part I of Section E of Annex I, by not providing to ESMA a list of its ancillary services'. It is almost needless to say that this infringement is not useful for the purpose of private enforcement, as it is difficult to see how this infringement can impact a specific credit rating and can cause loss to issuers and investors.[29]

In the context of private enforcement, issuers and investors will concentrate on the infringements that can impact the height of a credit rating and can cause financial or reputational loss as a consequence. As discussed in the literature, infringements that issuers and investors can use in practice are for instance:

- Infringements I.19-I.22 on a credit rating agency's failure to identify, eliminate or manage and disclose actual or potential conflicts of interest that may influence the analyses of rating analysts.[30]
- Infringement I.27 on a credit rating agency's failure to ensure that its rating analysts have appropriate knowledge and experience for the duties assigned.[31]
- Infringement I.42 and I.42b on a credit rating agency's failure to take adequate measures to ensure that its credit ratings and rating outlooks are based on a thorough analysis of all available information relevant to its analysis according to the applicable rating methodologies, and on a credit rating agency's failure to ensure that a change in a credit rating complies with its published rating methodologies, respectively.[32]
- Infringement I.46 and I.46a on a credit rating agency's failure to monitor its credit ratings on an ongoing basis or at least annually, and on a credit rating agency's failure to monitor its sovereign ratings on an ongoing basis or at least every six months.
- Infringement I.47 on a credit rating agency's failure to create internal arrangements to monitor the impact of changes in macroeconomic or financial market conditions on credit ratings.[33]

28 Gass 2014, p. 82.
29 *Cf.* Lehmann 2016a, pp. 73-74. *See also* section 5.3.1.3 (a) on the requirement of 'impact'. *As criticised by* Wimmer 2017, p. 403. *Cf. also, and for other examples,* Heuser 2019, p. 125 and Gass 2014, pp. 93 ff.
30 *As mentioned by* Van der Weide 2013, p. 216.
31 *As mentioned by* Van der Weide 2013, p. 216. *Also* Gass 2014, pp. 104-105.
32 *As discussed by* Lehmann 2016a, p. 73. *Also* Gass 2014, pp. 105-110.
33 *As discussed by* Lehmann 2016a, pp. 73-74.

The burden of proof with regard to the infringements is harmonised at the EU level and lies with issuers and investors pursuant to Article 35a (2) CRA Regulation. They must 'present accurate and detailed information indicating that the credit rating agency has committed an infringement of this Regulation, and that that infringement had an impact on the credit rating issued'. At the same time, courts may facilitate issuer claimants and investor claimants slightly, as they are allowed to take into consideration that the investor or issuer may not have access to information that is purely within the sphere of the credit rating agency.[34]

Yet although Article 35a (2) CRA Regulation allows courts to take the difficult position of issuers and investors into account, issuers and investors still face the heavy evidentiary task of having to prove the occurrence of an infringement and the required degree of culpability. Issuers and investors can consider basing follow-on actions on fines imposed upon credit rating agencies by ESMA. The fact that a fine was imposed at least proves that a credit rating agency negligently committed an infringement.[35] Yet, as discussed, not every infringement that can be fined by ESMA is useful in the context of civil liability, for the infringement may not be able to impact a credit rating assigned. This applies, for instance, to a fine imposed upon Moody's for infringements relating to the incorrect publication of rating methodologies and the incorrect manner in which a credit rating was presented (infringements III.3 and III.6)[36] and to a fine imposed upon DBRS for infringements relating to mistakes made in the establishment of a properly functioning compliance department within the credit rating agency (infringement I.11-I.14).[37]

(b) Circle of organs and persons that could commit infringements

Another topic that deserves attention prior to the introduction of the terms and subjects that will be compared, is the scope of the circle of organs and

34 The European Commission's Proposal for the CRA III Regulation initially proposed to introduce a presumption relating to the required impact in respect of investors: 'Where an investor establishes facts from which it may be inferred that a credit rating agency has committed any of the infringements listed in Annex III, it will be for the credit rating agency to prove that it has not committed that infringement or that that infringement did not have an impact on the issued credit rating', COM(2008) 704 final, p. 33. The current wording of Art. 35a (1) CRA Regulation hence places a heavier burden upon the investor.

35 Under Art. 36a (1) CRA Regulation, simple negligence is required only: 'Where, in accordance with Art. 23e(5), ESMA's Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III, it shall adopt a decision imposing a fine in accordance with paragraph 2. […]'

36 Board of Supervisors 23 May 2017, ESMA41-137-1005, available at www.esma.europa.eu/sites/default/files/library/esma41-137-1005_decision_of_the_board_of_supervisors_to_adopt_a_supervisory_measure_and_impose_fines_with_respect_to_infringements_by_moodys_deutschland_gmbh_and_moodys_investors_service_limited.pdf, last accessed at 31 August 2019.

37 Board of Supervisors 24 June 2015, ESMA/2015/1048, available at www.esma.europa.eu/sites/default/files/library/2015/11/2015-1048.pdf, last accessed at 31 August 2019.

persons within a credit rating agency that can commit infringements. The infringements listed in Annex III impose obligations upon credit rating agencies in general. But as defined under Article 3 (1) (b) CRA Regulation, credit rating agencies are 'legal persons whose occupation includes the issuing of credit ratings on a professional basis', so that they cannot actually commit infringements themselves, let alone do so intentionally or with gross negligence.[38]

The question is who belongs to the circle of organs and persons that could commit infringements. The board and its members, managers, rating committees, lead analysts or 'normal' analysts can commit infringements, but it is the wording of a specific infringement that forms the decisive factor in answering this question. Taking a closer look at the infringements, the wording of some of them points at failures to take adequate (organisational) measures at the level of the management board or by managers, such as infringements I.19, I.20, I.27, I.42 and I.47. The wording of others suggests more substantive mistakes made by rating committees, lead analysts or normal analysts, such as infringements I.21, I.42a, I.42b, I.46 and I.46a. Infringement I.42a, for instance, stipulates that '[t]he credit rating agency infringes Article 8(2) by using information falling outside the scope of Article 8(2)'. Rating committees, lead analysts and normal analysts can commit this infringement. As a consequence of the approach taken in this dissertation that the wording of infringements determines the relevant circle of organs and persons, it is argued that this element of Article 35a CRA Regulation does not fall within the competence of Member States.

The question of whether determining the relevant circle of organs and persons is a matter of EU law or national law, however, has been answered differently as well. As appears from the UK Credit Rating Agencies (Civil Liability) Regulations 2013, the UK legislature considered it a matter of national law.[39] Indeed, the wording of Article 3 and 4 (2) UK Implementing Regulations strongly suggests far-reaching restrictions to the circle of organs and persons that can commit infringements. Article 3 stipulates that 'an infringement shall be considered to have been committed intentionally by the credit rating agency if the senior management of the credit rating agency acted deliberately to commit the infringement', while Article 4 (1) involves the same sort of provision

38 *See* Heuser 2019, p. 137.

39 *See also for a similar approach* Art. 5 Irish Implementing Regulations, European Communities (credit rating agencies) (civil liability) regulations 2015, S.I. No. 399 of 2015 available at www.irishstatutebook.ie/eli/2015/si/399/made/en/pdf, last accessed at 31 August 2019. The Irish Implementing Regulations acknowledge that other employees can commit infringements as well, but link the infringements to inadequate supervision: 'the infringement was committed by one or more employees or officers of the credit rating agency (not being members of senior management) and – (i) the infringement would not have occurred but for the absence of supervision and control of those employees or officers by one or more members of senior management, and (ii) that absence of supervision and control was reckless.'

in respect of gross negligence. For the definition of 'senior management', the UK Implementing Regulations refer back to Article 3 (1) (n) CRA Regulation that provides the following definition: 'the person or persons who effectively direct the business of the credit rating agency and the member or members of its administrative or supervisory board'. The UK Implementing Regulations hence do not literally state that only the senior management can commit infringements. However, Article 3 and 4 (1) will have this effect, as, on the one hand, Article 35a CRA Regulation inextricably links committing an infringement to the required degree of culpability of intent or gross negligence, while, on the other hand, the UK Implementing Regulations restrict intentional and grossly negligent conduct of the credit rating agency to intentional and grossly negligent conduct of the senior management alone. For that reason, the UK Implementing Regulations can be interpreted to restrict the scope of application of Article 35a CRA Regulation by entailing that in fact only the senior management can commit infringements actionable under the English interpretation of Article 35a CRA Regulation.

The wording of Article 3 and 4 (2) UK Implementing Regulations does not come straight out of the blue, but bears resemblance to Article 36a (1) CRA Regulation. Article 36a (1) CRA Regulation states that ESMA can impose a fine on a credit rating agency when it has intentionally or negligently committed one of the infringements listed in Annex III. Furthermore, an infringement has been committed 'intentionally' when ESMA finds objective factors which demonstrate that the credit rating agency *or its senior management* acted deliberately. Nevertheless, I strongly doubt that the scope of application of Article 35a CRA Regulation can be restricted in this manner by the applicable national law. First, Article 36a (1) CRA Regulation not only refers to the senior management but also to the credit rating agency in general. But, more importantly, the wording and spirit of the infringements must be leading in this regard.

The question of whether determining the relevant circle of organs and persons is a matter of EU law or national law was answered differently also by Gass. In his analysis of the interpretation and application of Article 35a CRA Regulation under Austrian law, Gass qualified determining the relevant circle of organs and persons as a matter of 'attribution' of conduct to credit rating agencies. He argued that attribution of conduct must be assessed by the applicable national law, because attribution of conduct is a question following upon the elements of 'intent' and 'gross negligence', which are also referred back to the applicable national law. Subsequently, he used the wording of the infringements and the Austrian rules on the attribution of conduct of organs to legal persons and the rules on vicarious liability of employees to argue that both the conduct of organs and employees must be attributed to credit rating agencies.[40]

40 Gass 2014, pp. 122-124. *For the same approach as Gass,* Dumont du Voitel 2018, pp. 130-131. Heuser implicitly considered the attribution a matter of German law, *see* Heuser 2019, p. 137.

Although I agree with the final conclusion drawn by Gass that a credit rating agency is liable for the conduct of organs and employees, I do not agree that national law is necessary to reach this conclusion. Questions regarding the relevant circle of organs and persons do not, as Gass suggests, follow upon an analysis of intentional or grossly negligent conduct. Instead, the relevant circle of organs and persons must be clear from the outset, prior to assessing whether these organs or persons have acted intentionally or with gross negligence. And, as described, the wording and spirit of the infringements determines the relevant circle of organs and persons. Moreover, an actual application of national rules on attribution and vicarious liability often feels artificial, especially since national rules on vicarious liability create separate legal bases for risk-based liability for the acts and omissions of others, while Article 35a CRA Regulation creates a legal basis for fault-based liability of the credit rating agency itself.[41] National rules on risk-based liability hence cannot be directly applied in the scope of Article 35a CRA Regulation, and can only serve as a source of inspiration revealing the national approach to matters such as attribution and vicarious liability. For these reasons, it was decided not to include a legal comparison of the rules on attribution and vicarious liability of the Member States investigated.

41 *Cf. national grounds for vicarious liability under* Art. 6:170 BW, Art. 1242 CC and § 831 BGB. If Member States apply the doctrine of attribution broadly, analysing the rules on attribution in the context of Art. 35a CRA Regulation feels less artificial because the conduct of natural persons is attributed and counts as the conduct of the credit rating agency itself. The credit rating agency can then be held responsible 'for its own conduct'. For instance, Dutch law applies the concept of attribution broadly; unlawful conduct can qualify as unlawful conduct of a legal person if the conduct counts as the conduct of the legal person according to generally accepted standards (*in het maatschappelijk verkeer*), the *Babbel*-criterion (Hoge Raad 6 April 1979, ECLI:NL:HR:1979:AH8595, *NJ* 1980/34 annotated by C.J.H. Brunner (*Kleuterschool Babbel*). *See also* Hoge Raad 11 November 2005, ECLI:NL:HR:2005:AT6018, *NJ* 2007/231 annotated by J.B.M. Vranken (*Ontvanger v Voorsluijs*), para 3.6. *E.g.* Katan 2017, no. 119-120, Asser/Hartkamp & Sieburgh 6-IV 2015/326-328, Hoekzema, *Groene Serie Onrechtmatige Daad*, note VIII.7.1.1.3 and De Valk 2009, pp. 48-49). Under German law, the conduct of boards, board members, other constitutionally appointed representatives and leading subordinates can be attributed under § 31 BGB (Bundesgerichtshof 30 October 1967, *Entscheidungen des Bundesgerichtshofes*, Band 49, p. 21. *As referred to by e.g.* Palandt/Ellenberger 2019, BGB § 31, no. 6 and Hoekzema 2000, pp. 134-135, *also* MüKoBGB/Leuschner, 8. Aufl. 2018, BGB § 31, no. 12-13 and *cf.* Dumont du Voitel 2018, p. 131). *Cf. in the context of credit rating agency liability under German law* Heuser 2019, p. 137. In comparison, under French law, only the conduct of directors and organs will be attributed (*see e.g. with respect to organs* Cour de Cassation (Chambre Civile 2) 17 July 1967, Bulletin 1967, II, no. 261. *See also* Cour de Cassation (Chambre Civile 2) 27 April 1977, 75-14761, Bulletin 1977, II, no. 108, p. 74. *Cf. also* Bacache-Gibeili 2016, no. 197 and Sotiropoulou 2012, no. 491), so that the separate ground for risk-based liability under Art. 1242 CC plays a more important role.

5.3.1.2 'Intentionally' or 'with gross negligence'

The third part of the national law reports begin with analyses of the terms 'intentionally' and 'with gross negligence'. Article 35a (1) CRA Regulation does not involve fault-based liability in the form of simple negligence. Instead, the Union legislature increased the threshold for civil liability by requiring a credit rating agency to have committed an infringement intentionally or with gross negligence.[42] This degree of culpability relates to committing infringements listed in Annex III, instead of causing loss to issuers and investors.

The Union legislature found this high threshold for liability justified by the 'fundamentally forward looking' character of credit ratings and the fact that 'the activity of credit rating involves a certain degree of assessment of complex economic factors and the application of different methodologies may lead to different rating results, none of which can be considered as incorrect'.[43] Furthermore, the high threshold was considered legitimate because a claim based on Article 35a (1) CRA Regulation, if awarded, potentially exposes credit rating agencies to unlimited liability.[44] However, these justifications do not preclude that from an evidentiary law point of view, this high threshold is difficult to prove for investors and issuers, even if the burden of proof can be mitigated slightly in favour of investors and issuers by national courts under Article 35a (2) CRA Regulation.

The interpretation and application of 'intentionally or with gross negligence' is left to the applicable national law.[45] What constitutes 'grossly negligent' conduct can only be assessed concretely in relation to a specific case, so that the analyses that will be made in the national law reports will remain somewhat abstract. The European Commission's Proposal for the third version of the CRA Regulation aimed to provide some guidance, by submitting that '[a] credit rating agency acts with gross negligence if it seriously neglects duties imposed upon it by this Regulation'.[46] This explanation, however, was not included in the final version of the CRA III Regulation.

42 In contrast, ESMA can impose fines upon credit rating agencies if they committed infringements intentionally or negligently under Art. 36a (1) CRA Regulation. *Also* Heuser 2019, pp. 136-137.

43 Recital 33 CRA III Regulation.

44 Recital 33 CRA III Regulation.

45 The reference to the term 'intention' is in contradiction to the wording of Art. 35a (4) CRA Regulation and Recital 35 CRA III Regulation that terms that have not been defined in the CRA Regulation should be interpreted under the applicable national law, because the term 'intention' is defined under Art. 36a (1) CRA Regulation. Therefore, it seems not justified for the term 'intention' to be interpreted under the applicable national law. However, as Art. 35a (4) CRA Regulation explicitly stipulates that this term needs national interpretation, the national law reports will pay attention to this term anyway.

46 COM(2011) 747 final, p. 33.

5.3.1.3 'Impact' and 'caused to', including claimant-specific requirements

Article 35a (1) CRA Regulation explicitly addresses four aspects of causation. First, the provision requires the infringement listed in Annex III to have had an impact on the credit rating, thereby building the first part of the bridge between an infringement and the eventual loss suffered by issuers and investors. Second, a causal relationship must exist between the infringement which resulted in the affected credit rating and the loss suffered by the claimant, thereby building the second part of the bridge between an infringement and the eventual loss suffered by issuers and investors. In addition, Article 35a (1) CRA Regulation introduced two claimant-specific requirements for issuers and investors to fulfil. Although Article 35a CRA Regulation treats these matters as separate conditions for civil liability, in essence they all concern causation. Therefore, the national law reports will address all aspects of causation under the same heading. Furthermore, because of the close connection between the substantive rules on causation and rules of civil procedure, it was decided to discuss both types of rules together. The national law reports, however, mainly concentrate on substantive private law.

(a) 'Impact'

Article 35a (4) CRA Regulation explicitly refers the term 'impact' back to the applicable national law. Although, therefore, the interpretation and application of the term 'impact' forms part of the legal comparison, this reference to the applicable national law is superfluous from a substantive law perspective. Irrespective of the substantive law approach to causation adopted under the national laws investigated, it seems a matter of common sense that an infringement will be considered to have had an impact on a credit rating if, without the infringement having occurred, the credit rating would have been different (higher or lower). A glance at the European Commission's Proposal for the CRA III Regulation supports this approach. The Proposal stated that '[a]n infringement shall be considered to have an impact on a credit rating if the credit rating that has been issued by the credit rating agency is different from the rating that would have been issued had the credit rating agency not committed that infringement'.[47] Moreover, if the infringement committed would not have brought any change to a credit rating, it is hard to imagine how issuers or investors can prove they have suffered loss due to the infringement. As put forward by Wimmer, it is difficult to see why the legal protection of issuers and investors would be justified if the credit rating was not affected by the infringement committed.[48]

Although Article 35a (4) CRA Regulation refers the term 'impact' back to the applicable national law, rules on the burden and standard of proof relating

47 COM(2011) 747 final, p. 33.
48 Wimmer 2017, p. 154.

to the requirement of 'impact' can be found under Article 35a (2) CRA Regulation. This section stipulates that it is for issuers and investors 'to present accurate and detailed information indicating that the credit rating agency has committed an infringement of this Regulation, and that that infringement had an impact on the credit rating issued'. At the same time, courts may facilitate the claimant, as they can take into consideration that the investor or issuer may not have access to information that is purely within the sphere of the credit rating agency.[49] Even though credit rating agencies must publish parts of their rating methodologies, models and key assumptions under Article 8 (1) CRA Regulation,[50] the requirement was criticised for placing a too heavy burden on issuers and investors.[51]

(b) 'Caused to', including claimant-specific requirements

(i) – Infringement – credit rating – loss

Concentrating on the wording of the second aspect of causation, it is remarkable that Article 35a (1) CRA Regulation requires the existence of a causal relationship between the infringement and the loss suffered, instead of the existence of a causal relationship between the affected credit rating and the loss suffered.[52] This construction must be understood in light of the system of Article 35a CRA Regulation. Indeed, the civil liability of a credit rating agency originates from the commitment of an infringement rather than from the assignment of an affected credit rating itself. However, taking the wording literally, this system does not entirely correspond with reality.[53] It requires a direct causal relationship between the infringement and the loss suffered, while in fact loss caused in the context of Article 35a CRA Regulation can be compared with a domino effect: the commitment of an infringement leads to an affected credit rating of a different category, which in turn eventually causes loss suffered by issuers and investors. Moreover, the causal link between the affected credit rating and the loss suffered is essential, because the impact justifies the protection of issuers and investors. It seems, therefore, apt to

49 *E.g.* A. de Montesquiou, 'Agences de notation: pour une profession règlementée (rapport)', 18 June 2012. *Also e.g.* Chacornac 2014, no. 1062, Clédat 2012, para II.E and Denis 2011, p. 77. The European Commission's Proposal for the CRA III Regulation initially proposed to introduce a presumption for the requirement of impact in respect of investors: 'Where an investor establishes facts from which it may be inferred that a credit rating agency has committed any of the infringements listed in Annex III, it will be for the credit rating agency to prove that it has not committed that infringement or that that infringement did not have an impact on the issued credit rating', COM(2011) 747 final, p. 33. The current wording of Art. 35a (1) CRA Regulation, thus, places a heavier burden upon investors.

50 Sections 3.3.2.2 and 3.4.3.

51 *Cf. e.g.* Heuser 2019, p. 269 and Wimmer 2017, pp. 403-404.

52 *As remarked by* Wimmer 2017, pp. 207-208 and Gietzelt & Ungerer 2013, p. 342.

53 *Cf.* Wimmer 2017, p. 210 and Gietzelt & Ungerer 2013, p. 342. Both contributions pointed out that requiring causation between the affected credit rating and the loss suffered would correspond better with reality.

explain the requirement of causation between the infringement and the loss suffered in such way that it is also linked to the affected credit rating.[54]

(ii) – Substantiating causation

The way in which the second aspect of causation is substantiated depends on the factual perspective chosen by issuers and investors, upon whom the burden of proof for causation rests.[55]

Issuers can argue that their increased funding costs and/or reputational loss would not have occurred without the infringement committed by the credit rating agency and the affected credit rating.[56] They can derive evidence, for instance, from expert reports showing the causal link between the height of a credit rating and the funding costs or from rating triggers in loan documentation.[57] Yet providing such evidence alone does not entitle issuers to compensation. In addition, Article 35a (1) CRA Regulation contains an issuer-specific requirement relating to causation: an issuer may not have caused the infringement itself by having provided misleading and inaccurate information to the credit rating agency directly or through information publicly available. When an issuer provided misleading and inaccurate information, the causal relationship between the infringement and the loss is broken. As a consequence, the issuer is not entitled to compensation under Article 35a CRA Regulation at all.[58]

In case of a claim for damages brought by an investor, there is a wider range of factual scenarios that can underlie the claim for damages and can substantiate the second aspect of causation.[59] Pijls and De Jong described these scenarios in the general context of the disclosure of misleading statements

54 *Cf.* Wimmer 2017, p. 210. French scholars automatically explained the requirement of causation in this manner, A. de Montesquiou, 'Agences de notation: pour une profession règlementée (rapport)', 18 June 2012 : '*puis établir que la notation est à l'origine de préjudice subi*'. *See also* Chacornac 2014, no. 1062 and Denis 2011, para II.B.

55 In the context of misleading statements disseminated to the financial markets in general, Pijls 2018, p. 174. See previously section 3.5.3.2 and 3.5.3.3 for further factual scenarios.

56 *Also* section 3.6.2. As will be shown, the burden of proof of causation initially lies with the claimant in the Member States investigated.

57 *Cf.* Sotiropoulou 2013, para 28. Thépot 2010, para B.2, however, remarked that the sole existence of a rating trigger does not render the loss suffered by the issuer foreseeable under French law. A description of the procedural methods investors can use to demonstrate the influence of credit ratings falls outside the scope of this research.

58 In the absence of Art. 35a (1) CRA Regulation, failures to meet this additional issuer-specific requirement could also have another effect. Such failures could alternatively give rise to defences, such as contributory negligence, as to reduce the amount of damages awarded to issuers. Yet as the wording of Art. 35a (1) CRA Regulation implies that damages can only be claimed if this issuer-specific requirement is fulfilled, the defences under the applicable national law hardly play a role.

59 *Also* section 3.6.3.

disseminated to the financial markets.[60] These factual scenarios are also relevant for disputes involving credit rating agency liability. The following paragraphs describe two possible scenarios, based on the situation in which an investor decided to purchase financial instruments. Similar lines of argument can be followed in case an investor decided to continue to hold its financial instruments or to sell its financial instruments.

First, the investor can base its claim for damages on the statement that had the credit rating agency complied with its obligations under the CRA Regulation, and had the credit rating not been affected, the investor would not have invested in these financial instruments or in this issuer at all. As described by Pijls in the general context of the disclosure of misleading statements disseminated to the financial markets, an investor's reliance can take multiple forms. Translated into the context of credit rating agency liability, investors can have relied directly on the affected credit rating and investors can have relied on investment advice that was based on the affected credit rating. The third form described by Pijls, that investors can have relied on a market sentiment caused by misleading information, is less relevant in the context of credit rating agency liability.[61] From a civil procedure law perspective, the investor must provide evidence that it relied upon the credit rating when making the investment decision and, in the absence of the affected credit rating, it would have made an alternative, better investment decision instead.[62] Hereafter, under (c) (i), the evidentiary problems associated with this burden of proof will be discussed.

Second, the investor can submit that had the credit rating agency complied with its obligations under the CRA Regulation, and had the credit rating not been affected, the market price of the financial instruments and the coupon rate or yield would have been more beneficial to the investor.[63] In contrast to the first line of reasoning, the investor does not claim to have relied on the credit rating itself. Instead, the investor claims to have relied on the 'integrity' of the financial markets.[64] From a procedural law perspective, the investor must provide evidence that the credit rating influenced the market price or the initial coupon rate.[65]

60 *These factual scenarios were described by e.g.* Pijls 2018, p. 31 and De Jong 2010, pp. 44-46 in the context of the disclosure of misleading statements disseminated to the financial markets in general.
61 *Cf.* Pijls 2018, p. 177. *Cf. also on this factual scenario,* De Jong 2010, pp. 44-46. *In the context of credit rating agencies,* Wimmer 2017, p. 194.
62 *Cf.* Pijls 2018, pp. 176-179. *Cf. also on this factual scenario,* De Jong 2010, pp. 44-46. Under the legal systems investigated, the burden of proof of causation lies with the claimant as a matter of principle.
63 *In the context of credit rating agencies,* Wimmer 2017, p. 193.
64 *Cf.* Pijls 2018, pp. 174-176.
65 *See* section 3.3.4 on the influence of credit ratings on the prices and yields of financial instruments. A description of the procedural methods that investors can use to demonstrate the influence of credit ratings falls outside the scope of this study.

(c) Concentrating on 'reasonable reliance'

Article 35a (1) CRA Regulation does not only create an additional issuer-specific requirement, but also an additional investor-specific requirement. It stipulates that the investor 'may claim damages under this Article where it established that it has reasonably relied, in accordance with Article 5a(1) or otherwise with due care, on a credit rating for a decision to invest into, hold onto or divest from a financial instrument covered by that credit rating'. Hence, the Union legislature requires an investor to have reasonably relied on a credit rating and places the burden of proof of reasonable reliance on the investor.[66]

The way in which the Union legislature has framed the requirement of reasonable reliance under Article 35a (1) CRA Regulation is reminiscent of US securities law. Without diving into the details of US securities law, a claim for damages is subject to the requirement of reliance or transaction causation. In fraud-on-the-market cases, the requirement of reliance is explained as reliance on the integrity of the market prices. The investor does not need to prove direct reliance on the misleading information itself.[67] Yet, the investor must prove its reliance was 'reasonable'.[68] The investor-specific requirement of 'reasonable reliance' under Article 35a (1) CRA Regulation is reminiscent of the US requirement in that the reliance must have been 'reasonable'. However, in contrast to US securities law, the Union legislature did not facilitate an investor in providing evidence for reliance in the first place. Instead, the Union legislature did not distinguish between the question of whether the investor relied on a credit rating and of whether that reliance was reasonable.

The requirement of 'reasonable reliance' raises at least three important points, relating to the amount of successful claims based on Article 35a CRA Regulation (under (i)), the discretion of Member State laws to help investors meeting the requirement of reasonable reliance (under (ii)), and the different objectives the CRA Regulation aims to achieve (under (iii)). Furthermore, the wording of the requirement may also restrict the scope of application of Article 35a CRA Regulation to financial instrument ratings, as discussed in section 3.5.3.3 (b). Overall, the requirement of reasonable reliance and the corresponding burden of proof have significant influence on the scope of the right of redress created by Article 35a (1) CRA Regulation.

(i) – Limitations to successful claims

The requirement of 'reasonable reliance' and the burden of proof attached to this requirement limit the number of successful claims for damages based on Article 35a CRA Regulation.[69] Investors may have trouble proving they relied

66 This obligation is suggested by the fact that the Union legislature requires an investor to 'establish' reasonable reliance.

67 *Cf. in detail* Pijls 2018, pp. 136-140.

68 Pijls 2018, pp. 141-142.

69 *Cf. e.g.* Baumgartner 2015, pp. 525-526.

on credit ratings for their investment decisions. They can derive evidence, for instance, from transcripts of meetings or calls with investment advisers or the composition of the investment profile or the type of investment conduct.[70] Nevertheless, the reasons for investment decisions are not necessarily visible or noticeable from the outset, and it is often a combination of factors that determine investment decisions. An investor, therefore, may well have trouble providing evidence of direct reliance on a credit rating. Furthermore, a lack of reasonable reliance has drastic effects: it completely negates the causal relationship between the infringement and the affected credit rating and the loss completely. As will appear from the national law reports, one could imagine a lack of reasonable reliance to have less drastic effects as well. It could instead entitle a credit rating agency to a defence under the applicable national law, such as a defence based on contributory negligence. A successful defence reduces the amount of damages awarded to the investor, and does not lead to an all-or-nothing result.[71] Hence, as a result of potential evidentiary problems relating to reliance and of the drastic consequences of a lack of reasonable reliance, or evidence of such, the requirement of 'reasonable reliance' and the burden of proof attached to this requirement, limits the amount of successful claims for damages based on Article 35a CRA Regulation.

(ii) – Margin of discretion of national law

As investors may have trouble meeting the requirement of 'reasonable reliance', one can wonder whether and to what extent national laws are allowed to relax this requirement or to facilitate investors in meeting this requirement. Such relaxations or facilitations can lie in the sphere of substantive law or civil procedure law. An example of the former is the replacement of the requirement of reasonable reliance with the doctrine of loss of chance. An example of the latter is an evidentiary presumption of reasonable reliance.

The reference to 'reasonably relied' under Article 35a (4) CRA Regulation leaves room for debate as regards the discretion of Member States in respect of this requirement. On the one hand, a strictly grammatical interpretation of Article 35a (1) CRA Regulation suggests Member States cannot relax the requirement or facilitate investors; the provision clearly obliges investors to have reasonably relied on a credit rating and places the burden of proof of reasonable reliance on investors.[72] On the other hand, one can also interpret

70 *In the context of misleading statements and Dutch evidentiary law,* Pijls 2018, pp. 548-551 and De Jong 2010, p. 257. *Cf. also* Vandendriessche 2015, no. 339 on the relevance of the investor profile and investor sophistication.

71 This would be the case under Dutch law. See for a comparison between the effects of a lack of reasonable reliance under Dutch and US law, Pijls 2018, p. 142.

72 Heuser 2019, pp. 114-117. Heuser believed that concrete reliance – instead of abstract reliance on the integrity of market prices – is required under Art. 35a CRA Regulation. Contrary to Heuser, I would say this matter is left to the Member States. *See also on this topic* Heuser 2019, pp. 182-183.

the reference under Article 35a (4) Regulation as providing Member States with a large margin of discretion. This dissertation adopts the view that Member States have such as a large margin of discretion. Therefore, the requirement of 'reasonable reliance' is argued to apply in such way that Member States are allowed to relax the requirement of reasonable reliance and to facilitate investors in proving reasonable reliance. This flexible approach contributes to the full effect of the right of redress under Article 35a (1) CRA Regulation. Also, it accords with Article 35a (5) CRA Regulation, which stipulates that Article 35a CRA Regulation 'does not exclude further civil liability claims in accordance with national law'. One must realise, however, that the full effect of EU law and the principle of effectiveness cannot require Member States to adopt a flexible approach towards reasonable reliance. Member States can abide by the grammatical interpretation and apply Article 35a CRA Regulation restrictively.

(iii) – Conflicting objectives

The investor-specific requirement of reasonable reliance does not relate well to the objective to reduce overreliance on credit ratings, as expressed under Recital 9 CRA III Regulation.[73] The Union legislature was aware of the conflict arising between the requirement of reasonable reliance and the aim to reduce overreliance. It tried to reconcile both elements by explicitly stating that '[t]he fact that institutional investors including investment managers are obliged to carry out their own assessment of the creditworthiness of assets should not prevent courts from finding that an infringement of Regulation (EC) No 1060/2009 by a credit rating agency has caused damage to an investor for which that credit rating agency is liable' under Recital 36 CRA III Regulation.[74] Despite this attempt at reconciliation, however, the CRA Regulation nevertheless jumps back and forth between the aim of introducing an adequate right of redress and the aim of reducing overreliance on credit ratings.

5.3.1.4 Suffering 'damage' and claiming 'damages'

Article 35a (4) CRA Regulation refers the term 'damage' back to the applicable national law. Assessments as regards the existence of causation and loss, and the calculation of the amount of compensation cannot be strictly divided; on the contrary, the requirements of causation and loss are in fact often communicating vessels. The way in which the claimant frames the causal relationship determines the type or the amount of loss, and the other way around. For instance, when an investor claims it would not have bought the financial instruments had the infringement not been committed, the investor claims to have suffered loss to the extent of the full transaction costs. But when the

73 *As discussed by e.g.* Wimmer 2017, p. 394 and Van der Weide 2013, p. 217.
74 *As put forward by* Van der Weide 2013, p. 217.

investor approaches causation differently, and, for instance, argues that the impacted credit rating has affected the price of the financial instruments only, the investor's loss does not involve the full transaction costs but solely the extent to which the credit rating affected the price of the financial instruments. Due to this overlap, the divide between the sections on causation and damages can sometimes feel somewhat artificial, but it is necessary to draw a line to be able to compare the different national legal regimes investigated.

The different language versions show remarkable differences as regards the compensation that should be awarded to issuers and investors who fulfil the conditions of Article 35a (1) CRA Regulation. First, the English version deviates from the Dutch, French and German versions in respect of the available remedy. The English version entitles issuers and investors who suffered 'damage' as a consequence of the infringement to a right to claim 'damages'. This wording aligns with the typical approach under English law, whereas the main remedy under English law would be damages (a monetary sum). The other versions investigated use more generic terms to describe the remedy available, namely '*een belegger of uitgevende instelling [mag] een vordering wegens alle aan hem c.q. haar ten gevolg van die inbreuk toegebrachte schade tegen dat ratingbureau instellen*', '*un investisseur ou un émetteur peuvent demander réparation à cette agence de notation de crédit pour le préjudice qu'ils ont subi du fait de cette infraction*' and '*so kann ein Anleger oder Emittent von dieser Ratingagentur für den ihm aufgrund dieser Zuwiderhandlungen entstandenen Schaden Ersatz verlangen.*' The terms '*vordering wegens toegebrachte schade*', '*réparation*' and '*Ersatz*' are generic terms for compensation and do not point towards damages in the form of a monetary award directly – although compensation in the form of a monetary sum will be awarded in practice. Yet these differences are remarkable. Do they demonstrate that Article 35a CRA Regulation takes account of the fact that different language versions are used in different systems, or is it simply an example of hasty drafting? Second, the Dutch version deviates from the other versions investigated by stating that issuers and investors can submit a claim for 'all' loss suffered. It is not likely, however, that the Union legislature meant to suggest that compensation can be claimed for all loss suffered. So the difference in translation is peculiar and another example of hasty drafting.

Section 3.6 paid attention to the manners in which issuers and investors can suffer loss in the context of determining the competent court and the applicable law. Article 35a (4) CRA Regulation simply refers the term 'damage' back to the applicable national law. Recital 32 however provides some guidance as to what qualifies as an issuer's loss by explaining that '[c]redit ratings, whether issued for regulatory purposes or not, have a significant impact on investment decisions and on the image and financial attractiveness of issuers' and that a downgrade 'can impact negatively the reputation and funding costs of an issuer'. In respect of issuers, the CRA Regulation hence suggests that the damage can consist of both funding costs and reputational loss. The CRA

Regulation does not provide guidance on the question of what constitutes the loss of an investor exactly, so this question falls within the remit of the applicable national law. As a consequence, the national law reports will focus on what constitutes 'loss' and how compensation, i.e. the amount of damages, is calculated.[75]

In addition, the national law reports will focus on national legal mechanisms developed to limit the amount of damages awarded to issuers and investors. The reports concentrate on contributory negligence and mitigation. As stated in section 5.3.1.3, the claimant-specific requirements under Article 35a (1) CRA Regulation limit the relevance of the concept of contributory negligence, as failures to meet these requirements leave issuers and investors without a remedy at the EU level, while such failures could otherwise give rise to defences of credit rating agencies that could reduce the amount of damages. The claimant-specific requirements hence have the risk of barring tailor-made solutions by national courts in specific situations. The concept of contributory negligence can however still be relevant; for instance, when a credit rating agency has committed multiple infringements, while one of these infringements is caused partly by inaccurate information provided by the issuer. Furthermore, it can be questioned whether courts will not accept causation and reduce the damages due to contributory negligence in case an investor could have researched the risks of the investment more thoroughly to avoid an all-or-nothing approach.

5.3.2 Article 35a (3) – Limitations of liability in advance

Rating contracts, subscription contracts and terms of use of credit rating agencies' websites may well include clauses that aim to exclude or limit the civil liability of credit rating agencies. Article 35a (3) CRA Regulation provides little guidance on the admissibility of exclusion and limitation clauses in the area of credit rating agency liability:

> 'The civil liability of credit rating agencies, as referred to in paragraph 1, shall only be limited in advance where that limitation is:
> (a) reasonable and proportionate; and
> (b) allowed by the applicable national law in accordance with paragraph 4.
> Any limitation that does not comply with the first subparagraph, or any exclusion of civil liability shall be deprived of any legal effect.'

75 For a different approach to the recoverable loss, *see* Heuser 2019, pp. 144 ff. Heuser took as a starting point that the recoverable loss and the calculation of the amount of damages could be derived from the CRA Regulation itself.

Whereas the admissibility of limitation clauses is in fact left to the applicable national law, the use of exclusion clauses is thus completely prohibited. The initial proposal of the European Commission contained prohibitions of both exclusion and limitation clauses, but the prohibition of limitation clauses was not included in the final version of the CRA III Regulation.[76] The removal of this full prohibition corresponds with the approach taken in the first version of the CRA Regulation that the use of limitation clauses could be valid in certain situations, as appears from Recital 35 CRA I Regulation:

> 'In order to ensure the quality of credit ratings, a credit rating agency should take measures to ensure that the information it uses in assigning a credit rating is reliable. For that purpose, a credit rating agency should be able to envisage, inter alia, […] contractual provisions clearly stipulating liability for the rated entity or its related third parties, if the information provided under the contract is knowingly materially false or misleading or if the rated entity or its related third parties fail to conduct reasonable due diligence regarding the accuracy of the information as specified under the terms of the contract.'

Under Article 35a (3) CRA Regulation, the liability of credit rating agencies can be restricted in advance if such a limitation is reasonable and proportionate, and allowed by the applicable national law. Limitations that do not accord with these conditions or exclusions of civil liability 'shall be deprived of any legal effect'. The question arises as to where the line between exclusions and limitations can be drawn, and when a limitation can be considered to lead to a *de facto* exclusion of liability (which will unlikely be considered reasonable and proportionate).

Credit rating agencies can include limitations of liability in the terms of rating contracts and subscription contracts.[77] Furthermore, one can find limitations in general terms and conditions governing the use of credit ratings on credit rating agencies' websites. Some credit rating agencies submit the use of credit ratings to acceptance of their general terms in which a limitation of liability has been included. Limitations can take various forms; for instance, caps on the amount of damages in the form of a concrete sum or in the form of a certain percentage of the total value of the contract. A notice on the website of Standard & Poor's reads for instance: 'Notwithstanding the foregoing, to the extent permitted by law, the maximum liability of S&P, its affiliates, and their third party providers, to you for any damages with respect

76 *Also* De Pascalis 2015, p. 69. This section and the national law reports will not pay attention to disclaimers that would exclude or limit the obligations that follow from Art. 35a (1) and Annex III CRA Regulation, as it is expected that such disclaimers are not allowed under Art. 35a CRA Regulation for that would entirely deprive the provision from its effects.

77 This section and the national law reports do not determine the validity of limitations of liability included in contracts for solicited credit ratings that are directed towards investors and other possible users of credit ratings.

to the Web Site or Content related to access to or use of this site and its contents shall not exceed the greater of (a) the total amount paid by you to S&P for use of the Web Site during the 12 months immediately preceding the event giving rise to the alleged liability, or (b) U.S. $100.'

The complexity of the sections of the national law reports dealing with this matter lies in the fact that limitation clauses come in different sorts, while the circumstances of the case determine the validity of the clauses. Due to this wide range of possibilities, there is no way of stating whether and, if so, what limitations a legal system will allow exactly. However, the factors courts will take into account in assessing the admissibility of limitation clauses can be described more generally. In one respect, the legal systems investigated already converged: the Directive on unfair terms in consumer contracts arranged for a minimum level of consumer protection against unfair terms included in general or standard (i.e. not-individually negotiated) terms and conditions.[78] Rather little attention will however be paid to the national implementations of the Unfair Terms Directive, as its relevance in the context of credit rating agency liability is limited due to the fact that currently only one credit rating agency (Egan Jones) provides for paid subscriptions. But where an investor that qualifies as a consumer[79] is involved, any limitation of liability incorporated in general terms and conditions must be approached with caution. The limitation of legal rights, such as the right to damages, forms indeed part of the indicatory list of examples under the Unfair Terms Directive that may be regarded as unfair.[80]

5.3.3 Prescription

The final part of the legal comparison deals with the limitation periods of the selected legal systems. This subject cannot be explicitly linked to the terms referred back to the applicable national law under Article 35a CRA Regulation. The concrete reason why it was nevertheless decided to analyse the limitation periods adopted by the Member States is the extremely short limitation period of one year introduced by the UK Implementing Regulations.[81] This short

78 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. More specifically, Art. 8 Unfair Terms Directive for the character of minimum harmonisation.

79 Art. 2 (b) Unfair Terms Directive: ''consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;'.

80 Art. 3 (3) Unfair Terms Directive and Annex under (b) Unfair Terms Directive: 'inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;'.

81 Art. 16 UK Implementing Regulations.

period increases the attractiveness of English law for credit rating agencies, especially if other Member States employ longer limitation periods.

5.4 Dutch law

5.4.1 National private law context

The first legal system addressed as part of this legal comparison is Dutch law. Dutch private law is an example of a civil law system. The codification of Dutch private law can mainly be found in the Burgerlijk Wetboek (BW, Dutch Civil Code), but rules of a private law nature have been codified in other statutes as well.[82] The first version of the Burgerlijk Wetboek dates from 1808 and was based on the French Code Napoleon.[83] Revised versions of the Burgerlijk Wetboek entered into force in 1838 and in 1992.[84] The latter revision provided the Burgerlijk Wetboek with its current 'layered' structure. Although the Burgerlijk Wetboek is rooted in the French Code Civil, the 'New' Burgerlijk Wetboek was influenced by other legal systems as well – most importantly by German law, but also by English law.[85]

One of the features of the Burgerlijk Wetboek is that it makes use of 'open norms', such as reasonableness and fairness (*redelijkheid en billijkheid*, Art. 6:2 and Art. 6:248 BW) and good faith (*goede trouw*, Art. 3:11 BW). Dutch courts must apply these open norms in concrete cases and can use them to alter unfair results in concrete cases.[86] An appeal to a limitation of a liability clause by the user of the clause must be in accordance with the principles of reasonableness and fairness under Article 6:248 (2) BW.[87] Another important example of an open norm can be found under Article 6:162 BW. Article 6:162 BW forms

82 Intellectual property law is codified in specific statutes, such as the Copyright Act (Auteurswet) and the Patents Act 1995 (Rijksoctrooiwet 1995). In the context of financial law, provisions of a private law nature are, for instance, Art. 1:25d Financial Supervision Act (Wet op het financieel toezicht) on the limitation of the civil liability of Dutch financial supervisors and Art. 4:61p Financial Supervision Act (Wet op het financieel toezicht) on the liability of depositaries, implementing the UCITS V Directive (no. 2014/91/EU) and AIFMD (no. 2011/61/EU).

83 As can be derived from the name 'Wetboek Napoleon, ingerigt voor het Koninkrijk Holland' (Code Napoleon, developed for the purpose of the Kingdom of the Netherlands). Asser/Scholten Algemeen deel* 1974, p. 173.

84 The date of 1992 is not entirely correct. The separate books of the Burgerlijk Wetboek have been adopted in the period between 1970-2012. In 1992, Book 3, 5, 6 and (a part of) 7 were adopted, which are the most important Books for the purpose of this dissertation. *As derived from the overview provided by* Smits 2012, p. 622.

85 *Cf. and for examples* Hartkamp 2017, no. 7. *Cf. also* Smits 2012, p. 620 and Taekema, De Roo & Elion-Valter 2011, pp. 20-21.

86 *Cf.* Hartkamp 2017, no. 15, Smits 2012, p. 622 and Taekema, De Roo & Elion-Valter 2011, pp. 270-271.

87 Section 5.4.4.

the general Dutch legal ground upon which aggrieved parties can base claims for non-contractual liability for unlawful acts. Dutch non-contractual liability law is not confined to a limited amount of unlawful acts or torts. Instead, one of the three types of 'unlawful acts' distinguished by Article 6:162 (2) BW involves situations in which a natural or a legal person acted contrary to, or omitted to take action contrary to, generally accepted standards or proper social conduct. Dutch courts must determine what constitutes an act or omission contrary to generally accepted standards in light of the specific circumstances of the case.[88] The open character of Dutch private law entails that it does not oppose the compensation of pure economic loss as a matter of principle.[89]

The Burgerlijk Wetboek divides Dutch private law into nine books. For the purpose of determining the interpretation and application of Article 35a CRA Regulation, this national law report makes use of the Dutch *vermogensrecht*[90] and, in particular, the Dutch law of obligations as codified in Book 6 BW on the law of obligations in general and in Book 7 BW on special contracts. At the basis of the Dutch law of obligations lies the rule that obligations can only result from the law, pursuant to Article 6:1 BW. Agreements (Art. 6:213 BW) and unlawful acts (Art. 6:162 BW) form important sources of obligations. On the basis of Article 6:74 BW (contractual liability) or Article 6:162 BW (non-contractual liability), a natural or legal person may owe an obligation to compensate loss suffered as a consequence of a breach of contract or an unlawful act or omission.[91] Dutch private law does not consider the concurrence of these bases for liability problematic. The aggrieved party can base its claim for compensation on both contractual and non-contractual liability, as long as the requirements of each ground are fulfilled.[92] Moreover, the outcomes of claims for damages based on contractual and non-contractual liability may be similar, because the Burgerlijk Wetboek involves a single set of rules on recoverable loss and the calculation of damages under Section 6.1.10 BW.[93]

88 *This example has been derived from* Taekema, De Roo & Elion-Valter 2011, p. 270.
89 *Cf. e.g.* Verschuur 2003, p. 13 and Barendrecht 1998, pp. 115 ff.
90 It is difficult to find a satisfactory English translation of the term '*vermogensrecht*'. Dutch '*vermogensrecht*' is an umbrella term that involves *goederenrecht* (property law) and *verbintenissenrecht* (the law of obligations).
91 *Cf.* Hartlief, Keirse, Lindenbergh et al. 2018, no. 2-3. Dutch non-contractual liability law starts from the principle that each party bears its own loss, unless the loss was brought about unlawfully.
92 *E.g.* Hoge Raad 26 March 1920, ECLI:NL:HR:1920:141, *NJ* 1920, pp. 476-479 (*Curiël v Suriname*), p. 476. *Cf.* De Graaff 2017, no. 39 and Hartlief, Keirse, Lindenbergh et al. 2018, no. 4.
93 Although differences continue to exist, *see* De Graaff & Bakker, *Groene Serie Onrechtmatige Daad*, note III.3.6 and De Graaff 2017, no. 40.

5.4.2 National rules on credit rating agency liability

5.4.2.1 Little attention to credit rating agency liability

Dutch private law lacks special provisions arranging for credit rating agency liability. As a consequence, prior to the introduction of Article 35a CRA Regulation, issuers and investors had to base claims for damages on the general grounds for liability codified in Book 6 of the Burgerlijk Wetboek on the law of obligations. Overall, the liability of credit rating agencies has not been a widespread topic of political and academic debate in the Netherlands.[94] The introduction of Article 35a CRA Regulation passed by the Dutch legislature almost unnoticed[95] and Dutch courts have hardly decided on any cases involving credit rating agency liability.[96] In terms of academic literature, Bertrams investigated the liability of credit rating agencies under Dutch private law in 1998, and only a few contributions have followed in the subsequent 20 years.[97] The contributions that do exist, and especially the ones published by Bertrams, De Savornin Lohman & Van 't Westeinde, Boersma and Atema & Peek, extensively investigate the civil liability of credit rating agencies under Dutch private law. Although these contributions do not all discuss the same liability grounds, a picture arises that claims for credit rating agency liability under Dutch law can be based on legal grounds for contractual liability and non-contractual liability and, more specifically, on the provisions with regard to unfair commercial practices and misleading and comparative advertising.

94 Possibly due to the fact that credit rating agencies traditionally do not have established and registered themselves in the Netherlands.

95 In *Kamerstukken II* 2011/12, 22 112, 1298, no remarks were made with regard to credit rating agency liability. In *Kamerstukken I* 2011/12, 33 152, A, only the Progressive Liberal Democrats (D66) asked two questions on the requirement of reliance under Art. 35a CRA Regulation and on the interaction between Art. 35a CRA Regulation and Dutch private law.

96 The cases decided involved agencies that would not qualify as credit rating agencies under Art. 3 (1) (b) CRA Regulation. The services of these reference agencies involved checking the creditworthiness of third parties and disseminating the findings to their clients. In 2015, the District Court Amsterdam dismissed a claim for damages brought by GLS against 'credit rating agency' Graydon. It decided that Graydon had not breached its obligation to act with *zorgvuldigheid, deskundigheid and bekwaamheid* (due care, expertise and competence) as required under Art. 12.1 of the general terms and conditions of Graydon and as generally required under Dutch law (Rechtbank Amsterdam 14 January 2015, ECLI:NL:RBAMS:2015:6 (*GLS v Graydon*), para 4.3). In 2010, the District Court Rotterdam gave an interim judgment in a dispute between a rental company of fork-lift trucks and Dun & Bradstreet BV. The District Court Rotterdam never delivered a final judgment and the case was moved from the register ('*doorgehaald*') on the request of both parties. For the interim judgment, Rechtbank Rotterdam 29 December 2010, ECLI:NL:RBROT:2010:BP5369, *JOR* 2011/388 annotated by S.R. Damminga.

97 Bertrams 1998. *Furthermore e.g.* Jaakke 2014, Atema & Peek 2013, Brugman & Schonewille 2013, Haentjens & Den Hollander 2013, Van der Weide 2013, Duffhues & Weterings 2011, Boersma 2010, Van 't Westeinde 2009 and De Savornin Lohman & Van 't Westeinde 2007.

5.4.2.2 In the presence of a contractual relationship – issuers & investors[98]

Dutch private law qualifies contracts for solicited credit ratings and subscription contracts as 'agreements' under Article 6:213 (1) BW. Pursuant to Article 6:213 (1) BW, an agreement is a multilateral legal act ('*meerzijdige rechtshandeling*') by which a party or multiple parties take on obligations towards another or multiple other parties. When entering into rating contracts and subscription contracts, credit rating agencies and issuers, and credit rating agencies and investors take on obligations towards each other. More specifically, rating contracts qualify as '*overeenkomsten van opdracht*' (agreements for the provision of services) under Article 7:400 (1) BW.[99] A credit rating agency – as the provider of services – promises to assign a credit rating, which qualifies as agreeing to carry out activities that do not involve creating a work of a tangible nature, safekeeping items, publishing work or transporting persons or items as required under Article 7:400 (1) BW. The legal qualification of subscription contracts is less self-evident.[100] Dutch private law could qualify paid subscriptions as *koopovereenkomsten* (purchase agreements)[101] or as *overeenkomsten van opdracht* (agreements for the provision of services) under Article 7:400 (1) BW.[102] In my opinion, paid subscription contracts could qualify as agreements for the provision of services under Dutch law, because the business model of a credit rating agency that offers paid subscriptions is based on payments of investors for the assignment of credit ratings.

As a consequence of qualifying rating contracts and paid subscriptions as agreements for the provision of services, credit rating agencies are expected to exercise '*de zorg van een goed opdrachtnemer*' ('the care of a good provider of services') in the assignment of credit ratings pursuant to Article 7:401 BW.[103] Dutch courts approach this yardstick objectively and analyse what conduct could have been expected from a reasonable credit rating agency

98 Atema & Peek 2013, pp. 949-952, Duffhues & Weterings 2011, pp. 14-15, De Savornin Lohman & Van 't Westeinde 2007, pp. 9-10 and Bertrams 1998, pp. 357-359 and 364-365.
99 Atema & Peek 2013, p. 950, Duffhues & Weterings 2011, p. 14, De Savornin Lohman & Van 't Westeinde 2007, p. 9 and Bertrams 1998, p. 357.
100 The legal qualification of paid subscription contracts received little attention in Dutch academic literature. Duffhues & Weterings 2011, p. 14-15 and Bertrams 1998, p. 364.
101 *As defended by* Bertrams 1998, p. 364. It is questionable whether paid subscriptions qualify as 'purchase agreement' in the sense of Art. 7:1 BW, because purchase agreements can only involve the purchase of objects ('*zaken*') and property rights ('*vermogensrechten*'). However, the Dutch Supreme Court adopted a broad scope of application of Art. 7:1 BW, *see* Hoge Raad 27 April 2012, ECLI:NL:HR:2012:BV1301, *NJ* 2012/293 (*De Beeldbrigade v Hulskamp*), para 3.5. In this case, the Dutch Supreme Court qualified the purchase of software as a purchase agreement, because the agreement provided the purchaser with an individualised item for an unlimited period over which the purchaser could exercise factual power. Wessels 2015, no. 2.
102 *As defended by* Duffhues & Weterings 2011, pp. 14-15.
103 *In relation to rating contracts* Atema & Peek 2013, p. 950, Duffhues & Weterings 2011, pp. 14-15 and Bertrams 1998, p. 357.

placed in the same position as the defendant credit rating agency.[104] If a credit rating agency failed to exercise the care of a good provider of services in the assignment of a credit rating, the credit rating agency is liable. If the failure resulted in a breach of a credit rating agency's contractual obligations under the rating contract or the subscription contract, issuers and investors can base a claim for compensation on the general provision for contractual liability under Article 6:74 (1) BW.[105] If this failure resulted in an unlawful act, issuers and investors can also base a claim on Article 6:162 BW (discussed hereafter).

5.4.2.3 In the absence of a contractual relationship

(a) Issuers – Article 6:162 BW[106]

In the absence of a contractual relationship between a credit rating agency and an issuer, an issuer can base a claim for compensation relating to pure economic or reputational loss on Article 6:162 BW if a credit rating agency did not exercise reasonable care and skill in the assignment of the inaccurate unsolicited credit rating. Moreover, issuers can also base a claim for compensation on Article 6:162 BW in relation to solicited credit ratings, if the breach of contract also constituted an unlawful act. Article 6:162 (1) BW forms the general legal basis for non-contractual liability under Dutch private law.[107] The provision requires the commitment of an unlawful act, which can be attributed to the party who committed the unlawful act and which caused loss to the aggrieved party: '*Hij die jegens een ander een onrechtmatige daad pleegt, welke hem kan worden toegerekend, is verplicht de schade die de ander dientengevolge lijdt, te*

104 *In relation to rating contracts* Atema & Peek 2013, p. 950, who also pointed out that the provisions of the CRA Regulation can be used to substantiate the standard of care required by Art. 7:401 BW. *Also* Bertrams 1998, p. 358. *Cf. in general* Asser/Tjong Tjin Tai 7-IV 2018/93-94. This dissertation does not focus on the power of the parties involved to agree to specific responsibilities.

105 *In relation to rating contracts* Atema & Peek 2013, pp. 949-950. *Cf. in general* Asser/Tjong Tjin Tai 7-IV 2018/197.

106 *Discussed by* De Savornin Lohman & Van 't Westeinde 2007, pp. 10 and 17-18 and Bertrams 1998, pp. 359-360.

107 In theory, Art. 6:162 BW could be used by a broader category of aggrieved parties than issuers and investors alone, but only in as far as the violated norm aims to protect the interests of those aggrieved parties in accordance with the requirement of relativity under Art. 6:163 BW. One could think of situations in which competitors of an issuer were disadvantaged by a too positive credit rating assigned to the issuer. Atema & Peek, however, pointed out that it is questionable whether a credit rating agency owes a duty of care to competitors (Atema & Peek 2013, p. 960). As Dutch law does not involve special provisions for defamation, claims relating to reputational loss must be based on Art. 6:162 BW as well. *As can be derived from* Hartkamp 2016, p. 185 and De Savornin Lohman & Van 't Westeinde 2007, pp. 17-18.

vergoeden.'[108] Article 6:162 (2) BW distinguishes three categories of unlawful acts. The party who caused the loss must have (1) violated the aggrieved party's rights; (2) acted or omitted to take action contrary to its legal duties; or (3) acted or omitted to take action contrary to generally accepted standards or proper social conduct.[109]

An issuer can argue that a credit rating agency has committed an unlawful act belonging to each of the three categories listed above. As an example of the first category, an issuer could argue that the negligent assignment of an inaccurate credit rating resulted in a violation of its personality rights.[110] An example of the second category is a situation in which a credit rating agency has breached its obligations under Annex III CRA Regulation – although, in order to eventually succeed in a claim for damages, the issuer must fulfil the requirement of relativity under Article 6:163 BW.[111] An example of the third category is a situation in which a credit rating agency has failed to exercise reasonable care and skill in the assignment of a solicited credit rating and committed a so-called professional error.[112] The standard of care expected from professional parties is that they conduct themselves as can be expected from *een redelijk bekwaam en redelijk handelend beroepsbeoefenaar* (a reasonably competent and reasonably acting professional).[113] The concrete circumstances of a case determine what can be expected from a reasonably competent and reasonably acting professional party. The standard of care is equal to the standard of care under Article 7:401 BW, which provides that a professional party must exercise the care of a good provider of services.[114]

108 If a subordinate of a credit rating agency, for instance an employee, committed an unlawful act in the scope of the exercise of its tasks, an issuer can also base a claim for compensation against the credit rating agency on Art. 6:170 BW for vicarious liability. This legal basis for civil liability will not be discussed in this dissertation.

109 *On the basis of* Art. 6:162 (2) BW: *'Als onrechtmatige daad worden aangemerkt een inbreuk op een recht en een doen of nalaten in strijd met een wettelijke plicht of met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt, een en ander behoudens de aanwezigheid van een rechtvaardigingsgrond.*' Asser/Hartkamp & Sieburgh 6-IV 2015/39 and 43.

110 De Savornin Lohman & Van 't Westeinde 2007, p. 17, who suggested the issuer can bring a claim based on defamation under Art. 6:162 BW.

111 This dissertation assumes that the obligations under Annex III CRA Regulation can have direct horizontal effect through Article 35a CRA Regulation. If that would not be the case, issuers are not able to invoke these obligations directly vis-à-vis credit rating agencies in national legal proceedings based on Art. 6:162 BW (*cf.* Asser/Hartkamp & Sieburgh 6-IV/44.1).

112 *Cf. in general* Asser/Hartkamp & Sieburgh 6-IV 2015/67.7.

113 Asser/Tjong Tjin Tai 7-IV 2018/200. *For this standard see e.g. with regard to accountants* Hoge Raad 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2008/528 annotated by C.C. van Dam (*Deloitte Touche e.a. v Vie d'Or*), paras. 5.3 and 5.4.2 and *with regard to lawyers* Hoge Raad 9 June 2000, ECLI:NL:HR:2000:AA6159, *NJ* 2000/460 (*S. v V.*), para 3.3.

114 *As stated by* Asser/Tjong Tjin Tai 7-IV 2018/200.

The norm of reasonable care and skill in the assignment of a credit rating applies to the assignment of unsolicited credit ratings as well.[115] The absence of a contractual relationship between a credit rating agency and an issuer does not discharge a credit rating agency from this obligation under Dutch law. This conclusion was derived from the approach of Dutch courts in cases concerning the unlawfulness of publications on products and legal entities.[116] In this type of case, a contractual relationship does not exist between the publisher and the producer or other legal entity. Dutch courts balance the freedom of speech of the publisher against the economic interests of the producers and legal entities. A publisher enjoys a wide margin of discretion, but its freedom is not absolute. Hence, a publication will not easily be considered wrongful, but it must be the result of professional (*deskundig*), objective (*objectief*) and clear (*duidelijk*) investigations. Because of the societal importance of these publications, Dutch courts set high standards on the prudence (*zorgvuldigheid*) exercised by the publisher.[117] Similar considerations apply to the publication of unsolicited credit ratings. The freedom of speech of a credit rating agency must be balanced against the economic interests of the issuer, while credit ratings are of high societal relevance. A credit rating agency enjoys a wide margin of discretion in the assignment of the credit rating, but the credit rating must be the result of professional (*deskundig*), objective (*objectief*) and clear (*duidelijk*) investigations. Dutch courts are expected to set high standards for the prudence (*zorgvuldigheid*) exercised by a credit rating agency.

(b) Investors

(i) – Article 6:193b & 6:194 BW

As described under (a), Article 6:162 BW forms the general legal basis for non-contractual liability under Dutch private law. This ground for civil liability will discussed hereafter, under (ii). First, this section pays attention to the possibilities for investors, who relied on a solicited credit rating attached to specific financial instruments, to base a claim for damages on Article 6:193b of the Section on Unfair Commercial Practices or on Article 6:194 BW of the Section on Misleading and Comparative Advertising included in the Burgerlijk

115 Bertrams also argued that no difference should be made between the obligations of a credit rating agency in respect of solicited and unsolicited credit ratings (Bertrams 1998, p. 360).

116 *As referred to by* Bertrams 1998, p. 360.

117 Hoge Raad 9 October 1987, ECLI:NL:HR:1987:AC1068, *NJ* 1988/537 annotated by C.J.H. Brunner (*Consumentenbond v Westerkamp Haweka*), para 3.3. *Repeated in* Rechtbank Amsterdam 8 September 2016, ECLI:NL:RBAMS:2016:5698 (*X v De Persgroep Nederland*), paras. 4.1-4.2 and Rechtbank Den Haag 30 September 2015, ECLI:NL:RBDHA:2015:11224 (*ANWB v Consumentenbond*), paras. 4.2-4.3. *Cf.* Rechtbank Den Haag 6 November 2018, ECLI:NL:RBDHA:2018:13142 (*Australian Gold LLC v Consumentenbond*), paras. 4.2-4.3.

Wetboek.[118] Contributions by Atema & Peek and De Savornin Lohman & Van 't Westeinde extensively investigated the possibilities for credit rating agencies being held liable by investors under these Sections already.[119]

Article 6:193b BW on unfair commercial practices and Article 6:194 BW on misleading advertisements serve to protect parties against unfair practices employed by professional parties or by persons acting on behalf of those professional parties. These provisions are *lex specialis* of Article 6:162 BW.[120] It is attractive for investors to try to base a claim on these *leges speciales*, because they allow investors to benefit from reversals of the burden of proof under the Sections on Unfair Commercial Practices and Misleading and Comparative Advertising.[121] These reversals deviate from the general rule under Article 150 Wetboek van Burgerlijke Rechtsvordering (Dutch Code of Civil Procedure), which stipulates that the burden of proof rests upon the claimant.[122]

Article 6:193b BW aims to protect consumers against unfair commercial practices conducted by traders.[123] In order to fall within the scope of this provision (1) the investor shall qualify as a 'consumer'; (2) the credit rating agency shall qualify as a 'trader'; and (3) the credit rating activity shall qualify

---

118 Section 3a and Section 4 of Title 3 Book 6 BW. Section 3a forms the implementation of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'). Section 4 forms the implementation of Directive 2006/114/EC concerning misleading and comparative advertising. Franx 2017, pp. 137 and 140-141.

119 Atema & Peek 2013, pp. 952-959 and De Savornin Lohman & Van 't Westeinde 2007, pp. 10-15. *See also* Franx 2017, pp. 341-344, Jaakke 2014, pp. 192-193, Van der Weide 2013, p. 217, Boersma 2010, pp. 21-22, Van 't Westeinde 2009, pp. 62-64 and Coskun 2008, pp. 612-613. The contribution of De Savornin Lohman & Van 't Westeinde related to Art. 6:194 Ancient BW. The scope of this provision used to be broader and covered both claims brought by consumers and parties acting in their business capacity.

120 *In respect of Art. 6:193b BW Kamerstukken II* 2006/07, 30928, 3, p. 14, De Graaff, *Groene Serie Onrechtmatige Daad*, note III.8.14 and note III.8.16. *Cf. in the context of prospectus liability e.g.* Asser/De Serière 2-IV 2018/452 and Timmerman 2013, p. 648.

121 *Already discussed by* Franx 2017, pp. 342-343, Jaakke 2014, p. 193, Atema & Peek 2013, pp. 954 and 959, Boersma 2010, p. 22, Van 't Westeinde 2009, p. 64 and De Savornin Lohman & Van 't Westeinde 2007, p. 15. *Cf. in general* Verkade 2011, no. 61-63 and 67 and Krans 2010, pp. 50-52.

122 Under Art. 6:193j (1) BW, consumer-investors must state that a credit rating was incorrect, upon which the credit rating agency must prove that the credit rating was correct. If the credit rating agency acted wrongfully under Art. 6:193b BW, the unfair commercial practice is attributed to the credit rating agency subject to proof to the contrary (Art. 6:193j (2) BW, Verkade 2016, no. 49 and 52). The Section on Misleading and comparative advertising provides for similar reversals of the burden of proof under Art. 6:195 (1) and (2) BW. The reversals apply only to persons or entities who determined the content of the misleading statement.

123 Art. 6:193b (1) BW – '*Een handelaar handelt onrechtmatig jegens een consument indien hij een handelspraktijk verricht die oneerlijk is.*'

as 'unfair commercial practice'. An investor can fall within the definition of a consumer under the Section on Unfair Commercial Practices if he qualifies as a natural person who does not act in the exercise of his profession or business.[124] This legal basis for liability, hence, does not apply to institutional investors.

The question arises whether a credit rating agency qualifies as a trader under Article 6:193b BW. Pursuant to Article 6:193a (1) (b) BW, the term 'trader' involves any natural or legal person acting in the course of its profession or business and anyone acting on behalf of a trader. As an example of 'anyone acting on behalf of a trader', Dutch parliamentary history refers to the legal concept *volmacht* (power of attorney).[125] However, an attorney is not the only example of a person that can act on behalf of a trader.[126] A credit rating agency can qualify either as a legal person acting in the course of its profession or business or, arguably, as a legal person acting on behalf of a trader (an issuer) when publishing a solicited credit rating on its website or when a credit rating is published in a prospectus.[127]

Furthermore, the question arises whether the publication of a credit rating can qualify as an unfair commercial practice. Under Article 6:193a (1) (d) BW, for the purpose of the Section on Unfair Commercial Practices, commercial practices involve all practices directly relating to the promotion, sale or supply of products to consumers. Pursuant to Article 6:193b (2) BW, commercial practices are unfair if they are contrary to the requirements of professional diligence and distort (or can distort) the ability of an average consumer to take an informed decision.[128] Commercial practices are particularly unfair if they qualify as 'misleading' in the sense of Article 6:193c BW. Under this provision, a commercial practice is misleading if it spreads factually incorrect information or information that can mislead the average consumer in respect of, for instance, the existence or the nature of the product and the main characteristics of the product.

The publication of credit ratings can fall within the definition of 'unfair commercial practice'. One can imagine a credit rating agency acting contrary to the requirements of professional diligence. Furthermore, due to the importance of credit ratings on the financial markets, one can imagine that an inaccurate credit rating could distort the ability of an average consumer investor[129]

124 Art. 6:193a (1) (a) BW.
125 *Kamerstukken II* 2006/07, 30928, C, p. 9. *Also* T&C BW, commentary on Art. 6:193a BW and Verkade 2016, no. 16.
126 *See* Rechtbank Rotterdam 23 May 2013, ECLI:NL:RBROT:2013:CA0879 (*Goltex v Autoriteit Consument & Markt*), in which a legal person that sent invitations for bus trips was considered to act on behalf of the trader who offered the bus trips (para 9.1). *Derived from* Verkade 2016, no. 16.
127 Franx 2017, p. 343.
128 *Translation based on* Warendorf et al.
129 Regarding this concept, see, hereafter, Art. 6:194 BW.

to take an informed investment decision in concrete cases. As explained by Atema & Peek, such a situation can occur especially in relation to structured finance ratings, because those credit ratings directly relate to the sale of financial instruments by the issuer and relate to financial products that could have a complex structure.[130] More in general, it can also be argued that the publication of solicited credit ratings assigned to issuers and financial instruments directly relates to the promotion and sale of financial instruments to consumer investors, due to the information function of credit ratings on the financial markets. An issuer can indeed request a credit rating to signal a certain level of creditworthiness to the financial markets. This will especially be the case if the solicited credit rating was included in a prospectus of financial instruments.[131] It seems, however, not possible to argue that an unsolicited credit rating directly relates to the promotion, sale or supply of products, because a request for the assignment of a credit rating of the issuer is lacking.

Article 6:194 BW aims to protect professional parties against the publication of misleading statements by a provider of goods or services acting in the course of its profession or business or by anyone acting on behalf of such a provider.[132] In order to fall within the scope of this provision: (1) the investor shall act in the exercise of its profession or business; (2) the credit rating agency shall have publicly issued a credit rating relating to financial instruments (which qualify as 'goods'[133]) on behalf of the issuer; (3) the issuer shall act in its professional or business capacity; and (4) the credit rating shall qualify as misleading. Following De Savornin Lohman & Van 't Westeinde and Atema & Peek in respect of the third condition, the publication of credit ratings attached to financial instruments on a website or in a prospectus qualifies as making information publicly available.[134] Article 6:194 BW will only find application in relation to solicited credit ratings, because it is required that

130 Atema & Peek 2013, p. 955.

131 Franx 2017, p. 343.

132 Art. 6:194 (1) BW – '*Hij die omtrent goederen of diensten die door hem of degene ten behoeve van wie hij handelt in de uitoefening van een beroep of bedrijf worden aangeboden, een mededeling openbaar maakt of laat openbaar maken, handelt onrechtmatig jegens een ander die handelt in de uitoefening van zijn bedrijf, indien deze mededeling in een of meer opzichten misleidend is, zoals ten aanzien van: a. de aard, samenstelling, hoeveelheid, hoedanigheid, eigenschappen of gebruiksmogelijkheden; […]*'.

133 Atema & Peek 2013, p. 957 and De Savornin Lohman & Van 't Westeinde 2007, p. 14. Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*) in which Art. 6:194 BW was applied to a case concerning prospectus liability. De Savornin Lohman & Van 't Westeinde (2007, p. 15) limit the application of Art. 6:194 BW to credit ratings included in a prospectus. Otherwise, they argue, 'such a rating does not concern a statement regarding goods or services that are offered'.

134 Atema & Peek 2013, p. 957 and De Savornin Lohman & Van 't Westeinde 2007, p. 13. The term 'publication' must be interpreted broadly, as held by the Dutch Supreme Court in Hoge Raad 2 December 1994, ECLI:NL:HR:1994:ZC1562, *NJ* 1996/246 annotated by D.W.F. Verkade (*ABN AMRO v Coopag Finance*), para 4.1. De Savornin Lohman & Van 't Westeinde 2007, pp. 13-14.

a credit rating agency must have acted on behalf of the issuer when assigning and publishing the credit rating.[135]

A core requirement of Article 6:194 BW is that the information published must be misleading. The misleading character of information can, for instance, relate to the nature, composition, quality or characteristics of the goods or services offered.[136] In *VEB v World Online*, the Dutch Supreme Court provided guidance on the misleading character of statements included in a prospectus.[137] One must approach the question whether a statement included in a prospectus is misleading from the perspective of the so-called '*maatman-belegger*' (the average investor). According to the Dutch Supreme Court in *VEB v World Online*, a statement is misleading if it is reasonably plausible that the statement was of material importance for the investment decision of the average investor. The Dutch Supreme Court did not require that an investor was actually acquainted with the statement, but only that the statement was of material importance for the investment decision of an average investor so that it could have influenced the economic conduct of an investor.[138]

The question then arises whether the economic conduct of an average investor would be influenced by a credit rating. Depending on the concrete situation, credit ratings could have such influence. For instance, structured finance ratings may well influence the economic conduct of an average investor; credit ratings are indeed indispensable in structured finance in order to sell the products in the financial markets. More in general, it can also be argued that the publication of solicited credit ratings assigned to issuers and financial instruments can influence the economic conduct of an average investor, especially if the credit rating is gravely inaccurate or borders on the line between investment grade and speculative grade.[139]

(ii) – Article 6:162 BW

Investors can also base a claim for damages on the general provision for civil liability under Article 6:162 BW. The general remarks made in respect of Article 6:162 BW under section 5.4.2.3 (a) already apply in the context of investors as well. If an investor suffered loss as a consequence of an incorrect credit rating, it can argue that a credit rating agency has committed an unlawful act belong-

135 *As explained by* Verkade, Art. 6:194 BW does not apply to information disseminated by persons or entities that do not offer goods or services or do not act on behalf of persons or entities that offer goods or services, Verkade 2011, no. 16. This hence explains why Art. 6:194 BW does not apply to the publication of unsolicited credit ratings. *See* De Savornin Lohman & Van 't Westeinde 2007, p. 18 and Atema & Peek 2013, p. 957.

136 Art. 6:194 (1) (a) BW. *Translation derived from* Warendorf et al.

137 *For this analogue application* Atema & Peek 2013, pp. 957-958.

138 *Cf.* Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), para 4.10.4, *as referred to by* Atema & Peek 2013, p. 958.

139 Atema & Peek 2013, p. 958.

ing to the second category (the violation of legal duties) or the third category (the violation of generally accepted standards) listed under Article 6:162 (2) BW.[140] The second category covers situations in which a credit rating agency breached its obligations under the CRA Regulation – although, in order to eventually succeed in claiming damages, the investor must meet the requirement of relativity under Article 6:163 BW.[141] Apart from violations of their legal obligations under the CRA Regulation, credit rating agencies may owe a duty of care to investors under Dutch private law.[142] A breach of that duty of care can constitute an unlawful act of the third category.

The statement that credit rating agencies may owe a duty of care vis-à-vis investors in the absence of a contractual relationship deserves further explanation. In the absence of Dutch case law addressing this matter specifically, a credit rating agency's duty of care vis-à-vis investors can only be constructed by drawing analogies with other situations in which professional parties were held to owe a duty of care to third parties.[143] Whether a professional party owes a duty of care to a third party ultimately depends on the concrete circumstances of a case. In her dissertation, Van den Akker distilled Dutch case law into more general guidelines to determine whether a professional party owes a duty of care to a third party, including: (1) the capacity and the societal standing (*maatschappelijke positie*) of the professional; (2) whether the professional exercised a public task or statutory duty; (3) whether it was foreseeable that third parties would rely on the professional's conduct and whether that reliance was justified (*gerechtvaardigd vertrouwen*); and (4) whether the purpose of any existing agreement between the professional and its client was to serve the third party's interests.[144]

The meaning of these guidelines becomes clearer when looking at concrete examples of professional liability under Dutch law, such as the civil liability of accountants vis-à-vis parties other than the audited legal entity itself. An important consideration for the scope of a duty of care is the type of task performed by the accountant; whether the accountant performed a statutory

140 De Savornin Lohman & Van 't Westeinde 2007, p. 10.

141 This dissertation assumes that the obligations under Annex III CRA Regulation can have direct horizontal effect through Article 35a CRA Regulation. If that would not be the case, issuers are not able to invoke these obligations directly vis-à-vis credit rating agencies in national legal proceedings based on Art. 6:162 BW (*cf.* Asser/Hartkamp & Sieburgh 6-IV/44.1).

142 *E.g.* Franx 2017, p. 343, Boersma 2010, pp. 19-20, Van 't Westeinde 2009, p. 63, De Savornin Lohman & Van 't Westeinde 2007, pp. 15-16 and Bertrams 1998, p. 362. *In contrast,* Coskun 2008, pp. 612-613.

143 *An extensive construction was made by* Boersma 2010, pp. 19-22.

144 Van den Akker 2001, pp. 160-163, 163-165, 165-169, 169-171, respectively.

obligation or an individually agreed service.[145] In *Deloitte Touche e.a. v Vie d'Or*, the question arose whether the accountant of former insurer Vie d'Or was liable towards the former policy holders of Vie d'Or. The Dutch Supreme Court considered that the circle of parties that has an interest in the adequate performance of an accountant's task is broader than the audited legal entity alone. Third parties may expect in principle that financial information and statements required by law to be published, to the independent and objective opinion of the accountant, adequately reflect the status of the legal entity and comply with European and national law and with the general norms and standards of accounting. Moreover, third parties are allowed to base their conduct on the financial information and statements and to assume the financial information and statements are not misleading.[146] The case of *Deloitte Touche e.a. v Vie d'Or* concerned the control and approval of annual financial statements, which is often required by law and to which great public importance is attached. Therefore, the Dutch Supreme Court set high standards for the prudence (*zorgvuldigheid*) exercised by the accountant.[147] In contrast, when performing individually agreed services at the request of private parties, accountants do not fulfil a public task and, in principle, only owe a duty of care towards their clients.[148] Ultimately, the question of whether an accountant owes a duty of care towards third parties, however, depends on the concrete circumstances of the case. Even if an accountant performs individually agreed services, the scope of its duty of care can extend to third parties if the services are performed to the benefit of third parties or if the accountant can reasonably foresee that third parties will rely on the services provided.[149]

The considerations that play a role in the context of accountant's liability also play a role in the context of the duty of care owed by other types of

145 *Cf.* Parket Hoge Raad 14 October 2016, ECLI:NL:PHR:2016:1021, para 3.4. This case was eventually dismissed by the Dutch Supreme Court on the basis of Art. 81 Wet op de rechterlijke organisatie, Hoge Raad 16 December 2016, ECLI:NL:HR:2016:2876. An example of a statutory obligation is the control and approval a legal person's annual financial statements under Art. 2:393 BW and the publication of these statements under Art. 2:394 BW (*for other examples* Van den Akker 2001, p. 73). An example of an individually agreed service is the valuation of legal entities at individual requests (Van den Akker 2001, p. 74).

146 *Cf.* Hoge Raad 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2008/528 annotated by C.C. van Dam (*Deloitte Touche e.a. v Vie d'Or*), para 5.4.1.

147 Hoge Raad 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2008/528 annotated by C.C. van Dam (*Deloitte Touche e.a. v Vie d'Or*), para 5.4.1.

148 Parket Hoge Raad 14 October 2016, ECLI:NL:PHR:2016:1021, para 3.4. This case was eventually dismissed by the Dutch Supreme Court on the basis of Art. 81 Wet op de rechterlijke organisatie, Hoge Raad 16 December 2016, ECLI:NL:HR:2016:2876. *Also* Van den Akker 2001, p. 74.

149 Parket Hoge Raad 14 October 2016, ECLI:NL:PHR:2016:1021, para 3.4. This case was eventually dismissed by the Dutch Supreme Court on the basis of Art. 81 Wet op de rechterlijke organisatie, Hoge Raad 16 December 2016, ECLI:NL:HR:2016:2876. *Also* Van den Akker 2001, p. 75.

professional parties.[150] The societal importance of notarial deeds entails that third parties can often hold a notary liable for the inadequacy of notarial deeds.[151] Furthermore, a solicitor does not owe a duty of care to the opposite party in negotiations,[152] but owes a duty of care to a third party when providing a so-called third party opinion on its client to that third party.[153] And, due to their important societal standing, banks even owe a special duty of care (*bijzondere zorgplicht*) that can extend to third parties.[154] According to Kramer, a key factor in the scope of the duty of care owed by professional parties to third parties is the foreseeability of reliance by those third parties. A professional party is more likely to owe a duty of care towards third parties when it is foreseeable that third parties will act upon statements made by the professional party and that those third parties may suffer loss as a result of those acts.[155]

In the context of credit rating agency liability, a Dutch court must balance the considerations outlined above against each other. On the one hand, a credit rating agency does not perform a statutory task when assigning credit ratings. A credit rating agency instead assigns credit ratings on its own motion or performs a service as agreed with the issuer. In principle, therefore, one could argue that a credit rating agency is liable towards issuers only for failures to exercise reasonable care and skill in the assignment of credit ratings. On the other hand, the existence of an obligation to exercise reasonable care and skill

150 At this point, this dissertation does not consider the possibilities to exclude or limit the obligations owed by professional parties vis-à-vis third parties.

151 *In detail* Kramer 2017b, pp. 319-320. *See also* Asser/Tjong Tjin Tai 7-IV 2018/204 and Van den Akker 2001, pp. 139 ff.

152 *In detail* Van den Akker 2001, pp. 101-103. *See also* Asser/Tjong Tjin Tai 7-IV 2018/204.

153 *Cf.* Van Dijk 2016, no. 127 and Van den Akker 2001, p. 111.

154 *On the special duty of care owed by banks in general e.g.* Hoge Raad 9 January 1998, ECLI:NL:HR:1998:ZC2536, *NJ* 1999/285 annotated by W.M. Kleijn (*MeesPierson v Ten Bos*). *On the special duty of care owed to third parties e.g.* Hoge Raad 23 December 2005, ECLI:NL:HR:2005:AU3713, *NJ* 2006/289 annotated by M.R. Mok (*Safe Haven*), Hoge Raad 27 November 2015, ECLI:NL:HR:2015:3399, *NJ* 2016/245 annotated by T.F.E. Tjong Tjin Tai (*ABN AMRO v Van den Berg*) and Gerechtshof Amsterdam 14 May 2019, ECLI:NL:GHAMS:2019:1611 (*ING v Foodlocker*). *Cf.* Asser/Tjong Tjin Tai 7-IV 2018/204.

155 Kramer 2017b, p. 321. Kramer based these general conclusions on the decisions of the Gerechtshof Arnhem-Leeuwarden 16 June 2015, ECLI:NL:GHARL:2015:4385, *NJ* 2017/97 and Gerechtshof Arnhem-Leeuwarden 23 September 2014, ECLI:NL:GHARL:2014:7353, *NJ* 2016/483 (*Rabobank v X*). Both cases were eventually dismissed by the Dutch Supreme Court on the basis of Art. 81 Wet op de rechterlijke organisatie on the basis of Art. 81 Wet op de rechterlijke organisatie, Hoge Raad 16 December 2016, ECLI:NL:HR:2016:2876 and Hoge Raad 9 September 2016, ECLI:NL:HR:2016:2044 (*Rabobank v X*), respectively. The professional party can limit its duty of care by explicitly stipulating in the contract with its client that the information may not be used by third parties. As held by the Court of Appeal Arnhem-Leeuwarden, however, such limitation will not work if the professional knows the information will still be used by third parties and fails to take any measures against this use. Gerechtshof Arnhem-Leeuwarden 23 September 2014, ECLI:NL:GHARL:2014:7353, *NJ* 2016/483 (*Rabobank v X*), para 3.10, *as derived from* Kramer 2017b, pp. 321-322.

in the assignment of credit ratings vis-à-vis investors can be justified by the important function of credit rating agencies as gatekeepers, and by the important functions of credit ratings for financial markets. Market participants indeed still use credit ratings as external opinions on creditworthiness to make investment decisions and attach much importance to credit ratings as such. Moreover, credit ratings are meant to be used by third parties when issuers request credit ratings to be able to attract investments, as well as when issuers use credit ratings to comply with regulatory requirements.[156] As stated by Van 't Westeinde as well, these functions are not altered by the fact that credit rating agencies present credit ratings as mere opinions and limit the permitted use of credit ratings.[157] Consequently, it is reasonably foreseeable for credit rating agencies that credit ratings will be relied upon by investors and may cause them loss, so that the existence of a duty of care owed to investors could be adopted under Dutch private law.[158]

Finally, it must be assessed what conduct would constitute a breach of the duty of care. In the area of professional liability, professionals breach their duty of care if they fail to act as can be expected from a reasonably competent and reasonably acting professional.[159] What can be expected of a reasonably competent and reasonably acting professional must be determined in the concrete circumstances of the case. This standard of care is equal to the standard of care under Article 7:401 BW, namely that a professional must exercise the care of a good provider of services.[160]

5.4.3 Article 35a (1)

5.4.3.1 'Intentionally' or 'with gross negligence'

The Dutch version of Article 35a CRA Regulation translates the required degree of culpability as '*opzettelijk of met grove nalatigheid*'. The Burgerlijk Wetboek does not define these terms. Under Dutch law, conduct qualifies as intentional (*opzettelijk*) if a person deliberately and consciously acted or omitted something with the purpose of causing loss. In addition, conduct qualifies as intentional

---

156 Moreover, credit rating agencies are aware of that goal, Van 't Westeinde 2009, p. 63. *Also* Boersma 2010, p. 20 and Bertrams 1998, p. 362.

157 *Cf.* Van 't Westeinde 2009, p. 63.

158 *See* Boersma 2010, pp. 19-20, Van 't Westeinde 2009, p. 63 and Bertrams 1998, p. 362.

159 Asser/Tjong Tjin Tai 7-IV 2018/200. *For this standard see e.g. with regard to accountants,* Hoge Raad 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2008/528 annotated by C.C. van Dam (*Deloitte Touche e.a. v Vie d'Or*), paras. 5.3 and 5.4.2 and *with regard to lawyers* Hoge Raad 9 June 2000, ECLI:NL:HR:2000:AA6159, *NJ* 2000/460 (*S. v V.*), para 3.3.

160 *As stated by* Asser/Tjong Tjin Tai 7-IV 2018/200. Due to credit rating agencies' discretion in assigning credit ratings, Bertrams argued that credit rating agencies should only be liable in case of '*grove, aan roekeloosheid grenzende onzorgvuldigheid*' (Bertrams 1998, p. 364. Van 't Westeinde 2009, p. 63 is of the same opinion).

as well if a person accepted that its conduct would cause loss or had a significant chance of resulting in loss, but carried on anyway.[161] In the context of credit rating agency liability, it is required that a credit rating agency deliberately and consciously committed an infringement or accepted that its conduct would result in committing an infringement or created a significant chance of committing an infringement.

It is challenging to construct the exact interpretation and application of 'gross negligence' under Dutch private law. The Dutch version of Article 35a CRA Regulation translates gross negligence as '*grove nalatigheid*', while *grove nalatigheid* is neither a term the Burgerlijk Wetboek commonly uses,[162] nor a term Dutch legislation in general commonly uses.[163] Dutch statutes in the field of private law instead employ terms such as '*roekeloosheid*', '*bewuste roekeloosheid*' and '*ernstige verwijtbaarheid*'. So, for the purpose of interpreting Article 35a CRA Regulation, should one follow the path of *grove nalatigheid* or should one try to connect with other relevant Dutch legal concepts such as *grove schuld*, *(bewuste) roekeloosheid* and *ernstige verwijtbaarheid*? The answer to this question is relevant, because the concepts have different meanings that may differ depending on the legal context in which they are used. The fact that it is necessary to pose this question demonstrates a weakness in Article 35a CRA Regulation. What is the legal status of the terms used by Article 35a CRA Regulation, and is there a relationship with national legal concepts? Did the Union legislature deliberately choose the term *grove nalatigheid*, though it is not a concept that is commonly used under Dutch law? And, if so, could this choice be explained by the fact that the Dutch translation of the CRA Regulation is not only relevant to Dutch law, but also to Belgian law? These questions cannot be answered with certainty, but they are relevant in properly predicting the interpretation and application of Article 35a CRA Regulation.

Article 35a CRA Regulation is not the first provision of EU law that makes use of the term *grove nalatigheid*. Within the Burgerlijk Wetboek, three provisions that originate from EU law use the term *grove nalatigheid*: Article 4:187 (3) BW in the field of inheritance law and Article 7:527 (2) and Article 7:529 (2) BW in the field of financial law. The instruments of EU law underlying these provisions do not define the meaning of *grove nalatigheid*. Instead, they mostly leave the interpretation and application of this term to the applicable national law. For the purpose of Article 35a (1) CRA Regulation, it is interesting to

161 This explanation is based on criminal law and insurance law, in which the term *opzet* was developed. *E.g. in the context of insurance law,* Asser/Wansink, Van Tiggele & Salomons 7-IX* 2012/456-457. *For a similar explanation in the context of payment services*, Van Esch 2013, p. 1056.

162 *In the context of payment services cf.* Van Esch 2013, p. 1055.

163 The term *grove nalatigheid* does not occur more than ten times in Dutch Acts (*wetten in formele zin*), *e.g.* Art. 42d Elektriciteitswet 1998 (Electricity Act 1998), Art. 42 Wet buitengewoon pensioen 1940-1945 (Special Pensions (1940-1945) Act) and Art. 11.25 Wet luchtvaart (Aviation Act).

investigate how the Dutch legislature and Dutch courts approach *grove nalatigheid* on these occasions, although one must be aware of differences in the use of the term and in the legal areas in which the term is used.

Under Article 4:187 (1) BW, someone who has acted upon a certificate of inheritance[164] is assumed to have acted in good faith, unless, under Article 4:187 (3) BW, that person knew or due to gross negligence (*grove nalatigheid*) did not know that the certificate was not in accordance with reality.[165] The Explanatory Memorandum stipulates that the underlying ratio of Article 4:187 (3) BW is that a person who should have reasonably known that the certificate of inheritance was incorrect should not have acted upon it.[166] Hence, it seems that the conduct of the person who acted upon the declaration of inheritance will be approached from the objective perspective of a reasonable person placed in the same position.[167] Whether a person acted with '*grove nalatigheid*' depends on the answer to the question whether the person should have realised that the declaration might have been incorrect, not on whether the person did in fact realise that the declaration might have been incorrect (state of mind), but did not check upon the correctness of the declaration.

Furthermore, in the field of financial law, Article 7:527 (2) and Article 7:529 (2) BW contain the term *grove nalatigheid*. These provisions belong to Title 7.7.B BW on payment transactions, the Dutch implementation of the Payment Services Directive II ('PSD II'[168]). Under this Title, a payment services provider (for instance, a bank) must in principle reimburse a payment services user (for instance, a consumer) for unauthorised payment transactions.[169] However, under Article 7:529 (2) BW, a payment services provider is not liable if a payment services user has intentionally or with gross negligence failed to fulfil its obligations under Article 7:524 BW.[170] PSD II – similar to its predecessor

164 A certificate of inheritance is a notarial deed that provides information on an inheritance. For instance, it indicates who the beneficiaries are and whether they accepted their share (Art. 4:188 (1) (a) BW).

165 Art. 4:187 (1) BW was amended in light of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

166 *Kamerstukken II* 2013/14, 33851, 3, p. 17.

167 The Dutch legislature hardly paid attention to this point, because it expected that the added value of the term gross negligence was little compared to the status of Dutch law at that time, *Kamerstukken II* 2013/14, 33851, 3, p. 17.

168 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC. Reference is made to the research of Van Esch 2013, who extensively investigated the meaning of the term *grove nalatigheid* under Dutch law in this context.

169 Art. 7:528 (1) BW. Rank, in: T&C Burgerlijk Wetboek, Art. 7:528 BW, note 1 and 2.

170 *Also* Rank, in: T&C Burgerlijk Wetboek, Art. 7:529 BW, note 2. In addition, under Art. 7:527 (2) BW, '[i]f a payment service user denies consent for an executed payment transaction, the fact that the use of a payment instrument was not registered by the payment service

PSD I – leaves the application and the interpretation of the term gross negligence to the applicable national law.[171] The recitals of PSD II provide little guidance: 'while the concept of negligence implies a breach of a duty of care, gross negligence should mean more than mere negligence, involving conduct exhibiting a significant degree of carelessness; for example, keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties.'[172] The Dutch version translates 'a significant degree of carelessness' as '*een aanzienlijke mate van onvoorzichtigheid*'. Although it is not stated explicitly, this example may indicate that the state of mind of the payment services user is not decisive, so that it is not decisive whether the user was conscious of the risks he took but rather that he took in fact significant risks.

In its turn, the Dutch legislature left the interpretation and application of gross negligence to financial supervisors and courts.[173] For the way in which Dutch lower courts apply the term gross negligence in the context of payment services, reference is made to the case law analysis of Van Esch – conducted in 2013, before PSD II entered into force. Van Esch concluded that Dutch courts did not give sufficient insight in their reasoning and did not indicate what the desirable conduct of the payment services user would have been, so that it remained unclear where the exact line between negligence and gross negligence could be drawn.[174] He formulated several indicators that could help to qualify conduct in a concrete situation as *grof nalatig*, such as whether the payment services user was aware of the risk, the height of the chance that the conduct would result in loss and whether the payment services user had been warned of concrete dangers.[175] He concluded that it is not required that the payment services user was actually conscious of the chance that its conduct would result in loss.[176] More recent decisions of Dutch lower courts support the findings of Van Esch. In order to decide whether conduct qualifies as *grof nalatig*, Dutch lower courts compared actual conduct with the conduct that could have been expected from a regularly informed and reasonably attentive payment services user (an objective perspective). It was not decisive whether the payment services user was conscious of the chance that its conduct could result in loss. Dutch courts instead seem to consider the blameworthiness of

provider will not necessarily constitute conclusive evidence that the payor consented to the payment transaction or that the payor acted fraudulently or did not perform any of his obligations under Article 524 intentionally or with gross negligence.' *Translation derived from* Warendorf et al.

171 Recital 33 PSD I and Recital 72 PSD II.

172 Recital 72 PSD II.

173 *Kamerstukken II* 2017/18, 34813, 3, pp. 42-43.

174 *Cf.* Van Esch 2013, p. 1066.

175 *Cf.* Van Esch 2013, pp. 1068-1069.

176 Van Esch 2013, p. 1068.

the conduct as a whole in comparison with the conduct that could be expected from a regularly informed and reasonably attentive payment services user.[177]

Furthermore, the term *grove nalatigheid* can be found under Article 5:23 (1) BW in the area of property law.[178] This provision does not originate from EU law. Under Article 5:23 (1) BW, '[w]here an object or animal is found on the land of another person, otherwise than through the wilful conduct or gross negligence of its owner, the owner of the land must, upon request, permit the owner of the object or the animal to search for and remove it'.[179] The Parliamentary History of this provision explains that it would be *grof nalatig* if, for example, someone turns his garden into a tennis court or hockey pitch without taking measures to avoid tennis or hockey balls ending up in his neighbour's garden.[180] As explained by Van Esch, this example does not clarify whether the state of mind of the person who turned his garden into a tennis court or hockey pitch is relevant, viz. whether that person was conscious of or should have been conscious of the chance that the balls would end up in his neighbour's garden. One could conclude therefore that it is not required that the owner of the object or the animal was in fact conscious of the risks he was taking.[181]

Article 4:187 (3), Article 7:527 (2), Article 7:529 (2) BW and Article 5:23 (1) BW use the term *grove nalatigheid* in three entirely different contexts. However, generally the interpretation and application of *grove nalatigheid* show three similarities. First, the Dutch legislature and the courts do not seek a link with legal concepts such as *grove schuld* and *(bewuste) roekeloosheid* used more commonly under Dutch law. Second, whether certain conduct qualifies as *grof nalatig* depends on the concrete circumstances of the case so that it is difficult to capture *grove nalatigheid* in an abstract definition.[182] Third, for conduct to qualify as *grof nalatig*, it does not seem to be required that the party who acted with gross negligence was aware of the potential consequences of its conduct. It seems that courts will analyse the conduct from an objective perspective, analysing whether the party should have reasonably been aware of its potential consequences.

The other possible translation of gross negligence is '*grove schuld*'. I would be hesitant to move away from the term *grove nalatigheid*, because the Union legislature chose this term and the Dutch legislature and courts did not seek

177 *Cf. explicitly* Rechtbank Rotterdam 5 November 2015, ECLI:NL:RBROT:2015:9378 (*X v Rabobank*), para 5.4. *Also* Gerechtshof Den Haag 7 August 2018, ECLI:NL:GHDHA:2018:1865 (*X v ING Bank*), para 5.5 and Gerechtshof Amsterdam 23 May 2017, ECLI:NL:GHAMS:2017:1960 (*Hama Holding v ABN AMRO*), para 3.6.

178 *An example derived from* Van Esch 2013, p. 1058.

179 *Translation derived from* Warendorf et al.

180 Van Zeben, Du Pon & Olthof 1981, p. 132. Van Esch 2013, p. 1058. *See also* Stolker, in: *T&C BW* 2015, Art. 5:23 BW and Ploeger, *Groene Serie Zakelijke Rechten*, Art. 5:23 BW, note 1.

181 Van Esch 2013, p. 1058.

182 *As remarked by* Van Esch 2013, p. 1056.

a link with other concepts in comparable situations either – although I realise only a very limited amount of examples is available. Moreover, seeking a link with the term *grove schuld* does not necessarily provide a clearer perspective. As we will see below, the use of terms in Dutch legislation and case law in this area can sometimes be compared to a magic trick using words.

The term *grove schuld* was used in the Burgerlijk Wetboek on multiple occasions prior to the 1990s. Since then, the Dutch legislature has replaced the term *grove schuld* with other terms, such as (*bewuste*) *roekeloosheid*, but it has failed to do so in a consistent manner.[183] In the context of property law, the term *grove schuld* is still used by Article 5:54 (3) BW. The Dutch Supreme Court defined *grove schuld* in this context to mean whether an *ernstig verwijt* could be made (whether the defendant could be seriously blamed), a yardstick reminiscent of Article 2:9 BW on the internal liability of directors or legal persons.[184] And, in relation to the liability of Dutch financial supervisors where Dutch legislation refers to the term *grove schuld* without further explanation,[185] Dutch lawyers do not agree on its meaning. The key question in the debate is whether *grove schuld* covers conscious recklessness (*bewuste roekeloosheid*) only, or both conscious recklessness and unconscious recklessness (*onbewuste roekeloosheid*). The difference between these terms is that conscious recklessness requires someone to be conscious of the substantial chance that his or her conduct will result in loss, but is under the impression that the loss will not occur anyway; while unconscious recklessness requires a substantial chance that loss will occur, while the person responsible for the loss did not think of that chance, but should have thought of that chance.[186] Hence, depending on the legal context, different terms are in use to describe the required degree of culpability.

In Dutch case law, the term *grove schuld* developed more towards the term *bewuste roekeloosheid* over the years in the context of exclusion and limitation clauses. In *Codam 75 v Merwede* in 1954, the Dutch Supreme Court explained *grove schuld* as negligence, which comes close to intent in terms of blameworthiness ('*een in laakbaarheid aan opzet grenzende schuld*').[187] The Dutch Supreme Court analysed the conduct of the defendant, who was acting in his

183 *See for overviews e.g.* De Graaf 2006, pp. 17-18, Van Dunné 2005, p. 89 and Haazen 2004. In labour law, *grove schuld* was replaced by *bewuste roekeloosheid* in Art. 6:170 (3), Art. 7:658 (2) and Art. 7:661 BW, *Kamerstukken II* 1993/94, 23438, 3, pp. 39 and 41. In transport law, *grove schuld* was replaced by the phrase reckless, with the knowledge that loss would probably occur, *e.g.* Art. 8:111 (1) BW. In insurance law, *grove schuld* was replaced by the term *roekeloosheid*, *Kamerstukken II* 1999/2000, 19529, 5, p. 31.

184 Hoge Raad 28 March 2008, ECLI:NL:HR:2008:BC1242, *NJ* 2008/353 annotated by F.M.J. Verstijlen (*Nelemans v Scheepswerf*), para 3.3. *See, on the yardstick of Art. 2:9 BW,* Westenbroek 2016.

185 Art. 1:25d Wet op het Financieel Toezicht (Wft).

186 Opinion AG 6 June 2014, ECLI:NL:PHR:2014:527, para 2.28. *Cf.* De Graaf 2006, p. 19 (for an overview of the discussion) and Mendel 1993, pp. 116-117 (in the area of insurance law).

187 Hoge Raad 12 March 1954, *NJ* 1955/386 (*Codam 75 v Merwede*).

capacity of captain of a ship, and concluded that his conduct should never have occurred because it was reckless towards another ship.[188] The Dutch Supreme Court analysed the defendant's conduct in general and did not pay attention to his state of mind. This approach changed in 1997, in *Stein v Driessen*, where the Dutch Supreme Court equated *grove schuld* and *bewuste roekeloosheid* (conscious recklessness).[189] It has been argued that the Dutch Supreme Court thereby switched from a more objective to a more subjective approach, as conscious recklessness implies that a party realised that he was taking a risk, but anticipated that it would not materialise.[190] This subjective approach was also adopted in *UAP v Van Woudenberg*, in which the Dutch Supreme Court held that the term *grove schuld* under Article 3 *Loodsenwet* (Pilotage Act) can be understood as reckless conduct with the knowledge that it would probably result in loss.[191]

The term conscious recklessness, however, is not always interpreted subjectively either. In *Telfort v Scaramea*, the Dutch Supreme Court was said to have interpreted conscious recklessness in a more objective manner.[192] The Dutch Supreme Court qualified Telfort's conduct as *bewust roekeloos*, because Telfort had failed to verify whether KPN could actually deliver the corresponding interconnection capacity needed by Scaramea – while Telfort had reason to doubt whether KPN could deliver the interconnection capacity – and Telfort omitted to take relatively simple measures to prevent Scaramea from suffering a large amount of loss.[193] The Supreme Court's decision that Telfort's failure to take relatively simple preventive measures qualified as *bewuste roekeloosheid* caused Dutch scholars to conclude that the Dutch Supreme Court had shifted towards a more objective approach. As analysed by AG Van Peursem in a subsequent case, the decision of the Dutch Supreme Court was not based on what Telfort knew or was aware of, but instead on what a reasonable con-

188 *Cf.* Hoge Raad 12 March 1954, *NJ* 1955/386 (*Codam 75 v Merwede*), p. 692. According to Van Dunné, the mistakes made by the captain did not concern errors in judgment or stupid mistakes, but rather structural mistakes (Van Dunné 2005, p. 93).

189 Hoge Raad 12 December 1997, ECLI:NL:HR:1997:ZC2524, *NJ* 1998/208 (*Gemeente Stein v Driessen*), para 3.6.1. *See e.g.* Opinion AG 6 June 2014, ECLI:NL:PHR:2014:527, para 2.25 and Van den Brink 2000, p. 96.

190 Opinion AG 6 June 2014, ECLI:NL:PHR:2014:527, para 2.28 and Opinion AG 30 November 2011, ECLI:NL:PHR:2012:BX8442, para 2.7. Although it was not agreed upon that the term conscious recklessness added a subjective component, *cf. for the discussion* Opinion AG 6 June 2014, ECLI:NL:PHR:2014:527, paras. 2.26-2.27 and De Graaf 2006, pp. 18-19.

191 Hoge Raad 4 February 2000, ECLI:NL:HR:2000:AA4731, *NJ* 2000/429 annotated by K.F. Haak (*UAP v Van Woudenberg*), para 3.5. In transport law, this wording is commonly used, *cf.* Art. 8:111 (1) BW. However, the scope and effects of this decision are uncertain, *cf.* Van den Brink 2000, p. 96.

192 *See* Opinion AG 6 June 2014, ECLI:NL:PHR:2014:527, paras. 2.29 and 2.31.

193 *Cf.* Hoge Raad 5 September 2008, ECLI:NL:HR:2008:BD2984, *NJ* 2008/480 (*Telfort v Scaramea*), para 3.5.

tractor should have done in the concrete circumstances of the case.[194] In summary, over the years, the Dutch Supreme Court replaced the term *grove schuld* by conscious recklessness, but this term was in turn approached more objectively in *Telfort v Scaramea*, leading to the somewhat strange result that a subjective term is interpreted in an objective manner. The question remains what this tangled web of altered definitions means for the way in which *grove schuld* is interpreted and applied nowadays.

With these remarks in mind, it is difficult to ascertain what conduct qualifies as *grove schuld* in the absence of any further explanation. Article 1:25d Wet op het Financieel Toezicht (Wft, the Dutch Financial Supervision Act) demonstrates the existing uncertainty. Article 1:25d Wft excludes the liability of the Dutch financial supervisors for loss caused by their supervision, unless the loss was caused for a significant part by the intentional or grossly negligent (*grove schuld*) inadequate performance of their tasks. The Explanatory Memorandum does not provide sufficient guidance on the yardstick for determining *grove schuld*. It only states that the conduct of the supervisor must be to such a blameworthy and indifferent extent that it entails a significant chance that the supervisor will not fulfil its tasks properly. In addition, it refers to the Dutch Supreme Court's interpretation of *grove schuld* in *Codam 75 v Merwede*.[195]

In Dutch academic literature, scholars do not agree as to whether the term *grove schuld* covers solely conscious recklessness or both conscious recklessness and unconscious recklessness in this context. On the one hand, according to De Serière, Van Rossum and Sahtie, the term *grove schuld* must be interpreted subjectively, so that it only covers conscious recklessness.[196] De Serière and Sahtie based their position on the development in Dutch private law from the term *grove schuld* to conscious recklessness (as discussed).[197] On the other hand, Affourtit & Lubach take the approach that the Dutch legislature should not have used the term *grove schuld*, because, in their eyes, that term implies that a supervisor cannot be held liable for conduct committed with unconscious recklessness. They prefer a more objective approach towards *grove schuld*.[198] Van Praag adopted a similar approach and argued that the Explanatory

194 Opinion AG 6 June 2014, ECLI:NL:PHR:2014:527, para 2.31. Many scholars analysed *Telfort v Scaramea* and each of them explained and interpreted the decision slightly differently. Overall, however, most of them agreed that the Dutch Supreme Court interpreted and applied the term conscious recklessness in an objective manner, *see e.g.* Duyvensz 2011, Kraaipoel 2009 and Hoge Raad 10 June 2011, ECLI:NL:HR:2011:BP9994, *NJ* 2012/405 annotated by T.F.E. Tjong Tjin Tai, para 3 (*Van den Hoek v Pots*).

195 *Kamerstukken II* 2011/12, 33058, 3, p. 5.

196 Asser/De Serière 2-IV 2018/908, Van Rossum 2014, p. 184 and Sahtie 2012, p. 275. *For an overview of the discussion, see also* Tegelaar 2016, p. 713.

197 Asser/De Serière 2-IV 2018/908 and Sahtie 2012, pp. 274-275. Van Rossum referred to the position of Sahtie in this respect (Van Rossum 2014, p. 184).

198 Affourtit & Lubach 2012, pp. 176-178.

Memorandum does not require that the supervisor was aware of 'the improper character' of its conduct. Instead, according to Van Praag, the emphasis lies on the blameworthiness of the conduct. He attaches importance to the fact that the Explanatory Memorandum states that *Codam 75 v Merwede* still involves a leading interpretation of *grove schuld*.[199] Overall, however, because the Explanatory Memorandum does not provide much guidance and academic opinions differ, it remains to be seen how Dutch courts will interpret and apply the term *grove schuld* under Article 1:25d Wft.[200]

Even after analysing quite a number of examples, it remains difficult to comprehend the exact way in which Dutch law will approach gross negligence under Article 35a (1) CRA Regulation in abstract terms. This difficulty lies in the first place in the wording of Article 35a (1) CRA Regulation, as the provision does not seek a link with commonly used Dutch legal concepts. The current tangled web of different terms and definitions used in Dutch law does not help either, although it will always remain difficult to describe a term that depends so much upon the exact circumstances of the case. In an attempt to move past these uncertainties, I would argue that the interpretation and application of *grove nalatigheid* under Article 35a (1) CRA Regulation be explained under Dutch law in accordance with the examples of Article 4:187 (3), Article 7:527 (2), Article 7:529 (2) and Article 5:23 (1) BW. This choice is motivated by the fact that the EU legislature chose this term and that the Dutch legislature and the courts did not seek a link with legal concepts such as *grove schuld, (bewuste) roekeloosheid* and *ernstige verwijtbaarheid* either in relation to Article 4:187 (3), Article 7:527 (2) and Article 7:529 (2) BW – although I realise this reasoning is based on a limited amount of examples. As a consequence, in the context of credit rating agency liability, *grove nalatigheid* may be approached objectively so that the conduct of the credit rating agency will be compared with the conduct of a reasonable credit rating agency placed in the same position. The minimum threshold for grossly negligent conduct does not involve that the credit rating agency was aware of the potential consequences of its conduct – i.e. that it would result in committing an infringement – but thought that the consequences would not occur. Instead, conduct may also qualify as grossly negligent if a credit rating agency was not aware of the potential consequences, but should have been aware of the fact that its conduct involved the risk of committing one the infringements listed in Annex

199 Van Praag 2013, p. 900.

200 In April 2018, the Dutch Supreme Court decided the case *GSFS v DNB* on the liability of financial supervisor DNB. Pension fund GSFS started proceedings against DNB based on Art. 6:162 BW for a decision of DNB to remove GSFS from the Dutch Register for pension funds in 2013. The Dutch Supreme Court did not provide a useful yardstick to assess grossly negligent conduct. It only decided that, if DNB in hindsight did not possess certain powers, the simple fact that it had already exercised those powers did not entail that DNB neglected its tasks with gross negligence. Hoge Raad 9 March 2018, ECLI:NL:HR:2018:309 (*GSFS v DNB*), para 3.3.5.

III CRA Regulation. Dutch courts would hence rather analyse the blameworthiness of the conduct than the subjective state of mind of the credit rating agency.

5.4.3.2 'Impact' and 'caused to', including claimant-specific requirements

(a) General approach under Dutch law

As stated in section 5.3.1.3, the terms 'impact', 'caused to' and the claimant-specific requirements relate to causation, and are therefore discussed together. But prior to doing so, the general approach to causation under Dutch law must be explained in order to explain how Dutch law approaches the terms 'impact' and 'caused to' under Article 35a (1) CRA Regulation.

In Dutch private law, causation is divided into two 'stages': the stage of the establishment of liability (*vestigingsfase*),[201] and the stage of the scope of liability, i.e. the calculation of the amount of damages awarded (*omvangsfase*). These two stages can be described as causation in fact and causation in law, respectively. At the first stage, Dutch courts assess from a factual perspective whether a breach of contract or tort generated the loss suffered, by application of the *condicio sine qua non* test.[202] It is in light of this first stage that Dutch courts will consider the terms 'impact' and 'caused to', namely as requirements for establishing the liability of the credit rating agency. The Dutch interpretation and application of 'impact' and 'caused to' therefore concentrates on the *condicio sine qua non* test. At the second stage of causation in law, Dutch courts assess whether the loss can be attributed to the defendant, by the *leer der redelijke toerekening* (the theory of objective attribution) as codified under Article 6:98 BW.[203] The theory of objective attribution plays an important role in the calculation of damages under Dutch law, so this topic will be discussed under section 5.4.3.3 (b).

(b) Establishment of causation

To start with, this section concentrates on the first stage of the establishment of causation. The translation of '*condicio sine qua non*' gives away that the *condicio sine qua non* test determines whether an event was the necessary condition of the loss. The test is described as a '*wegdenkoefening*' in Dutch academic literature;[204] the requirement of factual causation is not fulfilled

201 For instance, 'causation' – in the sense of factual causation – is one of the requirements of Art. 6:162 BW, the general provision for non-contractual liability discussed under section 5.4.2.3.

202 *See* Asser/Sieburgh 6-II 2017/50 and Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 1.4.

203 *See* Asser/Sieburgh 6-II 2017/50 and 57 and Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 4.1.

204 The term '*wegdenkoefening*' was derived from Klaassen 2012, p. 3. *See, for the term 'wegdenken', also e.g.* Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 4.1 and Van Dijk 2013, p. 61.

when the loss would also have occurred in the absence of the event.[205] The burden of proof lies with the party that invokes the provision and its legal consequences under Article 150 Wetboek van Burgerlijke Rechtsvordering (Rv, the Dutch Code of Civil Procedure). It is up to the claimant to allege that the *condicio sine qua non* test has been fulfilled. If the defendant materially contests the allegations, the claimant is also expected to prove them.[206] The standard of proof is a reasonable degree of probability (*'redelijke mate van waarschijnlijkheid'*).[207]

In the context of credit rating agency liability, issuers need to allege (and prove if materially contested) that had the infringement not occurred: (1) the credit rating would have been different; and (2) the issuer would not have been confronted with increased funding costs and/or reputational loss. Investors need to allege (and prove if materially contested) that: (1) had the infringement not occurred, the credit rating would have been different; and (2) had the infringement not occurred, the investor would not have suffered pure economic loss. In the context of misleading statements on the financial markets in general, De Jong identified two 'links' (*'schakels'*): the causal link between the misleading statement and (the conditions of) the transaction ('transaction causation') and the causal link between the misleading statement and the loss.[208] Pijls did not explicitly identify these two links, but the approaches do not differ substantially from each other.[209] The factual perspective underlying the investor's claim for damages determines the elements of transaction causation.[210] If an investor claims it would not have bought the financial instruments at all, it must allege (and prove if materially contested) that it would have taken a different investment decision and that the affected credit rating caused its loss.[211] If an investor claims it would have bought the financial instruments against another price, it must allege

205 The application of the *condicio sine qua non* test is problematic in situations where the loss was caused by two independent causes ('multiple causation'). The test then does not appoint any of the two events as the cause of the loss. Art. 6:99 BW provides a solution for such situations by stating that the parties responsible for these causes will be joint and severally liable. Asser/Sieburgh 6-II 2017/86 ff. and Giessen & Rijnhout 2017, p. 265. See in detail on multiple causation in general Tjong Tjin Tai 2018.

206 Klaassen 2012, p. 4. *Also* Pitlo/Rutgers & Krans 2014, no. 32-33. *Cf. also* Boonekamp, *Stelplicht & Bewijslast*, commentary on Art. 6:98 BW and Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 2.5.1-2.5.2 and Asser 2004, no. 18 and 23.

207 *E.g.* Pijls 2018, pp. 41 and 542, Klaassen 2017, no. 20.1, Snijders, Klaassen & Meijer 2017, no. 199, Klaassen 2012, p. 6 and De Jong 2010, p. 253.

208 De Jong 2010, pp. 44-46.

209 Pijls 2018, pp. 186-187. This dissertation does also not strictly divide between the two links of causation distinguished by De Jong 2010, pp. 44-46.

210 *On the importance of the factual perspective chosen by the investor,* Pijls 2018, p. 173.

211 *In the context of misleading information of the financial markets in general,* Pijls 2018, p. 544. *See, for the investor's options to provide evidence,* Pijls 2018, pp. 548 ff. *Cf. also* De Jong 2010, p. 44.

(and prove if materially contested) that the affected credit rating affected the price of the financial instruments bought.[212]

(c) Possibilities to deal with causal uncertainty concerning investor's reliance

(i) – Friction

The structure of Dutch private law does not fit the structure of Article 35a (1) CRA Regulation as regards the investor-specific requirement of reasonable reliance. As described in section 5.3.1.3 (c), Article 35a (1) CRA Regulation frames the requirement of reasonable reliance as an essential part of the causal link between an infringement and an affected credit rating and an investor's loss. The burden of proof rests upon the investor. Dutch private law, however, distinguishes between the elements of *reliance* and the *reasonableness* of the reliance from each other. The element of reliance forms part of the causal link, which is to be established by the claimant as a matter of principle.[213] The element of the 'reasonableness' of the reliance would, however, not be considered at the stage of the establishment of causation. When an investor's reliance is unreasonable, the credit rating agency involved is entitled to the defence of contributory negligence under Article 6:101 BW.[214] The burden of proof then rests upon the credit rating agency. The Dutch approach to reasonable reliance hence differs from the approach taken by Article 35a CRA Regulation in two aspects: a lack of reasonable reliance does not necessarily break the causal link between a credit rating and an investor's loss completely, and the burden of proof regarding *unreasonable* reliance rests upon the credit rating agency.[215] The application of the requirement of 'reasonable reliance', therefore, causes friction within the structure of Dutch national private law.

(ii) – Possibilities to deal with causal uncertainty concerning investor's reliance

'Causal uncertainty' and evidentiary problems relating to reliance do not uniquely exist in relation to credit rating agency liability. They also arise in other situations, of which prospectus liability is a commonly used example. Dutch courts can employ several methods to 'solve' uncertainties in this type of cases.[216] They can, for instance, lighten the burden of proof resting upon claimants under Article 150 Rv by applying the *jurisprudentiële omkeringsregel*

212 *In the context of misleading information of the financial markets in general,* Pijls 2018, pp. 542-547. *Cf. also* De Jong 2010, p. 44.
213 See, hereafter, section 5.4.3.2 (c).
214 See, hereafter, section 5.4.3.3 (c).
215 *Cf. in the context of a comparison between US law and Dutch law,* Pijls 2018, pp. 141-142.
216 *See, for the classification of the four tools, the overview provided by* Giesen & Maes 2014 *who distinguished between procedural and substantive legal facilitations in relation to informed consent cases. In relation to the adoption of causation as a starting point,* Pijls & Van Boom 2010, no. 6 speak of an '*EU-conforme interpretatie van art. 150 Rv*'. *See, in general on deviations from Art. 150 Rv*, Asser 2004, no. 26-28. This dissertation only provides a limited overview of the relevant Dutch case law in this regard.

(reversal of the burden of proof) or by adopting the existence of causation as a starting point (‘*het tot uitgangspunt nemen van causaal verband*’). This section will pay further attention only to situations in which courts adopt causation as a starting point under Dutch law under (iii), as a successful appeal to the *jurisprudentiële omkeringsregel* is not granted easily by Dutch courts.[217] Furthermore, from a substantive law perspective, courts can apply the doctrine of *proportionele aansprakelijkheid* (proportional liability) or the doctrine of *verlies van een kans* (loss of chance), thereby distributing the consequences of causal uncertainty among the parties which leads to the partial compensation of aggrieved parties. The Dutch Supreme Court distinguished these doctrines from each other in the case *Deloitte Belastingadviseurs v H&H Beheer* in 2012.[218] Although Dutch academic literature did not always support this distinction, this report adopts the distinction made by the Dutch Supreme Court[219] and only discusses the application of the doctrine of loss of chance, which is more likely to be relevant in the context of credit rating agency liability than the doctrine of proportionate liability.[220]

217 The *omkeringsregel* only applies when a rule was violated that aims to protect against a specific type of loss, while the infringement enlarged the danger of incurring that loss, Hoge Raad 29 November 2002, ECLI:NL:HR:2002:AE7345, *NJ* 2004/304 (*TFS v NS*), para 3.5.3, Hoge Raad 29 November 2002, ECLI:NL:HR:2002:AE7351, *NJ* 2004/305 annotated by W.D.H. Asser (*Kastelijn v Achtkarspelen*), para 3.6 and *cf.* Hoge Raad 19 December 2008, ECLI:NL:HR:2008:BG1890, *NJ* 2009/28 (*Smeets v Gemeente Heerlen*), para 3.3. *See also* Asser/Sieburgh 6-II 2017/77. It was assumed that, under the current state of the law, the *omkeringsregel* mostly applies to the breach of *verkeersnormen* or *veiligheidsnormen* (traffic or safety standards). *See, for instance*, Hoge Raad 19 December 2008, ECLI:NL:HR:2008:BG1890, *NJ* 2009/28 (*Smeets v Gemeente Heerlen*), para 3.4. *See also e.g.* Pijls 2018, p. 45, Giesen & Maes 2014, p. 223 and Akkermans & Van Dijk 2012, p. 166.

218 Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), paras. 3.5.1-3.6.

219 The distinction was criticised by *e.g.* Van Velthoven 2018, pp. 111-112. Van Velthoven considered both concepts to be especially the same, because the methods of calculating damages would eventually be the same. The distinction was supported by *e.g.* Cox 2016, pp. 272-273, Castermans & Den Hollander 2013, p. 193 and Hillen 2013, p. 124-126. *In respect of the distinction* Nuninga 2019 and Den Hoed 2018, pp. 198-199.

220 The doctrine of proportionate liability has a very limited scope of application. It applies when the existence of a causal relationship is inherently uncertain and the chance that the defendant caused the loss is neither very small nor very large, while the nature of the violated rule and nature of the loss render it unacceptable to let the aggrieved party carry the risk of the uncertain causal relationship. In such extreme situations, the defendant is liable to the extent of the chance that its conduct caused the loss. *See* Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.5.2, *as decided in* Hoge Raad 31 March 2006, ECLI:NL:HR:2006:AU6092, *NJ* 2011/250 annotated by T.F.E. Tjong Tjin Tai (*Nefalit v Karamus*), para 3.13. In *Fortis v Bourgonje*, a case concerning the special duty of care owed by banks, the Dutch Supreme Court held that proportional liability must be applied restrictively only, because it bears the risk of holding a party responsible that is not responsible for the loss at all. *See* Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.5.2, *as decided in* Hoge

(iii) – Evidentiary presumption VEB v World Online

On multiple occasions, the Dutch Supreme Court adopted the existence of a causal relationship as a starting point (*'het tot uitgangspunt nemen van causaal verband'*), also qualified as an 'evidentiary presumption'.[221] In decisions concerning securities lease agreements (investment advice cases), the Dutch Supreme Court assumed that if the bank had not breached its special duty of care, the investor would have taken a different investment decision.[222] In the prospectus liability case *VEB v World Online*, the Dutch Supreme Court required that the investors directly or indirectly relied on the misleading statement,[223]

Raad 24 December 2010, ECLI:NL:HR:2010:BO1799, *NJ* 2011/251 annotated by T.F.E. Tjong Tjin Tai (*Fortis v Bourgonje*), paras. 3.7-3.8. *See also* Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 2.10 and Giesen & Maes 2014, pp. 225-226. According to De Jong (De Jong 2016, p. 128), the concept of proportional liability will not be often applied in cases concerning investment loss, but the application is not impossible either. *Cf. also* Pijls 2018, pp. 576-577 who did not think the Dutch Supreme Court would apply the doctrine of proportional liability to cases concerning investment loss. Cases concerning claims for credit rating agency liability brought by investors rather resemble situations covered by the doctrine of loss of chance than by the doctrine of proportional liability. The uncertainty lies in the hypothetical course of events in the absence of an affected credit rating, i.e. whether the investor would have taken a better investment decision in the absence of the affected credit rating. The investor could argue that the *condicio sine qua non* relationship exists between the affected credit rating and their chance of having taken a properly informed investment decision.

221 The Dutch Supreme Court did not explicitly use the term 'evidentiary presumption', but only stated that causation should be adopted as a starting point, Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), para 4.11.2. Pijls & Van Boom 2010, p. 194 qualified this construction as an evidentiary presumption and their approach has been followed since by e.g. Giesen & Reinhout 2017, p. 264 and Giesen & Maes 2014, p. 228.

222 Hoge Raad 5 June 2009, ECLI:NL:HR:2009:BH2815, *NJ* 2012/182 annotated by J.B.M. Vranken (*De Treek v Dexia*), paras. 5.5.2 and 5.5.3, Hoge Raad 5 June 2009, ECLI:NL:HR:2009:BH2811, *NJ* 2012/183 annotated by J.B.M. Vranken (*Levob v Bolle*), paras. 4.7.9 and 4.7.10. *Confirmed by* Hoge Raad 8 February 2013, ECLI:NL:HR:2013:BX7846, *NJ* 2014/495 annotated by Jac. Hijma (*Van Lanschot Bankiers v Grove*), paras. 3.7.1 and 3.7.2, *as stated by* Van Giesen & Maes 2014, p. 229.

223 *As concluded by e.g.* Pijls 2018, p. 212 and De Jong 2010, pp. 159-160 – although they did not agree with the Dutch Supreme Court that an investor must have been influenced by the misleading information as a starting point. Prior to the decision in *World Online*, it was not entirely clear whether the Dutch Supreme Court required (in)direct reliance. For overviews of the Dutch case law prior to the decision in *World Online*, reference is made to e.g. Pijls 2018, pp. 200 ff. and De Jong 2010, pp. 155 ff. For instance, in the decision *Aeilkema v Veenkoloniale Bank* of 1931, the Dutch Supreme Court did not require Aeilkema (the investor) to have relied on misleading information on the state of the Veenkoloniale Bank for purchasing *pandbrieven* (freely translated as mortgage bonds), *see* Hoge Raad 11 December 1931, *NJ* 1932, p. 161 (*Aeilkema v Veenkoloniale Bank*). To assume the existence of a causal relationship, the Dutch Supreme Court held that: *'daarvoor niet beslissend is, dat Aeilkema tot zijne daad niet is bewogen door kennisneming van de jaarstukken der Bank […];'* (hence, that it is not decisive for the purposes of causation that Aeilkema was not influenced in its decision to purchase the mortgage bonds by the misleading information).

but accepted an evidentiary presumption in favour of the investors.[224]

In VEB *v World Online*, the Dutch Supreme Court held that claimants – in this case, investors – must allege and prove the existence of a *condicio sine qua non* relationship as a matter of principle. At the same time, the Dutch Supreme Court acknowledged that investors can experience evidentiary problems, not only because it is difficult to prove an investment decision was influenced by misleading information, but also because investors may be indirectly influenced by misleading information which created a certain market sentiment or reached them indirectly through their advisors. The Dutch Supreme Court held that courts are allowed to assume that a causal relationship between a misleading statement and an investment decision exists, because, in the absence of such a presumption, evidentiary problems could render investor protection in prospectus liability cases illusory. In light of the European principle of effectiveness and Article 6 (2) Prospectus Directive, which require Member States to 'ensure that their laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus', a presumption of causation is justified, the Dutch Supreme Court argued. The evidentiary presumption entails that Dutch courts can assume that a *condicio sine qua non* relationship exists between the misleading statement and the investment decision, but investors shall nevertheless prove the *condicio sine qua non* relationship between their investment decision and the loss. Furthermore, the Dutch Supreme Court stated that the presumption applies to retail investors and professional investors, but that the presumption can be rebutted more easily if a professional investor was involved. In any case, it is up to the defendant to provide evidence to the contrary.[225]

The exact scope of application of the evidentiary presumption is the subject of debate in Dutch academic literature. On one side, scholars such as Klaassen and De Bie Leuveling Tjeenk suspected that the evidentiary presumption has a limited '*uitstralingseffect*'[226] outside cases concerning the special duty of care of banks in securities lease agreements and cases concerning prospectus liability will be limited. According to Klaassen, the decisions in the securities lease and prospectus liability cases were driven by the specific features of these cases. She argued that the securities lease cases were test cases to settle mass claims, so that the Dutch Supreme Court needed to decide on a high level of

224 Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), paras. 4.11.1-4.11.2. *See on these cases e.g.* De Jong 2016, pp. 123-124, Giesen & Maes 2014, p. 227, Klaassen 2013, De Jong & Pijls 2012, Klaassen 2012, pp. 10-12, De Jong 2010, pp. 155 ff. and Pijls & Van Boom 2010.

225 Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), paras. 4.11.1-4.11.2, in particular: '*Met het oog op die effectieve rechtsbescherming en gelet op de met de prospectusvoorschriften beoogde bescherming van (potentiële) beleggers tegen misleidende mededelingen in het prospectus, zal tot uitgangspunt mogen dienen dat condicio sine qua non-verband tussen de misleiding en de beleggingsbeslissing aanwezig is.*'

226 Klaassen 2013, p. 147 and Klaassen 2012, p. 12.

abstraction. Furthermore, *VEB v World Online* would be based on the effectiveness of EU law, which is a justification that is not necessarily present in cases involving national law only.[227] De Bie Leuveling Tjeenk agreed with Klaassen and argued that it is only justified to assume the existence of a causal relationship in cases on the settlement of mass claims.[228]

On the other side, scholars such as Pijls and Van Boom, De Jong and Busch did not rule out the possibility of a broader application of the evidentiary presumption. Pijls & Van Boom stated that '*in algemene zin een lans is gebroken voor een EU-conforme interpretatie van art. 150 Rv*' in *VEB v World Online*. They did not exclude the possibility that Dutch courts will apply the evidentiary presumption on the basis of EU law, especially where a professional party breached a European duty of information towards a consumer.[229] Furthermore, De Jong argued that the Dutch courts might also adopt a presumption if misleading statements were disseminated in the context of the Transparency Directive and the former Market Abuse Directive.[230] Busch adopted a similar approach and considered it arguable that Dutch courts will assume causation between misleading information or statements and investment decisions in cases concerning violations of the Market Abuse Regulation. He expected that the influence of the European principle of effectiveness would be substantial, even when EU law has not explicitly obliged Member States to apply their rules of civil liability. Busch based this expectation on the fact that the principle of effectiveness is a fundamental principle of EU law and that the legal protection of investors could otherwise become illusory.[231] In his dissertation, Pijls took a more cautious approach. Although he concluded that Dutch courts could adopt a presumption if misleading statements were disseminated in the context of the Transparency Directive, he considered it uncertain whether Dutch courts will do so in the context of the Market Abuse Regulation. Pijls

227 Klaassen 2012, pp. 13-15. *And, although less restrictively,* Klaassen 2013, p. 150.

228 De Bie Leuveling Tjeenk 2014, p. 319.

229 Pijls & Van Boom 2010, no. 10. *Although they explicitly pointed at the ongoing uncertainty,* Giesen & Maes 2014, p. 229 *concluded in this regard*: '*er gloort hoop voor de in bewijsnood verkerende niet-geïnformeerde consument*.'

230 De Jong 2016, p. 125, De Jong 2011, p. 373 and De Jong 2010, pp. 271-272. Arons was of a different opinion in relation to the liability of securities analysts under the regime of the old Market Abuse Directive (MAD). He would not apply the rule of *VEB v World Online* to the liability of securities analysts under the old MAD regime. In his opinion, investors who relied on the recommendations of securities analysts do not necessarily deserve the same protection as investors in prospectus liability cases (1) because the MAD does not oblige Member States to apply their rules of civil liability to persons responsible for the reports of securities analysts; and (2) because the MAD only provides a general prohibition on the distribution of misleading reports, while the Prospectus Directive provides detailed information on the content of prospectuses so that its rules would have horizontal effects and the European principle of effectiveness would apply. Arons 2013, pp. 816-818.

231 Busch 2016, pp. 534-535.

based this conclusion on the fact that the Market Abuse Regulation does not include a provision equivalent to Article 6 (2) Prospectus Regulation.[232]

The question that must be answered here is whether this evidentiary presumption also applies in the case of claims for credit rating agency liability brought by investors. The possibility of an analogue application of the evidentiary presumption of *VEB v World Online* already came up in other Dutch contributions on credit rating agency liability as well.[233] To begin with, one can question whether and under what circumstances Dutch courts would consider credit ratings misleading for the *maatman-belegger* (the average investor). Indeed, in *VEB v World Online*, the Dutch Supreme Court assumed the existence of the causal relationship while, as discussed in section 5.4.2.3 (b) (i), having first concluded that the statements had a misleading character on the average investor. Could a credit rating be misleading in the sense that it is material to the investment decision of the average investor? The answer to this question depends, amongst other circumstances, on the gravity of the impact of the infringement on the level of the credit rating and on the type of issuer or financial instrument to which the credit rating was assigned.[234] One can imagine that the publication of solicited credit ratings assigned to issuers and financial instruments can influence the economic conduct of an average investor, especially if the credit rating is gravely inaccurate or borders on the line between investment grade and speculative grade. Furthermore, structured finance ratings may well influence the economic conduct of the average investor; credit ratings are indeed indispensable in structured finance in order to sell the products in the financial markets.[235]

Assuming that the credit rating is considered misleading to the average investor, multiple similarities exist between prospectus liability and credit rating agency liability that justify arguing in favour of applying the evidentiary presumption to cases concerning credit rating agency liability. Article 6 (2) Prospectus Directive and Article 35a CRA Regulation have similar goals: the compensation of investors when provisions of EU law are infringed by another private party. The right of redress must be ensured before national courts and, to a more or lesser extent, under the applicable national law. The evidentiary problems possibly experienced by investors are similar in cases concerning prospectus liability and credit rating agency liability. In both cases, a restrictive application of the *condicio sine qua non* test can require investors to provide evidence of the influence of information on an internal decision. In the absence of facilitations, the right of redress and the protection of investors under Article

232 Pijls 2018, pp. 223 and 561-563.

233 Atema & Peek observed that it is not certain whether the presumption applies (Atema & Peek 2013, pp. 961-962), while Giesen & Rijnhout explained in somewhat more detail why the presumption could be applied (Giesen & Rijnhout 2017, p. 264).

234 Section 5.4.2.3 (b) (i).

235 *Cf.* Atema & Peek 2013, p. 958.

35a (1) CRA Regulation becomes illusory in practice. Along the same lines, Giesen & Rijnhout pointed out that the line of reasoning of *VEB v World Online* could also apply to Article 35a CRA Regulation, 'because the EU introduced this regulation to protect parties against unfair ratings and also that this protection would be illusory when the CSQN is not presumed'.[236] One can, hence, argue that Dutch courts would apply an evidentiary presumption in some cases concerning credit rating agency liability, in which the credit rating is considered misleading to the average investor. Finally, it should be remarked that the evidentiary presumption is most relevant in relation to investors who do no act in the scope of their profession or business. In combination with the additional European requirement under Article 5 (a) (1) CRA Regulation and the fact that the presumption can be rebutted more easily if a professional investor was involved, professional investors are less likely to benefit from the evidentiary presumption.

(iv) – Loss of chance

Dutch courts can apply the doctrine of loss of chance when the *condicio sine qua non* relationship between an event – a breach of contract or an unlawful act – and the loss is uncertain, because the hypothetical course of events in the absence of the defendant's conduct is uncertain. In loss of chance cases, uncertainty exists as to whether a chance at a better result would have been realised in the absence of a certain event.[237] This type of situation occurs for instance when a lawyer neglects to lodge an appeal, while it is not certain whether its client would have won the case in appeal. One could say that the course of events is uncertain – winning or losing the case – and that, therefore, the loss is uncertain. In this type of situation, the application of the doctrine of loss of chance causes courts to approach the notion of loss in a different way. The claimant must still allege (and prove) the existence of a *condicio sine qua non* relationship, but, more specifically, between the defendant's act or omission and the lost chance of achieving a more favourable, hypothetical result. To be eligible for compensation, a lost chance must be realistic.[238] Dutch courts determine the height of the lost chance by balancing 'good and

---

236 Giesen & Rijnhout 2017, p. 264.

237 Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.5.3 *as decided in e.g.* Hoge Raad 24 October 1997, ECLI:NL:HR:1997:AM1905, *NJ* 1998/257 annotated by P.A. Stein (*Baijings v Mr. H*), para 5.2. *Cf. also in respect of this decision e.g.* Den Hoed 2018, Giesen & Maes 2014, p. 229, Castermans & Den Hollander 2013, Hillen 2013, p. 124 and Akkermans & Van Dijk 2012, p. 159.

238 Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.8.

bad chances' ('*goede en kwade kansen*') and calculate the amount of damages by multiplying the total loss with the lost chance.[239]

The scope of application of the doctrine of loss of chance under Dutch law is not entirely clear yet. As it is often possible to rephrase a case in terms of lost chances, the doctrine potentially has a wide scope of application. Over the past years, the Dutch Supreme Court has expanded the application of the doctrine of loss of chance from cases concerning the liability of negligent lawyers to cases concerning the liability of negligent tax advisors and to medical delay cases.[240]

In the case of *Deloitte Belastingadviseurs v H&H Beheer*, the Dutch Supreme Court applied the doctrine of loss of chance to a claim for damages relating to incorrect tax advice provided by a tax advisor to the claimant. The Dutch Supreme Court awarded damages for a lost chance of 60% that had the advice of the tax advisor to the claimant been correct, the Dutch tax authorities would have accepted an alternative tax strategy of the claimant.[241] In this case, the uncertainty on the hypothetical course of events was related to the hypothetical conduct of the Dutch tax authorities. Hence, the Dutch Supreme Court applied the doctrine of loss of chance in the context of negligent tax advice, in which the uncertainty lay in the conduct of a third party. The decision did not provide much further guidance on the scope of application of the doctrine of loss of chance. The Dutch Supreme Court stated that there is no reason to apply the doctrine restrictively, because a *condicio sine qua non* relationship exists between the defendant's conduct and the claimant's lost chance.[242]

239 Hoge Raad 24 October 1997, ECLI:NL:HR:1997:AM1905, *NJ* 1998/257 annotated by P.A. Stein (*Baijings v Mr. H*), para 5.2.

240 *For the liability of negligent lawyers, see* Hoge Raad 24 October 1997, ECLI:NL:HR:1997: AM1905, *NJ* 1998/257 annotated by P.A. Stein (*Baijings v Mr. H*). *For the liability of negligent tax advisors, see* Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*). *For medical delay cases, see* Hoge Raad 23 December 2016, ECLI:NL:HR:2016:2987, *NJ* 2017/133 annotated by S.D. Lindenbergh (*Baby Esther*) and Hoge Raad 27 October 2017, ECLI:NL:HR:2017:2786, *NJ* 2017/422 (*X v AZM*). In addition, the Dutch Supreme Court applied the doctrine of loss of chance when a municipality informed the claimant that it would draft a zoning plan – which needed to be agreed upon by other bodies as well – in a certain way, but forgot to do so. The claimant succeeded in its claim for damages based on loss of chance, arguing that the omission of the municipality caused him to lose a chance that the zoning plan would have been accepted by third parties to its benefit. Hoge Raad 19 June 2015, ECLI:NL: HR:2015:1683, *NJ* 2016/1 annotated by T.F.E. Tjong Tjin Tai (*Overzee v Gemeente Zoeterwoude*), para 3.5.3.

241 Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.8.

242 Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.7. *For a critical approach to the reasoning of the Dutch Supreme Court, see* De Jong 2016, p. 127 and Giesen & Maes 2014, p. 230. In Asser/Sieburgh 6-II 2017/80a, it was warned that a broad application of the doctrine of loss of chance has far reaching consequences for Dutch private law. For a theory on the scope of application of the doctrine of loss of chance, Nuninga 2019, pp. 45 ff.

Furthermore, the Supreme Court remarked that the doctrine applies in 'some' (*sommige*) situations in which the causal uncertainty relates to the realisation of a certain chance, but it did not elaborate further on this point.[243]

In October 2018, the Court of Appeal of the Hague applied the doctrine of loss of chance in a situation in which the uncertainty lay in the hypothetical conduct of the claimant itself. In *X v Stichting Wijdezorg*, a medical case manager failed to provide the claimant with adequate information on his options to hire a medical case manager for the care of one of his parents. The Court of Appeal decided that this failure constituted a breach of the care manager's duty of care for which her employer Stichting Wijdezorg was liable.[244] The Court of Appeal considered that the case manager had deprived the claimant of the opportunity to have hired a case manager. It estimated the chance that had the information provided been adequate, the claimant would have hired a case manager at 50%.[245] Hence, in this case, the doctrine of loss of chance was applied in a situation in which the defendant failed to provide adequate information and in which the uncertainty lay in the conduct of the claimant itself.

The question that must be answered here is whether investors can successfully invoke the doctrine of loss of chance in a dispute over credit rating agency liability under Dutch law. From an investor's perspective, it is worth framing a claim for damages in terms of loss of chance. The investor can do so by arguing that the impacted credit rating deprived the investor of a chance or an opportunity to have taken a completely well-informed investment decision.[246] Building on the decision of the Court of Appeal of the Hague in the case of *X v Stichting Wijdezorg*, one could argue that the doctrine of loss of chance conceptually fits cases of credit rating agency liability in which the uncertainty also relates to the hypothetical conduct of the claimant itself. The case of *X v Stichting Wijdezorg*, however, concerned a completely different context and involved a situation in which the relationship between the defendant and the claimant was more proximate. In any case, the application of the doctrine of loss of chance in credit rating agency liability requires a broad and far-reaching application of the doctrine.[247] Therefore, in the absence of case law confirming this matter, it is doubtful that courts would

---

243 Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*), para 3.5.3. Den Hoed 2018, p. 196.

244 Gerechtshof Den Haag 9 October 2018, ECLI:NL:GHDHA:2018:2558 (*X v Stichting Wijdezorg*), para 12.

245 Gerechtshof Den Haag 9 October 2018, ECLI:NL:GHDHA:2018:2558 (*X v Stichting Wijdezorg*), para 16.

246 *In the context of misleading statements on the financial markets in general, cf.* Pijls 2018, p. 577.

247 Pijls did not expect the doctrine of loss of chance to apply in the context of investment loss (Pijls 2018, pp. 567-577). He considered the disadvantages of the doctrine of proportional liability and loss of chance to be similar: both doctrines bear the risk of holding a party liable that did not cause the loss. Therefore, he considered it 'not probable' that the Dutch Supreme Court would apply the doctrine of loss of chance to investment loss cases.

apply the doctrine of loss in the field of credit rating agency liability under Dutch law.

5.4.3.3 *Suffering 'damage' and claiming 'damages'*

Dutch courts will determine the extent of the recoverable loss and the award of damages in relation to claims based on Article 35a CRA Regulation in accordance with the rules of Section 6.1.10 Burgerlijk Wetboek on '*wettelijke verplichtingen tot schadevergoeding*' ('legal obligations to the compensation of loss'). This Section contains general rules on compensable loss and on the calculation of the amount of damages, and applies to legal obligations to pay damages codified both inside and outside the Burgerlijk Wetboek.[248] Concepts such as objective attribution ('*leer der redelijke toerekening*', discussed under (b)), contributory negligence and mitigation (discussed under (c)) and the deduction of collateral benefits[249] can reduce the defendant's obligation to compensate the claimant's loss.

(a) Nature of reparable loss and calculation of the amount of damages

Section 6.1.10 Burgerlijk Wetboek does not define the term loss (*schade*) as such. Article 6:95 BW does explain that *vermogensschade* (economic loss) and *ander nadeel* (other disadvantages) are eligible for compensation, although other disadvantages are only eligible for compensation as far as permitted by law.[250] Dutch law does not oppose the compensation of pure economic loss, reputational loss and lost chances as a matter of principle. The Dutch law of damages starts from the principle of full compensation.[251] In principle, it must be determined in what position the claimant would have been in the absence of the infringement, by comparing the actual sequence of events with the alleged hypothetical sequence of events.[252] The moment at which the loss materialises is used in principle as the reference date for the calculation of damages.[253] However, there could be multiple possible hypothetical sequences of events and one could debate the exact moment at which loss has materialised.[254] It is up to the claimant to allege (and prove) the existence

248 Hartlief, Keirse, Lindenbergh et al. 2018, no. 198. Dutch courts can determine the award of damages in separate legal proceedings, *schadestaatprocedures,* under Art. 612 Rv.

249 Under Art. 6:100 BW. This dissertation does not pay attention to this concept.

250 Lindenbergh 2014, no. 40 and Hartlief, Keirse, Lindenbergh et al. 2018, no. 199.

251 Lindenbergh 2014, no. 11. Although there are many exceptions to this general principle (Lindenbergh 2014, no. 12).

252 Klaassen 2017, no. 4-5. *Explicitly in the context of financial litigation* Hoge Raad 3 February 2012, ECLI:NL:HR:2012:BU4914, *NJ* 2012/95, *JOR* 2012/116 annotated by S.B. van Baalen (*Rabobank Vaart en Vecht v X*), para 3.9.1.

253 Klaassen 2017, no. 4.

254 In case of claims brought by investors, for instance, at the time the investor bought the shares, at the time the investor sold the shares or at the time the credit rating turned out to be affected?

of the loss and the hypothetical sequence of events. For the proof of causation and loss, the following methods can be used: expert studies showing the hypothetical (price) development of financial instruments and interest rates, witness testimonies and analyses of (previous) investment conduct.[255] Although the burden of proof lies with the claimant, Dutch courts have a wide margin of appreciation in the assessment of the extent of the loss.[256] Under Article 6:97 BW, courts 'shall assess the [loss] in a manner most appropriate to its nature' and '[w]here the extent of the [loss] cannot be determined precisely, it shall be estimated'.[257]

In the context of credit rating agency liability, courts must calculate in what position the issuer or investor would have been in the absence of the infringement, by comparing the actual sequence of events with the alleged hypothetical sequence of events.[258] The hypothetical factual sequence of events chosen by the issuer and the investor, and the way in which they frame their claim for damages are again of crucial importance.[259]

In respect of investors, one can think back to the possible lines of argument discussed under the introduction to the requirement of causation (section 5.3.1.3 (b) (ii)). The investor who states he would not have bought the financial instruments at all claims to have suffered greater loss as compared to the investor who states he would have bought the financial instruments anyway, but for another (lower) price or against another interest rate. The hypothetical course of events differs: the first scenario concentrates on alternative investment decisions made[260] and the second scenario concentrates on the development of the prices of the financial instruments in the absence of the infringement and the affected credit rating. Hence, the assessment of the loss and the calculation of the amount of damages cannot be separated from the requirement of causation; they depend on the approach taken in the stage of causation by the parties, and on whether the Dutch courts end up applying the *condicio sine qua non* test, the evidentiary presumption or the doctrine of loss of chance to claims for damages brought by investors. Application of the evidentiary

255 *As stated in the context of deficient market disclosures by* De Jong 2010, pp. 238 ff. and 257. This dissertation will not assess in detail in which manner claimants could exactly provide evidence for the hypothetical scenario. *For another detail analysis in this regard, see* Pijls 2018.

256 Klaassen 2017, no. 6 and Hartlief, Keirse, Lindenbergh et al. 2018, no. 206.

257 *Translation derived from* Warendorf et al. This requires Dutch courts in principle to calculate the loss in the concrete circumstances of each case; yet, an abstract calculation of loss is also permitted in certain situations.

258 Klaassen 2017, no. 4-5. *Explicitly, in the context of financial litigation,* Hoge Raad 3 February 2012, ECLI:NL:HR:2012:BU4914, *NJ* 2012/95, *JOR* 2012/116 annotated by S.B. van Baalen (*Rabobank Vaart en Vecht v X*), para 3.9.1.

259 *As emphasised in the context of the attribution of economic loss to directors by* Pijls 2017, p. 450 and, *in relation to prospectus liability, from* Arons & Pijls 2010, p. 473. Both emphasised the importance of the factual approach chosen in the context of causation.

260 Would the investor have made a more beneficial decision? Or, would the investor not have invested the financial instruments at all? *See* De Jong 2010, p. 177.

presumption in principle entitles the claimant to full compensation, whereas an application of the doctrine of loss of chance entitles the claimant to compensation to the extent of the lost chance. Courts can estimate the height of the lost chance under Article 6:97 BW. As stated by Pijls, it is difficult to determine the exact height of the chance. Courts can estimate the chance by assessing the investment profile and the investment conduct of the claimant.[261] If Dutch courts applied the doctrine of loss of chance, the damages are calculated by multiplying the height of the lost chance with the total loss.[262] The total loss depends again on the factual scenario on which the investor has based its claim for damages.[263]

(b) Legal causation – Objective attribution ('leer der redelijke toerekening')

As stated, the extent of the loss suffered is not necessarily equal to the extent of the loss that must be compensated by the defendant. At this point, we can pick up where we left off in the analysis of causation under Dutch law: causation in law or the theory of objective attribution ('*leer der redelijke toerekening*')[264] as codified under Article 6:98 BW. Under Article 6:98 BW, '[r]eparation of [loss] can only be claimed for [loss] which is related to the event giving rise to the liability of the obligor, which, also having regard to the nature of the liability and of the [loss], can be attributed to him as a result of such event'.[265] The defendant must prove the facts demonstrating that the loss cannot be attributed to him under the general rule of Article 150 Rv.[266] The application of this theory can hence lead to a limitation of the loss attributed to the credit rating agency and can decrease the amount of damages awarded to issuers and investors accordingly.

Whether or not to attribute loss does not only depend on the nature of the liability and the nature of the loss, as explicitly referred to under Article 6:98 BW, but also on other factors (a multifactor approach[267]). Dutch scholars have developed taxonomies for the factors relevant under Article 6:98 BW. In 1981, the Dutch scholar Brunner developed four rules on attribution ('*de*

261 Pijls 2018, pp. 578-579.
262 De Jong 2010, p. 298.
263 Pijls 2018, p. 579.
264 *For this term e.g.* Hartlief, Keirse, Lindenbergh et al. 2018, no. 216 and Lindenbergh 2014, no. 13.
265 *Translation derived from* Warendorf et al. Even if Dutch courts would facilitate investors in proving causation by means of an evidentiary presumption, Art. 6:98 BW continues to apply unabatedly. Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), para 4.11.3: '*Opmerking verdient ten slotte dat ten aanzien van het bestaan en de omvang van de schade, alsmede het causaal verband als bedoeld in art. 6:98 BW, in beginsel de gewone bewijsregels blijven gelden, waarbij de rechter ingevolge art. 6:97 BW bevoegd is de schade te begroten op de wijze die met de aard van deze schade in overeenstemming is, of de schade te schatten indien deze niet nauwkeurig kan worden vastgesteld.*'
266 *Cf.* Boonekamp, *Stelplicht & Bewijslast*, commentary on Art. 6:98 BW.
267 *E.g.* Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 4.1 and Dijkshoorn 2011.

deelregels van Brunner'): (1) if the loss is more foreseeable, broader attribution of loss is justified; (2) if the chain of events is shorter, broader attribution of loss is justified; (3) the nature of the responsibility entails broad or limited attribution, for instance, the aim of the infringed norm must justify attribution and a higher degree of negligence or intent entails a broader attribution of loss; and (4) the nature of the loss entails broad or limited attribution.[268] In response to Brunner, Hartlief proposed three rules in the context of attribution: (1) if an event is a normal and to be expected consequence of the unlawful act, it should be attributed to the wrongdoer; (2) if an event is an abnormal or not to be reasonably expected consequence of the unlawful act, attribution to the wrongdoer deserves additional justification; (3) the additional justification could be found in the nature of the liability, the nature of the loss or a high degree of culpability.[269] Furthermore, Boonekamp distinguished (somewhat freely translated) relevant factors such as the nature of the liability, the nature of the loss, the foreseeability of the loss,[270] the nature of the violated norm, the nature of the defendant's conduct, whether a created risk has been realised, the length of the chain of causation, the defendant's attitude during the proceedings, the nature of the relevant activity, the financial strength of the parties and the possibilities of insurance.[271] The multifactor approach under Article 6:98 BW has the advantage that it provides courts with flexibility in concrete cases.[272] At the same time, the flexibility entails that court decisions are of a factual nature, so that they have little predictive value for future cases. One should therefore be very careful in making general predictions about the attribution of loss.

In the context of disputes over credit rating agency liability based on Article 35a CRA Regulation, the attribution of increased funding costs and reputational loss suffered by issuers to credit rating agencies does not generally cause any problems. The attribution of these types of loss can be justified by the fact that Article 35a CRA Regulation aims to protect issuers from these types of loss, that it is reasonably foreseeable that infringements leading to impacted credit ratings cause loss to issuers and that there is a high degree of culpability on the side of the credit rating agency – because Article 35a CRA Regulation requires intention or gross negligence on the side of the credit rating agency.

268 *Cf.* Brunner 1981, pp. 213-216. *See with regard to these sub rules e.g.* Asser/Sieburgh 6-II 2017/64-66, Klaassen 2017, no. 34 ff. and Holthuijsen-van der Kop 2015.

269 Hartlief 2014, p. 2917.

270 In Hoge Raad 10 February 2017, ECLI:NL:HR:2017:214, *NJ* 2018/115 (*Avi Cranes Ltd. v Van Adrighem*), para 4.1.2, the Dutch Supreme Court stated that, in the application of Art. 6:98 BW, '*ook wat naar objectief inzicht voorzienbaar of waarschijnlijk was, een rol kunnen spelen (Parl. Gesch. Boek 6, p. 345)*'.

271 Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 4.3. *See also* Klaassen 2017, no. 34 ff. and Holthuijsen-van der Kop 2015. *See also* Dijkshoorn 2011, *who analyses the application of the multifactor approach in Dutch case law.*

272 *E.g.* Asser/Sieburgh 6-II 2017/58 and Klaassen 2017, no. 33.

The potential effects of the theory of objective attribution are especially interesting in situations in which an investor based its claim for damages on the factual perspective that in the absence of the infringement and the impacted credit rating, it would not have bought the financial instruments at all. Would Dutch law award damages for the lost value of the investment and missed benefits that could have resulted from another investment? Or, would Dutch law only award damages for lost yields and the inflated price of the financial instruments that can be linked directly to the affected credit rating? In the context of credit rating agency liability, Bertrams rejected the full compensation of investors for the nominal value of the financial instruments bought. Emphasising the responsibility of investors for their investment decisions, he pleaded to limit the amount of damages to the difference between the actual interest rate and the hypothetical interest rate had the credit rating been correct.[273] This approach hence filters out the loss caused by price movements due to, for instance, other incorrect or incomplete information, overreactions on the financial markets and general declines of the financial markets. The same approach can be discerned in the context of liability for the violation of disclosure obligations and prospectus liability under Dutch law. De Jong and Pijls provided extensive contributions in this regard.[274] In a simplified outline, De Jong and Pijls argued that the amount of damages should be capped at the inflation of the securities price caused by incorrect or incomplete information or misleading prospectuses. In their view, except for the difference between the actual and the hypothetical price, loss should remain at the expense of the investor.[275]

As stated by De Jong, decisions of the Dutch Supreme Court in this area provide little direction.[276] Court decisions are highly influenced by the factual circumstances of cases, so that they have little predictive value for future cases. In *TMF v De Boer et al.*, for instance, De Boer et al. (hereafter 'De Boer') invested in a project of the company HSI for the development of a thermal

273 Bertrams 1998, p. 365. Giessen & Rijnhout 2017, p. 264 and Atema & Peek 2013, p. 962 only briefly refer to the attribution of loss under Art. 6:98 BW, but do not take a stand on the matter.

274 *E.g.* Pijls 2018, Pijls 2017, De Jong 2016, De Jong & Pijls 2013, De Jong 2010 and Pijls 2009.

275 De Jong 2016, pp. 128-129 and De Jong 2010, pp. 183, 189 and 294, Pijls 2009, p. 135. De Jong and Pijls were also concerned with the question of whether investors must have relied directly or indirectly on incorrect or incomplete information, or whether investors can also claim damages when they relied on the soundness of market prices. As De Jong and Pijls only wished to compensate the extent to which the misleading information inflated the market price of the financial instruments, they did not require the investor to prove that it relied on the misleading information for its investment decision (*cf.* Pijls 2018, p. 319 and De Jong 2010, p. 273).

276 De Jong 2016, p. 128.

bath in Spain, relying on a brochure produced by financial advisor TMF.[277] The project failed and De Boer claimed damages from TMF for a misleading advertisement under Article 6:194 BW. De Boer alleged that TMF's conduct caused them to invest in the thermal bath while that project was in fact not viable from the start.[278] The Court of Appeal of Amsterdam limited the award of damages to the difference between the investment and the actual value of the shares,[279] suggesting a limited attribution of the loss to TMF. The Dutch Supreme Court, however, overturned the decision of the Court of Appeal of Amsterdam. The Court of Appeal of Amsterdam had limited the award of damages because TMF was not involved in the project after having made the brochure, but, according to the Dutch Supreme Court, the Court of Appeal of Amsterdam should have included the argument of De Boer that the project was not viable from the start in its reasoning. The Dutch Supreme Court held that '*[i]n dat licht bezien valt zonder nadere motivering, die evenwel ontbreekt, niet in te zien dat het verlies van de geïnvesteerde bedragen niet meer als een gevolg van het onrechtmatig handelen van TMF aan haar kan worden toegerekend*'.[280] The Dutch Supreme Court hence does not generally disapprove of the limitation, but the reasoning of the Court of Appeal of Amsterdam was inadequate, which renders it impossible to derive general conclusions on the application of Article 6:98 BW at this point.[281]

Article 6:98 BW's effect on the attribution of loss caused by impacted credit ratings can only be determined on a case-by-case basis, especially because Dutch courts have considerable freedom in balancing the relevant circumstances of the case. The question of objective attribution is especially relevant in situations in which investors argue that they would not have bought the financial instruments at all and wish to receive compensation to the extent of the full cost of their transaction. Dutch scholars have argued that in the context of credit rating agency liability, liability for the violation of disclosure obligations and prospectus liability, Dutch courts should lean towards a restrictive attribution of loss so that investors do not receive compensation for the full cost of the transaction. Under Article 35a CRA Regulation, however, this approach leads to the situation that an investor must, on the one hand, have reasonably relied on the credit rating, while, on the other hand, will only

277 Hoge Raad 30 May 2008, ECLI:NL:HR:2008:BD2820, *NJ* 2010/622 annotated by J.B.M. Vranken (*TMF v De Boer*), para 3.1. *This case was described in this context by* De Jong 2010, pp. 180-183. Pijls 2018, p. 263 and Pijls 2017, p. 451 fn. 13 *also discuss TMF v De Boer et al. as an example of a case where the specific facts determined the outcome of the case.*

278 Hoge Raad 30 May 2008, ECLI:NL:HR:2008:BD2820, *NJ* 2010/622 annotated by J.B.M. Vranken (*TMF v De Boer*), para 3.2.

279 Hoge Raad 30 May 2008, ECLI:NL:HR:2008:BD2820, *NJ* 2010/622 annotated by J.B.M. Vranken (*TMF v De Boer*), para 3.3.4.

280 Hoge Raad 30 May 2008, ECLI:NL:HR:2008:BD2820, *NJ* 2010/622 annotated by J.B.M. Vranken (*TMF v De Boer*), para 4.8.

281 *Cf.* De Jong 2010, p. 181.

be compensated to the extent of the difference between the actual and the hypothetical price or between the actual and hypothetical yield of the financial instruments or loans.

(c) Contributory negligence & mitigation of loss

Dutch courts can reduce the wrongdoer's obligation to compensate the aggrieved party under Article 6:101 BW. This provision establishes rules on contributory negligence on the side of the aggrieved party, in situations where the loss was caused by events that fall within the sphere of risk of the aggrieved party and on failures to mitigate loss on the side of the aggrieved party.[282] This broad scope of application stems from the way in which Article 6:101 BW is formulated. The provision states that the wrongdoer's obligation to compensate loss can be reduced 'where circumstances which can be attributed to' the aggrieved party have contributed to the loss suffered.[283] The wording and place of Article 6:101 BW in Section 6.1.10 Burgerlijk Wetboek presume that the provision will only be applied when the liability of the defendant has been established.[284] It is up to the defendant, as the party who wishes to benefit from Article 6:101 BW, to invoke the provision.[285] The consequence of a successful defence based on Article 6:101 BW by the defendant is that courts reduce the amount of damages awarded to the aggrieved party. Dutch courts weigh the degree to which the respective parties contributed to the loss and reduce the amount of damages accordingly.[286] But where fairness ('*billijkheid*') so requires, courts are allowed to adapt the apportionment. On this basis, courts can decide to completely release the defendant from its obligation to pay damages or to completely preserve the defendant's obligation to pay damages.[287]

As stated in section 5.4.3.2 (c) (i), the 'reasonableness' of an investor's reliance on a credit rating would not be considered in the stage of the establishment of causation under Dutch law. When an investor's reliance is unreasonable, a credit rating agency can be entitled to the defence of contributory

282 Art. 6:101 BW is often referred to as the provision on contributory negligence or '*eigen schuld*', but that description is too narrow. The provision covers situations in which the aggrieved party itself has caused the loss and situations in which other events caused the loss that fall within the sphere of risk of the aggrieved party. Boonekamp, *GS Schadevergoeding*, Art. 6:101 BW, note 1.2 and Hartlief, Keirse, Lindenbergh et al. 2018, no. 226.

283 *Translation derived from* Warendorf et al.

284 Keirse & Jongeneel 2013, no. 20.

285 *Cf.* Boonekamp, *Stelplicht & Bewijslast*, commentary on Art. 6:101 BW and Keirse & Jongeneel 2013, no. 63.

286 Keirse & Jongeneel 2013, no. 113.

287 Hartlief, Keirse, Lindenbergh et al. 2018, no. 229 and Keirse & Jongeneel 2013, no. 113. As appears from the wording of Art. 6:101 BW, 'a different apportionment shall be made or the obligation to repair the damage shall be extinguished in its entirety or maintained if it is fair to do so on account of varying degrees of seriousness of the faults committed or any other circumstances of the case'. *Translation derived from* Warendorf et al.

negligence under Article 6:101 BW. The Dutch private law approach to reasonable reliance hence differs from Article 35a CRA Regulation in two aspects: the burden of proof lies with the credit rating agency and a lack of reasonable reliance does not necessarily break the causal link between the credit rating agency's conduct and the loss suffered by the investor completely.[288] The application of the requirement of 'reasonable reliance' hence causes friction within the structure of Dutch national private law.

5.4.4 Article 35a (3) Limitations of liability in advance

5.4.4.1 General system

The legal basis for determining the admissibility of a limitation clause under Dutch law depends on whether the limitation clause is covered by Section 6.5.3 Burgerlijk Wetboek on general terms and conditions (*algemene voorwaarden*). The description of the Dutch law approach to limitation clauses is divided into three parts: (i) the binding force of terms and conditions through offer and acceptance; (ii) the substantive test for general terms and conditions under Article 6:233 BW;[289] and (iii) the general substantive test for appeals to terms and conditions which are contrary to reasonableness and fairness under Article 6:248 (2) BW.

(a) Are the conditions binding upon the other party?

In order for the other party to be bound by a limitation clause, the clause must have been offered by the user and accepted by the other party.[290] Dutch law does not impose requirements of form (*vormvereisten*) upon the offer and the acceptance.[291] Consequently, the user can offer a limitation orally, in writing in a contract or through a written notice, while the other party can accept a limitation both expressly and tacitly.[292] These remarks also apply to agreements concluded online. Users can bind their counterparties by submitting the conclusion of an agreement to the explicit acceptance of the general terms and conditions (by 'box ticking').[293]

288 *Cf. in the context of a comparison between US law and Dutch law,* Pijls 2018, pp. 141-142.
289 Limitations of liability will often be included in general terms and conditions. Most of the literature used relates to general terms and conditions.
290 Under Art. 6:217 (1) BW. *In the context of general terms and conditions*, Hijma 2016, no. 19 and Van Wechem 2007, no. 34.
291 Under Art. 3:33 BW in conjunction with Art. 3:37 (1) BW. *In the context of general terms and conditions*, Hijma 2016, no. 19.
292 *Cf. in the context of general terms and conditions* Loos 2018, no. 58, Jongeneel 2017a, pp. 126-131, Hijma 2016, no. 19-20 and Van Wechem 2007, no. 35 ff.
293 Jongeneel 2017a, p. 128 and Siemerink, Van Eijk & Van Esch 2006, pp. 145-146.

The acceptance of general terms and conditions is more difficult when the standard terms of use are shown under a subpage of the website, but where no explicit acceptance is required.[294] The question arises whether the user of the website tacitly accepted the terms by using the website. Jongeneel answered this question in the negative, especially because the user of the general terms and conditions can easily ask the user of the website for explicit acceptance. His opinion does not differ if the website itself states that use of the website implies acceptance of the standard terms of use.[295] In this context, Siemerink, Van Eijk and Van Esch pointed towards the decision of the District Court Rotterdam in the case *Netwise Publications v NTS Computers*.[296] In this case, a professional party who used a website was bound to the general terms and conditions, notwithstanding the fact that it had not explicitly agreed to them. The District Court Rotterdam held:

> *'Zelfs indien moet worden aangenomen dat op de openingspagina van de site niet was vermeld 'door in deze gids te zoeken stemt u in met de voorwaarden', doch dat slechts een button 'voorwaarden' werd getoond en dat door het aanklikken van die button de voorwaarden konden worden geraadpleegd, moet worden aangenomen dat NTS door de gids te raadplegen zich aan die voorwaarden heeft gebonden. Immers, van een professionele bezoeker van de site mag worden verwacht dat hij begrijpt dat de 'voorwaarden' waar hij op eenvoudige wijze kennis van kan nemen, (onder meer) voorwaarden zijn die Netwise aan het gebruik van de gids wenst te verbinden.'*[297]

From this quotation, it can be derived that the capacity of the user of the website and the ease with which the general terms and conditions could have been consulted were decisive in concluding that the user of the website was bound by the general terms and conditions. However, it has been argued that, usually, the user of a website will not be bound so easily to general terms and conditions. Lodder emphasised that, generally, and especially where consumers are involved, the user of the website must be put more clearly in the position to consult the general terms and conditions.[298] Also, Siemerink, Van Eijk & Van Esch considered it doubtful whether the District Court Rotterdam would have come to the same conclusion if the user of the website had been a consumer instead of a professional party.[299] Overall, the binding force of a limitation to which the user of a website has not explicitly agreed is thus not necessarily provided for under Dutch law.

294 Jongeneel 2017a, p. 128 and Siemerink, Van Eijk & Van Esch 2006, pp. 146-147.
295 Jongeneel 2017a, p. 128.
296 Rechtbank Rotterdam (vzr.) 5 December 2002, ECLI:NL:RBROT:2002:AF2059, *Computerrecht* 2003, p. 149 annotated by A.R. Lodder (*Netwise Publications v NTS Computers*). Siemerink, Van Eijk & Van Esch 2006, p. 148.
297 Rechtbank Rotterdam (vzr.) 5 December 2002, ECLI:NL:RBROT:2002:AF2059, *Computerrecht* 2003, p. 149 annotated by A.R. Lodder (*Netwise Publications v NTS Computers*), para 3.1.
298 *Computerrecht* 2003, p. 149 annotation Lodder, no. 7.
299 Siemerink, Van Eijk & Van Esch 2006, p. 148.

In the context of credit rating agency liability, if the limitation is included in individually negotiated or general terms and conditions of rating contracts concluded between credit rating agencies and issuers or subscription contracts concluded between credit rating agencies and investors, offer and acceptance of the limitation are not problematic. The same applies to the use of disclaimers or standard terms of use on credit rating agencies' websites to which an investor has explicitly agreed by clicking in agreement.[300] Some credit rating agencies make use of this method by subjecting the access to credit ratings on their websites to explicit acceptance of standard terms of use that also include a limitation. More problematic is the binding force of disclaimers on websites to which the investor has not explicitly agreed; for instance, if the standard terms of use are shown under a subpage of the website, but where no explicit acceptance is required. In *Netwise Publications v NTS Computers*, the capacity of the user of the website and the ease with which the general terms and conditions could have been consulted were decisive for the District Court Rotterdam to hold that the user of the website was bound by the terms of use. However, no general guidance in respect of consumers can be derived from these cases.

(b) Substantive tests for voidable general terms and conditions

The fact that a party is bound to a general term or condition stipulating a limitation of liability, does not automatically mean that such a limitation clause is valid. If the limitation clause is included in general terms and conditions and the other party is not a legal person in the sense of Article 6:235 BW (meaning that the other party is a consumer or a 'smaller' company[301]), the rules of Section 6.5.3 Burgerlijk Wetboek must be complied with. Within Section 6.5.3 Burgerlijk Wetboek, Article 6:233 BW provides for an *inhoudstoetsing* or substantive test of the clauses.[302] Under section (a) and (b), clauses are voidable if they are 'unreasonably onerous to the other party' ('*onredelijk bezwarend voor de wederpartij*') or 'if the user has not given the other party a reasonable opportunity to take note of the general terms and conditions' ('*indien de gebruiker aan de wederpartij niet een redelijke mogelijkheid heeft geboden om van de algemene voorwaarden kennis te nemen*'), respectively.[303] The latter requirement

300 *Example inspired by* Jongeneel 2017a, p. 128 and Siemerink, Van Eijk & Van Esch 2006, pp. 145-146.

301 Art. 6:235 BW: 'The grounds for nullification referred to in Articles 233 and 234 may not be invoked by **a.** a legal person referred to in Article 360 of Book 2 which, at the time of entry into the contract, has recently published its annual accounts or a legal person in respect of which, at that time, Article 403 (1) of Book 2 has recently been applied; **b.** a party to which the provision in subparagraph a does not apply, if, at the aforementioned time, fifty or more persons work for it or if, at that time, a declaration pursuant to the Handelsregisterwet 2007 (Commercial Registry Act 2007) shows that fifty or more persons work for it.' *Translation derived from* Warendorf et al.

302 *E.g.* Jongeneel 2017b, p. 388 and De Graaf 2006, p. 8. *Also in detail* Loos 2018, no. 169 ff.

303 *Translations of the terms derived from* Warendorf et al.

touches upon the issues discussed under section (i) to some extent,[304] and will not be addressed further. For the purpose of determining in which circumstances a limitation of liability is admitted under Dutch law, the following paragraph concentrates on the question of whether the limitation is unreasonably onerous to the other party.

Following the wording of Article 6:233 (a) BW, for determining whether a clause qualifies as unreasonably onerous, one must take into account 'the nature and the further content of the contract, the manner in which the terms and conditions were established, the mutually apparent interests of the parties and the other circumstances of the case'.[305] It has been argued in Dutch academic literature that this test does not substantially differ from the test applied to determine whether an appeal to a limitation clause is unreasonable under Article 6:248 (2) BW.[306] For the purpose of avoiding unnecessary reiteration, the relevant circumstances will be discussed in detail under section (c) only. However, for investors who qualify as consumers, Section 6.5.3 does provide additional rules in the form of the so-called black and grey list. The black and grey list contain examples of terms deemed to be unfair and presumed to be unfair, respectively.[307] The exclusion and limitation of liability of a consumer's right to damages are included in the grey list. Consequently, limitations of liability are presumed to be unfair, but the user of the terms can put forward counter-evidence in order to prove that the limitation was in fact not unreasonably onerous.[308] In a more general context, Jongeneel has however analysed that providing counter-evidence will often be very difficult. Counter-evidence could, according to him, be provided for instance by economic reports demonstrating that the user of the general terms and conditions cannot insure against certain risks or cannot reasonably produce the goods or services in the absence of the limitation.[309]

(c) Appeals contrary to reasonableness and fairness

In a concrete case, a user of terms and conditions may not invoke a limitation clause if that appeal is contrary to the principles of reasonableness and fairness under Article 6:248 (2) BW.[310] This road can be travelled by all parties, i.e., in case of concurrence between Article 6:233 BW and Article 6:248 (2) BW, a party can choose on which legal basis to attempt to escape from the application of the limitation clause.[311]

304 *See* Jongeneel 2017a, p. 123.
305 *Translation derived from* Warendorf et al.
306 *E.g.* De Graaf 2006, p. 10. *Implicitly* Hijma 2016, no. 26.
307 Art. 6:236 BW and Art. 6:237 BW, respectively.
308 Art. 6:237 (f) BW. *See in detail on this provision* Loos 2018, no. 290 ff.
309 Jongeneel 2017b, pp. 400-401.
310 *In the words of* De Graaf 2006, p. 8 and Jongeneel 2017b, p. 388, an '*uitoefeningstoets*'.
311 *In detail, also on the development of this rule*, Loos 2018, no. 186, Jongeneel & Pavillon 2017, pp. 174-175, Hijma 2016, no. 27, De Graaf 2006, pp. 7-9 and Rijken 1983.

The reasonableness and fairness test originates from the decision of the Dutch Supreme Court in *Saladin v HBU*.[312] The Dutch Supreme Court held that whether the user of a term can appeal to that term depends on many circumstances: '*O. dat het antwoord op de vraag in welke gevallen* […] *een beroep op dit beding niet vrijstaat, afhankelijk kan zijn van de waardering van tal van omstandigheden, zoals: de zwaarte van de schuld, mede i.v.m. de aard en de ernst van de bij enige gedraging betrokken belangen, de aard eb de verdere inhoud van de overeenkomst waarin het beding voorkomt, de maatschappelijke positie en de onderlinge verhouding van pp., de wijze waarop het beding is tot stand gekomen, de mate waarin de wederpartij zich de strekking van het beding bewust is geweest.*'[313] The relevant circumstances that have to be balanced against each other are hence, *inter alia*:

- The gravity of the user's conduct. For example, did the user act intentionally, with (conscious) recklessness or with simple negligence?
- The nature and further content of the agreement concluded. For instance, what are the other (general) terms and conditions of the agreement, did the other party pay a reasonable price in relation to the exclusion or limitation?[314]
- The positions of the parties and their interrelationship relationship. For instance, does the other party qualify as a consumer, a professional or an expert?[315]
- The manner in which the terms and conditions were established. For instance, did the parties negotiate or were general terms and conditions applied?[316]
- The mutually apparent interests of the parties. For instance, how does the user's interest to limit and be able to insure its liability risks relate to the other party's interest in full compensation?[317,318]

These circumstances have been addressed together as the '*omstandigheden catalogus*'. With regard to each limitation, the specific circumstances must be taken into consideration in order to determine whether invoking the term is admissible. The circumstance of the gravity of the user's conduct is of particular importance in relation to the admissibility of limitation clauses. Invoking

312 Hoge Raad 19 May 1967, ECLI:NL:HR:1967:AC4745, *NJ* 1967/261 annotated by G.J. Scholten (*Saladin v HBU*). At the time *Saladin v HBU* was decided, the reasonableness and fairness test did not exist yet and the question was whether an appeal to the term was contrary to the principle of good faith. Jongeneel 2017b, p. 388.

313 Hoge Raad 19 May 1967, ECLI:NL:HR:1967:AC4745, *NJ* 1967/261 annotated by G.J. Scholten (*Saladin v HBU*).

314 *In detail, in the context of general terms and conditions,* Loos 2018, no. 208 ff.

315 *In detail, in the context of general terms and conditions,* Loos 2018, no. 229.

316 *In detail, in the context of general terms and conditions,* Loos 2018, no. 215 ff.

317 *In detail, in the context of general terms and conditions,* Loos 2018, no. 221 ff. and, *in particular*, no. 224-225.

318 *See, for the explanation of all of these circumstances and examples, also e.g.* Schelhaas 2017, pp. 72-75, Hijma 2016, no. 26, De Graaf 2006, Duyvensz 2003, pp. 19-35 and Rijken 1983, p. 97.

terms that aim to limit liability for loss caused intentionally or due to conscious recklessness (*opzettelijk of met bewuste roekeloosheid*) by the user of the terms or employees who are charged with the management of the user is generally not permitted.[319] Invoking terms that aim to limit liability for loss caused intentionally or due to conscious recklessness by employees or subordinates is not generally inadmissible, but might nevertheless be so in light of other relevant circumstances.[320] As has been discussed in more detail in section 5.4.3.1, the exact meaning of the term conscious recklessness is debatable. But at this point, it suffices to say that since the decision of the Dutch Supreme Court in *Telfort v Scaramea* in 2008, it is clear that the term conscious recklessness covers both '*waarschijnlijkheidsbewustzijn*' and '*mogelijkheidsbewustzijn*' of the possible occurrence of loss on the side of the user.[321] The term hence covers both situations in which the user of the limitation was aware that its acts could cause loss and situations in which the user of the limitation was aware that its omission could cause loss.

5.4.4.2 Limitations of liability in relation to issuers and investors

Depending on whether a limitation clause has been included in general terms and conditions or has been negotiated on an individual basis, the admissibility of an appeal to the limitation clause must be assessed in accordance with Section 6.5.3 Burgerlijk Wetboek and/or Article 6:248 (2) BW. An application of the general statutory framework to the admissibility of limitations clauses in relation to issuers and investors then leads to the following general guidelines:

- If Section 6.5.3 Burgerlijk Wetboek applies, by means of general terms and conditions, a credit rating agency cannot limit its liability if that would be 'unreasonably onerous' to the issuer or investor under Article 6:233 (a) BW. If limitations of liability are presumed to be unfair under Article 6:237 (f) BW, it will be difficult for credit rating agencies to provide proof rebutting this presumption. This Section will only apply in a limited amount of situations, namely in relation to contracts concluded with investors acting as consumers and small companies under Article 6:235 BW.

---

319 *E.g.* Hoge Raad 5 September 2008, ECLI:NL:HR:2008:BD2984, *NJ* 2008/480 (*Telfort v Scaramea*) and Hoge Raad 12 December 1997, ECLI:NL:HR:1997:ZC2524, *NJ* 1998/208 (*Gemeente Stein v Driessen*). *E.g.* Loos 2018, no. 228, Jongeneel 2017b, p. 403, Schelhaas 2017, p. 73, De Graaf 2006, pp. 13 ff. and Duyvensz 2003, p. 98.

320 De Graaf 2006, pp. 29 and 45 ff. De Graaf argued that conduct and state of mind of employees and subordinates will not easily be attributed to the user of the terms. For a situation in which an appeal to an exclusion of liability was allowed, *e.g.* Hoge Raad 31 December 1993, ECLI:NL:HR:1993:ZC1210, *NJ* 1995/389 annotated by C.J.H. Brunner (*Matatag v De Schelde*). *Cf. also* Duyvensz 2003, p. 98.

321 Hoge Raad 5 September 2008, ECLI:NL:HR:2008:BD2984, *NJ* 2008/480 (*Telfort v Scaramea*), para 3.5. Jongeneel 2017, pp. 408-410.

- In general, a credit rating agency cannot invoke a limitation clause if the appeal is contrary to the principles of reasonableness and fairness under Article 6:248 (2) BW.
- The reasonableness and fairness test involves a balancing act of the relevant circumstances of the case, whereby the gravity of the conduct of the credit rating agency as user of the general or individually negotiated terms and conditions, the insurability of the risks on the side of the credit rating agency, the capacity and expertise of the issuer or investor and the price paid for the agreement by the issuer or investor can be of particular importance with regard to the admissibility of limitations of liability. It follows from this test that by means of (general) terms and conditions, a credit rating agency cannot limit its liability for loss caused by intentional or consciously reckless conduct.

Article 35a CRA Regulation requires credit rating agencies to have committed an infringement intentionally or with gross negligence. Although the meaning of gross negligence cannot be determined with certainty under Dutch law, I have argued in section 5.4.3.1 that the threshold set by gross negligence is lower than the threshold set by *bewuste roekeloosheid* or conscious recklessness. As a consequence, under Dutch law, if an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence under Article 35a (1) CRA Regulation, a credit rating agency would still have some room to limit its liability if it acted with gross negligence but not with conscious recklessness.[322]

5.4.5 Prescription of claims

Dutch rules on the prescription periods of claims ('*rechtsvorderingen*') can be found in Section 3, Title 4 on the acquisition and loss of claims of Book 3 of the Burgerlijk Wetboek. The general rule of Article 3:306 BW involves a prescription period of twenty years, but many special prescription periods apply to different types of claims.[323] Relevant in the context of claims for damages brought by investors and issuers based on Article 35a CRA Regulation, are the rules on the prescription of claims for damages under Article 3:310 BW.

---

322 As stated under section 5.3.1.1 (b), the attribution of conduct and state of mind is a matter of EU law and is determined by the wording of the infringements. However, it would have been better if the wording of Art. 35a and Annex CRA Regulation had been more precise in this regard.

323 Art. 3:306 BW – '*Indien de wet niet anders bepaalt, verjaart een rechtsvordering door verloop van twintig jaren*.' Due to the tremendous amount of exceptions, Art. 3:306 BW has been described as 'safety net', *see* Koopmann, *GS Vermogensrecht*, Art. 3:306 BW, note 2.A2 and Koopmann 2010, p. 5. *See, for similar remarks*, Asser/Sieburgh 6-II 2017/397.

Article 3:310 (1) BW states that '*[e]en rechtsvordering tot vergoeding van schade of tot betaling van een bedongen boete verjaart door verloop van vijf jaren na de aanvang van de dag, volgende op die waarop de benadeelde zowel met de schade of de opeisbaarheid van de boete als met de daarvoor aansprakelijke persoon bekend is geworden, en in ieder geval door verloop van twintig jaren na de gebeurtenis waardoor de schade is veroorzaakt of de boete opeisbaar is geworden.*' Issuers and investors hence lose their right to claim damages: (1) 5 years after the moment that the issuer or investor (as aggrieved party) became acquainted with both the loss and the party responsible for the loss (this period starts to run from the day after the aggrieved party became acquainted); but at the latest (2) 20 years after the event occurred that caused the loss. Koopmann qualifies these periods as the 'subjective' and the 'objective' yardstick, respectively, as the 5-year prescription period takes into account the specific circumstances relating to the aggrieved party while the 20-year prescription period only takes the event that caused the loss into account.[324]

The yardstick for the 5-year prescription period of acquaintance ('*bekendheid*') with the loss and the party who caused the loss is interpreted as *actual* acquaintance ('*daadwerkelijke bekendheid*').[325] The notion of actual acquaintance was given substance in Dutch case law. The holder of the right must actually be able to bring proceedings against the party who caused the loss.[326] For that purpose, the holder of the right must be sufficiently (but not absolutely) certain that the loss was caused by wrongdoing of the other party.[327] Suspicions and presumptions in this respect alone are not sufficient for the prescription period to start running, even when the circle of potential parties who could have caused the loss was small.[328] Overall, the impression is that the prescription period does not start to run swiftly and that Dutch law does not require a proactive attitude from the holder of the right in this respect.

324 Koopmann 2010, p. 5. *And, on the yardstick of the twenty-year period,* Asser/Sieburgh 6-II 2017/413.

325 *E.g.* Hoge Raad 31 October 2003, ECLI:NL:HR:2003:AL8168, *NJ* 2006/112 annotated by C.E. du Perron (*Saelman*), para 3.4 and Hoge Raad 6 April 2001, ECLI:NL:HR:2001:AB0900, *NJ* 2002/383 annotated by H.J. Snijders (*Vellekoop v Wilton Feijenoord*), para 3.4.2. *Recently repeated by* Hoge Raad 31 March 2017, ECLI:NL:HR:2017:552, *NJ* 2017/165 (*Mispelhoef v Staat*), para 3.3.2. *Also e.g.* Asser/Sieburgh 6-II 2017/411 and 415 and Koopmann 2010, pp. 44-45. These contributions discussed the case law referred to in this paragraph in detail and provide far more extensive overviews of relevant case law in this area.

326 Hoge Raad 31 October 2003, ECLI:NL:HR:2003:AL8168, *NJ* 2006/112 annotated by C.E. du Perron (*Saelman*), para 3.4.

327 Hoge Raad 31 October 2003, ECLI:NL:HR:2003:AL8168, *NJ* 2006/112 annotated by C.E. du Perron (*Saelman*), para 3.5 and Hoge Raad 31 March 2017, ECLI:NL:HR:2017:552, *NJ* 2017/165 (*Mispelhoef v Staat*), para 3.3.2.

328 *As can be derived from* Hoge Raad 31 March 2017, ECLI:NL:HR:2017:552, *NJ* 2017/165 (*Mispelhoef v Staat*), para 3.3.2. This decision has been approved and disapproved of, *see, respectively*, Fluitsma & Lubach 2017 and Burgers 2017, while Smeehuijzen (annotation *JA* 2017/93) did not consider the decision groundbreaking, though instructive.

5.4.6 Concluding remarks

The liability of credit rating agencies has not been a widespread topic of political and academic debate in the Netherlands. The introduction of Article 35a CRA Regulation passed by the Dutch legislature almost unnoticed,[329] Dutch courts have hardly decided on any cases involving credit rating agency liability[330] and contributions from Dutch scholars are rather scarce.

Dutch private law contains multiple grounds on which issuers and investors can base claims for liability. Depending on the existence of a contractual relationship, issuers can base claims on Article 6:74 BW and/or Article 6:162 BW. Credit rating agencies breach a duty of care if they fail to act as can be expected from *een redelijk bekwaam en redelijk handelend* (a reasonably competent and reasonably acting) credit rating agency.[331] What can be expected from a credit rating agency must be determined in the concrete circumstances of the case. This standard leaves a margin of discretion to credit rating agencies, but forms a lower threshold for liability than the requirement of intention or gross negligence imposed by Article 35a CRA Regulation. Depending on the existence of a contractual relationship and on the particular circumstances of the case, investors can base claims on Article 6:74 BW, Article 6:193b BW, Article 6:194 BW and Article 6:162 BW. It is attractive for investors to base a claim for damages on Article 6:193b BW or Article 6:194 BW, because these provisions allow them to benefit from a reversal of the burden of proof in respect of the inadequacy of the credit rating.

Dutch law does not provide explicit guidance on the interpretation and application of Article 35a CRA Regulation, so that the interpretation and application has been constructed in accordance with the general principles of Dutch private law. This report demonstrated that under Dutch law, quite a number of uncertainties exist on the interpretation and application of Article 35a CRA Regulation. For instance, the term 'gross negligence' translated as '*grove nalatigheid*' is not sufficiently clear for the purposes of Dutch private law. One can make an educated guess as to the meaning of this term, but it is hard to determine the exact degree of culpability required, because '*grove nalatigheid*' is not a term used commonly in Dutch private law. Moreover, other

329 In *Kamerstukken II* 2011/12, 22 112, 1298, no remarks were made about credit rating agency liability. In *Kamerstukken I* 2011/12, 33 152, A, only the Progressive Liberal Democrats (D66) asked two questions on the requirement of reliance under Art. 35a CRA Regulation and on the interaction between Art. 35a CRA Regulation and Dutch private law.

330 The cases decided only involved agencies that would not qualify as a credit rating agencies under Art. 3 (1) (b) CRA Regulation, Rechtbank Amsterdam 14 January 2015, ECLI:NL:RBAMS:2015:6 (*GLS v Graydon*) and Rechtbank Rotterdam 29 December 2010, ECLI:NL:RBROT:2010:BP5369, *JOR* 2011/388 annotated by S.R. Damminga.

331 *Cf.* Asser/Tjong Tjin Tai 7-IV 2018/200. *For this standard see e.g. with regard to accountants*, Hoge Raad 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2008/528 annotated by C.C. van Dam (*Deloitte Touche e.a. v Vie d'Or*), para 5.3 and 5.4.2 and *with regard to lawyers*, Hoge Raad 9 June 2000, ECLI:NL:HR:2000:AA6159, *NJ* 2000/460 (*S. v V.*), para 3.3.

uncertainties manifest themselves in respect of the requirement of causation in relation to claims brought by investors. It is not clear whether Dutch courts would facilitate investors in proving that they had relied on an affected credit rating for the purpose of their investment decision. In the context of prospectus liability and incorrect tax advice, Dutch courts can employ several tools to facilitate investors or parties that acted upon advice, respectively. Although one can argue that these tools should find application in the context of credit rating agency liability, any application requires an extension of their scope of application. If Dutch courts facilitate investors, they will most likely do so by applying an evidentiary presumption in relation to the causal link between the impacted credit rating and an investment decision in relation to investors who do no act in the scope of their profession or business. Finally, Dutch case law provides little guidance on the question of whether and, if so, how the full compensation of investors will be limited by means of the theory of objective attribution under Article 6:98 BW. On certain occasions, therefore, these uncertainties render it difficult to provide an accurate overview of the interpretation and application of Article 35a CRA Regulation under Dutch law.

5.5 French law

5.5.1 National private law context

This national law report concentrates on the interpretation and application of Article 35a CRA Regulation under French law. French private law is the most important legal system of the Romanist civil law tradition. The main codification is formed by the Code Civil (CC, French Civil Code), that served as a source of inspiration for many other legal systems.[332] The Code Civil was introduced during the reign of Napoléon in 1804, and was mainly based on Roman law and French 'post-revolutionary' ideas.[333] Its content was strongly influenced by the credo of the French revolution '*liberté, égalité, fraternité*' (freedom, equality, fraternity), traces of which can be found in the importance attached to the 'autonomy of the will' in contract law for example.[334] Although parts of the Code Civil were subject to revision and the protection of weaker parties was increased over the years, up to February 2016, most provisions remained very similar to their introduction in 1804.[335] By *Ordonnance* n° 2016-131 of 10 February 2016, however, the French law of

332 *E.g.* Van Dam 2013, no. 301-2.
333 *See* Whittaker 2008, p. 296.
334 *See e.g.* Steiner 2018, p. 214, Van Dam 2013, no. 301-1, Fauvarque-Cosson & Fournier 2012, p. 344 and Whittaker 2008, p. 296.
335 Fauvarque-Cosson & Fournier 2012, p. 346. *Cf. also e.g.* Van Dam 2013, no. 301-1. *For an overview of developments, see* Whittaker 2008, pp. 298 ff.

obligations and, in particular, French contract law were revised. In respect of French non-contractual liability law, this revision only involved a renumbering.[336] The *Projet de réforme de la responsabilité civile Mars 2017* may be the harbinger of substantive changes to French liability law, both to the provisions on contractual and non-contractual liability.[337] As the future of this reform project was still unclear when this study was finalised, only brief references to this proposal will be made in the footnotes of this report.

French private law is characterised by the use of general notions and concepts and by a certain degree of vagueness and uncertainty.[338] The French legislature used general notions and concepts in the drafting of the Code Civil.[339] The Code Civil contains few provisions in respect of civil liability and the existing provisions are formulated broadly. As an example, Article 1240 and 1241 CC do not include specifications of concepts such as fault, causation and harm.[340] The use of general notions and concepts provides French civil liability law with an 'open' character. It allows for the compensation of all types of loss and does not object to the compensation of pure economic loss as a matter of principle.[341] Yet, the use of general notions and concepts also entails that, in the words of Viney, courts are left with 'the job of resolving innumerable questions' in concrete cases.[342] French case law does not necessarily mitigate the rather vague and uncertain character of French private law. Indeed, French courts do not tend to extensively motivate their decisions[343] and the French legal system does not officially involve a system of legal precedent.[344] The latter position, however, does not entirely correspond with reality, because decisions of French courts in general and of the French Supreme Court in particular are of high authority in practice.[345] The French approach to the judiciary explains these characteristics of French case law and of the French legal system. Traditionally, French courts are

336 Bénabent 2016, no. 511. *Ordonnance* n° 2016-131 is available at www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004939&categorieLien=id, last accessed at 31 August 2019.
337 *See* www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_1303 2017.pdf and for the English version www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf, last accessed at 31 August 2019.
338 *Cf.* Van Dam 2013, no. 610-4.
339 *Cf.* Van Dam 2013, no. 610-4.
340 The *Projet de réforme de la responsabilité civile Mars 2017* proposes more detailed provisions on loss and causation under Art. 1235 ff. and Art. 1239 ff., respectively.
341 *See e.g.* Quézel-Ambrunaz 2017, p. 242, Van Dam 2013, no. 710-2, Viney, Jourdain & Carval 2013, no. 251, Sotiropoulou 2012, no. 483 and Whittaker 2008, p. 364.
342 Viney 2008, p. 237. *See also* Van Dam 2013, no. 301-2 and no. 610-4.
343 Van Dam 2013, no. 301-3. *Cf.* Steiner 2018, pp. 139-140, Fauvarque-Cosson & Fournier 2012, p. 347 and Bell 2001, p. 70.
344 Steiner 2018, pp. 68-69 (*also for exceptions*), Van Dam 2013, no. 301-3 and Bell 2001, pp. vii and 66.
345 Van Dam 2013, no. 301-3 and Fauvarque-Cosson & Fournier 2012, p. 346. *Cf.* Steiner 2018, p. 71 and Bell & Boyron 2008, p. 31.

considered not more than '*la bouche qui prononce les paroles de la loi*'. They must apply the law to a case at hand and should not sit on the legislature's seat.[346] Consequently, French courts are considered bound by law only and not by prior court decisions[347] and French courts do not provide an insight in policy arguments that influenced decisions, because that is considered to belong to the realm of the legislature.[348]

The French Code Civil consists of five Books, involving the rules on, for instance, persons (Book 1), goods and different forms of property (Book 2) and the way in which property can be obtained (Book 3). For the purpose of constructing the interpretation and application of Article 35a CRA Regulation, the French law of obligations under Book 3, Title III ('*des sources d'obligations*') was primarily used. More specifically, the study concentrates on the general notions and concepts underlying both contractual liability under Article 1231-1 CC and non-contractual liability under Article 1240 CC ff. Although the conditions for both contractual and non-contractual liability are similar to some extent,[349] French law employs a strong divide between contractual and non-contractual liability under the principle of *non-cumul*. The principle of *non-cumul* entails that parties who wish to bring a claim for compensation in private law may not choose to base their claim on breach of contract (*responsabilité contractuelle*) or fault (*responsabilité délictuelle* or *responsabilité extracontractuelle*).[350] If a contractual obligation has been breached, the aggrieved party must bring a claim for compensation based on contractual liability and is not permitted to claim compensation based on non-contractual liability.[351] The ratio behind this strict divide is that the rules relating to contractual and non-contractual claims may differ, for instance in respect of the validity of limitation clauses (see section 5.5.4), but this is subject to criticism in French academic literature.[352]

In contrast to the other legal systems investigated in this dissertation, French law distinguishes between 'two types' of loss, namely *dommage* (harm) and *préjudice* (loss).[353] In concrete cases, harm and loss suffered by the aggrieved party can overlap, but harm and loss do not necessarily consist of the same components. For example, a car accident can result in the aggrieved

346 Montesquieu 1748, p. 327. *As stated by e.g.* Steiner 2018, pp. 65-66, Van Dam 2013, no. 301-3 and Bell 2001, pp. vii-viii.
347 Steiner 2018, pp. 68-69, Van Dam 2013, no. 301-3.
348 Steiner 2018, p. 140.
349 *Cf.* Whittaker 2008, p. 361.
350 *See e.g.* De Graaff 2017, no. 17-18, Bénabent 2016, no. 507 and Chacornac 2014, no. 1058. *E.g.* Cour de Cassation (Chambre Civile 1) 11 January 1922 (*Pelletier v Doderet*) and Cour de Cassation (Chambre Civile 2) 9 June 1993, 91-21650, Bulletin 1993, II, no. 204, p. 110.
351 *Cf. e.g.* Bénabent 2016, no. 507, Charcornac 2014, no. 1058 and Tallon 2008, p. 231.
352 *E.g.* Moron-Puech 2017.
353 English translations derived from the English version of the *Projet de réforme de la responsabilité civile Mars 2017*, available at www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf, last accessed at 31 August 2019.

party having broken his leg and in loss of income because the aggrieved party is temporarily not able to work. French law qualifies the broken leg, as a direct consequence of the accident, as harm and the loss of income as prejudice. This distinction cannot always be made so easily in other situations as well. In this national law report, reference is mainly made to the term 'loss' (*préjudice*). If necessary in a particular context, reference is made to the term 'harm' (*dommage*).

5.5.2 National rules on credit rating agency liability

5.5.2.1 Liability regime prior to 2018

(a) Art. L. 544-5 and L. 544-6 Code monétaire et financier

Until the beginning of 2018, French private law was known for its special rules on the civil liability of credit rating agencies under Article L. 544-5 and L. 544-6 Code monétaire et financier. As the only national legislature of the Member States investigated in this dissertation, the French legislature codified special rules on the liability of credit rating agencies and on the validity of jurisdiction and exclusion clauses in the French Code monétaire et financier in 2010, in response to the CRA I Regulation. However, in January 2018, the French legislature abolished the special provisions as a somewhat late response to Article 35a CRA Regulation.[354]

Article L. 544-5 Code monétaire et financier was generally understood not to have created a special regime for liability, but rather to have made explicit that general provisions of the French law of obligations apply when a credit rating agency makes a fault in or falls short of (*'fautes et manquements'*) the implementation of its obligations under the first version of the CRA Regulation.[355] Article L. 544-5 (1) Code monétaire et financier stipulates that:

> *'Les agences de notation de crédit mentionnées à l'article L. 544-4 engagent leur responsabilité* délictuelle et quasi délictuelle, *tant à l'égard de leurs* clients *que des* tiers, *des conséquences dommageables des* fautes et manquements *par elles commis dans la mise en œuvre des obligations définies dans le règlement (CE) n° 1060 / 2009 du Parlement européen et du Conseil, du 16 septembre 2009, précité.'*[356]

With this provision, French law was considered to provide for a more stringent liability regime than Article 35a CRA Regulation, because the threshold for fault under French non-contractual liability law constitutes simple negligence which

354 Assemblée Nationale 14 January 2018, no. 907, Art. 32.

355 Prorok 2016, no. 467, Cappelie 2014, para 2.1, Chacornac 2014, no. 1055, Merville 2013, no. 12, Sotiropoulou 2013, no. 6 and P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010. *Cf.* Denis 2011, p. 77.

356 Emphasis added [DJV].

is lower than 'intention' or 'gross negligence' as required by Article 35a CRA Regulation.[357] Nevertheless, Article L. 544-5 is not considered an easy road towards compensation. Rapporteur for the Sénat Marini explained: '*[…] les cas dans lequels le régime de responsabilité pour faute fondé sur l'article L. 544-5 pourra être invoqué avec succès seront sans doute rares mais pas inexistants. Cet article constitue cependant un signal important à destination des agences de notation, eu égard aux enjeux pour les investisseurs et les sociétés concernées.*'[358]

In order to strengthen the liability regime in the Code monétaire et financier, the second part of Article L. 544-5 forbade the use of exclusive jurisdiction clauses in favour of third countries (non-Member States):

> '*Tout accord ayant pour effet de soumettre,* par avance et exclusivement, aux juridictions d'un Etat tiers à l'Union européenne *un différend relatif aux dispositions du règlement (CE) n° 1060 / 2009 du Parlement européen et du Conseil, du 16 septembre 2009, précité, alors que les juridictions françaises auraient été compétentes pour en connaître à défaut d'un tel accord,* est réputé nul et non écrit.'[359]

Furthermore, Article L. 544-6 prohibited credit rating agencies from using clauses that exclude their liability completely: '*Les clauses qui visent à* excludé la responsabilité *des agences de notation de crédit mentionnées à l'article L. 544-4 sont* interdites et réputées non écrits.'[360] Initially, the legislative proposal prohibited the use of both exclusion and limitation clauses. During the legislative proceedings, the French *Sénat* however decided that the use of limitation clauses should be allowed; first, because limitation of liability is permitted under Recital 35 CRA I Regulation;[361] and, second, because a prohibition would discourage credit rating agencies from establishing and registering in France.[362]

(b) Doctrinal debate and criticism

The introduction of Article L. 544-5 and L. 544-6 Code monétaire et financier received a great deal of attention and criticism in French academic literature, which is in sharp contrast to the silence that surrounded the abolition of the provisions in January 2018.

357 Cappelie 2014 and Sotiropoulou 2013, no. 30.
358 P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010.
359 Emphasis added [DJV]. A provision prohibiting exclusive jurisdiction clauses in favour of other Member States would not have been in compliance with Art. 25 (1) Brussels I Regulation (recast). Denis 2011, p. 75.
360 Emphasis added [DJV].
361 P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010. *See also* Tchotourian 2011, no. 13.
362 *Cf.* J. Chartier, 'Rapport fait au nom de la commission des finances, de l'économie générale et du contrôle budgétaire sur le projet de loi, modifié par le Sénat, de régulation bancaire et financière (no. 2833) no. 2848', 7 October 2010, p. 40.

To begin with, the 'legal' nature of Article L. 544-5 was the subject of debate in French academic literature. Article L. 544-5 stipulated that credit rating agencies '*engagent leur responsabilité délictuelle et quasi délictuelle, tant à l'égard de leurs clients que des tiers*'. The wording of Article L. 544-5 hence suggested that claims for damages must be based on non-contractual liability, irrespective of whether a contractual relationship exists between the credit rating agency and the issuer or investor.[363] French authors were however taken by surprise by the fact that credit rating agency liability would always qualify as non-contractual, pointing out that this qualification conflicts with the French principle of *non-cumul*.[364] Indeed, in the absence of Article L. 544-5, the principle of *non-cumul* would have required an issuer or investor that concluded a rating or subscription contract with a credit rating agency to base a claim for damages on contractual liability.[365] Instead, by connecting liability to faults committed in the implementation of obligations under the first version of the CRA Regulation, and by explicitly using the terms '*délictuelle et quasi délictuelle*', Article L. 544-5 reverses the 'legal hierarchy' that would otherwise follow from the principle of *non-cumul*, leaving a subordinate role for contract law in credit rating agency liability.[366]

Yet different, positive voices can be heard in French academic literature as well. Sotiropoulou considered the choice of the French legislature well-considered ('*délibéré et réfléchi*'), precisely because it created a more protective regime based on the contents of violated obligations rather than on the quality of the aggrieved party.[367] Furthermore, a completely different perspective is offered by Moron-Puech, who uses Article L. 544-5 as an example to argue that in fact contractual and non-contractual liability are of the same nature and that the principle of *non-cumul* has no foundation in the Code Civil. Moron-Puech builds upon the report of Marini, which states that:

> '*Nous nous étions principalement concentrés, jusque-là, sur la responsabilité contractuelle, c'est-à-dire la relation entre l'agence de notation et son client. Or il est toujours délicat de trop s'immiscer dans les relations contractuelles, dès lors que deux parties contractent dans un cadre communautaire qui les autorise à choisir le droit sous lequel elles se placent. Par conséquent, à l'issue de ce nouveau travail, j'ai proposé à la commission de replacer la réflexion sur le terrain de la responsabilité délictuelle, afin de nous intéresser à la*

363 Merville 2013, no. 17.

364 *See e.g.* Prorok 2016, no. 468, Charcornac 2014, no. 1058, Thépot 2010, para II. *Cf. also* Clédat 2012, para II.B. A neutral descriptive approach is given by Merville 2013, no. 17.

365 The relationship between issuer and credit rating agency in the course of a rating contract is qualified as a '*contrat de louage d'ouvrage*' or '*contrat d'entreprise*' (agreement for services, Art. 1708 and 1710 CC). Thépot 2010, para II.B.1 and Dondero, Haschke-Dournaux & Sylvestre 2004, no. 23.

366 *See, in detail about this subordinated role,* Sotiropoulou 2013, no. 8-13. *Also* Merville 2013, no. 13.

367 Sotiropoulou 2013, no. 15.

responsabilité des agences de notation à l'égard de l'ensemble de la communauté financière et du marché.'

Moron-Puech concludes from this quotation that the choice in favour of the wording '*délictuelle*' demonstrates the general nature of non-contractual liability in the Code Civil.[368] Were his approach to be followed, a discussion on the 'legal' nature of Article L. 544-5 would no longer be relevant.

Furthermore, the need to introduce Article L. 544-5 was questioned. Chacornac posed the question of why it was necessary to introduce Article L. 544-5 at all, as the provision only explicitly subjects credit rating agencies to French non-contractual liability law instead of having introduced a special liability regime.[369] According to Daigre, the wording of L. 544-5 '*est en soi curieuse car elle pourrait donner le sentiment d'une immunité antérieure*'.[370] As will be discussed in sections 5.5.2.2 and 5.5.2.3 as well, credit rating agencies were indeed already subject to liability under French contract and non-contractual liability law prior to 2010. In addition, Article L. 544-5 was criticised for not having improved the feasibility of claims for damages, because the provision lacks special rules that facilitate claims against credit rating agencies.[371] As examples of possible special rules, Prorok referred to legal presumptions that help claimants to prove fault, causation or harm.[372] Although it does not necessarily justify the lack of special rules, the conclusion of Marini cited above that claims based on Article L. 544-5 will seldom be successful already prepared for this criticism and, in the words of Clédat, shows that the French legislative draftsmen '*étaient conscients de cette faiblesse*'.[373]

Not only the first, but also the second part of Article L. 544-5 – on the invalidity of exclusive jurisdiction clauses – led to discussion. Clédat, for instance, questioned the provision's capacity to subject disputes to '*jurisdictions françaises, selon les règles de droit français*'. Two reasons why he questions this capacity are that Article L. 544-5 does not prohibit a choice in favour of courts of other Member States and that Article L. 544-5 allows for non-exclusive jurisdiction clauses in favour of the courts of third countries.[374] The former reason to doubt this capacity could however not have been avoided by the

368 Moron-Puech 2017, p. 8, *as referring to JORF. Débats parlementaires. Sénat. Compte rendu intégral*, 1 October 2010, p. 7256, available at www.senat.fr/seances/s201010/s20101001/s20101001.pdf, last accessed at 31 August 2019.

369 Charcornac 2014, no. 1055.

370 Daigre 2011, p. 115 (*mentioned by* Chacornac 2014, no. 1055 and Prorok 2016, no. 467). *Cf. also* Clédat 2012, para II.B, who stated that the confirmation may seem surprising.

371 *Cf.* Prorok 2016, no. 467. *See also* Denis 2011, p. 77 who claimed that Art. L. 544-5 has made it more difficult to prove a credit rating agency made a fault and Clédat 2012, para I.B who claimed that Art. L. 544-5 does not develop credit rating agency liability.

372 Prorok 2016, no. 467.

373 P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010. Clédat 2012, para II.E.

374 Clédat 2012, para II.A. *Cf. also* Cappelie 2014, para 2.3 and Denis 2011, p. 75.

French legislature. A national prohibition to submit a dispute to the jurisdiction of another Member State would not have been in compliance with Article 25 (1) Brussels I Regulation (recast) that explicitly allows for such choice.[375] As another reason to doubt its effectiveness, Clédat pointed out that Article L. 544-5 remains silent on the topic of choice of law allowing parties to agree to apply another (non-French) law to their dispute.[376] Indeed, a prohibition of exclusive jurisdiction clauses differs from a prohibition of choice of law and Article L. 544-5 hence does not promote the application of French law.[377]

Similar criticism in terms of effectiveness has been formulated against Article L. 544-6, which forbids credit rating agencies from completely excluding their liability through exclusion clauses. In order to preclude credit rating agencies from evading this prohibition by including choice of law clauses in their contracts (*'délocalisation des contrats'*), several authors point out that, in first instance, the French *Sénat* adopted an amendment stating that Article L. 544-6 constituted an overriding mandatory provision (*'loi de police'*) under Article 9 (1) Rome I Regulation.[378] As a consequence, parties would not be able to escape the application of Article L. 544-6 by making a choice of law since, under Article 9 (2) Rome I Regulation, nothing in the Rome I Regulation 'shall restrict the application of the overriding mandatory provisions of the law of the forum'. As indicated by Prorok, Clédat and Denis, however, this amendment was not included in the final version of L. 544-6, so that parties could still escape the prohibition of exclusion clauses by choice of law.[379] Yet, since Article 35a (3) CRA Regulation currently prohibits exclusion clauses, this loophole has at least partly been closed.[380]

Finally, the system of Article L. 544-5 and Article L. 544-6 displays an inconsistency. On the one hand, according to the first part of Article L. 544-5, claims for damages must allegedly be based on non-contractual liability law. The existence of a contractual relationship between a credit rating agency and an issuer or an investor is hence not taken into consideration. On the other hand, by stating rules on jurisdiction and exclusion clauses, the second part of Article L. 544-5 and Article L. 544-6 in fact acknowledge that some sort of contractual relationship can exist between them. This recognition of the contractual relationship can also be derived from the explicit substantive prohibition of exclusion clauses under Article L. 544-6. As explained by Clédat, '*[s]i la responsabilité des agences de notation devait avoir un caractère exclusivement*

375 Denis 2011, p. 75.
376 Clédat 2012, para II.A. *Cf. also* Denis 2011, p. 75.
377 *Cf.* Denis 2011, p. 75 and Thépot 2010, p. 26.
378 P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010. *As pointed out by* Prorok 2016, no. 468, Clédat 2012, para II.A, Denis 2011, pp. 74-75 and Tchotourian 2011, no. 13.
379 Prorok 2016, no. 468, Clédat 2012, paras. II.A and II.D and Denis 2011, pp. 74-75. *Cf. also* Cappelie 2014, para 2.2.
380 *Cf.* Prorok 2016, no. 468, fn. 1129.

délictuel ou quasi délictuel, ces [i.e. Article L. 544-6] *stipulations seraient […] inutiles*',[381] because French tort law already generally forbids the exclusion and limitation of liability.[382] The somewhat peculiar result then seems to be that a claim for damages is governed by non-contractual liability law, except for the exclusion and limitation of liability which is governed by contract law if a contractual relationship between the credit rating agency and the issuer or the investor exists.

French courts have never awarded damages based on Article L. 544-5 Code monétaire et financier. This may not come as a surprise considering the critical remarks discussed, which show that succeeding in a claim for damages under French law continues to be difficult for claimants. Article L. 544-5 Code monétaire et financier did clarify the principal position under French law: credit rating agencies could be held liable by issuers and investors on the basis of Article L. 544-5 in accordance with the conditions of French non-contractual liability law under Article 1240 and 1241 CC.

(c) Abolition

In January 2018, the French legislature abolished the special liability regime under Article L. 544-5 and L. 544-6 Code monétaire et financier in response to the introduction of Article 35a CRA Regulation.[383] The aim of the French legislature was to converge the French rules on credit rating agency liability with the European rules: '*L'objectif de cet amendment est de faire converger le régime français de responsabilité civile des agences de notation de crédit vers le régime européen de droit commun*.'[384] The French legislature considered that the French regime under Article L. 544-5 Code monétaire et financier subjected credit rating agencies to stricter rules, such as the possibility for issuers to hold a credit rating agency liable in tort in the absence of a rating contract, and the absence of the requirement to prove causation between an infringement and an affected credit rating. Furthermore, the French legislature considered that the EU regime provided sufficient protection.[385] Yet, the French legislature did not conceal its actual motive underlying this alignment: '*La France alignera en revanche sa législation sur le droit commun de l'Union européenne, rendant l'activité des agences de notation de crédit sur son territoire lisible et stable*.'[386] Hence, the alignment seems driven by the wish to keep the activities of credit rating agencies on French territory comprehensible and stable. As Chapter 6 will go on to discuss, these amendments to French law demonstrate how competition between the Member States can lead to a decreased level of issuer

381 Clédat 2012, para II.B.
382 Castermans, Dankers-Hagenaars & Dejean de la Batie 2017, p. 24, Leveneur-Azémar 2017, no. 77, Viney, Jourdain & Carval 2017, no. 355 and *cf.* Bénabent 2016, no. 510.
383 Assemblée Nationale 14 January 2018, no. 907, Art. 32.
384 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 1.
385 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 2.
386 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 2.

and investor protection in some Member States – as compared to the situation prior to the introduction of Article 35a CRA Regulation.[387]

The *Exposé sommaire* demonstrates at least two flaws in the reasoning of the French legislature. First, the French legislature emphasises that Article 35a CRA Regulation creates a unified regime for the liability of credit rating agencies. The only argument supporting this statement is that the French legislature itself decided to align French law with Article 35a CRA Regulation. However, by not referring to Article 35a (4) CRA Regulation in the *Exposé sommaire* at all, the French legislature ignores reality and does not provide a complete picture of the current rules on credit rating agency liability at the EU level. Second, the French legislature emphasises on the one hand that French law is aligned with the regime under EU law exactly because French law would otherwise be more stringent on credit rating agencies, but, on the other hand, that '*la suppression ainsi proposée ne conduirait pas à une reduction substantielle des droit protégés*' and hence that the abolition does not substantially reduce the protected rights of issuers and investors.[388] These statements, however, plainly contradict each other.

Furthermore, even though the *Exposé sommaire* states that the abolition will render credit rating agency activities on French territory comprehensible ('*lisible*'), the *Exposé sommaire* actually leaves uncertainty as regards the current state of credit rating agency liability under French law. Upon the introduction of Article L. 544-5 Code monétaire et financier, the question was raised by French scholars as regards the added value of the provision because credit rating agencies were already considered subject to French private law as a matter of principle.[389] Moreover, Article L. 544-5 Code monétaire et financier was accused of '*donner le sentiment d'une immunité antérieure*'.[390] The same question can be raised as regards the abolition: does the abolition not have any substantive effects because credit rating agencies are subject to French liability law anyway or does the abolition imply that credit rating agencies are not subject to French liability law? The *Exposé sommaire* does not provide proper guidance in this regard, which is problematic from the perspective of legal certainty. Under section 5.5.2.2 and 5.5.2.3, the general rules of French private law in the context of credit rating agency liability are discussed, but the remarks made in this paragraph must be kept in mind when reading those sections.

387 Section 6.3.1.4.
388 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 2.
389 Daigre 2011, p. 115 (*mentioned by* Chacornac 2014, no. 1055 and Prorok 2016, no. 467). *Cf. also* Clédat 2012, para II.B, who stated that the confirmation may seem surprising.
390 Daigre 2011, p. 115 (*mentioned by* Chacornac 2014, no. 1055 and Prorok 2016, no. 467).

5.5.2.2 In the presence of a contractual relationship – investors & issuers

Questions on contractual liability will only arise when a credit rating agency concluded an agreement with an issuer or an investor. Both rating contracts concluded between credit rating agencies and issuers, and subscription contracts concluded between credit rating agencies and investors qualify as 'agreements' under Article 1101 CC. More specifically, the relationship between a credit rating agency and an issuer in the course of a rating contract has been qualified as a '*contrat de louage d'ouvrage*' or '*contrat d'entreprise*' (agreement for the execution of work) under Article 1708 in conjuction with Article 1710 CC.[391] The precise legal qualification of subscription contracts between a credit rating agency and an investor hardly received any attention in French academic literature, and is mostly qualified as 'contractual'.[392]

When a party breaches its obligations under the agreement, it must compensate the harm caused by the breach and interests under Article 1231-1 CC, unless the breach was caused by a *force majeure*. In French law, the apportionment of the burden of proof depends on the type of obligation that has been violated: *une obligation de résultat* (an obligation to obtain a certain result) or *une obligation de moyens* (an obligation to make a certain effort).[393] In relation to *obligations de résultat*, the burden of proof lies with the party who breached its obligations. While, in relation to *obligations de moyens*, the burden of proof lies with the claimant.[394] In order to decide whether an obligation qualifies as an *obligation de résultat* or an *obligation de moyens*, the decisive criterion is whether the obligation is characterised by an 'uncertainty', for instance, whether the party has a certain margin of discretion when fulfilling its obligations.[395] Rating contracts and subscription contracts involve mixtures of *obligations de résultat* and *obligations de moyens*, but claims for damages relating to allegedly incorrect credit ratings are concerned with an *obligation de moyens*

391 *E.g.* Thépot 2010, II.B.1, Dondero, Haschke-Dournaux & Sylvestre 2004, no. 23 and Couret 2003, no. 9. In the report of Chartier, more specifically, rating contracts were qualified even more in particular as *contrats d'ouvrage et d'industrie* under Art. 1779 (3) CC – Art. 1779 CC qualifies the main types of *contrats d'ouvrage et d'industrie*. *See* M.J. Chartier, 'Rapport fait au nom de la commission des finances, de l'économie générale et du contrôle budgétaire sur le projet de loi de régulation bancaire et financière (no. 2165) no. 2550', 25 May 2010, p. 72. *See also* Leclerc 2010, p. 152.

392 *As concluded by* Seibold 2016, p. 86 *in her legal comparison as well*. Leclerc 2010, p. 150, *as derived from* Seibold 2016, p. 86. A precise legal qualification lacks, for instance, in Dondero, Haschke-Dournaux & Sylvestre 2004, no. 67.

393 Bénabent 2016, no. 406. *Cf.* Malaurie, Aynès & Stoffel-Munck 2018, no. 941-942 and Tallon 2008, p. 229. *In the context of credit rating agency liability, the importance of this distinction has been emphasised by* Merville 2013, no. 14, Sotiropoulou 2013, no. 8, Leclerc 2010, p. 152 and Dondero, Haschke-Dournaux & Sylvestre 2004, no. 69. *See also* Seibold 2016, p. 54.

394 Bénabent 2016, no. 408 and no. 407, respectively.

395 Bénabent 2016, no. 411.

of a credit rating agency.[396] Indeed, a credit rating agency has a margin of discretion in deciding what credit rating to assign. Hence, it is up to the issuer or investor to prove that the credit rating agency failed to perform its obligations under the rating contract or the subscription contract. As an *obligation de moyens* is characterised by the fact that it does not involve an obligation to achieve a certain result, the sole fact that the result has not been achieved is not sufficient proof of a failure to meet contractual obligations. Rather, in order to prove such a failure, the claimant must show that the credit rating agency did not employ all reasonable means, care and diligence to fulfil its obligations, as compared to what could have been expected from a reasonable credit rating agency.[397]

5.5.2.3 In the absence of a contractual relationship – investors & issuers

In principle, due to the French principle of *non-cumul*, non-contractual liability only comes into play in situations in which the claimant and the defendant did not enter into a contractual relationship with each other. In the case of credit rating agency liability, non-contractual liability is thus only relevant in relation to unsolicited credit ratings and in the absence of subscriptions.

The fact that rating activities fall within the remit of French non-contractual liability law was made explicit by Article L. 544-5 Code monétaire et financier, and the abolition of this provision caused doubt as to whether credit rating agencies still fall within the remit of French non-contractual liability law. But if we assume that the abolition means that we return to the situation in French law prior to the introduction of L. 544-5 Code monétaire et financier, one can say that credit rating agencies are subject to French non-contractual liability law and do not enjoy complete immunity because of their right to freedom of speech.[398] In this context, reference has often been made to the case *LVMH v Morgan Stanley* – decided by the Court of Appeal of Paris – on the non-contractual liability of financial analysts.[399] In this case, the company LVMH

---

396 *See* Leclerc 2010, p. 152 and Dondero, Haschke-Dournaux & Sylvestre 2004, no. 69-78.

397 *Cf. in general* Bénabent 2016, no. 407 and Malaurie, Aynès & Stoffel-Munck 2018, no. 942. *Cf. also* Viney, Jourdain & Caval 2013, no. 533-3. *In the context of credit rating agency liability,* Dondero, Haschke-Dournaux & Sylvestre 2004, no. 78. *Cf. also* Sotiropoulou 2013, no. 9, Merville 2013, no. 14 and Leclerc 2008, pp. 153-155. Some of these references still refer to the standard of conduct of the *bon père de famille*, but this standard was replaced by the standard of reasonableness in French legislation by Loi n° 2014-873, 4 August 2014 pour l'égalité réelle entre les femmes et les hommes, *cf. also* Malaurie, Aynès & Stoffel-Munck 2018, no. 943.

398 Chacornac 2014, no. 1055 and Daigre 2011, p. 115 (*mentioned by* Chacornac 2014, no. 1055 and Prorok 2016, no. 467). *Cf. also* Clédat 2012, para II.B, who stated that the confirmation may seem surprising.

399 Tribunal de Commerce Paris 12 January 2004, no. 2002/93985 and Cour d'Appel de Paris 30 June 2006, no. 04/06308 (*LVMH v Morgan Stanley*). *E.g.* Charcornac 2014, no. 1031-1040, Sotiropoulou 2013, no. 29, A. de Montesquiou, 'Agences de notation: pour une profession

Moët Hennessy Louis Vuitton (in short: LVMH) claimed damages for, amongst others, reputational loss from Morgan Stanley for incorrect statements published by Morgan Stanley in its capacity of financial analyst. The Court of Appeal of Paris held that Morgan Stanley enjoyed the right of freedom of speech, though this right is not absolute. The Court of Appeal stated that:

> *'Les parties reconnaissent, en outre, que l'analyste financier doit pouvoir justifier du sérieux des sources, s'abstenir de diffuser des informations fausses ou trompeuses sur les perspectives ou la situation d'un émetteur d'instruments financiers ou sur les perspectives d'évolution d'un instrument financier'*.[400]

Subsequently, Morgan Stanley was subjected to French non-contractual liability law. The same reasoning can be applied to credit rating agencies as well. On the one hand, credit rating agencies have a right to freedom of speech. On the other hand, this right is not absolute and does not grant immunity from civil liability to credit rating agencies.

The main provisions regarding non-contractual liability can be found in Article 1240 and Article 1241 CC, requiring: (1) the occurrence of a fault ('*une faute*'); (2) the existence of harm ('*un dommage*'); and (3) the existence of a causal relationship between the fault and the harm ('*un lien de causalité*'). French law does not restrict the type of loss for which compensation can be claimed, so that claims can be brought for both pure economic loss and reputational loss.[401] The Code Civil does not provide a definition of 'fault'.[402] The term 'fault' is generally approached from an objective perspective, comparing the wrongdoer's conduct with the conduct of a reasonable man (prior to 2014, *le bon père de famille*, see section 5.5.2.2).[403] In the context of professional liability, the professional wrongdoer's conduct is compared with the conduct of a reasonable professional in the same field.[404]

5.5.3 Article 35a (1)

5.5.3.1 'Intentionally' or 'with gross negligence'

The French version of Article 35a CRA Regulation translates the required degree of culpability as '*de manière intentionnelle ou par négligence grave*'. French law distinguishes different types of *fautes* (faults) that qualify the gravity of the

règlementée (rapport)', 18 June 2012, Denis 2011, p. 73 and P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010.

400 Cour d'Appel de Paris 30 June 2006, no. 04/06308 (*LVMH v Morgan Stanley*).

401 *See* Whittaker 2008, p. 364.

402 *As stated literally by* Bacache-Gibeili 2016, no. 143.

403 Bacache-Gibeili 2016, no. 146-147 and *cf.* Bénabent 2016, no. 528.

404 Bacache-Gibeili 2016, no. 147 and *cf.* Bénabent 2016, no. 535.

conduct of the defendant. The classification, however, is subject to debate.[405] Bénabent makes a division on the basis of the gravity of the fault. He distinguishes between *faute volontaires* or *délibérées* (involving *faute intentionnelle, faute inexcusable* and *faute dolosive* (including *faute lourde*)), *faute simple* and *faute légère*.[406] But the different types of faults could also be structured by motive, depending on whether the defendant must have intended its act and/or the loss to occur (*faute intentionnelle* and *faute dolosive*) or not (*faute inexcusable, faute lourde*, *faute simple* and *faute légère*).[407]

The exact meaning of some of the faults is also subject to debate.[408] In a simplified outline, the different types can be defined as follows.[409] The *fautes volontaires* or *délibérées* involve some sort of consciousness (but not necessarily intent) on the side of the defendant. To have committed a *faute intentionnelle*, the defendant must have deliberately committed or omitted something and must also have intended the loss to occur as a result.[410] To have committed a *faute inexcusable*, in the words of Bénabent, the defendant must have committed a fault of '[*une*] *exceptionnelle gravité*' '*caracterisée sinon par l'intention de causer le dommage, par la conscience de sa probabilité*',[411] which could be qualified, in the words of Leveneur-Azémar, as 'wilful misconduct'.[412] As opposed to other types of faults, the term '*faute inexcusable*' was introduced by the French legislature and plays a role in specific legal areas such as labour law and transport law.[413] To have committed a *faute dolosive*, the defendant must have deliberately committed or omitted something, without necessarily having intended to cause any loss to the claimant.[414]

Even though it has been written that the *faute dolosive* '*assimilait*' ('is similar to') the *faute lourde*[415] and even though the blameworthiness of both faults may be similar, the category of *faute lourde* does not involve intentional conduct on the side of the defendant. Rather, it involves extreme negligence which can be qualified as worse than the degree of negligence involved in *fautes simples*.[416] Providing a clear definition of the term *faute lourde* is difficult, because the French legislature and the French courts have not developed a

405 *Cf.* Viney, Jourdan & Carval 2013, no. 609.
406 Bénabent 2016, no. 413-417.
407 *As described by* Viney, Jourdan & Carval 2013, no. 609, who stated that this division is controversial.
408 *Cf. for faute inexcusable, faute dolosive* and *faute lourde* Leveneur-Azémar 2017, no. 503.
409 *See in detail* Leveneur-Azémar 2017 and Viney, Jourdan & Carval 2017.
410 *As defined by* Bénabent 2016, no. 413, *referring to e.g.* Cour de Cassation (Chambre Civile 1) 2 February 1994, 92-10844, Bulletin 1994, I, no. 37, p. 29.
411 Bénabent 2016, no. 413. *Cf. also* Leveneur-Azémar 2017, no. 538 and no. 540.
412 Leveneur-Azémar 2017, no. 535.
413 Leveneur-Azémar 2017, no. 534. *Cf. also* Bénabent 2016, no. 413. *See in detail* Viney, Jourdan & Carval 2013, no. 618 ff.
414 *As defined by* Bénabent 2016, no. 413. *See in detail* Viney, Jourdan & Carval 2013, no. 618 ff.
415 *E.g.* Leveneur-Azémar 2017, no. 503 and Bénabent 2014, no. 412.
416 *Cf.* Viney, Jourdan & Carval 2017, no. 379.

clear definition over the years.[417] The French Court of Cassation provided the following definition in the 1950s: '*une négligence d'une extrême gravité dénotant l'inaptitude du débiteur à l'accomplissement de la mission contractuelle qu'il a acceptée*'.[418] A *faute lourde* is hence characterised by misconduct of such an extent that it is demonstrated that the defendant is not competent to perform its tasks. The conduct of the defendant is compared to the conduct of a reasonable party placed in the position of the defendant.[419] In relation to the definition provided by the French Court of Cassation, Leveneur-Azémar remarked: '*[L]e comportement particulièrement grave adopté par le débiteur caractérise la faute lourde. Il s'agit d'une grossière erreur, d'un comportement stupide, d'une négligence énorme.*'[420]

How can this overview of faults be translated into the terms '*intentionnelle*' and '*négligence grave*' under Article 35a CRA Regulation? The 'intention' of the credit rating agency must have been directed at causing the infringement and not necessarily at causing loss as well, so that 'intentional' as interpreted under French law mirrors the levels of gravity of the *faute intentionnelle* and *faute dolosive*. One could doubt whether *fautes inexcusables* are covered by the term 'intentional', but they will be considered at least a '*négligence grave*'. In conclusion, the terms 'intention' and 'gross negligence' under French law cover situations in which the credit rating agency: (1) intended the infringement and the consequences of its conduct to occur (derived from the *faute intentionnelle*); (2) intended the infringement to occur but not necessarily intended to cause any loss (derived from the *faute dolosive*); and (3) was conscious or should have been conscious of the possibility that loss would occur, but decided to carry on anyway (derived from the *faute inexcusable*). In addition, the French interpretation of gross negligence covers situations that French law describes as '*fautes lourdes*'; situations in which the credit rating agency did not intend to commit an infringement or was not conscious of potential risks, but acted with such a high degree of negligence compared to how a reasonable credit rating agency would have acted in the same position, that it is demonstrated that the credit rating agency was not competent to fulfil its tasks.[421]

417 *Cf.* Leveneur-Azémar 2017, no. 522-523. *Cf. also* Viney, Jourdan & Carval 2013, no. 610.

418 Cour de Cassation (Chambre Commerciale) 17 December 1951, Bulletin, II, no. 396. *As derived from* Leveneur-Azémar 2017, no. 524. *Confirmed by the* Cour de Cassation (Chambre Mixte) 22 April 2005, 03-14112, Bulletin mixt. 2005, no. 4, p. 10: '*une faute lourde, caractérisée par une négligence d'une extrême gravité confinant au dol et dénotant l'inaptitude du débiteur de l'obligation à l'accomplissement de sa mission contractuelle.*' Leveneur-Azémar 2017, no. 526 and Viney, Jourdan & Carval 2017, no. 380.

419 *Cf.* Viney, Jourdan & Carval 2017, no. 379 and Viney, Jourdan & Carval 2013, no. 611.

420 Leveneur-Azémar 2017, no. 524 and sources cited there. As described by Leveneur-Azémar, a *faute lourde* is not necessarily constituted by a single event. A range of *fautes légères* can also add up to a *faute lourde*. Leveneur-Azémar 2017, no. 529, *referring to* Cour de Cassation (Chambre Civile 1) 5 February 1957, *D.* 1957, p. 232 and Viney, Jourdan & Carval 2013, no. 611-1.

421 Wimmer 2017, pp. 331-332 reached similar conclusions in her legal comparison.

5.5.3.2 'Impact' and 'caused to', including claimant-specific requirements

(a) General rules on causation

As stated in section 5.3.1.3, the terms 'impact', 'caused to' and the claimant-specific requirements are related to causation, and are therefore discussed together. French law has not adopted conceptualised, strict distinctions between different 'stages' of causation. The requirement of causation follows from the provisions on contractual and non-contractual liability under the Code Civil, but the Code Civil does not provide a precise definition of this requirement.[422] Article 1231-4 CC on contractual liability provides the most extensive description: '*Dans le cas même où l'inexécution du contrat résulte d'une faute lourde ou dolosive,* les dommages et intérêts ne comprennent que ce qui est une suite immédiate et directe de l'inexécution.'[423] Hence, the harm must be an immediate and direct result of the breach of contract.

The French basic test for causation is the *condicio sine qua non* test.[424] If the loss would not have occurred in the absence of the breach of contract or the fault, the *condicio sine qua non* test is fulfilled.[425] If multiple events together caused the harm, all events stand in a *condicio sine qua non* relationship to the harm. In such situations, the question arises whether French law makes a selection of relevant causal events. French doctrine distinguishes two main theories in this regard: the theory of equivalence and the theory of causal adequacy. According to the theory of equivalence, each event that fulfils the *condicio sine qua non test* is considered a legally relevant cause of the harm.[426] Under the theory of causal adequacy, only '*la cause efficiente, c'est-à-dire qui devait ou risquait normalement de produire un tel dommage*' – so an efficient cause which, so to say, normally causes or entails the risk of causing the harm – will be considered as the legally relevant cause of the harm.[427] French courts have not expressed a preference for either of these theories and apply them both depending on the exact circumstances of the case.[428]

---

422 In relation to French non-contractual liability law, Bacache-Gibeili referred to Art. 1240 and 1241 CC. Art. 1240 CC: *'Tout fait quelconque de l'homme, qui* cause *à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.'* Art. 1241 CC: '*Chacun est responsable du dommage qu'il a* causé *non seulement par son fait, mais encore par sa négligence ou par son imprudence.'* Emphasis added [DJV]. Bacache-Gibeili 2016, no. 485. *Cf.* Bacache-Gibeili 2016, no. 492. The *Projet de réforme de la responsabilité civile Mars 2017* proposes to codify the requirement of causation under Art. 1239.

423 Emphasis added [DJV]. *See* Viney, Jourdain & Carval 2013, no. 348.

424 *Cf.* Bacache-Gibeili 2016, no. 489 and Viney, Jourdain & Carval 2013, no. 353.

425 Viney, Jourdain & Carval 2013, no. 353.

426 Bénabent 2016, no. 544, *cf.* Bacache-Gibeili 2016, no. 495, *cf.* and Viney, Jourdain & Carval 2013, no. 339 and *in detail* Quézel-Ambrunaz 2010, no. 19 ff.

427 Bénabent 2016, no. 544. *Cf. also* Bacache-Gibeili 2016, no. 497.

428 *Cf.* Bénabent 2016, no. 544, Bacache-Gibeili 2016, no. 501 and Van Dam 2013, no. 1105.

The burden of proof in respect of causation – and more in general – lies with the claimant as a matter of principle.[429] Yet French courts are free to appreciate the evidence of the *condicio sine qua non* relationship.[430] It is often difficult to provide conclusive evidence of the causal relationship, but, as described by Quézel-Ambrunaz, French courts tend to adopt a flexible approach.[431] They can facilitate the claimant by holding that several indications demonstrate the existence of the line of causation or by excluding other potential causes of the harm so that the cause at stake remains as cause of the harm.[432] If the causal relationship is inherently uncertain, French courts tend to apply the doctrine of loss of chance – as discussed under (b).

In the context of credit rating agency liability, issuers and investors hence need to satisfy the *condicio sine qua non* test in principle. Issuers must prove that (1) had the infringement not occurred, the credit rating would have been different (the requirement of 'impact'); and (2) had the infringement not occurred, the issuer would not have suffered additional funding costs and/or reputational loss. Proof of the latter element can, for instance, consist of rating triggers inserted in loan contracts and investment restrictions applicable to institutional investors.[433] Furthermore, investors must prove that (1) had the infringement not occurred, the credit rating would have been different (the requirement of 'impact'); and (2) had the infringement not occurred, the investor would not have suffered pure economic loss, i.e. the investor would not have purchased, maintained or sold the financial instruments.

Investors will often struggle with gathering proof of reasonable reliance. The case of *Pfeiffer v Société Eurodirect Marketing*, however, forms an example in which the claimant did succeed in proving reliance.[434] In this case, the management of the company Eurodirect Marketing published incorrect information on Eurodirect Marketing. At the time of the publication of the incorrect information, the claimant already possessed financial instruments

429 Bacache-Gibeili 2016, no. 506-507 and Bénabent 2016, no. 542. *For an example in French case law*, Cour de Cassation (Chambre Civile 2) 15 November 1989, 88-18310, Bulletin 1989, II, no. 206, p. 106: '*Que, de ces constatations et énonciations, la cour d'appel a pu déduire que la société des Remorques Cazenave* [the claimant] *n'apportait pas la preuve de l'existence d'un lien certain de causalité entre la projection prétendue d'étincelles et le déclenchement de l'incendie et, par ces seuls motifs, a justifié sa décision;'*. *In the context of civil liability and disclosure obligations,* Sotiropoulou 2012, no. 567.

430 *Cf.* Quézel-Ambrunaz 2010, no. 284.

431 *Cf.* Quézel-Ambrunaz 2010, no. 285. *See also* Van Dam 2013, no. 1107-2.

432 Quézel-Ambrunaz 2010, no. 286. *Cf. also* Bacache-Gibeili 2016, no. 508 and Van Dam 2013, no. 1107-2.

433 *Cf.* Sotiropoulou 2013, no. 28. Thépot 2010, para B.2 remarked that the sole existence of a rating trigger would not render the harm suffered by the issuer foreseeable under French law.

434 Cour d'Appel de Colmar 14 October 2003, no. 01/03432 (*Pfeiffer v Société Eurodirect Marketing*) and Cour de Cassation (Chambre Commerciale) 22 November 2005, 03-20600 (*Pfeiffer v Société Eurodirect Marketing*). *See* Prorok 2016, no. 214, Vandendriessche 2015, no. 338 (for a similar brief description of the facts) and Chacornac 2014, no. 890.

issued by Eurodirect Marketing. Subsequent to the publication of the information, the claimant checked the validity of the information with the directors of Eurodirect Marketing and purchased additional financial instruments in Eurodirect Marketing.[435] Under these circumstances, the Court of Appeal of Colmar and the French Court of Cassation accepted the existence of a causal relationship between the incorrect information and the purchase of the financial instruments. The dominant method to deal with this type of case under French law, however, is the application of the doctrine of loss of chance – as discussed under (b).

If the requirements for liability are fulfilled, a defendant can raise the defence of '*a cause étrangère*'.[436] As defined by Bacache-Gibeili, '*causes étrangères*' are events, actions or omissions that stand in a *condicio sine qua non* relationship to the harm, but do not relate to the conduct of the defendant.[437] If the *cause étrangère* was unforeseeable ('*imprévisible*') and irresistible ('*irrésistible*'), French law qualifies the cause as *force majeure*. A *force majeure* breaks the link of causation between the defendant's conduct and the harm completely and, as a consequence, absolves the defendant from liability.[438] If the *cause étrangère* lacks a *force majeure* character, causation can be shared between the conduct of the defendant and the *cause étrangère*. Such a situation occurs, for instance, when the harm was partly caused by the claimant's own fault. Then, the claimant will not be entitled to full compensation of its harm and the liability of the defendant will hence be reduced.[439] Even though this defence of contributory negligence is discussed in the context of causation under French law, this topic will be discussed in section 5.5.3.3 (c) for the purposes of the legal comparison.

(b) Opportunities to deal with causal uncertainty concerning reliance

As discussed in section 5.3.1.3, Article 35a (1) CRA Regulation requires investors to have reasonably relied on credit ratings. Gathering such evidence is however difficult and sometimes impossible, so that investors will often have trouble satisfying the *condicio sine qua non* test. As described under (a), French courts can approach the existence of a causal relationship with a certain flexibility. In addition, this section investigates whether French law leaves room to apply the doctrine of loss of chance in cases concerning credit rating agency liability claims brought by investors.

The doctrine of loss of chance or *perte de chance* has a broad scope of application in French private law. French courts have used the concept both

435 Cour d'Appel de Colmar 14 October 2003, no. 01/03432 (*Pfeiffer v Société Eurodirect Marketing*).
436 Bacache-Gibeili 2016, no. 529.
437 *See* Bacache-Gibeili 2016, no. 530.
438 *See* Bacache-Gibeili 2016, no. 532-533.
439 *See* Bacache-Gibeili 2016, no. 557-558.

to solve situations in which the causal relationship between the fault and the harm (*dommage*) was uncertain and situations in which the exact amount or magnitude of loss (*préjudice*) was uncertain. In the former situation, the doctrine of loss of chance serves to replace the harm suffered with the lost chance, so that the claimant must prove the causal relationship between the defendant's conduct and the lost chance. French law requires the claimant to prove that the conduct of the defendant caused the claimant to lose an actual and certain chance to avoid the occurrence of the harm.[440] In the latter situation, the doctrine of loss of chance serves as a tool to calculate the damages.

In the context of this dissertation, we are mainly concerned with the former application of the doctrine of loss of chance under French law. The first traces of this application of the doctrine of loss of chance by the French courts can be found in a case decided in 1889, in which the claimant lost a chance to win legal proceedings due to a fault made by a legal official.[441] Over the years, French courts expanded the application of the doctrine of loss of chance. The concept is currently applied to all sorts of situations in which the defendant breached its obligations to provide correct and complete information, for instance, in medical and financial law. For the purposes of this dissertation, we will concentrate on the application in the area of financial law in more detail.[442] French legal scholars have not always welcomed the broad application of loss of chance. On the one hand, the doctrine of loss of chance helps claimants and distributes the consequences of causal uncertainty between the parties. As the height of the award of damages depends on the size of the lost chance, the doctrine of loss of chance has been said to allow for a golden mean instead of an all-or-nothing approach.[443] On the other hand, French legal scholars severely criticised the broad application, especially in the field of medical law. The current broad application is sometimes considered flawed,

440 Cour de Cassation (Chambre Civile 1) 21 November 2006, 05-15674, Bulletin 2006, I, no. 498, p. 443. Rapport du Club des Juristes 2014, no. 17, with regard to this decision of the French Court of Cassation: '*Autrement dit, pour être réparable, la perte d'une chance doit être réelle et sérieuse et constituer par conséquent un préjudice certain*.' Note that the doctrine of loss of chance differs from causal presumptions. A presumption of causation transfers the burden of proof upon the defendant, while the doctrine of loss of chance only eases the burden of proof of the claimant.

441 Cour de Cassation req. 17 July 1889, *S.* 1891, 1, p. 399, *as derived from* Nuninga, Verheij, Kahn, Auvray & Borucki 2020 (forthcoming), no. 1 and no. 6.

442 As some background information, it can be remarked that French courts apply the doctrine of loss of chance broadly in medical law. The concept does not only find application in informed consent cases, but also in cases in which a doctor negligently treated a patient as a consequence of which the patient lost a chance at a better result concerning its health. In respect of the latter form of application, *see e.g.* Cour de Cassation (Chambre Civile 1) 14 October 2010, 09-69195, Bulletin 2010, I, no. 200 and Cour de Cassation (Chambre Civile 1) 14 December 1965, Bulletin 1965, I, no. 707.

443 *See* Bénabent 2016, no. 550.

because it also covers situations that, strictly speaking, should not be considered loss of chance cases.[444]

French courts apply the doctrine of loss of chance where an investor claims to have suffered harm caused by the purchase, preservation or sale of financial instruments based on incorrect or incomplete information.[445] As put forward in French literature, the doctrine of loss of chance was used for the first time in financial litigation in *Flammarion*.[446] In *Flammarion*, the investor claimants sold their financial instruments in the company Flammarion after a statement containing negative information was published by Flammarion. The statement, however, did not contain information on pending negotiations with an Italian investor for the acquisition of Flammarion. Five days after the claimants had sold their shares for EUR 41 per share, the Italian investor offered to buy the shares in Flammarion for EUR 78.20 per share.[447] The Court of Appeal of Paris held that the loss consisted of a loss of chance to sell the shares to the Italian investor: '*Considérant que le préjudice subi par les appelants est constitué par* la perte de chance *de céder leurs actions au groupe RCS* […].'[448]

In subsequent case law, the French courts expanded the application of the doctrine of loss of chance to situations in which damages were claimed for the purchase and preservation of financial instruments based on incorrect information.[449] Moreover, whereas the investors had lost a concrete chance in *Flammarion* to sell their shares for a better price, in subsequent case law, French courts accepted that investors lost a chance in the sense that they lost autonomy to make a more beneficial investment decision.[450] In *Sidel*, the investor claimants had based their investment decisions on balance sheets that did not mirror the actual state of the company Sidel.[451] The Court of Appeal of Paris solved the case by applying the doctrine of loss of chance:

> '*Que ceux-ci ont de ce fait, pendant la période de prévention et jusqu'au 11 avril 2001, date à laquelle les faits ont été publiquement révélés, été empêchés de prendre des décisions*

444 This argument is especially put forward in some cases of medical negligence, *see e.g.* Borghetti 2013. In the field of financial law, Sotiropoulou 2016. *Cf.* Nuninga, Verheij, Kahn, Auvray & Borucki 2020 (forthcoming), no. 7.

445 Chacornac 2016, no. 93 and Rapport du Club des Juristes 2014, no. 20. The line in the case law has mainly been derived from Chacornac 2016, Prorok 2016, Chacornac 2014 and Rapport du Club des Juristes 2014.

446 Prorok 2016, no. 218 and Chacornac 2016, no. 97. Cour d'Appel de Paris 26 September 2003, no. 2001/21885 (*Flammarion*) and Tribunal de Grande Instance de Paris 15 November 2001, no. 2000/18125 (*Flammarion*).

447 Cour d'Appel de Paris 26 September 2003, no. 2001/21885 (*Flammarion*). *See also* Prorok 2016, no. 218 and Dezeuze 2004.

448 Cour d'Appel de Paris 26 September 2003, no. 2001/21885 (*Flammarion*). Emphasis added [DJV].

449 *Cf.* Chacornac 2016, no. 95 and Rapport du Club des Juristes 2014, no. 20.

450 Sotiropoulou 2016, p. 51 and *cf.* Sotiropoulou 2012, no. 502.

451 Cour d'Appel de Paris 17 October 2008, no. 06/09036 (*Sidel*) and Tribunal Correctionnel de Paris (11th ch.) 12 September 2006, no. 0018992026 (*Sidel*).

sur la base d'informations sincères, qu'ils n'ont pu prendre en connaissance de cause leur décision d'investissement et ont été privés de la chance d'effectuer des arbitrages éclairés, de mieux investir leur argent; *Que le préjudice direct et personnel ainsi subi par les actionnaires,* en achetant ou conservant *une action aux perspectives prometteuses surévaluées, est distinct de celui subi par la société ellemême;*'[452]

In short, the Court of Appeal of Paris held that the investors were not able to take an investment decision on the basis of truthful information and were therefore deprived of the chance to take informed decisions and to invest their assets better. The lost chance actually consists of a loss of autonomy and does not concern a concrete opportunity that has been lost.

In *Gaudriot*, the French Court of Cassation confirmed that the doctrine of loss of chance can apply to cases concerning the liability for the incorrect or incomplete disclosure of information in the context of the financial sector, as already done by the Court of Appeal of Paris in *Sidel*.[453] In this case, the management of the company Gaudriot disseminated information providing an incorrect impression of the company Gaudriot. Initially, the Court of First Instance of Guéret qualified the loss suffered by the claimants (investors in the company Gaudriot) as a loss of chance.[454] On appeal, the Court of Appeal of Limoges reversed the decision and considered that the qualification of the Court of First Instance of Guéret was incorrect:

'*Attendu par ailleurs, sur le préjudice,* que si c'est improprement que le premier juge a considéré que le préjudice s'analysait en un perte de chance *d'investir ailleurs leurs économies, alors qu'il est en réalité, comme rappelé précédemment, au minimum de l'investissement réalisé ensuite des informations tronquées portées à la connaissance des actionnaires, sa décision mérite cependant confirmation sur le montant des sommes allouées à titre de dommages et intérêts;*'[455]

The Court of Appeal of Limoges hence instead analysed to what extent the incorrect information had actually influenced the investment decision of the claimant.[456] The French Court of Cassation, however, proceeded to reverse the decision of the Court of Appeal of Limoges. The French Supreme Court explicitly held that in this type of case, the claimant only suffers a loss of chance to make a fully and well-informed investment decision:

'*Attendu que celui qui acquiert ou conserve des titres émis par voie d'offre au public au vu d'informations inexactes, imprécises ou trompeuses sur la situation de la société émettrice*

452 Cour d'Appel de Paris 17 October 2008, no. 06/09036 (*Sidel*). Emphasis added [DJV].
453 Cour de Cassation (Chambre Commerciale) 9 March 2010, 08-21547 and 08-21793, Bulletin 2010, IV, no. 48 (*Gaudriot*). Chacornac 2016, no. 97, Chacornac 2014, no 867 and no. 881, Sotiropoulou 2016, p. 51 and Rapport du Club des Juristes 2014, no. 21.
454 *See* Prorok 2016, no. 248.
455 Cour d'Appel de Limoges 6 October 2008, no. 07/00286 (*Gaudriot*). Emphasis added [DJV].
456 Prorok 2016, no. 249.

> perd seulement une chance *d'investir ses capitaux dans un autre placement ou de renoncer à celui déjà réalisé;*'[457]

The French Court of Cassation held that the investor only lost a chance, so that full compensation was not possible.

The French Court of Cassation again allowed the application of the doctrine of loss of chance in the case *Marionnaud*.[458] In *Marionnaud*, the investor – the company Afi Esca – purchased financial instruments issued by the company Marionnaud during a period in which Marionnaud published statements which did not correctly present Marionnaud's financial situation. The Court of Appeal of Paris awarded damages for loss of chance to Afi Esca.[459] The French Court of Cassation confirmed the decision of the Court of Appeal of Paris and allowed the application of the doctrine of loss of chance:

> '*que la société Esca avait été, de manière certaine, privée de la possibilité de prendre des décisions d'investissements en connaissance de cause et de procéder à des arbitrages éclairés, en particulier en renonçant aux placements déjà réalisés, la cour d'appel, qui n'avait pas à procéder à la recherche et pas davantage à répondre aux conclusions inopérantes invoquées par le moyen, a caractérisé le lien de causalité entre les fautes commises par la société et le préjudice, s'analysant en une perte de chance, subi par la société Esca; que le moyen n'est pas fondé;*'[460]

In conclusion, French law regularly applies the doctrine of loss of chance where an investor has suffered loss 'as a consequence' of the dissemination of incorrect or incomplete information to the financial markets. The doctrine applies to the purchase, preservation and sale of financial instruments. French courts have not required that the investor missed out on a concrete chance to take an alternative investment decision, but instead have allowed compensation for the investor's loss of autonomy. The issuer interfered in the investor's decision-making process and prevented the investor from the opportunity to make a fully and well-informed investment decision. An investor hence needs to establish causation between the issuer's fault and the lost chance, and not between the issuer's fault and the pure economic loss suffered on the investments. In this way, French law entitles investors to damages rather soon, but the compensation of the loss is partial only: the award of damages is capped at the height of the lost chance (see section 5.5.3.3 (b)). Moreover, as stated

457 Cour de Cassation (Chambre Commerciale) 9 March 2010, 08-21547 and 08-21793, Bulletin 2010, IV, no. 48 (*Gaudriot*). Emphasis added [DJV]. *See also* Prorok 2016, no. 250, Chacornac 2016, no. 97, Vandendriessche 2015, no. 329 and no. 347 and Rapport du Club des Juristes 2014, no. 21.

458 *See* Chacornac 2016, no. 97, Prorok 2016, no. 256, Sotiropoulou 2016, p. 51 and Rapport du Club des Juristes 2014, no. 21.

459 Cour d'Appel de Paris 19 March 2013, 2011/06831 (*Marionnaud*).

460 Cour de Cassation (Chambre Commerciale) 6 May 2014, 13-17632 and 13-18473, ECLI:FR:CCASS:2014:CO00430, Bulletin 2014, IV, no. 81 (*Marionnaud*).

by Sotiropoulou, the cases of *Gaudriot* and *Marionnaud* imply that the French Court of Cassation prefers partially compensating investors through application of the doctrine of loss of chance to fully compensating the loss suffered by investors.[461]

In the context of credit rating agency liability, the question arises whether French courts would apply the doctrine of loss of chance to claims brought by investors against credit rating agencies. Caution must be exercised in the absence of case law confirming this matter, but French law leaves room to apply this doctrine to claims for damages brought by investors against credit rating agencies.[462] The fact patterns and corresponding evidentiary problems are similar, whether the investor must prove reliance on credit ratings or on incorrect or incomplete information disseminated by issuers. In both situations, the investor can argue to have lost an opportunity to make a completely and well-informed investment decision because the issuer or the credit rating agency affected their decision-making process by publication of certain information or a credit rating. French courts do not refuse to apply the doctrine of loss of chance when the hypothetical sequence of events – what would the claimant have done? – and the lost chance depend on the conduct of the claimant (the investor). On the contrary, the loss of the investor's autonomy is an interest protected by French private law. Hence, investors can frame their claim against a credit rating agency as a loss of chance case and French law leaves room to apply the doctrine of loss of chance to situations in which investors claim to have lost chances to take fully and well-informed investment decisions due to affected credit ratings.

5.5.3.3 Suffering 'damage' and claiming 'damages'

(a) Nature of reparable loss and calculation of the amount of damages

The Code Civil does not generally codify the French law of damages and, in the area of non-contractual liability law, the French law of damages is made up by general principles.[463] French law distinguishes between material loss ('*préjudice matériel*' or '*préjudice patrimonial*') and immaterial loss ('*préjudice moral*' or '*préjudice extrapatrimonial*'),[464] but does not restrict the compensation of

461 Sotiropoulou 2016, p. 52. *Cf. also in respect of Gaudriot,* Vandendriessche 2015, no. 329 and no. 347.

462 *Cf.* Sotiropoulou 2013, no. 25. *Although this option is not referred to by* Quézel-Ambrunaz 2017, pp. 242-243.

463 The *Projet de réforme de la responsabilité civile Mars 2017* proposes to codify part of the current French law of damages. Art. 1235 proposes a codification of the principle of full compensation, Art. 1238 proposes a codification of the doctrine of loss of chance and Art. 1258 proposes a codification of the method to calculate the loss. These proposed provisions do not provide for fundamental changes in comparison to the current state of the law as developed by the French courts.

464 Bacache-Gibeili 2016, no. 423 and Bénabent 2016, no. 656-657. For a slightly different distinction, Steiner 2018, pp. 259-260.

any type of loss as a matter of principle. All types of loss are eligible for compensation, as long as the loss is certain, direct, and legitimate.[465] The requirement of directness also filters out remote types of loss which were, for instance, unforeseeable to the defendant.[466] In fact, this requirement is closely connected to the requirement of causation that the loss must be an immediate and direct result of the defendant's wrongful conduct. So, as long as the requirements of 'certain, direct and personal, and legitimate' are met, the compensation of pure economic loss as well as of lost chance – as will be discussed under (b) – is not problematic under French law.[467]

The French law of damages builds upon *le principe de la réparation intégrale* (the principle of full compensation).[468] To that end, French courts must determine in what position the aggrieved party would have been in the absence of the breach of contract or the fault.[469] The hypothetical factual scenario brought forward by the aggrieved party is hence of great importance to determine in what position the aggrieved party would have been. French courts must assess the amount of damages in the concrete circumstances of each case and cannot simply award a fixed sum of damages.[470] French courts have considerable freedom in assessing the amount of damages.

In the context of credit rating agency liability, increased funding costs, pure economic loss and reputational loss are eligible for compensation, as long as the loss is certain, direct and personal, and legitimate. Issuers and investors are in principle entitled to full compensation which must be determined by comparing the actual sequence of events with the hypothetical sequence of events. Yet, investors can only receive full compensation, in the sense of the full transaction costs, if French courts do not apply the doctrine of loss of chance (as discussed under (b)), which is the common method for dealing with cases concerning the incorrect or incomplete dissemination of information to the financial markets under French law. The exceptional case of *Pfeiffer v Société Eurodirect Marketing* illustrates how the amount of damages can be calculated

465 Bacache-Gibeili 2016, no. 373 and Bénabent 2016, no. 659. *Cf. also* Steiner 2018, pp. 259-262.
466 *See* Whittaker 2008, p. 413.
467 *Cf. in respect of pure economic loss* Steiner 2018, p. 260 and Viney, Jourdain & Carval 2013, no. 251.
468 Steiner 2018, p. 259, Bacache-Gibeili 2016, no. 596, Bénabent 2016, no. 680 and Rapport du Club des Juristes 2014, no. 12.
469 *E.g.* Cour de Cassation (Chambre Civile 2) 9 July 1981, 80-12142, Bulletin 1981, II, no. 156, Cour de Cassation (Chambre Civile 2) 7 December 1978, 77-12013, Bulletin 1978, II, no. 269, p. 207, Cour de Cassation (Chambre Civile 2) 8 April 1970, 68-13969, Bulletin 1970, II, no. 111, p. 87 and Cour de Cassation (Chambre Civile 2) 28 October 1954, Bulletin II, no. 328. Steiner 2018, p. 259, Bacache-Gibeili 2016, no. 597, Bénabent 2016, no. 680 and Rapport du Club des Juristes 2014, no. 13.
470 *E.g.* Cour de Cassation (Chambre Civile 1) 3 July 1996, 94-14820, Bulletin 1996, I, no. 296, p. 206 and Cour de Cassation (Chambre Civile 3) 3 December 2015, 13-22503, ECLI:FR:CCASS:2015:C301335. Rapport du Club des Juristes 2014, no. 15.

if an investor has managed to prove reliance.[471] The Court of Appeal of Colmar determined the amount of damages by the following method:

> *'Le préjudice dont se prévaut M. Michel X est constitué par la différence entre le prix d'achat et le prix de vente des actions et bons de souscriptions d'actions acquis postérieurement à la publication du communiqué du 7 avril 1998.'*[472]

The Court of Appeal of Colmar fully compensated the total loss suffered by the investor by calculating the difference between the claimant's purchase price and the claimant's selling price of the shares, and the difference between the claimant's purchase price of the shares and the purchase price of the shares after the incorrect information was corrected. Hence, the total loss consists of the decrease in value entailed by the dissemination of the incorrect or incomplete information.[473] Nevertheless, under French law the question arises as well whether all loss resulting from an investment decision can be considered as 'direct' loss, i.e. whether the defendant can be held responsible for all negative consequences flowing from an investment decision.[474] The French courts, however, tend to apply the doctrine of loss of chance in this type of situation, so that the investor is not entitled to full compensation in the sense of the full transaction costs, but only to a fraction of the total loss.

(b) Loss of chance

As described in section 5.5.3.2 (b), French law leaves room to apply the doctrine of loss of chance to claims brought against credit rating agencies by investors. The application of the doctrine of loss of chance is compatible with the general requirement that loss must have a 'certain' character in order to be eligible for compensation. In the words of Bacache-Gibeili, the requirement of the certainty of loss '*ne fait pas non plus obstacle à la réparation de la perte de chance*'.[475] The aggrieved party is entitled to compensation if it can prove that the lost chance itself was actual and serious, in the sense of a real chance, and certain.[476] Hence, as the lost chance is qualified as the compensable loss,

471 Cour d'Appel de Colmar 14 October 2003, no. 01/03432 (*Pfeiffer v Société Eurodirect Marketing*) and Cour de Cassation (Chambre Commerciale) 22 November 2005, 03-20600 (*Pfeiffer v Société Eurodirect Marketing*).

472 Cour d'Appel de Colmar 14 October 2003, no. 01/03432 (*Pfeiffer v Société Eurodirect Marketing*). Sotiropoulou 2012, no. 502.

473 Prorok 2016, no. 215.

474 Spitz 2010, no. 440.

475 Bacache-Gibeili 2016, no. 377. *Cf. also* Rapport du Club des Juristes 2014, no. 17.

476 *E.g.* Cour de Cassation (Chambre Civile 1) 21 November 2006, 05-15674, Bulletin 2006, I, no. 498, p. 443. Rapport du Club des Juristes 2014, no. 17, with regard to this decision of the French Court of Cassation: '*Autrement dit, pour être réparable, la perte d'une chance doit être réelle et sérieuse et constituer par conséquent un préjudice certain.*' *Also* Cour de Cassation (Chambre Civile 1) 5 November 2009, 07-21442, Bulletin 2009, I, no. 220 in respect of a lost

the general requirement that the compensable loss must be certain is fulfilled by requiring that the lost chance must be certain. Actual and certain chances are not necessarily high chances; the French courts have awarded compensation for the loss of a chance of only 5%[477] and 10%.[478]

How do French courts calculate the award of damages if the loss concerns an actual and certain lost chance? As the claimant only lost a chance to prevent the loss from occurring, the claimant is not entitled to compensation to the full extent of its loss.[479] The Court of Appeal of Paris held in *Marionnaud*: '*Considérant que la réparation d'une perte de chance doit être mesurée à la chance perdue et ne peut être égale à l'avantage qu'aurait procuré cette chance si elle s'était réalisée*.'[480] The compensation must hence be measured as the lost chance, which French courts can do by multiplying the total loss with the lost chance.[481] The total loss depends on the hypothetical sequence of events put forward by the claimant. The hypothetical sequence of events concerns the situation in which the claimant would not have taken the detrimental investment decision.[482] The claimant could argue that the total loss involves, for instance, the profit it could have made by having invested its assets in another way.[483] In accordance with the general principles on compensation under French law, in a medical loss of chance case, the French Court of Cassation held that courts should not award a fixed sum of damages in loss of chance cases:

> '*Attendu, cependant, que, déterminée en fonction de l'état de la victime et de toutes les conséquences qui en découlent pour elle, l'indemnité de réparation de la perte de chance d'obtenir une amélioration de son état ou d'échapper à une infirmité*, ne saurait présenter un caractère forfaitaire;'[484]

---

chance to win a horse race. *Also* Bacache-Gibeili 2016, no. 389, Bénabent 2016, no. 663 and Rapport du Club des Juristes 2014, no. 17.

477 Cour de Cassation (Chambre Civile 2) 1 July 2010, 09-15594, Bulletin 2010, II, no. 128 on a lost chance in respect of the outcome of negotiations.

478 Cour d'Appel de Paris 14 September 2007, no. 07/01477 (*Regina Rubens*).

479 *E.g.* Cour de Cassation (Chambre Civile 1) 27 March 1973, 71-14587, Bulletin 1973, I, no. 115, p. 105. Rapport du Club des Juristes 2014, no. 17.

480 Cour d'Appel de Paris 19 March 2013, no. 2011/06831 (*Marionnaud*). *E.g. also* Cour de Cassation (Chambre Civile 1) 16 July 1998, 96-15380, Bulletin 1998, I, no. 260, p. 181. Rapport du Club des Juristes 2014, no. 17.

481 *Cf.* Bénabent 2016, no. 663.

482 Spitz 2010, no. 379.

483 In the context of financial litigation, Vandendriessche 2015 stipulated that '[m]ore particularly, to value the lost chance, the probability of the plaintiff making another investment decision must be multiplied with the result that would have been obtained' (Vandendriessche 2015, no. 354). Yet, the decisions in *Flammarion* and *Regina Rubens* hereafter demonstrate that the calculation method depends on the circumstances of the case.

484 Emphasis added [DJV]. Cour de Cassation (Chambre Civile 1) 18 July 2000, 98-20430, Bulletin 2000, I, no. 224, p. 147, *derived from* Rapport du Club des Juristes 2014, no. 17.

The Report *l'Évaluation du préjudice financier de l'investisseur dans les sociétés cotées* of the *Club des Juristes*, however, created a different picture of the way in which French courts calculate the amount of damages in financial litigation. Instead of calculating the exact amount of damages by multiplying the lost chance with the total loss suffered, the Report demonstrated that French courts tend to award fixed sums of damages: a fixed sum per financial instrument or a fixed sum in total.[485] In *Sidel* and *Vivendi*, the French courts awarded EUR 10 damages per financial instrument.[486] The decision of the Court of Appeal of Paris in *Sidel* lacked motivation.[487] In *Vivendi*, the Correctional Tribunal of Paris only justified the amount generally by taking '*l'aléa inherent à toute operation boursière et du nombre limité de communications en cause*' into consideration.[488]

In *Flammarion*, *Regina Rubens* and *Marionnaud*, the French courts awarded fixed sums of damages to compensate the investor completely at once.[489] The clearest example of an award of a fixed sum of damages can be found in the decision *Marionnaud.* The Court of Appeal of Paris provided no substantive motivation for the award of damages, except for a general statement that, considering the existence of investment risks, the amount of damages would be fixed at EUR 30,000: 'Que tenant compte de l'aléa que comportent les opérations d'investissement en bourse, il convient de fixer à la somme de 30 000 euros *la réparation du préjudice subi par la société AFI ESCA*;'[490]

In the earlier decisions *Flammarion* and *Regina Rubens*, the courts motivated their decisions somewhat more extensively. The reasoning of the courts in these decisions comes closer to the 'traditional' way of calculating damages in case of loss of chance (by multiplying the total loss with the lost chance), even though the courts had not done so explicitly. In *Flammarion*, the Court of Appeal of Paris did not mention the lost chance explicitly, but one can construct the height of the lost chance by reconstructing the way in which the damages were calculated. The claimants had lost a chance to sell their financial instruments in the company Flammarion to an Italian investor for a guaranteed price. With regard to the calculation of the award of damages, the Court of Appeal of Paris held:

485 Rapport du Club des Juristes 2014, no. 24-26. The case law described in this section is derived from the Rapport du Club des Juristes. *Also* Vandendriessche 2015, no. 354.

486 Rapport du Club des Juristes 2014, no. 25 and Chacornac 2016, no. 99.

487 Cour d'Appel de Paris 17 October 2008, no. 06/09036 (*Sidel*): '*Que cette perte de chance sera évaluée à 10 euros par action détenue.*' Rapport du Club des Juristes 2014, no. 25.

488 *See, for the quotation,* Prorok 2016, no. 257 and Rontchevsky 2011, no. 4. Tribunal Correctionnel de Paris (11th ch.) 21 January 2011, no. 0220696051 (*Vivendi Universal*).

489 Rapport du Club des Juristes 2014, no. 26. *Cf. also* Chacornac 2016, no. 99.

490 Cour d'Appel de Paris 19 March 2013, no. 2011/06831 (*Marionnaud*). Emphasis added [DJV]. The French Court of Cassation did not grant the appeal of Marrionaud in respect of causation.

'*Considérant que le préjudice subi par les appelants est constitué par la perte de chance de céder leurs actions au groupe RCS au prix de 78,20 €, c'est-à-dire pour le prix total de 78 200 € pour l'indivision Soulier au lieu de 40 722,85 €, et de 115 736 € pour la société Immobilière Tourangelle au lieu de 58 941,58 €; Qu'il y a lieu d'évaluer cette perte de chance qui, au vu des circonstances ci-dessus énoncées, était soumise à un aléa très faible, à la somme de 33 000 € pour l'indivision Soulier et à celle de 50 000 € pour la société Immobilière Tourangelle;*'[491]

The total loss of the claimants consisted of the price difference between the actual selling price and the guaranteed selling price. The first claimant, Soulier, hence suffered a total loss of EUR 37,477.15.[492] The second claimant, the company Immobilière Tourangelle, hence suffered a total loss of EUR 56,794.42.[493] The Court of Appeal of Paris held that the uncertainty in this situation was very weak ('*un aléa très faible*') and awarded EUR 33,000 damages to Soulier and EUR 50,000 damages to the company Immobilière Tourangelle. The lost chance was hence considered high, as the Court of Appeal of Paris reimbursed 88% of the total loss.[494]

In contrast, in *Regina Rubens*, the Court of Appeal of Paris considered the chance lost by the company LV capital (a professional investor[495]) to be small. The Court of Appeal of Paris estimated the total loss at EUR 3,000,000 by having calculated the difference between the purchase price and the actual value of the financial instruments ('*les dommages-intérêts s'apprécient à 3 MF, soit la différence entre le prix payé et la valorisation actuelle de ces actions*'[496]). With regard to the award of damages, the Court of Appeal of Paris held:

'*Considérant qu'à cet égard, il doit être tenu compte tout à la fois de ce que: –* l'impact des manipulations comptables était relativement faible *au moment de l'acquisition, – si ces manipulations se sont largement développées au 2ème semestre 1999 et au cours de l'année 2000, elles ont eu pour but de masquer les pertes d'exploitation importante enregistrées durant cette période, mais ne sont pas directement à l'origine de ces pertes, lesquelles résultent de facteurs économiques ou conjoncturels peu favorables aux valeurs du secteur d'activité considéré; – même si elle avait alors eu connaissance de la situation véritable de Régina Rubens SA, LV capital n'aurait pu aisément céder sa participation dans Régina Rubens holding, les facteurs qui l'avaient conduit s'investir n'étant pas exclusivement des éléments d'ordre comptable;* qu'une estimation de cette perte de

491 Cour d'Appel Paris 26 September 2003, no. 2001/21885 (*Flammarion*). Emphasis added [DJV].

492 Namely EUR 78 200 – EUR 40 722,85 = EUR 37 477,15.

493 Namely EUR 115 736 – EUR 58 941,58 = EUR 56 794,42.

494 *Cf.* Rapport du Club des Juristes 2014, no. 26. Namely, as regards the damages awarded to Soulier (EUR 33,000 / EUR 37,477.15) x 100% = 88,12% and as regards the damages awarded to the company Immobilière Tourangelle (EUR 50,000 / EUR 56,794.42) x 100% = 88,04%.

495 In *Regina Rubens*, the Court of Appeal of Paris calculated the damages for the small investors differently. *See, in-depth,* Prorok 2016, no. 239.

496 Cour d'Appel de Paris 14 September 2007, no. 07/01477 (*Regina Rubens*).

> chance à 10% des sommes investies *apparait de nature à réparer justement le préjudice matériel de LV capital, à laquelle sera donc alloués la somme de 300 000€ à titre de dommages-intérêts;'*[497]

The Court of Appeal of Paris hence analysed that the impact of the incorrect information had been small and explicitly estimated the lost chance at 10%.[498]

What general lines can be unravelled from these cases, which can then be applied to claims brought by investors against credit rating agencies? The case law analysed in the Report of the *Club des Juristes* demonstrates how French courts tend to award some sort of fixed amount of damages – per financial instrument or a fixed sum.[499] The loss of chance nature of the loss entails that the claimant is not entitled to full compensation so that the fixed amount will not extend to the total loss. The case law shows that French courts hardly motivate their decisions on the award of damages. Due to this lack of (proper) motivation, it is difficult to derive general guidelines from the case law which can help to predict how French courts will calculate the amount of damages in future cases.[500] Whereas the application of the doctrine of loss of chance helps to solve uncertainties regarding causation, the height of the lost chance and the amount of damages awarded form a source of new uncertainties. The height of the lost chance depends on the facts of the case and on estimations by the French courts. These considerations also apply to credit rating agency liability cases, where it has to be awaited how French courts will assess the chance that an investor in a concrete situation (subjective approach) would have made an alternative investment decision in the absence of the affected credit rating.

(c) Contributory negligence & mitigation of loss

French legal scholars normally discuss the topic of contributory negligence or '*faute de la victime*' in the context of causation.[501] However, for the sake of the legal comparison, the defence of contributory negligence is discussed here in the context of the calculation of damages. If the conduct of the aggrieved party stands in a *condicio sine qua non* relationship with the loss suffered, French law considers causation 'shared' between the fault of the aggrieved party and the fault or breach of the wrongdoer.[502] Shared causation justifies shared responsibility, allowing for a deviation of the principle of full

497 Cour d'Appel de Paris 14 September 2007, no. 07/01477 (*Regina Rubens*). Emphasis added [DJV].

498 Rapport du Club des Juristes 2014, no. 26. Prorok 2016, no. 238.

499 Rapport du Club des Juristes 2014, no. 24-26.

500 Rapport du Club des Juristes 2014, no. 26. *Similar criticism has been brought up by* Chacornac 2016, no. 99, Vandendriessche 2015, no. 354 and Sotiropoulou 2012, no. 502.

501 *E.g.* Bacache-Gibeili 2016, no. 557 ff. and Bénabent 2016, no. 553.

502 Bacache-Gibeili 2016, no. 536-537.

compensation.[503] If the defendant succeeds in a defence based on contributory negligence, French courts reduce the amount of damages awarded to the aggrieved party. In order to determine the exact reduction, French courts balance the seriousness of the faults made by the defendant and the claimant.[504]

The current French position regarding the mitigation of damages forms an exception within the EU. The Code Civil currently does not contain any duty to mitigate loss and the French Court of Cassation explicitly denied the existence of such duty.[505] The absence of such duty appeared clearly from two decisions of the French Court of Cassation in 2003 in non-contractual liability law: '*Attendu que l'auteur d'un accident doit en réparer toutes les conséquences dommageables;* que la victime n'est pas tenue de limiter son préjudice dans l'intérêt du responsable'.[506] The French Court of Cassation explicitly confirmed this position in 2014. It refused to reduce the amount of damages for a loss of chance suffered by an investor caused by incorrect advice of a notary for the reason that the notary had proposed measures to mitigate the loss suffered.[507] The aggrieved party thus has no duty to limit its loss in the interest of the wrongdoer, irrespective of whether the loss is of a purely economic nature.[508] The current position under French law hence allows the victim to sit back while its loss aggravates.[509] French courts justify their

503 *Cf.* Bacache-Gibeili 2016, no. 557 and Bénabent 2016, no. 553.

504 *See* Bacache-Gibeili 2016, no. 571, Bénabent 2016, no. 553 and Van Dongen 2014, pp. 348-349. *For the discretion of the French courts see* Cour de Cassation (Chambre Criminelle) 19 March 2014, 12-87416, ECLI:FR:CCASS:2014:CR01193, Bulletin criminel 2014, no. 86 and Cour de Cassation (Chambre Mixte) 28 January 1972, 70-90072, Bulletin criminel Chambre Mixte, no. 37, p. 86.

505 Steiner 2018, p. 259, Vandendriessche 2015, no. 293, Thiriez 2014, para I.B and Le Pautremat 2006, pp. 212-213. If the aggrieved party voluntarily mitigated its loss, it will not receive compensation for the loss that was avoided, Le Pautremat 2006, p. 206. The *Projet de réforme de la responsabilité civile Mars 2017* proposes change in this regard. Under the proposed Art. 1263, with the exception of cases involving personal injury, courts can reduce the award of damages if the aggrieved party failed to take safe and reasonable measures to avoid the aggravation of its loss.

506 Cour de Cassation (Chambre Civile 2) 19 June 2003, 00-22302, Bulletin 2003, II, no. 203, p. 171. *Also* Cour de Cassation (Chambre Civile 2) 19 June 2003, 01-13289, Bulletin 2003, II, no. 203, p. 171. Emphasis added [DJV]. *For a description of these cases,* Le Pautremat 2006, pp. 208-2010. *Cf. also* Bacache-Gibeili 2016, no. 561, Bénabent 2016, no. 423, Thiriez 2014, para I.A.1 and no. 564.

507 Cour de Cassation (Chambre Civile 1) 2 July 2014, 13-17599, ECLI:FR:CCASS:2014:C100826. *See also for a reiteration of the same basic position* Cour de Cassation (Chambre Civile 1) 6 September 2017, 16-19563, ECLI:FR:CCASS:2017:C100920.

508 Cour de Cassation (Chambre Civile 1) 2 July 2004, 13-17599, ECLI:FR:CCASS:2014:C100826, *cf.* Bacache-Gibeili 2016, no. 564.

509 Vandendriessche 2015, no. 293 and Le Pautremat 2006, p. 209.

decisions by reference to the principle of full compensation, although this position has been challenged by French legal scholars.[510]

Vandendriessche pointed out that the absence of the duty to mitigate loss does not necessarily mean that French courts will reach decisions that differ from those made by courts of others Member States that would apply the duty to mitigate.[511] Especially if the factual circumstances of the case resembled both a failure to mitigate and contributory negligence, French courts will apply the latter concept. In 2014, for instance, the French Court of Cassation reduced the damages for the reason of contributory negligence, while the facts of the case may also, if French law had been familiar with such a concept, have given rise to a duty to mitigate the loss.[512] The French Court of Cassation considered:

> '*qu'il relève encore que M. X... a pris des risques déraisonnables en investissant aussi massivement sur le marché des warrants et qu'il a été particulièrement imprudent en cherchant à compenser les pertes subies par des investissements de plus en plus importants,* qui n'ont fait qu'aggraver la situation débitrice de son compte; *que de ces constatations, faisant ressortir que M. X...* avait eu un comportement fautif ayant contribué à la réalisation de son propre préjudice, *la cour d'appel a pu déduire qu'il devait être tenu pour partiellement responsable de l'aggravation du solde débiteur de son compte;*'[513]

The French Court of Cassation states that the conduct of M. X has aggravated his loss, but qualifies that conduct as a fault which has contributed to the realization of the total amount of loss suffered by M. X. So that eventually one could derive from the reasoning of the French Court of Cassation that it reduced the damages for contributory negligence with regard to the realization of the total amount of loss. According to Viney, although the victim has no obligation to mitigate the loss, the French Court of Cassation makes a distinction between faults made by the victim which nevertheless lead to a reduction of the amount of damages and simple *faits* which do not justify a reduction of the amount of damages.[514] This distinction recalls the distinction made more generally in contributory negligence, where only faults (and not *faits*) lead to a reduction of damages. So it seems that if the victim has committed a fault and thereby contributed to the realization of the total amount of loss suffered, French courts can reduce the amount of damages even though the victim has no obligation to mitigate its loss.

---

510 Thiriez 2014, para I.A.2 and Le Pautremat 2006, pp. 209 and 212-216. *Cf. also* Vandendriessche 2015, no. 293.
511 Vandendriessche 2015, no. 293.
512 Cour de Cassation (Chambre Commerciale) 4 November 2014, 13-24196, ECLI:FR:CCASS:2014:CO00971, Bulletin 2014, IV, no. 156. *See also* Viney 2014. *For other examples, see* Vandendriessche 2015, no. 293.
513 Cour de Cassation (Chambre Commerciale) 4 November 2014, 13-24196, ECLI:FR:CCASS:2014:CO00971, Bulletin 2014, IV, no. 156.
514 Viney 2014.

5.5.4 Article 35a (3) Limitations of liability in advance

5.5.4.1 General system[515]

The rules on the admissibility of limitation clauses under French law were mainly developed in French case law.[516] The French law approach towards limitation clauses differs depending on whether the liability is of a contractual or non-contractual nature.[517] In relation to contractual liability, limitation clauses are valid as a matter of principle. In relation to non-contractual liability, parties may not limit their liability in advance.

(a) Limitation clauses and contractual liability

As a general rule, French contract law allows for the limitation of liability by contract. Exceptions are made for limitation clauses that concern the user's essential obligations under the contract and that limit liability even when the defendant made a *faute lourde* or a *faute dolosive*.[518] The exception was developed by the French courts[519] and is nowadays derived from Article 1231 (3) CC: '*Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qui pouvaient être prévus lors de la conclusion du contrat, sauf lorsque l'inexécution est due à une faute lourde ou dolosive.*'

The terms *faute lourde* and *faute dolosive* have been discussed in section 5.5.3.1 with regard to the requirement of 'intention' or 'gross negligence' under Article 35a (1) CRA Regulation. As explained, a *faute lourde* is characterised

515 The *Projet de réforme de la responsabilité civile Mars 2017* currently does not cause substantive changes to the analysis made in this section. Under Art. 1281, exclusion and limitation clauses are valid as a matter of principle. Under Art. 1282, in relation to contractual matters, exclusion and limitation clauses do not have effect in case of *fautes lourdes* or *fautes dolosives.* Under Art. 1283, in relation to non-contractual matters, liability cannot be excluded or limited for faults.

516 Prior to the withdrawal of Art. L. 544-5 and Art. L. 544-6 Code monétaire et financier, the latter provision explicitly stipulated that the clauses which completely exclude the civil liability of credit rating agencies were prohibited. The legislative proposal for Art. L. 544-6 initially introduced a prohibition on limitation clauses as well (P. Marini, 'Projet de loi de régulation bancaire et financière: Rapport', 14 September 2010), but this prohibition was removed in a later stage of the legislative process (*cf.* J. Chartier, 'Rapport fait au nom de la commission des finances, de l'économie générale et du contrôle budgétaire sur le projet de loi, modifié par le Sénat, de régulation bancaire et financière (no. 2833) no. 2848', 7 October 2010, p. 40). As a consequence, the question of whether and to what extent limitation clauses were admissible under French law was already left to the general rules of French private law.

517 *Cf.* Castermans, Dankers-Hagenaars & Dejean de la Batie 2017, p. 22 and Viney, Jourdain & Carval 2017, no. 330.

518 Bénabent 2016, no. 434 and no. 431 and Leveneur-Azémar 2017, no. 55, *both referring to* Cour de Cassation (Chambre Commerciale) 15 June 1959, 57-12362, Bulletin Chambre Commerciale, no. 265, p. 231. *In the context of credit rating agency liability,* Tchotourian 2011, para II, Thépot 2010, para II.B.1 and Seibold 2016, p. 149.

519 *E.g.* Cour de Cassation (Chambre Commerciale) 15 June 1959, 57-12362, Bulletin Chambre Commerciale, no. 265, p. 231.

by such extreme misconduct that it is shown that the defendant is not competent to fulfil its tasks. The conduct of the defendant is compared to the conduct of a reasonable party placed in the position of the defendant.[520] Furthermore, the term *faute dolosive* was used to describe situations in which the defendant deliberately committed an act or omission, while it did not intend to cause loss to the claimant as a consequence of its conduct.[521] The ease with which this definition was presented there, does however not mirror the debate on the meaning of the term *faute dolosive* under French law. Until the decision of the French Court of Cassation in *Société des Comédiens français*, the terms *faute dolosive* and *faute intentionnelle* were considered '*synonymes*'.[522] Both *fautes dolosives* and *fautes intentionnelles* were assumed to also require an intention to commit an act or omission as an intention to cause loss as a consequence. However, in the decision *Société des Comédiens français*, the scope of *fautes dolosives* was enlarged:

> '*Vu l'article 1150 du Code civil: Attendu que le debiteur commet une faute dolosive lorsque, de propos délibéré, il se refuse a exécuter ses obligations contractuelles, même si ce refus d'est pas dicté par l'intention de nuire à son cocontractant*'.[523]

Hence, for a *faute dolosive*, it is required that that the defendant intended to commit an act or omission (here, to violate its contractual obligations), but it is not required that the defendant intended any loss to occur.[524] In the area of limitation clauses, the exact difference between *faute intentionnelle* and *faute dolosive* is however less important, because the minimum threshold to bar the effect of a limitation clause is a *faute lourde*.[525] For that reason, this topic will not be discussed in more detail.

Furthermore, the special rules under the Code de la consommation apply to limitation clauses included in general terms and conditions of consumer contracts.[526] Under Article L. 212-1 Code de la consommation, a term may be regarded as 'unfair' if 'it causes a significant imbalance in the parties' rights and obligations: '*Dans les contrats conclus entre professionnels et consommateurs,*

520 *Cf.* Viney, Jourdan & Carval 2017, no. 379 and *cf.* Viney, Jourdan & Carval 2013, no. 611 (who compare the conduct of the defendant with what he should have done).

521 *As derived from* Bénabent 2016, no. 413.

522 Viney, Jourdain & Carval 2017, no. 375 and Leveneur-Azémar 2017, no. 504. Cour de Cassation (Chambre Civile 1) 4 February 1969, 67-11387, Bulletin 1969, I, no. 60 (*Société des Comédiens français*).

523 Cour de Cassation (Chambre Civile 1) 4 February 1969, 67-11387, Bulletin 1969, I, no. 60 (*Société des Comédiens français*).

524 Leveneur-Azémar 2017, no. 508 and *cf.* no. 513, Viney, Jourdain & Carval 2017, no. 375 and Bénabent 2016, no. 413.

525 Leveneur-Azémar 2017, no. 515.

526 The Code de la consommation implements the Unfair Terms Directive in French law. The scope of the provisions on unfair terms under the Code de la consommation also apply to 'non-professionals' under Art. L 212-2 Code de la consommation. Art. liminaire: 'toute personne morale qui n'agit pas à des fins professionnelles;'.

sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat.'[527] The Code de la consommation stipulates a grey and a black list with examples of terms presumed to be unfair and deemed to be unfair, respectively.[528] The exclusion and limitation of liability of a consumer's right to damages are included in the black list.[529] French law hence regards a general term or condition that involves a limitation of liability in a consumer contract to be unfair, thereby even gold-plating the provisions under the Unfair Terms Directive.[530]

(b) Limitation clauses and non-contractual liability

French law approaches the validity of limitation clauses in relation to non-contractual liability with much restraint. Limitation of liability is generally not admitted because that would restrict the application of Article 1240 and 1241 CC,[531] which are considered public policy provisions ('*l'ordre public*').[532] Parties are therefore also not allowed to contract themselves out of this prohibition.[533] This restrictive approach is not explicitly addressed by the Code Civil, but has been established by the French Court of Cassation:

> '*que sont nulles les clauses d'exonération ou d'atténuation de responsabilité en matière délictuelle, les articles 1382 et 1383 du Code Civil étant d'ordre public et leur application ne pouvant être paralysée d'avance par une convention*'.[534]

5.5.4.2 Limitations of liability in relation to issuers and investors

In general, the admissibility of limitation clauses depends on whether the claim for damages concerns contractual or non-contractual liability. As a matter of

527 Emphasis added [DJV]. Very similar to Art. 3 (1) Unfair Terms Directive.

528 Art. R. 212-2 and Art. R. 212-1 Code de la consommation, respectively.

529 Art. R. 212-1 (6) Code de la consommation. *Cf. on the incorporation in the black list* Seibold 2016, p. 156.

530 *See* Leveneur-Azémar 2017, no. 213. Under Art. 3 (3) and Annex (b) Unfair Terms Directive, the limitation of legal rights, as the right to damages, only forms part of the indicatory list of examples that may be regarded as unfair.

531 Art. 1382 and 1383 ancien CC. After the revision of the Code Civil of 10 February 2016, an exception has been made for limitation clauses regarding qualitative liability ('la responsabilité sans faute') under Art. 1281 and 1282 CC (Castermans, Dankers-Hagenaars & Dejean de la Batie 2017, p. 25 and *cf.* Viney, Jourdain & Carval 2017, no. 355). However, this exception is not relevant in the light of the system of fault-based liability introduced by Art. 35a CRA Regulation.

532 Castermans, Dankers-Hagenaars & Dejean de la Batie 2017, p. 24, Leveneur-Azémar 2017, no. 77, Viney, Jourdain & Carval 2017, no. 355 and Bénabent 2016, no. 510. *See, for a critical approach,* Leveneur-Azémar 2017, no. 82 ff.

533 Castermans, Dankers-Hagenaars & Dejean de la Batie 2017, p. 24 and Leveneur-Azémar 2017, no. 81. *Cf.* Bénabent 2016, no. 510.

534 Cour de Cassation (Chambre Civile 2) 17 February 1955, 55-02810, Bulletin 1955, II, no. 100, p. 59. *Derived from* Leveneur-Azémar 2017, no. 77.

principle, one can question whether Article 35a CRA Regulation concerns a matter of contractual or non-contractual liability law and whether limitations of liability would therefore be considered contrary to public policy under French law. However, in relation to claims based upon Article 35a CRA Regulation, it is not necessary to go this far. Regardless of any public policy nature of Article 35a CRA Regulation, under French private law, a credit rating agency cannot limit its liability for loss caused intentionally or by means of a *faute lourde* or a *faute dolosive*.[535] As described under section 5.5.3.1, one of the conditions for credit rating agency liability under Article 35a CRA Regulation is that the credit rating agency must have committed the infringement *de manière intentionnelle ou par négligence grave*. As the threshold for a *faute lourde* is in fact *négligence grave*, the level of 'fault' required under Article 35a CRA Regulation is comparable to the *faute lourde* under French law. The threshold for liability under Article 35a (1) CRA Regulation ('intention' or 'gross negligence' ('*de manière intentionnelle ou par négligence grave*')) and the threshold for singling out the effect of a limitation clause (*faute lourde* or a *faute dolosive*) hence boil down to the same minimum threshold: extreme misconduct on the side of the credit rating agency, showing that it is not able to fulfil its tasks. As a consequence, if an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence under Article 35a (1) CRA Regulation, a limitation clause included in the contract will also not have any effect under French law.

5.5.5 Prescription

Prior to 2008, French law employed long limitation periods and the law was scattered in the sense that different periods applied varying according to the type of claim.[536] With the law reform of 17 June 2008, the limitation periods were shortened and the amount of exceptions was reduced.[537] Under Article 2224 CC, the standard limitation period for the prescription of claims is 5 years: '*Les actions personnelles ou mobilières se prescrivent par cinq ans à compter du jour où le titulaire d'un droit a connu ou aurait dû connaître les faits lui permettant de l'exercer*.' This general limitation period does however not apply if special rules

535 *As discussed in the context of credit rating agency liability by* Tchotourian 2011, para II and Thépot 2010, para II.B.1. *Also* Seibold 2016, p. 149.

536 *Cf.* Bénabent 2016, no. 837. French law distinguishes between the passing of time that leads to the acquisition of a title (acquisitive or positive prescription, i.e. '*la prescription acquisitive*') and the passing of time that leads to the loss of a title (extinctive or negative prescription, i.e. '*la prescription libératoire ou extinctive*'). Malaurie, Aynès & Stoffel-Munck 2018, no. 1200.

537 Bénabent 2016, no. 838. *Cf.* Viney, Jourdain & Carval 2017, no. 601. Although the reform has been criticised for not having simplified the regime sufficiently, *see in more detail*, Malaurie, Aynès & Stoffel-Munck 2018, no. 1201.

prescribe deviating limitation periods pursuant to Article 2223 CC.[538] But, in the area of credit rating agency liability, the limitation period for claims concerning contractual and non-contractual liability is 5 years.[539] The limitation period starts to run as from the day that the holder of the right became acquainted or should have become acquainted with the facts that allow it to exercise its right (*'à compter du jour où le titulaire d'un droit a connu ou aurait dû connaître les faits lui permettant de l'exercer'*, Art. 2224 CC). The notion of acquaintance is interpreted subjectively and objectively, in the sense that the holder of the right should know or should have known the relevant facts. In order for the prescription period to start running, the wrongful act or omission – the infringement in the case of credit rating agency liability – must have at least been committed and the loss occurred. In the words of Klein: *'la prescription ne saurait courir avant la naissance de l'action'*.[540]

How should Article 2224 CC be applied in credit rating agency liability, and, more in particular, in how far does the French notion of loss play a role here? The limitation period will start to run at different moments depending on whether one deems the loss to arise at the moment the credit rating turns out to be wrong and the financial markets respond to that information, or at the moment the investor was not able to make a fully and well-informed investment decision. Yet, as appears from Article 2224 CC, if the issuer or investor can prove that he should not have been aware of the loss when it arose, the limitation period can also start to run later in time.[541] The right to claim damages will, however, nevertheless expire 20 years after the moment of the emergence of the right to claim damages under Article 2232 CC (*'à compter du jour de la naissance du droit'*).

5.5.6 Concluding remarks

During the time in which this national law report was drafted, the French approach to credit rating agency liability underwent important changes. Whereas French law was known for its stringent approach towards credit rating agencies under Article L. 544-5 and L. 544-6 Code monétaire et financier, the abolition of these provisions by the French legislature in January 2018 leaves the question open of whether credit rating agencies can still be held

538 In the words of Viney, Jourdain & Carval 2017, no. 600: *'Or celles-ci sont nombreuses.'* For instance, an extended limitation period of ten years applies under Art. 2226 CC to claims involving physical harm (*'dommage corporel'*).

539 *Cf. for the general limitation period* Viney, Jourdain & Carval 2017, no. 601-602. Prior to 2008, the limitation period for claims concerning non-contractual liability was ten years starting from the moment the damage occurred or aggravated (Art. 2270 (1) ancien CC). *Cf. also for the general limitation period* Bénabent 2016, no. 841.

540 Klein 2013, no. 64.

541 *Cf.* Klein 2013, no. 78.

liable under French private law or whether Article 35a CRA Regulation provides the only legal basis for a claim for damages brought by issuers and investors. The silence in French academic literature with regard to the abolition of Article L. 544-5 and L. 544-6 Code monétaire et financier contrasts greatly with the large amount of attention devoted to the introduction of the provisions in 2010. The abolition shows that Article 35a CRA Regulation influences national legislatures even though Article 35a (5) CRA Regulation allows Member States to impose stricter rules upon credit rating agencies.

French law does not provide explicit guidance on the interpretation and application of Article 35a CRA Regulation. Therefore, the interpretation and application was constructed in accordance with the principles of French private law derived from Book 3 Code Civil. French law leans towards a rather broad interpretation and application of Article 35a CRA Regulation. The threshold for 'gross negligence' involves serious negligence, and does not require subjective intent or recklessness. Furthermore, French courts can adopt a flexible approach to causation and may apply the doctrine of loss of chance in the context of credit rating agency liability claims brought by investors. The application of this doctrine can be debated within the scope of Article 35a CRA Regulation, because it replaces the requirement of reasonable reliance under Article 35a (1) CRA Regulation as part of the causal link between the infringement and the investment decision. From the perspective of legal certainty, the application of the doctrine of loss of chance can be criticised. Due to the fact that French courts do not provide extensive reasoning on how they assess the height of the lost chance and the corresponding amount of damages, it is difficult to predict how French courts will calculate the amount of damages awarded in future cases. In the context of Article 35a (3) CRA Regulation, it is expected that limitation clauses will hardly have effect under French law if an issuer or investor fulfilled the requirements of Article 35a (1) CRA Regulation. As the threshold for liability under Article 35a (1) CRA Regulation ('intention' or 'gross negligence') and the threshold for singling out the effect of a limitation clause (*faute lourde* or *faute dolosive*) boil down to the same minimum threshold, a limitation clause does not have effect under French law when an issuer or investor succeeds in proving a credit rating agency behaved intentionally or grossly negligent. In conclusion, French law leans towards a rather broad interpretation and application of Article 35a CRA Regulation to the benefit of issuers and investors.

5.6 German law

5.6.1 National private law context

This national law report concentrates on the interpretation and application of Article 35a CRA Regulation under German law. Similar to the private law systems of Dutch and French law, the German system of private law is of a civil law nature. The main codification of German private law is formed by the Bürgerliches Gesetzbuch (BGB, the German Civil Code). The Bürgerliches Gesetzbuch was introduced in 1900, upon the unification of Germany in 1871.[542] It essentially roots in Roman law, but was developed over the years by German scholars in the 'Historical School of Law' of Von Savigny.[543] The Bürgerliches Gesetzbuch is known for being heavily structured, for using abstract concepts and for being highly detailed. It was said to be addressed to lawyers, and not to ordinary citizens.[544] The same level of detail can be found in decisions of German courts and in German academic literature. German courts motivate their decisions extensively and refer to relevant legal literature in their decisions.[545]

The Bürgerliches Gesetzbuch splits German private law into five books. For the purpose of interpreting the terms of Article 35a CRA Regulation, the first book '*Allgemeiner Teil*' (general part) and the second book '*Recht der Schuldverhältnisse*' (the law of obligations) have been used. The second book involves general provisions applicable to all obligations (such as the provisions on compensation and damages, § 249 BGB ff.). Furthermore, it involves the rules relating to contractual liability (§ 280 BGB ff.) and non-contractual liability (§ 823 BGB ff.). Claimants can base a claim for compensation[546] on contract and tort law, as German law is not familiar with the principle of *non-cumul*.[547]

An overarching feature of German non-contractual liability law is that only the rights described by law are protected. German law hence does not involve a general open provision for non-contractual liability for unlawful conduct. § 823 (1) BGB, for instance, protects '*das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht*' (life, body, health, freedom, property or another right). If § 823 (1) BGB does not refer to a specific interest, that interest in principle does not fall within the protective scope of § 823 (1) BGB. Financial interests are not referred to in § 823 (1) BGB, and German law

542 *Cf.* Zimmermann 2005, pp. 7-8. Germany is a federal republic, yet private law belongs to the competence of the federal government, Van Dam 2013, no. 401-1.

543 *Cf.* Robbers 2017, no. 567-574, Dedek & Schermaier 2012, pp. 353-354 and Kötz & Wagner 1998, p. 138. *For a description of the process towards codification*, Zimmermann 2005, pp. 4-8 and Kötz & Wagner 1998, pp. 132-142.

544 Kötz & Wagner 1998, p. 144. *Cf. also* Zimmermann 2005, p. 10.

545 *Cf.* Dedek & Schermaier 2012, p. 362.

546 Under German private law, a claimant is entitled to *Schadensersatz* (compensation) under § 249 BGB. The term 'compensation' is used rather than the term 'damages', because German law in principle awards restitution in kind instead of monetary damages. See section 5.6.3.3 (a).

547 De Graaff 2017, no. 33, and in more detail, no. 30-37. *Cf.* Staudinger/Hager (2017) Vorbem zu §§ 823 ff., para 37.

generally approaches the compensation of pure economic loss reluctantly.[548] This feature of a limitative system of non-contractual liability will appear throughout this section frequently.

Finally, fundamental rights play an important role in German private law. The importance of fundamental rights increased after the Second World War, when the overarching Grundgesetz (GG, the Basic Law) was introduced. The Grundgesetz applies to the whole body of German law, and hence also influences German private law. As the highest competent court in disputes concerning fundamental rights established under the Grundgesetz, the German Constitutional Court can decide on disputes concerning private law matters and fundamental rights.[549]

5.6.2 National rules on credit rating agency liability

5.6.2.1 Much attention to credit rating agency liability

The liability of credit rating agencies received much attention both prior and subsequent to the introduction of Article 35a CRA Regulation in 2013. Many authors explained the application and interpretation of Article 35a CRA Regulation under German law, which provided information for the analysis made in this dissertation.[550] Furthermore, the amount of case law on the liability of credit rating agencies and credit scoring agencies is considerable, especially compared to the other legal regimes investigated in this dissertation. Aligned with the general character of German law, a tangled web of national grounds for liability exists. As we will see below, German law takes a restrictive approach towards the civil liability of credit rating agencies vis-à-vis investors; hardly any of the legal grounds discussed provide investors with a realistic legal basis for a claim for compensation against a credit rating agency.

548 Although compensation for pure economic loss can be claimed under other provisions of the BGB, and sometimes even under § 823 (1) BGB, as will be discussed under section 5.6.2.3 (a) (i). *Cf.* Staudinger/Hager (2017) Vorbem zu §§ 823 ff., para 20 and Staudinger/Hager (2009) § 823, para E 7.

549 *Cf.* Dedek & Schermaier 2012, pp. 350 and 356.

550 *E.g.* Heuser 2019, Deipenbrock 2018, Dumont du Voitel 2018, Jansen, Kästle-Lamparter & Rademacher 2017, Wimmer 2017, MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, Seibold 2016, Schantz 2015, Haar 2014, Halfmeier 2014, Kontogeorgou 2014, Von Rimon 2014, Schroeter 2014, Amort 2013, Dutta 2013, Gietzelt & Ungerer 2013, Rosset 2013, Wagner 2013, Wojcik 2013 and Arntz 2012. *Prior to the introduction of Art. 35a CRA Regulation e.g.* Berger & Stemper 2010, Wildmoser, Schiffer & Langoth 2009 and Rohe 2005.

5.6.2.2 In the presence of a contractual relationship

(a) Issuers

The legal basis for a claim for compensation in contract law brought by issuers depends on the legal qualification of rating contracts, a topic to which German literature has devoted quite some attention. Most often, rating contracts are qualified as '*Werkvertrag*' (a contract for the production of a specific work) under § 631 BGB or as '*atypische Vertragsverhältnis*' (an atypical contractual relationship) under § 311 BGB.[551] The qualification as *Werkvertrag* (agreement for the execution of work) imposes the obligation upon a credit rating agency to assign a credit rating free from material and legal defects under § 633 (1) BGB.[552] Furthermore, a credit rating agency is under the general obligation not to breach duties arising from its obligations under § 280 (1) BGB.[553] A credit rating agency is not required to have assigned the accurate credit rating in hindsight, but rather must have assigned the credit rating in an objective, independent and professional manner – a yardstick that can be substantiated by Annex III CRA Regulation.[554] A violation of these provisions by a credit rating agency entitles the issuer to compensation under (§ 634 (4) in conjuction with) § 280 (1) BGB.[555]

(b) Investors

The legal basis for a claim for compensation in contract law brought by investors depends on the legal qualification of paid subscription contracts. German scholars often qualified a paid subscription as '*Kaufvertrag*' (sales contract) under § 433 (1) BGB, but also as '*Dienstvertrag*' (services contract) under § 611 (1) BGB or '*atypische Vertragsverhältnis*' (an atypical contractual relationship) under § 311 BGB.[556] In general, a credit rating agency is under the general obligation not to breach duties arising from its obligations under § 280 (1) BGB. When adopting the qualification of a paid subscription as *Kaufverträge*, § 433 (1) BGB requires the credit rating agency to deliver the credit

551 § 631 (1) BGB – '(1) *Durch den Werkvertrag wird der Unternehmer zur Herstellung des versprochenen Werkes, der Besteller zur Entrichtung der vereinbarten Vergütung verpflichtet*.' *For the qualification as Werkvertrag e.g.* Dumont du Voitel 2018, p. 251 (with one exception on p. 253), Seibold 2016, p. 46, Von Rimon 2014, p. 144, Amort 2013, p. 274 and Arntz 2012, pp. 90-91. *For the qualification as atypical contractual relationship e.g.* Seibold 2016, p. 46, Von Rimon 2014, p. 144, Arntz 2012, p. 91.

552 *E.g.* Dumont du Voitel 2018, p. 256, Seibold 2016, pp. 46-47 and Von Rimon 2014, pp. 145-146.

553 Seibold 2016, p. 48.

554 *Cf.* Von Rimon 2014, pp. 146-147.

555 Wimmer 2017, p. 342. *Also* Dumont du Voitel 2018, pp. 255-256.

556 *On the qualification as Kaufverträge see* Dumont du Voitel 2018, pp. 282-283, Seibold 2016, p. 82 and Amort 2013, p. 275. *On the qualification as Dienstverträge see* Wimmer 2017, p. 345 and Kontogeorgou 2014, p. 1401. *On the qualification as atypische Vertragsverhältnisse see* Von Rimon 2014, p. 185. *On the debate see* Seibold 2016, p. 81.

rating free from material and legal defects. A credit rating agency is not required to have assigned the accurate credit rating in hindsight, but rather must have assigned the credit rating in an objective, independent and professional manner.[557] The investor is entitled to damages under (§ 437 (3) in conjuction with) § 280 (1) BGB if the credit rating agency fails to comply with this obligation.[558]

5.6.2.3 In the absence of a contractual relationship

(a) Issuers

In the absence of a contractual relationship between an issuer and a credit rating agency, the issuer can make use of German non-contractual liability law only. German scholars mentioned, for instance, § 823 (1), § 824 and § 826 BGB as possible legal bases for liability.[559] It is, however, not always clear whether a claim concerning credit rating agency liability is covered by these grounds. Moreover, an appeal to these liability grounds will only succeed in a limited number of situations.

(i) – § 823 (1) BGB

§ 823 (1) BGB states that '*[w]er vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet.*'[560] An aggravated party hence has a right to compensation only when the other party violated an interest – life, body, health, freedom, property or another right – listed in § 823 (1) BGB. German courts expanded the protection of this provision by ensuring that unlawful violations of *das Recht am eingerichteten und ausgeübten Gewerbebetrieb* ('the right to business as a going concern'[561]) and *das allgemeines Persönlichtkeitsrecht* ('the general right to protection of the personality'[562]) also belong to the protective scope of § 823

557 *Cf.* Von Rimon 2014, p. 186.
558 Seibold 2016, p. 83.
559 *With regard to unsolicited credit ratings* Dumont du Voitel 2018, pp. 264 ff., MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, Wimmer 2017, pp. 346-360, Seibold 2016, pp. 62-69, Von Rimon 2014, pp. 175-180, Schroeter 2014, pp. 853-863, Amort 2013, p. 275, Wagner 2013, pp. 473-474 and Arntz 2012, pp. 93-95. *Regarding solicited credit ratings* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, Wimmer 2017, pp. 346-360, Seibold 2016, p. 49, Von Rimon 2014, pp. 165-173, Schroeter 2014, pp. 817 and 822, Amort 2013, p. 275, Wagner 2013, pp. 473-474 and Arntz 2012, p. 93. The overview provided does not reflect all grounds for liability discussed in German literature.
560 'A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019.
561 *Translation derived from* Robbers 2017, no. 748.
562 *Translation derived from* Robbers 2017, no. 750.

(1) BGB under the category of '*ein sonstiges Recht*'.[563] 'The right to business as a going concern' provides an entrepreneur with a right to compensation (of pure economic loss) when another party directly damages its business in an unlawful manner.[564] 'The general right to protection of the personality' covers, amongst others, situations in which someone's privacy was not respected or in which someone suffered loss as a consequence of defamatory statements.[565] In the context of credit rating agency liability, German authors generally state that issuers can claim damages for unlawful violations of the right to business as a going concern.[566] Compensation for violations of the general right to protection of the personality of the issuer is generally conceived to be more complex or even impossible.[567]

§ 823 (1) BGB requires that the rights of the claimant have been violated in an unlawful manner. In order to determine whether a credit rating agency's conduct was unlawful, German courts must balance an issuer's right to business as a going concern against a credit rating agency's right to freedom of speech under § 5 (1) Grundgesetz.[568] The simple fact that a credit rating or another statement relating to an issuer is negative, does not in itself create a unlawful violation of an issuer's rights. In a decision on the liability of a credit scoring agency for an allegedly too negative *Detailanalyse* in May 2006, the Higher Regional Court of Berlin stated that '*der Emittent [muss eine Beurteilung] grundsätzlich hinnehmen, und zwar auch dann, wenn sie für ihn ungünstig ist. Jeder Gewerbebetrieb muss eine nicht in Wettbewerbsabsicht verbreitete Kritik an seinem Produkt dulden […]*.'[569] A credit rating agency hence does not unlawfully violate the rights of an issuer by assigning a negative credit rating.

563 Van Dam 2013, no. 701-2 and Koch 2005, p. 210. *Cf.* Robbers 2017, no. 748 and no. 750.

564 Robbers 2017, no. 748, MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 322 ff., Staudinger/Hager (2017) § 823, para D 2, Van Dam 2013, no. 710-3 and Koch 2005, p. 210.

565 Robbers 2017, no. 750, Van Dam 2013, no. 706-2 and Koch 2005, p. 210.

566 *E.g.* Dumont du Voitel 2018, pp. 266 ff., MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139 and MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 350, Seibold 2016, p. 64, Schroeter 2014, pp. 860-861, Von Rimon 2014, pp. 170-171, Wagner 2013, p. 473 and Arntz 2012, pp. 93-94. *For a more cautious approach*, Wimmer 2017, pp. 350-352.

567 Seibold 2016, p. 65 and Arntz 2012, p. 93-94. The authors emphasised that issuers would only succeed in exceptional situations. Schroeter 2014, pp. 858-859 and Von Rimon 2014, p. 173 concluded that a claim for damages based on the general right of the protection of the personality was not possible. *Cf. also* Dumont du Voitel 2018, pp. 272-273.

568 Seibold 2016, p. 66, Schroeter 2014, p. 862, Von Rimon 2014, pp. 171-172 and Amort 2013, p. 275. *Cf.* Dumont du Voitel 2018, pp. 267. In Oberlandesgericht Brandenburg 7 December 2017, 6 W 141/17, ECLI:DE:OLGBB:2017:1207.6W141.17.0A, *BeckRS* 2017, 143334, para 19, the Higher Regional Court of Brandenburg repeated that the rights of the issuer and the credit rating agency must be balanced. In this specific case, however, the claim for damages was already dismissed for different reasons so that the balancing act was not necessary.

569 Kammergericht Berlin 12 May 2006, 9 U 127/05, ECLI:DE:KG:2006:0512.9U127.05.0A, para 33. *See also in respect of this decision*, Von Rimon 2014, p. 171. *Cf. in general* Staudinger/Hager (2017) § 823, para D 24.

At the same time, a credit rating agency's right to freedom of speech is not absolute. German scholars assumed that German courts will apply the yardstick developed in the case law concerning the unlawfulness of publications on products and legal entities (*Warentests*) in order to determine whether the violation was unlawful.[570] This assumption can be derived from a decision of the Higher Regional Court of Berlin, in which it held: '*Die Zulässigkeit der Veröffentlichung von Ratings […] ist (mit) an den Maßstäben auszurichten, die die Rechtsprechung […] für die Zulässigkeit der Veröffentlichung von Waren- bzw. Leistungstests entwickelt hat*'.[571] The yardstick developed in the context of the unlawfulness of publications on products and legal entities hence also applies to credit ratings. Subsequently, the Higher Regional Court explained that the analysis of the issuer must be produced neutrally, professionally and objectively: '*[d]anach muss die jeweilige Analyse einer beworbenen Kapitalanlage neutral, sachkundig und im Bemühen um objektive Richtigkeit erarbeitet werden.*'[572] Although less explicit, the Higher Regional Court of Frankfurt adopted the same approach in April 2015 where it held:

> '*Die von der Beklagten abgegebene äußerst negative Bewertung der Kreditwürdigkeit der Klägerin ist* ohne jegliche sachliche Basis. *Das gesamte Vorgehen der Beklagten bei der Abgabe ihrer verschiedenen Bewertungen ist von einer* verantwortungslosen Oberflächlichkeit geprägt, *die das absolute Recht der Klägerin, keine rechtwidrigen Eingriffe in ihren eingerichteten und ausgeübten Gewerbebetrieb erleiden zu müssen, schwerwiegend verletzt.*'[573]

Hence, in order to determine whether a credit rating agency committed an unlawful violation of the issuer's right to business as a going concern, German courts will determine whether the credit rating agency assgined the credit rating in a neutral, professional and objective manner.

(ii) – § 823 (2) BGB

A second option available to issuers upon which to base a claim for credit rating agency liability might be formed by § 823 (2) BGB.[574] On the basis of § 823 (2) BGB, the person who '*gegen ein den Schutz eines anderen bezweckendes*

---

570 Dumont du Voitel 2018, pp. 267-268, MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, Seibold 2016, p. 66, Von Rimon 2014, pp. 171-172, Gietzelt & Ungerer 2013, p. 345 and Arntz 2012, p. 94. *See, differently,* Schroeter 2014, pp. 862-863.

571 Kammergericht Berlin 12 May 2006, 9 U 127/05, ECLI:DE:KG:2006:0512.9U127.05.0A, para 33.

572 Kammergericht Berlin 12 May 2006, 9 U 127/05, ECLI:DE:KG:2006:0512.9U127.05.0A, para 34. *Cf. in general* Staudinger/Hager (2017) § 823, para D 32.

573 Oberlandesgericht Frankfurt 7 April 2015, 24 U 82/14, ECLI:DE:OLGHE:2015:0407.24U82.14.0A, para 26. Emphasis added [DJV].

574 *Brought up by* Wimmer 2017, pp. 352-355.

Gesetz verstößt' must compensate the loss caused.[575] In contrast to § 823 (1) BGB, aggrieved parties can claim the compensation of pure economic loss under § 823 (2) BGB.[576] In the context of credit rating agency liability, a credit rating agency must hence compensate the loss suffered by the issuer if it violated a norm intended to protect the individual issuer. Norms that are capable of having direct effect, for instance those included in EU regulations, can fall under the category '*eines anderen bezweckendes Gesetz*'.[577] Prior to the introduction of the third version of the CRA Regulation, individually protective norms were considered to be absent in the field of credit rating agency liability.[578] At that time, the infringements listed in Annex III CRA Regulation indeed served public enforcement and the protection of general public interests only. Yet the introduction of Article 35a CRA Regulation might have brought change in this regard, although it must be determined for each rule whether it specifically aims to protect an individual issuer.[579] Several German scholars however doubted the individually protective nature of the norms under the CRA Regulation.[580] But if the norms have such a protective effect, issuers can use Annex III of the CRA Regulation upon which to base a claim for non-contractual liability in accordance with § 823 (2) BGB.

The possibility of claims under § 823 (2) BGB was denied for another reason as well. Heuser argued that '*Art. 35 a Abs. 5 Rating-VO erlaubt zwar weitere mitgliedstaatliche Haftungsansprüche, aber gilt dies nach Erwägungsgrund 35 nicht für solche zivilrechtliche Haftungsansprüche, die sich auf Verstöße gegen die Rating-VO stützen* […]'.[581] Heuser hence defended the point of view that Article 35a (5) CRA Regulation does not allow further claims under the applicable national law for infringements listed in Annex III CRA Regulation. This point was already addressed in section 2.5.4.2 (c), where it was concluded that Article 35a (5) CRA Regulation does allow stricter national rules on civil liability for

575 § 823 (2) BGB: 'The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019. The phrase '[t]he same duty' refers to the duty to compensate the damage under § 823 (1) BGB.

576 *Cf.* Staudinger/Hager (2009) § 823, para G 4.

577 Palandt/Sprau 2019, BGB § 823, no. 57.

578 Wimmer 2017, pp. 352-353.

579 This dissertation assumes that the obligations under Annex III CRA Regulation can have direct horizontal effect through Article 35a CRA Regulation.

580 Wimmer doubted whether the norms under the CRA Regulation qualify as individual protective norms: Wimmer 2017, pp. 354-355. *Also e.g.* Berger & Ryborz 2014, p. 2243 and Schroeter 2014, p. 826. *Contra* Dutta 2013, p. 1735. Dumont du Voitel 2018, p. 353 argued that the norms under the CRA Regulation qualify as individual protective norms and can be used under § 823 (2) BGB.

581 Heuser 2018, p. 84. *Also* Heuser 2019, pp. 85-86. *For the same approach* Berger & Ryborz 2014, p. 2247.

infringements of Annex III CRA Regulation. Therefore, Heuser's conclusion in respect of § 823 (2) BGB is not followed here.[582]

(iii) – § 824 (1) BGB

Another possible ground for non-contractual liability available to issuers is § 824 (1) BGB. German academic literature refers to this provision as a possible legal basis for compensation, but immediately concludes that it will hardly be available to issuers in practice. § 824 (1) BGB offers protection against loss caused by the dissemination of incorrect factual statements which threaten someone's creditworthiness. The provision states that '*[w]er der Wahrheit zuwider eine Tatsache behauptet oder verbreitet, die geeignet ist, den Kredit eines anderen zu gefährden oder sonstige Nachteile für dessen Erwerb oder Fortkommen herbeizuführen, hat dem anderen den daraus entstehenden Schaden auch dann zu ersetzen, wenn er die Unwahrheit zwar nicht kennt, aber kennen muss*.'[583] But as credit ratings are considered opinions rather than facts, German academic literature deemed the applicability of § 824 (1) BGB to credit rating agency liability to be (nearly) impossible.[584]

The aforementioned decision of the Higher Regional Court of Berlin of May 2006 supports the conclusion drawn in German literature. The Higher Regional Court of Berlin dismissed an issuer's claim for damages based on § 824 BGB, because the *Detailanalyse* did not concern incorrect factual statements. It held that statements posed in an analysis can trigger the application of § 824 BGB, but only

> '*wenn ihnen im Rahmen der Analyse eine eigenständige Bedeutung zukommt. Handelt es sich dagegen um Angaben, die zu den Analyseergebnissen hinführen, kann es gerechtfertigt sein, diese Angaben gemeinsam mit den Ergebnissen als wertende Meinungsäußerung anzusehen*'.[585]

Subsequently, the Higher Regional Court of Berlin concluded that the information included in the *Detailanalyse* did not qualify as a factual statement. Taking into account this decision and the sentiment in German literature, it seems

582 *For the same reasoning in respect of § 823 (2) BGB*, Dumont du Voitel 2018, p. 338-341.

583 'A person who untruthfully states or disseminates a fact that is qualified to endanger the credit of another person or to cause other disadvantages to his livelihood or advancement must compensate the other for the damage caused by this even if, although he does not know that the fact is untrue, he should have known.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019.

584 Dumont du Voitel 2018, pp. 274 and 276, Heuser 2019, p. 85, MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, Seibold 2016, pp. 67-68, Schroeter 2014, p. 854, Amort 2013, p. 275, Wagner 2013, p. 473 and Arntz 2012, p. 93. Von Rimon 2014, p. 169 concluded that basing a claim for damages on § 824 BGB was not possible at all.

585 Kammergericht Berlin 12 May 2006, 9 U 127/05, ECLI:DE:KG:2006:0512.9U127.05.0A, paras. 41 and 34. *See also in respect of this decision*, MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, fn. 569 and Von Rimon 2014, pp. 166-167.

highly unlikely that an issuer's claim for damages based on § 824 BGB will succeed.

(iv) – § 826 BGB

Finally, as another possibility, issuers can base a claim for compensation on § 826 BGB. This provision offers protection against loss caused by persons who intentionally acted contrary to public policy. The provision states that *'[w]er in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet'*.[586] The threshold for liability is high: the tortfeasor must have acted contrary to public policy and the tortfeasor must have done so intentionally.[587] German literature deemed the applicability of § 826 BGB to credit rating agency liability exceptional, because it was assumed that this provision requires credit rating agencies to issue incorrect credit ratings with the intention to harm the issuer.[588]

(b) Investors

In the absence of a contractual relationship between investors and credit rating agencies, investors can make use of German non-contractual liability law only. German scholars mentioned various legal bases for liability, such as liability on the basis of a *Vertrag mit Schutzwirkung zugunster Dritter* (contracts with protective effects on third parties), § 823 (2) BGB and § 826 BGB.[589] As con-

---

586 'A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019.

587 German courts adopted a broad approach to the requirement of '*vorsätzlich*' conduct, section 5.6.2.3 (b) (iii) discusses the meaning of this requirement in more detail.

588 Heuser 2019, p. 85, Seibold 2016, p. 68, *cf.* Von Rimon 2014, p. 170, Schroeter 2014, p. 817 and Arntz 2012, p. 94. *Cf. also* Wimmer 2017, p. 360. Dumont du Voitel 2018, p. 277, considered that infringements of Annex III CRA Regulation could qualify as conduct contrary to public policy.

589 *E.g.* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 140, Haar 2014, pp. 317-318, Halfmeier 2014, pp. 330-331, Kontogeorgou 2014, pp. 1401-1402, Schroeter 2014, pp. 892 ff., Amort 2013, pp. 276-277, Wagner 2013, pp. 476-478 and 480-483 and Berger & Stemper 2010, pp. 2289-2293. Some other grounds for liability referred to by German authors are rather clearly not applicable, so that they do not deserve detailed attention here. For instance, a claim for damages cannot be based on § 823 (1) BGB, because a credit rating agency will not have violated an investor's right which is protected under § 823 (1) BGB, recently: Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 49. *E.g.* Wimmer 2017, p. 361, Seibold 2016, p. 90, Schantz 2015, p. 218, Schroeter 2014, p. 897 and Wojcik 2013, p. 2386. Furthermore, authors pointed at § 311 (3) BGB which creates a ground for *Dritthaftung* or *quasi-vertragliche Vertrauenshaftung* in respect of third parties who did not become part of an agreement, but, who, in particular, influenced the contract negotiations or the conclusion of the contract because of a certain degree of trust (*e.g.* Wimmer 2017, pp. 372 ff., Seibold 2016, pp. 96-98, Schantz 2015, pp. 218 ff. and Wagner 2013, pp. 482-483). Applying § 311 (3) BGB in the context of credit rating

cluded in the German contributions and as demonstrated by recent German case law, a successful appeal to these legal bases will only occur in exceptional situations.

(i) – Das Vertrag mit Schutzwirkung zugunster Dritter
To start with, German literature paid attention to the question of whether the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* entitles investors to claim compensation from a credit rating agency.[590] When invoking this concept, the investor attempts to derive protection from the rating contract concluded between the issuer and the credit rating agency.[591] The concept of *das Vertrag mit Schutzwirkung zugunster Dritter* entitles third parties to compensation based on protection derived from a contract concluded between other parties. So third party Z (the investor) can claim damages from X (a credit rating agency) on the basis of a contract that was concluded between X (a credit rating agency) and Y (an issuer).

The application of this concept requires four conditions to be fulfilled: (1) *Leistungsnähe* or *Vertragsnähe* – the investor must be directly involved in the performance of the contract, or the dangers entailed by a defective performance to the investor must be similar to the dangers to the issuer;[592] (2) *Einbeziehungsinteresse* or *Glaubigernähe* – the issuer must have an interest in the protection of the investor, so the question arises whether the issuer is responsible for the '*Wohl und Wehe*' of the investor;[593] (3) *Erkennbarkeit* of the circle of persons involved – the credit rating agency must be able to calculate and insure against liability risks prior to the conclusion of the contract;[594] and (4) *Schützbedürfigkeit* of the investor – the investor must deserve protection, for instance, because it has no other legal grounds at its disposal to base a claim

agency liability, in the sense that an investor would be able to base a claim against a credit rating agency on the basis that the credit rating agency influenced the contract negotiations or the conclusion of the contract between the issuer and the investor, seems to stretch the boundaries of this provision too far (*cf.* Dumont du Voitel 2018, p. 303, Wagner 2013, p. 483, Wojcik 2013, pp. 2386-2387, Seibold 2016, p. 98, *cf.* Schroeter 2014, p. 921 and *cf.* Berger & Stemper 2010, pp. 2292-2293).

590 *E.g.* Deipenbrock 2018, pp. 572-573, Dumont du Voitel 2018, pp. 303 ff., Wimmer 2017, pp. 363 ff., Seibold 2016, pp. 92-96, Schantz 2015, pp. 220-230, Haar 2014, p. 317, Halfmeier 2014, p. 330, Kontogeorgou 2014, p. 1401, Schroeter 2014, pp. 930 ff., Von Rimon 2014, pp. 201-209, Wagner 2013, pp. 480-482 and Berger & Stemper 2010, pp. 2289-2292.

591 *Cf.* Von Rimon 2014, p. 201, who remarked that the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* hence does not apply in case of unsolicited credit ratings. *Also* Dumont du Voitel 2018, p. 304.

592 MüKoBGB/Gottwald, 8. Aufl. 2019, BGB § 328, no. 184 and Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, para 61.

593 MüKoBGB/Gottwald, 8. Aufl. 2019, BGB § 328, no. 185.

594 MüKoBGB/Gottwald, 8. Aufl. 2019, BGB § 328, no. 190.

for compensation on.[595] German courts will apply these conditions stringently for the sake of avoiding opening the floodgates.[596]

Does the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* entitle an investor to claim compensation from a credit rating agency on the basis of a rating contract concluded between a credit rating agency and an issuer? Thus far, the German courts held that investors could not derive protection from rating contracts and credit scoring contracts and, subsequently, dismissed the claims for compensation.[597] Yet, it must be stressed that these decisions only related to credit scoring and issuer ratings.

In July 2017, the Higher Regional Court of Frankfurt dismissed a claim for damages against a credit scoring agency because the court considered that all four conditions for application of the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* were not fulfilled.[598] First, the claimants failed to satisfy the condition of *Leistungsnähe*. In summary, the Higher Regional Court explained that it cannot be concluded from the contract that the contracting parties meant for the investor to be involved with the performance of the contract and that the dangers entailed by a breach of contract committed by the credit rating agency to investors and the issuer were not comparable.[599] Second, the required *Einbeziehungsinteresse* was lacking. In summary, the Higher Regional Court held that it could not be said that the issuer meant for the investor to be protected and that the issuer was responsible for the '*Wohl und Wehe*' of the investor.[600] Third, the Higher Regional Court held that the potential liability risks were insufficiently *erkennbar* (foreseeable) for

595 MüKoBGB/Gottwald, 8. Aufl. 2019, BGB § 328, no. 191. *E.g. on these conditions in general in the context of credit ratings and credit scoring*, Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 22, Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, paras. 22-29 and *e.g.* Dumont du Voitel 2018, pp. 307 ff., Seibold 2016, p. 92, Schantz 2015, pp. 222 ff. and Berger & Stemper 2010, pp. 2289-2292.

596 *See* MüKoBGB/Gottwald, 8. Aufl. 2019, BGB § 328, no. 192.

597 Oberlandesgericht Dresden 6 March 2019, 5 U 1146/18, ECLI:DE:OLGDRES:2019:0306.5U1146.18.00, *BeckRS* 2019, 4673, para 32, Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 23, Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, paras. 58-59 and 67 and Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 9.

598 Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, para 62. Subsequently, in September 2017, the Regional Court Darmstadt again rejected a claim for damages against a credit scoring agency for similar reasons, Landgericht Darmstadt 22 September 2017, 13 O 195/14, ECLI:DE:LGDARMS:2017:0922.13O195.14.00, *BeckRS* 2017, 144511, paras. 81-97.

599 Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, paras. 23 and 62.

600 Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, paras. 25 and 63.

the credit scoring agency. When it entered into the contract, the credit scoring agency was not able to identify the amount of potential claimants and could therefore not calculate the potential liability risks, so that the credit scoring agency could not insure against those risks.[601] Finally, fourth, the Higher Regional Court held that the investor did not deserve protection on the basis of the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* because the investor could also base claims for damages against both the credit scoring agency and the issuer on other, independent legal bases.[602]

A few months later, in December 2017, the Regional Court Düsseldorf dismissed a claim for damages brought against a credit rating agency in relation to an issuer rating.[603] The reasoning bears resemblance to the reasoning of the Higher Regional Court of Frankfurt. First, the Regional Court held that a credit rating agency's breach of contract exposes an issuer to more severe and different dangers compared to the position of an investor. The Regional Court motivated that '*[d]er Anleger wird durch das Unternehmensrating bei seiner Anlageentscheidung möglicherweise beeinflusst. Der Emittent wird durch die Einstufung seiner Bonität, welche durch das Rating erfolgt, hingegen einer Vielzahl von Auswirkungen (z.B. Umsatzeinbußen, Einbußen bei der Kreditwürdigkeit) ausgesetzt*'.[604] Second, it was held that it did not become apparent why the issuer would have an interest in protecting investors, especially because the issuer is not responsible for the '*Wohl und Wehe*' of investors.[605] Third, the potential liability risks were insufficiently *erkennbar* (foreseeable) for the credit rating agency. The general nature of an issuer rating entails that the credit rating agency cannot calculate how many bond issues will be conducted.[606] Finally, fourth, the investor did not deserve protection on the basis of the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* because the investor could also claim compensation on other, independent legal bases. In this respect, it was not relevant whether such claims would be successful.[607]

In different legal proceedings, in April 2018, the Higher Regional Court of Düsseldorf more generally rejected a claim for damages brought against

601 Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, paras. 27 and 64-65.
602 Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020, paras. 29 and 66.
603 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, paras. 9-13.
604 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 10. Seibold applied this requirement in the opposite way, Seibold 2016, p. 93.
605 *See* Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 11.
606 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 12.
607 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 13.

a credit rating agency in respect of an issuer rating: '*Der Senat schließt sich der – soweit ersichtlich – in der Rechtsprechung und der Literatur ganz überwiegend vertretenen Ansicht an, dass dem Anleger im Falle eines fehlerhaften Unternehmensratings gegenüber einer Ratingagentur im Ergebnis grundsätzlich kein Anspruch aus der Rechtsfigur des Vertrags mit Schutzwirkung zu Gunsten Dritter zusteht […].*'[608] The Higher Regional Court hence followed the approach taken in other decisions and academic literature that investors cannot derive legal protection from rating contracts. In its reasoning, the Higher Regional Court attached great significance to the general nature of issuer ratings. The lack of *Leistungsnähe* was explained by means of the credit rating agency's disclaimer with regard to the use of the issuer rating that excluded the issuer rating to be used for the valuation of bonds.[609] The lack of *Einbeziehungsinteresse* was explained by the fact that '*[d]ie Verwendung der Unternehmensratings diente jedenfalls nicht unmittelbar der Erlangung des Kaufpreises für die Anleihe, sondern der Aufnahme bzw. dem Verbleib der Anleihen in das bzw. in dem Handelssegment C der Börse Stuttgart und sollte ausdrücklich nicht die alleinige Grundlage der Kaufentscheidung von Anlegern sein.*'[610] Hence, sufficient *Einbeziehungsinteresse* was lacking because the issuer rating served multiple goals, but not necessarily directly pricing bonds. Also, the Higher Regional Court stated that investors should not use issuer ratings as the sole basis for investment decisions. Furthermore, very importantly, the Higher Regional Court emphasised that the nature of an issuer rating entails that the circle of potential claimants is insufficiently foreseeable to a credit rating agency.[611]

Most recently, in March 2019, the Higher Regional Court of Dresden again rejected a claim for damages in respect of issuer ratings brought by an investor against a credit rating agency.[612] The credit rating agency was not registered under the CRA Regulation. The issuer had used issuer Top-Ratings for the advertisement of its financial products.[613] The Higher Regional Court of Dresden explicitly decided that the investor was not entitled to a claim for compensation based on the concept of *das Vertrag mit Schutzwirkung zugunster*

608 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 23. *Also e.g.* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 140, Seibold 2016, pp. 92-96 and Amort 2013, p. 276.

609 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 25.

610 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 26. Seibold applied this requirement in the opposite way, Seibold 2016, p. 93.

611 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 27.

612 Oberlandesgericht Dresden 6 March 2019, 5 U 1146/18, ECLI:DE:OLGDRES:2019:0306.5U1146.18.00, *BeckRS* 2019, 4673 and Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, paras. 3 and 5.

613 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 6.

Dritter.[614] As Top-Ratings are directed to an unlimited circle of persons and a credit rating agency cannot influence to whom the issuer disseminates Top-Ratings, the Higher Regional Court of Dresden concluded that the credit rating agency was not able to calculate its liability risks prior to the conclusion of the contract.[615] It was irrelevant whether the credit rating agency knew or should have known the volume of the issue of financial instruments at the time it assigned the credit rating, because this knowledge did not enable the credit rating agency to calculate its complete liability risks (the issue was for instance not necessarily limited to a certain volume).[616] Moreover, it was irrelevant whether the defendant acted as a credit scoring agency, an unregistered credit rating agency or a registered credit rating agency.[617]

As remarked, these decisions only concerned credit scorings and issuer ratings. This begs the question of whether the type of rating – attached to the issuer or to a specific financial instrument – is of relevance. The Higher Regional Court of Düsseldorf explicitly clarified that its decision did not relate to ratings attached to financial products.[618] The Higher Regional Court of Dresden did not address this point, but emphasised that the credit rating agency could not calculate its liability risks because the issue was not limited to this volume and was not limited to the period of validity of the Top-Ratings.[619] In German literature published prior to most case law described above, authors defended the point of view that the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* can apply to situations involving credit ratings attached to specific financial instruments.[620] Especially where the credit rating is designed for the purpose of one single, fixed issue of bonds, an investor can meet at least the requirement of *Erkennbarkeit* of liability risks. However, there is currently no German case law available confirming the applicability of the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* to cases involving credit ratings attached to specific financial instruments.

614 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, paras. 16 and 32.
615 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, paras. 23 and 25.
616 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 25.
617 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, paras. 16 and 32.
618 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, paras. 26 and 28.
619 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 25.
620 Seibold 2016, p. 95 and Halfmeier 2014, p. 330. Furthermore, Deipenbrock was of the opinion that the facts of the case of 8 February 2018 did not form a typical scenario of credit rating agency liability (because the case concerned an issuer rating and not a financial instrument rating), and that the decision, therefore, might not provide general guidance (*cf.* Deipenbrock 2018, p. 573).

(ii) – § 823 (2) BGB

As a second option available to investors upon which to base a claim for credit rating agency liability, German literature refers to § 823 (2) BGB.[621] On the basis of § 823 (2) BGB, the person who '*gegen ein den Schutz eines anderen bezweckendes Gesetz verstößt*' shall compensate the loss caused.[622] In contrast to § 823 (1) BGB, aggrieved parties can claim the compensation of pure economic loss under § 823 (2) BGB.[623] In the context of credit rating agency liability, a credit rating agency must compensate the loss suffered by the investor if it violated a norm intended to protect the individual investor. Norms that are capable of having direct effect, for instance those included in EU regulations, can fall under the category '*eines anderen bezweckendes Gesetz*'.[624] Prior to the introduction of the third version of the CRA Regulation, individually protective norms were considered to be absent in the field of credit rating agency liability.[625] The Regional Court Dresden decided that the rules of the CRA Regulation '*keine Schutzgesetze i.S.v. § 823 Abs. 2 BGB seien*' in a case of which the factual circumstances took place prior to the introduction of the third version of the CRA Regulation.[626] At that time, the infringements listed in Annex III CRA Regulation indeed served public enforcement and the protection of general public interests only. The introduction of Article 35a CRA Regulation may have brought change in this regard, although it must be determined for each rule whether it specifically aims to protect a specific investor.[627] If so, investors can use Annex III of the CRA Regulation upon

621 Dumont du Voitel 2018, pp. 321 ff., Wimmer 2017, pp. 352-355, Seibold 2016, pp. 90-91, Schantz 2015, pp. 234-238, Schroeter 2014, pp. 897, Von Rimon 2014, pp. 193-196 and Wojcik 2013, p. 2386.

622 § 823 (2) BGB: 'The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019. The phrase '[t]he same duty' refers to the duty to compensate the loss under § 823 (1) BGB.

623 *Cf.* Staudinger/Hager (2009) § 823, para G 4.

624 Palandt/Sprau 2019, BGB § 823, no. 57.

625 *Cf. e.g.* Schroeter 2014, p. 898, Berger & Stemper 2010, p. 2293 and Haar 2010, p. 1285.

626 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872. The Regional Court Dresden held that the case did not fall under the temporary scope of the third version of the CRA Regulation. It did not explain why the rules of the CRA Regulation did not qualify as protective norms under to § 823 (2) BGB (*see also* Deipenbrock 2018, p. 573). This point did not arise on appeal, Oberlandesgericht Dresden 6 March 2019, 5 U 1146/18, ECLI:DE:OLGDRES:2019:0306.5U1146.18.00, *BeckRS* 2019, 4673.

627 Seibold 2016, p. 91, Halfmeier 2014, p. 331, Von Rimon 2014, p. 195, Amort 2013, p. 277 and Wojcik 2013, p. 2386. However, Wimmer and Schantz doubted whether the norms under the CRA Regulation qualify as individual protective norms: Wimmer 2017, p. 361 and Schantz 2015, pp. 235-236. *Also* Dutta 2013, p. 1735. This dissertation assumes that the obligations under Annex III CRA Regulation can have direct horizontal effect through Article 35a CRA Regulation. *Cf. also in this regard* Maier *EWiR* 2018, p. 274. Dumont du Voitel 2018,

which to base a claim for non-contractual liability in accordance with § 823 (2) BGB.[628]

Heuser denied the possibility for investors to base claims on § 823 (2) BGB for another reason as well. He argued that '*Art. 35 a Abs. 5 Rating-VO erlaubt zwar weitere mitgliedstaatliche Haftungsansprüche, aber gilt dies nach Erwägungsgrund 35 nicht für solche zivilrechtliche Haftungsansprüche, die sich auf Verstöße gegen die Rating-VO stützen* […]'.[629] Heuser hence defended the point of view that Article 35a (5) CRA Regulation does not allow further claims under the applicable national law for infringements listed in Annex III CRA Regulation. This point was already addressed in section 2.5.4.2 (c), where it was concluded that Article 35a (5) CRA Regulation does allow stricter national rules on civil liability for infringements of Annex III CRA Regulation. Therefore, Heuser's conclusion in respect of § 823 (2) BGB is not followed here.[630]

(iii) – § 826 BGB

As a third option for investors upon which to base a claim for non-contractual liability, German literature refers to § 826 BGB.[631] § 826 BGB offers protection against loss caused by persons who intentionally acted contrary to public policy. The provision states that '*[w]er in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet*.'[632] The threshold for liability is high: a credit rating agency must have acted contrary to public policy and must have done so intentionally.

The requirement of intent is applied rather broadly. The German Federal Supreme Court held that the threshold of § 826 BGB can also be met when the wrongdoer acted carelessly (*gewissenlos*) or with gross negligence. Moreover, intentional conduct in the context of § 826 BGB can also occur if the wrongdoer has acted in such a frivolous manner that it must be assumed that the wrong-

p. 353 argued that the norms under the CRA Regulation qualify as individual protective norms and can be used under § 823 (2) BGB.

628 *As argued by* Dumont du Voitel 2018, p. 353.

629 Heuser 2018, p. 84. *Also* Heuser 2019, pp. 85-86 and Dumont du Voitel 2018, pp. 320-321. *For the same approach* Berger & Ryborz 2014, p. 2247. In contrast, in the context of § 823 (2) BGB, Schantz concluded that Art. 35a (5) CRA Regulation leaves the possibility of a claim under the applicable national law to the Member States (Schantz 2015, p. 235).

630 *For the same reasoning in respect of § 823 (2) BGB*, Dumont du Voitel 2018, p. 338-341.

631 *E.g.* Seibold 2016, pp. 91-92, Schantz 2015, pp. 239 ff., Haar 2014, p. 318, Kontogeorgou 2014, p. 1402, Schroeter 2014, p. 892, fn. 62 and p. 897, Wagner 2013, pp. 477-478 and Wojcik 2013, p. 2386.

632 § 826 BGB: 'A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019.

doer took possible harmful consequences for the victim for granted.[633] Notwithstanding the rather broad interpretation of the requirement of intent, investors can successfully invoke § 826 BGB only in exceptional situations. To have acted contrary to public policy, it is insufficient for the wrongdoer to have breached a general duty of care or a contractual obligation.[634] In the context of credit rating agency liability, it is insufficient if a credit rating agency did not exercise all reasonable care and skill in the assignment of the credit rating. A situation in which a credit rating agency acted contrary to public policy, for instance because it has issued incorrect credit ratings with the purpose of causing loss to investors, will rarely occur.[635]

A decision of the Regional Court Düsseldorf of December 2017 supports this observation, and adds a new perspective on the relevance of the difference between credit ratings attached to issuers and credit ratings attached to specific financial instruments, which limits the applicability of § 826 BGB in this context even further. The Regional Court dismissed an investor's claim for damages under § 826 BGB as the credit rating agency was not considered to have acted contrary to public policy.[636] The case involved an allegedly incorrect BBB credit rating attached to the issuer.[637] The Regional Court first analysed that conduct is not deemed as contrary to public policy for the only reason that it caused loss to others. Moreover, the conduct must be characterised by a special degree of blameworthiness, the existence of which can be derived from the aim of the conduct, the means employed, the disposition of the person or the consequences of the conduct. The grossly negligent dissemination of incorrect information or opinions qualifies as conduct contrary to public policy if the person who disseminated the information or opinions was aware of the potential loss that the dissemination could cause to other persons and adopted a thoughtless or reckless approach in respect of the significance of the information or opinions for decisions made by those persons. This will especially be so if the person who disseminated the information or opinions claims to be competent in this field but did not meet the standards of expertise in this

633 *Cf.* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 30. Bundesgerichtshof 3 December 2013, XI ZR 295/12, *NJW* 2014, pp. 1098-1101, para 34. *In particular on credit rating agency liability and § 826 BGB* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 140 and Wagner 2013, p. 477.

634 Bundesgerichtshof 3 December 2013, XI ZR 295/12, *NJW* 2014, pp. 1098-1101, para 23 and Bundesgerichtshof 4 June 2013, VI ZR 288/12, *NJW-RR* 2013, pp. 1448-1451, para 14.

635 *Cf.* Seibold 2016, p. 91. *Also, briefly,* Van Rimon 2014, p. 212. *More neutrally,* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 140, Halfmeier 2014, p. 330 and Amort 2013, p. 274. As an example of a situation in which a claim for damages can be based on § 826 BGB, Seibold referred to the situation in which a credit rating agency and an issuer cooperated to mislead investors by an inflated credit rating, Seibold 2016, p. 91.

636 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, paras. 18-19.

637 Amtsgericht Neuss 20 June 2017, 87 C 175/17, ECLI:DE:AGNE:2017:0620.87C175.17.00, *BeckRS* 2017, 144619, para 3.

regard.[638] The Regional Court subsequently concluded that these requirements were not met in that case:

> '*Diese Voraussetzungen sind nicht gegeben. Zwar muss der Beklagten bewusst sein, dass auch ein Unternehmensrating bei der Anlageentscheidung von Anlegern eine Rolle spielen wird. Allerdings handelt es sich bei einem Unternehmensrating stets nur um eine Komponente, welche ein Anleger bei seiner Entscheidung zugrunde zu legen hat. Tatsächlich wird das Unternehmensrating anders als das auf ein Finanzinstrument bezogenes Rating auch nicht etwa für das' Finanzinstrument erstellt, sondern dient in der Regel dazu, dass sich das bewertete Unternehmen zu besseren Konditionen Fremdkapital verschaffen kann. Die Bedeutung für die Entscheidung der Anleger ist daher nicht so hoch einzustufen, dass von einem rücksichtsbzw. gewissenlosen Verhalten bei fehlerhafter Erstellung des Ratings auszugehen ist.*'[639]

The reasoning of the Regional Court builds upon the assumption that an issuer rating is just one of the relevant factors underlying an investment decision. The Regional Court distinguishes issuer ratings from ratings attached to specific financial instruments in the sense that issuer ratings are assumed to have as a main goal to help the issuer attract capital against more favourable conditions. Due to their limited significance for investment decisions, the Regional Court concludes that it cannot be said that having attached an incorrect issuer rating qualifies as a thoughtless or reckless approach to the significance of the issuer rating for investment decisions made.

It is surprising that the decision of the Regional Court is rooted in the assumption that an issuer rating is just one of the relevant factors underlying an investment decision. Should the Regional Court not have focused on the blameworthiness of the credit rating agency's conduct instead? This decision leaves the impression that the blameworthiness of the credit rating agency's conduct might not be decisive for the qualification of conduct contrary to public policy. If other German courts adopt this line of reasoning, it does not

---

638 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 18: '*Sittenwidrig ist eine Handlung, die nach Inhalt oder Gesamtcharakter, der durch zusammenfassende Würdigung von Inhalt, Bewegungsgrund und Zweck zu ermitteln ist, die gegen das Anstandsgefühl aller billig und gerecht Denkender verstößt, d.h. mit den grundlegenden Wertungen der Rechtsund Sittenordnung nicht vereinbar ist […]. Dass das Verhalten einen Schaden hervorruft, genügt nicht. Hinzutreten muss eine nach den Maßstäben der allgemeinen Moral und des als „anständig" geltenden besondere Verwerflichkeit des Verhaltens, die sich aus dem verfolgten Ziel, den eingesetzten Mitteln, der zutage tretenden Gesinnung oder den eingetretenen Folgen ergeben kann […]. Grob fahrlässig unrichtige Auskünfte oder leichtfertige Gutachten u.ä. sind sittenwidrig, wenn sich der Auskunftgeber der möglichen Schädigung derjenigen, die mit seiner Äußerung zwangsläufig in Berührung kommen, bewusst ist und sein Verhalten angesichts seiner Bedeutung für die Entscheidung dieser Person als rücksichtsbzw. gewissenlos erscheint, insbesondere, wenn er Expertenkompetenz für sich in Anspruch nimmt, ohne den insoweit maßgeblichen Maßstäben auch nur annähernd zu genügen […].*'

639 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 19.

seem possible for investors who based their investment decision on an issuer rating to claim damages under § 826 BGB.

In March 2019, the Higher Regional Court of Dresden did focus on the blameworthiness of the conduct of the credit rating agency.[640] For conduct to qualify as contrary to public policy under § 826 BGB, it must qualify as *gewissenlos*. This could be the case if a credit rating agency accepted that its credit ratings would be used by the issuer to mislead investors.[641] It is, however, not sufficient if a credit rating agency would have assigned a different credit rating if it had assessed the issuer more critically.[642] Hence, unless there are special circumstances indicating that the credit rating agency acted in a *gewissenlos* manner, it does not seem possible for investors who based their investment decision on an issuer rating to claim damages under § 826 BGB.

5.6.3 Article 35a (1)

5.6.3.1 'Intentionally' or 'with gross negligence'

The German version of Article 35a CRA Regulation translates the required degree of culpability as '*vorsätzlich oder grob fahrlässig*'. The term '*vorsätzlich*' (intentionally) occurs regularly in the BGB, but has not been defined in the BGB itself.[643] German case law has shone light on the elements of intentional conduct:

> '*Vorsatz enthält ein „Wissens-" und ein „Wollenselement". Der Handelnde muss die Umstände, auf die sich der Vorsatz beziehen muss, […] gekannt bzw. vorausgesehen und in seinen Willen aufgenommen haben […]. Die Annahme der – vorliegend allein in Betracht kommenden – Form des bedingten Vorsatzes setzt voraus, dass der Handelnde die relevanten Umstände jedenfalls für möglich gehalten und billigend in Kauf genommen hat […].*'[644]

For conduct to qualify as intentional under German law, the wrongdoer must hence know of and intend the consequences of its conduct to occur, or must

640 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872.

641 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, paras. 36 and 39.

642 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 40.

643 *E.g.* § 276, § 823 and § 826 (1) BGB. Wimmer 2017, p. 293. *Cf. also* Van Dam 2013, no. 802-2.

644 Bundesgerichtshof 20 December 2011, VI ZR 309/10, *NJW-RR* 2012, pp. 404-405, para 10. *As derived from* Palandt/Grüneberg 2019, BGB § 276, no. 10. *Also* Bundesgerichtshof 3 December 2013, XI ZR 295/12, *NJW* 2014, 1098, para 26.

at least accept or take for granted that its conduct may have harmful consequences.[645]

The term *grob fahrlässig* also occurs regularly in the BGB, but has not been defined either.[646] The difference between gross negligence and 'normal' negligence is a matter of degree. Whereas a person acts negligently when it fails to take reasonable care,[647] gross negligence presumes a more serious and severe breach of duty. Frey described the breach required for normal negligence as *'[d]as kann vorkommen'* and the breach required for gross negligence as *'[d]as darf nicht vorkommen'*.[648] In 1953, the German Federal Supreme Court held in this respect:

> *'Was grobe Fahrlässigkeit ist, sagt das Gesetz nicht. Die Rechtsprechung versteht darunter im allgemeinen ein Handeln, bei dem die erforderliche Sorgfalt nach den gesamten Umständen in ungewöhnlich großen Maße verletzt worden ist und bei dem dasjenige unbeachtet geblieben ist, was im gegebenen Falle jedem hätte einleuchten müssen […].'*[649]

Gross negligence hence requires a person to have breached the required standard of care in an unusually severe way, by not having paid attention to matters that should not have been ignored in that concrete situation. A person who acts with gross negligence must generally do so from an objective and a subjective perspective. This means that the breach of duty must objectively be unusually severe, while the person must be to blame from a subjective perspective.[650] Subjective culpability can, for instance, exist when the tortfeasor was conscious of the risks involved. However, gross negligence cannot be equated with conscious negligence.[651] Consciousness of the possible harmful consequences, therefore, does not seem an essential part of gross negligence

645 *Cf.* Palandt/Grüneberg 2019, BGB § 276, no. 10, Van Dam 2013, no. 802-2. *In the context of credit rating agency liability*, Heuser 2019, p. 138.

646 *E.g.* § 31a, 199 (1) (2), 300 (1), 309 (7) (b) and 521 BGB. Wimmer 2017, p. 294. *Recently* Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A, para 401.

647 As defined under § 276 (2) BGB. § 276 BGB is taken as a starting point by Heuser 2019, p. 138 and Wimmer 2017, p. 294.

648 Frey *AuR* 1953, 7 (8), *as derived from* MüKoBGB/Grundmann, 8. Aufl. 2019, BGB § 276, no. 94. *This quotation was also used by* Heuser 2019, p. 138.

649 Bundesgerichtshof 11 May 1953, *Entscheidungen des Bundesgerichtshofes*, Band 10, p. 16. *Also* Bundesgerichtshof 8 July 1992, IV ZR 223/91, *NJW* 1992, pp. 2418-2419, para 1: '*[E]inen schweren Verstoß gegen die im konkreten Fall gebotene Sorgfalt dar, der über ein normales Maß deutlich hinausgehe.' Recently* Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A, para 401. *Also* MüKoBGB/Grundmann, 8. Aufl. 2019, BGB § 276, no. 94, Palandt/Grüneberg 2015, BGB § 276, no. 14, Staudinger/Schwarze (2014) § 276, no. 93 and Röhl 1974, p. 521.

650 Staudinger/Schwarze (2014) § 276, no. 93-94. *In the context of credit rating agency liability* Heuser 2019, p. 138. *Recently* Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A, para 401.

651 Staudinger/Schwarze (2014) § 276, no. 104 and Röhl 1974, p. 526.

under German law. Moreover, the requirement of subjective culpability can be relaxed when the wrongdoer is a legal person.[652]

In the context of credit rating agency liability, hence, conduct can qualify as 'intentional' if a credit rating agency knew its conduct would or could cause an infringement and intended to commit an infringement or at least accepted that its conduct could result in an infringement.[653] Furthermore, German legal scholars explained the meaning of gross negligence in such way that a credit rating agency – by having committed one of the infringements – must have breached the required standard of care in an unusually severe way, thereby not having paid attention to matters that it should not have ignored. Although consciousness of possible harmful consequences does not seem required, courts must assess the subjective blameworthiness of the wrongdoer. German scholars point out that whether conduct qualifies as gross negligent, is a question that can only be answered in the concrete circumstances of the case.[654]

Finally, due to the increased threshold for liability under Article 35a CRA Regulation, the question arises to what extent the threshold of gross negligence under Article 35a CRA Regulation is similar to the yardstick under § 826 BGB. The German Federal Supreme Court indeed held that the threshold of § 826 BGB can also be met when the wrongdoer acted carelessly (*gewissenlos*) or with gross negligence.[655] Moreover, Wagner stated that Article 35a CRA Regulation might practically not go further than § 826 BGB.[656] However, § 826 BGB requires the wrongdoer to have acted intentionally *and* contrary to public policy. Considering the decision of the Higher Regional Court of Dresden, § 826 BGB seems to introduce a higher threshold than Article 35a CRA Regulation. Indeed, for conduct to qualify as contrary to public policy under § 826 BGB, it is insufficient for the wrongdoer to have breached a general duty of care or a contractual obligations.[657] Instead, the conduct must qualify as *gewissenlos*, which could be the case if a credit rating agency accepted that its credit ratings would be used by the issuer to mislead investors or if a credit

652 MüKoBGB/Grundmann, 8. Aufl. 2019, BGB § 276, no. 95 and Staudinger/Schwarze (2014) § 276, no. 96, both referring to Röhl 1974, p. 526. *In the context of credit rating agency liability* Heuser 2019, pp. 138-139.

653 *In the context of credit rating agencies* Wimmer 2017, p. 293 and Gietzelt & Ungerer 2013, p. 341.

654 *E.g.* Heuser 2019, p. 139, Wimmer 2017, pp. 294-295 and Gietzelt & Ungerer 2013, p. 341. Dutta 2013, p. 1734 refers the explanation of gross negligence back to the case law in respect of § 309 (7) (b) BGB.

655 *Cf.* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 30. Bundesgerichtshof 3 December 2013, XI ZR 295/12, *NJW* 2014, pp. 1098-1101, para 34. *In particular on credit rating agency liability and § 826 BGB* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 140 and Wagner 2013, p. 477.

656 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 142 (referring to Haar 2013, p. 2493).

657 Bundesgerichtshof 3 December 2013, XI ZR 295/12, *NJW* 2014, pp. 1098-1101, para 23.

rating agency issued credit ratings to damage the issuer.[658] This example goes further than the requirement of a credit rating agency having committed an infringement with gross negligence under Article 35a CRA Regulation.

5.6.3.2 'Impact' and 'caused to', including claimant-specific requirements

(a) General rules on causation

As stated in section 5.3.1.3, the terms 'impact', 'caused to' and the claimant-specific requirements are related to causation, and are therefore discussed together. German law divides the assessment of causation into two elements: *haftungsbegründende Kausalität* and *haftungsausfüllende Kausalität*. *Haftungsbegründende Kausalität* concerns the link between the defendant's conduct and the infringement of the claimant's rights, while *haftungsausfüllende Kausalität* concerns the link between the infringement of the claimant's rights and the claimant's loss. *Haftungsausfüllende Kausalität* in fact forms part of the German law of damages. Depending on the circumstances of the case, it can be difficult to draw the line between these two elements of causation. The difference, however, is important in the context of the required standard of proof.[659]

The elaboration of the two elements of causation depends on the legal context in which they apply. In the context of § 823 (1) BGB, *haftungsbegründende Kausalität* concerns the causal relationship between the defendant's breach of duty and the infringement of the claimant's protected legal right(s), whereas *haftungsausfüllende Kausalität* concerns the causal relationship between the infringement of the claimant's protected legal right(s) and the loss suffered by the claimant.[660] In the context of § 823 (2) BGB, *haftungsbegründende Kausalität* concerns the causal relationship between the defendant's conduct and the breach of a legal provision that intends to protect the claimant, whereas *haftungsausfüllende Kausalität* concerns the causal relationship between the breach of such a legal provision and the loss suffered by the claimant.[661] As a concrete example, in the context of prospectus liability, *haftungsbegründende Kausalität* concerns the causal relationship between the incorrect or incomplete information (resulting from the defendant's conduct) and the investment decision (the infringement of the claimant's right to decide on the investment), whereas *haftungsausfüllende Kausalität* concerns the causal relationship between

658 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, paras. 36 and 39.

659 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 67, Van Dam 2013, no. 1103-1, Van Gerven, Lever & Larouche 2000, p. 397 and Magnus 2000, pp. 63-64.

660 *E.g.* Infantino & Zervogianni 2017, p. 104 and Van Dam 2013, no. 1103-1. Van Gerven, Lever & Larouche 2000, pp. 396-397 provided a slightly different explanation of *haftungsausfüllende Kausalität* and emphasised the causal relationship between the conduct of the defendant and the loss suffered by the claimant.

661 *Cf.* Kötz & Wagner 2013, no. 130.

the incorrect or incomplete information (resulting from the defendant's conduct) and the loss suffered by the claimant.[662]

The claimant bears the burden of proof as regards the requirement of causation.[663] The difference between *haftungsbegründende Kausalität* and *haftungsausfüllende Kausalität* is important for it determines the required standard of proof under German law.[664] § 286 ZPO sets the required standard of proof to determine the truth of factual claims and *haftungsbegründende Kausalität*, while § 287 ZPO sets the required standard of proof to determine *haftungsausfüllende Kausalität* – and the extent of the loss suffered.[665]

Under the general rule of § 286 ZPO, '*[d]as Gericht hat unter Berücksichtigung des gesamten Inhalts der Verhandlungen und des Ergebnisses einer etwaigen Beweisaufnahme nach freier Überzeugung zu entscheiden, ob eine tatsächliche Behauptung für wahr oder für nicht wahr zu erachten sei*', German courts are hence free to assess the evidence, but the standard of proof is demanding: courts must 'be convinced' that a claim is true or not.[666] The German Federal Supreme Court explained this yardstick in the *Anastasia* case in 1970, which was a case on the burden and standard of proof relating to the statement of the claimant that she was the grand Duchess Anastasia Romanov. The Federal Supreme Court held that courts could not be convinced on the basis of a *bloßen Wahrscheinlichkeit* (sheer probability) only, but that '*[e]ine von allen Zweifeln freie Überzeugung*' (complete persuasion) was not required either. In factually doubtful situations, the courts can suffice with '*einem für das praktische Leben brauchbaren Grad von Gewißheit […], der den Zweifeln Schweigen gebietet, ohne sie völlig auszuschließen*'.[667] Furthermore, the courts can suffice with '*einer an Sicherheit grenzenden Wahrscheinlichkeit*' only, if the judges are convinced of the truth.[668]

In contrast, under § 287 ZPO, the claimant must meet a less demanding standard of proof in relation to the *haftungsausfüllende Kausalität* and the extent

662 Assmann in Assmann/Schütze, HdB KapitalanlageR 2015, § 5 no. 90-91 and *cf.* Vandendriessche 2015, no. 166.

663 As a rule, the burden of proof lies with the party that invokes a fact to support its claim or defence. Bundesgerichtshof 17 February 1970, *Entscheidungen des Bundesgerichtshofes*, Band 53 (*Anastasia*), p. 250: '*Die allgemeine Beweislastregel des deutschen Rechts, daß jede Partei die Beweislast für alle Voraussetzungen einer von ihr in Anspruch genommenen Norm trägt […].*' *As derived from* Murray & Stürner 2004, p. 267.

664 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 67, Van Dam 2013, no. 1103-1, Van Gerven, Lever & Larouche 2000, p. 397 and Magnus 2000, pp. 63-64.

665 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 67 and no. 85. *Also* GF-ZPO/Siebert 2019, § 287, no. 4-5 and Infantino & Zervogianni 2017, p. 104. Some caution must be exercised, as the 'division of labour between § 286 ZPO and § 287 ZPO' is debated, Steel 2015, p. 56.

666 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 67, Steel 2015, p. 53 and Murray & Stürner 2004, p. 310.

667 Bundesgerichtshof 17 February 1970, *Entscheidungen des Bundesgerichtshofes*, Band 53 (*Anastasia*), p. 256.

668 *Cf.* Bundesgerichtshof 17 February 1970, *Entscheidungen des Bundesgerichtshofes*, Band 53 (*Anastasia*), p. 256.

of the loss suffered: '*[i]st unter den Parteien streitig, ob ein Schaden entstanden sei und wie hoch sich der Schaden oder ein zu ersetzendes Interesse belaufe, so entscheidet hierüber das Gericht unter Würdigung aller Umstände nach freier Überzeugung.*' § 287 ZPO provides courts with more freedom to decide on the evidence:[669] the required standard of proof does not involve '*an Sicherheit grenzenden Wahrscheinlichkeit*', but rather '*überwiegende Wahrscheinlichkeit*'.[670] This relaxation of the standard of proof, however, does not discharge claimants from the obligation to provide sufficient *Anhaltspunkte* (reference points). Otherwise, without such *Anhaltspunkte* the assessment made by the Court would remain '*in der Luft*' and would qualify as '*willkürlich*' (arbitrary).[671]

In the context of credit rating agency liability, the question arises as to how Article 35a (1) CRA Regulation fits within the framework of *haftungsbegründende* and *haftungsausfüllende Kausalität*. In relation to claims brought by issuers, one can qualify the causal relationship between the infringement and the affected credit rating – the 'impact' – as *haftungsbegründende Kausalität* and the causal relationship between the infringement which resulted in the affected credit rating and the loss suffered by issuers as *haftungsausfüllende Kausalität*. However, in relation to claims brought by investors, it is more difficult to determine where the line between *haftungsbegründende Kausalität* and *haftungsausfüllende Kausalität* must be drawn. German academic literature generally qualifies the causal relationship between the infringement and the affected credit rating – the 'impact' – as *haftungsbegründende Kausalität* and the causal relationship between the infringement which resulted in the affected credit rating and the loss suffered by investors as *haftungsausfüllende Kausalität*.[672] These general descriptions of *haftungsbegründende Kausalität* and *haftungsausfüllende Kausalität* however do not specifically address the requirement of reasonable reliance, thereby suggesting that reliance falls within the scope of *haftungsausfüllende Kausalität*. Only Schroeter explicitly divides the assessment of *haftungsbegründende Kausalität* in the causal relationship between the infringement and the affected credit rating and reasonable reliance by the credit rating agency, so that reliance then needs to be proven under the general rule of § 286 ZPO.[673]

669 Murray & Stürner 2004, p. 312. *Cf. also* Baumbach/Lauterbach/Albers/Hartmann 2015, § 287, no. 2.

670 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 85. *Also* GF-ZPO/Siebert 2019, § 287, no. 11. Bundesgerichtshof 5 November 1992, IX ZR 12/92, *NJW* 1993, p. 734: '*jedenfalls eine deutlich überwiegende, auf gesicherter Grundlage beruhende Wahrscheinlichkeit reicht für die richterliche Überzeugungsbildung aus* […].' *See also e.g.* Bundesgerichtshof 21 July 2005, IX ZR 49/02, *NJW* 2005, p. 3277.

671 Oberlandesgericht München 18 July 2002, 19 U 5630/01, ECLI:DE:OLGMUEN:2002:0718.19U5630.01.0A, *NZG* 2002, p. 1111, *as derived from* Von Rimon 2014, p. 191. *Also in this regard* GF-ZPO/Siebert 2019, § 287, no. 11, Musielak/Voit/Foerste, 15. Aufl. 2018, ZPO § 287, no. 7 and Baumbach/Lauterbach/Albers/Hartmann 2015, § 287, no. 2.

672 *E.g.* Wimmer 2017, pp. 153 and 210, Seibold 2016, pp. 128-129 and Gietzelt & Ungerer 2013, p. 342.

673 With regard to *haftungsbegründende Kausalität* only, *see* Schroeter 2014, pp. 948-949.

It is possible to defend both approaches, depending on whether one finds the wording of Article 35a (1) CRA Regulation or the German system of private law decisive.[674] In any case, I would conclude that the element of 'reasonable reliance' constitutes a factual claim that must be proven by the standard of proof required under § 286 ZPO, regardless of whether the causal link between the credit rating and the investment decision qualifies as *haftungsbegründende Kausalität* and *haftungsausfüllende Kausalität*.[675]

Haftungsbegründende and *haftungsausfüllende Kausalität* spin out the different causal links which must be proven. In addition, there are tests to assess the existence of a causal relationship. The *condicio sine qua non* test determines the existence of causation in fact, whereas the *Adäquanztheorie* (the theory of causal adequacy) and the *Schutzzwecklehre* (the theory of the scope of the rule) determine the existence of causation in law. There seems to be no unity in German doctrine as regards the question of whether all of these tests apply both to the assessment of *haftungsbegründende* and *haftungsausfüllende Kausalität*. It has been argued that *haftungsbegründende Kausalität* is mainly determined by the *condicio sine qua non* test, whereas *haftungsausfüllende Kausalität* is determined by all three of them.[676]

Causation in fact is determined by application of the *condicio sine qua non* test. This test is not satisfied if the loss would also have occurred in the absence of the defendant's breach of contract or duty.[677] The application of the *condicio sine qua non* test is problematic if two independent causes led to the loss

674 One the one hand, liability under Art. 35a (1) CRA Regulation is essentially based on an infringement listed in Annex III which had an impact on a credit rating, so one could argue that the *haftungsbegründende Kausalität* only concerns this causal link. On the other hand, the essence of *haftungsbegründende Kausalität* can be said to concern the link between the defendant's conduct and the infringement of the claimant's rights, so that an investor should demonstrate its right to take a proper investment decision has been breached by the infringement and the affected credit rating. The first approach adopted by German authors as Seibold, Gietzelt & Ungerer and Wimmer can be explained by reference to the wording of Art. 35a CRA Regulation, but leads to a remarkable difference with the approach to prospectus liability under German law. In the area of prospectus liability, *haftungsbegründende Kausalität* concerns the causal relationship between the incorrect information and the investment decision of an investor, whereas *haftungsausfüllende Kausalität* concerns the causal relationship between the incorrect information and the loss suffered by the claimant. Consequently, reliance upon the prospectus falls within the scope of *haftungsbegründende Kausalität*, while reliance on an affected credit rating by investors falls within the scope of *haftungsausfüllende Kausalität*. Although the structure of Art. 35a (1) CRA Regulation can be used to explain this difference, it is nevertheless remarkable that the requirement of reliance falls under different standards of proof in factually comparable situations. At the same time, when one considers 'reasonable reliance' to qualify as a factual claim anyway, both approaches lead to the conclusion that the high standard of proof under § 286 ZPO applies.

675 *Cf.* Von Rimon 2014, p. 155.

676 Zimmermann & Kleinschmidt 2007, p. 594. *See also* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 70 and Van Gerven, Lever & Larouche 2000, p. 397.

677 *Cf.* Palandt/Grüneberg 2019, Vorb v § 249, no. 25.

('multiple causation'), as the question of whether the loss suffered by the claimant would also have occurred without one of the two causes is then answered twice in the affirmative. As a result, the *condicio sine qua non* test is not fulfilled in respect of both causes which would lead to the incorrect conclusion that none of the causes stands in a causal relationship with the loss. § 840 (1) BGB remedies this situation by stating that the parties responsible for these causes will be jointly and severally liable.[678]

Causation in law involves an assessment of whether the loss can be attributed to the defendant.[679] The *Adäquanztheorie* (the theory of causal adequacy) and the *Schutzzwecklehre* (the theory of the scope of the rule) were developed to restrict responsibility for causes that did satisfy the *condicio sine qua non* test.[680] The *Adäquanztheorie* entails that the defendant is responsible only for loss that could reasonably be expected to flow from the defendant's conduct.[681] The German Federal Supreme Court described the theory as follows:

> '*Eine Begebenheit ist adäquate Bedingung eines Erfolges, wenn sie die objektive Möglichkeit eines Erfolges von der Art des eingetretenen generell in nicht unerheblicher Weise erhöht hat. Bei der dahin zielenden Würdigung sind lediglich zu berücksichtigen a) alle zur Zeit des Eintritts der Begebenheit dem optimalen Beobachter erkennbaren Umstände, b) die dem Urheber der Bedingung noch darüber hinaus bekannten Umstände.*'[682]

In summary, the German Federal Supreme Court held that an event can be considered an adequate cause of a certain result if the event generally increased the objective possibility of that result while that result did not occur in an inconsiderable manner. For this purpose, a) all circumstances recognisable to the optimal observer at the time of the occurrence of the event and, b) the further circumstances known to the author of the cause can be taken into consideration. In addition, the *Schutzzwecklehre* entails that the defendant is liable only for loss that falls within the protective scope of the violated rule or duty.[683]

In the context of credit rating agency liability, the burden of proof regarding causation between the infringement and the loss suffered lies with investors

678 *In the context of credit rating agency liability*, Jansen, Kästle-Lamparter & Rademacher 2017, p. 251.

679 Bundesgerichtshof 23 October 1951, *Entscheidungen des Bundesgerichtshofes*, Band 3, p. 265: '*Es ist seit langem in der Rechtslehre und Rechtsprechung unstreitig, daß der Kreis solcher natürlich logischen Ursachen gemeinhin ein viel zu großer ist, um jede ihrer Folgen dem Verursachenden verantwortlich zur Last legen zu können.*'

680 *E.g. cf.* Infantino & Zervogianni 2017, pp. 103-104 and Van Dam 2013, no. 1103-1 and 1103-2.

681 Van Dam 2013, no. 1103-1.

682 Bundesgerichtshof 23 October 1951, *Entscheidungen des Bundesgerichtshofes*, Band 3, pp. 266-267. *As derived from,* Van Dam 2013, no. 1103-1. *Also* Bundesgerichtshof 30 January 1990, XI ZR 63/89, *NJW* 1990, p. 2058.

683 Van Dam 2013, no. 1103-2.

and issuers. Issuers must prove that had the infringement not occurred: (1) the credit rating would have been different (the requirement of 'impact'); and (2) the issuer would not have suffered additional funding costs and/or reputational loss. Furthermore, investors must prove that had the infringement not occurred: (1) the credit rating would have been different (the requirement of 'impact'); and (2) the investor would not have suffered pure economic loss. In order to do so, in combination with the second sentence of Article 35a (1) CRA Regulation, investors must prove that they relied on the credit rating when making their investment decision.[684]

In respect of both claims, the first causal link qualifies as *haftungsbegründende Kausalität*. The standard of proof required by § 286 ZPO does not apply, due to the rules stated by Article 35a (2) CRA Regulation in this regard. The second link qualifies as *haftungsausfüllende Kausalität*, although it was argued already that the requirement of reasonable reliance falls within the scope of *haftungsbegründende Kausalität*. The lower standard of proof under § 287 ZPO applies to the causal link and the assessment of the loss. However, § 286 ZPO applies to factual claims underlying the *haftungsausfüllende Kausalität*, such as whether the investor has reasonably relied upon the credit rating or not. Finally, if the issuer or investor succeeds in proving the *condicio sine qua non* relationship, a German court can limit the liability of the credit rating agency by application of the *Adäquanztheorie* and the *Schutzzwecklehre*.

(b) Opportunities to deal with causal uncertainty

Issuers and, in particular, investors can experience problems in gathering evidence proving the existence of a *condicio sine qua non* relationship. In 2016, for instance, the Regional Court Düsseldorf rejected a claim for damages because the investor could not prove the *condicio sine qua non* relationship between the incorrect credit rating and its investment decision. The Regional Court concluded that it was possible that the investor based its investment decision on the credit rating, but that it was also possible that the investor based its investment decision on other factors. The Regional Court acknowledged that proving an internal fact (*innere Tatsache*) may often be difficult, but did not attach consequences to this statement, except for the conclusion that proof based on indices will be of special importance in this type of cases.[685]

684 Jansen, Kästle-Lamparter & Rademacher 2017, p. 251. *For this approach, see* Landgericht Düsseldorf 29 August 2016, 21 O 57/15, ECLI:DE:LGD:2016:0829.21O57.15.00, *BeckRS* 2016, 17265.

685 Landgericht Düsseldorf 29 August 2016, 21 O 57/15, ECLI:DE:LGD:2016:0829.21O57.15.00, *BeckRS* 2016, 17265: '*Die Kammer verkennt hierbei nicht, dass die Transaktionskausalität eine sog. innere Tatsache und der Beweis einer solchen oftmals mit erheblichen Schwierigkeiten verbunden ist. Daher kommen Indizien bei der Beweisführung eine besondere Bedeutung zu*.' In this case, the facts pleaded against the investor, because the investor invested for the second time in the same issuer after the credit rating agency had withdrawn the credit rating and the

German scholars raised the question of whether German courts will facilitate issuers and investors in proving causation between the infringement and the eventual loss.[686] German law can facilitate claimants in general through procedural law by (statutory) reversals of the burden of proof or by presumptions of causation on the basis of *prima facie* evidence (in German *prima facie Beweis* or *Anscheinsbeweis*).[687] In the context of prospectus liability and liability of incorrect or incomplete investment advice, specific facilitations to the benefit of investors were introduced. A study of German academic literature however displays scepticism by German authors with regard to the application of facilitations in the context of credit rating agency liability,[688] although Schantz argued in favour of the application of these facilitations in the context of Article 35a CRA Regulation.[689] This section briefly describes the possible facilitations and explains the reasons why German authors consider it unlikely that German courts will apply them. The first facilitation concerns claims brought by both issuers and investors, while the other possible facilitations discussed are relevant in relation to claims brought by investors only. This section does not pay attention to the doctrine of loss of chance, as German courts do not apply this doctrine as a matter of principle.[690] Lost chances do not qualify as protected interests for which compensation can be claimed under German law.

(i) – Anscheinsbeweis (prima facie evidence)

German courts can presume the truth of certain facts on the basis of *Anscheinsbeweis* (*prima facie* evidence) provided by the claimant. The application of this concept is relevant in relation to claims for credit rating agency liability brought by issuers and investors. In order for a presumption to be based on *Anscheinsbeweis*, it is required that '*im Einzelfall ein typischer Geschehensablauf vorliegt, der nach der Lebenserfahrung auf eine bestimmte Ursache hinweist und so*

issuer had filed for a *Schutzschirmverfahrens* (in preparation of insolvency proceedings). The Regional Court also concluded that § 448 ZPO, under which a court may question one of the parties if the court is not satisfied that a certain fact is true or not true on the basis of the evidence provided, does not apply when a party provided insufficient proof to support a claim.

686 *E.g.* Schantz 2015, pp. 327 ff. As Art. 35a (2) CRA Regulation stipulates the burden of proof in respect of causation between an infringement and a credit rating, this dissertation does not pay further attention to German law in this respect.

687 *Cf.* Van Dam 2013, no. 1107-1, Magnus 2013, no. 20 and Jansen 1999, p. 276. The line between these concepts is sometimes difficult to draw.

688 *E.g.* Arne Maier *VuR* 2017, p. 386, Wimmer 2017, pp. 306-307, Von Rimon 2014, p. 154, Amort 2013, p. 278, Gietzelt & Ungerer 2013, p. 343, *cf.* Wagner 2013, pp. 494-495, Berger & Stemper 2010, p. 2294 and Blaurock 2007, pp. 635-637.

689 Schantz 2015, p. 365.

690 *Cf. e.g.* Palandt/Grüneberg 2019, Vorb v § 249, no. 53, Magnus 2013, no. 35 and Van Dam 2013, no. 1110-3. Less recently: Jansen 1999, pp. 273-274. *Although, in German literature, it has been argued that the doctrine of loss of chance should be applied, e.g.* Jansen 1999, p. 275.

sehr das Gepräge des gewöhnlichen und Üblichen trägt, daß die besonderen individuellen Umstände in ihrer Bedeutung zurücktreten […].'[691] German courts can thus accept *prima facie* evidence when a case involves a typical course of events which, from life experience, points to a certain cause in such an ordinary and customary way that special individual circumstances of the case are not important.

In the context of credit rating agency liability, the question arises whether a causal relationship between the affected credit rating and the loss suffered by issuers and investors can be presumed on the basis of *prima facie* evidence. As concluded by Von Rimon and Schroeter, the influence of credit ratings cannot be qualified as typical course of events in which individual circumstances of the case are not important.[692] This applies to pure economic and reputational loss that issuers could suffer, because these types of loss could be caused by other factors as well. The same applies to pure economic loss that could be suffered by investors, because investors can take investment decisions that are not necessarily only influenced by credit ratings[693] or because the price or yield of the financial instruments was affected by other causes (or was not even affected at all).

(ii) – The concept of Anlagestimmung (reliance on 'market sentiment')[694]

The application of the concept of *Anlagestimmung* (the concept of 'market sentiment'[695]) is relevant in relation to claims brought by investors only. German courts applied this concept in prospectus liability cases, prior to the introduction of the reversal of the burden of proof under § 23 (2) Wertpapierprospektgesetz (German Securities Prospectus Act).[696] The concept of *Anlagestimmung* substitutes the requirement of an investor's individual reliance on a prospectus. Instead, German courts presume that a prospectus caused a certain sentiment on the financial markets based on which an investor was presumed to have taken its investment decision.[697] In the context of claims brought by investors against credit rating agencies, the majority of German

691 Bundesgerichtshof 18 March 1987, IVa ZR 205/85, *NJW* 1987, p. 1945, *as derived from* Musielak/Voit/Foerste, 15. Aufl. 2018, ZPO § 286, no. 23.

692 Von Rimon 2014, pp. 157 and 191 and Schroeter 2014, p. 950.

693 *Cf. for this consideration in the context of ad-hoc disclosure* Bundesgerichtshof 4 June 2007, II ZR 147/05, *NZG* 2007, pp. 708-711 (*ComROAD IV*), para 13.

694 The concepts of the *Vermutung aufklärungsrichtigen Verhaltens* and *Anlagestimmung* are sometimes categorised as form of *Anscheinsbeweis*, factual presumption or reversal of the burden of proof. It has however been decided to discuss these concepts separately.

695 *As derived from* Vandendriessche 2015, no. 322.

696 § 23 (2) '*Ein Anspruch nach den §§ 21 oder 22 besteht nicht, sofern (1) die Wertpapiere nicht auf Grund des Prospekts erworben wurden, (2) der Sachverhalt, über den unrichtige oder unvollständige Angaben im Prospekt enthalten sind, nicht zu einer Minderung des Börsenpreises der Wertpapiere beigetragen hat, (3) der Erwerber die Unrichtigkeit oder Unvollständigkeit der Angaben des Prospekts bei dem Erwerb kannte*'. Vandendriessche 2015, no. 323.

697 Vandendriessche 2015, no. 322-323.

scholars concluded that German courts will generally not presume the existence of a causal relationship based on *Anlagestimmung*.[698] They explained this conclusion by the fact that German courts mostly restricted the application of the concept of *Anlagestimmung* to the field of prospectus liability and by the fact that credit ratings in themselves are generally not considered capable of creating the required market sentiment.[699]

On several occasions, investors have tried to expand the scope of the concept of *Anlagestimmung* to cases concerning the violation of ad hoc disclosure obligations, but without success. In *Infomatic I*, the German Federal Supreme Court refused to assume that incomplete or incorrect ad hoc disclosures are generally capable of creating a positive market sentiment similar to prospectuses:

> '*Auch die von der Rechtsprechung zur Prospekthaftung nach dem Börsengesetz alter Fassung entwickelten Grundsätze über den Anscheinsbeweis bei Vorliegen einer Anlagestimmung […] lassen sich nicht ohne weiteres auf die Deliktshaftung nach § 826 BGB im Hinblick auf fehlerhafte Adhoc-Mitteilungen i.S. des § 15 Abs. 1 bis 3 WpHG a.F. übertragen. Zwar ist denkbar, daß sich im Einzelfall -je nach Tragweite der Information aus positiven Signalen einer Adhoc-Mitteilung auch eine (regelrechte) Anlagestimmung für den Erwerb von Aktien entwickeln kann. Zur genauen Dauer einer solchen denkbaren Anlagestimmung lassen sich aber ebenso wenig -wenn nicht sogar weniger -verläßliche, verallgemeinerungsfähige Erfahrungssätze aufstellen wie für den Bereich der Emissionsprospekte.*'[700]

Yet, the German Federal Supreme Court left the door open for exceptional situations in which statements issued on an ad-hoc basis do create a certain sentiment in the financial markets. The German Federal Supreme Court repeated this restrictive approach in *Comroad IV*:

> '*Denn der Informationsgehalt der Ad-hoc-Mitteilung beschränkt sich im Allgemeinen ausschnittartig auf wesentliche aktuelle, neue Tatsachen aus dem Unternehmensbereich, die zumeist für eine individuelle zeitnahe Entscheidung zum Kauf oder Verkauf der Aktien relevant sein können, jedoch in der Regel nicht geeignet sind, eine so genannte Anlagestimmung hervorzurufen. Zwar ist denkbar, dass sich im Einzelfall – je nach Tragweite der*

698 *As stated by* Dumont du Voitel 2018, p. 220, Wimmer 2017, p. 307, Von Rimon 2014, p. 188, Gietzelt & Ungerer 2013, p. 343 and Blaurock 2007, p. 636. Although there is no unity in German literature, *see* Heuser 2019, p. 181, fn. 939 and 940. Heuser, however, rejected the application of the concept of *Anlagestimmung* because it would be contrary to EU law (Heuser 2019, p. 183).

699 Von Rimon 2014, pp. 187-188 and Gietzelt & Ungerer 2013, p. 343. *In respect of the latter argument only* Wimmer 2017, p. 307.

700 Bundesgerichtshof 19 July 2004, II ZR 217/03, *NJW* 2004, pp. 2668-2671 (*Infomatec*), para 60. *Also* Koch 2017, pp. 381-382.

> *Information – aus positiven Signalen einer Ad-hoc-Mitteilung auch eine regelrechte Anlagestimmung für den Erwerb von Aktien entwickeln kann; […].'*[701]

The German Federal Supreme Court hence made a difference between the question of whether a statement is material for an individual investment decision and the question of whether a statement is capable of creating a certain market sentiment. Ad-hoc disclosures can be relevant for individual investment decisions to purchase or sell financial instruments. However, they are only capable of creating a certain market sentiment in exceptional situations. Overall, outside the field of prospectus liability, an investor hence faces a difficult task to prove that the incorrect or the incomplete information created a certain market sentiment.[702]

In the context of credit rating agency liability, the reasoning of the German Federal Supreme Court in *Infomatic I* and *Comroad IV* might well apply. Credit ratings show resemblance to ad-hoc disclosures, in the sense that they do not provide such an extensive overview of the issuer or its financial instruments as prospectuses do. German courts will therefore analyse whether a certain credit rating created a certain market sentiment. Von Rimon posed this question, and answered it in the negative for most situations. In her opinion, only solicited credit ratings can create a certain investment sentiment in exceptional situations. However, normally, credit ratings will not be considered to be capable of creating a certain market sentiment so that the concept of *Anlagestimmung* will not be applied easily to cases concerning credit rating agency liability.[703]

(iii) – Vermutung aufklärungsrichtigen Verhaltens ('a presumption of advice-conform behaviour'[704]*)*

The application of a *Vermutung aufklärungsrichtigen Verhaltens* is relevant in relation to claims brought by investors only. It applies to situations in which the claimant received incorrect or incomplete advice on the basis of which the claimant took a decision, while the defendant owed a duty to the claimant to provide correct and complete information in order to enable the claimant to take a decision. When a German court adopts a *Vermutung aufklärungsrichtigen Verhaltens* ('a presumption of advice-conform behaviour'[705]), it presumes that, had the advice been correct and complete, the claimant would have acted

701 Bundesgerichtshof 4 June 2007, II ZR 147/05, *NZG* 2007, pp. 708-711 (*ComROAD IV*), para 13. *Also* Koch 2017, p. 382. This approach was repeated subsequently again in Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 64.
702 *Cf.* Fleischer in Assmann/Schütze, HdB KapitalanlageR 2015, § 6, no. 25 and no. 27-28.
703 Von Rimon 2014, p. 188.
704 *Translation derived from* Vandendriessche 2015, no. 199.
705 *Translation derived from* Vandendriessche 2015, no. 199.

in accordance with that advice.[706] The burden of proof shifts towards the defendant, who must provide evidence to the contrary.[707]

In the context of claims brought by investors against credit rating agencies, German scholars often concluded that the *Vermutung aufklärungsrichtigen Verhaltens* does not apply.[708] This conclusion is based on the difference in services provided by investment advisors and credit rating agencies, which entails that a reversal of the burden of proof is justified in the context of investment advice, but not in the context of credit rating agency liability. As explained by the German Federal Supreme Court, the justification of the reversal of the burden of proof lies in the fact that, on the one hand, the duty owed by the defendant aims to protect the claimant, while, on the other hand, the claimant cannot not benefit much from this protection without any facilitations in relation to the burden of proof:

> '*Dem Ersatzberechtigten wäre wenig damit gedient, wenn er seinen Vertragsgegner zwar an sich aus schuldhafter Verletzung einer solchen Hinweispflicht in Anspruch nehmen könnte, aber regelmäßig daran scheitern würde, daß er den meist schwer zu führenden Beweis nicht erbringen könnte, wie er auf den Hinweis reagiert hätte, wenn er gegeben worden wäre.*'[709]

As the goal of the duty of an advisor is to enable an investor to take a specific investment decision and to estimate whether it wishes to take the investment risks attached to that decision, it was considered reasonable to shift the burden of proof towards the advisor.[710] Whereas investment advisors provide advice as to enable an investor to take a certain investment decision, such an element of advice with regard to a concrete investment decision is lacking in the context of the services provided by credit rating agencies.[711] The fact that advice relating to a specific investment decision is not part of the duty owed by credit rating agencies, entails that German courts cannot presume that, had the credit rating not been affected by the infringement, investors would have acted in

706 *In the context of financial advice* Vandendriessche 2015, no. 199. *See also* Von Rimon 2014, p. 189. In 1973, the German Federal Supreme Court drew an analogy between situations of medical negligence and negligent investment advice and applied the *Vermutung aufklärungsrichtigen Verhaltens* in the context of investment advice. Bundesgerichtshof 5 July 1973, VII ZR 12/73, *NJW* 1973, p. 1689.

707 *Explicitly* Bundesgerichtshof 8 May 2012, X I ZR 262/10, *NJW* 2012, pp. 2427-2434, *BKR* 2012, pp. 368-377, para 29. *See also* Von Rimon 2014, p. 189.

708 *As stated by* Von Rimon 2014, pp. 189-190, Amort 2013, p. 278 and Berger & Stemper 2010, p. 2294. *Cf. also* Schantz 2015, pp. 327-328. *Contra* Dumont du Voitel 2018, p. 224, who argued that application of this doctrine is possible in specific situations.

709 Bundesgerichtshof 5 July 1973, VII ZR 12/73, *NJW* 1973, p. 1689.

710 Bundesgerichtshof 5 July 1973, VII ZR 12/73, *NJW* 1973, p. 1689.

711 *For a similar reasoning in the context of ad-hoc disclosure,* Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 62.

accordance with the credit rating or would have acted in a different manner.[712]

(iv) – Replacing direct reliance with Kursdifferenzschade
The final facilitation investigated in this subsection is relevant in relation to claims brought by investors only. This facilitation does not relieve the burden of proof by presumptions of reliance or by presumptions of correct-credit-rating-conform conduct, but instead relates to the replacement of the requirement of reliance on the credit rating by the requirement of causation between the credit rating and the price of the financial instruments and the yield.[713] This method of circumventing the requirement of direct reliance is similar to the fraud-on-the-market doctrine as applied under US securities law.[714]

In the case of *ComROAD IV*, the German Federal Supreme Court refused to apply the US fraud-on-the-market doctrine in the context of ad-hoc disclosure. It held that application of this doctrine would lead to an endless extension of civil liability under § 826 BGB.[715] Consequently, direct reliance on the information was hence considered crucial for a duped investor to succeed in a claim for damages. But since the *IKB* case of 2011, it seems possible for German courts to award compensation when the claimant cannot prove direct reliance on the information, but wishes to be compensated for the fact that the incorrect or incomplete transaction affected the price of the securities transaction. In the context of a claim for compensation based on § 37b WpHG (on liability for

712 *For this reasoning, see, most extensively*, Von Rimon 2014, pp. 189-190. *Also* Amort 2013, p. 278 and Berger & Stemper 2010, p. 2294. *The same reasoning applies in relation to ad-hoc disclosure*, Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 62.

713 Schantz 2015, pp. 330-331.

714 The fraud-on-the-market doctrine builds upon the idea that all information is reflected in the price of a financial instrument (Efficient Capital Market Hypothesis). Instead of requiring the claimant's reliance on incomplete or incorrect information, the theory assumes that an investor relies on the integrity of market prices so that there exists a causal connection between the loss suffered by the investor and the incomplete or incorrect information. Investors hence do not need to provide evidence of their direct reliance on the incomplete or incorrect information. *See in detail* Vandendriessche 2015, no. 396 ff. *Also* Schantz 2015, pp. 330-331. A more detailed description of the fraud-on-the-market doctrine under US securities law falls outside the scope of this dissertation. On the differences between the US fraud-on-the-market doctrine and the German *IKB*-case, Vandendriessche 2015, no. 419.

715 Bundesgerichtshof 4 June 2007, II ZR 147/05, *NZG* 2007, pp. 708-711 (*ComROAD IV*), para 16: '*Derartige Ansichten liefen darauf hinaus, im Rahmen des § 826 BGB auf den Nachweis des konkreten Kausalzusammenhangs zwischen der Täuschung und der Willensentscheidung des Anlegers zu verzichten und stattdessen – in Anlehnung an die so genannte fraud-on-the-market-theory des US-amerikanischen Kapitalmarktrechts – an das enttäuschte allgemeine Anlegervertrauen in die Integrität der Marktpreisbildung anzuknüpfen. Diesem Denkansatz, der zu einer uferlosen Ausweitung des ohnehin offenen Haftungstatbestands der sittenwidrigen vorsätzlichen Schädigung auf diesem Gebiet führen würde, ist der Senat in seiner bisherigen kapitalmarktrechtlichen Rechtsprechung zu den fehlerhaften Ad-hoc-Mitteilungen in Bezug auf die haftungsbegründende Kausalität nicht gefolgt […]; hieran hält er weiterhin fest.*' Haar 2014, p. 319. *Also* Koch 2017, p. 282.

the omission to disclose insider information in time), the German Federal Supreme Court held:

> '*Für den Fall, dass der Klägerin der Kausalitätsnachweis zwischen unterbliebener Ad-hoc-Mitteilung und Kaufentschluss des Zedenten nach den oben genannten Maßstäben nicht gelingen sollte, weist der Senat darauf hin, dass dann jedenfalls der Kursdifferenzschaden ersatzfähig ist. Hierfür kommt es im Rahmen von § 37b WpHG nicht darauf an, ob der Zedent bei rechtzeitiger Veröffentlichung der Insiderinformation vom Kauf der Aktien Abstand genommen hätte; er muss lediglich darlegen und gegebenenfalls beweisen, dass – wäre die Ad-hoc-Mitteilung rechtzeitig erfolgt – der Kurs zum Zeitpunkt seines Kaufs niedriger gewesen wäre […].*'[716]

Hence, if the claimant cannot provide evidence for the causal relationship between the investment decision and the ad-hoc disclosure, it can be apt to compensate the claimant for the so-called *Kursdifferenzschade* (the impact of the incorrect or incomplete information on the price of the transaction). The claimant then must prove that the incomplete or incorrect information affected the price of the transaction.

It is highly questionable whether German courts would apply this relaxation of the requirement of reliance to the situation of credit rating agency liability by analogy.[717] As explained in the general introduction the term 'caused to' in section 5.3.1.3, Article 35a (1) CRA Regulation explicitly prescribes that an investor must have 'reasonably relied […] on a credit rating'. A strictly grammatical interpretation hence leaves no room for a replacement of the requirement of reliance on the credit rating by the requirement of causation between the credit rating and the price of the financial instruments and the yield. From other decisions with regard to the question of whether Article 35a (1) CRA Regulation applies to investors who relied on an issuer rating (as opposed to a credit rating attached to a specific financial instrument), it appears that German courts stay close to the wording of the CRA Regulation.[718] There-

716 Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 67. Vandendriessche 2015, no. 418 ff., Haar 2014, p. 319 and Wagner 2013, p. 495. *Also* Koch 2017, p. 384. *Repeated in e.g.* Landgericht Stuttgart 28 February 2017, 22 AR 1/17 Kap, ECLI:DE:LGSTUTT:2017:0228.22AR1.17KAP.0A, *BeckRS* 2017, 118702, para 369: '*Im Rahmen der Ersatzfähigkeit der Kursdifferenzschäden kommt es im Rahmen von § 37b WpHG nicht darauf an, dass der Kläger bei rechtzeitiger Veröffentlichung der Ad-hoc-Mitteilung von seiner Transaktion Abstand genommen hätte. Der Kläger muss lediglich darlegen und gegebenenfalls beweisen, dass – wäre die Ad-hoc-Mitteilung rechtzeitig erfolgt – der Kurs zum Zeitpunkt seines Kaufs niedriger gewesen wäre […].*' *Also* Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A, para 330.

717 Dumont du Voitel dismissed application of this doctrine in the context of credit rating agency liability claims under Art. 35a CRA Regulation (Dumont du Voitel 2018, p. 221).

718 See section 3.5.3.3 (b). *E.g.* Amtsgericht Neuss 28 December 2016, 80 C 3954/15, ECLI:DE:AGNE:2016:1228.80C3954.15.00, *BeckRS* 2016, 130332, Landgericht Düsseldorf 17 March 2017, 10 O 181/15, ECLI:DE:LGD:2017:0317.10O181.15.0A and Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321.

fore, it is unlikely that German courts will apply the rules flowing from the IKB decision in disputes over credit rating agency liability.

5.6.3.3 Suffering 'damages' and claiming 'damages'

(a) Nature of reparable loss and calculation of damages

When applying Article 35a CRA Regulation, German courts will determine the award of damages in accordance with the general rules on *Schadenersatz* (compensation[719]) under § 249-254 BGB.[720] These provisions apply to all *Schadenersatzansprüche*, also to those codified outside the BGB.[721] From § 249-254 BGB, it can be derived that an obligation to provide compensation can relate to material loss, immaterial loss, and lost profits. The German law of damages builds upon the principle of full compensation. Under § 249 (1) BGB, the party that shall provide compensation, '*hat den Zustand herzustellen, der bestehen würde, wenn der zum Ersatz verpflichtende Umstand nicht eingetreten wäre*'. Tot hat end, a German court must determine in what position the aggrieved party would have been in the absence of the wrongful conduct of the other party (*Differenzhypothese*[722]). Under German law, compensation involves *Naturalrestitution* (restitution in kind) as a matter of principle. However, compensation can also be granted in the form of an award of damages pursuant to § 249 (2), § 251 (1) and § 253 BGB.[723]

The claimant bears the burden of proof in respect of the existence and extent of the loss suffered. As discussed, the required standard of proof is relaxed with regard to *haftungsausfüllende Kausalität* and the extent of the loss under § 287 ZPO.[724] This provision provides courts more freedom to decide on the evidence and allows them to estimate the loss.[725] The required standard of proof does not involve '*an Sicherheit grenzenden Wahrscheinlichkeit*' (freely translated as a degree of probability that borders certainty) as under § 286 ZPO, but rather '*überwiegende Wahrscheinlichkeit*' (freely translated as

719 The term 'compensation' is used rather than the term 'damages', as German law in principle awards restitution in kind instead of monetary damages.

720 *As commonly accepted in German contributions. E.g.* Heuser 2019, pp. 158 ff., Wimmer 2017, p. 283, Von Rimon 2014, pp. 164 and 191, Schroeter 2014, p. 849 and Dutta 2013, p. 1735.

721 Palandt/Grüneberg 2019, Vorb v § 249, no. 4. *Cf. also* Staudinger/Schiemann (2017) Vorbem zu §§ 249 ff., para 6 and Van Dam 2013, no. 1203-2.

722 Palandt/Grüneberg 2019, Vorb v § 249, no. 3 and 10. *Cf. also* Staudinger/Schiemann (2017) Vorbem zu §§ 249 ff., para 35 and Staudinger/Schiemann (2017) § 249, para 4.

723 Robbers 2017, no. 656 and Van Dam 2013, no. 1203-2. *Cf. also* Staudinger/Schiemann (2017) § 249, para 1.

724 Heuser 2019, pp. 191-192, Dumont du Voitel 2018, pp. 225 ff. and Schantz 2015, p. 318. *In general cf.* Staudinger/Schiemann (2017) Vorbem zu §§ 249 ff., para 97. *Recently* Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A, para 332.

725 Murray & Stürner 2004, p. 312. *Cf. also* Staudinger/Schiemann (2017) Vorbem zu §§ 249 ff., para 97 and Baumbach/Lauterbach/Albers/Hartmann 2015, § 287, no. 2.

predominant degree of probability).[726] This relaxation of the standard of proof, however, does not discharge claimants from the obligation to provide sufficient *Anhaltspunkte* (reference points). Without any such *Anhaltspunkte*, the estimate of a court would remain '*in der Luft*' and would qualify as '*willkürlich*' (arbitrary).[727] In *EM.TV*, the German Federal Supreme Court paid attention to the fact that proof of hypothetical transaction prices may be difficult to gather in cases concerning liability for the violation of ad-hoc disclosure obligations. However, it stated that '*sich trotz aller Schwierigkeiten der hypothetische Transaktionspreis mit den Methoden der modernen Finanzwissenschaft durchaus mit der erforderlichen Sicherheit errechnen läßt, um […] zumindest eine richterliche Schadenssätzung gemäß § 287 ZPO zu ermöglichen*' and '*[a]ls geeignete Hilfgröße zur Ermittlung des hypothetischen Preises kann auf die Kursveränderung unmittelbar nach Bekanntwerden der wahren Sachlage zurückgegriffen und sodann "vermittels rückwärtiger Induktion" auf den wahren Wert des Papiers am Tage des Geschäftsabschlusses näherungsweise geschlossen werden*'.[728] According to the Regional Court of Stuttgart, the claimant does not need to prove the concrete difference between the actual value of the financial instruments and the price paid at the time the claimant entered into the transaction. It is sufficient to provide evidence of the change of the price of the financial instruments at the moment that the information was corrected.[729]

In the context of credit rating agency liability, German courts must hence determine in what position the issuer or investor would have been in the absence of the infringement and the affected credit rating. In relation to claims for damages brought by issuers, issuers must hence provide sufficient *Anhaltspunkte* that, had the credit rating not been affected, they would have paid less funding costs and would not have suffered reputational loss.[730] In addition, lost profits may be claimed under § 252 BGB.[731]

726 MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 823, no. 85. *Also* GF-ZPO/Siebert 2019, § 287, no. 11. Bundesgerichtshof 5 November 1992, IX ZR 12/92, *NJW* 1993, p. 734: '*jedenfalls eine deutlich überwiegende, auf gesicherter Grundlage beruhende Wahrscheinlichkeit reicht für die richterliche Überzeugungsbildung aus* […].' *See also e.g.* Bundesgerichtshof 21 July 2005, IX ZR 49/02, *NJW* 2005, p. 3277 and Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 68. *Also* Dumont du Voitel 2018, p. 226.

727 Oberlandesgericht München 18 July 2002, 19 U 5630/01, ECLI:DE:OLGMUEN:2002:0718.19U5630.01.0A, *NZG* 2002, p. 1111, *as derived from* Von Rimon 2014, p. 191. *Also in this regard* GF-ZPO/Siebert 2019, § 287, no. 11, Musielak/Voit/Foerste, 15. Aufl. 2018, ZPO § 287, no. 7 and Baumbach/Lauterbach/Albers/Hartmann 2015, § 287, no. 2. *Also* Dumont du Voitel 2018, p. 227.

728 Bundesgerichtshof 9 May 2005, II ZR 287/02 (*EM.TV*), p. 18. *For EM.TV in the context of credit rating agencies*, Schantz 2015, pp. 318-319.

729 Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A, paras. 330 and 332.

730 *Cf.* Von Rimon 2014, p. 164. *Also* Heuser 2019, p. 166, Wimmer 2017, pp. 202-203 and Rosset 2013, p. 38. *See for the idea that an issuer can also claim Naturalrestitution* Wimmer 2017, pp. 201-202.

731 Wimmer 2017, p. 203, Von Rimon 2014, p. 164 and Rosset 2013, p. 38.

In the context of claims brought by investors, the eventual amount of damages to be awarded to investors is the subject of debate in German literature. The discussion evolves around the question of whether investors shall be compensated to the full extent of the investments made (*Vertragsabschlussschade* or *Transaktionsschade*) or only to the extent to which the credit ratings affected the price of the investments (*Kursdifferenzschade*). Some German scholars preferred compensation of the *Kursdifferenzschade* only, mainly because they considered it unfair to hold credit rating agencies responsible for all risks involved with investment decisions.[732] German courts have not decided on this matter in the context of credit rating agency liability.

As described under section 5.6.3.2 (b), I expect that German law will generally not facilitate investors in proving reasonable reliance. But if investors succeed in proving reasonable reliance, they might receive compensation to the extent of the costs of cancellation of the transaction of the financial instruments. In the IKB case, which was decided in the context of deficient ad-hoc market disclosures, the German Federal Supreme Court held that claimants may choose whether to claim *Vertragsabschlussschade* (in the sense of *Transaktionsschade*) or *Kursdifferenzschade*, provided that they are able to prove reliance on the ad-hoc disclosure. The German Federal Supreme Court stated that investors cannot only claim damages to the extent of the *Kursdifferenz*, but also '*die Rückgängigmachung des Wertpapiergeschäfts*' (the cancellation of the securities transaction) which forms in fact the *Naturalrestitution* to which investors are entitled under the general rule of § 249 BGB.[733] The investor then transfers the securities back to the issuer in return for the price of the transaction. When the investor has already resold the securities, it is entitled to the difference between the purchase price and the sales price.[734] The German Federal Supreme Court explicitly paid attention to the argument often used against full compensation that it is not fair to hold issuers responsible for all risks of investment decisions.[735] However, it ended this discussion by stating that '*die Gefahr der zufälligen Verschlechterung der zurück zu gewährende Sache general beim Schädiger [bleibt]*' and that '*die infolge allgemeiner Marktrisiken eingetretene Vermögensminderung trotzdem (auch) Folge der durch die unrichtige bwz. unterbliebene Ad-hoc-Mitteilung bedingten Investitionsentscheidung des Anlegers*

732 Wimmer 2017, pp. 194-197, Gietzelt & Ungerer 2013, p. 344, *cf.* Wagner 2013, p. 495. Heuser 2019, pp. 161-164 and Von Rimon 2014, p. 191 do not make a choice between these two options. Schantz does not support the idea to limit the amount of damages to *Kursdifferenzschade* (Schantz 2015, p. 324).

733 Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 50. *Also* Bundesgerichtshof 9 May 2005, II ZR 287/02 (*EM.TV*), p. 8. *Also* Koch 2017, pp. 382-384.

734 *Prior to the IKB decision*, Bundesgerichtshof 9 May 2005, II ZR 287/02 (*EM.TV*), p. 8.

735 *For a description of this criticism, see also* Schantz 2015, p. 321.

[ist]'.[736] At the same time, the German Federal Supreme Court held that a limitation of the amount of damages to the *Kursdifferenz* is justified when a provision that entitled the investor to damages in the first place prescribes this.[737]

As discussed, Article 35a (1) CRA Regulation in principle requires an investor to have reasonably relied on a credit rating. Provided that the investor can prove that this was the case, the *IKB* case suggests that the investor is free to choose whether to claim damages for the *Vertragsabschlussschade* or *Kursdifferenzschade*.[738] Furthermore, the *IKB* case suggests that an investor's right to compensation of the *Vertragsabschlussschade* is limited if Article 35a CRA Regulation prescribes this. Here, one ends up in a circular reasoning because the *IKB* decision implies that one needs to look at the ground for liability, while the ground for liability in this situation provides no indications in this regard and refers the term '*Ersatz*' back to German law. Overall, under German law, issuers can claim compensation for increased funding costs and reputational loss and investors can choose whether they wish compensation for *Vertragsabschlussschade* or *Kursdifferenzschade*. German courts in principle award restitution in kind, but damages can also be awarded. Issuers and investors bear the burden of proof in respect of the recoverable loss, but the standard of proof is relaxed under § 287 ZPO.

(b) – Contributory negligence & mitigation

§ 254 BGB establishes the rules on *Mitverschulden* in both contractual and non-contractual liability law, covering both contributory negligence and the obligation resting upon the aggrieved party to mitigate its loss. Under § 254 (1) BGB,

736 Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 58.

737 Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 52.

738 Wimmer 2017, p. 200. *Cf. also* Schantz 2015, p. 326. Wimmer pointed out that the possibility of compensation of *Vertragsabschlussschade* through *Naturalrestitution* has the somewhat peculiar consequence that a credit rating agency would receive the financial instruments and would have to pay the investor for these financial instruments (Wimmer 2017, p. 195). Rosset therefore stated that the compensation will be paid in the form of damages (Rosset 2013, p. 38). Heuser pointed out that the possibility of *Naturalrestitution* is barred by the CRA Regulation itself. If an investor would transfer the financial instruments to the credit rating agency in return for the purchase price, the credit rating agency would possess rated financial instruments and thereby act contrary to Art. 6 (1)-(2) and Infringement 3 (a) and (b) Annex I Part B CRA Regulation (Heuser 2019, p. 161). These Infringements prohibit a credit rating agency to rate issuers of which the credit rating agency owns financial instruments or, in case of an existing credit rating, requires a credit rating agency to disclose its credit rating might be affected by the fact that the credit rating agency owns financial instruments of the issuer. Hence, *Naturalrestitution* in respect of an affected credit rating does not automatically cause the credit rating agency to commit an infringement of the CRA Regulation, but it seems nevertheless most likely that, in a dispute over credit rating agency liability, compensation will often be granted in the form of damages.

courts can reduce the award of damages if the aggrieved party has *mitgewirkt* or contributed to the loss. Under § 254 (2) BGB, courts can reduce the award of damages if the aggrieved party failed to point out to the other party that there was a risk of an unusually large loss and if the aggrieved party failed to avoid or to reduce the loss. Under German law, one cannot say the aggrieved party owes any duties to the defendant, but rather that the aggrieved party loses its right to full compensation if it does not guard its own interests.[739] If the wrongdoer acted intentionally, the award of damages will not be reduced. However, if the wrongdoer acted with gross or conscious recklessness, the award of damages can be reduced on the basis of § 254 BGB.[740] German courts must consider the application of § 254 BGB on its own motion if one of the parties states adequate factual statements in this regard.[741] However, the burden of proof lies with the wrongdoer.[742] The factual statements must be proven under the standard of proof of § 286 ZPO. Subsequently, under § 287 ZPO, German courts weigh the degree to which the respective parties contributed to the loss and reduce the amount of damages accordingly.[743]

The 'reasonableness' of an investor's reliance on a credit rating would not be considered in the stage of the establishment of causation under German law. When an investor's reliance is unreasonable, the credit rating agency involved is entitled to the defence of contributory negligence under § 254 (1) BGB. The German private law approach to reasonable reliance hence differs from Article 35a CRA Regulation in two aspects: the burden of proof lies with the credit rating agency, and a lack of reasonable reliance does not necessarily break the causal link between the credit rating agency's conduct and the loss suffered by the investor completely.[744] The application of the requirement of 'reasonable reliance' hence causes inevitable friction within the structure of German national private law.

739 *Cf.* Van Dam 2013, no. 1208-03.
740 *See* MüKoBGB/Oetker, 8. Aufl. 2019, BGB § 254, no. 11.
741 MüKoBGB/Oetker, 8. Aufl. 2019, BGB § 254, no. 143.
742 MüKoBGB/Oetker, 8. Aufl. 2019, BGB § 254, no. 145.
743 *See* MüKoBGB/Oetker, 8. Aufl. 2019, BGB § 254, no. 117. *Also Cf. also* Staudinger/Schiemann (2017) Vorbem zu §§ 249 ff., para 91.
744 *Cf.* Heuser 2019, pp. 164-165.

5.6.4 Article 35a (3) Limitations of liability in advance

5.6.4.1 General system[745]

The legal basis for determining the admissibility of a limitation clause under German law depends on whether the limitation clause was included in general terms and conditions or not; for instance, when the limitation clause resulted from individual negotiations between the parties. The description of the German law approach to limitation clauses is divided into three parts: (i) the binding force of terms and conditions in general; (ii) the substantive test for general terms and conditions under § 305 – § 310 BGB;[746] and (iii) the substantive test for other (individually negotiated) terms and conditions under § 242 BGB. As an overarching principle, under § 276 (3) BGB, liability for intentional conduct cannot be limited in advance.[747]

(a) – Are the terms and conditions binding upon the other party?
In order for the other party to be bound by a limitation clause, the clause must have been offered by the user and accepted by the other party. General terms and conditions become part of an agreement when the user of the terms, upon the moment of entering into the agreement, (1) '*die andere Vertragspartei ausdrücklich oder, wenn ein ausdrücklicher Hinweis wegen der Art des Vertragsschlusses nur unter unverhältnismäßigen Schwierigkeiten möglich ist, durch deutlich sichtbaren Aushang am Ort des Vertragsschlusses auf sie hinweist und*' (2) '*der anderen Vertragspartei die Möglichkeit verschafft, in zumutbarer Weise, die auch eine für den Verwender erkennbare körperliche Behinderung der anderen Vertragspartei angemessen berücksichtigt, von ihrem Inhalt Kenntnis zu nehmen, und wenn die andere Vertragspartei mit ihrer Geltung einverstanden ist*' under § 305 (2) BGB.[748] The user of the terms must hence inform the other party expressly of the terms or must place a clearly visible notice at the place where the contract is concluded and must allow the other party to take notice of the content of the terms. These requirements also apply to agreements concluded online. Users can bind their counterparties by submitting the conclusion of an agreement to the explicit acceptance of the general terms and conditions (by 'box ticking')[749] or by

---

745 *Similar overviews can be found in the dissertations on credit rating agency liability of e.g.* Heuser 2019, pp. 167 ff., Wimmer 2017, pp. 233 ff. and Von Rimon 2014, pp. 158 ff.

746 Limitations of liability will often be included in general terms and conditions. Most of the literature used relates to general terms and conditions.

747 § 276 (3) BGB: '*Die Haftung wegen Vorsatzes kann dem Schuldner nicht im Voraus erlassen werden.*'

748 This provision does not apply to entrepreneurs and legal entities under public law under § 310 (1) BGB.

749 MüKoBGB/Basedow, 8. Aufl. 2019, BGB § 305, no. 76.

creating a clearly visible link at the order page through which the other party can access and print the general terms and conditions.[750]

In the context of credit rating agency liability, if the limitation is included in the (general) terms and conditions of rating contracts concluded between credit rating agencies and issuers or subscription contracts concluded between credit rating agencies and investors, offer and acceptance of the limitation clause are not problematic. The same applies to the use of standard terms of use on credit rating agency's websites to which an investor has explicitly agreed by clicking in agreement. Some credit rating agencies make use of this method by subjecting the access to credit ratings on their websites to explicit acceptance of standard terms of use that also include a limitation.

(b) – Substantive test for general terms and conditions

§ 307 BGB forms the legal basis of the substantive test to determine the admissibility of general terms and conditions (*Inhaltskontrolle*). This provision is part of the statutory framework on general terms and conditions (*allgemeine Geschäftsbedingungen*) under § 305 – § 310 BGB. *Allgemeine Geschäftsbedingungen* are terms and conditions that have been formulated in advance by the user and that are meant to apply to a multitude of agreements.[751] § 310 (1) BGB restricts the scope of application of this statutory framework by stating that part of the rules do not apply to general terms and conditions accepted by entrepreneurs and legal entities under public law (e.g. states).[752] As a result, entrepreneurs and legal entities under public law who agreed to the general terms and conditions of their counterparty cannot derive protection from § 305 (2)-(3), § 308 (1) and (2)-(8) and § 309 BGB directly. The effect of this restriction, however, must not be overestimated. The second sentence of § 310 (1) BGB states that '*§ 307 Abs. 1 und 2 findet in den Fällen des Satzes 1 auch insoweit Anwendung, als dies zur Unwirksamkeit von in § 308 Nummer 1, 2 bis 8 und § 309 genannten Vertragsbestimmungen führt; auf die im Handelsverkehr geltenden Ge-*

750 Bundesgerichtshof 14 June 2006, I ZR 75/03, *NJW* 2006, pp. 2976-2978, para 16, *in the context of an agreement for parcel services. Also* Palandt/Grüneberg 2019, § 305, no. 36.

751 § 305 (1) BGB.

752 § 310 (1) BGB: '*§ 305 Absatz 2 und 3, § 308 Nummer 1, 2 bis 8 und § 309 finden keine Anwendung auf Allgemeine Geschäftsbedingungen, die gegenüber einem Unternehmer, einer juristischen Person des öffentlichen Rechts oder einem öffentlich-rechtlichen Sondervermögen verwendet werden […].*' The term '*unternehmer*' is defined under § 14 BGB. '*Einer juristischen Person des öffentlichen Rechts*' covers amongst others states and other public authorities. Ulmer & Schäfer in Ulmer/Brandner/Hensen, AGB-Recht, 12. Aufl., § 310 BGB, no. 14 and no. 24, respectively. *As discussed in the context of credit rating agencies by e.g.* Wimmer 2017, pp. 235-236 and Von Rimon 2014, pp. 159-160.

wohnheiten und Gebräuche ist angemessen Rücksicht zu nehmen.'[753] The admissibility of the terms is judged in accordance with § 307 (1)-(2) BGB, but § 308 and § 309 BGB can nevertheless apply by analogy to provide substance to this test (by a '*Parallelwertung in der Unternehmersphäre*').[754] Therefore, the protection that entrepreneurs and legal entities under public law can derive from § 305-§ 310 BGB is similar.

As already mentioned, § 307 BGB submits general terms and conditions to a substantive test. Furthermore, § 308 and 309 BGB provide examples of types of terms that do not have effect.[755] The test employed by § 307 (1) BGB is that '*[b]estimmungen in Allgemeinen Geschäftsbedingungen sind unwirksam, wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen*', so that terms do not have effect if they disadvantage the other party unreasonably against the principle of good faith. Such an unreasonable disadvantage can, for instance, exist when the term restricts rights and duties lying at the essence of the agreement to such an extent that the achievement of the goals of the agreement is endangered (so called '*Kernpflichten*' or '*Kardinalpflichten*').[756] In addition, § 308 and 309 BGB provide examples of terms that do not have effect. The list under § 308 BGB is indicative in the sense that courts have a margin of appreciation ('*Wertungsmöglichkeit*'), whereas no such discretion exists in respect of the list under § 309 BGB. In the context of this dissertation, the most relevant example is found under § 309 (7) (b) BGB, which provides that '*ein Ausschluss oder eine Begrenzung der Haftung für sonstige Schäden, die auf einer grob fahrlässigen Pflichtverletzung des Verwenders oder auf einer vorsätzlichen oder grob fahrlässigen Pflichtverletzung eines gesetzlichen Vertreters oder Erfüllungsgehilfen des Verwenders beruhen*' does not have effect.

(c) – Substantive test for other terms and conditions

In respect of terms and conditions that do not qualify as general terms and conditions covered by § 305 – § 310 BGB, the general open norm under § 242 BGB forms the legal basis of the substantive test.[757] In the context of this

753 § 310 (1) BGB – 'Section 305 (2) and (3) and sections 308 and 309 do not apply to standard business terms which are used in contracts with an entrepreneur, a legal person under public law or a special fund under public law. Section 307 (1) and (2) nevertheless apply to these cases in sentence 1 to the extent that this leads to the ineffectiveness of the contract provisions set out in sections 308 and 309; reasonable account must be taken of the practices and customs that apply in business dealings […].' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0731, last accessed at 31 August 2019.

754 MüKoBGB/Basedow, 8. Aufl. 2019, BGB § 310, no. 11-12 and Palandt/Grüneberg 2019, § 307, no. 38 and 40. *Also* Wimmer 2017, pp. 237-236 and Von Rimon 2014, p. 160.

755 Palandt/Grüneberg 2019, § 307, no. 1.

756 § 307 (2) (2) BGB. Palandt/Grüneberg 2019, § 307, no. 33.

757 Prior to the introduction of special rules on general terms and conditions, the substantive test was based on § 242 BGB. The special statutory framework of § 305 – § 310 BGB takes priority over § 242 BGB, *cf. e.g.* MüKoBGB/Schubert, 8. Aufl. 2019, BGB § 242, no. 532, Staudinger/Looschelders/Olzen (2015) § 242, no. 379-380, Fuchs in Ulmer/Brandner/

dissertation, terms and conditions resulting from individual negotiations form an important example of terms and conditions covered by § 242 BGB. § 242 BGB provides a general norm prescribing how a party should act in the performance of an agreement. The provision is applied on several occasions, of which the substantive test of limitation clauses is only one.[758] § 242 BGB states that '*[d]er Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*.'[759] The obligor must hence perform its duties in good faith. The other party can attempt to deprive a limitation clause from its effects by invoking § 242 BGB, but German courts will not easily deprive limitation clauses from their effects on this basis.[760] German law starts from the principles of freedom of contract and private party autonomy and from the premise that negotiating parties are able to guard their own interests. Only when a significant imbalance between the parties' negotiating strengths precludes one of the parties to exercise its party autonomy, will courts make use of § 242 BGB to restore the balance between the parties in the agreement.[761]

5.6.4.2 Limitations of liability in relation to issuers

Depending on whether a limitation clause has been included in general terms and conditions or has been negotiated on an individual basis, the admissibility of the limitation clause must be assessed in accordance with § 305 – § 310 BGB or § 242 BGB respectively. This dissertation assumes that the issuer qualifies as an entrepreneur or a legal entity under public law. An application of the general statutory framework to the admissibility of limitations clauses in the context of credit rating agency liability, as already carried out in German literature, then leads to the following general guidelines:

Hensen, AGB-Recht, 12. Aufl., Vorb. v. § 307 BGB, no. 62 and Pfeiffer in Wolf/Lindacher/Pfeiffer, § 307, no. 27-28. *This topic has been discussed in the context of credit rating agencies by e.g.* Wimmer 2017, pp. 239-241 and Von Rimon 2014, pp. 162-163.

758 The *Inhaltskontrolle* must be distinguished from the *Ausübungskontrolle* under § 242 BGB. The *Ausübungskontrolle* assumes that a term is valid, but that invoking the term in a concrete situation is unreasonable, *e.g.* Staudinger/Looschelders/Olzen (2015) § 242, no. 342, Fuchs in Ulmer/Brandner/Hensen, AGB-Recht, 12. Aufl., Vorb. v. § 307 BGB, no. 63 and Pfeiffer in Wolf/Lindacher/Pfeiffer, § 307, no. 27 and 29.

759 § 242 BGB – 'An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.' *Translation derived from* www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0731, last accessed at 31 August 2019.

760 *Cf.* Staudinger/Looschelders/Olzen (2015) § 242, no. 340.

761 MüKoBGB/Schubert, 8. Aufl. 2019, BGB § 242, no. 534, Wimmer 2017, pp. 240-241 and Von Rimon 2014, pp. 162-163.

- Under § 276 (3) BGB, a credit rating agency cannot limit its liability for loss caused by intentional conduct.[762]
- By means of general terms and conditions, a credit rating agency cannot limit its liability for loss caused by grossly negligent conduct under § 310 (1) in conjunction with § 307 (1) in conjunction with § 309 (7) (b) BGB.[763]
- By means of general terms and conditions, a credit rating agency cannot limit its liability for the violation of rights and duties lying at the essence of the agreement to such an extent that achieving the goals of the agreement is endangered under § 307 (2) (2) BGB.[764] In particular, Von Rimon argues that the CRA Regulation involves so-called '*Kardinalpflichten*' so that limiting liability in respect of obligations flowing from the CRA Regulation is not permitted.[765] If German courts adopted this approach, credit rating agencies would find it difficult to limit their liability for obligations flowing from the CRA Regulation.
- By means of individually negotiated terms, a credit rating agency generally has more freedom to limit its liability. However, when a significant imbalance between the negotiating strengths of the credit rating agency and the issuer precludes the issuer from exercising its party autonomy, German courts may step in to restore the imbalance between the credit rating agency and the issuer.[766] According to Wimmer and Von Rimon, such an imbalance may occur when an issuer negotiates with Moody's, Standard & Poor's or Fitch.[767]

In respect of claims based on Article 35a CRA Regulation, the most important conclusion is that if an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence under Article 35a (1) CRA Regulation, a limitation clause included in the contract will hardly have any effect under German law. Indeed, the threshold for liability under Article 35a (1) CRA Regulation ('intention' or 'gross negligence') and the threshold for singling out the effect of a limitation clause (*Vorsatz* or *grobe Fahrlässigkeit*) are similar. In relation to intentional conduct,

762 *As concluded by e.g.* Heuser 2019, p. 169, Wimmer 2017, p. 234, Seibold 2016, p. 138, Happ 2015, p. 85, Von Rimon 2014, p. 159, Schroeter 2014, p. 813, Dutta 2013, p. 1735, Gietzelt & Ungerer 2013, p. 345 and Rohe 2005, p. 140.

763 § 309 (7) (b) BGB is used to pencil in the substantive test under § 307 (1). *As concluded by e.g.* Heuser 2019, p. 169, Wimmer 2017, p. 238, Seibold 2016, p. 139, Happ 2015, p. 85, Von Rimon 2014, p. 161 (*also* pp. 159-160), Schroeter 2014, p. 813, Dutta 2013, p. 1735, Gietzelt & Ungerer 2013, p. 345, Arntz 2012, p. 93, Berger & Stemper 2010, p. 2293 and Rohe 2005, p. 140.

764 *As concluded by e.g.* Wimmer 2017, pp. 236-238, Seibold 2016, pp. 140-141, Von Rimon 2014, pp. 160-161, Schroeter 2014, pp. 813-814, Amort 2013, p. 277, Arntz 2012, p. 93, Berger & Stemper 2010, p. 2294 and Rohe 2005, p. 141.

765 Von Rimon 2014, pp. 160-161.

766 *As concluded by e.g.* Wimmer 2017, pp. 240-241 and Von Rimon 2014, pp. 162-164.

767 Wimmer 2017, pp. 240-241 and Von Rimon 2014, pp. 163-164.

this conclusion applies to all (general) terms and conditions under § 276 (3) BGB. In relation to grossly negligent conduct, this conclusion applies to at least all general terms and conditions under § 310 (1) in conjunction with § 307 (1) in conjunction with § 309 (7) (b) BGB. One can also question whether such a clause would cause a significant imbalance between the credit rating agency and the issuer under § 242 BGB.

5.6.4.3 Limitations of liability in relation to investors

As a credit rating agency will most likely not enter into negotiations with investors, it is assumed the limitation is included in the credit rating agency's general terms and conditions.[768] The admissibility of the limitation must therefore be assessed in accordance with § 305 – § 310 BGB. An application of the general statutory framework to limitations adopted in respected of investors, as done by German legal scholars, leads to the following general guidelines:

- A credit rating agency cannot limit its liability for loss caused by intentional conduct under § 276 (3) BGB.[769]
- A credit rating agency cannot limit its liability for loss caused by gross negligence under § 309 (7) (b) BGB.[770] When the investor qualifies as an entrepreneur or a legal entity under public law, the inadmissibility is based on § 310 (1) BGB in conjunction with § 307 BGB with an application by analogy of § 309 (7) (b) BGB.
- A credit rating agency cannot limit its liability for the violation of rights and duties lying at the essence of the subscription contract to such an extent that the achievement of the goals of the agreement is endangered under § 307 (2) (2) BGB.[771]

In respect of claims based on Article 35a CRA Regulation, the most important conclusion is that if an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence under Article 35a (1) CRA Regulation, a limitation clause included in the contract will hardly have any effect under German law. Indeed, the threshold for liability under Article 35a (1) CRA Regulation ('intention' or 'gross negligence') and the threshold for singling out the effect of a limitation clause (*Vorsatz* or *grobe Fahrlässigkeit*) are similar. In relation to intentional conduct,

768 This section does not concentrate on limitation clauses directed at third parties included in rating contracts between credit rating agencies and issuers.

769 *As concluded by e.g.* Wimmer 2017, p. 234, Dutta 2013, p. 1735 and Gietzelt & Ungerer 2013, p. 345.

770 *As concluded by e.g.* Wimmer 2017, p. 238, Dutta 2013, p. 1735, Gietzelt & Ungerer 2013, p. 345, Wagner 2013, p. 486 and Berger & Stemper 2010, p. 2293.

771 *As concluded by e.g.* Wimmer 2017, p. 238, Wagner 2013, p. 486 and Berger & Stemper 2010, p. 2294.

this conclusion applies to all (general) terms and conditions under § 276 (3) BGB. In relation to grossly negligent conduct, this conclusion applies to at least all general terms and conditions under § 310 (1) in conjunction with § 307 (1) in conjunction with § 309 (7) (b) BGB.

5.6.5 Prescription of claims

German authors generally concluded that the rules for the prescription periods of claims (*'Anspruch'*), which can be found in Book 1, Abschnitt 5 *'Verjährung'* of the BGB, apply to claims concerning credit rating agency liability.[772] German law works with a relatively short standard limitation period (*'regelmäßigen Verjährungsfrist'*) of 3 years under § 195 BGB, which can be extended to 10 or 30 years depending on the type of claim and the circumstances of the case.[773]

Under § 199 (1) BGB, the standard prescription period of 3 years starts to run by the end of the year[774] in which (1) *'der Anspruch entstanden ist'*; and (2) *'der Gläubiger von den den Anspruch begründenden Umständen und der Person des Schuldners Kenntnis erlangt oder ohne grobe Fahrlässigkeit erlangen müsste'*. Hence, the beginning of the prescription period is marked by the end of the year (1) in which the claim arises; and (2) in which the claimant becomes acquainted with the circumstances on which the claim can be based and with the defendant's identity, or in which the claimant should have become acquainted with the circumstances on which the claim can be based and with the defendant's identity had it not acted with gross negligence.[775] In this way, German law combines subjective and objective elements in the yardstick for prescription.[776]

German law considers a claim to arise when the claimant can enforce its right.[777] So in the context of credit rating agency liability, it must be determined from what moment issuers and investors are able to enforce their rights

772 *As concluded by e.g.* Heuser 2019, pp. 170-171, Happ 2015, p. 86, Halfmeier 2014, pp. 332-333, Gietzelt & Ungerer 2013, p. 345, Wojcik 2013, p. 1389 and Wildmoser, Schiffer & Langoth 2009, pp. 663-664. The prescription periods under § 195 and § 199 apply, provided that the claim for compensation is not governed by special prescription regimes, Palandt/Ellenberger 2019, § 195, no. 2.

773 Palandt/Ellenberger 2019, § 195, no. 1.

774 The period then starts to run as from 31 December midnight, Koopmann 2010, p. 9.

775 *Translation based on* www.gesetze-im-internet.de/englisch_bgb/, last accessed at 31 August 2019.

776 MüKoBGB/Grothe, 8. Aufl. 2018, BGB § 199, no. 1 and *cf.* Koopmann 2010, p. 9.

777 Bundesgerichtshof 17 February 1971, VIII ZR 4/70, *NJW* 1971, p. 979: *'Unter der Entstehung des Anspruchs i.S. des § 198 Satz 1 BGB ist der Zeitpunkt zu verstehen, an welchem der Anspruch erstmalig geltend gemacht und notfalls im Wege der Klage durchgesetzt werden kann.' As referred to by* MüKoBGB/Grothe, 8. Aufl. 2018, BGB § 199, no. 4 and Palandt/Ellenberger 2019, § 199, no. 3.

under Article 35a (1) CRA Regulation. An issuer can do so when the affected credit rating has been issued and allegedly influenced its funding costs and its reputation. In contrast, it is more difficult to determine the exact moment an investor can enforce its rights. Would that be from when the investor invests in the issuer – so that the loss can no longer be avoided – or later in time when the influence of the rating becomes clear – and the loss actually occurs? Inspiration can be drawn from the area of investment advice and prospectus liability, where claims are understood to arise when the investor purchases the financial instruments.[778] The German Federal Supreme Court explained that the requirement for the claim to have arisen is: '*nicht erst mit dem Eintritt von Kursverlusten, sondern schon mit dem Erwerb der Wertpapier […] erfüllt gewesen, da die Zedentin die risikoreichen Wertpapiere bei sachgerechter Beratung nicht erworben hätte.*'[779] The German Federal Supreme Court hence considered the claim to arise when the financial instruments were bought, because the claimant argued that it would not have purchased the financial instruments had the advice been correct. The same type of reasoning could apply to claims brought by investors against credit rating agencies, so that the claim arises when an investor purchases the financial instruments.

In addition, it must be questioned when exactly a claimant can be considered to have become acquainted with the circumstances on which the claim can be based and with the defendant's identity had it not acted with gross negligence. The first part of this analysis – namely when the claimant actually became acquainted with the facts of the case and with the identity of the defendant – strongly depends on the circumstances of the case. It is not required that the claimant understands the precise legal consequences of the situation, but the claimant must know that the facts of the case may entitle it to certain rights.[780] Furthermore, the threshold for acting with gross negligence is rather high, the claimant must for instance have omitted to access easily accessible sources of information.[781] In the context of claims brought against credit rating agencies by investors, German literature stated that investors for example need to pay attention to situations in which the credit rating agency corrects the credit rating.[782]

Furthermore, § 199 (3) BGB arranges for specific maximum prescription periods with regard to *Schadensersatzansprüche* (claims for compensation) arising

778 *On liability for incorrect investment advice*, Bundesgerichtshof 8 March 2005, XI ZR 170/04, *NJW* 2005, p. 1580, *as derived from* Palandt/Ellenberger 2019, § 199, no. 21. *On prospectus liability,* Assmann in Assmann/Schütze, HdB KapitalanlageR 2015, § 5, no. 110 and no. 202.

779 Bundesgerichtshof 8 March 2005, XI ZR 170/04, *NJW* 2005, p. 1580.

780 MüKoBGB/Grothe, 8. Aufl. 2018, BGB § 199, no. 28 and Bundesgerichtshof 27 May 2008, XI ZR 132/07, *NJW-RR* 2008, pp. 1497-1498.

781 MüKoBGB/Grothe, 8. Aufl. 2018, BGB § 199, no. 31. *In the context of credit rating agency liability*, Wimmer 2017, p. 313 and Halfmeier 2014, p. 332.

782 Wimmer 2017, p. 313 and Wildmoser, Schiffer & Langoth 2009, p. 664.

out of contract and tort. Irrespective of the knowledge of the obligee, a claim expires 10 years after it arose. Irrespective of the knowledge of the obligee and the moment at which the claim arose, a claim for compensation expires 30 years after the conduct that caused the loss. When a conflict arises between these two terms, the claim expires when the shortest term has passed.

Finally, attention should be paid to the dissertation of Wimmer, in which she adopted a deviating approach as regards the prescription period applying to claims for damages brought against credit rating agencies. She stated that the special prescription regime under § 12 (4) WpÜG (*Wertpapiererwerbs- und Übernahmegesetz*, Securities Acquisition and Takeover Act) can be applied by analogy to credit rating agency liability.[783] This provision determines the prescription period for liability claims brought against persons who offered securities while their offers contained incorrect or incomplete information under § 12 (1) WpÜG. Pursuant to § 12 (4) WpÜG, those claims expire 1 year after the moment the person who purchased the securities became aware of the incorrect of incomplete information contained in the offer and, at the latest, three years after the moment the offer was published.[784] Wimmer considered that the systems of liability and the goals of § 12 (1) WpÜG and Article 35a (1) CRA Regulation were comparable to such an extent, that the prescription period under § 12 (4) WpÜG could apply by analogy to claims concerning credit rating agency liability. However, she also submitted that the application of the general rules of prescription under § 194 BGB is defendable, especially because the prescription of comparable claims for prospectus liability and the liability for ad-hoc disclosure follow the general rules under § 194 BGB ff.[785] This dissertation follows this (majority) approach so that the rules for prescription under German law can be found under § 195 in conjuction with § 199 (1) and (3) BGB.

5.6.6 Concluding remarks

The civil liability of credit rating agencies is a widespread topic of academic debate in Germany. Many authors explained the application and interpretation

783 *For a detailed analysis,* Wimmer 2017, pp. 314-319. Again, the prescription periods under § 195 and § 199 only apply if the claim for compensation is not governed by special prescription regimes such as § 12 (4) WpÜG, Palandt/Ellenberger 2015, § 195, no. 2.

784 § 12 (4) WpÜG: '*Der Anspruch nach Absatz 1 verjährt in einem Jahr seit dem Zeitpunkt, zu dem derjenige, der das Angebot angenommen hat oder dessen Aktien dem Bieter nach § 39a übertragen worden sind, von der Unrichtigkeit oder Unvollständigkeit der Angaben der Angebotsunterlage Kenntnis erlangt hat, spätestens jedoch in drei Jahren seit der Veröffentlichung der Angebotsunterlage.*' *Cf. also* MüKoAktG/Wackerbarth, 4. Aufl. 2017, WpÜG § 12, no. 36.

785 Wimmer 2017, p. 314, fn. 1223. The German legislature abolished the special regime for the prescription of prospectus liability claims in 2012, Assmann in Assmann/Schütze, HdB KapitalanlageR 2015, § 5 no. 110 and no. 200.

of Article 35a CRA Regulation under German law, which provided information for the analysis made in the previous sections.[786] Furthermore, the amount of case law on the liability of credit rating agencies and credit scoring agencies is considerable, especially compared to the other legal regimes investigated in this dissertation.

German private law takes a rather restrictive approach to credit rating agency liability. In the absence of a contractual relationship, investors have few possibilities for holding a credit rating agency liable under German law. They will only succeed in a claim for damages on German private law under exceptional circumstances. This situation might have changed with the introduction of Annex III CRA Regulation, as the Annex might have created statutory norms that aim to protect investors, so that investors can use these norms in a claim for damages based on § 823 (2) BGB. Issuers and investors, who concluded paid subscription contracts, have more opportunities to hold a credit rating agency liable under German law.

German law does not provide explicit guidance on the interpretation and application of Article 35a CRA Regulation. Therefore, the interpretation and application were made in accordance with the general principles of German private law. The German courts interpreted the scope of application of Article 35a CRA Regulation restrictively, so that the right of redress is only available to investors who relied on credit ratings attached to financial instruments. Furthermore, the research shows that German law leans towards a restrictive interpretation and application of Article 35a CRA Regulation in respect of causation; tools available to facilitate investors are generally not available in the situation of credit rating agency liability. But if an investor can prove reasonable reliance, it can be fully compensated under German law to the extent of the costs of the transaction of the financial instruments. German law does not entail an equally restrictive interpretation and application of other terms, such as 'gross negligence'. Furthermore, limitation clauses will hardly have effect under German law when an issuer or investor fulfilled the requirements of Article 35a (1) CRA Regulation. As the threshold for liability under Article 35a (1) CRA Regulation and the threshold for singling out the effect of a limitation clause boil down to the same minimum threshold, a contractual limitation clause will not have effect under German law when an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence.

786 *E.g.* Heuser 2019, Deipenbrock 2018, Jansen, Kästle-Lamparter & Rademacher 2017, Wimmer 2017, MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, Seibold 2016, Schantz 2015, Haar 2014, Halfmeier 2014, Kontogeorgou 2014, Von Rimon 2014, Schroeter 2014, Amort 2013, Dutta 2013, Gietzelt & Ungerer 2013, Rosset 2013, Wagner 2013, Wojcik 2013 and Arntz 2012. *Prior to the introduction of Art. 35a CRA Regulation e.g.* Berger & Stemper 2010, Wildmoser, Schiffer & Langoth 2009 and Rohe 2005.

5.7 English law

5.7.1 National private law context

This national law report concentrates on the interpretation and application of Article 35a CRA Regulation under English law.[787] In contrast to the other legal systems investigated, English law is a common law system. The main feature of common law systems is that private law rules are developed generally through case law, and cannot be found in a general civil code. The roots of the English system of private law lie in the Middle Ages, with little influence from Roman law.[788] Initially, common law courts and courts of equity separately developed English private law.[789] Over the years, however, the distinction between these courts was abandoned and further changes to the court system were made – such as the change from the House of Lords to the Supreme Court, but courts and individual judges still form the core actors of the English common law system.

When solving a case, an English court does not have an English general civil code to take as a starting point; instead it starts from the facts of the case. The court compares the case at hand with prior court decisions, and reaches a conclusion on the basis of the similarities and dissimilarities.[790] This report makes an attempt to apply this style of reasoning as well. The absence of a national civil code does not mean that English courts are free to take any decision they consider apt. English law developed rules of legal precedent. Court decisions are, for instance, binding upon 'lower' courts. This means that decisions of the Supreme Court are binding upon the High Court and the Court of Appeal.[791] Although case law is of the utmost importance for English private law, case law is not the only source of English private law rules. Parts of English private law has indeed been codified in statutes over the years.[792]

787 This dissertation refers to the term 'English' law, but also refers to the UK legislature and to the Credit Rating Agencies (Civil Liability) Regulations 2013 as the UK Implementing Regulations. The United Kingdom involves the legal systems of England and Wales, Scotland and Northern Ireland. It was the legislature of the United Kingdom who implemented Art. 35a CRA Regulation in the UK Implementing Regulations, but this dissertation only looked at the interpretation and application of Art. 35a CRA Regulation from the perspective of the UK Implementing Regulations under the legal systems of England and Wales.

788 Cartwright 2016, pp. 8-9 and *cf.* Van Dam 2013, no. 501-1.

789 Cartwright 2016, p. 5.

790 *Cf.* Cartwright 2016, p. 20 and Van Dam 2013, no. 501-1.

791 Cartwright 2016, pp. 24-27.

792 *E.g.* the Defamation Act 2013 in respect of the tort of defamation, Occupiers' Liability Act 1957 on occupiers' liability and the Law Reform (Contributory Negligence) Act 1945 in respect of the defence of contributory negligence.

English courts approach statutory rules from an objective perspective and tend to interpret them in accordance with their literal meaning.[793]

English contract and tort law were developed separately by the courts, although they both form part of the English law of obligations.[794] Breaches of contract and torts entitle the aggrieved party to the same remedy of damages, which is the primary remedy under English law.[795] When the conduct of a party constitutes both a breach of contract and a tort, the aggrieved party can choose to bring a claim for damages based on breach of contract and/or on tort.[796] The structure of English tort law deserves some explanation from the outset. English tort law does not involve a general legal basis for non-contractual liability and, instead, consists of multiple torts applicable to specific situations. The system of multiple torts originates from medieval English civil procedure law, under which claimants could only bring claims for damages if they had a right of action, namely if they could serve a so-called writ.[797] Torts relate to all types of different situations, such as when the tortfeasor violated its duty of care towards another party (the tort of negligence), disseminated defamatory statements (tort of defamation), caused damage to someone's land (tort of nuisance) or intentionally misleads another party by making an incorrect statement (tort of deceit).

This report will mainly use concepts relating to the tort of negligence to construct the English interpretation and application of Article 35a CRA Regulation. The reason why this report concentrates on these concepts lies in the contents of the Credit Rating Agencies (Civil Liability) Regulations 2013 (hereinafter: UK Implementing Regulations). The UK legislature introduced the UK Implementing Regulations especially for the purpose of explaining the meaning of the terms of Article 35a CRA Regulation.[798] Where the UK Implementing Regulations do not provide a clear-cut definition of a term, they mostly refer the interpretation and application of the terms back to the tort of negligence. Examples of such references can be found under Article 6 (the term 'reasonable relied'), Article 8 (the term 'caused') and Article 14 (b) (on the calculation of damages). As the existence and scope of a duty of care forms the core element of the tort of negligence, this topic will be discussed in detail in section 5.7.2.3. From the outset, it is important to realise that English law

793 Cartwright 2016, p. 28 and Van Dam 2013, no. 501-4.

794 *Cf.* Cartwright 2016, pp. 51-52.

795 *See in respect of English contract law* Cartwright 2016, p. 274. Specific performance of contractual obligations will only be ordered when the primary remedy of damages is not suitable in a concrete situation, *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1, 11.

796 As appeared from *Henderson v Merrett Syndicates Ltd (No. 1)* [1995] 2 A.C. 145, 193-194, a claimant may choose 'the remedy [*viz.* contractual or tortious] which is most advantageous to him.' Seibold 2016, p. 62.

797 Van Dam 2013, no. 502-1.

798 Regulations 2013 (2013 No. 1637), available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksi_20131637_en.pdf, last accessed at 31 August 2019.

shows reluctance towards the compensation of pure economic loss as a matter of principle and that the UK Implementing Regulations aim to diminish the differences between Article 35a and common law liability.[799]

As already stated on multiple occasions, upon the completion of this research on 3 September 2019, there was not yet certainty as regards the legal consequences of Brexit. Nevertheless, it was decided to include English law in this dissertation for two reasons. First, based on Article 3 (1) and Article 3 (2) (a) European Union (Withdrawal) Bill, the Regulations on credit rating agencies will form part of UK domestic law, so that Article 35a CRA Regulation and the UK Implementing Regulations[800] will continue to exist at least for some time after Brexit.[801] More specifically, Article 92 UK EU Exit Credit Rating Agencies Regulations of February 2019 confirms that Article 35a CRA Regulation will be transposed into English law.[802] Moreover, the impression that the UK may continue the civil liability regime for credit rating agencies was derived from the post-implementation review of the UK Implementing Regulations conducted by HM Treasury and the Financial Conduct Authority in April 2019.[803] The review recommended to keep the UK Implementing Regulations in their current form. It was concluded that the UK Implementing Regulations provide legal certainty to stakeholders involved and that credit rating agencies are not burdened by large amounts of claims.[804] Yet, even though the United Kingdom introduces a nationalised version of Article 35a CRA Regulation, Article 35a CRA Regulation and English law will not necessarily develop in the same direction after Brexit – for instance, because UK courts are no longer bound by decisions of the CJEU as from Brexit Day.[805] If, after that date, the CJEU rules on the interpretation and application of Article 35a CRA Regulation, English courts are not bound by such decisions. Furthermore, the second reason to continue to include English law in this legal comparison is that the English approach to Article 35a CRA Regulation differs from the other national laws investigated, and demonstrates how Member States

799 Explanatory Memorandum to the Credit Rating Agencies (Civil Liability) Regulations 2013, 2013 No. 1637, para 7.4. *Also* Risso 2015, pp. 715-716.

800 In full: The Credit Rating Agencies (Civil Liability) Regulations 2013 (2013 No. 1637), available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksi_20131637_en.pdf, last accessed at 31 August 2019.

801 The European Union (Withdrawal) Bill is available at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf, last accessed at 31 August 2019.

802 In full: The Credit Rating Agencies (Amendment etc.) (EU Exit) Regulations 2019 (2019 No. 266), available at www.legislation.gov.uk/uksi/2019/266/pdfs/uksi_20190266_en.pdf, last accessed at 31 August 2019.

803 Post-implementation review of the Credit Rating Agencies (Civil Liability) Regulations 2013, 12 April 2019, available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksiod_20131637_en.pdf, last accessed at 31 August 2019.

804 Post-implementation review of the Credit Rating Agencies (Civil Liability) Regulations 2013, 12 April 2019, available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksiod_20131637_en.pdf, last accessed at 31 August 2019.

805 Art. 6 (1) (a) and Art. 6 (2) European Union (Withdrawal) Bill.

can use their discretion under Article 35a CRA Regulation to limit its scope of application. Therefore, the English interpretation and application of Article 35a CRA Regulation forms an interesting study object.

5.7.2 National rules on credit rating agency liability

5.7.2.1 Approach UK Implementing Regulations

The Explanatory Memorandum of the UK Implementing Regulations describes Article 35a CRA Regulation as an 'additional mode of claim', because credit rating agencies were already 'subject to civil liability' under tort law (the tort of negligent misstatement) and contract law.[806] Yet, contrary to what the Explanatory Memorandum suggests, it is not evident whether and, if so, to what extent credit rating agencies can be held liable under English law. No cases on credit rating agency liability have been decided under English law thus far[807] and the application of general concepts of contract law and, in particular, tort law in this specific type of situation is not problem-free. Depending on whether they entered into a contractual relationship with the credit rating agency, issuers and investors can choose to bring a claim for damages based on breach of contract and/or[808] on tort. As described, English tort law does not involve a general ground for non-contractual liability, but consists of multiple torts applicable to specific situations. When an issuer or an investor wishes to base its claim for damages on tort law, it may wonder whether to base that claim on the tort of deceit or the tort of negligence (the tort of negligent misstatement) for its pure economic loss or the tort of defamation for its reputational loss. The following subsections provide a brief overview of the possible grounds based on which issuers and investors can bring claims for damages against credit rating agencies under English law. Due to its importance for the interpretation and application of Article 35a CRA Regulation under the UK Implementing Regulations, most attention is paid to the tort of negligence.

806 Explanatory Memorandum to the Credit Rating Agencies (Civil Liability) Regulations 2013, 2013 No. 1637, para 7.4.

807 *Most recently confirmed by* Getzler & Whelan 2017, p. 16. To the knowledge of the author, there was no English case law on credit rating agency liability available upon the completion of this study.

808 As appeared from *Henderson v Merrett Syndicates Ltd (No. 1)* [1995] 2 A.C. 145, 193-194, a claimant may choose 'the remedy which is most advantageous to him.' Seibold 2016, p. 62.

5.7.2.2 *In the presence of a contractual relationship – issuers & investors*

The relationship can be qualified as contractual when the issuer and the credit rating agency have concluded a rating contract or when the investor has a paid a subscription with the credit rating agency. For issuers and investors to be able to base a claim on breach of contract under English law, the credit rating agency must have violated the express or implied terms of the contract.[809] Similar to other professional parties acting in their professional capacity, credit rating agencies must 'exercise the skill and care which is to be expected of a reasonably competent member of the profession' when assigning credit ratings.[810] Yet it is not easy to hold credit rating agencies liable for breach of contract, because, as stated by Seibold, issuers may have trouble proving that the credit rating agency failed to take reasonable skill and care.[811] Also, an issuer or investor will not be able to hold a credit rating agency liable (to the full extent of its losses) if the rating contract or subscription includes a valid clause that limits or excludes the duty owed by, or the liability of, a credit rating agency.[812]

5.7.2.3 *In the absence of a contractual relationship*

(a) Issuers

(i) – Tort of negligence

In the absence of a contractual relationship between an issuer and a credit rating agency, an issuer can attempt to hold a credit rating agency liable for an incorrect credit rating under the tort of negligence. The tort of negligence covers a wide range of situations in which the wrongdoer owed a duty of care to the aggrieved party, while the breach of that duty caused the aggrieved party to suffer loss that is not too remote and while the wrongdoer cannot successfully raise a defence. In disputes over credit rating agency liability, difficulties already arise at the first stage in which the claimant must establish that the defendant owed a duty of care towards it.

In the absence of a contractual relationship, one cannot treat the existence of a duty of care owed by a credit rating agency vis-à-vis issuers (and investors) as a given fact.[813] English private law approaches the compensation of pure economic loss caused by reliance on inaccurate statements with re-

809 *Cf. with regard to issuers* Seibold 2016, pp. 59-61, Edwards 2013, p. 190 and Ebenroth & Dillon 1992, pp. 789-790.

810 *Quotation of* Treitel 2015, no. 6-043. *Cf. with regard to issuers* Seibold 2016, p. 61, Edwards 2013, p. 190 and Ebenroth & Dillon 1992, pp. 789-790.

811 *Cf.* Seibold 2016, p. 61.

812 *Cf.* Edwards 2013, p. 190 and Ebenroth & Dillon 1992, p. 789.

813 For the analysis made in this section, particular use has been made of other studies on credit rating agency liability under English law: Getzler & Whelan 2017, Seibold 2016, Alexander 2015 and Ebenroth & Dillon 1992.

luctance. Traditionally, the English courts adopted a 'general exclusionary rule'[814] in respect of pure economic loss, in the sense that the defendant generally does not owe a duty to of care in respect of such loss.[815] There are a few exceptions to this general exclusionary rule in the field of negligent misstatements and the provision of services. In *Customs and Excise Commissioners v Barclays Bank plc*, Lord Mance described 'three broad approaches' to assess whether a claimant owes a duty of care to avoid pure economic loss: (1) to consider whether a voluntary assumption of responsibility has been made by the defendant; (2) to consider whether a duty is owed under the three stage test of *Caparo Industries Plc v Dickman*; and (3) to consider an application of the so-called 'incremental approach'.[816]

The distinction between the second and the third approach is, however, not as sharp as it may seem. The recent case of *Robinson v Chief Constable of West Yorkshire Police* clarified that one can actually not speak of a three stage *test*. In fact, Lord Reed JSC explained that *Caparo Industries Plc v Dickman* rejected the idea of a test, and instead adopts 'an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities'.[817] Having that said, when courts exercise judgement in deciding whether a party owes a duty of care in a novel type of case, the exercise of judgement involves perspectives of *Caparo Industries Plc v Dickman* that will be discussed hereafter in more detail.[818] As the perspectives of *Caparo Industries Plc v Dickman* hence continue to be of relevance in novel types of cases such as the duty of care owed by credit rating agencies, the remainder of this section and section 5.7.2.3.(b) (ii) will be based on these perspectives.

Prior to turning to the perspectives of *Caparo Industries Plc v Dickman*, this paragraph considers whether it can be said that a credit rating agency voluntarily assumed responsibility towards an issuer in respect of a credit rating. The concept of the voluntary assumption of responsibility was introduced in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*, in which the claimant relied on a negligent misstatement made by the defendant.[819] The defendants had provided a credit reference in respect of a third party upon the request of the claimant's bank. When the claimant subsequently relied on the incorrect credit reference and suffered loss, the claimant started proceedings against the defendant. In *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*, the House of

814 Lunney, Nolan & Oliphant 2017, p. 381 and Mullis & Oliphant 2011, p. 53.

815 *Spartan Steel and Alloys Ltd v Martin & Co (Contractor) Ltd* [1973] Q.B. 27, [1972] 3 W.L.R. 502. Mullis & Oliphant 2011, p. 53. *Cf.* Cartwright 2017, no. 6-04. *In the context of credit rating agencies* Miglionico 2019, no. 7.05 ff.

816 *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 A.C. 181, 189-190 and 213. *In the context of credit rating agencies,* Alexander 2015, pp. 4-5.

817 *Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] A.C., para 21.

818 *Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] A.C., para 27 and 29.

819 *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465.

Lords held that the defendant owed a duty of care to the claimant. Lord Morris of Borth-y-Gest explained that a duty of care exists when a party, who possesses a special skill, uses that skill to assist another party who subsequently relies upon that skill.[820] A duty of care can also arise when a party takes it upon itself to provide information or advice, while it was placed in such a position that it knows or should have known that other parties could reasonably rely on its information or advice.[821] Furthermore, Lord Devlin considered that certain special relationships justify the existence of a duty to take care in word.[822] Such special relationships include relationships that are 'equivalent to contract', namely relationships in which the one party assumed responsibility towards the other and in which there would be an agreement but for the absence of consideration.[823]

Second, we turn to the question of whether English courts can conclude that a credit rating agency owed a duty of care to avoid economic loss caused by negligent misstatements, i.e. credit ratings, based on the three perspectives that were deemed relevant in the case of *Caparo Industries Plc v Dickman*.[824] The relevant perspectives to determined the existence of a duty of care are whether: (1) the loss is foreseeable; (2) the relationship between the parties is 'one of "proximity" or "neighbourhood"'; and (3) imposing a duty is 'fair, just and reasonable'.[825] In this concrete situation, Caparo Industries Plc. purchased shares in Fidelity Plc. while relying on 'inaccurate and misleading' reports on Fidelity made by the auditors.[826] Questions were raised regarding the scope of the duty of care owed by the auditors and, in particular, the question was raised whether the auditors owed a duty of care to the shareholders of Caparo. It was decided that the auditors neither owed a duty of care 'to members of the public at large who rely upon the accounts in deciding to buy shares in the company', i.e. potential investors,[827] nor to shareholders who decided to buy additional shares based upon the accounts.[828] Lord Bridge of Harwich explicitly distinguished the factual situation in *Caparo Industries Plc v Dickman* from the situation in which a valuer of property held a duty of care to house purchasers, such as in the case of *Smith v Eric S. Bush*.[829] He explained the main characteristics of these cases, which lead to the conclusion that a duty of care was owed:

820 *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465, 502-503.
821 *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465, 503.
822 *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465, 528.
823 *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465, 529. *E.g.* Cartwright 2017, no. 6-10 and no. 6-16 and Mullis & Oliphant 2011, p. 61.
824 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605.
825 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 617-618.
826 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 614.
827 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 623.
828 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 627.
829 *Smith v Eric S. Bush* [1990] 1 A.C. 831, 848.

> 'The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation.'[830]

In contrast, Lord Bridge of Harwich held that a duty of care will not be owed if a statement is 'put into more or less general circulation' and may be foreseeably relied on by strangers for a variety of purposes, because, if the law would state otherwise, the defendant would be subject to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class' (the floodgates argument).[831] Hence, the extent to which the addressee of the advice or information can be determined ('proximity') plays a key role in determining the existence and the scope of the duty of care.

How do these general principles relate to situations in which an issuer claims to have suffered loss as a consequence of an incorrect credit rating? In the case of solicited credit ratings, the existence of a rating contract entails that issuers will not have trouble establishing that the credit rating agency owed them a duty of care under the tort of negligence as well.[832] In contrast, it is doubtful that English courts will accept that a credit rating agency made a voluntary assumption of responsibility towards an issuer as in the case of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* or owed a duty of care under the three perspectives of *Caparo Industries Plc v Dickman* vis-à-vis issuers in the absence of a rating contract.[833] Up until the completion of this study, there was no English case law available on this concrete matter.

The fact pattern of claims for credit rating agency liability brought by issuers differs from the fact patterns in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* and *Caparo Industries Plc v Dickman*. In the latter two cases, the claimant relied upon a statement providing information on a third party made by the defendant and suffered loss as a result. In the situation of an issuer claim in relation to an unsolicited credit rating, the issuer takes the position of the third party in the cases of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* and *Caparo Industries Plc v Dickman*. Here, it is the subject of the statement, namely the issuer, who claims the party who made the statement, namely the credit rating agency, owed a duty of care towards it. The difference in fact patterns does not form an obstacle to construct a voluntary assumption of responsibility towards an issuer as in the case of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* or a duty of care in accordance with *Caparo Industries*

830 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 620-621.
831 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 621. *Referring to the US case Ultramares v Touche* (1931) 174 N.E. 441, 444.
832 *Cf.* Ebenroth & Dillon 1992, p. 790.
833 *See* Ebenroth & Dillon 1992, p. 790 and Seibold 2016, pp. 76 ff.

Plc v Dickman vis-à-vis issuers. In *Spring v Guardian Assurance Plc*, the House of Lords applied the cases to construct a duty of care owed by an employer to its former employee in the provision of a job reference as well.[834]

The situation in which an issuer claims damages under the tort of negligence from a credit rating agency for the inaccurate assignment of an unsolicited credit rating bears rather strong resemblance to situations in which an inadequate reference provided by a referee caused loss to the subject of the reference. Also in this area, there are only a few decisions of English courts available.[835] The case of *Spring v Guardian Assurance Plc* is one of these cases. The House of Lords held that an employer owed a duty to take reasonable care to one of its former company representatives (Spring) in the preparation of a job reference to a potentially future employer of Spring.[836] Lord Goff based the existence of the duty of care on the principles derived from *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*[837] He argued that the former employer possessed special knowledge of the employee and emphasised the importance of job references in daily life. Moreover, in his opinion, it is obvious that an employee relies upon the employer exercising reasonable skill and care in the preparation of the reference.[838] The duty of care was even described as an 'implied term' of the former employment contract.[839] The majority of the House of Lords held that the employer owed a duty of care under the three stage test of *Caparo Industries Plc v Dickman*.[840] Lord Slynn of Hardly explained that loss resulting from a careless reference is clearly foreseeable and that the proximate relationship is obvious in this context. Indeed, the relationship between the employer and its former employee was sufficiently proximate due to the existence of a former employment relationship between them. Furthermore, Lord Slynn of Hardly could find no reasons why it would not be fair, just and reasonable to impose a duty of care upon the employer.[841]

Furthermore, in *Gatt v Barclays Bank Plc*, one can find an indication that English courts might not have so many objections against deciding that the provider of a credit reference owes a duty of care to the subject of the reference. In this case, Judge Moloney QC remarked along the sidelines that he would have no great difficulty in holding that a bank, as the provider of a credit reference, owed a duty of care to a customer, the subject of the credit reference, when providing a credit reference to a third party. He explained

834 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, in particular, 319.
835 *Cf.* Cartwright 2017, no. 6-40.
836 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296. *Also* Cartwright 2017, no. 6-40. *As repeated in Hincks v Sense Network Ltd* [2018] EWHC 533 (QB), para 71.
837 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 316 and 319.
838 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 319.
839 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 320.
840 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 325 and 335.
841 *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 335.

his position by emphasising the importance of credit rating 'in the modern world' and by pointing to the analogies between job references and credit references. In this case, a contractual relationship between the bank and the customer existed as well, so that a contractual duty also existed between the parties.[842]

The references to the cases of *Spring v Guardian Assurance Plc* and *Gatt v Barclays Bank Plc* begin to explain why it is doubtful that English courts will accept that a credit rating agency made a voluntary assumption of responsibility towards an issuer as in the case of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*, or owed a duty of care in accordance with *Caparo Industries Plc v Dickman* vis-à-vis issuers in the absence of a rating contract, though this has not yet been substantiated. Overall, it seems that the lack of relationship between the issuer and the credit rating agency blocks these possibilities, in contrast to the case of *Spring v Guardian Assurance Plc*.

First, it is doubtful whether English courts will accept that a credit rating agency made a voluntary assumption of responsibility towards an issuer, as in the case of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* An argument in favour of the existence of a duty of care is that a credit rating agency employs a special skill. It placed itself in a position in which it could expect that others would reasonably rely on the information provided. However, the choice to conduct credit rating activities might not be sufficient to establish that a credit rating agency assumed responsibility towards the issuer. Support for the rejection of this argument can be found in the Court of Appeal case *Smeaton v Equifax Plc* on the liability of a credit reference agency.[843] The Court of Appeal held that credit reference agency Equifax did not owe a duty of care towards a consumer whose credit file with Equifax was incorrect. Lord Justice Tomlinson concluded that a credit reference agency does not assume responsibility 'to every member of the public simply by choosing to operate this type of business'.[844] It must, however, be admitted that Equifax maintained credit files on virtually all inhabitants of the United Kingdom, whereas credit rating agencies assign unsolicited credit ratings to a more limited amount of issuers.[845] The main reason for the doubt as to the existence of a voluntary assumption of responsibility is that, in the absence of any form of communication between a credit rating agency and an issuer, the relationship between the issuer and the investor cannot be called 'special', let alone 'equivalent to contract'. In contrast to the case of *Spring v Guardian Assurance Plc*, one cannot say that the duty of care is in fact an implied contractual term, because no

842 *Cf. Gatt v Barclays Bank Plc* [2013] EWHC 2 (QB), para 35. *For a similar decision Boyo v Lloyds Bank Plc* [2019] EWHC 2279 (QB), p. 16.

843 *Smeaton v Equifax Plc* [2013] EWCA Civ 108.

844 *Cf. in case of credit reference agencies Smeaton v Equifax Plc* [2013] EWCA Civ 108, para 74. Contrary to Judge Thornton QC in the decision of the High Court of Justice Queen's Bench Division.

845 *Smeaton v Equifax Plc* [2013] EWCA Civ 108, para 1.

relationship exists between the issuer and the credit rating agency at all. When a credit rating agency and an issuer communicate about the assignment of the unsolicited credit rating, it might be possible to construct such a special relationship. Hence, although there are indications that a credit rating agency voluntarily assumed responsibility towards the issuer, it is difficult to fit this situation under the criteria derived from *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd* in the complete absence of any communication between the parties.

Second, English courts may also be reluctant to accept the existence of a duty of care when considering the three perspectives that were of relevance in *Caparo Industries Plc v Dickman*. When approaching the case of credit rating agencies from the first and the third perspective, one could conclude credit rating agencies owe a duty of care in relation to solicited credit ratings. First, it is foreseeable that an issuer could suffer loss if a credit rating agency fails to exercise reasonable care and skill in the assignment of a credit rating. The information function of credit ratings to market participants renders it logical that an issuer could suffer loss if a credit rating agency negligently publishes a credit rating that mirrors an incorrect level of creditworthiness. Second, imposing a duty of care upon a credit rating agency vis-à-vis an issuer is fair, just and reasonable. In the case of unsolicited credit ratings, there are no floodgates arguments against imposing a duty of care upon a credit rating agency, because a credit rating agency will not be exposed to an indeterminate group of claimants, just to those issuers and the products it decided to attach a credit rating to itself.[846] From the perspective of proximity, however, it could be difficult to establish that a credit rating agency owes a duty of care to the issuer in the absence of any form of relationship between the credit rating agency and the issuer.[847] In particular situations, sufficient proximity might be present when a credit rating agency and an issuer communicate about the assignment of the unsolicited credit rating. Hence, although it is not a given fact that issuers who received an unsolicited credit rating can establish that a credit rating agency owed a duty of care towards them under the English tort of negligence, the presence of any communication on the assignment of the credit rating might provide a window of opportunity to overcome the hurdle of proximity under English law.

846 *See, for relevant factors to determine whether imposing a duty of care would be fair, just and reasonable, Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 A.C. 181, 219-220. From this perspective, the case on credit reference liability *Smeaton v Equifax Plc* [2013] EWCA Civ 108 is somewhat different, as Lord Justice Tomlinson concluded that imposing a duty of care would not be fair, just and reasonable because that could lead to 'indeterminate liability to an indeterminate class' (para 75).

847 Ebenroth & Dillon 1992, p. 801. *See also* Seibold 2016, p. 78. Although both sources state that 'weak proximity' can be overlooked if the damage is very foreseeable and it is 'inherently fair and just' to impose a duty.

(ii) – Tort of defamation

As a credit rating concerns the reputation of the issuer in terms of its creditworthiness, an issuer may wonder whether it can base a claim on the tort of defamation and, more specifically, whether it can bring an action for libel.[848] The tort of defamation provides a ground to compensate reputational loss caused by defamatory statements. Yet, as pointed out by Duncan & Neill, the law of defamation must seek the right balance between defending the one party's reputation and the other party's right to free speech.[849] Prior to asking whether a credit rating agency can invoke a defence that precludes liability under the tort of defamation, it must be questioned whether a credit rating qualifies as a defamatory statement at all.

To qualify as a 'defamatory' statement, a credit rating must have seriously harmed the issuer's reputation[850] in the eyes of 'right-thinking members of society generally' or 'reasonable people generally'.[851] Under Article 1 (2) of the Defamation Act 2013, the requirement of serious harm is elaborated upon in respect of commercial entities that trade for profit. Translated to the context of credit rating agency liability, English courts will only accept that an issuer has suffered serious harm if the credit rating has caused serious financial loss to the issuer. Furthermore, one can question whether a credit rating qualifies as a defamatory statement in the eyes of society. Whereas an incorrect and insulting newspaper article is clearly harmful to someone's reputation in the eyes of society, the defamatory character of an incorrect commercial opinion on creditworthiness is less self-evident. Opinions in academic literature differ on whether a credit rating can qualify as a defamatory statement in the eyes of society.

On the one hand, Von Schweinitz took the point of view that a credit rating, as a prognosis for future default, does not generally involve a statement that would seriously harm the issuer's reputation in the eyes of society.[852] For this reason, he concluded that the tort of defamation is generally not available to issuers.[853] On the other hand, Ebenroth & Dillon were of the completely opposite opinion that, at first sight, the assignment of an inaccurate credit rating presents a case of defamation.[854] Support for the latter approach

848 Duncan & Neill explained that within the tort of defamation a distinction could be made between 'an action of libel' and 'an action for slander'. Although oversimplified, libel relates to defamatory statements made by written word or another 'permanent form' and slander relates to defamatory statements made by spoken word. Duncan & Neill 2015, no. 3.01. *Also* Clerk & Lindsell 2018, no. 22-08.

849 Duncan & Neill 2015, no. 1.01. *Also* Clerk & Lindsell 2018, no. 22-01.

850 Under Art. 1 (1) Defamation Act 2013. Under Art. 15 Defamation Act 2013, statements can involve 'words, pictures, visual images, gestures or any other method of signifying meaning'.

851 *Skuse v Granada Television Ltd* [1996] E.M.L.R. 278, 286. Duncan & Neill 2015, no. 4.01.

852 Von Schweinitz 2007, p. 123. *Cf. also* Seibold 2016, p. 75 (fn. 438).

853 Von Schweinitz 2007, p. 124.

854 Ebenroth & Dillon 1992, p. 810.

can be derived from Duncan & Neill, where they explain the meaning of the term 'financial loss' under Article 1 (2) Defamation Act 2013. As examples of financial loss, they refer to the 'loss of customers and suppliers' and to issues in 'obtaining credit' or 'attracting investment'.[855] These are typically types of losses that issuers could suffer as a result of an inaccurate credit rating, which would be an indication that a claim based on defamation is possible as a matter of principle. Support for this approach can also be found in the High Court of Justice decision in the case of *Gatt v Barclays Bank Plc*.[856] In this case, a bank had provided a third party with an inaccurate credit reference on one of its customers. HHJ Moloney QC held that this credit reference qualified as defamatory, because it incorrectly suggested that the customer was financially irresponsible.[857] This suggests that statements on financial matters could qualify as defamatory as a matter of principle. In the absence of case law confirming this matter, however, it is not certain whether English courts would qualify inaccurate credit ratings as defamatory statements. Moreover, one must realise that a credit rating agency can try to invoke a defence of honest opinion under Article 3 Defamation Act 2013.[858]

(b) Investors

(i) – Tort of deceit

In the absence of a contractual relationship with a credit rating agency, investors can start proceedings against credit rating agencies on the basis of the tort of deceit, though such claims will only be successful in extra-ordinary situations of fraud on the side of the credit rating agency. The tort of deceit is meant for situations in which a wrongdoer intentionally or recklessly issues a false or misleading statement with the intention that another party relies on that false or misleading statement. If the other party suffers loss as a consequence of relying on the false or misleading statement, it can claim damages under the tort of deceit.[859] The high threshold of 'intention' or 'recklessness' entails that investors will only be able to use this tort in exceptional situations. Such an exceptional situation could occur when a credit rating agency fraudulently attached an inflated credit rating to an issuer or its financial instruments.

(ii) – Tort of negligence

Section 5.7.2.3 (a) (ii) on the existence of a duty of care to take reasonable care and skill in the assignment of the credit rating owed by a credit rating agency

855 Duncan & Neill 2015, no. 4.21.

856 *Gatt v Barclays Bank Plc* [2013] EWHC 2 (QB).

857 *Gatt v Barclays Bank Plc* [2013] EWHC 2 (QB), para 37.

858 *Prior to the introduction of the Defamation Act 2013* Ebenroth & Dillon 1992, pp. 815-816. *For a successful defence based on qualified privilege of a bank for a report to a credit reference agency* *Boyo v Lloyds Bank Plc* [2019] EWHC 2279 (QB), p. 14.

859 *E.g.* Cartwright 2017, no. 5-05 and Winfield & Jolowicz 2014, no. 12-002.

vis-à-vis an investor under the tort of negligence has explained the general principles relating to the duty of care in cases involving inaccurate statements that caused pure economic loss. The restrictive approach under English law towards the compensation of pure economic loss becomes visible once again when assessing whether credit rating agencies voluntarily assumed responsibility or owed a duty of care towards investors in situations in which investors do not have a paid subscription with a credit rating agency. This situation mirrors the fact patterns in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd*. and *Caparo Industries Plc v Dickman* in the sense that one party makes a negligent statement on which another party places reliance and suffers loss as a consequence. The duty of care towards investors would involve the duty to ensure reasonable care and skill in the assignment of the credit rating so that the investor is provided with accurate information. The importance of the scope of the duty of care will be discussed in more detail in section 5.7.3.3 (a) in the context of the calculation of damages.[860]

First, it is doubtful that English courts accept that a credit rating agency made a voluntary assumption of responsibility towards an investor, as in the case of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd*. An argument in favour of the existence of a duty of care is that a credit rating agency employs a special skill and placed itself in a position in which it could expect that investors would rely on the information provided. The reliance on credit ratings by investors is indeed one of most important uses of credit ratings. The main reason for the doubt as to the existence of a voluntary assumption of responsibility is that there is no relationship between a credit rating agency and an investor, let alone a relationship that is equivalent to contract or a relationship that would be contractual but for the absence of consideration. Hence, although a credit rating agency employs a special skill on which investors may place reliance, it is difficult to fit this situation under the criteria derived from *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd* due to the generally complete absence of a relationship between credit rating agencies and investors.[861]

Second, if at all, it is only in exceptional situations that English courts will accept that credit rating agencies owe a duty of care vis-à-vis investors based on an analogue application of *Caparo Industries Plc v Dickman*. From the perspective of foreseeability of losses, it would be justified to conclude that a credit rating agency owes a duty of care vis-à-vis investors. It is common knowledge, and credit rating agencies must or should be well aware, that investors base investment decisions on credit ratings. It is, therefore, logical that investors may suffer loss if a credit rating agency does not exercise reasonable care and

860 *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191.

861 *Contra* Miglionico, no. 7.54, who put most emphasis on the arguments in favour of the application of *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd* to the context of credit rating agencies.

skill in the assignment of the credit rating and negligently assign an inaccurate credit rating. This reasoning especially applies in the rating of structured finance products, because credit rating agencies can provide advice to the issuer on the composition of the transaction so that the structured finance products can be traded on the financial markets with a certain credit rating.[862] However, even though the loss is foreseeable, it is still difficult to establish that credit rating agencies owe a duty of care towards investors because of a possible lack of sufficient proximity and because imposing a duty of care may not be considered fair, just and reasonable by English courts.[863]

Getzler and Whelan expected that the existence and scope of the duty of care depend on the way in which an English court approaches the purpose of the credit rating and on whether English courts conclude that credit ratings aim to protect a claimant from certain types of loss.[864] The importance of the purpose of a statement and the task undertaken by the provider of the statement can be derived from the approach of the English courts in negligent misstatement cases.[865] In *Caparo Industries Plc v Dickman*, Lord Bridge of Harwich held that a party does not owe a duty of care for a statement that was 'put into more or less general circulation' and that could be foreseeably relied on by strangers for a variety of different purposes. He feared that accepting the existence of a duty of care in such situations would subject the defendant to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class' (the floodgates argument).[866] In respect of auditing reports, Lord Oliver of Aylmerton remarked that such reports do not aim to assist 'those who might be minded to profit from dealings in the company's shares'.[867] He cannot find a reason why the statutory duties of an auditor extend to the protection of the interests of investors in the financial markets.[868] As stated by Getzler and Whelan, the reports rather aimed to provide companies and shareholders with information to exercise their company and shareholder rights.[869] Hence, English courts do not tend to accept a duty of care in respect of statements that are put in general circulation and tend to closely scrutinise the purpose of the particular statement.

If a statement serves a particular purpose and is known to be relied upon by a particular party, English courts can accept the existence of a duty of care vis-à-vis that particular party. In *Caparo Industries Plc v Dickman*, Lord Oliver

862 Alexander 2015, pp. 9-10.
863 *Cf.* Getzler & Whelan 2017, p. 21.
864 Getzler & Whelan 2017, p. 21. *For the importance of the task resting upon a referee,* Cartwright 2017, no. 6-40.
865 *See also for a description of the case law* Getzler & Whelan 2017, pp. 17-21.
866 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 621. Referring to *Ultramares v Touche* (1931) 174 N.E. 441, 444.
867 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 643.
868 *See Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 649-650.
869 Getzler & Whelan 2017, p. 16.

of Aylmerton explicitly stated that his decision on the absence of a duty of care did not concern cases in which accountants audited a company and issued reports for the specific purpose of submission to a potential investor.[870] This approach can also be derived from other professional liability cases. In *Smith v Bush*, a valuer who carried out a valuation of a house at the request of a prospective mortgagee was held to owe a duty of care to a prospective mortgagor where the valuer knew that the prospective mortgagor would base its decision to purchase the house in reliance on the valuation alone.[871] Furthermore, in the Court of Appeal decision in *Law Society v KPMG Peat Marwick*, the auditors who made the annual reports of a law firm at the request of the firm owed a duty of care towards the Law Society, as a third party, because the auditors were told that the reports were meant for the Law Society to scrutinise the law firm.[872] English courts interpret the purpose of a statement objectively, so that a court needs to consider whether 'a reasonable person in the position of the claimant' could have expected that the purpose 'for which the statement was made or communicated included protecting him from' the type of losses suffered.[873]

So, then, would English courts consider the purpose of a credit rating to justify the existence of a duty of care towards investors? The purpose of credit ratings differs from the purpose of the auditor reports in one important respect. Whereas reports of auditors are generally meant to inform the company and its shareholders to exercise their rights 'in their respective capacities',[874] the purpose of credit ratings is outward-looking.[875] Both the information and regulatory function of credit ratings mean that they are meant to be used by third parties. Credit ratings provide an informed opinion on relative creditworthiness to investors, potential investors and regulators, so the reason of their existence is that they will be relied upon by third parties. Yet, one can wonder whether a credit rating actually aims to protect an investor from credit risk. A credit rating is an informed opinion, but not a guarantee against defaults. But, notwithstanding the outward-looking purpose of credit ratings, English courts may not be prepared to hold that a credit rating agency owes a duty of care because that could expose credit rating agencies to liability claims coming from an indeterminate group for indeterminate amounts.[876] In conclusion, it is expected that English courts will not easily accept that a

870 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 650.

871 *Smith v Eric S. Bush* [1990] 1 A.C. 831. *See also* Mullis & Oliphant 2011, p. 59 and Ebenroth & Dillon 1992, pp. 792-793.

872 *Law Society v KPMG Peat Marwick* [2000] 1 W.L.R. 1921. Getzler & Whelan 2017, pp. 18-19.

873 *MAN Nutzfahrzeuge AG v Freightlinger Ltd* [2007] EWCA Civ 910, para 36. *See also* Getzler & Whelan 2017, p. 20. *Also Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 A.C. 181, 199.

874 Getzler & Whelan 2017, p. 16.

875 Von Schweinitz 2007, pp. 120-121 and 140. *See also* Siebold 2016, p. 102.

876 Ebenroth & Dillon 1992, p. 800.

credit rating agency owes a duty of care towards investors to take reasonable care and skill in the preparation of the credit rating.[877] Having that said, in specific situations, the imposition of a duty of care can be justified. The clearest example is when a credit rating is assigned on a specific request while a credit rating agency is aware that the credit rating is meant for potential investors to decide on a specific investment decision.[878]

5.7.3 Article 35a (1)

5.7.3.1 'Intentionally' or 'with gross negligence'

Article 3 UK Implementing Regulations defines 'intention' in such way that the senior management of the credit rating agency must have deliberately committed the infringements. In other words, the senior management must have intended to commit an infringement as a consequence of its conduct.[879]

Article 4 UK Implementing Regulations defines 'gross negligence' as 'reckless' as to whether the infringement occurs. The senior management acts 'recklessly' if it acts 'without caring whether an infringement occurs'.

Whereas most provisions of the UK Implementing Regulations refer the interpretation of Article 35a CRA Regulation back to the tort of negligence, Article 4 forms an exception. As stated by Hoggard, the requirement and definition of 'recklessness' is known from the tort of deceit.[880] Under the tort of deceit, someone who made a false statement can be held liable if the statement was made intentionally or recklessly and was made to be acted upon

877 *See* Seibold 2016, pp. 102-103. *Cf.* Alexander 2015, p. 11. *Contra* Miglionico 2019, no. 7.54 and no. 7.64.

878 *Cf.* Getzler & Whelan 2017, p. 21 and Alexander 2015, p. 11. *Cf. also* Miglionico 2019, no. 7.76.

879 *Cf. on the term 'intention' in general* Winfield & Jolowicz 2014, no. 3-002 and 3-003. *Cf.* Charlesworth & Percy 2018, no. 1-03. *In detail with regard to credit rating agencies* Hoggard 2016, pp. 370-373.

880 Hoggard 2016, pp. 367-368. See, on the tort of deceit, section 5.7.2.3 (b) (i). Baumgartner raised an interesting similarity between the UK Implementing Regulations and US law. He stated that the same threshold for civil liability was introduced under Article 15 U.S. Code 78u–4: 'In the case of an action for money damages brought against a credit rating agency or a controlling person under this chapter, it shall be sufficient, for purposes of pleading any required state of mind in relation to such action, that the complaint state with particularity facts giving rise to a strong inference that the credit rating agency knowingly or recklessly failed – (i) to conduct a reasonable investigation of the rated security with respect to the factual elements relied upon by its own methodology for evaluating credit risk; or (ii) to obtain reasonable verification of such factual elements (which verification may be based on a sampling technique that does not amount to an audit) from other sources that the credit rating agency considered to be competent and that were independent of the issuer and underwriter.' Baumgartner 2015, p. 514.

by another party.[881] In *Derry v Peek*, the term 'reckless' was explained as acting without 'care whether [a statement] is true or false'.[882] The term 'reckless' hence serves to describe the mental state in which someone 'turned his mind to the consequences of his act' but did not let these consequences stop him.[883]

By having adopted this definition, the UK Implementing Regulations have introduced a high threshold for claimants to overcome. Being reckless as to the consequences of certain conduct strongly resembles having an intention in respect of the consequences of certain conduct. In *Three Rivers DC v Bank of England (No 3)*, Lord Steyn said that 'reckless indifference to consequences is as blameworthy as deliberately seeking such consequences'.[884] Moreover, the wording of Article 4 UK Implementing Regulations indicates that recklessness must be construed subjectively instead of objectively. The senior management should have been careless as to whether an infringement occurred, which differs from the situation in which the senior management 'had failed to give any thought to the possibility of an objectively obvious risk'.[885] Article 4 UK Implementing Regulations, hence, requires indifference and not mere inadvertence. 'Inadvertence' covers situations in which the person responsible for the damage has never even thought about the potential risks of his act.[886]

5.7.3.2 'Impact' and 'caused to', including claimant-specific requirements

As stated in section 5.3.1.3, the terms 'impact', 'caused to' and the claimant-specific requirements fall under the broad concept of causation, and are therefore discussed all together. The UK Implementing Regulations, however, address these terms separately.

In respect of the term 'impact', Article 5 UK Implementing Regulations states that an infringement has an impact on a credit rating if, due to the infringement, issuers or financial products ended up in a different rating category. The English approach codifies the common sense approach to the term 'impact', as already mentioned in section 5.3.1.3 (a).

In respect of the term 'caused to', Article 8 UK Implementing Regulations states that 'the test of causation in negligence' applies to determine whether a causal relationship exists between the infringement and the loss. In *Wallace v Kam*, the High Court of Australia summarised the common law approach to causation in the tort of negligence: 'The common law of negligence requires determination of causation for the purpose of attributing legal responsibility.

881 Winfield & Jolowicz 2014, no. 12-002.
882 *Derry v Peek* (1889) 14 App. Cas. 337, 350. *Also* Cartwright 2017, no. 5-14-5-15.
883 Charlesworth & Percy 2018, no. 1-05.
884 *Three Rivers DC v Bank of England (No 3)* [2003] 2 A.C. 1, 192 and Clerk & Lindsell 2018, no. 1-61.
885 *Cf.* Clerk & Lindsell 2018, no. 1-61.
886 Charlesworth & Percy 2018, no. 1-05.

Such a determination inevitably involves two questions: a question of historical fact as to how particular harm occurred; and a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person.'[887] The English law of negligence divides the test for causation in an assessment of causation in fact and causation in law. The burden of proof in respect of factual causation rests upon the claimant (an issuer or investor). When the claimant has established causation, English courts can use the concepts of legal causation and remoteness as correction mechanisms.

(a) Causation in fact

The assessment of causation in fact is formed by the but for test: 'would the [issuer or investor] not have suffered the harm, but for the [credit rating agency's] negligence'?[888] Issuers and investors have to prove on a balance of probabilities ('more likely than not')[889] that they would not have suffered the loss had the infringement not been committed and had the credit rating not been affected.

Issuers need to prove that they would not have suffered (financial and/or reputational) loss but for the affected credit rating. To that end, they must prove that they would have been better off without the affected credit rating. If a rating trigger was included in an investment contract, issuers can prove factual causation more easily. It will however be more difficult to prove factual causation if the issuer would have suffered the loss anyway; for instance, due to a general decline in the financial markets. That said, English courts can apply the but for test more flexibly if it would cause unfair results in a specific situation. Otherwise, in situations where multiple causes independently contributed to the loss (overdetermination), none of the causes would satisfy the but for test.[890] For instance, in the hypothetical scenario that an issuer is able to prove that two incorrect credit ratings issued by different credit rating agencies independently caused an increase in funding costs, a strict application of the but for test would lead to the conclusion that none of the credit ratings actually caused the loss because the loss would have occurred anyway due to the other incorrect credit rating. One would therefore never be able to conclude that the loss would not have been caused, but for one of the incorrect

887 *Wallace v Kam* [2013] HCA 19, 250 CLR 375, 381 (para 11).

888 *Cf. e.g.* Clerk & Lindsell 2018, no. 2-09, Mullis & Oliphant 2011, p. 121 and Wanambwa 2014. *See for an application of the but for test e.g. Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428, 438-439.

889 *E.g.* Clerk & Lindsell 2018, no. 2-07 and Lunney, Nolan & Oliphant 2017, p. 224.

890 *See e.g.* Green 2015, p. 9.

credit ratings. As that would lead to unfair results, causation will be accepted in these situations.[891]

Investors need to prove on a balance of probabilities that they (reasonably) relied on the credit rating at the moment of making the investment decision and they would not have invested at all or would have made an alternative investment decision had the credit rating not been affected.[892] Both elements are difficult to prove, as there may be various causes that contributed to the investment decision (e.g. other available information and advice) and to the loss (e.g. a general decline in the financial markets). As will be described under (c), English courts are not likely to mitigate the burden of proof or to employ other methods to overcome the evidential problems of investors. Moreover, as will be discussed first under (b), Article 6 and 7 UK Implementing Regulations interpret 'reasonable reliance' in such manner that the threshold for the civil liability of credit rating agencies is increased further.

(b) 'Reasonable' reliance

Article 6 and 7 UK Implementing Regulations define when an investor reasonably relied on a credit rating in accordance with Article 5a CRA Regulation or otherwise with due care. Pursuant to Article 6, the test for whether the reliance of an investor was reasonable is the same as for whether it is reasonable for a person to rely on a statement for the purposes of determining whether the statement gives rise to a duty of care in negligence. In the case of professional investors, this test shall be combined with the requirement under Article 5a CRA Regulation (see the general remarks on causation, section 5.3.1.3). Alternatively, investors must have reasonably relied with due care. Article 7 UK Implementing Regulations states that an investor has acted otherwise with due care if it took the care that a reasonably prudent investor would have exercised in the same circumstances – which forms an objective approach, depending on the circumstances of the case.

By equating the test for reasonable reliance with the test for whether a statement gives rise to a duty of care under the tort of negligence, the UK Implementing Regulations in fact introduce the requirement of the existence of a duty of care under the tort of negligence in the application of Article 35a

891 It is important to distinguish cases of multiple causation from cases in which a causal connection was not proven at all. In *Wilsher v Essex Area Health Authority* [1988] AC 1074, a premature baby developed a medical condition that could have been caused by the negligence of a junior doctor *or* by naturally arisen conditions from which the baby suffered. Green described this case as a case of 'indeterminate cause', in which no liability could be based on the but for test. In extreme situations, particularly in medical cases, a more flexible approach towards causation has been adopted based on public policy reasons. Green 2015, pp. 33-34. In the event of credit rating agency liability, however, such public policy reasons do not exist.

892 *Cf. for other examples in professional negligence cases* Kramer 2017a, no. 13-12 and Wanambwa 2014.

CRA Regulation. In order to assess whether the reliance of the investor was reasonable, it must hence be investigated whether the credit rating agency voluntarily assumed responsibility towards the investor as in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*[893] or whether the credit rating agency owed a duty towards the investor using the three perspectives employed in *Caparo Industries Plc v Dickman.*[894] But, as discussed in section 5.7.2.3 (b) (ii), in the absence of any special relationship, an investor faces a challenging task to establish that the credit rating agency owed a duty of care towards him, let alone that the credit rating agency voluntarily assumed responsibility. This interpretation of reasonable reliance thus causes the threshold for liability under Article 35a CRA Regulation to be very high in situations where English law applies.

As a final remark, the English interpretations of gross negligence and reasonable reliance lead to a combination of elements of two different torts (deceit and negligence, respectively) in the interpretation and application of Article 35a CRA Regulation under English law – although one must realise that the UK Implementing Regulations do not explicitly refer back to the tort of deceit.[895] The tort of deceit requires at least recklessness on the side of the defendant (the English interpretation of 'gross negligence'), but, although the claimant has to be induced by the statement, the tort of deceit does not require the claimant to have *reasonably* relied on the statement.[896] For liability under the tort of negligence, recklessness on the side of the defendant is not required, but reasonable reliance is required through the assessment of the voluntary assumption of responsibility and the through application of the perspectivesof *Caparo Industries Plc v Dickman* (blended in through the English interpretation and application of reasonable reliance). The interpretation and application under the UK Implementing Regulations hence leads to a situation in which a credit rating agency is required to have committed the infringement recklessly, while the claimant also needs to have reasonably relied on the credit rating for purposes of establishing a duty of care under English law.[897] As

893 *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465.
894 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605.
895 *The idea of the combination of the requirements of these torts is derived from* Hoggard 2016. Hoggard criticised the combination of the requirements of intention or gross negligence and reasonable reliance in general: 'Taken on its own terms, the requirement [of reasonable reliance] is not without possible justification: one suspects that the requirement of reasonable reliance is partly to ensure that investors are not at liberty to make risky investments effectively underwritten by the CRAs. That being said, the requirement of reasonable reliance does seem out of place in an article concerned with intentional or grossly negligent infringement. However, there exists no such requirement in tortious deceit. All that is required in this respect is that the claimant relied on the statement, not that the reliance was in any way reasonable.'
896 *Cf.* Winfield & Jolowicz 2014, no. 12-015 and 12-016 (who do not mention the requirement of *reasonable* reliance in the context of the tort of deceit). *Cf. also* Hoggard 2016, p. 373.
897 *Cf.* Hoggard 2016, p. 373.

a consequence, as already stated above, the threshold for liability under Article 35a CRA Regulation is very high in situations in which English law applies, even compared to the requirements of the torts of deceit and negligence under common law.

(c) Possibilities to deal with causal uncertainty concerning reliance[898]

(i) – No relaxation burden of proof but for test

To start with, English courts will not relax the but for test in cases concerning credit rating agency liability. By 'relaxation of the but for test', I understand situations in which the claimant cannot satisfy the but for test, but courts accept that the but for test has been satisfied anyway. English courts can do so for reasons of public policy, but they will only do so in the most exceptional situations.

Such an exceptional situation occurred in the medical negligence case *Chester v Afshar*. In this case, the claimant (a patient) suffered from a serious neurological disease after a 'small but unavoidable risk of surgery' had occurred.[899] The doctor had performed the surgery properly, but had not warned the patient of this risk prior to the surgery. This omission constituted a breach of his duty of care towards the patient. The question arose whether the patient was entitled to damages, even though she could not prove that her decision to undergo the surgery would have been different had she been warned.[900] Lord Steyn held that this situation justified 'a narrow and modest departure from traditional causation principles'.[901] Lord Hope of Craighead explained in this regard: 'To leave the patient who would find the decision difficult without a remedy, as the normal approach to causation would indicate, would render the duty useless in the cases where it may be needed most. This would discriminate against those who cannot honestly say that they would have declined the operation once and for all if they had been warned.'[902] Hence, the English courts will not lightly depart from the com-

898 In case of prospectus liability, Art. 90 FSMA (in conjunction with Schedule 10 para 6 FSMA) is assumed to have introduced a presumption of reliance, Vandendriessche 2015, no. 326. This section will not discuss this rule because the presumption does not apply to cases concerning credit rating agency liability. Art. 90 FSMA is limited to prospectus liability and Art. 8 UK Implementing Regulations explicitly refers to 'the test of causation in negligence'.

899 *Chester v Afshar* [2004] UKHL 41, [2005] 1 A.C. 134, 139-140, para 1.

900 *Chester v Afshar* [2004] UKHL 41, [2005] 1 A.C. 134, 139-140, paras. 1-5.

901 *Chester v Afshar* [2004] UKHL 41, [2005] 1 A.C. 134, 146, para 24.

902 *Chester v Afshar* [2004] UKHL 41, [2005] 1 A.C. 134, 162, para 87.

mon law principles and will only do so in the most extreme situations of medical negligence.[903]

English courts have not applied the principles of *Chester v Afshar* outside the field of medical negligence.[904] In the context of financial advice, in *Beary v Pall Mall Investments*, the Court of Appeal refused to relax the but for test and refused to apply *Chester v Afshar* by analogy. In this case, the claimant had received incorrect advice in respect of his pension savings. The defendant – who was an independent financial adviser – provided this incorrect advice negligently. The claimant could not prove he would have invested his pension savings differently in the absence of the incorrect advice, but instead invoked the principles of *Chester v Afshar*.[905] Dyson L.J. acknowledged the difficulties in proving causation,[906] but nevertheless refused to apply these principles by analogy: 'But I would not in any event accept the submission of Mr Ticciati that the *Chester v Afshar* principle should be applied generally in claims for negligent financial advice. In *Chester v Afshar*, the majority made it very clear that the departure from established principles of causation in that case was exceptional, and was justified by the particular policy considerations that are in play where there is a breach of the doctor's duty to advise a patient of the disadvantages and dangers of proposed treatment so as to enable the patient to give informed consent. The analogy that Mr Ticciati seeks to draw between a breach of the doctor's duty of care and breach of the duty of care owed by financial advisers (whether in relation to pensions or otherwise) is unconvincing. The subject-matter of the two duties is very different. The policy considerations applicable to the duty to give proper financial advice and the duty to give proper medical advice are quite different. The suggestion that the established principles of causation should be rejected in all cases of negligent financial advice is breathtakingly ambitious, contrary to authority and, in my view, wrong.'[907] Hence, as stated by Dyson L.J., the public policy reasons which justified a departure from the common law principles in *Chester v Afshar* are absent in relation to cases concerning negligent investment advice.

903 *As appears as well from subsequent decisions, e.g. Meiklejohn v St George's Healthcare NHS Trust* [2014] EWCA Civ 120, para 34: 'Chester is at best a modest acknowledgement, couched in terms of policy, of narrow facts far from analogous to those we are considering. Reference to it does not advance the case for the Claimant since I cannot identify within it any decision of principle.' and *Crossman v St George's Healthcare NHS Trust* [2016] EWHC 2878 (QB), para 50.

904 *Cf.* Clerk & Lindsell 2018, no. 2-19.

905 *Beary v Pall Mall Investments* [2005] EWCA Civ 415, [2005] P.N.L.R. 35, paras. 1-6 and 10.

906 *Beary v Pall Mall Investments* [2005] EWCA Civ 415, [2005] P.N.L.R. 35, para 36: 'Indeed, the question [what would have happened had correct advice been given] is even more difficult for the victim of negligent pension advice than it is for the victim of negligent medical advice. This is because in the world of financial advice, there are very many possible choices, whereas the number of possible answers to the question what would the patient have decided to do if properly advised or informed is usually far more restricted.'

907 *Beary v Pall Mall Investments* [2005] EWCA Civ 415, [2005] P.N.L.R. 35, para 38.

Although by means of a less extensive reasoning, the Court of Appeal also refused to apply *Chester v Afshar* by analogy in *White v Paul Davidson & Taylor* concerning negligent advice provided by solicitors for the same reason.[908]

As English courts have explicitly refused to apply the principles of *Chester v Afshar* outside the field of medical negligence because of a lack of pressing reasons of public policy, I see no room to apply these principles in cases concerning credit rating agency liability either. The relaxation of the but for test is reserved for the most extreme cases of medical negligence, and finds no application in the field of negligent advice provided by both financial advisors and lawyers. The nature of public policy arguments relating to credit rating agency liability bears more resemblance to the liability of financial advisors and lawyers than to the liability of doctors. Also, misconduct by credit rating agencies causes pure economic loss rather than physical loss to investors, on the basis of which the decisions in *Chester v Afshar* and *Beary v Pall Mall Investments* could also be distinguished.

(ii) – No application loss of chance

English law acknowledges the loss of a chance as a head of damages and applies the concept on several occasions. In order to explain whether the English courts would apply the doctrine of loss of chance to cases concerning claims for credit rating agency liability brought by investors, first, some background information must be provided on the application of the doctrine of loss of chance in English private law.

The starting point of an analysis of the application of the doctrine of loss of chance under English law is traditionally formed by the Court of Appeal decision in *Chaplin v Hicks* in 1911. In this case, the Court of Appeal decided the defendant had breached his contractual obligations towards the plaintiff by refusing to reschedule an interview with her, subsequent to which the defendant would decide to whether or not admit her to take part in a beauty contest. The Court of Appeal awarded damages for loss of chance, because '[t]he very object and scope of the contract were to give the plaintiff the chance of being selected as a prize-winner, and the refusal of that chance is the breach of contract complained of and in respect of which damages are claimed as compensation for the exclusion of the plaintiff from the limited class of competitors'.[909]

---

908 *White v Paul Davidson & Taylor* [2004] EWCA Civ 1511, [2005] P.N.L.R. 15, paras. 33 and 42: 'There are no such policy considerations in the present case. If there were, then it would be difficult to distinguish this case from any other case of professional negligence on the part of a lawyer or accountant. None of the long-established authorities on causation was overruled by the House of Lords in *Chester v Afshar*. For these reasons, it would not, in my judgment, be right for this court to apply *Chester v Afshar* in preference to those traditional principles already summarised by Ward LJ.' And, implicitly, *Moy v Pettman Smith (A Firm)* [2005] UKHL 7, [2005] 1 W.L.R. 581, para 64.

909 *Chaplin v Hicks* [1911] 2 K.B. 786, 786-788 and 795.

Furthermore, English courts are prepared to award damages for lost chances in cases in which solicitors negligently denied their clients certain opportunities. For instance, in *Kitchen v Royal Air Force Association*, the plaintiff was compensated for the lost opportunity of bringing an action against a third party, as her solicitor had negligently let the prescription period elapse.[910] As another more recent example, in *Dixon v Clement Jones Solicitors*, the plaintiff was compensated for the lost opportunity of continuing proceedings against a third party, as her solicitor had negligently failed to serve a statement of claim at the beginning of the proceedings.[911] Furthermore, in *Allied Maples Group Ltd v Simmons & Simmons*, the plaintiff was compensated for the lost opportunity to negotiate better terms with a third party, as the solicitor had negligently failed to advise the plaintiff to attempt to include a certain warranty in the terms.[912]

English courts, however, did not apply the doctrine of loss of chance in tort law cases concerning medical negligence. In *Hotson v East Berkshire Area Health Authority* and *Gregg v Scott*, the House of Lords refused to award damages for loss of chance where the claimants argued that they lost a chance – to avoid a medical condition and to recover from cancer, respectively – as a consequence of breach of duty of the defendants – namely not having discovered the initial injury and the disease of the claimants in time.[913] The House of Lords inclined to the common law principles of causation: the claimants had to fulfil the but for test and had to prove that, on the balance of probabilities, the medical condition and the likely premature death would not have been caused but for the negligence of the doctors.[914]

Although caution must be exercised in conceptualising English case law, the key question that must be answered – to be able to determine whether the doctrine of loss of chance applies in the case of credit rating agency liability claims brought by investors – is what general rules underlie these decisions? And, more specifically, where to draw the line between loss of chance cases and cases in which the but for test is applied?[915]

In *Allied Maples Group Ltd v Simmons & Simmons*, Stuart-Smith L.J. provided useful guidance to distinguish between 'normal' but for test cases and loss

910 *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563, 567 and 575-576.

911 *Dixon v Clement Jones Solicitors* [2004] EWCA Civ 1005, paras. 48-51.

912 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1621. *Also e.g. Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, para 109.

913 *Hotson v East Berkshire Area Health Authority* [1987] A.C. 750, 765 and 767 and *Gregg v Scott* [2005] UKHL 2, [2005] 2 A.C. 176, 178. *See for an assessment of these cases* Winfield & Jolowicz 2014, no. 7-025-7-027, Lunney, Nolan & Oliphant 2017, pp. 224-227 and Mullis & Oliphant 2011, pp. 130-131.

914 *Hotson v East Berkshire Area Health Authority* [1987] A.C. 750, 793 and *Gregg v Scott* [2005] UKHL 2, [2005] 2 A.C. 176, 198-199, 225, 234. Although in *Gregg v Scott*, Lord Nicholls of Birkenhead and Lord Hope of Craighead were dissenting.

915 *For explanations of the doctrine of loss of chance under English law, see also e.g.* Green 2015, p. 154 and McGregor 2018, no. 10-043-10.045 and no. 10-057-10-067.

of chance cases.[916] In this case, the defendants (law firm Simmons & Simmons) failed to properly warn the claimant (client Allied Maples Group Ltd.) for the risks of the removal of a warranty in a contract concluded with a third party.[917] The question arose whether Allied Maples Group Ltd. could claim damages, without being able to prove that the third party would have accepted the warranty. As regards the scope of application of the doctrine of loss of chance, Stuart-Smith L.J. distinguished three types of situations. The first type covers situations in which the negligence consists of a positive act or misfeasance. Stuart-Smith L.J. considered the question of causation here to be a question of historical fact to which the but for test applies. The second type covers situations in which the negligence consists of an omission – for instance, to provide adequate instruction or advice. Stuart-Smith L.J. considered the question of causation here to be a hypothetical one, namely what would the plaintiff have done had the instruction or advice been given? In this type of situation, the answer to the question depends on the conduct of the claimant, and the claimant must prove its hypothetical conduct on the balance of probabilities. The third type covers situations in which the loss 'depends on the hypothetical action of a third party'. It is only in this type of situation that according to Stuart-Smith L.J., the English courts apply the doctrine of loss of chance.[918] Hence, regarding its own conduct, Allied Maples Group Ltd. had to prove on a balance of probabilities that it 'would have taken action to obtain the benefit or avoid the risk' had the advice been correct, so in fact being under the obligation to prove reliance on the advice.[919] But as regards the conduct of the third party, the claimant did not need to prove that the third party would actually have accepted the warranty. It was sufficient to prove that 'he had a substantial rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages'.[920]

The distinctions between past events and future events and between acts of claimants and defendants appear from other decisions as well. The English courts upheld the but for test in a wide range of cases involving negligent professional advice and the claimant's reliance.[921] In a case concerning incorrect advice provided by accountants, *First Interstate Bank of California v Cohen Arnold & Co*, the Court of Appeal applied the but for test to the question of what the claimant (the First Interstate Bank of California) would have done

916 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1609 ff.

917 *See Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1607.

918 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1609-1611. As can be derived from the speech of Stuart-Smith L.J., he considers cases as *Chaplin v Hicks* [1911] 2 K.B. 786 and *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563 to qualify as the third type of situation. *See also* Clerk & Lindsell 2018, no. 2-78, McGregor 2018, no. 10-057 ff. and *cf.* Kramer 2017a, no. 13-79.

919 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1610.

920 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1611.

921 Kramer 2017a, no. 13-11-13-13.

had the advice of the accountant been correct.[922] Moreover, in cases on negligent investment advice such as *Zaki and others* and *Bank Leumi (UK) plc v Wachner*, the claimants do not invoke the application of the doctrine of loss of chance at all. In these cases, the English courts actually analysed the personality and previous investment conduct of the investor claimants to be able to conclude whether they had relied on the negligent investment advice. The degree of investor sophistication formed an important indicator: a sophisticated investor will have more trouble proving reasonable reliance than an unexperienced investor.[923] For instance, in *Zaki v Credit Suisse (UK) Ltd*, Teare J concluded that the claimant had its own views on the markets, 'had a serious appetite for investing' and was 'bullish, brave and confident'.[924] Furthermore, in *Bank Leumi (UK) plc v Wachner*, Flaux J concluded that he was not convinced the claimant's conduct was influenced by the investment advice, based on 'the evidence of her own personality' and the fact that she was 'a sophisticated business woman and investor who knew her own mind'.[925] The English courts hence evaluated whether the investor relied on the advice by concretely assessing the capacities and characteristics of the investors and the other circumstances of the case.

In February 2019, in *Perry v Raleys Solicitors*, the Supreme Court confirmed the position taken by Stuart-Smith L.J. in *Allied Maples Group Ltd v Simmons & Simmons*.[926] According to Lord Briggs JSC, where the hypothetical factual scenario depends on the claimant's hypothetical conduct, the claimant needs to prove on a balance of probabilities what the claimant would have done. If the hypothetical conduct depends on a third party's conduct, the doctrine of loss of chance applies.[927] *Perry v Raleys Solicitors* concerned a case in which the hypothetical factual scenario depended on the conduct of the claimant. The concrete question was whether, in the absence of the negligence of its solicitor, Perry would have filed a claim for a specific type of damages against its former employer and whether Perry would have succeeded in this claim. According to Lord Briggs JSC, Perry had to prove on a balance of probabilities: (1) he would have made the claim for a specific type of damages in time; and

922 *First Interstate Bank of California v Cohen Arnold & Co* [1996] C.L.C. 174, 183-184. *Example derived from* McGregor 2018, no. 10-079. *See also e.g. Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 Q.B. 113 and the assessment of Stuart-Smith L.J. with regard to this case in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602, 1612.

923 *See* Bradley 2015, p. 514.

924 *Zaki v Credit Suisse (UK) Ltd* [2011] EWHC 2422 (Comm), para 133 (appeal dismissed in *Zaki v Credit Suisse (UK) Ltd* [2013] EWCA Civ 14, para 50). *This example has been derived from* Bradley 2015, p. 514.

925 *Bank Leumi (UK) Plc v Wachner* [2011] EWHC 656 (Comm), paras. 203 and 209-210. *This example has been derived from* Bradley 2015, p. 514.

926 *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 W.L.R. 636.

927 *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 W.L.R. 636, paras. 20-21.

(2) the claim was 'an honest claim'.[928] It was added that it could be tested in an adversarial trial whether Perry's claim was an honest claim.[929]

The cases described and the types of situations distinguished by Stuart-Smith L.J. in *Allied Maples Group Ltd v Simmons & Simmons* and confirmed by the Supreme Court in *Perry v Raleys Solicitors* provide a good explanation of the reasons why English courts will not apply the doctrine of loss of chance in credit rating agency liability cases started by investors. These situations classify as the so-called 'type 2' situations of *Allied Maples Group Ltd v Simmons & Simmons*. Indeed, for the purposes of establishing causation, the hypothetical question must be answered of what the claimant (the investor) would have done if the defendant (the credit rating agency) had conducted itself adequately. The causal uncertainty hence relates to the conduct of the claimant and not, or at least, not only, to the conduct of a third party or another external event. As a consequence, investors must prove on a balance of probabilities how they would have acted in the absence of the affected credit rating (reasonable reliance) and how this scenario would have played out. English courts will not apply the doctrine of loss of chance to claims for damages brought by investors based on Article 35a CRA Regulation.

(d) Causation in law

If claimants – issuers and investors – succeed in satisfying the but for test, that does not put an end to a court's assessment of causation under English law. Legal causation or causation in law is not automatically provided if claimants manage to satisfy the but for test. English courts tend to hold a defendant liable if its act or omission qualifies as the effective or dominant cause of the claimant's loss.[930] In *Galoo Ltd v Bright Grahame Murray*, a case on auditor liability, Glidewell L.J. stated 'the court's common sense' determines whether an act or omission merely 'gives the opportunity for [the claimant] to sustain the loss' or forms the effective cause of the loss.[931] In addition, liability will not be accepted if the chain of causation between the act or omission and the loss was broken by intervening acts of the claimant itself or a third party or by a natural event occurring independent of any human acts.[932]

928 *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 W.L.R. 636, para 25.

929 *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 W.L.R. 636, para 24.

930 *Galoo Ltd v Bright Grahame Murray* [1994] 1 W.L.R. 1360, 1374. *In the context of the liability of accountants and auditors*, Jackson & Powell 2017, no. 17-127. *Cf.* Clerk & Lindsell 2018, no. 2-98.

931 *Galoo Ltd v Bright Grahame Murray* [1994] 1 W.L.R. 1360, 1375, Glidewell L.J. explicitly states this rule applies to contract and tort law. *In the context of the liability of accountants and auditors*, Jackson & Powell 2017, no. 17-128. *Cf.* Clerk & Lindsell 2018, no. 2-99.

932 Clerk & Lindsell 2018, no. 2-107 and Mullis & Oliphant 2011, pp. 136-137.

(e) Remoteness

This final subsection on causation pays attention to the concept of remoteness of loss.[933] Article 35a CRA Regulation does not suggest that the term 'caused to' includes questions relating to remoteness, but since both the elements of causation and damages are left to the interpretation and application of the applicable national law, it was assumed that English courts can include the concept of remoteness in decisions on claims for civil liability based on Article 35a CRA Regulation under English law. The concept of remoteness serves to avoid that a wrongdoer's liability extends to all, possibly far-fetched, harmful consequences of a breach of contract or tort. In essence, the concept of remoteness limits a wrongdoer's responsibility to the foreseeable consequences of its conduct. The concrete tests to determine whether a certain type of loss is too remote differ in contract and tort law.[934] Although up to now, we have mainly been concerned with English private law concepts under the tort of negligence for the purposes of the interpretation and application of Article 35a CRA Regulation, this dissertation now briefly pays attention to the tests for remoteness in both contract and tort law. It was decided to do so because the possible existence of a contractual relationship, or of a relationship between parties equivalent to contract in credit rating agency liability cases, may cause English courts to apply the narrower approach to remoteness adopted in contract law.

The test for remoteness is narrower in contract law as compared to tort law.[935] Losses are considered not too remote and, hence, recoverable when the respective parties had or could have had the losses in reasonable contemplation when they entered into the agreement or when the loss flowed naturally from the breach of contract. The first element of the test scrutinises whether a reasonable party has or could have thought about the possible harmful consequences of a breach at the time it entered into the contract.[936] The background of this test is the type of relationship between the parties. As explained by Lord Reid in *The Heron II*, prior to entering into a contract, parties have the opportunity to discuss usual and unusual risks with each other and to search for protection against such risks from each other.[937] The idea

933 The topic of remoteness could alternatively be discussed in the context of the calculation of the award of damages and is closely related to the duty of care and the scope of the duty of care owed by a wrongdoer.

934 *Cf. The Heron II* [1969] 1 A.C. 350, 385-386. *Also e.g.* Beatson, Burrows & Cartwright 2016, p. 581 and Cartwright 1996, p. 493.

935 *Cf.* Cartwright 1996, p. 493.

936 *The Heron II* [1969] 1 A.C. 350, 385. Cartwright 1996, p. 493. *Also e.g.* McKendrick 2017, pp. 388 and 393 and Beatson, Burrows & Cartwright 2016, pp. 575 and 585. Since the decision in *The Achilleas* [2008] UKHL 48, [2009] 1 A.C. 61 some uncertainty exists on the exact application of the test for remoteness in contract law (*cf.* Beatson, Burrows & Cartwright 2016, pp. 578-580). A broader discussion of these matters falls outside the scope of this dissertation.

937 *The Heron II* [1969] 1 A.C. 350, 386.

is that the claimant was in the position to discuss specific unusual risks with the defendant prior to the conclusion of the contract and, thereby, could have protected itself against those risks.

In tort law, and more specifically in the context of the tort of negligence, the test for remoteness is formulated in terms of the foreseeability of losses. Losses are considered not too remote and, hence, recoverable when they are a reasonably foreseeable consequence of the negligence of the defendant.[938] As long as the losses were reasonably foreseeable, it is irrelevant whether the losses were usual or unusual risks associated with the tort. Moreover, losses can also be reasonably foreseeable if their magnitude and precise manner of infliction could not be determined in advance.[939] Again, the background of this test is the type of relationship between the parties. As explained by Lord Reid in *The Heron II*, in tort cases, the aggrieved party was not in the position to discuss specific unusual risks with the wrongdoer prior to the tort and to protect itself against such risks. Therefore, the defendant cannot complain if it is held liable for the foreseeable consequences of the violation of its duty of care under the tort of negligence.[940]

In cases involving the tort of negligence, the remoteness of loss can be closely connected to the question of whether a credit rating agency owes a duty of care at all and what would the scope of that duty be. The foreseeability of loss is indeed a recurring element in the requirements of the tort of negligence. It is not only relevant at the stage of causation for the purpose of the concept of remoteness, but can already play a role in the assessment of whether the defendant owes a duty of care at all.[941] One of the perspectives of *Caparo Industries Plc v Dickman* is indeed whether the loss suffered was foreseeable to the wrongdoer.[942] Therefore in a concrete case, it might well be that the loss is not reasonably foreseeable, and that the defendant does not owe a duty of care to the claimant in the first place.[943]

In the context of credit rating agency liability, the question is what type of loss is recoverable and, if any, what type of loss is too remote. If a contractual relationship exists between an issuer and a credit rating agency, one can wonder whether English courts would apply the test for remoteness of contract or tort law to claims based on Article 35a CRA Regulation. For the purpose of Private International Law, Article 35a CRA Regulation qualified as a non-contractual obligation,[944] yet one can imagine English courts laying emphasis on the contractual relationship between the parties instead and

938 *The Wagon Mound* [1961] A.C. 388, 409. *Also The Heron II* [1969] 1 A.C. 350, 385-386. *E.g.* Mullis & Oliphant 2011, p. 139 and Winfield & Jolowicz 2014, no. 7-029.

939 Winfield & Jolowicz 2014, no. 7-037. *E.g. Hughes v Lord Advocate* [1963] A.C. 837, 845.

940 *The Heron II* [1969] 1 A.C. 350, 386.

941 *For this point*, Cartwright 1996, pp. 497-498.

942 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 617-618. Section 5.7.2.3 (a) (i).

943 *Cf.* Cartwright 1996, p. 499.

944 Section 4.2.

applying the narrower contractual test of remoteness. In *Wellesley Partners LLP v Withers LLP*, the Court of Appeal indeed held that, if concurrent liability in tort and contract arises, English courts must apply the contractual test for remoteness.[945] However, irrespective of whether the contractual or tortious test of remoteness is applied in the context of claims based on Article 35a CRA Regulation, it seems safe to assume that reputational loss and increased funding costs are so specific to the business of credit rating that those types of loss must have been contemplated by the parties anyway. Therefore, neither of these types of loss seem too far-fetched or remote from the perspective of credit rating agencies. This reasoning applies both in the presence and in the absence of a contractual relationship between an issuer and a credit rating agency.

More interesting questions regarding remoteness can arise in non-contractual cases, and, more specifically, when an investor claims damages from a credit rating agency caused by an impacted credit rating, while the investor's loss aggravated due to a general decline in the financial markets. In the context of negligent financial advice, the remoteness of pure economic loss caused by a downturn of the financial markets was addressed in *Rubenstein v HSBC Bank plc*.[946] One must be aware of the differences between the factual situation in *Rubenstein v HSBC Bank plc* and of the situation of credit rating agency liability: in *Rubenstein v HSBC Bank plc*, the parties had entered into a contractual relationship for the purpose of the provision of financial advice, while a credit rating agency issues a credit rating on the internet mostly in the absence of a contractual relationship with investors. The reasoning of the Court of Appeal is nevertheless interesting for purposes of this dissertation, because it shows that loss caused by general declines in the financial markets is not necessarily considered too remote under English law.

In *Rubenstein v HSBC Bank plc*, Rubenstein invested in financial instruments in 2005 relying on negligent investment advice provided by HSBC Bank. Rubenstein suffered economic loss in 2008, when Lehmann Brothers became insolvent. In first instance, the judge held that HSBC Bank had breached its duty of care and various statutory duties, but refused to award damages to Rubenstein

945 *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 W.L.R. 1351, paras. 80, 157 and 163. Although in *Wellesley Partners LLP v Withers LLP*, tortious liability was based on an assumption of responsibility of the defendant. Moreover, Cartwright could imagine that English courts do not always apply the test of reasonable foreseeability in tort cases in the same way. At some occasions, he could imagine English courts to apply this test in a stricter manner. He referred to the example of *Hedley Byrne*-type of cases, because English courts qualified the relationship between the parties as equivalent to a contractual relationship in such situations, which would justify application of the contractual test of remoteness. *Cf.* Cartwright 1996, pp. 500-502. Roth J and Longmore LJ adopted this position in *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, para 163 and para 187.

946 *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184.

because the loss was considered too remote.[947] Lord Justice Rix allowed Rubenstein's appeal,[948] considering, among other things, that the cause of Rubenstein's pure economic loss was a collapse in the value of the financial instruments in which Rubenstein had invested. This type of loss was not only foreseeable but also foreseen, because the factor of market risk was included in the brochure of the financial instruments.[949] Furthermore, as it was HSBC Bank's duty to protect Rubenstein from the negative consequences following market volatility, HSBC Bank could not escape liability by arguing that this collapse of the market was unforeseeable.[950] Moreover, Lord Justice Rix attached importance to the fact that this case concerned the statutory protection of a consumer, so that the bank should have contemplated this type of loss even though the consumer did not raise the risk of this type of loss prior to entering into the contract.[951] Hence, Lord Justice Rix used the scope of duty of HSBC Bank and the capacity of the claimant to explain that the market loss was foreseeable and not too remote.

The reasoning of Lord Justice Rix in *Rubenstein v HSBC Bank plc* demonstrates that loss aggravated by a large decline in the financial markets does not qualify as too remote per se. It is of crucial importance whether the type of loss in itself was reasonably foreseeable, irrespective of the magnitude of the loss. Moreover, it demonstrates again the crucial importance of the specific circumstances of a concrete case. Transposing these lessons to the context of claims for credit rating agency liability brought by investors, one could draw the conclusion that loss aggravated by a large decline in the financial markets is not too remote as a matter of principle. A credit rating agency could have foreseen that an investor would invest in financial instruments in reliance on its credit rating. Moreover, it could have foreseen that if the credit rating was impacted by an infringement, an investor could take up more credit risk than expected. Considering the financial context in which credit rating agencies operate, it is also foreseeable that loss is aggravated by a general downturn in the financial markets. However, even if the losses are foreseeable, a credit rating agency is not necessarily required to compensate investors for these losses under English law. Section 5.7.3.3 (a) discusses the reasons why investors are not compensated for this foreseeable type of loss under English law anyway.

947 *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, para 1. As described somewhat more precisely by Lord Justice Rix on appeal 'the judge also found that the loss suffered by the investor was not caused by the bank's negligence or breach of duties: it was rather caused by unprecedented market turmoil, and was unforeseeable and too remote.'

948 *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, paras. 113 and 116-125.

949 *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, para 117.

950 *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, paras. 118-119.

951 *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184, para 123.

5.7.3.3 *Suffering 'damage' and claiming 'damages'*

(a) Nature of reparable loss and calculation of the amount of damages

Article 13 and Article 14 UK Implementing Regulations provide rules on the types of loss that are recoverable and on how courts must calculate awards of damages. In respect of issuer claims, the amount of damages awarded depends on the content of any existing contract between an issuer and a credit rating agency. In the absence of such a contract, the increased funding costs of an issuer are recoverable.[952] Consequently, reputational loss does not seem recoverable under the UK Implementing Regulations. In respect of investor claims, if an investor and a credit rating agency entered into a contract for the provision of a credit rating, the recoverable damages have to be determined in accordance with that contract.[953] In the absence of such a contract, the amount of damages is equal to the amount of damages awarded to the investor in a case in which the investor would succeed in a claim for damages in the tort of negligence.[954]

The latter rule deserves elaboration. In English tort law, as a general rule, the amount of damages must be determined by analysing in which position the investor would have been in the absence of the tort.[955] The application of this rule results in the compensation of all loss suffered by an investor, yet with the exclusion of types of loss that are too remote.[956] Furthermore, the recoverable loss can be limited by the scope of the duty of care owed by the defendant, as demonstrated by the case of *South Australia Asset Management Corporation v York Montague Ltd* (*SAAMCO*). In *SAAMCO*, Lord Hoffmann limited the award of damages in a case on the overvaluation of property based on the type of duty owed by the defendant.[957] Nowadays, this ruling is considered a general principle of the English law of damages.[958]

In *SAAMCO*, Lord Hoffmann connected the award of damages to the scope of the duty of care owed by the defendant. He distinguished two types of duties: the duty 'to *provide information* for the purpose of enabling someone else to decide upon a course of action' and the duty 'to *advise* someone as to what course of action he should take'. If a defendant owes a duty to provide

952 Art. 13 UK Implementing Regulations. For the admissibility of limitation clauses in contracts, see section 5.7.4.
953 Art. 14 (a) UK Implementing Regulations.
954 Art. 14 (b) UK Implementing Regulations.
955 *E.g.* Clerk & Lindsell 2018, no. 28-07 and Mullis & Oliphant 2011, p. 381.
956 Section 5.7.3.2 (e).
957 *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191.
958 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 47. *As recently applied by the Court of Appeal in Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, para 54 and *repeated in Main v Giambrone & Law (A firm)* [2017] EWCA Civ 1193, para 81. *Cf.* Clerk & Lindsell 2018, no. 10-156. Irrespective of whether it concerns a contract or tort law case, *see* Winfield & Jolowicz 2014, no. 7-059.

information, 'he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong'.[959] The defendant bears, however, no responsibility for the decision of the claimant to enter into a certain transaction and for loss that would have occurred even if the information had been correct (e.g. general declines in property or financial markets).[960] The distinction of Lord Hoffmann has been criticised. It was argued, for example, that it would be difficult to tell the difference between the duty to provide information and the duty to give advice in some situations.[961]

More recently, in *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)*, Lord Sumption confirmed the substantive idea underlying Lord Hoffmann's distinction between information and advice cases, and described prototypes of each duty: a valuer who owes a duty to provide information (as in *SAAMCO*)[962] and an investment adviser advising clients on particular transactions who owes a duty to provide advice.[963] The distinction is rooted in whether it was the responsibility of the wrongdoer to guide the aggrieved party through the decision-making process, or not. The task of an adviser is to consider all matters involved in taking a certain decision, instead of specific factors in the decision only.[964] The task of a provider of information is to provide a limited amount of the information based on which a claimant takes a certain decision. It is not the task of the information provider to guide a claimant through the entire decision-making process.[965] As emphasised by Lord Sumption, the fact that a certain piece of information is crucial for the

959 *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191, 214.

960 *See BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, paras. 31 and 35. As the defendant bears no responsibility for the claimant's decision to enter into the transaction, Lord Hoffmann did not distinguish between 'no transaction cases' and 'successful transaction cases', see *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191, 218 and *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 35. *Also e.g.* Kramer 2017a, no. 14-97.

961 *As pointed out by Lord Sumption in BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, paras. 37 and 39.

962 As another example, one can refer to the duty owed by the accountant in *Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, para 74.

963 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 44. For another example, the Court of Appeal decision in *Main v Giambrone & Law (A firm)* [2017] EWCA Civ 1193, 2017 WL 03174625, paras. 82-83.

964 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 40. *Also Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, para 52 and *Main v Giambrone & Law (A firm)* [2017] EWCA Civ 1193, para 81.

965 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 41.

claimant's decision does not necessarily cause the provision of information to qualify as advice.[966]

In the concrete case of *SAAMCO*, the House of Lords concluded that the valuer owed a duty to provide information only. According to Lord Hoffmann, the direct consequence of the defendant's incorrect valuation was that the claimant's collateral for a loan was worth less than expected. Lord Hoffmann calculated the cap on the amount of damages by measuring the difference between the overvaluation and the actual value of the property at the moment of the valuation.[967] Additional loss caused by the general decline in the property markets fell within the sphere of risk of the claimant and outside the scope of the duty owed by the defendant.

Considering the fact that the *SAAMCO* rules are general rules of the law of damages and considering the similarities between the case of *SAAMCO* and investor claims against credit rating agencies, it can be argued that the rules flowing from *SAAMCO* should be applied in the field of credit rating agency liability as well. But, as pointed out by Wanambwa, caution must be exercised in the absence of case law confirming this conclusion.[968] If the rules flowing from *SAAMCO* are applied, the question is whether a dispute over credit rating agency liability between an investor and a credit rating agency qualifies as an information case or as an advice case.[969] This question can be answered relatively easily. The position of credit rating agencies is more equal to the position of valuers than the position of actual advisers. Credit rating agencies provide a specific piece of information to investors, which does not involve advice to investors as to whether to take a certain investment decision or not. It is not a credit rating agency's task to guide an investor through the investment decision process. By analogy, if a credit rating agency owes a duty of care at all, a credit rating agency owes a duty to exercise reasonable care and skill to provide adequate information only. This conclusion is not altered by the fact that a credit rating agency knew or could have known that the credit rating was material to the investor's investment decision.[970] Hence, a credit rating agency is not responsible for the investor's investment decision and the investor itself bears the risk of all consequences flowing from that decision. A credit rating agency only bears responsibility for the direct consequences

966 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 42.

967 *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191, 222. *Recently Tiuta International Ltd v De Villiers Surveyors Ltd* [2017] UKSC 77, [2017] 1 W.L.R. 4627, para 6. *For criticism on this method e.g.* Kramer 2017a, no. 14-117.

968 Wanambwa 2014, p. 521.

969 Assuming that a credit rating agency owes a duty of care under the tort of negligence to investors.

970 *Cf. BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, paras. 41-42.

of the information being incorrect, namely of the credit rating being impacted by the infringement(s) committed.

How, then, should courts assess the height of the amount of damages in concrete terms? In information cases, courts must quantify the direct consequences of the inaccurate information.[971] It is upon the claimant to provide evidence of the direct consequences of the inadequate information.[972] English courts can calculate the amount of damages by excluding the loss that a claimant would have suffered anyway had the information been correct, this is the so-called *SAAMCO* cap.[973] It is this construction that causes loss caused by general market declines to often fall outside the aggrieved party's recoverable loss in information cases. In the area of prospectus liability, as Vandendriessche explained, courts may limit the award of damages in accordance with the *SAAMCO* rules as well. The amount of damages is then capped at the difference between the price paid for the financial instruments and the price that would have been paid for the financial information had the prospectus been correct ('mispricing loss').[974] In the context of investor claims against credit rating agencies, courts must assess the direct consequences of the credit rating being impacted by the infringement. Loss that would have been suffered anyway, had the credit rating not been impacted, falls outside the scope of duty of the credit rating agency. An investor's award of damages would then be capped at the difference between the price paid for the financial instruments and corresponding yield and actual price and corresponding yield had the credit rating not been affected. Hence, mispricing loss caused by the credit rating is at most recoverable under English law.

The application of *SAAMCO* under Article 35a CRA Regulation is not without difficulties. First, the rules flowing from *SAAMCO* do not necessarily fit well within the structure of Article 35a CRA Regulation. Lord Hoffmann's reasoning in *SAAMCO* was based on the scope of the duty of care owed by the defendant. However, the scope of the duty of care owed by credit rating agencies under the tort of negligence is not necessarily comparable with the duty not to commit infringements listed in Annex III of the CRA Regulation. One can, therefore, question whether it is justified to limit the award of damages based on the scope of duty argument, while the overall responsibility of the credit rating agency is based on infringements of the EU regulatory framework. This forms at least one example of a situation in which the system employed by Article 35a CRA Regulation leads to a strange mixture of EU law and a national

971 *Cf.* Winfield & Jolowicz 2014, no. 7-059.

972 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 53.

973 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, paras. 32 and 45. *Also Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, para 47 and *Main v Giambrone & Law (A firm)* [2017] EWCA Civ 1193, para 81. *See e.g.* Kramer 2017a, no. 14-105.

974 Vandendriessche 2015, no. 352.

legal system. In addition, restricting the award of damages to mispricing loss under English law seems at odds with the requirement of reasonable reliance under Article 35a CRA Regulation. Article 35a requires proof of reasonable reliance on the side of the investor, so that it can be insufficient for the investor to show it would have bought the financial instruments for another price had the credit rating been correct. But at the end of the day, if the rules of *SAAMCO* apply, an investor's award of damages is nevertheless capped at the mispricing loss anyway. Overall, friction exists between the rules flowing from *SAAMCO* and the mould provided by Article 35a CRA Regulation.

Furthermore, the application of *SAAMCO* can lead to difficulties in concrete cases, because it can be difficult to measure the informational value and direct effects of impacted credit ratings. The case of *SAAMCO* provided a rather clear example in which the direct consequences of the incorrect information could be calculated in the form of the overvaluation, but this is not necessarily the case in other situations. For instance, in *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)*, a lawyer of the defendant's firm had drawn up a facility agreement that included an incorrect assumption on the purpose of the loan provided by the claimant.[975] As another example, in *Manchester Building Society v Grant Thornton UK LLP*, an accountant provided incorrect advice on the possibility of an accounting strategy in respect of interest rate swaps.[976] In such information cases, it is difficult to quantify the direct consequences of the incorrect information provided. According to Kramer, courts should then engage in 'a more sophisticated and logical investigation' of the hypothetical scenario in which the information provided had been correct. Subsequently, courts must determine what types of loss fall inside and outside the duty of care owed by the defendant.[977] Lord Sumption also admitted that the *SAAMCO* cap may be a mathematically imprecise tool to link the scope of duty to the height of the award of damages. He pointed at difficulties that could arise if the loss was caused by multiple commercial factors, and it is difficult or impossible to quantify and distinguish the direct consequences of the factors. Subsequently, he dismissed this concern by stating that 'mathematical precision is not always attainable in the law of damages'.[978] Yet, in the case of credit rating agency liability, the application of *SAAMCO* can lead to difficulties in concrete cases, because it can be difficult to measure the informational value and direct effects of impacted credit ratings at all, and to distinguish between the effects of the credit rating and other aggravating factors of the loss. As the burden of proof lies upon the investor as the claimant

975 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 6.
976 *Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, para 21.
977 Kramer 2017a, no. 14-119.
978 *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 46. *See* Kramer 2017a, no. 14-118.

in this regard, the risks of not providing sufficient evidence lie with investors.[979]

(b) Contributory negligence[980] and mitigation of loss

Article 15 declares that the English concepts of contributory negligence and mitigation are applicable to claims brought by issuers and investors. Article 15 (2) UK Implementing Regulations declares that the Law Reform (Contributory Negligence) Act 1945 is applicable to the assessment of damages awarded to investors and issuers. As defined under the Law Reform (Contributory Negligence) Act 1945, the concept of contributory negligence refers to situations in which the claimant has suffered loss 'as the result partly of his own fault and partly of the fault of any other person or of persons'[981] so that the claimant can be said to have contributed to its loss. As stated by Winfield & Jolowicz, for a successful appeal to contributory negligence, the defendant must prove that (1) the claimant did not take reasonable care of its own safety; and (2) this failure contributed to, in the sense of (partly) 'caused', its loss.[982]

A successful appeal to contributory negligence by the defendant does not automatically cause its liability to be completely excluded, but instead reduces the amount of damages awarded to the claimant.[983] Under Article 1 (1) of the Law Reform (Contributory Negligence) Act 1945, courts can reduce the damages to the extent they consider 'just and equitable having regard to the claimant's share in the responsibility for the damage'. But, assuming that the rules of *SAAMCO* also apply to credit rating agency liability, how should this so-called 'apportionment' of damages be done: by reducing the award of damages on the basis of the total amount of loss suffered, or on the basis of the amount of damages that would be awarded in accordance with the rules of *SAAMCO*?[984] This question was raised before the House of Lords in *Platform Home Loans Ltd v Oyston Shipways Ltd*, a case on the overvaluation of property.[985] According to Lord Hobhouse of Woodborough, reducing the damages

979 *See e.g. Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40, para 98, in which the claimant building society did not provide sufficient evidence that the loss would not have been suffered if the accountant would have provided correct information on the accounting strategy followed.

980 The factual circumstances that can lead to contributory negligence, such as a lack of reasonable reliance, could also be relevant for a defence based on the voluntary assumption of risk (Mullis & Oliphant 2011, p. 66). As defences based on the voluntary assumption of risk (or *volenti non fit iniuria*) are nowadays less important (Mullis & Oliphant 2011, p. 147) and are not mentioned by the UK Implementing Regulations, no further attention will be paid to this topic.

981 Art. 1 (1) Law Reform (Contributory Negligence) Act 1945.

982 Winfield & Jolowicz 2014, no. 23-038–23-039.

983 *E.g.* Clerk & Lindsell 2018, no. 3-57 and Winfield & Jolowicz 2014, no. 23-037.

984 *Cf.* McGregor 2018, no. 7-010. *See also* Jackson & Powell 2017, no. 5-177.

985 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190. Clerk & Lindsell 2018, no. 3-102, McGregor 2018, no. 7-010 and Jackson & Powell 2017, no. 5-177.

on the basis of the damages that would be awarded in accordance with *SAAMCO* 'in effect makes the same deduction twice over'.[986] He concluded that English courts should apply 'the traditional percentage reduction' to the overall loss suffered by the claimant.[987] Afterwards, the damages can be limited further in accordance with the *SAAMCO* principle.[988]

As a final remark, the application of the concept of contributory negligence combined with the English interpretation of 'gross negligence' again leads to a combination of elements of two different torts (deceit and negligence, respectively) in the interpretation of Article 35a CRA Regulation.[989] A comparison similar to the one made under the requirement of reasonable reliance can be conducted. The tort of deceit requires recklessness on the side of the defendant (the English interpretation of 'gross negligence'), but, if the requirements have been met, the defence of contributory negligence is not available.[990] Under the tort of negligence, the threshold for liability is less high, but the defendant is entitled to invoke the defence of contributory negligence. The English interpretation of Article 35a CRA Regulation hence leads to a situation in which a credit rating agency is required to have committed the infringement recklessly, while the credit rating agency can also invoke the defence of contributory negligence if the claimant failed to take reasonable care. As already stated above, the threshold for liability under Article 35a CRA Regulation is very high in situations in which English law applies, even compared to the requirements of the torts of deceit and negligence under common law.

Under Article 15 (1) UK Implementing Regulations, the concept of mitigation applies to claims for damages brought by issuers and investors. The concept of mitigation precludes a victim from adopting a passive attitude towards its loss. If the claimant unreasonably decided to wait and see its loss getting worse and, in other words, did not act 'reasonably in response to the defendant's wrong', courts can limit the amount of damages awarded.[991] It is up to the defendant to prove that the claimant failed to act reasonably.[992] But courts will not easily conclude that the claimant failed to act reasonably, as the

986 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190, 211.

987 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190, 212. *See also* Levinson 2002, p. 199.

988 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190, 212. Clerk & Lindsell 2018, no. 3-102, McGregor 2018, no. 7-010, Jackson & Powell 2017, no. 5-177 and Levinson 2002, p. 199.

989 *The idea of the combination of the requirements of these torts is derived from* Hoggard 2016.

990 *Alliance and Leicester BS v Edgestop Ltd* [1993] 1 W.L.R. 1462, 1477.

991 *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWCH 1250 (Comm), para 33. *Cf.* Clerk & Lindsell 2018, no. 28-09, *cf.* McGregor 2018, no. 9-004 and Winfield & Jolowicz 2014, no. 23-064.

992 *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWCH 1250 (Comm), para 38.

claimant was put in the unfortunate position in which he suffered losses by the defendant in the first place.[993]

In the case of credit rating agency liability, what can be reasonably expected from issuers and investors after an infringement has occurred? The answer to this question will of course vary depending on the exact situation. It follows from the speech of Leggatt J in *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* that, once aware of the defendant's misconduct, the claimant must act quickly.[994] In the scenario that an issuer discovers the occurrence of an infringement, it seems reasonable to expect the issuer to warn the credit rating agency within reasonable time (in the short term). It is, however, questionable whether the concept of mitigation requires investors to sell their financial instruments upon becoming aware of an infringement. There are examples in English case law where the failure to sell a house (as a security or as property) in times of more favourable market conditions constituted a failure to mitigate,[995] but these were again situations in which the claimant had unreasonably postponed action in reaction to the defendant's breach.[996] Such a situation seems not to be at hand when the financial markets suddenly crash down very shortly or immediately after the investor becomes aware of the occurrence of an infringement.

The consequence of a failure to mitigate loss is that the part of the loss that could have been avoided is not recoverable.[997] But how should this principle be applied? By reducing damages on the basis of the total amount of loss suffered, or on the basis of the amount of damages that would be awarded in accordance with the rules of *SAAMCO*? As discussed above, this question came before the House of Lords in *Platform Home Loans Ltd v Oyston Shipways Ltd*, a case on the overvaluation of property and contributory negligence.[998] According to Lord Hobhouse of Woodborough, reducing the damages on the basis of the damages that would be awarded in accordance

993 *Banco de Portugal v Waterlow & Sons Ltd* [1932] A.C. 452, 506 and *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWCH 1250 (Comm), para 38. Clerk & Lindsell 2018, no. 28-09 and Winfield & Jolowicz 2014, no. 23-064. *Cf.* McGregor 2018, no. 9-079.

994 *Cf. Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWCH 1250 (Comm), para 35.

995 McGregor 2018, no. 9-084-9-085, referring to *Bristol and West Building Society v Fancy & Jackson* [1997] 4 All E.R. 582 and *Patel v Hooper & Jackson* [1999] 1 W.L.R. 1792, respectively. *Bristol and West Building Society v Fancy & Jackson* has been partly overturned by *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599, para 50 as regards the point of the respective duties, but not as regards mitigation.

996 *Bristol and West Building Society v Fancy & Jackson* [1997] 4 All E.R. 582.

997 *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No.2)* [1912] A.C. 673, 689. *Also* Clerk & Lindsell 2018, no. 28-09, McGregor 2018, no. 9-014 and Winfield & Jolowicz 2014, no. 23-064.

998 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190.

with the SAAMCO principle 'in effect makes the same deduction twice over'.[999] He concluded that English courts should apply 'the traditional percentage reduction' in case of contributory negligence to the overall loss suffered by the claimant.[1000] According to McGregor, the same considerations apply to mitigation, so that 'the mitigation should attach, in the claimant's favour, to the real loss and not to the lesser attributable loss'.[1001]

5.7.4 Article 35a (3) Limitations of liability in advance

Article 9 (1) UK Implementing Regulations stipulates that limitations are generally allowed under English law. Under Articles 10-12, non-exhaustive lists of factors are provided that courts can take into account when deciding whether a limitation clause is 'reasonable and proportionate'. These factors provide useful guidance, but do not provide a clear-cut answer on which limitation clauses would be reasonable and proportionate and leave considerable discretion to the courts.

5.7.4.1 Limitations of liability towards issuers – solicited ratings

Article 10 (1) UK Implementing Regulations lists six circumstances that can indicate a limitation is reasonable and proportionate:
- The limitation was the result of contractual negotiations.
- The price of the rating is in proportion to the extent of the limitation.
- The credit rating agency allowed the issuer to provide additional information or clarifications which were taken into consideration prior to the issue of the credit rating.
- The limitation involves loss which the credit rating agency could not have reasonably foreseen at the time of the assignment of the credit rating.
- The limitation involves loss against which a credit rating agency could not have reasonably insured itself.
- The limitation involves loss that no credit rating agency would be reasonably expected to have the resources to meet.

5.7.4.2 Limitations of liability towards issuers – unsolicited ratings

The UK Implementing Regulations have dedicated an entire provision to the limitation of liability towards issuers for the assignment of an unsolicited credit rating. It is, however, rather difficult to imagine how the limitation could take

999 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190, 211.
1000 *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190, 212. *See also* Levinson 2002, p. 199.
1001 *Cf.* McGregor 2018, no. 9-037.

shape and how the credit rating agency gives notice of the limitation. A credit rating agency could try to rely on a general limitation against third parties on its website. Nevertheless, Article 11 (1) UK Implementing Regulations lists four circumstances that can indicate a limitation is reasonable and proportionate:

- The credit rating agency allowed the issuer to provide additional information or clarifications which were taken into consideration prior to the issue of the credit rating.
- The limitation involves loss which the credit rating agency could not have reasonably foreseen at the time of the assignment of the credit rating.
- The limitation involves loss against which a credit rating agency could not have reasonably insured itself.
- The limitation involves loss that no credit rating agency would be reasonably expected to have the resources to meet.

5.7.4.3 Limitations of liability towards investors – with and without subscriptions

Article 12 (1) UK Implementing Regulations lists seven circumstances that can indicate a limitation is reasonable and proportionate:

- The limitation was the result of contractual negotiations.
- The price of the rating is in proportion to the extent of the limitation.
- The relationship between the credit rating agency and the investor lacks proximity.
- The limitation relates to loss that followed from unexpected or unusual use of the credit rating.
- The limitation involves loss which the credit rating agency could not have reasonably foreseen at the time of the assignment of the credit rating.
- The limitation involves loss against which a credit rating agency could not have reasonably insured itself.
- The limitation involves loss that no credit rating agency would be reasonably expected to have the resources to meet.

Finally, under Article 12 (3) UK Implementing Regulations, a limitation is not likely to be reasonable and proportionate if the credit rating agency has not taken steps to make investors aware of the limitation.

The three lists of circumstances described above originate from and specify circumstances that could be considered under 'ordinary' common law rules.[1002] Under English law, disclaimers restricting or excluding the duty of care and limitations restricting or excluding liability arising out of breach

1002 *See in detail in the context of credit rating agencies* Getzler & Whelan 2017, pp. 25 ff. *Also* Seibold 2016, pp. 201 ff. *See in detail in general* Cartwright 2017, no. 9-08 ff. This section concentrates on the statutory controls for limitation clauses only.

of contract or breach of duty[1003] incorporated in a contractual term or a notice must comply with the 'reasonableness test' under the Unfair Contract Terms Act 1977 (UCTA 1977).[1004] As Articles 10-12 UK Implementing Regulations provide non-exhaustive lists, courts are free to consider other factors that could be included in the reasonableness test as well. Seibold refers to the factor of the equality of the bargaining power of the respective parties as an example.[1005] It is doubtful whether courts can take the gravity of the conduct or the state of mind of the credit rating agency into account, because Article 9 (1) UK Implementing Regulations states that limitations are generally allowed under English law for the purpose of Article 35a (3) CRA Regulation, while Article 35a (3) CRA Regulation relates to a right of redress that requires intention or gross negligence on the side of the defendant already.

The Consumer Rights Act 2015[1006] applies to non-individually negotiated general terms and conditions in subscription contracts concluded between credit rating agencies and investors who can be qualified as 'consumers'.[1007] The relevance of this act will, however, be limited in practice as currently only one credit rating agency (Egan Jones) provides for paid subscriptions. The Consumer Rights Act 2015 entails that 'unfair terms' are not binding upon

1003 *Distinction derived from* Getzler & Whelan 2017, pp. 25-26.

1004 *Cf.* Art. 1 (1), Art. 1 (3), Art. 2 (2), Art. 3 (2) and Art. 11 UCTA 1977. With regard to disclaimers, *see Smith v Eric S. Bush* [1990] 1 A.C. 831, 849 and 873. The UCTA 1977 only applies to 'business liability', i.e. liability arising from 'things done or to be done […] in the course of a business' (Art. 1 (3) UCTA 1977) and the burden of proof lies on the party who wishes to rely on the contractual term or the notice (Art. 11 (5) UCTA 1977). Under Art. 11 (1) UCTA 1977, a term will be considered fair and reasonable if 'having regard to the circumstances of which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made'. Schedule 2 provides factors that can be involved, such as the equality of bargaining power of the parties, whether the customer could have entered into another contract without having excepted the term and whether the customer knew (or ought reasonably to have known) the existence and the extent of the term. Although under Art. 11 (2) UCTA 1977 the factors listed in Schedule 2 relate to specific types of contract, English courts use them as 'generally applicable guidelines' (Cartwright 2016, p. 229). If a contract term or a notice seeks to restrict liability to a fixed sum, Art. 11 (4) UCTA 1977 specifies that one has to consider: (1) how many resources the person relying on the restriction could be expected to hold to meet potential obligations to pay damages; and (2) the possibilities of insurance.

1005 Seibold 2016, p. 202 (and p. 153).

1006 Since 1 October 2015. The Consumer Rights Act 2015 forms the English Implementation of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. Previously: the Unfair Terms in Consumer Contracts Regulations 1999. Cartwright 2016, pp. 230-231. *Cf.* Seibold 2016, p. 154.

1007 Art. 2 (3) (in conjunction with Art. 59 (1) and Art. 60) Consumer Rights Act 2015: '"Consumer" means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.'

consumers.[1008] A term can be qualified as 'unfair' if 'it causes a significant imbalance in the parties' rights and obligations' 'contrary to the requirement of good faith'.[1009] As described under Schedule 2: 'A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations (…)'[1010] may be considered unfair, although the unfairness of the term is not automatically provided. Yet, limitation clauses included in subscription contracts concluded with consumers shall be assessed in light of the Consumer Rights Act 2015 and cannot manifestly limit the right to claim damages under Article 35a CRA Regulation.

5.7.5 Prescription of claims

Under Article 16 UK Implementing Regulations, the limitation period under English law is one year, starting from the moment the claimant discovered the infringement or 'could with reasonable diligence have discovered it'. As pointed out by Getzler and Whelan, this limitation period is 'remarkably short'.[1011] In comparison, actions for latent damages based on the tort of negligence expire six years 'from the date on which the cause of action accrued' or three years after the moment the claimant had or could have had the knowledge necessary to bring an action for damages.[1012] A time bar of one year after the cause of action arose applies to actions based on the tort of defamation,[1013] but there are various escapes through which this period can be prolonged.[1014]

5.7.6 Concluding remarks

English law takes a restrictive approach to the civil liability of credit rating agencies. Although the Explanatory Memorandum to the English Implementing Regulations states that credit rating agencies were already 'subject to civil

1008 Art. 62 (1) Consumer Rights Act 2015.
1009 Art. 62 (4) Consumer Rights Act 2015.
1010 Schedule 2, Part 1 (2) Consumer Rights Act 2015.
1011 Getzler & Whelan 2017, p. 35.
1012 Art. 14A (4)-(5) Latent Damage Act 1986, with a maximum of fifteen years after the date on which the act or omission took place that allegedly constituted to negligence, Art. 14B (1) Latent Damage Act 1986. Winfield & Jolowicz 2014, no. 26-093.
1013 Art. 5 Defamation Act 1996, Duncan & Neill 2015, no. 24.01.
1014 Winfield & Jolowicz 2014, no. 26-089. *In detail* Duncan & Neill 2015, no. 24.03 ff.

liability' under tort law ('the tort of negligent misstatement'),[1015] a closer analysis of English tort law shows that in the absence of any contractual relationship, a credit rating agency will owe a duty of care under the tort of negligence in exceptional situations only. This reluctant approach stems from a more general reluctance under English law to compensate economic loss caused by reliance on negligent misstatements. As concluded in several other academic contributions, issuers and, in particular, investors who wish to base a claim for damages on the tort of negligence will experience severe difficulties in establishing that a credit rating agency owed them a duty of care in the first place.[1016] If the conduct of a credit rating agency constitutes a breach of contract, English law allows issuers and investors to claim damages on the basis of contractual liability.

The UK legislature implemented the terms of Article 35a CRA Regulation in the UK Implementing Regulations. This approach enhances the legal certainty in respect of the interpretation and application of Article 35a CRA Regulation under English law.[1017] At the same time, the UK legislature used UK Implementing Regulations as a method to diminish the differences between Article 35a and common law liability.[1018] This aim resulted in a narrow interpretation and application of Article 35a CRA Regulation. On the one hand, the UK Implementing Regulations restrict the scope of application of Article 35a CRA Regulation by indirectly providing that only the senior management can commit infringements, and by creating high hurdles for the condition of gross negligence. On the other hand, the UK Implementing Regulations refer back to various elements of the tort of negligence, which find only restrictive application in relation to credit rating agency liability. This restrictive approach does not only become apparent in relation to the existence of a duty of care, but also in relation to the other elements of the tort of negligence. As a result, the threshold for liability under Article 35a CRA Regulation is high in situations in which English law applies, even compared to the requirements of the torts of deceit and negligence under common law. Considering this narrow interpretation and application, it comes as no surprise that the post-implementation review of the UK Implementing Regulations conducted in April 2019 concluded

---

1015 Explanatory Memorandum to the Credit Rating Agencies (Civil Liability) Regulations 2013, 2013 No. 1637, para 7.4.

1016 *Cf. with regard to issuers* Seibold 2016, p. 76. *Cf. with regard to investors* Seibold 2016, p. 101, Alexander 2015, p. 11, Risso 2015, p. 716, Miglionico 2014, pp. 164-165, Edwards 2013, p. 189 and Ebenroth & Dillon 1992, p. 800.

1017 As concluded by the post-implementation review of the Credit Rating Agencies (Civil Liability) Regulations 2013, 12 April 2019, available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksiod_20131637_en.pdf, last accessed at 31 August 2019.

1018 Explanatory Memorandum to the Credit Rating Agencies (Civil Liability) Regulations 2013, 2013 No. 1637, para 7.4. *Also* Risso 2015, pp. 715-716.

that credit rating agencies are not burdened by large amounts of claims under English law.[1019]

5.8 Comparison

5.8.1 Remarks in advance

The previous sections analysed the interpretation and application of Article 35a CRA Regulation under Dutch, French, German and English law. This section compares the results of the national law reports, concentrating on both similarities and differences between the legal systems investigated. In addition, this section briefly concludes to what extent any differences between the legal systems can lead to different outcomes in decisions of national courts on claims for damages based on Article 35a CRA Regulation.

It is necessary to make three important remarks in advance. First, the overviews of national rights of redress provided by the second parts are not entirely exhaustive, but do provide an idea of the general approach taken in the private law systems of the legal systems investigated. The comparison made in this section is based only on the rights of redress referred to in the second parts of the country reports. Second, the findings of the national law reports used in this comparative overview must be approached with the necessary caution, as the reports contain some uncertainties regarding the exact national interpretations and applications of Article 35a CRA Regulation. These uncertainties are partly caused by the absence of explicit national statutory guidance and case law in some Member States, which explains how general rules of private law apply in the context of the civil liability of credit rating agencies. Third, the comparative sections restrict the amount of references to relevant case law, legal academic literature and other sources to a minimum, to ensure the comparison remains readable and to avoid unnecessary repetition. The findings (and especially the summary positions provided) are, however, based on contributions written by other legal scholars. The national law reports account for the academic contributions and other sources used. Therefore, readers are referred to the national law reports for the findings used in the previous comparative overview.

1019 *Cf.* post-implementation review of the Credit Rating Agencies (Civil Liability) Regulations 2013, 12 April 2019, available at www.legislation.gov.uk/uksi/2013/1637/pdfs/uksiod_20131637_en.pdf, last accessed at 31 August 2019.

5.8.2 National bases for civil liability – comparison

5.8.2.1 In the presence of a contractual relationship

The second parts of the national law reports concentrated on the question of whether and on what legal basis (or bases) issuers and investors can bring claims for compensation against credit rating agencies under the national laws investigated.[1020] The relevant sections focussed, in other words, on rights of redress available to issuers and investors under the national legal systems investigated.

Contractual liability is most relevant where issuers concluded ratings contracts with credit rating agencies. In the presence of a contractual relationship, the legal landscapes of the national laws investigated look similar.[1021] The four national systems investigated allow issuers and investors to claim damages based on contractual liability, if the conduct of a credit rating agency constituted a breach of its obligations under the contract.[1022] Furthermore, the national laws adopt similar yardsticks or standards to assess whether a credit rating agency breached its contractual obligations. In essence, national courts must assess whether a credit rating agency acted with reasonable care and skill in the assignment of a credit rating, and not whether a credit rating agency assigned a correct credit rating in hindsight.[1023] Consequently, it seems that credit rating agencies will not be liable soon under any of the four legal systems, because they have a wide margin of discretion in the assignment of credit ratings.

1020 Section 5.4.2 (Dutch law), section 5.5.2 (French law), section 5.6.2 (German law) and section 5.7.2 (English law).

1021 *See* section 5.4.2.2 (Dutch law), section 5.5.2.1 (French law), section 5.6.2.2 (German law) and section 5.7.2.2 (English law). With regard to the legal bases for compensation available in the presence of contractual relationships, this dissertation concentrated on general principles and norms of the national laws of contract, notwithstanding the power of the (commercial) parties involved to create their own terms that may expand the responsibility of credit rating agencies.

1022 Under Art. 6:74 BW (Dutch law), Art. 1231-1 CC (French law), § 280 (1) BGB (German law) and liability for breach of contract under English law.

1023 In respect of Dutch law, Atema & Peek 2013, pp. 950-951 and Bertrams 1998, p. 357. In respect of French law, Dondero, Haschke-Dournaux & Sylvestre 2004, no. 78 and *cf.* Sotiropoulou 2013, no. 9, Merville 2013, no. 14 and Leclerc 2008, pp. 153-155. In respect of German law, Von Rimon 2014, pp. 146-147 and 186. In respect of English law, *cf. with regard to issuers* Seibold 2016, p. 61, Edwards 2013, p. 190 and Ebenroth & Dillon 1992, pp. 789-790.

5.8.2.2 *In the absence of a contractual relationship*

In the absence of a contractual relationship, the opportunities for issuers and investors to hold a credit rating agency liable differ between the national legal systems investigated.[1024]

The national law reports demonstrated that issuers have more opportunities to hold a credit rating agency liable than investors. Under Dutch and French law, issuers are able to base claims for damages against credit rating agencies on the general legal bases for non-contractual liability of Article 6:162 BW and Article 1240 and Article 1241 CC, respectively. Prior to January 2018, French law involved special rules on credit rating agency liability under Article L. 544-5 and L. 544-6 Code monétaire et financier. The French legislature abolished these provisions in January 2018 in order to converge the civil liability regimes for credit rating agencies under French and EU law.[1025] The *Exposé sommaire* of the French legislature does not address the relationship between Article 35a CRA Regulation and legal bases for credit rating agency liability under French law, so that one can question whether issuers and investors can still base a claim for damages on French private law or whether issuers and investors can only resort to Article 35a CRA Regulation. Under German law, issuers can base claims for damages on § 823 (1) for violations of an issuer's right to business as a going concern, § 824 and § 826 BGB.[1026] Within these three legal systems, national courts must balance an issuer's interests against a credit rating agency's right to freedom of speech. The right to freedom of speech is not absolute, and credit rating agencies are generally required to assign the credit rating with the care and skill that can be expected from a reasonable credit rating agency. English law takes a more restrictive approach towards the civil liability of credit rating agencies vis-à-vis issuers. In the absence of case law confirming these matters, it is not certain whether English courts are prepared to grant claims for damages based on the tort of defamation or to decide that a credit rating agency owes a duty of care under the tort of negligence towards issuers.

The opportunities for investors to hold a credit rating agency liable differ between the national legal systems investigated. Under Dutch law, investors

1024 *See* section 5.4.2.3 (Dutch law), section 5.5.2.2 (French law), section 5.6.2.3 (German law) and section 5.7.2.3 (English law).

1025 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 1.

1026 *With regard to unsolicited credit ratings* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, Wimmer 2017, pp. 346-360, Seibold 2016, pp. 62-69, Von Rimon 2014, pp. 175-180, Schroeter 2014, pp. 853-863, Amort 2013, p. 275, Wagner 2013, pp. 473-474 and Arntz 2012, pp. 93-95. *With regard to solicited credit ratings* MüKoBGB/Wagner, 7. Aufl. 2017, BGB § 826, no. 139, Wimmer 2017, pp. 346-360, Seibold 2016, p. 49, Von Rimon 2014, pp. 165-173, Schroeter 2014, pp. 817 and 822, Amort 2013, p. 275, Wagner 2013, pp. 473-474 and Arntz 2012, p. 93. The overview provided did not reflect all grounds for liability discussed in German literature.

can base claims for damages on the general tort law provision of Article 6:162 BW. Furthermore, investors may invoke the special grounds for liability under Article 6:193b and 6:194 BW in case of solicited ratings or structured finance ratings, which entitle them to facilitations regarding the burden of proof in respect of the accuracy of credit ratings. Under French law, investors seem to be able to base a claim for damages on the general tort law provisions of Article 1240 and Article 1241 CC. Again, the abolition of the special rules on credit rating agency liability under Article L. 544-5 and L. 544-6 Code monétaire et financier in January 2018 caused some doubt on this matter.[1027] As the *Exposé sommaire* of the French legislature does not address the relationship between Article 35a CRA Regulation and legal bases for credit rating agency liability under French law, one can question whether investors can still base a claim for damages on French private law or whether they can only resort to Article 35a CRA Regulation.

German and English law involve less opportunities for investors to hold credit rating agencies liable in the absence of a contractual relationship. It seems that investors can only successfully invoke certain provisions of national law if a credit rating agency conducted itself in a highly blameworthy manner or in exceptional situations involving credit ratings relating to specific issues of financial instruments. Under German law, the financial interests of investors do not fall within the interests protected by § 823 (1) BGB.[1028] Prior to the introduction of Article 35a CRA Regultion, investors could not use the infringements of Annex III CRA Regulation in claims for damages based on § 823 (2) BGB. It is doubtful whether investors can currently use the infringements of Annex III CRA Regulation in claims for damages based on § 823 (2) BGB,[1029] and, if at all, an investor will only be able to base a claim for compensation on the concept of *das Vertrag mit Schutzwirkung zugunster Dritter* in relation to credit ratings attached to specific financial instruments.[1030] Furthermore, investors can resort only to § 826 BGB in the most exceptional situations of

1027 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 1.

1028 Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 49.

1029 This dissertation argued in favour of the opportunity to use the infringements listed in Annex III under § 823 (2) BGB (section 5.6.2.3 (a) (ii) and (b) (ii)). Dumont du Voitel 2018, p. 353 argued that the norms under the CRA Regulation qualify as individual protective norms and can be used under § 823 (2) BGB. However, other German scholars doubted this opportunity (Wimmer 2017, pp. 354-355 and Heuser 2019, p. 84).

1030 Seibold 2016, p. 95 and Halfmeier 2014, p. 330. Furthermore, Deipenbrock was of the opinion that the facts of the case of 8 February 2018 did not form a typical scenario of credit rating agency liability (because the case concerned an issuer rating and not a financial instrument rating), and that the decision, therefore, might not provide general guidance (*cf.* Deipenbrock 2018, p. 573).

misconduct,[1031] and this provision creates conditions for civil liability which are more restrictive than the conditions set by Article 35a (1) CRA Regulation itself. Under English law, the opportunities for investors to bring claims for damages are limited as well. Investors can base a claim for damages on the tort of deceit, but such a claim succeeds only if the credit rating agency acted intentionally or recklessly in the assignment of the credit rating. Furthermore, except for exceptional situations, credit rating agencies will not owe a duty of care under the tort of negligence towards investors.[1032]

Overall, issuers and investors have more opportunities to hold a credit rating agency liable in the presence of a contractual relationship in the legal systems investigated. The four legal systems are rather similar in this respect. In the absence of a contractual relationship, English law takes the most restrictive approach towards the civil liability of credit rating agencies vis-à-vis issuers. Furthermore, the comparison demonstrated that investors have much fewer opportunities to hold a credit rating liable and, in some legal systems, are hardly entitled to any right of redress at all. From this perspective, Article 35a CRA Regulation had the potential of filling a gap in the legal protection of investors at least under German and English law.

5.8.3 Article 35a (1) CRA Regulation – comparison

5.8.3.1 'Intentionally' or 'with gross negligence'

The requirement that an infringement must have been committed 'intentionally' or 'with gross negligence' forms an increased threshold for the civil liability of credit rating agencies. What exactly constitutes intentional or grossly negligent conduct depends on the circumstances of the case and is difficult to grasp in a concrete definition. As a result, the analyses made in the national law reports remained abstract. The positions of the national laws investigated can be summarised as follows:

1031 Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179, para 19 and Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872, para 40.

1032 *Cf.* Getzler & Whelan 2017, p. 21, Seibold 2016, pp. 102-103 and Alexander 2015, p. 11.

Legal system	*Summarised position on 'intentionally' and 'with gross negligence'*	*Section*
Dutch law	Intentionally: a credit rating agency deliberately and consciously committed an infringement or accepted that its conduct would result in committing an infringement or created a significant chance of committing an infringement. With gross negligence: a credit rating agency was conscious or should have been conscious of the fact that its conduct involved the risk of committing one the infringements listed in Annex III. The conduct will be approached from an objective perspective, so that it will be compared with the conduct of a reasonable credit rating agency placed in the same position. Yet, uncertainty remains as regards the exact interpretation and application of this term under Dutch law.	5.4.3.1
French law	Intentionally: a credit rating agency intended to commit an infringement or intended the consequences of its conduct to occur; it is not required that the credit rating agency intended to cause any loss. With gross negligence: a credit rating agency was conscious or should have been conscious of the chance that loss would occur, but decided to carry on anyway and the credit rating agency did not intend to commit an infringement or was not conscious of potential risks, but acted with such a high degree of negligence compared to how a reasonable credit rating agency would have acted in the same position, that it is shown that the credit rating agency was not competent to fulfil its tasks.	5.5.3.1
German law	Intentionally: a credit rating agency knowingly and consciously committed an infringement or must have intended or accepted that its conduct could result in committing an infringement. With gross negligence: a credit rating agency must have breached the required standard of care in an unusually severe way, thereby not having paid attention to matters that should not have been ignored. Consciousness of possible harmful consequences does not seem required under German law. Courts assess the subjective blameworthiness of a wrongdoer's conduct, but the requirement of subjective culpability can be relaxed when the wrongdoer is a legal person.	5.6.3.1

Legal system	*Summarised position on 'intentionally' and 'with gross negligence'*	*Section*
English law	Intentionally: a credit rating agency must have deliberately committed an infringement under Art. 3 UK Implementing Regulations – concentrated on senior management only, i.e. it must have intended an infringement to occur. With gross negligence: a credit rating agency must have acted recklessly, i.e. it must have acted without caring whether an infringement occurred under Art. 4 UK Implementing Regulations – concentrated on senior management only, implying consciousness of the risks involved.	5.7.3.1

The four legal systems approach the term 'intentionally' in similar manners. A credit rating agency must have deliberately committed the infringement or must have accepted its conduct would result in an infringement of the CRA Regulation. The UK Implementing Regulations do not explicitly mention the latter component under Art. 3 UK Implementing Regulations.

The more interesting question is what type of conduct meets the threshold of grossly negligent conduct. The national law reports revealed the four systems split into two groups. On the one hand, Dutch, French and German law adopt similar approaches to gross negligence, in the sense that the national courts concentrate on the blameworthiness of a credit rating agency's conduct as a whole as compared to the conduct of a reasonable credit rating agency placed in the same position. Whether a credit rating agency was conscious of the potentially harmful consequences of its conduct forms a sign of gross negligence, but is not an essential element of grossly negligent conduct. Yet, it must be remarked that the Dutch interpretation and application of gross negligence remains uncertain, due to the fact that the Dutch translation of Article 35a (1) CRA Regulation does not correspond to commonly used Dutch legal concepts, while Dutch law involves a tangled web of terms and definitions relating to different degrees of culpability. On the other hand, English law provides a different, namely a narrower and subjective, interpretation of gross negligence under Article 4 UK Implementing Regulations. Following this interpretation, the senior management of a credit rating agency must have acted recklessly, i.e. must have acted without caring whether an infringement would occur. The senior management, hence, must have considered the possibility that its conduct would result in an infringement, but must have carried on anyway. As the burden of proof lies with issuers and investors, English law creates a threshold for civil liability, which investors and issuers can only overcome in the most exceptional situations.

Furthermore, the difference between, on the one hand, Dutch, French and German law and, on the other hand, English law is enlarged by the fact that the UK Implementing Regulations strongly suggest limitations on the circle of organs and persons within a credit rating agency that can commit infringements actionable under Article 35a (1) CRA Regulation. As described under section 5.3.1.1 (b), the wording of Article 3 and 4 (2) UK Implementing Regulations entails that the scope of application of Article 35a (1) CRA Regulation is restricted to situations in which the senior management of the credit rating agency committed an infringement intentionally or with gross negligence. Dutch, French and German law do not contain such explicit restrictions in the context of credit rating agency liability. As described under section 5.3.1.1 (b), I do not consider the relevant circle of organs and persons a matter of national law, but rather a matter of EU law. The wording and spirit of the infringements determine the relevant circle of organs and persons and, thereby, the scope of application of Article 35a CRA Regulation. However, as long as this matter has not come up in legal proceedings, the result in practice is that the English interpretation and application of the minimal threshold of gross negligence and the relevant circle of organs and persons that can commit infringements is much more restrictive in comparison to the other Member State laws investigated.

5.8.3.2 'Impact' and 'caused to', including claimant-specific requirements

Article 35a (1) CRA Regulation addresses several aspects of causation. First, the infringement listed under Annex III must have had an impact on the credit rating, thereby building the first part of the bridge between an infringement and the eventual loss suffered by issuers and investors. Second, a causal relationship must exist between the infringement – which resulted in the affected credit rating – and the loss suffered by the claimant. Furthermore, Article 35a (1) CRA Regulation contains two claimant-specific requirements. The wording of these requirements indicates that the burden of proof lies with issuers and investors and, more importantly, suggests that if issuers and investors cannot meet these requirements, the causal link between the infringement and the loss is broken so that these issuers and investors are not entitled to compensation under Article 35a CRA Regulation at all.

The table below provides an overview of the summarised positions under the national laws investigated. This overview, however, gives the impression that national courts will adopt a more structured approach than they would do in practice. The positions of the national laws investigated can be summarised as follows:

Legal system	*Summarised position on 'impact' and 'caused to', including specific requirements*	*Section*
Dutch law	'Two stage' test for the purposes of causation, which applies to 'impact' and 'caused to': - Establishing liability: *condicio sine qua non* test. Burden of proof: rests upon the issuer or investor, being the party who invokes Art. 35a. Standard of proof: a reasonable degree of probability. Opportunities to deal with causal uncertainty relating to reasonable reliance in claims brought by investors: • Evidentiary presumption of causation in relation to reliance (*VEB v World Online*)(?) – most relevant for retail investors • Application loss of chance(?) - Determining the extent of liability: Art. 6:98 BW, which forms part of the Dutch law of damages.	5.4.3.2
French law	No clear conceptualised distinction between different 'stages' of causation. - *Condicio sine qua non* test. French courts apply both theory of equivalence and the theory of causal adequacy. Burden of proof: rests upon issuer or investor, being the party who invokes Art. 35a. Standard of proof: French courts can adopt a flexible approach towards causation both in relation to claims brought by issuers and investors. Opportunities to deal with causal uncertainty relating to reasonable reliance in claims brought by investors: • Application loss of chance(?) - Defence based on *cause étrangère*.	5.5.3.2

Legal system	*Summarised position on 'impact' and 'caused to', including specific requirements*	*Section*
German law	Conceptualised distinctions between *Haftungsbegründende Kausalität* and the *Haftungsausfüllende Kausalität*, and between the *condicio sine qua non* test, the *Adäquanztheorie* and the *Schutzzwecklehre*. Test: - *Haftungsbegründende Kausalität*: 'impact' = causal link between infringement and credit rating. • *Condicio sine qua non* test. Burden of proof: rests upon issuer or investor, being the party who invokes Art. 35a. Standard of proof: influenced by Art. 35a (2). - *Haftungsausfüllende Kausalität*: 'caused to' = causal link between infringement and loss. • *Condicio sine qua non* test. • *Adäquanztheorie* (the theory of causal adequacy). • *Schutzzwecklehre* (the theory of the scope of the rule). Burden of proof: rests upon the claimant. Standard of proof: arranged for by § 287 ZPO, '*überwiegende Wahrscheinlichkeit*', but underlying factual claims, such as reasonable reliance in accordance with § 286 ZPO. Opportunities to deal with causal uncertainty relating to reasonable reliance in claims brought by investors: generally not applicable. The concept of *Anlagestimmung* might apply in the most exceptional situations. Uncertainty exists as regards to whether the requirement of reasonable reliance falls within the scope of *Haftungsbegründende Kausalität* or *Haftungsausfüllende Kausalität*. It was argued that reasonable reliance concerns a factual claim, so that the standard of proof under § 286 ZPO applies.	5.6.3.2

Legal system	*Summarised position on 'impact' and 'caused to', including specific requirements*	*Section*
English law	The UK Implementing Regulations split the interpretation and application of 'impact' and 'caused to'. 'Impact': The issuer or financial product ended up in a different rating category due to the infringement under Art. 5 UK Implementing Regulations. In essence, this description mirrors the but for test. 'Caused to': the test for causation in negligence under Art. 8 UK Implementing Regulations: - Causation in fact: But for test. Burden of proof: rests upon the claimant. Additional threshold 'reasonable' reliance: only if the credit rating agency assumed responsibility or owed a duty of care towards the investor under the tort of negligence. Opportunities to deal with causal uncertainty relating to reasonable reliance in claims brought by investors: n.a. - Causation in law. - Remoteness. Standard of proof: balance of probabilities.	5.7.3.2

The overview shows that the national laws touch upon the same main elements in relation to causation. Differences between the Member States mainly arise in the ways in which national courts could deal with causal uncertainty relating to the reasonable reliance of investors. English law in particular takes a very restrictive approach to the requirement of reasonable reliance, so that the number of situations in which investors can meet the threshold of reasonable reliance is limited to a great extent.

(a) 'Impact'

Article 35a (1) CRA Regulation requires the infringement committed to have had an impact on the credit rating. Article 35a (4) CRA Regulation explicitly refers the term 'impact' back to the applicable national law, so that national rules on causation determine the substantive test to establish the impact of a credit rating. Article 35a (2) CRA Regulation, however, did not completely leave matters of civil procedure law to the Member States. It provides that the investor or issuer must provide accurate and detailed information indicating that the infringement had an impact on the credit rating. The result is a somewhat strange mixture of EU law and national law, in which national law determines the relevant 'test' and EU law determines the burden and standard of proof in relation to that national test.[1033]

The reference under Article 35a (4) CRA Regulation to the applicable national law is superfluous, as the meaning of the requirement of 'impact' is a matter of common sense. What else could the Union legislature have meant by the requirement of 'impact' apart from the idea that the infringement entailed that the credit rating ended up in a different rating category? The national law reports do not reveal relevant differences between the Member States in this regard. English law explicitly stipulates that the issuer or financial product must have ended up in a different rating category due to the infringement under Article 5 UK Implementing Regulations. The other three legal systems investigated do not provide explicit explanations, but the requirement of impact must be assessed within the general analysis on causation. Dutch, French and German law apply the *condicio sine qua non* test. In essence, the four national laws investigated hence approach the term 'impact' in the same way.

(b) 'Caused to'

The second element of causation concerns the relationship between the infringement which affected the credit rating and the eventual loss suffered by issuers and investors. The national law reports show that legal systems investigated take the same test for causation as a starting point: had the infringement not occurred, then an issuer would not have suffered additional funding costs and/or reputational loss and an investor would not have suffered pure economic loss. This test forms a concrete application of the national tests for factual causation; the *condicio sine qua non* test under Dutch, French and German law and the 'but for' test under the English tort of negligence. All legal systems place the burden of proof upon the issuer or the investor, being the party that invokes its rights under Article 35a (1) CRA Regulation. Furthermore, the legal systems employ mechanisms to limit the outcomes of the *condicio sine qua non* test and the 'but for' test, if the defendant's conduct was not the adequate cause of the loss or if the loss was unforeseeable or too remote. Differences can be identified between the Member States in respect of the opportunities of national courts to deal with causal uncertainty in relation to the investor-specific requirement of 'reasonable reliance'.

(c) Opportunities to deal with causal uncertainty in relation to '(reasonable) reliance'

Article 35a (1) CRA Regulation contains two claimant-specific requirements. This section concentrates on the investor-specific requirement, which requires investors to prove that they 'reasonably relied, in accordance with Article 5a(1)

1033 Although, ultimately, the applicable national law determines the content of Art. 35a (2) CRA Regulation as well.

or otherwise with due care, on a credit rating for a decision to invest into, hold onto or divest from a financial instrument covered by that credit rating'.

(i) – Structural mismatch with national legal systems

The national law reports displayed a structural mismatch between the investor-specific requirement of reasonable reliance under Article 35a (1) CRA Regulation and the national legal systems investigated. The requirement does not fit within the national legal systems. Whereas reasonable reliance under Article 35a (1) CRA Regulation forms part of the requirement of causation, the Member State laws would deal with this element in a different manner. For instance, Dutch and German law separate the elements of reliance and the reasonableness of the reliance. The first element belongs to the assessment of causation, whereas the second element belongs to the law of damages. A lack of reasonable reliance, therefore, would not automatically lead to the negation of the causal connection, but rather to a reduction of the recoverable loss and the amount of damages awarded in these legal systems.

Furthermore, in respect of claims brought under the tort of negligence, English courts consider 'reasonable reliance' for the purpose of establishing whether a credit rating agency owes a duty of care or not. The UK Implementing Regulations also treat the requirement of reasonable reliance under Article 35a (1) CRA Regulation as part of the duty of care. Article 6 aligns the test for reasonable reliance with the test to determine whether it is reasonable for a person to rely on a statement for the purposes of determining whether the statement gives rise to a duty of care in negligence. As a result, national courts must investigate whether a credit rating agency voluntarily assumed responsibility towards the investor as in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[1034] or whether a credit rating agency owed a duty towards the investor using the considerations of *Caparo Industries Plc v Dickman.*[1035] But, in the absence of the existence of a special relationship between the credit rating agency and the investor, the investor will face a very challenging task to establish that the credit rating agency owed a duty of care towards him, let alone that the credit rating agency voluntarily assumed responsibility towards him. By framing the requirement as part of the duty of care, the English implementation of 'reasonable reliance' hence leads to a severe restriction of the scope of Article 35a CRA Regulation.

(ii) – Facilitating investors

The requirement of 'reasonable reliance' imposes a heavy burden upon investors in concrete legal proceedings against credit rating agencies. It requires investors to provide evidence of their reliance on credit ratings and of the

1034 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465, [1963] 3 W.L.R. 101.

1035 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, [1990] 2 W.L.R. 358. *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181, 189-190 and 213.

relevance of credit ratings for their investment decisions. Investors may often have trouble providing such evidence and a strict application of this requirement will cause many claims to be rejected because of a lack of evidence. Therefore, the national law reports investigated whether national courts have possibilities to facilitate investors in meeting the requirement of (reasonable) reliance. These could be of an evidentiary law nature, involving, for instance, reversals of the burden of proof. Alternatively, such facilitation possibilities could be of a substantive law nature, involving, for instance, the replacement of the requirement of reasonable reliance with the doctrine of loss of chance. As statutes and case law on this matter are often absent in the concrete situation of credit rating agency liability, the national law reports analysed to what extent facilitation possibilities applied in other areas could also apply in the context of credit rating agency liability. But in the absence of statutes and case law confirming this matter, one must exercise the necessary caution with regard to these applications.[1036]

The picture arising from the national law reports is diverse,[1037] and clouded by uncertainties. French and Dutch law provide the most possibilities to relax the requirement of reasonable reliance in favour of investors. French courts can adopt a flexible approach in respect of the burden and standard of proof imposed upon investors. Furthermore, French law leaves room to apply the doctrine of loss of chance in the context of credit rating agency liability. The application of this doctrine would entail that the requirement of causation between the infringement (and the affected credit rating) and a lost chance replaces the requirement of reasonable reliance. Although French courts have not yet applied the doctrine in the context of credit rating agency liability, such an application fits the general French approach to the doctrine of loss of chance; French courts tend to apply this concept in a broad manner and recognise the loss of autonomy as a compensable head of damages in the context of the dissemination of incorrect or incomplete information to the financial markets.[1038] In the context of credit rating agency liability, investors must argue that due to the infringement and the affected credit rating, they lost an opportunity to make a completely and well-informed investment decision, i.e. they lost the autonomy to make a completely and well-informed investment decision. As long as the investor can prove this chance was real, serious and certain, French courts are prepared to even compensate lost chances that are relatively small.

1036 It must be noted that the opinions are divided on this matter. Heuser believed concrete reliance is required under Art. 35a CRA Regulation. Contrary to Heuser, I would say this matter is left to the Member States. *See also on this topic* Heuser 2019, pp. 182-183.

1037 *Cf. also in the context of deficient issuer information*, Vandendriessche 2015, no. 337.

1038 *Most notably* Cour de Cassation (Chambre Commerciale) 9 March 2010, 08-21547 and 08-21793, Bulletin 2010, IV, no. 48 (*Gaudriot*) and Cour de Cassation (Chambre Commerciale) 6 May 2014, 13-17632 and 13-18473, ECLI:FR:CCASS:2014:CO00430, Bulletin 2014, IV, no. 81 (*Marionnaud*).

Compared to French law, the current state of Dutch law in relation to possibilities to relax the requirement of reasonable reliance in favour of investors is clouded by more uncertainty. It is doubtful whether Dutch courts will apply the evidentiary presumption of *VEB v World Online* by analogy to the causal link between the credit rating and the investment decision, and whether Dutch courts will apply the doctrine of loss of chance in relation to credit rating agency liability. Dutch law leaves room to apply both concepts. However, at the same time, applying these concepts in the context of credit rating agency liability involves broadening their application. The application of the evidentiary presumption depends on whether courts consider a credit rating to be misleading to the average investor and whether courts deem it necessary to apply the presumption in the light of an effective application of Article 35a CRA Regulation. Considering the similarities between prospectus liability (*VEB v World Online* on the facts) and credit rating agency liability, there are valid reasons to assume that Dutch courts will apply the evidentiary presumption by analogy under Dutch law.[1039] Furthermore, it is doubtful whether Dutch courts would award damages if an investor frames its claim as a loss of chance case. The doctrine of loss of chance has developed further under French law than under Dutch law. As shown by the case of *Deloitte Belastingadviseurs v H&H Beheer*, the Dutch Supreme Court allows for the compensation of lost chances, the realisation of which depends on the conduct of claimants, such as a lost chance to take a certain decision.[1040] Moreover, in October 2018, the Court of Appeal of The Hague also applied the doctrine of loss of chance where a medical case manager failed to provide the claimant with information on options of insurance and to offer the claimant assistance; in the absence of this failure, the chance that the claimant would have hired the case manager was 50%.[1041] At the same time, the link between the affected credit rating and the investor's investment decision is more far-fetched than, for instance, the link between the advice of a lawyer and the subsequent conduct of its client. In addition, Dutch courts have not awarded damages for the loss of autonomy in the context of incorrect or incomplete information to the financial markets. So there is room to apply the doctrine of loss of chance to credit rating agency liability under Dutch law, but it would constitute an extension of the application of this concept under Dutch law. In the absence of case law confirming this matter, the application of the evidentiary presumption and the doctrine of loss of chance remains uncertain under Dutch law. From an investor's perspective, however, it is worthwhile invoking these tools when Dutch law applies to their claim.

The positions of German and English law are the clearest, but also the most restrictive: these legal systems will in principle not relax the requirement of

1039 *Cf.* Giesen & Rijnhout 2017, p. 264.
1040 Asser/Sieburgh 6-II 2017/80a.
1041 Gerechtshof Den Haag 9 October 2018, ECLI:NL:GHDHA:2018:2558, para 16.

reasonable reliance in favour of investors. German law involves very few possibilities to relax the requirement of reasonable reliance in favour of investors. It is assumed that in principle the normal burden and standard of proof continue to apply in respect of reasonable reliance. Investors must prove that they reasonably relied on a credit rating under the high standard of proof under § 286 ZPO. The standard of proof under § 286 ZPO is more demanding than the 'balance of probabilities' test employed under English law. German courts are not likely to apply facilitations such as the adoption of *Anscheinsbeweis*, the *Vermutung aufklärungsrichtigen Verhaltens* (a presumption of advice-conform behaviour) and the tool of replacing direct reliance with *Kursdifferenzschade* by analogy in the context of credit rating agency liability. Furthermore, as a matter of principle, German law does not protect chances lost by an aggrieved party. Therefore, the doctrine of loss of chance finds no application in the context of credit rating agency liability under German law.[1042] In the most exceptional situations, there is some room for German courts to replace the requirement of reliance with the concept of *Anlagestimmung* (reliance on market sentiment). Yet, German courts are assumed to mostly uphold the requirement of reasonable reliance of Article 35a (1) CRA Regulation.[1043]

Finally, English courts will maintain the normal division of the burden of proof of the 'but for' test in respect of reasonable reliance, so that investors must prove that they reasonably relied on a credit rating on a balance of probabilities. English courts only deviate from the general common law principles in respect of causation for the most pressing reasons of public policy in cases concerning medical negligence, which do not come into play in cases of credit rating agency liability in which financial interests are at stake.[1044] Furthermore, English courts will not apply the doctrine of loss of chance in these situations, as that concept is strictly reserved for causal uncertainty relating to future events in which the lost chance does not depend on the hypothetical conduct of the claimant.[1045] In this regard, English law adopts the exact opposite position as compared to French law. Whereas French law compensates the loss of autonomy to have taken a fully and well-informed investment decision, English law explicitly denies the compensation of the loss of autonomy to have taken a fully and well-informed investment decision. Hence, in the context of credit rating agency liability in which the lost chance of the claimant involves a chance to have made a fully and well-informed

1042 *Cf. e.g.* Palandt/Grüneberg 2019, Vorb v § 249, no. 53, Magnus 2013, no. 35 and Van Dam 2013, no. 1110-3. Less recently Jansen 1999, pp. 273-274.

1043 Von Rimon 2014, p. 188. Heuser, however, rejected the application of the concept of *Anlagestimmung* because it would be contrary to EU law (Heuser 2019, p. 183).

1044 *As can be derived from e.g. Beary v Pall Mall Investments* [2005] EWCA Civ 415, [2005] P.N.L.R. 35.

1045 *As can be derived from e.g. Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 W.L.R. 636 and *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602.

investment decision, English courts would not apply the doctrine of loss of chance to facilitate the investor.

In summary, French law leaves most room to deviate from the requirement of reasonable reliance by relaxing the burden and standard of proof or by application of the doctrine of loss of chance. Under Dutch law, the application of such facilitation possibilities remains more uncertain. From an investor's perspective, however, it is worthwhile invoking these tools when Dutch law applies to their claim. Finally, the positions of German and English law are the clearest, but also the most restrictive: these legal systems do not[1046] leave room to facilitate investors in proving reasonable reliance or to relax the requirement of reasonable reliance. Of these two systems, the standard of proof under German law is the most compelling. However, as the UK Implementing Regulations aligned the test for whether the reliance of an investor was reasonable with the test for whether it is reasonable for a person to rely on a statement for the purposes of determining whether the statement gives rise to a duty of care in negligence, the hurdle for proving reasonable reliance is very high under English law as well.

5.8.3.3 Suffering 'damage' and claiming 'damages'

Article 35a (1) CRA Regulation entitles issuers and investors to 'damages' for 'damage' caused to them due to the infringement and the affected credit rating. The CRA Regulation does not provide sufficient guidance on what loss ('damage') an issuer or investor must have suffered, so that this element falls within the remit of the applicable national law. Therefore, the national law reports concentrated on what constitutes recoverable loss and how compensation, i.e. the amount of damages, is calculated. Furthermore, the national law reports focus on national legal mechanisms developed to limit the amount of damages awarded. It should be kept in mind that if national courts reach the stage at which they must calculate the amount of damages to be awarded, issuers and investors have already managed to overcome quite some hurdles on the way to a successful claim for compensation against a credit rating agency.

1046 Noting that German law leaves some room for German courts to replace the requirement of reliance with the concept of *Anlagestimmung* in the most exceptional situations.

The positions of the national laws investigated can be summarised as follows:

Legal system	*Summarised position on suffering 'damages' and claiming 'damages'*	*Section*
Dutch law	Type of loss: undefined in BW, but compensation of both pure economic and reputational loss is not problematic. Recoverable loss and calculation of damages: - Issuers: in principle full compensation, unless the loss cannot be attributed to the credit rating agency under Art. 6:98 BW (legal causation). But, in general, the factors of Art. 6:98 BW point towards a broad attribution of loss. - Investors: in principle full compensation, unless the loss cannot be attributed to the credit rating agency under Art. 6:98 BW (legal causation). The obligation to compensate loss and the corresponding amount of damages may be limited to the influence of the affected credit rating on the price or the yield of the financial instruments. Unless Dutch courts apply the doctrine of loss of chance to claims brought by investors then the amount of damages would be calculated by multiplying the total loss by the lost chance. Art. 6:101 BW: Contributory negligence applies and issuers and investors are under the obligation to mitigate their loss.	5.4.3.3
French law	Types of loss: undefined in CC. Each type of loss is eligible for compensation as long as it qualifies as certain, direct and legitimate. Recoverable loss and calculation of damages: - Issuers: full compensation. - Investors: full compensation, unless not all loss is considered sufficiently 'direct' and unless French courts apply the doctrine of loss of chance to claims brought by investors then the amount of damages is calculated by multiplying the total loss by the lost chance. However, in practice, French courts often award a fixed sum of damages without clear motivation. Contributory negligence applies. No general obligation to mitigate the loss.	5.5.3.3

Legal system	*Summarised position on suffering 'damages' and claiming 'damages'*	*Section*
German law	Types of loss: material loss, immaterial loss and lost profits. Recoverable loss and calculation of damages: - Issuers: full compensation. - Investors: full compensation, analogue application of the case *IKB* suggests investors, if they succeed in proving reasonable reliance, can choose between *Vertragsabschlussschade (Transaktionschade)* and *Kursdifferenzschade*. § 254 BGB: Contributory negligence applies and issuers and investors are under the obligation to mitigate their loss.	5.6.3.3
English law	Under Art. 13 and 14 UK Implementing Regulations, the following types of loss can be compensated and the following method to calculate the amount of damages applies: - Issuers: • Amount depends on the rating contract. • In the absence of a rating contract, increased funding costs only. - Investors: • Amount depends on the subscription contract. • In the absence of a subscription contract, courts must calculate the amount of damages in accordance with the rules under the tort of negligence. Starting point: Full compensation. But: analogue application of the case *SAAMCO* leads to the compensation of the mispricing loss only. Art. 15 UK Implementing Regulations: Contributory negligence applies. Art. 15 UK Implementing Regulations: Mitigation applies.	5.7.3.3

The national law reports aimed to provide guidance on what types of loss are compensated and on how the amount of damages is calculated.

In respect of claims against credit rating agencies brought by issuers, the reports revealed a difference between the types of loss eligible for compensation under, on the one hand, Dutch, French and German law, and, on the other hand, English law. Under Dutch, French and German law, issuers can claim damages for both pure economic and reputational loss as a matter of principle

– notwithstanding practical difficulties relating to proving the existence and extent of reputational loss. Under English law, however, issuers can only claim damages awarded for increased funding costs pursuant to Article 13 (1) (b) UK Implementing Regulations. Apart from this difference, the general principles to calculate the amount of damages are similar within the four legal systems investigated. The national laws take the principle of full compensation as a starting point, and calculate the award of damages by comparing the actual position of the issuer with the hypothetical situation in which the issuer would have been in the absence of the infringement and the impacted credit rating. The burden of proof lies with the issuer, but the national courts can estimate the recoverable loss and the corresponding amount of damages.

In respect of claims brought by investors, the national law reports demonstrated some uncertainty as to what loss is eligible for compensation and how the amount of damages is calculated. The laws of damages of the four legal systems start from the principle of full compensation. A recurring consideration in the national law reports is to what extent investors are entitled to compensation: to the total lost value of their investments or to the mispricing loss and lost yields only. The nature of the activities pursued by credit rating agencies and investors renders general reluctance towards the compensation of the total value of the investment justified. There are multiple manners in which national courts can limit the recoverable loss so that investors are not compensated to the full costs of the transaction of the financial instruments.

Under Dutch law, for instance, courts can limit the recoverable loss by applying the theory of objective attribution under Article 6:98 BW. The defendant (a credit rating agency) must invoke this theory. The case law of the Dutch Supreme Court provides little guidance on the application of this theory in the context of financial litigation. Dutch scholars argued against the compensation of the total value of the investment in the field of prospectus liability and liability for a breach of disclosure obligations, and argued in favour of the compensation of mispricing loss.[1047] It is worthwhile for credit rating agencies to invoke Article 6:98 BW and to argue that at least part of the loss suffered by investors cannot be reasonably attributed to them.

Furthermore, under English law, if an investor manages to reach the stage at which national courts calculate the damages at all, the investor is not entitled to compensation of the total value of the investment. The scope of duty of a credit rating agency does not extend to the compensation of the total value of the investment. If a credit rating agency owes a duty of care to investors under English law at all, such a duty only concerns the provision of correct and complete information. The breach of such a duty entitles the investor to compensation of the direct consequences of the incorrect or incomplete information only under the general principles of the *SAAMCO* case.[1048] Trans-

1047 De Jong 2016, pp. 128-129 and De Jong 2010, pp. 183, 189 and 294, Pijls 2009, p. 135.
1048 *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191.

posing these principles to claims for damages under Article 35a (1) CRA Regulation, an investor is entitled to the compensation of mispricing loss and lost yields at most.

As stated, French law leaves room to apply the doctrine of loss of chance in the context of credit rating agency liability. The application of the doctrine of loss of chance would also lead to the 'partial' compensation of investors only. As we have seen, in cases concerning issuer liability for deficient market disclosures, French courts have applied the doctrine of loss of chance in order to achieve a 'golden mean' replacing the all-or-nothing approach. The risks of an uncertain causal relationship are hereby distributed amongst the issuer and the investor. Yet, the application of the doctrine of loss of chance has disadvantages. The way in which French courts currently apply the doctrine leads to uncertainties at the stage of the calculation of the amount of damages. In the context of issuer liability, French courts often award fixed sums of damages and fail to explain how they assessed the height of the chance or the fixed sum of damages. The case law shows that French courts hardly motivate their decisions on the award of damages. Due to this lack of (proper) motivation, it is difficult to derive general guidelines from the case law which can help to predict how French courts will calculate the amount of damages in future cases.[1049]

Only German law takes a position that deviates from the other legal regimes investigated. The German approach to calculation of the award of damages relates to the German approach to causation. As described in section 5.6.3.2 (b), under German law, the requirement of reasonable reliance under Article 35a (1) CRA Regulation will most likely be upheld so that investors will only reach the stage of the calculation of damages in exceptional situations. However, if an investor does reach this stage, it seems that the investor can choose to claim *Vertragsabschlussschade* or *Kursdifferenzschade* based on the *IKB* case.[1050]

Overall, German and English law adopt the clearest approaches, whereas Dutch and French law lack clear guidance on the recoverable loss and the calculation of damages in the context of credit rating agency liability. One difference between German and English law is that although both regimes incline towards demanding proof of reasonable reliance, German law entitles an investor to the compensation of *Vertragsabschlussschade* or *Kursdifferenzschade* whereas English law entitles an investor to the compensation of mispricing loss only. Under Dutch law, it is worthwhile for credit rating agencies to invoke Article 6:98 BW and to argue that part of the loss suffered by investors

1049 Rapport du Club des Juristes 2014, no. 26. *Similar criticism has been brought up by* Chacornac 2016, no. 99 and Vandendriessche 2015, no. 354.

1050 Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*), para 50. *Also* Bundesgerichtshof 9 May 2005, II ZR 287/02 (*EM.TV*), p. 8. *Also* Koch 2017, pp. 382-384.

cannot be attributed to them. The current position of Dutch law in this respect, however, is not yet clear. Finally, French law leaves room to find a golden mean by applying the doctrine of loss of chance, but it is then completely dependent upon the circumstances of the case as to what damages the investor is entitled exactly. It is hence unlikely that courts will compensate investors to the extent of the total value of the investment. German law seems to take a different approach in this regard, provided that the investor succeeds in proving reasonable reliance. However, German legal scholars strongly argued against the full compensation of investors.

5.8.4 Article 35a (3) CRA Regulation – Limitations of liability in advance – comparison

Article 35a (3) CRA Regulation prohibits exclusion clauses, but allows for limitation clauses as long as they are reasonable and proportionate and allowed by the applicable national law. The positions of the national laws investigated can be summarised as follows:

Legal system	*Summarised position on the admissibility of limitations of liability in advance*	*Section*
Dutch law	Limitation clauses are valid as a matter of principle. In respect of issuers and investors, the following general guidelines apply: - If Section 6.5.3 BW applies, by means of general terms and conditions, a credit rating agency cannot limit its liability if that would be 'unreasonably onerous' to the issuer or investor under Art. 6:233 (a) BW. Limitations of liability are presumed to be unfair under Art. 6:237 (f) BW. - In general, a credit rating agency cannot invoke a limitation clause if the appeal is contrary to the principles of reasonableness and fairness under Art. 6:248 (2) BW. - The reasonableness and fairness test involves a balancing act of the relevant circumstances of the case, whereby the gravity of the conduct of the credit rating agency, the insurability of the risks on the side of the credit rating agency, the capacity and expertise of the issuer or the investor and the price paid for the agreement by the issuer or investor can be of particular importance. It follows from this test that by means of (general) terms and conditions, a credit rating agency cannot limit its liability for loss caused by intentional or consciously reckless conduct.	5.4.4

Legal system	*Summarised position on the admissibility of limitations of liability in advance*	*Section*
French law	The French law approach towards limitation clauses differs depending on whether the liability is of a contractual or non-contractual nature. In relation to contractual liability, limitation clauses are valid as a matter of principle. In relation to non-contractual liability, parties may not limit their liability in advance. However, irrespective of the existence of a contractual relationship, a credit rating agency cannot limit its essential obligations under the rating contract or the subscription contract and cannot limit liability even for *fautes lourdes* or a *fautes dolosives.* As the threshold for liability under Art. 35a (1) CRA Regulation ('intention' or 'gross negligence') and the threshold for singling out the effect of a limitation clause (*faute lourde* or *faute dolosive*) boil down to the same minimum threshold (extreme misconduct on the side of the credit rating agency, showing that it is not able to fulfil its tasks), *if an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence under Article 35a (1) CRA Regulation, a limitation clause included in the contract will also not have any effect under French law.*	5.5.4

Legal system	*Summarised position on the admissibility of limitations of liability in advance*	*Section*
German law	Limitation clauses are valid as a matter of principle. But, in respect of issuers, the following general guidelines apply: - Under § 276 (3) BGB, a credit rating agency cannot limit its liability for loss caused by intentional conduct. - By means of general terms and conditions, a credit rating agency cannot limit its liability for loss caused by grossly negligent conduct under § 310 (1) in conjunction with § 307 (1) in conjunction with § 309 (7) (b) BGB. - By means of general terms and conditions, a credit rating agency cannot limit its liability for the violation of rights and duties lying at the essence of the agreement under § 307 (2) (2) BGB. - By means of individually negotiated terms, a credit rating agency generally has more freedom to limit its liability. However, when a significant imbalance between the negotiating strengths of the credit rating agency and the issuer precludes the issuer from exercising its party autonomy, German courts may step in to restore the imbalance. Limitation clauses are valid as a matter of principle. But, in respect of investors, the following general guidelines apply: - A credit rating agency cannot limit its liability for loss caused by intentional conduct under § 276 (3) BGB. - A credit rating agency cannot limit its liability for loss caused by gross negligence under § 309 (7) (b) BGB. When the investor qualifies as an entrepreneur or a legal entity under public law, the inadmissibility is based on § 310 (1) BGB in conjunction with § 307 BGB with an application by analogy of § 309 (7) (b) BGB. - A credit rating agency cannot limit its liability for the violation of rights and duties lying at the essence of the subscription contract to such an extent that the achievement of the goals of the agreement is endangered under § 307 (2) (2) BGB. Most importantly, in the specific context of Art. 35a CRA Regulation, *if an issuer or an investor can prove that a credit rating agency has committed the infringement intentionally or with gross negligence under Article 35a (1) CRA Regulation, a limitation clause included in the contract will also not have any effect under German law.* In relation to intentional conduct, this conclusion applies to all (general) terms and conditions under § 276 (3) BGB. In relation to grossly negligent conduct, this conclusion applies to at least all general terms and conditions under § 310 (1) in conjunction with § 307 (1) in conjunction with § 309 (7) (b) BGB. One can also question whether such a clause would cause a significant imbalance pursuant to § 242 BGB between the credit rating agency and the issuer.	5.6.4

Legal system	*Summarised position on the admissibility of limitations of liability in advance*	*Section*
English law	Limitation clauses are generally allowed under Art. 9 UK Implementing Regulations. Arts. 10-12 UK Implementing Regulations provide a non-exhaustive list of factors that courts can take into account when deciding whether a limitation clause is 'reasonable and proportionate'. These factors provide guidance, but do not provide a clear-cut answer on which limitation clauses would be reasonable and proportionate and leave much freedom to the courts.	5.7.4

On a general level, the national laws investigated approach the admissibility of limitation clauses differently, although all sorts of reasonableness tests and a large dependency on the circumstances of the case recur in the national law reports. The similarities between the Dutch and German systems to assess the admissibility of limitation clauses is explained by the fact that the Dutch legislature used the German rules on general terms and conditions as an example for Section 6.5.3 BW.

French and German law approach the admissibility of limitation clauses most restrictively in favour of issuers and investors. They do not allow a credit rating agency to limit its liability for intentional or grossly negligent conduct. Hence, as intentional and grossly negligent conduct is required by Article 35a (1) CRA Regulation, credit rating agencies cannot limit their liability under Article 35a CRA Regulation when an issuer or investor has proven that the credit rating agency committed the infringement intentionally or with gross negligence. Under German and French law, limitation clauses will not have effect if the issuer or investor managed to establish liability under Article 35a (1) CRA Regulation.

Under Dutch law, slightly different rules apply in respect of the effects of the blameworthiness of the conduct of a credit rating agency on its possibilities to invoke limitation clauses. The threshold for prohibitions to invoke limitation clauses is higher; Dutch law does not allow a credit rating agency to limit its liability for intentional or consciously reckless conduct. Consequently, the fact that the issuer or investor managed to establish liability on the basis of Article 35a CRA Regulation does not entail that the limitation clause is invalid or that an appeal to the clause is contrary to reasonableness and fairness. Finally, credit rating agencies have most room to limit their liability under English law. Articles 9-12 UK Implementing Regulations allow limitation clauses as a matter of principle and provide an overview of circumstances that courts can take into consideration when assessing whether a limitation clause is permissible, such as whether the parties negotiated on the terms and whether the credit rating agency could insure against the loss suffered.

5.8.5 Prescription of claims (comparison)

The final part of this legal comparison involves the limitation periods of claims within the selected legal systems. This subject cannot be explicitly linked to the terms referred back to the applicable national law under Article 35a CRA Regulation, but was discussed due to the short limitation period of one year introduced by the UK Implementing Regulations. The positions of the national laws investigated can be summarised as follows:

Legal system	*Summarised position on the prescription of claims*	*Section*
Dutch law	Art. 3:310 BW: claims for damages expire 5 years after the moment that the issuer or investor actually became acquainted with both the loss and the party responsible for the loss (this period starts to run from the day after the issuer or investor became acquainted with these elements) and, at the latest, 20 years after the event that caused the loss occurred.	5.4.5
French law	Arts. 2224-2223 CC: 5 years from the day that the holder of the right has the knowledge or should have had the knowledge from the facts that allow him to exercise his claim right (with a maximum of 20 years from the day that the right to claim damages arose).	5.5.5
German law	§ 195 in conjuction with § 199 (1) and (3) BGB: 3 years after the end of the year (1) in which the claim for damages arose; and (2) in which the issuer or investor became acquainted with the circumstances on which the claim can be based and with the defendant's identity, or in which the issuer or investor should have become acquainted with the circumstances on which the claim can be based and with the defendant's identity, had it not acted with gross negligence. Irrespective of the knowledge of the issuer or investor, a claim expires 10 years after it arose. Irrespective of the knowledge of the issuer or investor and the moment at which the claim arose, a claim for compensation expires 20 years after the conduct that caused the loss (the infringement).	5.6.5
English law	Art. 16 UK Implementing Regulations: 1 year from the moment the issuer or investor discovered the infringement or could with reasonable diligence have discovered it.	5.7.5

The most important lesson to draw from the positions summarised above is that English law employs a remarkably short limitation period in comparison to the other national laws investigated. The other national laws differ as well in length and in approach (objectively or subjectively), however claims for damages do not expire as quickly as under English law. Dutch law takes a special position in this regard, as the yardstick for the 5-year prescription period of acquaintance ('*bekendheid*') with the loss and the party who caused the loss is interpreted as *actual* acquaintance ('*daadwerkelijke bekendheid*').[1051] The other national laws investigated in this dissertation have adopted similar yardsticks, but interpret the acquaintance of the aggrieved party objectively.[1052]

5.8.6 Conclusions related to the legal comparison

Sections 5.8.3-5.8.5 compared the national interpretations and applications of Article 35a CRA Regulation, concentrating on both similarities and differences between the legal systems investigated. From this overview, one can draw the following general conclusions.

To start with, basic private law concepts, such as causation and the assessment of the recoverable loss and the calculation of the amount of damages, show similarities amongst the legal systems investigated. The four legal systems, for instance, apply the same basic test to the assessment of causation and start from the idea that the victim must be restored to the position as if the wrongful act or omission had not occurred. However, the concrete application of these concepts in the context of claims for credit rating agency liability differs. These differences become most visible in relation to claims brought by investors, which are of a complex nature and are coloured by underlying national basic principles.

Furthermore, the national interpretations and applications of Article 35a CRA Regulation did not lead to surprising findings in light of the general features of the legal systems investigated. At the risk of oversimplifying the results of the legal comparison, French law generally adopts the most flexible approach to the interpretation and application of Article 35a CRA Regulation (to the benefit of issuers and investors), while the English interpretation and application under the UK Implementing Regulations is very restrictive (to the disadvantage of issuers and investors). Dutch and German law take up middle positions, with the former system leaning more towards the French interpreta-

1051 *E.g.* Hoge Raad 31 October 2003, ECLI:NL:HR:2003:AL8168, *NJ* 2006/112 annotated by C.E. du Perron (*Saelman*), para 3.4 and Hoge Raad 6 April 2001, ECLI:NL:HR:2001:AB0900, *NJ* 2002/383 annotated by H.J. Snijders (*Vellekoop v Wilton Feijenoord*), para 3.4.2. *Repeated in* Hoge Raad 31 March 2017, ECLI:NL:HR:2017:552, *NJ* 2017/165 (*Mispelhoef v Staat*), para 3.3.2. *Also e.g.* Asser/Sieburgh 6-II 2017/411 and 415 and Koopmann 2010, pp. 44-45. These contributions discussed the case law referred to in this paragraph in detail and provided far more extensive overviews of relevant case law in this area.

1052 Koopmann 2010, p. 47.

tion and application and the latter system more towards the English interpretation and application.

The legal comparison revealed the following main differences in respect of claims for damages brought against credit rating agencies by both issuers and investors:

- 'Gross negligence': The national laws approach the term 'gross negligence' in various ways. Especially the restrictive interpretation of 'gross negligence' under Article 4 UK Implementing Regulations, which, moreover, limits the scope of application of Article 35a CRA Regulation to infringements committed by senior management only, leads to a very narrow interpretation and application of Article 35a CRA Regulation under English law – in particular as compared to the approach under French and German law.[1053]
- Admissibility of limitation clauses: French and German law do not seem to allow the limitation of liability under Article 35a CRA Regulation in the presence and absence of a contractual relationship. Dutch law and English law leave more room for the limitation of liability, especially if a contractual relationship between the parties exists.
- Prescription period: the private law systems investigated have different prescription periods to claims based on Article 35a CRA Regulation. Most importantly, Article 16 UK Implementing Regulation provides for a remarkably short limitation period of 1 year.

The legal comparison revealed the following difference in respect of claims for damages brought against credit rating agencies by issuers in particular:

- Recoverable loss: Whereas Article 13 UK Implementing Regulations only admits the compensation of increased funding costs, Dutch, French and German law do not restrict the types of recoverable loss as a matter of principle. In addition to damages for increased funding costs, issuers can also claim damages for reputational loss under these three legal systems. Recital 32 CRA III Regulation gives the impression that funding costs and reputational loss are separate heads of damages, as the Recital refers to the negative impact on an issuer's reputation and funding costs separately. In practice, the assessment of damages for reputational loss creates evidentiary problems for issuers, so that it is doubtful whether these differences will be of much relevance in practice.

The legal comparison demonstrated that one should not underestimate the differences between the national laws in respect of claims brought by investors. It revealed the following differences in respect of claims for damages brought against credit rating agencies by investors:

1053 *See* Wimmer 2017, p. 408.

- 'Reasonable reliance' (I): The UK Implementing Regulations stand out in severely limiting the scope of application of Article 35a CRA Regulation through their interpretation and application of 'reasonable reliance'. Article 6 UK Implementing Regulations links the requirement of 'reasonable reliance' to the test for the existence of a duty of care under the tort of negligence. As English courts would not often (if at all) consider this test satisfied in cases involving claims for credit rating agency liability brought by investors,[1054] national courts could reject the majority of investor claims for a failure of reasonable reliance under English law.
- 'Reasonable reliance' (II): The national laws differ in whether, and the extent to which, they facilitate investors in proving reasonable reliance, as part of the requirement of causation. The wording of Article 35a CRA Regulation does not require Member States to adopt a flexible approach towards the requirement of reasonable reliance. Under French and Dutch law, it is possible that national courts apply respectively the doctrine of loss of chance – which replaces the test of reasonable reliance altogether – or adopt an evidentiary presumption of reliance – which is a procedural law facilitation and changes the division of the burden of proof to the detriment of credit rating agencies. Under German and English law, national courts are expected to uphold the requirement of reasonable reliance and the corresponding burden of proof. The restrictive wording of Article 35a CRA Regulation, combined with the restrictive approaches under German and English law, will cause the majority of the claims for damages brought by investors to strike out under these legal systems, because investors cannot prove causation due to a lack of evidence of reasonable reliance.
- Calculation of damages: The national laws approach the calculation of the amount of damages awarded to investors in various ways. Due to the crucial role of the specific circumstances of the case at the stage of the calculation of awards of damages, it is difficult to generally predict the amount of damages courts will award. Under Dutch, French and English law, national courts will not always compensate investors to the full extent of their transaction costs. Under Dutch law, courts could attribute only part of the loss to a credit rating agency – if the credit rating agency successfully invokes Article 6:98 BW. Under French law, courts might only compensate investors' loss of autonomy to make a fully and well-informed investment decision. Under English law, courts could apply the *SAAMCO* case analogously, so that the award of damages is capped at the influence of the affected credit rating on the interest rate, yield or the price of the financial instruments. German law takes yet a different approach. It seems that if reasonable reliance can be proved, the investor can choose whether it claims *Vertragsabschlussschade* or *Kursdifferenzschade* under German law.

1054 Section 5.7.2.3 (b) (ii).

The final question, then, is whether the four national approaches to Article 35a CRA Regulation can lead to different results in legal proceedings, depending on what national law applies. Based on the differences listed above, this question is answered in the affirmative. However, even though the differences between the national approaches can lead to different results in legal proceedings, one must put them into perspective. The differences between the national interpretations and applications of Article 35a CRA Regulation are generally smaller in relation to claims brought by issuers, as compared to investors. Furthermore, irrespective of whether claims for damages are brought by issuers or investors, claims will not succeed easily in any of the legal systems investigated. The conditions set by Article 35a CRA Regulation and the national interpretations and applications of Article 35a CRA Regulation are restrictive, in particular in relation to a credit rating agency's civil liability towards investors, as compared to issuers. Hence, even though relevant differences exist between the interpretations and applications of the national laws investigated, one must keep in mind that the current combination of stringent conditions set at the EU level and restrictive national interpretations will overall cause many claims for damages to fail.

5.9 Concluding remarks

The previous section summarised the main findings of the legal comparison, rendering it superfluous to wrap up this Chapter with extensive concluding remarks. Nevertheless, after this rather voluminous Chapter, it seems useful to briefly return to its main objectives.

As national courts cannot apply Article 35a CRA Regulation without assistance of the applicable national law, an understanding of the meaning of its terms under Member State laws was needed to be able to conclude in Chapter 6 whether Article 35a CRA Regulation has created an adequate right of redress for issuers and investors. Chapter 5 aimed to contribute to this understanding by means of a legal comparison in respect of the interpretation and application of the terms of Article 35a CRA Regulation under four Member State laws. The object of this legal comparison was therefore to explain how the terms and subjects of Article 35a CRA Regulation are interpreted and applied under the four national laws selected – namely Dutch, French, German and English law – and to compare the findings, concentrating on both similarities and differences. Furthermore, this Chapter aimed to briefly conclude to what extent the differences can lead to different outcomes in decisions of national courts on claims for compensation based on Article 35a CRA Regulation.

Section 5.3 provided an in-depth analysis of the framework set by Article 35a CRA Regulation. At this point, we picked up where we left off the analysis of Article 35a CRA Regulation at the end of Chapter 3 (section 3.5.3 'Stakeholders defined and scope of application'). The terms and subjects of Article

35a CRA Regulation discussed in section 5.3 subsequently formed the main thread running through the national law reports and the legal comparison. From the outset, section 5.3 already revealed several issues in relation to the wording of Article 35a CRA Regulation. For instance, it addressed issues in relation to the attribution of acts and omissions to credit rating agencies, issues in relation to the wording of the investor-specific requirement of reasonable reliance and inconsistencies in the wording of Article 35a CRA Regulation in relation to the remedy involved (damages or compensation). These observations will be used in the analysis of whether Article 35a CRA Regulation creates an adequate right of redress for issuers and investors made in Chapter 6.

Subsequently, sections 5.4-5.7 involved reports of the interpretation and application of Article 35a CRA Regulation under Dutch, French, German and English law. Each country report started describing the main features of the legal system and the legal bases available in the legal system prior to the introduction of Article 35a CRA Regulation in 2013. Afterwards, the reports concentrated on the interpretation and application of several terms and subjects of Article 35a CRA Regulation. The national law reports revealed uncertainties as regards the exact interpretation and application of Article 35a CRA Regulation. It was sometimes difficult to predict the exact interpretation and application due to a scarcity or even lack of legal sources in respect of credit rating agency liability. Furthermore, the sometimes imprecise wording of Article 35a CRA Regulation, disparities between the conditions of Article 35a CRA Regulation and the structure of Article 35a CRA Regulation, caused uncertainties and friction. One can conclude that national law can approximately be 'poured into' the template of Article 35a CRA Regulation, but it is not an exact fit.

Finally, section 5.8 investigated which similarities and differences exist between the four national interpretations and applications, and whether any differences can lead to different decisions on civil liability claims based on Article 35a CRA Regulation. Risking oversimplifying the results of the legal comparison, French law can generally be said to adopt the most flexible approach to the interpretation and application of Article 35a CRA Regulation (to the benefit of issuers and investors). The English interpretation and application under the UK Implementing Regulations, on the other hand, is very restrictive (to the disadvantage of issuers and investors). Dutch and German law take up the middle ground, with the former system leaning more towards the French interpretation and application and the latter system more towards the English interpretation and application. It was observed that English law stands out in its adoption of a restrictive approach towards almost all terms and subjects investigated, leading to rather limited possibilities for issuers and investors to hold credit rating agencies liable when English law applies to their claims. The advantage of the method adopted by the UK legislature, however, is that English law at least provides rather clear guidance on how national courts should deal with credit rating agency liability, while this guidance is lacking and causing uncertainty within the other legal systems investigated.

The final question, then, is whether the four national approaches to Article 35a CRA Regulation can lead to different results in legal proceedings, depending on what national law applies. It was concluded that the differences can have effects on decisions in concrete cases and can lead to different results, but that the differences should be put into perspective. The current combination of stringent conditions set at the EU level and restrictive national interpretations at present causes many claims to fail, and will do so in the future, irrespective of which of the four national laws investigated applies to the dispute.

6 Observations and recommendations

6.1 Introductory remarks

The civil liability of credit rating agencies in Europe is a multi-faceted subject. The analyses of the European legal context (Chapter 2), the credit rating industry and its regulation (Chapter 3), the relevant aspects of Private International Law (Chapter 4) and the legal comparison of the interpretation and application of Article 35a CRA Regulation under Dutch, French, German and English law (Chapter 5) act as stepping stones towards this final Chapter 6. As the third pillar of this study, this Chapter aims to answer the main research questions of this dissertation:

Will the post-crisis goal of an adequate right of redress for issuers and investors against credit rating agencies be achieved whilst Article 35a CRA Regulation has to be interpreted under various systems of national law? Should civil liability be regulated differently based on that analysis and, if so, in what manner?

The previous Chapters addressed multiple questions and uncertainties arising in respect of Article 35a CRA Regulation and its functioning. This Chapter attempts to structure the analysis of whether Article 35a CRA Regulation forms an adequate right of redress for issuers and investors by observing the findings of the previous Chapters from the perspective of a normative framework (sections 6.3 and 6.4). As section 6.2 will explain, the normative framework involves three main perspectives: the added value of Article 35a – in the sense of increased protection for issuers and investors, legal certainty and convergence. The observations must be put into perspective, as this dissertation was based upon a legal comparison of four Member State laws only.

Subsequently, section 6.5 formulates recommendations to improve the current system of civil liability under Article 35a CRA Regulation. The recommendations are based on the assumption that the civil liability of credit rating agency liability towards issuers and investors is desirable as a matter of principle. They concentrate on the form in which the right of redress is arranged at the EU level (section 6.5.2), the clarification of rules of Private International Law (section 6.5.3) and the provision of additional substantive guidance at the EU level (section 6.5.4). Although the observations and recommendations of this Chapter are made in the particular context of credit rating agency liability, part of the observations and recommendations concern the vertical relationship between EU law and national law in general. These observations and recommendations serve to provide an insight as to whether the template of Article 35a CRA Regulation may be useful for other parts of the financial sector or other legal areas.

For the sake of transparency and completeness, it is important to emphasise again that prior to the publication of this dissertation, several dissertations and other academic contributions had already investigated the civil liability of credit rating agencies under Article 35a CRA Regulation and had commented upon the provision.[1] At some points, this Chapter reflects on these other contributions and, in particular, on other proposals for the improvement of Article 35a CRA Regulation. I consider that similarities in the conclusions and recommendations will provide the Union legislature with stronger indications that it should reconsider the wording and structure of Article 35a CRA Regulation. This study, however, also resulted in other conclusions and recommendations, and does not always agree with the points of view taken in other academic contributions.

6.2 Normative framework

Article 35a CRA Regulation aimed to establish an adequate right of redress 'for investors who have reasonably relied on a credit rating issued in breach of Regulation (EC) No 1060/2009 as well as for issuers who suffer damage because of a credit rating issued in breach of Regulation (EC) No 1060/2009'.[2] The Union legislature burdened itself with a complex task. The civil liability of credit rating agencies poses many economic, legal and political dilemmas. On the one hand, one may wish to compensate issuers and investors who suffered loss as a consequence of a credit rating agency's misconduct and to increase credit rating quality through the preventive effect of civil liability threats. On the other hand, arranging for the civil liability of credit rating agencies involves serious challenges. From an economic point of view, for instance, a right to damages without stringent conditions can negatively impact the credit rating industry and, thereby, the financial markets as a whole.

1 *In particular* Heuser 2019, Dumont du Voitel 2018, Wimmer 2017, Baumgartner 2015 and Schroeter 2014. *Also* Deipenbrock 2018, Lehmann 2016a, Deipenbrock 2014 and Haar 2014. *Cf. e.g.* Miglionico 2019, Picciau 2018b, Getzler & Whelan 2017, Hoggard 2016, Seibold 2016, Deipenbrock 2015, Happ 2015, Hemraj 2015, Alexander 2015, De Pascalis 2015, Risso 2015, Schantz 2015, Steinrötter 2015, Berger & Ryborz 2014, Dutta 2014, Gass 2014, Jaakke 2014, Miglionico 2014, Von Rimon 2014, Verständig 2014, Wanambwa 2014, Amort 2013, Atema & Peek 2013, Dutta 2013, Edwards 2013, Gietzelt & Ungerer 2013, Haentjens & Den Hollander 2013, Scarso 2013, Sotiropoulou 2013, Wagner 2013, Van der Weide 2013 and Wojcik 2013.

2 Recital 32 CRA III Regulation.

As appeared from the Impact Assessment, the European Commission believed that ensuring a right of redress for investors contributed to the overall objectives of 'reducing the risks to financial stability and restoring investor and other market participants confidence in financial markets and ratings quality'.[3] In addition, the European Commission stated it is often 'not satisfactory' and 'not consistent' with general principles of private law that investors have difficulties in holding a credit rating agency liable while a credit rating agency violated its obligations towards them.[4] Overall, Article 35a CRA Regulation can be said to have two functions. First, it serves to compensate issuers and investors for loss caused by infringements of Annex III CRA Regulation.[5] Second, although the Recitals of the CRA III Regulation do not explicitly refer to this function, Article 35a aims to prevent credit rating agencies from committing infringements ('*eine verhaltenssteuernde Funktion*'), thereby aiming to enhance the quality of credit ratings – by ensuring that they are assigned in the correct manner.[6] As this study approaches these topics from a legal perspective, with a focus on the influence of EU law on national private law, this dissertation concentrates on the first function.

The question then is what constitutes such an adequate right of redress for issuers and investors. An adequate right of redress for issuers and investors must create realistic requirements for civil liability, thereby striking the right balance between the interests of issuers, investors *and* credit rating agencies. Furthermore, the application of rules of Private International Law and the national interpretations and applications of Article 35a CRA Regulation should be predictable and foreseeable to all parties involved. Moreover, looking at the policy objectives of the Impact Assessment, an adequate right of redress should increase the liability of credit rating agencies – compared to the situation prior to the introduction of Article 35a CRA Regulation – and should reduce risks of regulatory arbitrage between the Member States.[7]

The normative framework developed to assess whether Article 35a CRA Regulation forms an adequate right of redress whilst it must be interpreted in accordance with national laws, therefore, involves three main perspectives:

3 SEC(2011) 1354 final, p. 23.
4 SEC(2011) 1354 final, p. 19.
5 *As can be derived from* Recital 32 CRA III Regulation. *E.g.* Heuser 2019, pp. 82-83.
6 *See e.g.* Heuser 2019, p. 83. Some scholars considered the preventive function of Art. 35a CRA Regulation to be most important. For instance, Lehmann argued that the compensation of private investors is not the main goal of Article 35a CRA Regulation. He emphasised that the CRA Regulation mainly wishes to prevent credit rating agencies from assigning incorrect credit ratings (Lehmann 2016a, p. 62). According to Berger & Ryborz, Art. 35a CRA Regulation did not only have a compensatory function. They attached more importance to the regulatory function of Art. 35a CRA Regulation (Berger & Ryborz 2018, p. 1236). *Also* Dutta 2013, p. 1732.
7 SEC(2011) 1354 final, p. 23. The perspective of the added value of Art. 35a CRA Regulation is also interesting to conclude whether the structure of Art. 35a CRA Regulation is a useful template for other parts of the financial sector or other legal areas as well.

the added value of Article 35a (in relation to increased liability of credit rating agencies and realistic requirements for civil liability), legal certainty (in relation to the predictability and foreseeability of rules) and convergence (mainly in relation to regulatory arbitrage). When being applied to the findings of the previous Chapters, these perspectives sometimes overlap and cannot always be strictly distinguished from each other. The recommendations are made from these perspectives, and are also briefly analysed from the perspective of the principles of subsidiarity and proportionality. The perspectives of legal certainty and convergence and the principles of subsidiarity and proportionality deserve additional explanation. Inspiration for this framework was drawn from the Impact Assessments of the European Commission on the first and third version of the CRA Regulation, and from general principles of EU law.[8]

The Impact Assessment for the first version of the CRA Regulation tested policy options against the criteria of, amongst others, certainty and convergence.[9] These perspectives continue to be relevant in the context of Article 35a CRA Regulation. The Impact Assessment described 'certainty' as the ability of relevant stakeholders (credit rating agencies, investors, issuers, legislatures, lawyers and judges) to have the highest possible confidence as to the content of the rules. Also, the rules followed in practice should be closely aligned with the objectives of the framework.[10] As issuers and investors have not brought many proceedings yet based on Article 35a CRA Regulation, this dissertation concentrated on the first part of the European Commission's definition of certainty. Legal certainty hence refers to the predictability of Article 35a CRA Regulation in the sense that parties should be able to determine and have confidence, for instance, in which Member State proceedings can take place, which law applies to the claims and whether the claims could be successful.[11] Along the same lines, the CJEU described the principle of legal certainty as 'a fundamental principle of Community law which requires, in particular, that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly'.[12]

The Impact Assessment on the first version of the CRA Regulation described 'convergence' as a development under which the framework for the operation of credit rating agencies should be governed by the same requirements in all

8 SEC(2008) 2745, p. 31. *See on general principles of EU law in detail e.g.* Jans, Prechal & Widdershoven 2015, Reich 2014 and Groussot 2006.

9 The first Impact Assessment of the European Commission involved several criteria against which the available policy objectives were tested: effectiveness, certainty, convergence and flexibility & efficiency (SEC(2008) 2745, p. 31).

10 SEC(2008) 2745, p. 31.

11 SEC(2008) 2745, p. 31.

12 ECJ 3 June 2008, C-308/06, ECLI:EU:C:2008:312 (*Intertanko and Others*), para 69 and ECJ 14 April 2005, C-110/03, ECLI:EU:C:2005:223 (*Belgium v Commission*), para 30. *Also* Raitio 2013, p. 204 and Groussot 2006, p. 190.

Member States.[13] The system of Article 35a CRA Regulation demonstrates that the Union legislature did not aim to harmonise the interpretation and application of all requirements for civil liability, but it is nevertheless interesting to analyse to what extent the interpretations and applications of Article 35a CRA Regulation diverge and to what extent Article 35a CRA Regulation nevertheless brought convergence. Especially in light of the wish of the European Commission to reduce regulatory arbitrage within the Member States,[14] one must know to what extent Article 35a CRA Regulation has brought any change and to what extent the approaches of the Member States to Article 35a CRA Regulation differ.

The principles of subsidiarity and proportionality serve as a tool to determine whether, in a particular field, action of the Union legislature is necessary and, if so, how far the Union legislature should go. Under the principle of subsidiarity, in areas that do not fall within the exclusive competence of the European Union, the Union legislature should intervene only if and insofar as certain objectives cannot be sufficiently achieved by the European Member States, but can be better achieved at the European level.[15] Under the principle of proportionality, the content and form of Union action must not exceed what is necessary to achieve the objectives of the treaties.[16] To that end, legislative instruments should minimise the financial or administrative burden imposed upon the EU or its Member States and should align the burden with the objectives set.[17] In legal literature, it was argued that the principle of proportionality mainly aims to protect the interests of the Member States and aims to ensure that the legal systems of the Member States are respected.[18] The CJEU can review the compliance of European legislative instruments with the principle of proportionality. Taking into account that the Union legislature has a margin of discretion, the CJEU adopts a cautious approach and only decides that European legislative instruments are invalid if they are manifestly inappropriate in respect of the objectives they aim to achieve.[19] Van den Brink, Den Ouden, Prechal et al. derived a 'three-pronged' test from the case law of the CJEU considering: (1) the suitability of the Union action to achieve the objective set; (2) the necessity of the Union action to achieve the objective set, in the sense that there should not be a less intrusive alternative option; and (3)

13 SEC(2008) 2745, p. 31.
14 SEC(2011) 1354 final, p. 23.
15 Art. 5 (3) TEU.
16 Art. 5 (4) TEU.
17 Art. 5 Protocol on the Application of the Principles of Subsidiarity and Proportionality.
18 Van den Brink, Den Ouden, Prechal et al. 2015, p. 187.
19 ECJ 13 November 1990, C-331/88, ECLI:EU:C:1990:391 (*The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*), para 14. *Also e.g.* CJEU 16 June 2015, C-62/14, ECLI:EU:C:2015:400 (*Gauweiler and Others*), para 81. *Also* Van den Brink, Den Ouden, Prechal et al. 2015, pp. 191-192.

whether the Union action results in a restriction that is disproportionate to achieve the objective set ('the proportionality principle *sensu stricto*').[20]

Finally, it must be emphasised again that this dissertation and the normative framework do not address empirical aspects of Article 35a CRA Regulation. For instance, although the risk of private enforcement can provide credit rating agencies with an incentive to assign high quality credit ratings, this dissertation does not involve the empirical research necessary to conclude whether Article 35a CRA Regulation serves this purpose.

6.3 Observations within the normative framework

6.3.1 Limited added value Article 35a

6.3.1.1 Added value in theory, limited added value in practice

In theory, European statutory rules on the civil liability of credit rating agencies could have added value in terms of issuer and investor protection. From a historical and international perspective, Article 35a CRA Regulation is a novelty. The historical analysis of Chapter 3 indeed demonstrated that debates on the civil liability of credit rating agencies vis-à-vis rated entities and persons, and investors have arisen since the establishment of the first reporting agencies and financial press companies in the mid-19th century. Notwithstanding public dissatisfaction with the accuracy of credit ratings, however, credit rating agencies largely managed to protect themselves against civil liability claims and regulation arranging for civil liability.[21]

Moreover, European statutory rules on the civil liability of credit rating agencies could have added value as compared to the legal bases, or lack of such, for credit rating agency liability under the national civil liability regimes of some Member States. Especially in the absence of a contractual relationship, issuers and investors sometimes have few opportunities to hold a credit rating agency liable. Examples of such legal systems investigated in this study are German and English law.[22] The reports of these two systems showed, for

20 Van den Brink, Den Ouden, Prechal et al. 2015, pp. 189-190. The CJEU does not literally apply this test, and mostly mixes part of the elements in a more general analysis. *E.g.* ECJ 13 November 1990, C-331/88, ECLI:EU:C:1990:391 (*The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*) and CJEU 16 June 2015, C-62/14, ECLI:EU:C:2015:400 (*Gauweiler and Others*). *Also e.g.* Reich 2014, pp. 157-158 and Groussot 2006, pp. 146-152.

21 In particular, section 3.2.

22 Section 5.6.2.3 (German law) and section 5.7.2.3 (English law). Other examples of such legal systems are Swedish and Polish law. Under the national civil liability regimes of these Member States, in the absence of a contractual relationship, investors are not likely to succeed in a claim for damages (SEC(2011) 1354 final, p. 142). *Also* Wimmer 2017, p. 381, on the comparison between Art. 35a CRA Regulation and national bases for civil liability

instance, that an investor will only succeed in a claim for damages if a credit rating agency conducted itself in a highly blameworthy manner or in exceptional situations involving credit ratings relating to specific issues of financial instruments.[23] Under English law, a credit rating agency does not generally owe a duty of care towards an investor under the tort of negligence,[24] so that one could say that Article 35a CRA Regulation forms a deviation from English law in that sense. At least in some Member States, Article 35a CRA Regulation had the potential of filling a gap in the legal protection of issuers and investors.[25] In theory, therefore, European statutory rules on the civil liability of credit rating agencies could have added value in terms of issuer and investor protection.

In practice, however, the current right of redress under Article 35a CRA Regulation has limited added value. At least the following interacting reasons explain this limited added value: Article 35a CRA Regulation has a narrow scope of application and sets stringent conditions for civil liability (section 6.3.1.2) and the structure of Article 35a CRA Regulation causes its effects to depend too much on national interpretations and applications (section 6.3.1.3). Whereas the first reason concerns the European framework for the right of redress, the second reason concerns the structure of the right of redress in terms of the combination between EU and national law.

Prior to discussing these reasons, it is important to point out that from a global perspective, one must realise that the relevance of European rules on credit rating agency liability is limited. Article 35a CRA Regulation only offers issuers and investors a right of redress against credit rating agencies established and registered in the EU. As the credit rating industry, and especially the big three credit rating agencies, operate on a global scale and are mainly located in the US, Article 35a CRA Regulation does not apply to an important part of the industry.[26] Even though the CRA Regulation encourages credit

---

under German law: '*Schlussendlich ist jedoch zu bezweifeln, ob das innerstaatliche deutsche Recht tatsächlich weiter als eine Haftung nach Art. 35a reicht und ein Rückgriff auf nationales Recht insofern „günstiger" ist.*' Hence, Wimmer concluded that issuers and investors are not necessarily better off under German law as compared to Art. 35a CRA Regulation.

23 Section 5.8.2.2.

24 Section 5.7.2.3 (b) (ii).

25 Under Dutch and French national private law, for instance, issuers and investors had more opportunities to hold a credit rating agency liable prior to the introduction of Art. 35a CRA Regulation. French law introduced specific rules on credit rating agency liability in Art. L. 544-5 and L. 544-6 Code monétaire et financier (section 5.5.2.1, although these rules were abolished in 2018 after the introduction of Art. 35a CRA Regulation). Under Dutch law, issuers and investors could base claims for damages on provisions of general private law (section 5.4.2).

26 Section 3.5.3.1. *Cf. in respect of the civil liability regime under Art. 35a CRA Regulation,* Heuser 2019, pp. 90 and 93, Wimmer 2017, p. 93, Schantz 2015, p. 356, Steinrötter 2015, p. 111, Dutta 2014, p. 40, Dutta 2013, pp. 1731-1732 and Gietzelt & Ungerer 2013, pp. 339-340. *Contra* Lehmann 2016a, pp. 81-82, who argued the scope of the liability regime is unclear, and

rating agencies to be established and registered in the EU and, thereby, to become subject to the regulatory regime of the CRA Regulation,[27] the US nature of the credit rating industry makes it difficult to create an effective right of redress at the EU level.[28] The regulation of the credit rating agency industry should therefore be arranged at a global level rather than at a European level.

6.3.1.2 Narrow scope of application and stringent conditions

Article 35a CRA Regulation has a narrow scope of application and sets stringent conditions for civil liability – from the perspective of issuers and, in particular, investors. Moreover, these stringent conditions are combined with a heavy burden of proof resting upon issuers and investors. Article 35a CRA Regulation, for instance, involves an increased threshold for civil liability by requiring a credit rating agency to have acted intentionally or with gross negligence.[29] Another example is that although Article 35a (2) CRA Regulation allows courts to take the difficult position of issuers and investors into account, issuers and investors still face a heavy evidentiary task to prove the occurrence of an infringement and the required degree of culpability.[30] Furthermore, the investor-specific requirement of 'reasonable reliance' illustrates both the (potentially) narrow scope of and the stringent conditions set by Article 35a CRA Regulation itself.[31] Article 35a (1) CRA Regulation explicitly stipulates '[a]n investor may claim damages under this Article where it establishes that it has reasonably relied, in accordance with Article 5a(1) or otherwise with due care, on a credit rating for a decision to invest into, hold onto or divest from a financial instrument covered by that credit rating'. This requirement restricts the application of Article 35a (1) CRA Regulation in two important respects.

First, a strictly grammatical interpretation of the condition of reasonable reliance restricts the scope of application of Article 35a CRA Regulation. The wording of the condition entails that the right of redress would then only be available to investors who invested in, held onto or divested from *financial instruments* by relying on *financial instrument ratings*. A strictly grammatical interpretation excludes investors who provide loans on the basis of a credit

Gass 2014, pp. 52-53. *See for the debate and arguments in favour of a broad scope of application of Art. 35a CRA Regulation* Wimmer 2017, pp. 87-89.

27 *See* Dutta 2014, p. 34 and Dutta 2013, p. 1732. *Also* Baumgartner 2015, p. 511.

28 *See* Dumont du Voitel 2018, pp. 234-235.

29 *Cf. e.g.* Heuser 2019, p. 270, Dumont du Voitel 2018, pp. 194 and 236-237 and Wimmer 2017, p. 405.

30 *Cf. e.g.* Heuser 2019, p. 268, Picciau 2018b, p. 387, Wimmer 2017, p. 405 and Berger & Ryborz 2014, p. 2243.

31 *Also* section 5.3.1.3 (c). *E.g.* Dumont du Voitel 2018, p. 236 and Picciau 2018b, p. 390.

rating and investors who relied on issuer ratings.[32] This grammatical, restrictive application has become common practice in the German lower courts. The German lower courts explained Article 35a CRA Regulation as applying to financial instrument ratings, and not to issuer ratings.[33] The Higher Regional Court of Düsseldorf even considered this matter an *acte claire*, so that it did not need to refer preliminary questions to the CJEU.[34] One can debate whether the German courts are right to apply Article 35a CRA Regulation in such a restrictive manner. However, it is clear that the wording of the investor-specific requirement under Article 35a (1) CRA Regulation does not excel in clarity.

Second, the investor-specific requirement places the burden of proof of 'reasonable reliance' upon investors. Article 35a CRA Regulation hereby imposes a heavy burden upon investors, since reasons for investment decisions may be difficult or impossible to prove in hindsight. As explained in section 5.3.1.3 (c) (ii), this dissertation assumed that the requirement of 'reasonable reliance' must be interpreted in such a way that Member States are allowed to facilitate investors in proving, at least, reliance.[35] At the same time, the full effect of EU law or the principle of effectiveness does not oblige Member States to relax the requirement of reasonable reliance, for the exact reason that Article 35a CRA Regulation itself imposes this requirement. Hence, Article 35a CRA Regulation itself limits the protection of investors; many claims may often be rejected due to a lack of evidence of reasonable reliance.[36]

Hence, a first reason why the added value of Article 35a CRA Regulation is limited is because of its narrow scope of application and its stringent conditions for civil liability. The fact that Article 35a CRA Regulation imposes stringent conditions is justified by the complex nature of credit rating activities. However, as the next section explains, the stringent conditions set at the EU level can be interpreted and applied even more restrictively under the applicable national law. The vertical interaction between EU law and national law then further marginalises the effects of Article 35a CRA Regulation.

32 Although Deipenbrock does not consider the latter scenario as a very likely liability scenario under Art. 35a CRA Regulation (Deipenbrock 2018, p. 574).

33 *See* section 3.5.3.3 (b). Amtsgericht Neuss 28 December 2016, 80 C 3954/15, ECLI:DE:AGNE:2016:1228.80C3954.15.00, *BeckRS* 2016, 130332, Landgericht Düsseldorf 17 March 2017, 10 O 181/15, ECLI:DE:LGD:2017:0317.10O181.15.0A and Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321.

34 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 36.

35 Art. 35a (5) CRA Regulation 'does not exclude further civil liability claims in accordance with national law.' Therefore, this study did not see objections for national courts to adopt a claimant-friendly application of the requirement of 'reliance', as in the Dutch case of *World Online*, Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), paras. 4.11.1-4.11.2. *Contra* Heuser 2019, pp. 182-183.

36 *Cf. on the requirement of reliance* Wimmer 2017, p. 432.

6.3.1.3 Structure

The added value of Article 35a CRA Regulation is limited further by its own structure. This study concludes that in order to create an adequate right of redress for issuers and investors, it is not sufficient to create a framework right of redress at the EU level only. Because Article 35a (4) CRA Regulation combines EU and national law within one right of redress, the added value of Article 35a CRA Regulation eventually depends on national interpretations and applications and on any limits to the discretion of the Member States in this regard. This structure, however, underestimates the importance of the general principles underlying national legal systems and the general national approach of Member States to credit rating agency liability (under (a)) and overestimates the extent to which the 'discretion'[37] of Member States can be limited at the EU level (under (b)).

(a) Underestimating effects general national approach

The structure employed by Article 35a CRA Regulation underestimates the importance of the general principles underlying national legal systems and the general national approach of Member States to credit rating agency liability. At the national level, this general national approach determines whether certain national legal bases for civil liability are available to issuers and investors, and also influences the way in which national conditions for civil liability are interpreted and applied. Article 35a CRA Regulation only makes a difference in respect of the former matter: the provision stipulates that an EU legal basis for civil liability is available. In contrast, Article 35a (4) CRA Regulation leaves the interpretation and application of most conditions for civil liability to the Member States. Consequently, the general principles underlying national legal systems and the general national approach of Member States to credit rating agency liability colour the interpretation and application of the conditions for civil liability set by Article 35a CRA Regulation in a similar manner as national conditions for credit rating agency liability. From this perspective, the introduction of a framework provision at the EU level, hence, does not change the underlying domestic national approaches. Consequently, Article 35a CRA Regulation only constitutes effects if the applicable national law does not oppose credit rating agency liability as a matter of principle.

This statement can be substantiated by means of the example of English law. English law provides an example of a legal system that approaches the compensation of pure economic loss reluctantly as a matter of principle. It

37 The term 'discretion' is used to address the relative freedom of Member States in the interpretation and application of Art. 35a CRA Regulation. Notwithstanding this discretion, this dissertation assumed that Art. 35a CRA Regulation has horizontal direct effect. Section 2.5.4.2 (b) (ii).

also approaches the civil liability of credit rating agency reluctantly.[38] Especially in the absence of a contractual relationship, there are limited legal bases available to issuers and, in particular, investors to hold a credit rating agency liable under English law. The influence of this reluctant approach, however, goes further. It also influences the conditions of the tort of negligence *and*, through the UK Implementing Regulations, the conditions of Article 35a CRA Regulation. Indeed, if a national legal system opposes credit rating agency liability as a matter of principle, it is hard to see how national courts would relax, for instance, the requirement of causation in favour of issuers and investors. As another example, one can look at the interconnectedness between the scope of the duty of care and the recoverable loss in the English tort of negligence. If a credit rating agency owes a duty of care to investors at all, this duty of care only involves a duty of care to provide adequate information. As a consequence, a credit rating agency is not responsible for the investment decision made, but for mispricing loss or missed interests or yields.[39] This approach is transposed to the interpretation and application of Article 35a CRA Regulation at the EU level under Article 14 (b) UK Implementing Regulations, so that investors are only entitled to mispricing loss and missed interests when English law applies to a claim under Article 35a CRA Regulation. Hence, the general principles underlying national legal systems and the general national approach of Member States to credit rating agency liability eventually determine the effects of Article 35a CRA Regulation.

Due to the continuing importance of the general principles underlying national legal systems and the general national approach of Member States to credit rating agency liability, the sole act of creating a framework right of redress at the EU level is, hence, not necessarily sufficient to create an adequate right of redress at the EU level. For the structure of Article 35a CRA Regulation to work, national courts must be favourably disposed towards the civil liability of credit rating agencies, or EU law must have the tools to severely restrict the discretion of Member States (under (b)).

(b) Overestimating restrictions to national discretion[40] at the EU level

Due to the continuing importance of national legal systems in the interpretation and application of Article 35a CRA Regulation, the added value of Article 35a CRA Regulation depends on the extent to which EU law can restrict the discretion of Member States in this respect. The European possibilities to limit national discretion can be derived from the general European principles on

38 Section 5.7.2.3.

39 Section 5.7.3.3 (a), based on *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191 and *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599.

40 The term 'discretion' is used to address the relative freedom of Member States in the interpretation and application of Art. 35a CRA Regulation, but it must not be confused with the 'discretion' that bars the direct effect of provisions of EU law (section 2.3.2.2).

the enforcement of EU rights and obligations: in the absence of EU law on the matter of enforcement, the enforcement of EU rights belongs to the 'national procedural autonomy' of the Member States, which is limited by (in short) the principles of equivalence and effectiveness.[41] These main principles apply in a similar manner to Article 35a CRA Regulation: the national discretion under Article 35a (4) CRA Regulation is limited by the wording of Article 35a CRA Regulation and the infringements themselves, and by the principles of equivalence and effectiveness. Article 35a (4) CRA Regulation, hence, does not provide Member States with a *carte blanche* to interpret and apply the terms of Article 35a CRA Regulation.[42] However, as this section will demonstrate, both the wording of Article 35a CRA Regulation (under (i)) and the principles of equivalence and effectiveness (under (ii)) hardly restrict the discretion of Member States in respect of Article 35a CRA Regulation.

(i) – Marginal restrictions wording Article 35a

The wording of Article 35a CRA Regulation hardly restricts Member States' discretion in the interpretation and application of the relevant terms and subjects. On the contrary, in comparison with 'normal' regulations, Article 35a (4) CRA Regulation expanded the discretion of the Member States. Only at two points does Article 35a CRA Regulation provide limitations: Annex III CRA Regulation defines the infringements for which a credit rating agency can incur liability under Article 35a CRA Regulation and Article 35a (3) CRA Regulation completely prohibits complete exclusions of civil liability.

The remarks made in the remains of this section deviate slightly from the observation that Article 35a CRA Regulation has limited added value in practice. Yet, it was considered important to explain in more detail one of the examples in which the wording of Article 35a CRA Regulation restricts Member State discretion: the relevant circle of organs and persons who can commit infringements for which a credit rating agency is liable. This dissertation concluded that the wording of Annex III CRA Regulation limits the discretion of Member States in respect of the relevant circle of organs and persons who can commit infringements for which a credit rating agency can be liable.[43] Questions concerning the attribution of conduct and state of mind, therefore, do not fall within the discretion of Member States. Some infringements suggest misbehaviour at the management level,[44] but other infringements suggest misbehaviour at the level of rating committees and analysts.[45] Either way, this has become a matter of EU law and not a matter of national law.

41 Section 2.4.
42 Section 2.5.5.
43 Section 5.3.1.1 (b).
44 *E.g.* Infringement I.27.
45 *E.g.* Infringements I.46 and I.46a.

Consequently, national legislatures and courts must take account of the wording of the infringements to assess at what level it could have been committed. In this respect, the UK Implementing Regulations are not compatible with the CRA Regulation. The wording of Article 3 and 4 (2) UK Implementing Regulations strongly suggest far-reaching restrictions to the circle of organs and persons that can commit the infringements listed in Annex III CRA Regulation. They restrict intentional and grossly negligent conduct of the credit rating agency to intentional and grossly negligent conduct of senior management alone. As a result, they restrict the scope of application of Article 35a CRA Regulation, as in fact only the senior management can commit infringements actionable under the English interpretation of Article 35a CRA Regulation. This restrictive interpretation and application does not seem compatible with the wording of Article 35a CRA Regulation combined with the wording of the infringements. Hence, this is an example of a situation in which the wording of Article 35a CRA Regulation and Annex III CRA Regulation limit the discretion of Member States and in which national legislatures and courts must take account of guidance set at the Union level.

(ii) – Marginal restrictions principles of effectiveness and equivalence

The principles of equivalence and effectiveness hardly restrict the national autonomy of Member States in respect of the interpretation and application of Article 35a CRA Regulation. This section concentrates only on the principle of effectiveness, which requires Member States to ensure that national law does not render the enforcement of rights conferred by EU law impossible in practice or excessively difficult.[46] The CJEU used this principle, for instance, to determine the loss for which a victim of the violation of competition law rules could claim compensation[47] and to strike out a national requirement of causation, which formed a categorical bar to the enforcement of rights established by EU law that applied regardless of the particular circumstances of the case.[48] In the context of Article 35a CRA Regulation, the principle of effectiveness, hence, requires national interpretations and applications not to create categorical bars that block claims for compensation regardless of the particular circumstances of the case.

A national interpretation or application of Article 35a CRA Regulation will not easily meet the threshold of a categorical bar. Restrictive national inter-

---

46 *E.g.* ECJ 7 January 2004, C-201/02, ECLI:EU:C:2004:12 (*Wells*), para 67, ECJ 9 November 1983, C-199/82, ECLI:EU:C:1983:318 (*Amministrazione delle finanze dello Stato v San Giorgio*), para 14 and ECJ 16 December 1976, C-33/76, ECLI:EU:C:1976:188 (*Rewe v Landwirtschaftskammer für das Saarland*), para 5. *In detail* section 2.4.3 and 2.5.5.

47 ECJ 13 July 2006, C-295/04, ECLI:EU:C:2006:461 (*Manfredi)*, para 100. *See* Vandendriessche 2015, no. 94. *As repeated in* CJEU 6 June 2013, C-536/11, ECLI:EU:C:2013:366 (*Donau Chemie and Others*), para 24.

48 CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*), para 33. *Cf. also* CJEU 6 June 2013, C-536/11, ECLI:EU:C:2013:366 (*Donau Chemie and Others*), para 49.

pretations and applications of Article 35a CRA Regulation are, therefore, often admissible. Again, one can use the definitions under the UK Implementing Regulations as examples. Even though the report of English law demonstrated that English law provides for a narrow interpretation and application of Article 35a CRA Regulation, it is unlikely that the CJEU can step in on the basis of the principles of effectiveness. For example, the definition of 'gross negligence' as 'reckless' and 'without caring whether an infringement occurs' under Article 4 UK Implementing Regulations is extremely restrictive. Nevertheless, this definition does not form a categorical bar to the application of Article 35a CRA Regulation, which applies regardless of the particular circumstances of the case.[49] One can argue it is simply a restrictive interpretation, which is allowed under Article 35a CRA Regulation. Indeed, the Recitals of the CRA III Regulation itself explained that the nature of credit rating activities justify an increased threshold for civil liability.[50] Moreover, one can argue that the English definition of gross negligence does not bar claims under Article 35a CRA Regulation irrespective of the particular circumstances of the case, it will just be met only in exceptional circumstances.

As another example falling in the grey area between (very) restrictive interpretations and categorical bars, Article 6 UK Implementing Regulations equates the test on investors' 'reasonable reliance' with the test on whether a person may reasonably rely on a statement and is owed a duty of care under the tort of negligence.[51] This way, the UK Implementing Regulations indirectly reintroduce the requirement of the existence of a duty of care under the tort of negligence in the application of Article 35a CRA Regulation. In order to assess whether the reliance of the investor was reasonable, it must be investigated under English law whether the credit rating agency voluntarily assumed responsibility towards the investor as in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[52] or whether the credit rating agency owed a duty towards the investor from the perspectives employed in *Caparo Industries Plc v Dickman.*[53] But, as discussed in section 5.7.2.3 (b) (ii), in the absence of any special relationship, an investor faces a challenging task to establish that a credit rating agency owed a duty of care to the investor or voluntarily assumed responsibility towards the investor. This interpretation of reasonable reliance under English law thus causes the threshold for liability under Article 35a CRA Regulation to be very high. One can again question whether Article 6 UK Implementing Regulations renders the enforcement of the right to damages conferred by Article 35a CRA Regulation 'virtually impossible or excessively difficult'. This

49 *As existed under* CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*), para 33. *See also* CJEU 6 June 2013, C-536/11, ECLI:EU:C:2013:366 (*Donau Chemie and Others*), para 49.

50 *Cf.* Recital 33 CRA III Regulation.

51 Section 5.7.3.2 (b).

52 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465, [1963] 3 W.L.R. 101.

53 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, [1990] 2 W.L.R. 358.

restrictive interpretation and application of Article 35a CRA Regulation comes close to a categorical bar, although it still cannot be said to apply irrespective of the circumstances of the particular case. Indeed, in very specific situations, the requirement of reasonable reliance under English law can be fulfilled.

Overall, the wording of Article 35a CRA Regulation and the principle of effectiveness hardly restrict the discretion of the Member States. The structure of Article 35a CRA Regulation itself empowered Member States to interpret and apply Article 35a CRA Regulation narrowly and, thereby, empowered Member States to marginalise its effects.

6.3.1.4 Unintended effect: decreased issuer and investor protection under French law

As one of the final remarks regarding the added value of Article 35a CRA Regulation, this section points at a possibly unintended effect of the introduction of Article 35a CRA Regulation. If one considers that the Union legislature introduced Article 35a CRA Regulation to increase the minimum level of protection of issuers and investors by ensuring they are entitled to a right of redress against credit rating agencies, and Article 35a (5) CRA Regulation explicitly allows for further liability claims under the national laws of the Member States,[54] it is remarkable to realise that the issuer and investor protection under French law decreased subsequent to the introduction of Article 35a CRA Regulation.

The French legislature abolished the special civil liability rules for credit rating agencies under Article L. 544-5 and L. 544-6 Code monétaire et financier in response to the introduction of Article 35a CRA Regulation.[55] The aim of the French legislature was to converge the French rules on credit rating agency liability with the European ones: '*L'objectif de cet amendment est de faire converger le régime français de responsabilité civile des agences de notation de crédit vers le régime européen de droit commun*.'[56] It considered that the French regime under Article L. 544-5 Code monétaire et financier subjected credit rating agencies to stricter rules, such as the possibility for issuers to hold a credit rating agency liable in tort in the absence of a rating contract and the absence of the requirement to prove causation between an infringement and an affected credit rating. Moreover, the French legislature did not conceal another motive underlying the abolition of the special rules on liability: '*La France alignera en revanche sa législation sur le droit commun de l'Union européenne, rendant l'activité des agences de notation de crédit sur son territoire lisible et stable*.'[57] The abolition is, thus, at least partly driven by the wish to keep the activities of credit rating agencies on French territory comprehensible and stable.

54 *In respect of investors*, SEC(2011) 1354 final, p. 23.
55 Assemblée Nationale 14 January 2018, no. 907, Art. 32.
56 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 1.
57 Assemblée Nationale 14 January 2018, no. 907, Art. 32, p. 2.

Hence, whereas the Union legislature wished to increase issuer and investor protection, the introduction of Article 35a CRA Regulation in fact led to a decrease in protection under French law. One must be aware of the possibility that Member States align their legal systems to Article 35a CRA Regulation for the purpose of regulatory competition. The establishment of a right of redress, which does not provide a clear minimum level of protection at the EU level, hence, does not necessarily increase protection within Member States.

6.3.2 Private International Law rules leave uncertainty

6.3.2.1 Focus on three main issues

Another observation that can be made from the perspective of the normative framework, is that the application of Private International Law rules creates uncertainty in disputes over credit rating agency liability. Parties involved in litigation on credit rating agency liability based on Article 35a CRA Regulation cannot always determine and have confidence in which Member State proceedings can take place and what law applies to claims for civil liability. The foreseeable and predictable application of rules of Private International Law, however, is of crucial importance to determine the competent court and to determine the law applicable to claims based on Article 35a CRA Regulation against credit rating agencies established[58] and registered in the EU. This is especially the case because disputes on credit rating agency liability may well be of a cross-border nature. From the perspective of legal certainty, the most important issues concern the validity of exclusive jurisdiction clauses in favour of third country courts (section 6.3.2.2) and the location of the *Erfolgsort* of financial loss (section 6.3.2.3). Furthermore, somewhat outside the perspective of legal certainty, this section addresses complications in relation to claims for civil liability brought by issuers for reputational loss (section 6.3.2.4).

6.3.2.2 Exclusive jurisdiction clauses in favour of third country courts

In the context of the credit rating industry, the importance of jurisdiction clauses that confer exclusive jurisdiction upon the courts of third countries cannot be overestimated. Credit rating agencies often include jurisdiction clauses in favour of the courts of New York in general terms and conditions

58 The CRA Regulation uses the term 'established' to indicate that a (separate) legal entity needs to be established at European territory. This use of the term 'established' must be distinguished from the meaning of the term 'establishment' in the context of Article 7 (5) Brussels I Regulation (recast), which does not require a separate legal entity to be established.

of their websites,[59] and might well do so in agreements for solicited credit ratings.

The validity of exclusive jurisdiction clauses in favour of third country, i.e. non-European, courts determines whether Member State courts must deny jurisdiction in favour of those courts. However, the way in which Member State courts must assess the validity of such jurisdiction clauses in cases involving credit rating agencies established and registered in the EU is clouded in uncertainty.[60] If the Hague Choice of Court Convention applies, Member State courts must respect the exclusive jurisdiction clause for third country courts and cannot assume jurisdiction.[61] Currently, the importance of the Hague Choice of Court Convention is rather limited in the context of credit rating agencies. Indeed, Moody's, Standard & Poor's and Fitch often employ jurisdiction clauses in favour of the US courts, but the US has not ratified and approved the Hague Choice of Court Convention yet.[62] If the Hague Choice of Court Convention does not apply, it is uncertain how Member State courts must determine the validity of jurisdiction clauses in favour of third country courts. National courts can apply the other provisions of the Brussels I Regulation (recast) or apply their own national Private International Law rules. The choice between these two options matters. The application of the remaining provisions of the Brussels I Regulation (recast) sidesteps party autonomy, while national rules of Private International Law might respect party autonomy.[63]

---

59 *See e.g.* the Terms of Use of Standard & Poor's' website, available at www.standardandpoors.com/en_US/web/guest/regulatory/termsofuse, which state that: 'The parties agree that the State and Federal courts of New York shall be the exclusive forums for any dispute arising out of these Terms of Use and the parties hereby consent to the personal jurisdiction of such courts', the Terms of Use of Moody's' website, available at www.moodys.com/termsofuseinfo.aspx (also involving an arbitration clause) and the Terms of Use of Fitch's website, available at www.thefitchgroup.com/site/termsofuse. The Terms of Use of DBRS submit jurisdiction to the courts of Ontario (Canada), available at www.dbrs.com/terms-and-conditions/. All websites were last accessed at 31 August 2019.

60 *In detail* section 4.3.3.3.

61 Art. 6 Hague Choice of Court Convention.

62 *See* www.hcch.net/en/instruments/conventions/status-table/?cid=98, last accessed at 31 August 2019.

63 For instance, under Dutch, English, French and German law, jurisdiction clauses are likely to be upheld. For the Dutch rules on jurisdiction clauses, see Art. 8 and 9 Wetboek van Burgerlijke Rechtsvordering (*see also* Strikwerda & Schaafsma 2019, no. 60 Kuypers 2008, pp. 232 ff.). Under English law, jurisdiction clauses will usually be upheld 'in the absence of strong reasons for departing from it' (*Donohue v Armco* [2001] UKHL 64, [2002] 1 All ER 749, [2002] 1 All ER (Comm) 97, [2002] 1 Lloyd's Rep 425, para 24 by Lord Bingham). Under French law, a jurisdiction clause can be upheld as long as it has been made in the context of an international dispute ('un litige internationale') and as long as it is not contrary to the 'compétence territoriale impérative' of the French courts (Cour du Cassation (Chambre Civile 1) 17 December 1985, 84-16338, Bulletin 1985, I, no. 354, p. 318 (*CSEE v SORELEC*) and Audit & d'Avout 2013, no. 454, Loussouarn, Bourel & De Vareilles-Sommières, no. 714 and *see also* Kuypers 2008, p. 238). For the German rules on jurisdiction clauses, see § 38-39 Zivilprozessordnung (ZPO). Under § 38 ZPO, a jurisdiction clause will be allowed

As a result of this uncertainty, it is difficult for parties, and even for national courts, to determine and have confidence as to whether an exclusive jurisdiction clause in favour of third country courts will and should be upheld.

If an exclusive jurisdiction clause in favour of the courts of a third country is upheld, the opportunities for issuers and investors to start proceedings against credit rating agencies in Member State courts are limited.[64] The credit rating industry is indeed an international and mainly US-based industry, so that issuers and investors must then often start proceedings in the US. Although the Private International Law questions of jurisdiction and applicable law are separate, the fact that the competent court is a non-Member State has consequences for the way in which the applicable law is to be determined. Courts of third countries determine the applicable law in accordance with their own *lex fori*, and do not apply the Rome II Regulation with its limitations on choice of law. This interplay of rules on jurisdiction and applicable law entails that certain expectations of the European Commission expressed in the Impact Assessment in relation to investor claims against credit rating agencies deserve qualification. The European Commission stated that:

> 'An efficient right of redress under this option (and also option 2) presupposes that the applicable law under private international law rules (Rome II Regulation) would be the law of a Member State. Under Art. 4 of Rome II the applicable law is the law of the country where the damage occurs, which could be in case of financial instrument purchases either the place of purchase, the place where the securities are deposited or where the account is located. Following these criteria purchases by EU investors on EU markets will in most cases lead to the application of the law of a Member State which will ensure an efficient right of redress under this option.'[65]

The European Commission assumed, hence, that the Rome II Regulation applies to disputes over credit rating agency liability. The implicit assumption underlying this statement is that a Member State court assumed jurisdiction in the first place. However, the interplay between jurisdiction and applicable law will not always entail that a Member State court is competent and applies the Rome II Regulation. Especially if a valid jurisdiction clause exists in favour

if the parties have complied with several conditions. The conditions vary depending on the specific circumstances of the situation (*see* Kuypers 2008, p. 237).

64 If, contrary to an exclusive jurisdiction clause, a claimant starts legal proceedings before a court of another Member State, the defendant must contest the jurisdiction of that court upon its appearance. Otherwise, the appearance is considered a tacit prorogation of jurisdiction so that the court seised is competent under Art. 26 (1) Brussels I Regulation (recast). Art. 26 (1) applies irrespective of whether an exclusive jurisdiction clause conferred jurisdiction upon the courts of a Member State or a third country. *E.g. in respect of Art. 24 (1) Brussels I Regulation*, CJEU 17 March 2016, C-175/15, ECLI:EU:C:2016:176 *(Taser International*), paras. 23-25.

65 SEC(2011) 1354 final, p. 47, fn. 119.

of third country courts, those courts will apply their own system of determining applicable law instead of the rules of the Rome II Regulation.

6.3.2.3 Erfolgsort of financial loss

The *Erfolgsort* or 'place where the damage occurred' is the relevant connector to determine special jurisdiction under Article 7 (2) Brussels I Regulation (recast) and, if a court of a Member State has assumed jurisdiction, the applicable national law under Article 4 (1) Rome II Regulation, respectively. These provisions require national courts to locate financial loss suffered by issuers and investors. The location of financial loss is however extremely complex, if not impossible, and consequently forms another main source of legal uncertainty for parties involved in litigation on credit rating agency liability.[66]

National courts already posed multiple preliminary questions to the CJEU in relation to this topic in cases concerning prospectus liability and professional liability. The latest decisions of the CJEU in *Universal Music* and *Helga Löber v Barclays Bank* did not provide definitive guidance on the relevant circumstances to determine the *Erfolgsort* of financial loss in the context of jurisdiction. One can only derive the following guidelines from the decisions:

- Special jurisdiction, i.e. not *forum rei*, must be justified by the objectives of the Brussels I Regulation (recast), so that national courts can only assume jurisdiction based on Article 7 Brussels I Regulation (recast) if there is 'a close connection between the court and the action or in order to facilitate the sound administration of justice'.[67] The close connection must ensure legal certainty and foreseeability, so that the defendant is not sued in a court 'he could not reasonably have foreseen'.[68]
- A combination of specific circumstances must justify the assumption of special jurisdiction, so that: (1) the locations of bank accounts themselves, whether cash or securities accounts, do not justify jurisdiction in the absence of other connecting factors; and (2) claimants' domiciles themselves do not justify jurisdiction in the absence of other connecting factors.

Chapter 4 qualified this approach as the 'helicopter view', because it seems as if the CJEU is taking a step backwards and choosing the 'justified' *Erfolgsort* in a specific case.[69] The way in which national courts should apply the rules following on from these decisions is, however, not straightforward in the context of credit rating agency liability.

66 *In detail*, section 4.3.5.3 and 4.4.3.1. *In the context of credit rating agencies* Deipenbrock 2018, pp. 570-571. Deipenbrock concluded that the outcome of the rules is not predictable.
67 Recital 16 Brussels I Regulation (recast).
68 Recital 16 Brussels I Regulation (recast).
69 Section 4.3.5.3 (b).

(a) Claims brought by issuers

An analogous application of the 'helicopter view' to claims for credit rating agency liability brought by issuers renders a combination of the following circumstances relevant to determine the place where the increased funding costs of the issuer occurred:

- the place where the issuer is established, especially because the credit rating was assigned to that issuer or one of its financial instruments;
- the place of the cash account in which the loss materialised;
- the place of the market(s) on which the financial instruments were sold; and
- if applicable, the place where the credit rating agency and the issuer entered into a contract for a solicited credit rating or the place where the obligation to pay increased funding costs began to rest unequivocally upon the issuer, namely the moment the issuer entered into a contractual relationship with an investor that stipulates certain interest rates and clauses on the interest rates.

If these circumstances are located in the same Member State, the helicopter view constitutes a foreseeable and predictable solution to both issuers and credit rating agencies. The *Erfolgsort* of the increased funding costs will then often be located in the place, or, more in general, the country of establishment of the issuer.[70] This outcome is foreseeable to credit rating agencies, as they can choose to which issuers or financial instrument they assign credit ratings. In relation to applicable law, this solution strikes a fair balance between the interests of the credit rating agency and the issuer. This especially applies in the context of unsolicited credit ratings, in which the issuer did not request to be rated by the credit rating agency in the first place.

If the circumstances mentioned above are not located in the same Member State, the helicopter view does not result in a foreseeable and predictable solution for issuers and credit rating agencies. In situations of credit rating agency liability, it is, however, easily imaginable how these relevant circumstances could be spread over different countries. One could imagine, for instance, an issuer established in the Netherlands concluding a rating contract with Moody's France in Paris for the assignment of a credit rating to financial instruments listed on the New York Stock Exchange. It appeared implicitly from *Universal Music* that the 'irreversibility' test should be applied in such situations,[71] but the CJEU did not apply the irreversibility test in *Helga Löber v Barclays Bank* (though Advocate General Bobek had proposed applying this

70 For instance, if Italy claims to have suffered financial loss due to an affected credit rating, it is hard to see how the place where the damage occurred could not be Italy.

71 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*), para 31. Van Bochove 2016, p. 459.

test).[72] One can therefore doubt whether the place in which the loss became irreversible is the decisive connecting factor. Moreover, one can question when and where loss caused by an infringement and an affected credit rating becomes irreversible. At the time and place when and where the rating contract was concluded? At the time and place when and where the rating committee approved a credit rating? At the time and place when and where the issuer was consulted prior to the publication of the credit rating? Or, at the time and place when and where the affected credit rating was published? As the international character of the credit rating industry causes the relevant circumstances of a concrete case to spread over multiple countries easily, application of the helicopter view in such cases does not lead to foreseeable and predictable outcomes for credit rating agencies and issuers. In litigation on credit rating agency liability based on Article 35a CRA Regulation, issuers and credit rating agencies cannot always determine and have confidence in which Member State proceedings can take place under Article 7 (2) Brussels I Regulation (recast) and what law applies to claims for civil liability based on Article 35a CRA Regulation.

(b) Claims brought by investors

An analogous application of the 'helicopter view' to claims for credit rating agency liability brought by investors renders a combination of the following circumstances relevant to determine the place where the financial loss occurred:

- the domicile or place of establishment of the investor;
- the location(s) of the bank account(s) held by the investor;
- the primary or secondary market on which the financial instruments were purchased (or sold);
- the place where any relevant contracts were concluded as a consequence of which the loss allegedly became irreversible (i.e. the contract by which the relevant financial instruments were purchased or sold); and
- the place where the credit rating agency and the investor entered into a contractual relationship (if applicable).

If these circumstances are located in the same Member State, the *Erfolgsort* of the financial loss will often be located in the place, or, more in general, the country of domicile or establishment of the investor. Although this is a foreseeable and predictable place for investors, it is not necessarily so for credit rating agencies. In *Helga Löber v Barclays Bank*, the CJEU justified the jurisdiction of the court of the claimant's (the investor's) domicile (the Austrian court) by the fact that the issuer (the defendant) notified the prospectus to the Austrian supervisory authorities and that the issuer, therefore, could have foreseen the

72 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*) and Opinion A-G M. Bobek, ECLI:EU:C:2018:310, paras. 70 and 72, with CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

possibility of legal proceedings before the Austrian courts.[73] In disputes over credit rating agency liability, however, it is difficult to find such a justification as there is often no relationship between the credit rating agency and the investor or any other connection with the country in which the investor is domiciled. One could argue that a connection with the European markets exists, because a credit rating agency established and registered itself in a Member State in order for its credit ratings to be allowed to be used for regulatory purposes by certain issuers.[74] Furthermore, one could argue that a credit rating agency could predict the possible locations of civil proceedings by assessing in which countries the prospectus of the financial instruments they rated are notified. These justifications, however, are not very convincing, and it remains to be seen whether such arguments cause Member State courts to assume jurisdiction.

If the relevant circumstances described above are not located in the same Member State, the helicopter view does not constitute a foreseeable and predictable solution to investors and credit rating agencies. In *Helga Löber v Barclays Bank*, the CJEU did not explain how the relevant circumstances interrelate and which relevant circumstance is to be deemed decisive. Especially in relation to institutional investors, the relevant circumstances can spread over multiple countries. In such situations, investors and credit rating agencies cannot always determine and have confidence in which Member State proceedings can take place under Article 7 (2) Brussels I Regulation (recast) and what law applies to claims for civil liability based on Article 35a CRA Regulation.

Leaving the perspective of legal certainty, the helicopter view can be criticised also from the perspective of efficiency, because it can lead to a 'dispersal' of the national laws applicable to the more or less same set of facts and claims.[75] The risk of dispersal of applicable laws is caused by the helicopter view's inclination towards locating the *Erfolgsort* in the domicile or place of establishment of the investor, since, especially in relation to retail investors, the relevant circumstances will often point towards the domicile of the investor. As loss caused by one single infringement of Annex III CRA Regulation can spread over the whole world, potential investor claimants can be domiciled or established in multiple countries. Consequently, credit rating agencies can be potentially sued in all Member States and claims based on Article 35a CRA Regulation can be governed by the laws of all Member States. This dispersal

73 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*), para 35.

74 Art. 4 (1) CRA Regulation. Pursuant to Art. 3 (1) (g) CRA Regulation, the term 'regulatory purposes' means 'the use of credit ratings for the specific purpose of complying with Union law, or with Union law as implemented by the national legislation of the Member States'.

75 In the context of economic loss, Lehmann criticised the connecting factor of the place where the damage occurred for such dispersal (the '*Mosaiktheorie*'). Lehmann 2011, p. 546. *See also e.g.* Lehmann 2018, p. 18 and Lehmann 2012, p. 400. This argument equally applies to jurisdiction.

of jurisdiction and applicable law causes inefficiency from the perspective of credit rating agencies.

6.3.2.4 Erfolgsort of reputational loss

In addition or as an alternative to financial loss, issuers can argue that an impacted credit rating caused reputational loss. Although it may often be complex to quantify reputational loss and such claims might not often occur in practice, this opportunity should not be ruled out in advance.[76] National courts may find locating reputational loss for the purpose of the *Erfolgsort* complicated. These complications become most clear in relation to determining the applicable national law under Article 4 (1) Rome II Regulation. As credit ratings are issued online and investors and suppliers can be domiciled all over the world, reputational loss suffered by issuers can spread over the world. For the purposes of Article 4 (1) Rome II Regulation, hence, the loss can occur all over the world as well. Consequently, the rather peculiar situation can occur in which a civil liability claim based on Article 35a CRA Regulation brought by an issuer is governed by different national laws depending on the Member States in which the reputational loss has been suffered,[77] creating a rather unclear and inconvenient situation for issuers and credit rating agencies. Moreover, one can wonder how the location of financial and reputational loss relate when both are claimed on the basis of Article 35a CRA Regulation.

6.3.3 Uncertainty relating to interpretation and application terms Article 35a

6.3.3.1 Sources of uncertainty

Chapter 5 revealed that issuers, investors and credit rating agencies cannot always determine and have confidence in the exact interpretation and application of the terms of Article 35a CRA Regulation under the four legal systems investigated.[78] This uncertainty is of a fundamental nature, and not merely the result of the fact that statutory rules cannot foresee each possible factual

76 Especially because Recital 32 CRA III Regulation indicates that both types of loss fall under the scope of Art. 35a CRA Regulation by stating that it is important to provide issuers with a right of redress as an impacted credit rating 'can impact negatively the reputation and funding costs of an issuer.'

77 *Cf.* Dicey, Morris & Collins 2014, no. 35-027.

78 *See for similar criticism on the clarity of Art. 35a CRA Regulation* Baumgartner 2015, p. 563: *'ME ist es sehr erfreulich, dass der europäische Gesetzgeber die Haftung von Ratingagenturen ausdrücklich geregelt und damit einen wichtigen Beitrag zur Rechtssicherheit für die Geschädigten ebenso wie für die Ratingagenturen geleistet hat. Die dadurch bewirkte Rechtsklarheit wird aber durch die komplexe Struktur der EU-RatingVO (und damit auch des Art 35a leg cit) gemindert („Papiertiger“).'*

scenario that could occur. This study discovered uncertainties in the interpretation and application of Article 35a CRA Regulation stemming from three interacting sources: (1) the imprecise drafting and unclear status of the terms used by Article 35a CRA Regulation; (2) friction between the terms of Article 35a CRA Regulation and the system of the applicable national law;[79] and (3) uncertainty on the application of national law concepts in the context of credit rating agency liability – hence, this is uncertainty at the national level, which turns into uncertainty at the EU level. The following sections refer to several examples of uncertainty. It is important to note that these examples often originate from a combination of multiple sources, and that they can often be framed in multiple ways.

6.3.3.2 Imprecise drafting & unclear status terms

The first source of uncertainty is the sometimes imprecise drafting of Article 35a CRA Regulation[80] and the unclear status of the terms used by Article 35a CRA Regulation and its different language versions. Article 35a CRA Regulation provides no guidance as to how Member States should deal with its terms. Consequently, in concrete cases, national courts could question whether they should treat the terms as 'legal concepts' that must be applied strictly according to the definition under the applicable national law, and, if that is not the case, what legal relevance they should attach to the terms used. The uncertainty in this regard is sometimes aggravated by the different wordings used by different language versions of Article 35a CRA Regulation.

An example of an uncertain term is '*grove nalatigheid*' ('gross negligence') used in the Dutch version of the CRA Regulation.[81] The term '*grove nalatigheid*' does not provide sufficient guidance under Dutch law. This Dutch translation of gross negligence does not correspond to concepts commonly used in the Dutch private law system. Moreover, Dutch law has many terms and definitions relating to different degrees of culpability. One can, therefore, wonder how the term '*grove nalatigheid*' fits into the Dutch private law system, and what degree of culpability used in the Dutch private law system suits this term most. As a result, it is not possible to state with complete certainty how restrict-

79 *Cf.* Wimmer 2017, p. 409 and Baumgartner 2015, p. 565 (Baumgartner criticises the structure of Art. 35a as well, but is more positive in general: '*Die Regelung des Verhältnisses zwischen EU-RatingVO und nationalem Haftungsrecht ist mE grundsätzlich gelungen: Zu befürworten ist mE die kumulative Anwendung nationalen Haftungsrechts und vor allem die Klarstellung in Art 35a Abs 5 EU-RatingVO, die im Novellierungsvorschlag der Europäischen Kommission noch nicht enthalten war. Zwar könnte man aus Gründen der Rechtssicherheit und Rechtsvereinheitlichung, die mit EU-Verordnungen üblicherweise angestrebt wird, für eine insofern verdrängende Wirkung des Art 35a EU-RatingVO eintreten.*').

80 As concluded in section 2.5.4.2 (b) (ii), issuers and investors can invoke the right of redress under Art. 35a CRA Regulation directly before national courts. This section, however, does criticise the clarity of the provision.

81 Section 5.4.3.1.

ive a Dutch court would and should apply the concept of gross negligence under Article 35a CRA Regulation.

Another example of uncertainty caused by the terms used by Article 35a CRA Regulation lies in the remarkable difference between the different language versions in the terminology used to describe the 'remedy' available to issuers and investors. Whereas the English version refers to 'damages', the Dutch, French and German versions use broader notions as '*vorderingen wegens toegebrachte schade*', '*reparation*' and '*Ersatz*', respectively. The nature of disputes over credit rating agency entails that the relevant remedy will most often be damages, but these discrepancies raise broader questions on the status of the terms and the status of different versions of Article 35a CRA Regulation. One can question whether the Union legislature deliberately used different wordings and whether the different versions take note of the legal systems they are most associated with, or whether the differences are simply the result of imprecise drafting. Either way, as the structure of Article 35a CRA Regulation implies that Member States must treat the provision as a directly effective legal basis for civil liability which they must apply in a concrete case, the clarity of the wording of the provision is of the essence and uncertainty on the relevance of any discrepancies should not occur. In this respect, the Union legislature should have considered the status of the terms and the different language versions more carefully, so as to enable Member States to determine how they should approach the right of redress under Article 35a CRA Regulation.

Another example is the wording of the investor-specific requirement of reasonable reliance. This requirement causes uncertainty on the scope of application of the right of redress under Article 35a CRA Regulation. From the outset, it must be emphasised that the uncertainty is caused by the imprecise wording of this requirement[82] *and* by inevitable friction between the way in which Article 35a CRA Regulation frames this requirement and the applicable national law.[83] Although this dissertation argues that the Union legislature simply drafted the investor-specific requirement of reasonable reliance in an imprecise manner, a strictly grammatical interpretation restricts the scope of application of the right of redress severely. The right of redress would then only be available to investors who invested in, held onto or divested from *financial instruments* in reliance on *financial instrument ratings* only, thereby excluding investors who provide loans on the basis of a public credit rating and, more importantly, investors who relied on issuer ratings.[84] The German lower courts have already interpreted and applied Article 35a CRA Regulation in such a restrictive way, so that the scope of application of Article 35a CRA

82 Section 6.3.1.2 already.
83 Section 6.3.3.3.
84 Although Deipenbrock did not consider the latter scenario as a very likely liability scenario under Art. 35a CRA Regulation (Deipenbrock 2018, p. 574).

Regulation was limited to financial instrument ratings only under German law.[85] The German courts considered the scope of application an *acte claire*, so that they did not need to refer preliminary questions to the CJEU.[86] I do not agree with the Court of Appeal Düsseldorf that this issue can be considered an '*acte claire*'.[87] The right of redress created by the first sentence of Article 35a (1) CRA Regulation does not provide any restrictions, and one can doubt whether the Union legislature intended to restrict the scope of application of Article 35a CRA Regulation in this manner. In any case, the wording of the investor-specific requirement of Article 35a (1) CRA Regulation is highly unfortunate and causes uncertainty as regards the scope of application of the right of redress.

6.3.3.3 Friction

The second source of uncertainty is friction between the terms of Article 35a CRA Regulation and (the structure and system of) the applicable national law. The Union legislature inserted the reference to the applicable national law without considering the complexity of the task of interpretating and applying Article 35a CRA Regulation. The structure of the provision, however, does not account for the coherence of national legal systems, which was already considered in section 6.3.1.3 (a) in a slightly different manner. As the conditions and terms used under Article 35a CRA Regulation do not necessarily fit national legal systems, it is difficult to 'pour' the applicable national law into the mould provided by Article 35a CRA Regulation. The complexity of the task given to national courts can be compared with a baby shape sorter: the structure of Article 35a CRA Regulation sometimes requires a national court to press a square-shaped block of national law into a triangle-shaped hole created by Article 35a CRA Regulation.

The investor-specific requirement of reasonable reliance can serve again as an example. From the outset, it must be emphasised again that the uncertainty is caused by the imprecise wording of this requirement[88] *and* by inevitable friction between the requirement and its application under the applicable national law. This section concentrates on the latter aspect only. From a systematic point of view, as compared to the four legal systems investigated, the Union legislature framed the requirement of 'reasonable reliance'

---

85 *See* section 3.5.3.3 (b). Amtsgericht Neuss 28 December 2016, 80 C 3954/15, ECLI:DE:AGNE:2016:1228.80C3954.15.00, *BeckRS* 2016, 130332, Landgericht Düsseldorf 17 March 2017, 10 O 181/15, ECLI:DE:LGD:2017:0317.10O181.15.0A and Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321.

86 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 36.

87 Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321, para 36.

88 Section 6.3.1.2, section 6.3.3.2 and section 3.5.3.3 (b).

in an exceptional manner. It framed the requirement as part of the causal link between the infringement and the affected credit rating and the investor's loss, and did not distinguish the elements of whether the investor *relied* on a credit rating and of whether that reliance was *reasonable*.[89] In contrast, all legal systems investigated would approach the condition of reasonable reliance differently. French law might replace the requirement of reliance with the doctrine of loss of chance.[90] English law would consider the reasonableness of the reliance at the stage of the duty of care.[91] Under Dutch private law, the elements of reliance and the reasonableness of the reliance are distinguished. Reliance forms part of the causal link, which in principle is to be proven by the claimant. The 'reasonableness' of the reliance is not considered at the stage of the establishment of causation. When an investor's reliance is unreasonable, the credit rating agency involved is entitled to the defence of contributory negligence under Article 6:101 BW. The Dutch private law approach to 'reasonable' reliance hence differs from Article 35a CRA Regulation in two aspects: the burden of proof lies with the credit rating agency and a lack of reasonable reliance does not necessarily break the causal link between the credit rating agency's conduct and the loss suffered by the investor completely. German law would approach reasonable reliance in a similar manner to Dutch law.[92] Hence, at this point, a mismatch exists between Article 35a CRA Regulation and the four legal systems investigated, and no harmonisation has been achieved. National private law has its own structure, and is not so 'liquid' or flexible that national courts can pour it into the mould of EU law exactly.

However, the friction relating to the application of the requirement of reasonable reliance is only one example. One can see the same sort of mismatch in relation to the way in which Member States determine the admissibility of limitation clauses under Article 35a (3) CRA Regulation.[93] Article 35a (3) CRA Regulation stipulates that credit rating agencies may only limit their civil liability in advance 'where that limitation is: (a) reasonable and proportionate; and (b) allowed by the applicable national law in accordance with paragraph 4'. Again, one can see that national private law has its own structure, and is not so 'liquid' or flexible that national courts can pour it into the mould of EU law exactly. The national tests for the admissibility of limitation clauses are far more complex than whether a limitation is reasonable and proportionate, and involve many more different aspects than the substantive test of the limitation alone.[94] Furthermore, albeit to a more limited extent, the report

89 *See* section 5.3.1.3 (c) (i).
90 Section 5.5.3.2 (b).
91 Section 5.7.3.2 (b).
92 Section 5.6.3.3 (b).
93 As described by Wimmer in the context of Art. 35a CRA Regulation and German law (Wimmer 2017, p. 409).
94 Sections 5.4.5, 5.5.5, 5.6.5 and 5.7.5.

of German law demonstrated how Article 35a CRA Regulation does not easily fit the concepts of *haftungsbegründende* and *haftungsausfüllende Kausalität*.[95] And, the report of English law demonstrated that the rules flowing from the *SAAMCO* case do not necessarily fit well within the structure of Article 35a CRA Regulation.[96] Overall, this friction between the conditions and terms of Article 35a CRA Regulation and the structure and system of national private law causes complexity in the application of Article 35a CRA Regulation in concrete cases.

6.3.3.4 Uncertain application of national legal concepts

The third source of uncertainty in respect of the interpretation and application of Article 35a CRA Regulation lies in inherent uncertainty on the application of some concepts of national law to disputes over credit rating agency liability. One could say that uncertainty at the national level turns into uncertainty at the EU level. This uncertainty relates to investor claims rather than to issuer claims. The application of national private law concepts to investor claims against credit rating agencies is often less straightforward and legal precedent is often absent within the legal systems investigated.

One example concerns whether national courts will facilitate investors with regard to the requirement of reasonable reliance under Dutch and German law. In both legal systems, national courts developed mechanisms to facilitate investors in proving causation in disputes over prospectus liability. In the absence of decisions on credit rating agency liability, one can argue in favour and against the application of these concepts in the context of credit rating agency liability.[97] Another example found in the legal comparison involves uncertainty on the recoverable loss and the calculation of damages in relation to investor claims under Article 35a CRA Regulation. Chapter 5 sometimes struggled with predicting to what extent investors will be compensated under, mostly, Dutch and French law. These legal systems did not introduce implementing measures to explain the terms of Article 35a CRA Regulation, while hardly any legal precedent exists on how the general private law concepts are applied in relation to investor claims for credit rating agency liability. Under Dutch law, there is little guidance in case law on the calculation of damages in securities litigation in general, so that it is difficult to predict whether an investor will be compensated to the extent of the nominal value of the investment, or the extent of the price inflation of the financial instruments or missed yields only.[98] Furthermore, if French law applies to the dispute, a national court may apply the doctrine of loss of chance to facilitate the investor and to spread consequences of legal uncertainty between the

95 Section 5.6.3.2 (a).
96 Section 5.7.3.3 (a).
97 Section 5.4.3.2 (c) (iii) and section 5.6.3.2 (b) (ii), respectively.
98 Section 5.4.3.3 (b).

parties. Yet, it cannot be stated with certainty that French law would allow such an extension of the doctrine of loss of chance and would compensate the investor for the loss of its autonomy to take a completely and well-informed investment decision. Moreover, if the doctrine of loss of chance were to apply, that in turn leads to uncertainties in the calculation of the award of damages. Indeed, in other situations, the French courts hardly motivated their decision so that the uncertainty for the parties involved reoccurs in the determination of the height of the lost chance.[99] Overall, the reference to national law under Article 35a (4) CRA Regulation may at first seem to simplify the liability of credit rating agencies, because it avoids the harmonisation of core concepts of national private law. However, Article 35a CRA Regulation passes on the application of complex doctrines to the national level, where complications nevertheless occur.

6.3.4 Little convergence

6.3.4.1 Differences between four legal systems investigated

The Impact Assessment on the first version of the CRA Regulation described 'convergence' as a development under which the framework for operation of credit rating agencies should be governed by the same requirements in all Member States.[100] Article 35a CRA Regulation adopts an ambivalent attitude towards the convergence of the legal regimes of the Member States. The mould for civil liability is harmonised at the EU level, but Article 35a CRA Regulation does not aim to harmonise the substance of the conditions for credit rating agency liability set at the EU level. We have already seen that the structure of Article 35a CRA Regulation causes the right of redress to have little added value and provides room for restrictive interpretations and applications. In addition, the legal comparison revealed relevant differences between the interpretations and applications under the four legal systems investigated.

The national interpretations and applications of Article 35a CRA Regulation did not lead to surprising findings in light of the general features of the legal systems investigated. Risking oversimplifying the results of the legal comparison, French law generally adopts the most flexible approach to the interpretation and application of Article 35a CRA Regulation (to the benefit of issuers and investors), while the English interpretation and application under the UK Implementing Regulations is very restrictive (to the disadvantage of issuers and investors). Dutch and German law take up the middle ground, with the former system leaning more towards the French interpretation and application and the latter system more towards the English interpretation and application.

99 Section 5.5.3.2 and 5.5.3.3.
100 SEC(2008) 2745, p. 31.

The legal comparison revealed the following main differences in respect of claims for damages brought against credit rating agencies by both issuers and investors:

- 'Gross negligence': The national laws approach the term 'gross negligence' in various ways. Especially the restrictive interpretation of 'gross negligence' under Article 4 UK Implementing Regulations, which, moreover, limits the scope of application of Article 35a CRA Regulation to infringements committed by senior management only, leads to a very narrow interpretation and application of Article 35a CRA Regulation under English law – in particular as compared to the approach under French and German law.[101]
- Admissibility of limitation clauses: French and German law do not seem to allow the limitation of liability under Article 35a CRA Regulation in the presence and absence of a contractual relationship. Dutch law and English law leave more room for the limitation of liability, especially if a contractual relationship between the parties exists.
- Prescription period: the private law systems investigated have different prescription periods to claims based on Article 35a CRA Regulation. Most importantly, Article 16 UK Implementing Regulation provides for a remarkably short limitation period of 1 year.

The legal comparison revealed the following difference in respect of claims for damages brought against credit rating agencies by issuers in particular:

- Recoverable loss: Whereas Article 13 UK Implementing Regulations only admits the compensation of increased funding costs, Dutch, French and German law do not restrict the types of recoverable loss as a matter of principle. In addition to damages for increased funding costs, issuers can also claim damages for reputational loss under these three legal systems. Recital 32 CRA III Regulation gives the impression that funding costs and reputational loss are separate heads of damages, as the Recital refers to the negative impact on an issuer's reputation and funding costs separately. In practice, the assessment of damages for reputational loss creates evidentiary problems for issuers, so that one can doubt whether these differences will be of much relevance in practice.

The legal comparison demonstrated that one should not underestimate the differences between the national laws in respect of claims brought by investors. It revealed the following differences in respect of claims for damages brought against credit rating agencies by investors:

- 'Reasonable reliance' (I): The UK Implementing Regulations stand out in severely limiting the scope of application of Article 35a CRA Regulation through their interpretation and application of 'reasonable reliance'.

101 *See* Wimmer 2017, p. 408.

Article 6 UK Implementing Regulations links the requirement of 'reasonable reliance' to the test for the existence of a duty of care under the tort of negligence. As English courts would not often (if at all) consider this test satisfied in cases involving claims for credit rating agency liability brought by investors,[102] national courts could reject the majority of investor claims for a failure of reasonable reliance under English law.

- 'Reasonable reliance' (II): The national laws differ in whether and the extent to which they facilitate investors in proving reasonable reliance, as part of the requirement of causation. The wording of Article 35a CRA Regulation does not require Member States to adopt a flexible approach towards the requirement of reasonable reliance. Under French and Dutch law, it is possible that national courts respectively apply the doctrine of loss of chance – which replaces the test of reasonable reliance altogether – or adopt an evidentiary presumption of reliance – which is a procedural law facilitation and changes the division of the burden of proof to the detriment of credit rating agencies. Under German and English law, national courts are generally expected to uphold the requirement of reasonable reliance and the corresponding burden of proof. The restrictive wording of Article 35a CRA Regulation, combined with the restrictive approaches under German and English law, will cause the majority of the claims for damages brought by investors to be unsuccessful under these legal systems, because investors cannot prove causation due to a lack of evidence of reasonable reliance.
- Calculation of damages: The national laws approach the calculation of the amount of damages awarded to investors in various ways. Due to the crucial role of the specific circumstances of the case at the stage of the calculation of awards of damages, it is difficult to generally predict the amount of damages courts will award. Under Dutch, French and English law, national courts will not (always) compensate investors to the full extent of their transaction costs. Under Dutch law, courts could attribute only part of the loss to a credit rating agency – if the credit rating agency successfully invokes Article 6:98 BW. Under French law, courts might only compensate investors' loss of autonomy to make a fully and well-informed investment decision. Under English law, courts could apply the *SAAMCO* case analogously, so that the award of damages is capped at the influence of the affected credit rating on the interest rate, yield or the price of the financial instruments. German law takes yet a different approach. It seems that if the investor can prove reasonable reliance, the investor can choose whether it claims *Vertragsabschlussschade* or *Kursdifferenzschade* under German law.

102 Section 5.7.2.3 (b) (ii).

The differences found between the interpretations and applications under Dutch, French, German and English law can lead to different outcomes in legal proceedings. But notwithstanding the fact that the differences can have effects on decisions in concrete cases, one must put these differences into perspective.[103] In comparison to claims brought by investors, the differences between the national interpretations and applications of Article 35a CRA Regulation are smaller in relation to claims brought by issuers. Moreover, claims for damages brought by issuers and investors will not succeed easily in any of the legal systems investigated. The conditions set by Article 35a CRA Regulation and the national interpretations and applications of Article 35a CRA Regulation are restrictive, especially in relation to investors. The current combination of stringent conditions set at the EU level and restrictive national interpretations causes and will cause many claims to fail, and can prevent claims from being asserted. As a final remark, the UK Implementing Regulations by far provided for the most restrictive interpretation and application of Article 35a CRA Regulation of the four national legal systems investigated. Brexit may lead to the deviating English approach disappearing from the overarching European stage.

6.3.4.2 Continuing risks of regulatory arbitrage

The finding that differences between the interpretations and applications of Article 35a CRA Regulation under Dutch, French, German and English law can lead to different outcomes in legal proceedings, increases the importance of clear and objective rules of Private International Law. Indeed, the importance of clear and objective conflicts of law rules and the level of harmonisation of national laws at the EU level are linked. The more differences exist between Member State laws, the more important clear and objective conflict of laws rules are in order to reduce risks of regulatory arbitrage. However, the

103 From a comparison between German, English and French law, Wimmer derived the conclusion that these legal systems interpret and apply the terms of Art. 35a in similar ways: '*Festzuhalten ist, dass deutsches, französisches wie englisches Haftungsrecht in Bezug auf die im Vergleich untersuchten Merkmale der Kausalität, des Verschuldens sowie des Schadensrechts in Nuancen voneinander abweichen, im Grundsatz jedoch auf strukturell vergleichbare Art und Weise die Lücken des Art. 35a zu schließen vermögen*' (Wimmer 2017, p. 335). This dissertation's conclusion differs from Wimmer's conclusion. The difference mainly originates from the different analyses of the requirement of causation and of the facilitations of (reasonable) reliance, which also influenced the approaches to the calculation of damages. This dissertation assumed that Member States are allowed (but not obliged) to adopt an approach in respect of the requirement of reasonable reliance that is favourable to investors, which is derived from Art. 35a (5) CRA Regulation (section 5.3.1.3 (c) (ii)). Therefore, this dissertation discussed, for instance, that French courts may apply the doctrine of loss of chance, which also creates a different approach to the notion of loss and the calculation of damages. Furthermore, this dissertation constructed the restrictive approach under English law by means of the UK Implementing Regulations (*see for the analysis of Wimmer*, Wimmer 2017, pp. 320-328).

structure of Article 35a CRA Regulation does not solve risks of regulatory arbitrage.[104] For example, as long as the UK Implementing Regulations apply in their current form, it is to the advantage of credit rating agencies to try to ensure English law applies to any liability claims. The European Commission expressed the aim to reduce regulatory arbitrage between the Member States in the Impact Assessment,[105] but these incentives remain as long as the substantive rules on credit rating agency liability are not harmonised at the EU level.

6.4 No adequate right of redress

In summary, four important observations were made from the perspective of the normative framework:

1. Article 35a CRA Regulation has added value in the sense of issuer and investor protection in theory, but has little added value in practice. At least two (interacting) reasons explain this limited added value. First, the framework for civil liability created by Article 35a CRA Regulation has a narrow scope of application and sets stringent conditions for civil liability. Second, the structure of Article 35a CRA Regulation causes its effects to depend too much on the national interpretations and applications. The structure employed underestimates the continuing importance of general principles underlying national legal systems and the general national approach of Member States to credit rating agency liability, while it overestimates the limits EU law can set to the discretion left to the Member States.
2. Some European Private International Law rules on jurisdiction and applicable law do not have a foreseeable and predictable outcome and cause uncertainty from the perspective of issuers, investors and credit rating agencies. The issues mostly concern the admissibility of exclusive jurisdiction clauses in favour of the courts of third countries and the assessment of the place where financial loss occurred under Article 7 (2) Brussels I Regulation (recast) and Article 4 (1) Rome II Regulation.
3. Uncertainty exists on the exact interpretation and application of some of the terms of Article 35a CRA Regulation under the four legal systems investigated. This study uncovered uncertainties in the interpretation and application of Article 35a CRA Regulation stemming from three (interacting) sources: (1) the imprecise drafting and unclear status of terms used by Article 35a CRA Regulation; (2) friction between the terms of Article 35a CRA Regulation of the applicable national law and its structure and system; and (3) uncertainty on the application of some concepts of national law to credit rating agency liability.
4. The differences found between the interpretations and applications under Dutch, French, German and English law can lead to different outcomes in legal proceedings

104 Wimmer 2017, p. 409. *Cf. also e.g.* Miglionico 2019, no. 9.05-9.06, Bergier 2018, p. 233 and Dumont du Voitel 2018, p. 144.
105 SEC(2011) 1354 final, p. 23.

in practice. To some extent, these differences should be put into perspective as issuers and investors will not easily succeed in a claim for damages under any of the laws investigated. Yet, the current structure of Article 35a CRA Regulation and the currently existing substantive differences between the Member States do not solve risks of regulatory arbitrage.

These observations lead to the conclusion that Article 35a CRA Regulation does not achieve its post-crisis goal of creating an adequate right of redress for issuers and investors whilst Article 35a CRA Regulation has to be interpreted under various systems of national law.[106] Article 35a CRA Regulation refers to the applicable national law with ease, but creating an adequate right of redress at the EU level with terms that need to be interpreted and applied at the national level is anything but easy. One is left with the impression that the Union legislature has thought too lightly about the practical implementation of the combination of EU law and national law in the right of redress created by Article 35a (1) CRA Regulation.[107] This impression, however, does deserve qualification in two respects. First, Article 35a CRA Regulation functions better in relation to issuer claims as compared to investor claims. Second, the reasons why Article 35a CRA Regulation does not form an adequate right of redress do not only stem from the structure chosen, but also from the provision's scope of application, the conditions for civil liability and the imprecise wording of Article 35a CRA Regulation itself. Overall, whether one considers the main function of Article 35a CRA Regulation to compensate issuers and investors or to serve as a private enforcement tool to enforce the regulatory obligations of credit rating agencies, a reconsideration of the current regime for civil liability is desirable.

6.5 Recommendations

6.5.1 Remarks in advance

This section is concerned with the question of whether the civil liability of credit rating agencies must be regulated differently, and if so, in what manner.

106 *Cf.* Deipenbrock 2018, pp. 574-575.

107 Baumgartner criticised the civil liability regime under Art. 35a CRA Regulation as well, but also added a more positive note (Baumgartner 2015, p. 563: '*ME ist es sehr erfreulich, dass der europäische Gesetzgeber die Haftung von Ratingagenturen ausdrücklich geregelt und damit einen wichtigen Beitrag zur Rechtssicherheit für die Geschädigten ebenso wie für die Ratingagenturen geleistet hat. Die dadurch bewirkte Rechtsklarheit wird aber durch die komplexe Struktur der EU-RatingVO (und damit auch des Art 35a leg cit) gemindert („Papiertiger").*'). *For a more positive conclusion also* Bergier 2018, p. 230, who stated that the regime under Art. 35a CRA Regulation is without a doubt an improvement, but, at the same time, questioned whether Art. 35a CRA Regulation was not more of a confirmation of the principle civil liability than a special civil liability for credit rating agencies.

If the Union legislature reconsiders the CRA Regulation, it could take the points described in this section into consideration.[108] The recommendations are based on the assumption that the civil liability of credit rating agency liability towards issuers and investors is desirable as a matter of principle. They concentrate on the form in which the right of redress is arranged at the EU level (section 6.5.2), on the clarification of rules of Private International Law (section 6.5.3) and on the provision of additional substantive guidance at the EU level (section 6.5.4).

It is not always self-evident how Article 35a CRA Regulation can be improved to serve as an adequate right of redress. The civil liability of credit rating agencies poses many challenges from a political, economic and legal perspective. The public consultation on Article 35a CRA Regulation demonstrated political and societal disagreement on the desirability of credit rating agency liability in general[109] and it is expected that reaching a compromise at the EU level that increases the level of issuer and investor protection will be difficult. Furthermore, potential economic consequences and incentives associated with credit rating agency liability must be carefully considered to avoid unintended, negative consequences. Finally, it is difficult to capture all considerations in a statutory right of redress. Overall, Wimmer rightly compared these challenges to navigating between Scylla and Charybdis.[110]

6.5.2 Possible structures of EU provisions on civil liability

6.5.2.1 Three options

The legislative European influence on credit rating agency liability can take multiple forms. Chapter 2 provided a roadmap of the different types of influence of EU law on (national rules for) civil liability.[111] Keeping this roadmap in the back of our minds, the Union legislature can consider, at least, the following three formats to arrange for credit rating agency liability: (a) the Union legislature can simply require Member States to apply their civil liability regimes; (b) the Union legislature can impose more detailed obligations upon Member States by describing when issuers and investors are entitled to a right of redress under the applicable national law; and (c) the Union legislature can

108 The recommendations concentrate on the current system of civil liability under Art. 35a CRA Regulation. Prior to the publication of this dissertation, Wimmer 2017 published a reform proposal of Art. 35a CRA Regulation and Heuser 2019 and Dumont du Voitel 2018 made recommendations as regards the improvement of Art. 35a CRA Regulation.

109 Section 3.5.1.2.

110 Wimmer 2017, p. 414.

111 Section 2.5.

expand the current civil liability regime under Article 35a CRA Regulation and further reduce the importance of the applicable national law.[112]

The differences between options (a)-(c) are a matter of degree. Depending on the level of detail of provisions under option (b), their effects will resemble option (a) or (c). Options (a) and (b) have in common that issuers and investors must base their claim for damages on the applicable national law, but option (b) can impose more detailed obligations upon Member States and, therefore, has the potential of converging the Member State laws to a larger extent.[113] Options (b) and (c) have in common that they can establish detailed rules on civil liability. The legal basis of the right of redress (the concrete claim for damages) differs: under option (b), issuers and investors must base claims for damages on the applicable national law, whereas option (c) creates a right of redress with horizontal direct effect at the EU level.

6.5.2.2 Option (a) Requiring application of national civil liability regimes

The Union legislature can require Member States to apply their national civil liability regimes to infringements of Annex III CRA Regulation (see also section 2.5.3.2).[114] The same type of structure can be found under Article 11 (2) Prospectus Regulation. Article 11 (2) Prospectus Regulation requires Member States to apply 'their laws, regulations and administrative provisions on civil liability to those persons responsible for the information given in a prospectus'. In the same way, the CRA Regulation could require Member States to ensure the application of their national rules on civil liability to infringements of Annex III CRA Regulation. In essence, this option forms an indirectly effective

112 As another option, the Union legislature could provide EMSA or the European Commission with a mandate to extend Art. 35a CRA Regulation through technical binding standards of ESMA or non-legislative acts of general application of the European Commission. The CRA Regulation currently does not involve a mandate to extend Art. 35a CRA Regulation through technical binding standards of ESMA or non-legislative acts of general application of the European Commission, as the CRA Regulation does not foresee in these possibilities in respect of credit rating agency liability. Yet, technical binding standards and non-legislative acts could be another manner to (re)define and clarify the terms of Art. 35a CRA Regulation. Under Art. 290 (1) and (2) TFEU, the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act can be delegated to the European Commission. The legislative act at stake must then strictly define the scope of the delegation of power. The power of the European Commission may be delegated to ESMA under Art. 28 of Regulation No 1095/2010. With regard to the CRA Regulation, ESMA is entitled to draft technical binding standards. However, this power does not include the drafting of technical binding standards on the civil liability of credit rating agencies (see Art. 21 (4) CRA Regulation and the affirmation of this power in Recital 46-47, CRA III Regulation). Another version of the CRA Regulation could hence also involve a mandate in the area of civil liability.

113 Art. 35a is included in a regulation, but this option could also be achieved through a directive.

114 *Cf. for this option* Deipenbrock 2018, p. 571.

and less complex version of Article 35a CRA Regulation and is a statutory and mandatory version of Recital 69 CRA I Regulation, which stipulated that 'any claim against credit rating agencies in relation to any infringement of the provisions of this Regulation should be made in accordance with the applicable national law on civil liability'.

A general advantage of option (a) is that the division between EU law and national law is clear. Member States must ensure that their national rules on civil liability apply to infringements of Annex III CRA Regulation, and issuers and investors must base any claims for civil liability on the applicable national law. This option does not involve the harmonisation of conditions for civil liability and avoids the rather complex exercise of interpreting and applying EU law in accordance with the applicable national law, as required by Article 35a CRA Regulation. From the perspective of the principle of proportionality, option (a) is least intrusive on the legal systems of Member States. The civil liability regime must be applied in accordance with the principles of effectiveness and equivalence, but one must realise that the influence of these principles is limited.[115]

In the particular context of this dissertation, the disadvantage of this option is that it does not solve the issues addressed by the European Commission in the Impact Assessment for the third version of the CRA Regulation. Option (a) continues different levels of investor (and issuer) protection and does not take away incentives for credit rating agencies to 'shop' for the most beneficial civil liability regime.[116] Although Member States must apply their national civil liability regimes in accordance with the principles of effectiveness and equivalence, we have seen that these principles can only preclude outliers, i.e. situations in which Member States create categorical bars to the application and enforcement of EU law.[117] Although option (a) may form an attractive political compromise, this dissertation shows that it is preferred to provide more guidance at the EU level through options (b) and (c) in the context of the credit rating industry.

6.5.2.3 Option (b) Imposing detailed obligations upon Member States

As a second option, the Union legislature can decide to impose detailed obligations upon Member States in respect of credit rating agency liability (see also section 2.5.3.3). A similar type of structure can be found under Article 11 (2) PRIIPs Regulation. This provision entitles a retail investor who demonstrates loss resulting from reliance on a key information document to a right to damages against the PRIIP manufacturer in accordance with national law. A more extensive example of this option is formed by the Directive on Com-

115 Sections 2.5.5 and 6.3.1.3 (b) (ii).
116 *Cf.* SEC(2011) 1354 final, p. 19.
117 Sections 2.5.5 and 6.3.1.3 (b) (ii).

petition Law Damages.[118] In a similar way, the CRA Regulation could require Member States to ensure the application of their rules on civil liability to infringements of Annex III CRA Regulation. The European provisions on civil liability could then define elements such as 'gross negligence' and the recoverable loss. Such provisions on civil liability lack horizontal direct effect, so that issuers and investors must base their claims for damages on national private law.

An advantage of this option is that the division between EU law and national law is rather clear. EU law provides guidance on private enforcement, but the legal bases for civil liability are to be found at the national level. Consequently, Member States must ensure that their national rules on civil liability apply to infringements of Annex III CRA Regulation and that their national rules are in conformity with the rules set by the CRA Regulation, while issuers and investors must base their claims for damages on the applicable national law. Another advantage is that Member States can fit the European rules on private enforcement into their national legal systems, so that the internal coherence of national civil liability regimes is respected. Moreover, option (b) does not require the complex exercise of interpreting and applying EU law in accordance with the applicable national law, as required by Article 35a CRA Regulation.[119] At the same time, it enables the Union legislature to impose more detailed obligations upon Member States to create a minimum level of protection. The influence of this option, however, depends on the extent to which the EU rules on civil liability impose obligations upon Member States.

6.5.2.4 Option (c) Extending Article 35a

As a third option, the Union legislature can decide to provide further guidance on the civil liability of credit rating agencies under Article 35a CRA Regulation and to remove the broad reference to the applicable national law.[120] A similar provision can be found under Article 82 General Data Protection Regulation (see section 2.5.4.3). Article 82 provides for a horizontal direct effective and autonomous right to compensation for '[a]ny person who has suffered material or non-material damage as a result of an infringement of' the General Data Protection Regulation 'from the controller or processor for the damage suffered'. This right of redress has horizontal direct effect, so that claimants

118 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

119 Although it must be admitted that implementing EU law to national private law can also raise difficulties for national legislatures.

120 *As recommended by* Heuser 2019, p. 267. *Cf. also for this option* Deipenbrock 2018, p. 571. *Cf. also* Miglionico 2019, no. 9.05, who concluded that it is unfortunate that the Union legislature did not introduce a uniform civil liability regime.

can base their claims for compensation on EU law. Furthermore, the conditions for liability have an autonomous meaning, as the provision does not refer the interpretation and application of the terms back to the applicable national law.

To be able to reduce the influence of the applicable national law, Article 35a CRA Regulation must provide additional guidance on core private law concepts such as causation, damages and prescription. In the absence of a general EU regime of private law, the applicable national law will continue to serve as a safety net.[121] The fact that option (c) requires additional guidance on core private law concepts forms the largest challenge of this structure, as it will be difficult to reach a political compromise in this regard. At the same time, option (c) can solve the issues addressed by the European Commission in the Impact Assessment for the third version of the CRA Regulation, such as the different levels of investor protection between Member States and the incentives for credit rating agencies to 'shop' for the most beneficial civil liability regime.[122]

6.5.2.5 Competence, subsidiarity and proportionality

Options (b) and (c) recommend the Union legislature to introduce more detailed European rules on credit rating agency liability. The perspectives of the competence of the Union legislature and the principles of subsidiarity and proportionality do not preclude the introduction of additional European rules in this area.

The Union legislature can base its competence to establish additional European rules on credit rating agency liability on Article 114 TFEU, which allows the Union legislature to approximate national rules at the EU level if necessary for the establishment and functioning of the internal market.[123] The Union legislature also based its competence for the various versions of the CRA Regulation on Article 114 TFEU. The European Commission justified the third version of the CRA Regulation by the global nature of the credit rating industry. It argued that the credit rating industry is not affected by national borders. A credit rating agency can indeed issue a credit rating in one Member State, which is used by market participants in other Member States. The European Commission concluded that EU legislative action was necessary, because a 'lack of a regulatory framework' in one Member State can affect market participants and financial markets in other Member States as well.[124]

The Commission's Proposal for the third version of the CRA Regulation did not contain a special justification for the EU legislative action in respect

121 *Cf.* Wimmer 2017, pp. 435 and 440.
122 *Cf.* SEC(2011) 1354 final, p. 19.
123 *See on the competence of the Union legislature in general* section 2.2. This section discussed that Art. 114 TFEU serves as a broad legal basis for the competence of the Union legislature.
124 COM(2011) 747 final, p. 6.

of the civil liability of credit rating agencies.[125] The Impact Assessment for the third version of the CRA Regulation did demonstrate reluctance on the side of the European Commission to interfere with national private law.[126] This reluctance is in compliance with the shared competence of the EU and Member States in the field of the internal market and with the principles of subsidiarity and proportionality.[127] The reference to national law under Article 35a (4) CRA Regulation could be seen as the substantiation of the principles of subsidiarity and proportionality. Yet, this reference is also the reason why legal scholars doubted the competence of the Union legislature in respect of the current form of Article 35a CRA Regulation. Article 114 TFEU indeed authorises the Union legislature to approximate national laws, while Article 35a CRA Regulation instead continues the differences between the Member States.[128] The introduction of more detailed European rules on credit rating agency liability may, therefore, be more easily based on Article 114 TFEU than the current right of redress created under Article 35a CRA Regulation. Both options (b) and (c) entail a further approximation of Member State laws, whether through obligations imposed upon Member States or through European rules with horizontal direct effect.

From the perspective of the principles of subsidiarity and proportionality, broadening the legal framework under Article 35a CRA Regulation is not problematic. Due to the international character of the credit rating industry, creating an adequate right of redress for issuers and investors vis-à-vis credit rating agencies can only be achieved at the very least by legislative action at the EU level. From the perspective of the principle of proportionality, one can wonder whether this dissertation should propose amendments to broaden the legal framework under Article 35a CRA Regulation. Would it not be less intrusive to wait and see how the CJEU applies the principles of equivalence and effectiveness in the context of credit rating agency liability? However, as discussed in section 2.5.5 and 6.3.1.3 (b) (ii), the CJEU has adopted a restrictive approach in this regard. The principles of equivalence and effectiveness can only address outliers, i.e. situations in which the Member States create a categorical bar on liability.[129] Taking the observations made in section 6.3 into account, further rules on credit rating agency liability at the EU level are

125 The Union legislature must clearly state its reasons for legal measures, but is not required 'to go into every relevant point of fact and law'. *Cf.* CJEU 16 June 2015, C-62/14, ECLI:EU:C:2015:400 (*Gauweiler and Others*), para 70.

126 *As can be derived from the different policy options discussed in the Impact Assessment,* SEC(2011) 1354 final, pp. 45-48.

127 Art. 4 (2) (a) TFEU and Art. 5 (3) and (4) TEU, respectively. *Cf. also on the current system of Art. 35a CRA Regulation and the principles of subsidiarity and proportionality,* Baumgartner 2015, p. 506.

128 *E.g.* Lehmann 2016a, p. 77 and Gietzelt & Ungerer 2013, p. 336. Dumont du Voitel even concluded that Art. 35a should not have been based on Art. 114 TFEU (Dumont du Voitel 2018, pp. 151 and 153).

129 Sections 2.5.5 and 6.3.1.3 (b) (ii).

necessary to create an adequate right of redress for issuers and investors vis-à-vis credit rating agencies. The current functioning of Article 35a CRA Regulation proves why more intrusive action at the EU level is required, so that the establishment of such rules is in accordance with the principle of proportionality.

6.5.3 Private International Law rules

6.5.3.1 Continuing importance PIL

Additional European legislative guidance in the area of credit rating agency liability is not only necessary in relation to the substantive conditions for civil liability (section 6.5.4), but also in relation to Private International Law aspects. Private International Law is of crucial importance in disputes over credit rating agency liability, in particular if Member State laws continue to determine part of the interpretation and application of Article 35a CRA Regulation. The following recommendations concentrate on the enhancement of legal certainty through the introduction of an express provision on the validity of exclusive jurisdiction clauses in favour of the courts of non-Member States (section 6.5.3.2) and through the introduction of an express provision on the connectors to determine the competent court and the applicable law in relation to claims based on Article 35a CRA Regulation (section 6.5.3.3).

6.5.3.2 Limit validity exclusive jurisdiction clauses third country courts

This dissertation already stated on multiple occasions that within the credit rating industry, the importance of jurisdiction clauses that confer jurisdiction upon the courts of third countries cannot be overestimated. However, exclusive jurisdiction clauses in favour of third country courts currently impose two challenges: (1) in which manner should national courts determine the validity of such clauses?; and (2) if such clauses are valid, civil liability claims against credit rating agencies will often 'disappear' from EU territory, in the sense that Member State courts do not have jurisdiction.

In order to increase legal certainty for credit rating agencies, investors and issuers, the Union legislature could consider adding a new section to Article 35a CRA Regulation on the validity of exclusive jurisdiction clauses in favour of the courts of third countries. The international character of the credit rating industry justifies legislative interference restricting the validity of exclusive jurisdiction clauses in favour of the courts of third countries. Interference with party autonomy is a radical tool, but one can question whether and to what extent 'party autonomy' is at stake in the credit rating agency industry. Considering the lack of competition and the relatively large power of credit rating agencies, would a jurisdiction clause be negotiable for issuers, let alone (retail) investors? Nevertheless, the balance between ensuring that issuers and investors can bring proceedings in the EU and undesirable interference with party autonomy remains a delicate one.

The Union legislature has several options to clarify and restrict the validity of exclusive jurisdiction clauses in favour of the courts of third countries in the context of credit rating agency liability. If the Union legislature wishes to restrict the validity of such jurisdiction clauses in relation to all types of issuers and investors, it can draw inspiration from the system of Article 14 Rome II Regulation as regards the validity of choice of law clauses in relation to non-contractual obligations. Article 14 Rome II Regulation provides that a choice of law agreement must be entered into after the event that gave rise to the damages occurred.[130] An exception is made for professional parties, which can enter into a freely negotiated choice of law agreement before the event that gave rise to the damages occurred.[131] In the context of exclusive jurisdiction clauses in favour of the courts of third countries in the context of credit rating agency liability, the Union legislature could add a new section to Article 35a CRA Regulation. This section could then stipulate that parties can agree to submit claims based on Article 35a CRA Regulation to the jurisdiction of non-Member State courts of their choice only (a) by an agreement entered into after the event giving rise to the damage occurred; or (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice of law must be expressed or demonstrated with reasonable certainty by the circumstances of the case. The advantage of this approach is that it increases certainty on the way in which the validity of exclusive jurisdiction clauses should be determined. Moreover, it protects small investors who do not act in their professional capacity, while it provides professional parties with flexbility. Indeed, the system respects the party autonomy of professional parties and allows them to decide on the competent court in advance – ensuring legal certainty from their perspective.

Alternatively, the Union legislature can decide to protect only retail investors against, for instance, jurisdiction clauses included in general terms and conditions of websites of credit rating agencies. The Union legislature can draw inspiration from other situations in which 'weaker' parties are protected against jurisdiction clauses already. The Brussels I Regulation (recast) offers protection against jurisdiction clauses in the context of insurance contracts,[132] consumer contracts,[133] and employment contracts.[134] The Brussels I Regulation (recast) stipulates, for instance, that parties to these types of contract can only enter into a jurisdiction agreement 'after the dispute has arisen'. The

130 Art. 14 (1) (a) Rome II Regulation.
131 Art. 14 (1) (b) Rome II Regulation.
132 Art. 15 Brussels I Regulation (recast).
133 Art. 19 Brussels I Regulation (recast).
134 Art. 23 Brussels I Regulation (recast).

Union legislature could decide to apply this approach to all types of jurisdiction clauses, whether they designate jurisdiction to the courts of non-Member States or Member States.[135]

6.5.3.3 *Relevant connectors and location of financial loss*

(a) *Action at EU level necessary*

The observations from the perspective of the normative framework demonstrated how the application of the rules of the Brussels I Regulation (recast) and the Rome II Regulation leaves uncertainty for stakeholders involved in litigation on credit rating agency liability. The uncertainty pertained to the assessment of the *Erfolgsort* under Article 7 (2) Brussels I Regulation (recast) and the place where the damage occurred under Article 4 (1) Rome II Regulation. As the CJEU's approach in *Universal Music* and *Helga Löber v Barclays Bank* did not provide a foreseeable and predictable solution for credit rating agency liability cases and the CJEU showed reluctance to formulate a general rule to locate financial loss, the Union legislature should consider taking action to enhance legal certainty in the particular context of credit rating agency liability or in the context of disputes involving financial loss in general.

The question then is what form such European action should take. There is a wide range of options available, but finding a satisfactory solution is difficult as each option has its own advantages and disadvantages. Moreover, in considering the various options, the Union legislature must face fundamental questions, such as: does it wish to create Private International Law rules for credit rating agency liability in particular or for financial torts and securities litigation in general? Does it wish to maintain the connecting factor of the *Erfolgsort* and 'the place where the damage occurred' in relation to cases involving financial loss, or does it wish to introduce other connectors in relation to such cases? Does it wish to continue to align the rules of Article 7 (2) Brussels I Regulation (recast) and Article 4 (1) Rome II Regulation? The subsections hereafter describe a variety of options proposed in academic literature and during the legal proceedings for the third version of the CRA Regulation.[136] It must be noted in advance that this section will not discuss matters of jurisdiction and applicable law separately. Furthermore, it must be noted that the options not only involve proposals that continue the location of financial loss as a connector and provide a general rule to locate financial loss, but also other proposals which, for instance, reject the location of financial loss as a connector completely. The proposals, hence, all take slightly different

---

135 The Union legislature would have to introduce special rules for clauses that designate jurisdiction to the courts of non-Member States outside the legal framework of the Brussels I Regulation (recast). The disadvantage of this strategy is that rules of Private International Law are scattered over various laws.

136 *More alternative approaches in relation to financial loss can be found in* Lehmann 2018, pp. 20 ff.

perspectives on the way in which the current uncertainty could be resolved. The final subsection describes the recommended solution.

(b) Schroeter: place of establishment credit rating agency

In the particular context of credit rating agency liability, in 2014 Schroeter proposed using the escape clause under Article 4 (3) Rome II Regulation. Article 4 (3) Rome II Regulation stipulates that if a tort is 'manifestly more closely connected' with a country other than that indicated in Article 4 (1) or 4 (2) Rome II Regulation, the law of that country applies to the dispute. According to Schroeter, the law of the place of establishment of the credit rating agency should apply to claims based on Article 35a CRA Regulation.[137] Schroeter's approach builds on the close connection between the public and private enforcement of the CRA Regulation. Prior to the centralisation of the supervision of ESMA, he was in favour of using the place of the relevant national supervisor as a connecting factor under Article 4 (3) Rome II Regulation. This connector, however, lost its relevance when the supervision of credit rating agencies was transferred to ESMA in 2011.[138] As an alternative, Schroeter proposed the place of establishment of a credit rating agency as the relevant connector under Article 4 (3) Rome II Regulation.[139]

As a connector to determine the applicable law, the place where a credit rating agency is established has advantages and disadvantages. One important advantage is that this approach entails that claims for damages based on Article 35a CRA Regulation against credit rating agencies established and registered in the EU are governed by the national law of a Member State. Other approaches discussed in this section do not guarantee this result. A comparison with the manner in which Dutta locates the *Erfolgsort* in credit rating agency liability cases (under (c)) helps to explain this advantage of Schroeter's approach. As we will see, Dutta proposed locating the *Erfolgsort* in the place of the principal business of the issuer. Imagine that an EU credit rating agency established in Ireland issues a credit rating attached to bonds issued by a company with its principal place of business in Russia. Schroeter's approach causes the claim based on Article 35a CRA Regulation to be interpreted and applied under Irish law, while Dutta's approach causes Russian law to apply (so that one can wonder whether a claim based on Article 35a CRA Regulation exists at all). Schroeter's approach hence facilitates the application of the CRA Regulation. Furthermore, the place of an EU credit rating agency's establishment constitutes a foreseeable connecting factor to issuers and investors, as they can easily determine the place where a credit rating agency is established within the EU.

137 Schroeter 2014, pp. 836-839.
138 Schroeter 2014, pp. 836-837.
139 Schroeter 2014, p. 837.

Schroeter's approach, however, has one important drawback. For the purpose of their EU registration with ESMA, credit rating agencies themselves decide on their place of establishment within the EU. Using this place of establishment as a connector in fact allows credit rating agencies to choose the law applicable to potential future claims for damages based on Article 35a CRA Regulation. As long as the civil liability regimes amongst the Member States differ, this connecting factor incentivises credit rating agencies to 'shop' for the most beneficial applicable law.[140] Considering the current differences between the Member States (section 6.3.4.1), one can see how various applicable laws increase or reduce the civil liability risks of credit rating agencies under Article 35a CRA Regulation. This disadvantageous side to Schroeter's approach is mitigated if the Union legislature reduces the role of the applicable national law under Article 35a (4) CRA Regulation.

(c) Dutta: seat issuer as Erfolgsort

In the particular context of credit rating agency liability, in 2014 Dutta argued in favour of locating financial loss at the place of the '*Sitz des bewerteten Unternehmens (oder des bewerteten Staats)*' (the seat of the rated entity or state).[141] Dutta's proposal was published in 2014, prior to the decisions of the CJEU in *Kolassa v Barclays Bank*,[142] *Universal Music*[143] and *Helga Löber v Barclays Bank*,[144] so that he proposed applying Article 5 (3) Brussels I Regulation and 4 (1) Rome II Regulation in a certain manner. In Dutta's opinion, the place of the '*Sitz des bewerteten Unternehmens (oder des bewerteten Staats)*' could determine both the competent court and the applicable national law in relation to claims brought by both investors and issuers, for all types of loss. Dutta justified locating the *Erfolgsort* at the seat of the issuer by arguing that '*da sich hier die Vermögensinteressen der vom fehlerhaften Rating Betroffenen zum ersten Mal materialisieren*'.[145] He located the seat of a rated entity in the place of the '*tatsächlichen Sitz des Unternehmens*' (the factual seat) and not in the statutory seat, as the location of loss concerns the business of an entity and does not concern the organisation of an entity.[146]

(i) – Application to issuer claims

The application of Dutta's approach to claims for credit rating agency liability brought by issuers generally creates a predictable and foreseeable solution for issuers and credit rating agencies. The factual seat of a rated entity or state

140 *For this criticism on Schroeter's proposal* Heuser 2019, p. 240, Dumont du Voitel 2018, p. 170 and *see* Happ 2015, p. 72.
141 Dutta 2014, p. 39.
142 CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*).
143 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
144 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).
145 Dutta 2014, p. 39. *Cf. also* Wimmer 2017, p. 109 and Dumont du Voitel 2018, pp. 164-167.
146 Dutta 2014, p. 39.

can be located relatively easy, if the issuer has a relatively easy corporate structure. Moreover, a close connection exists between the civil liability claim of the issuer and the court of the place where the issuer has its seat.[147] Yet, the more complex the issuer's corporate structure, the more complex locating the issuer's factual seat becomes.

One must realise that Dutta's approach in fact introduces the *forum actoris* (forum of the claimant) in relation to issuer claims based on Article 35a CRA Regulation. It provides issuers as claimants with a strong position as opposed to credit rating agencies. Dutta's approach contrasts with the general approach of the CJEU, which generally opposes the *forum actoris* as a connector.[148] In specific cases, however, the CJEU did locate the financial loss in the seat of an entity. Dutta referred to the decision of the CJEU in *ÖFAB v Koot.*[149] In *ÖFAB v Koot*, creditors started proceedings against a member of the board of directors and a shareholder of the entity Copperhill for Copperhill's debts. The CJEU held that the place where the harmful event occurred or may occur under Article 5 (3) Brussels I Regulation was the place to which the activities carried out by Copperhill and the financial situation related to those activities were connected.[150] *ÖFAB v Koot* is an example of a case in which the harmful event was situated in the seat of an entity in a concrete case, and is not an example of a case in which in fact a *forum actoris* was introduced. Locating financial loss in the seat of a rated entity as a matter of principle irrespective of the specific circumstances of the case, as proposed by Dutta, however, does in fact introduce a *forum actoris* and deviates from the ordinary approach taken in EU Private International Law.

(ii) – Application to investor claims

The application of Dutta's approach to claims for credit rating agency liability brought by investors creates a predictable and foreseeable solution for investors and credit rating agencies. Dutta's approach brings legal certainty as the seat of rated entities with a simple corporate structure and rated states can often be located relatively easily.[151] Investors can determine the place of establishment of the issuer upon the moment of purchasing the financial instruments. Credit rating agencies can determine the place of establishment of issuers and financial instruments to which they attach credit ratings. Considering the

147 The basis of a liability claim is indeed an incorrect credit rating that relates to an issuer itself or its activities/products. *Cf. also in favour of adopting this connecting factor in respect of issuers in respect of the applicable national law*, Heuser 2019, p. 236 and Dumont du Voitel 2018, p. 164.

148 For instance, in *Kronhofer v Maier*, the CJEU refused to locate the *Erfolgsort* in the centre of assets of the claimant (a retail investor). ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*, para 21.

149 ECJ 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*). Dutta 2014, p. 39.

150 ECJ 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*), paras. 53-55.

151 *Cf. also for this advantage,* Heuser 2019, p. 223.

objective of Article 4 (1) Rome II Regulation – striking a fair balance between the interests of the claimant and the defendant – this connecting factor constitutes a proper alternative to the approach taken in *Helga Löber v Barclays Bank*. From the perspective of investors and credit rating agencies, the seat of a rated entity or state is an objective connector, which does not prejudice credit rating agencies over investors or the other way around. Furthermore, this connecting factor ensures that multiple claims based on Article 35a CRA Regulation for one and the same affected credit rating are not governed by multiple applicable laws. A dispersion of the applicable law in respect of investor claims is hence avoided by Dutta's approach.

Yet, Dutta's approach is hard to fit within the main rule under Article 7 (2) Brussels I Regulation (recast) and Article 4 (1) Rome II Regulation. Dutta's justification to locate the *Erfolgsort* in the seat of an issuer *'da sich hier die Vermögensinteressen der vom fehlerhaften Rating Betroffenen zum ersten Mal materialisieren'*[152] is not a strong argument in relation to loss suffered by investors. One can doubt whether financial loss suffered by an investor can really be located in an issuer's seat.[153] Moreover, considering the current case law of the CJEU in especially *Kolassa v Barclays Bank* and *Helga Löber v Barclays Bank* (cases that were decided subsequent to Dutta's proposal), the loss suffered by investors cannot be located in the place where the issuer was established. From that perspective, Dutta's approach, hence, derogates from the approach taken by the CJEU and does not fit the current framework of EU Private International Law from a conceptual perspective.

Furthermore, one must realise the consequences of Dutta's approach for investors, who invested in issuers whose factual seat is located outside the EU. An example involves a claim for civil liability of an investor domiciled in the Netherlands against a credit rating agency established and registered in France in respect of an affected credit rating attached to a Russian issuer. Dutta's approach locates the *Erfolgsort* in Russia, so that there is no legally relevant *Erfolgsort* in the context of the Brussels I Regulation (recast) at all. More importantly, in this type of situation, Dutta's approach limits the application of the right of redress under Article 35a CRA Regulation. Indeed, Dutta's approach leads to the conclusion that under Article 4 (1) Rome II Regulation, Russian law applies to the dispute over credit rating agency liability so that the claim based on Article 35a CRA Regulation is no longer on the table.[154] In this manner, rules of Private International Law affect the legal protection of EU investors.

152 Dutta 2014, p. 39.
153 For this reason, Heuser rejected the approach of Dutta in respect of investors (Heuser 2019, p. 229).
154 *As explained in* section 4.4.1.

(d) – EP: investor's habitual residence as a connector
Another possible connector is the domicile (or habitual residence) of the claimant. During the legislative proceedings for the third version of the CRA Regulation, the European Parliament proposed introducing the habitual residence of investors as a connector to determine the competent court and the applicable law. This proposal stipulated: '5a. The civil liability regime applicable shall be that of the Member State in which the investor sustaining the damage had his or her habitual residence when the damage occurred.'[155] This proposal, however, did not enter into force.

At first sight, the 'habitual residence' of issuers and investors may seem an attractive connector. It provides issuers and investors with legal certainty, and with the opportunity to sue credit rating agencies in their own countries. Furthermore, it guarantees that a Member State law applies to claims brought by issuers and investors who are domiciled in the EU. However, using the claimant's domicile as a connector does not align with the current approach taken in EU Private International Law, which tends to avoid determining jurisdiction and applicable law based on the domicile of the claimant (as explained under (c)). Especially in relation to investor claims, there are disadvantages attached to this approach. The domicile of an investor is not foreseeable and predictable for credit rating agencies. Moreover, as loss caused by credit ratings can easily spread over the whole world subsequent to their publication on the Internet, introducing the *forum actoris* entails that credit rating agencies can be sued by investors in all Member States. In addition, there is a risk of dispersion of the applicable national law to one single infringement of Annex III CRA Regulation.

(e) Heuser: place of Vermögensverfügung investor as a connecting factor
In the context of credit rating agency liability vis-à-vis investors, in 2019 Heuser proposed using the place where the investor initiated the decisive steps to decrease its assets for the purpose of the transaction (*der Vermögensverfügungsort*) as a connector to determine the applicable national law under Article 4 (1) Rome II Regulation.[156] Heuser distinguished this connector from other connectors such as the place where the investor made its investment decision and the place where the investor is domiciled. Employing the *Verfügungsort* as a connecting factor implies that an investor's loss occurs at the moment of initiating the transaction of the financial instruments. This approach, however, disadvantages credit rating agencies as defendants, because the place in which an investor disposes of its assets lacks foreseeability and predictability from their perspective and because one can question how to locate this place exactly.[157]

155 Report A7-0221/2012, pp. 68 and 83.
156 Heuser 2019, pp. 232-234 and 257. *Cf. also* Heuser 2019, pp. 226-227.
157 *Contra* Happ 2015, pp. 191-192.

(f) *Relevant financial market as a connector*

As an alternative connecting factor in the context of securities litigation in general, the German Council on Private International Law[158] proposed using the financial market on which relevant securities were traded as a connector to determine the law applicable to non-contractual obligations. To that end, the German Council on Private International Law proposed adding a provision to the Rome II Regulation (Art. 6a Rome II Regulation). This provision created special conflict of laws rules for securities litigation and, more specifically, for 'illicit' acts on the financial markets. The structure of the proposed Article 6a Rome II Regulation reminded of Article 6 Rome II Regulation providing for special rules for non-contractual obligations arising from unfair competition acts and Article 7 Rome II Regulation providing for special rules for non-contractual obligations arising from environmental damage. The proposed Article 6a read as follows:

> '(1) The law applicable to a non-contractual obligation arising out of an illicit act on the financial market shall be *the law of the country where the affected financial instrument has been admitted to trading on a regulated market*. In the case of multiple listings, the law applicable shall be the law of the country where the financial instrument was acquired or disposed of. The same shall apply in the case of trading outside a regulated market unless the person claimed to be liable could not reasonably foresee this law.
> (2) Where it is clear from all the circumstances of the case that the act is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply.
> (3) Where the law applicable cannot be determined on the basis of paragraph 1, the non-contractual obligation shall be subject to the law of the country with which it is most closely connected.
> (4) If the illicit act affects markets in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant may instead choose to base his or her claim on the law of the court seised, provided that the financial instrument has been admitted to trading on a regulated market in this Member State or is publicly offered there.
> (5) Where an illicit act on the financial market affects exclusively the interests of a specific person, Articles 4 and 14 shall apply.
> (6) The law applicable pursuant to paragraphs 1 to 4 may be derogated from only by an agreement entered into after the event giving rise to the damage occurred.'[159]

158 The German Council on Private International Law (der Deutscher Rat für IPR) provides advice and issues reform proposals in the area of Private International Law to the German government in order to stimulate the development of statutory Private International Law. Krause 2018, pp. 26 and 30.

159 Emphasis added [DJV]. 'Resolution of the German Council for Private International Law, Special Committee on Financial Market Law', *IPRax* 2012, pp. 471-472. *Cf. also* Garcimartín 2011, pp. 453-456 (in the context of prospectus liability in particular).

The proposed Article 6a Rome II Regulation indicates that the connector to determine the law applicable to financial torts is the place where the affected financial instrument was admitted to trading on a regulated market. If the affected financial instrument was traded on several regulated markets, Article 6a Rome II Regulation indicates that the law applies of the place where the investor acquired or disposed of the financial instrument. The drafters of the proposal derived its wording from the specific conflicts of law rules for unfair competition damages claims under Article 6 Rome II Regulation.[160] Article 6 (1) Rome II Regulation stipulates that 'the law applicable to a non-contractual obligation arising out of an act of unfair competition is the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.' Article 6 (1) and the proposed Article 6a (1) Rome II Regulation hence both concentrate on a relevant market as a connecting factor. Lehmann, as one of the members of the German Council on Private International Law, pointed at the advantages of the proposed Article 6a Rome II Regulation. He argued that this 'market-oriented approach', amongst others, enhances legal certainty, avoids a dispersal of the applicable national law and aligns with the approaches under US law and Swiss law.[161]

The German Council on Private International Law already indicated that the proposed main rule under Article 6a (1) Rome II Regulation is not always adequate for disputes involving credit rating agency liability.[162] If the proposed rule applied to such disputes, the law applicable to claims based on Article 35a CRA Regulation is the law of the country in which the financial instrument 'affected' by the credit rating has been admitted to trading on a regulated market. The proposed Recital 20a Rome II Regulation stipulated that the 'escape clause' under the proposed Article 6a (2) Rome II Regulation could be used, for instance, 'with respect to liability for an erroneous rating of the issuer'. In the explanatory note to the proposal, Lehmann referred to an example in which a credit rating agency is held liable for an incorrect *issuer* rating – attached to the issuer and hence not to specific financial instruments – on which investors relied for acquiring financial instruments. In his opinion, the law of the financial market on which those financial instruments were traded was arbitrary ('*willkürlich*') from the perspective of a credit rating agency. This national law is arbitrary because the credit rating agency rated the issuer and not the financial instruments. In such situations, Lehmann argued that the law of the country in which the issuer is established should

160 Lehmann 2012, p. 402.

161 Lehmann 2016b, pp. 340-341 (in the context of prospectus liability in particular). *Cf. also* Lehmann 2018, pp. 24-25.

162 Lehmann 2012, p. 404. *See also* Heuser 2019, p. 242. *Contra* Schantz 2015, pp. 351-352. Schantz wished to adopt the place of the relevant financial market as connecting factor.

apply.[163] The law of the place in which the issuer is established in fact brings us back to Dutta's approach, discussed under (c).

(g) Recommendation: Schroeter amended

Resolving the existing uncertainty in respect of the location of financial loss necessary to be able to apply Article 7 (2) Brussels I Regulation (recast) and Article 4 (1) Rome II Regulation is a matter of choosing the 'least worst' solution, as each of the alternative approaches described under (b)-(f) has its own advantages and disadvantages. In general, the essence of Private International Law rules is to facilitate legal proceedings. Therefore, in the concrete context of credit rating agency liability, clear, objective, foreseeable, predictable and simple connecting factors are needed. Furthermore, it is desirable to align the rules for jurisdiction and applicable law as much as possible, so that competent courts can apply their own national law as much as possible.

From this perspective, *in combination with the recommendation that the Union legislature should establish more detailed rules on the civil liability of credit rating agencies at the EU level* (section 6.5.4), the Union legislature could codify a slightly amended version of Schroeter's approach (discussed under (b)) in the CRA Regulation. The Union legislature could add to Article 35a CRA Regulation that the competent court and the applicable law are determined by the place of establishment and registration of the EU credit rating agency.[164] This connecting factor would apply to claims for damages based on all types of loss, whether of a purely financial or reputational nature. The connection of a credit rating agency with European territory is then crucial to determine jurisdiction and applicable law. Yet, this is not problematic because Article 35a CRA Regulation was already concluded to only apply to those credit rating agencies.[165] In deviation of the original proposal of Schroeter, the Union legislature could increase the legal protection of retail investors in relation to jurisdiction, by stipulating that retail investors[166] can start proceedings before the courts of the place of their domicile.[167]

Taking into account the general system of the Brussels I Regulation (recast), this approach in essence forms a concrete application of Article 4 (1) Brussels I Regulation (recast) combined with special retail investor protection. The advantage of this approach is that it forms a predictable and foreseeable solution for credit rating agencies, issuers and investors. This dissertation does not argue in favour of applying Article 7 (2) Brussels I Regulation (recast) and

163 Lehmann 2012, p. 404.
164 Combined with the proposals to limit the validity of exclusive jurisdiction clauses (section 6.5.3.2).
165 Section 3.5.3.1.
166 For the definition of 'retail investor', one could adopt the categorisation of MiFID II or the general definition of a 'consumer' (a natural person acting outside its professional capacity). *See on this topic* Lehmann 2018, p. 13.
167 *As argued in the context of retail investors by* Gargantini 2016, pp. 39 ff.

of defining the *Erfolgsort* in any of the ways proposed in the previous subsections. The manners in which the *Erfolgsort* can be located in disputes over credit rating agency liability do not correspond with the ratio underlying Article 7 (2) Brussels I Regulation (recast). They do not necessarily provide highly predictable outcomes, and are not necessarily justified by a close connection between the court and the action or by the facilitation of the sound administration of justice.[168] Exactly because financial loss is intangible in space and hardly tangible in time, it is preferred not to try to artificially pin down financial loss for purposes of the *Erfolgsort* in disputes over credit rating agency liability based on Article 35a CRA Regulation.[169]

Taking into account the general system of the Rome II Regulation, Schroeter's approach deviates from the main rule under Article 4 (1) Rome II Regulation. However, employing the place of establishment and registration of the credit rating agency as a decisive connecting factor for applicable law purposes has several advantages. First, it forms a predictable and foreseeable solution to credit rating agencies, issuers and investors. Second, it is an attractive choice from a regulatory perspective, because it ensures that the law of a Member State and, hence, Article 35a CRA Regulation, applies to disputes over credit rating agency liability involving a credit rating agency established and registered in the EU. Investors who invested in non-EU issuers could fall within the protection of Article 35a CRA Regulation by designing the Private International Law rules in this way. Third, this rule solves disparities in the location of financial and reputational loss in respect of issuer claims, and thereby avoids the fragmentation of claims and dispersal of laws in relation to claims for financial and reputational loss.

However, it is important to emphasise again that this approach only works well when Article 35a CRA Regulation provides a civil liability regime that does not depend to a large extent on the applicable national law for its interpretation and application. Otherwise, the approach allows credit rating agencies to choose the applicable law and, thereby, to choose the magnitude of their liability risks by means of their place of establishment and registration.[170]

168 *As required under* Recital 15-16 Brussels I Regulation (recast).

169 *Cf. in the context of credit rating agencies* Heuser 2019, p. 222. *Cf. in general on financial loss* Garcimartín 2011, p. 452 and Haentjens & Verheij 2016, p. 346.

170 Yet the civil liability threat under a national regime forms only one of the possible considerations for a credit rating agency to establish and register itself in a certain country or not.

6.5.4 Further substantive guidance

6.5.4.1 More guidance, in a balanced manner

The recommendation that the Union legislature must provide further substantive guidance at the EU level can hardly come as a surprise. Already in 2012, the European Economic and Social Committee advised that the civil liability of credit rating agencies vis-à-vis investors 'should be worked out in more detail and be far clearer.'[171] Option (b) and (c), described in sections 6.5.2.3 and 6.5.2.4, recommend the Union legislature to consider providing more guidance as to substantive private law at the EU level, especially in respect of the civil liability of credit rating agencies vis-à-vis investors.[172] The only manner to increase the level of protection of investors and to enhance legal certainty on the EU level is by reducing the influence of the applicable national law.[173] The general tendency of the recommendations, therefore, is that Article 35a CRA Regulation should provide more guidance in respect of the conditions for civil liability.

An argument in favour of more substantive guidance is not necessarily an argument in favour of lowering the conditions for the civil liability of credit rating agencies – although some of the recommendations do so. A right to damages should strike the right balance. First, in terms of harmonisation and the role of the applicable national law. Second, in terms of the interests of issuers, investors *and* credit rating agencies. And, third, in terms of enhancing legal certainty, while preserving flexibility in concrete cases. Ultimately, the exact elaboration of Article 35a CRA Regulation is a political and normative choice on the risk allocation between issuers, investors and credit rating agencies. Therefore, this section sometimes provides multiple options on how the Union legislature could elaborate Article 35a CRA Regulation.

It is important to recall that an EU right of redress against credit rating agencies will always have a rather limited scope of application. On the one hand, because the nature of credit rating activities entails that civil liability

171 'Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies'', 21 June 2012, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012AE0820&from=EN, last accessed at 31 August 2019.

172 The civil liability of credit rating agencies vis-à-vis issuers is generally accepted within the four Member States investigated and of a less complex nature (section 5.8.2.1), so that the interpretation and application of Art. 35a CRA Regulation in accordance with those national laws is more straightforward.

173 *For this recommendation also* Heuser 2019, p. 267 and Dumont du Voitel 2018, p. 244. Furthermore, Wimmer proposed to codify part of the additional substantive guidance in a new Annex IV CRA Regulation (Wimmer 2017, p. 440). *Cf. for an argument in favour of further European harmonisation of national private law in the field of intermediated securities law* Haentjens 2019, pp. 286-287.

should only come into play in a limited number of situations of serious misconduct by a credit rating agency. On the other hand, because the credit rating industry is highly oriented towards the US and it is, therefore, difficult to 'catch' non-EU credit rating agencies within an EU right to damages. However, once an EU credit rating agency passes the threshold of serious misconduct, issuers and investors should be entitled to a right of redress subject to realistic conditions.

The recommendations concentrate on the link between the duties of credit rating agencies and recoverable loss (section 6.5.4.2), the meaning of the term gross negligence (section 6.5.4.3), the attribution of conduct and state of mind (section 6.5.4.3), the condition of 'reasonable reliance' (section 6.5.4.4) and the admissibility of limitations of civil liability used by credit rating agencies (section 6.5.4.5). In addition, it is recommended that the Union legislature should harmonise the prescription period of claims under Article 35a CRA Regulation. As this dissertation did not investigate the desired length of the prescription period, this topic is not further elaborated upon.[174]

6.5.4.2 Reasoning from justification for civil liability and duty of care credit rating agencies

The civil liability of credit rating agencies under Article 35a CRA Regulation finds its basis in the violation of Annex III CRA Regulation. The advantage of this Annex-based structure is that it avoids debates on the accuracy of credit ratings and clarifies the type of conduct for which credit rating agencies can be held liable. Mistakes made in the assignment of the credit rating (which impacts the height of the credit rating) trigger civil liability, rather than the inaccuracy of the credit rating itself.[175] The disadvantage of the Annex-based structure is that it blends the substantive underlying justification for civil liability and the substantive underlying duty owed by credit rating agencies towards issuers and investors into the woodwork. One can wonder what the main underlying justification is for civil liability: the fact that a credit rating agency did not comply with its regulatory obligations (which emphasises the private enforcement function of Article 35a CRA Regulation) or the fact that the credit rating agency caused loss to issuers and investors (which emphasises the compensatory function of Article 35a CRA Regulation).

Reasoning from the justification and function of Article 35a CRA Regulation, and the corresponding underlying substantive duties owed by credit rating agencies can help the Union legislature to further shape the right of redress under Article 35a CRA Regulation. Moreover, it can provide guidance to

174 *In contrast* Wimmer proposed to set a limitation period of one year following upon the moment an issuer or investor has knowledge of the incorrectness of the credit rating, or three years subsequent to the moment the credit rating was issued (Wimmer 2017, p. 440).

175 *Cf.* Dumont du Voitel 2018, p. 233.

national legislatures and courts in the interpretation and application of Article 35a CRA Regulation. If one emphasises the function of Article 35a CRA Regulation as a private enforcement tool to enforce the regulatory obligations of credit rating agencies, credit rating agencies simply owe investors a duty to comply with the CRA Regulation; nothing more and nothing less. If one emphasises the compensatory function of Article 35a CRA Regulation, one should question what type of duty or obligation a credit rating agency owes towards which parties in respect of the avoidance of what type of loss. The Union legislature could structure this analysis by designing a number of case studies to assess when a credit rating agency should owe a certain responsibility from a factual perspective. This factual analysis could also help clarifying the desired scope of the right of redress, in terms of what types of investors in relation to what types of investment transactions deserve legal protection.

One way to specify the substantive duty of care and the scope of that duty owed by credit rating agencies towards issuers and investors, is by connecting the duty to the function of credit rating agencies as 'information intermediaries'.[176] Issuers and investors use credit ratings to, respectively, signal and determine a certain degree of creditworthiness, so that their main interests are that the credit rating reflects the creditworthiness accurately. The fact that credit rating agencies qualify their credit ratings as mere opinions and that credit ratings are not the only form of financial information investors can rely on, does not affect this general information function of credit ratings. Translated into a substantive duty of care, one could say that a credit rating agency must exercise all reasonable care and skill to provide issuers and investors with adequate information.[177] Translated into the scope of the duty, one could say that a credit rating agency *generally* only owes a duty of care to provide information and is therefore *generally* only responsible (and liable) for the consequences of the information being incorrect. Consequently, for instance, a credit rating agency does not bear responsibility for an investor's investment decision in itself.[178] In the context of the current system of the CRA Regulation, one could say that an infringement which had an impact on the credit rating essentially forms a violation of the duty to exercise all reasonable care and skill to provide correct information to issuers and investors. This substantive duty should not replace the annex-based structure,[179] but could be kept in the back of our minds when thinking further about requirements of causation and loss under Article 35a CRA Regulation.

176 *See on this function of credit rating agencies e.g.* Schroeter 2014, p. 51, Coffee 2013, pp. 84-85, Darbellay 2013, pp. 37-38 and Coffee 2006, p. 283. *In detail* section 3.3.3.

177 *Based on the approach under English law in South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191, which was confirmed in *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599.

178 *Cf. on the responsibilities of credit rating agencies vis-à-vis investors* Wimmer 2017, p. 195.

179 The annex-based structure is useful, because it avoids the debate on the accuracy of credit ratings and because it avoids credit ratings agencies are liable for inaccurate predictions.

6.5.4.3 Defining standard of care and attribution (issuer claims and investor claims)

The Union legislature should provide substance to the requirement that a 'credit rating agency has committed, intentionally or with gross negligence, any of the infringements listed in Annex III' at the EU level. Clarification is especially necessary with regard to the term 'gross negligence', but is also helpful in respect of the attribution of conduct and state of mind to a credit rating agency.

Proposals to provide further guidance on the standard of care under Article 35a CRA Regulation often go hand in hand with proposals to lower the threshold for civil liability from gross negligence to simple negligence. For instance, Heuser, Wimmer and Baumgartner recommended lowering the threshold for civil liability to simple negligence.[180] They combined these proposals with the recommendation to limit the civil liability to a certain sum.[181] Considering the close relationship between issuers and credit rating agencies, I do not see any problem in lowering the threshold to simple negligence in respect of issuers. However, I would be more reluctant to lower the threshold in respect of investors. The difference in proximity to a credit rating agency can justify a different risk allocation.

But rather than concentrating on the labels of 'gross' and 'simple' negligence, one should concentrate on the substantive yardstick to determine the standard of care credit rating agencies should adopt. The initial proposal of the European Commission for Article 35a CRA Regulation provided a definition of gross negligence that was somewhat vague, but nevertheless stated the type of conduct for which Article 35a CRA Regulation provides compensation adequately. The proposal stipulated that a credit rating agency acts grossly negligently if 'it seriously neglects duties imposed upon it by this Regulation'.[182] Building upon this definition, a national court should approach the conduct of a credit rating agency objectively from a professional liability perspective. To that end, it should assess whether a reasonable credit rating agency put in the same position could or could not have reasonably acted in a similar manner. Thereby, the national court must take into consideration that Article 35a CRA Regulation only wishes to provide compensation for serious misconduct leading to infringements. Gross negligence should involve, for instance, situations in which a credit rating agency has thought about the possible consequences of its actions but committed the infringement nonetheless, and also situations in which a credit agency should have thought about

180 Heuser 2019, p. 270, Wimmer 2017, p. 425 and Baumgartner 2015, pp. 564-565. Schantz also criticised the threshold of 'gross negligence' (Schantz 2015, pp. 363-364). *Accord* Dumont du Voitel 2018, p. 240.

181 Heuser 2019, pp. 270-271, Wimmer 2017, p. 438, fn. 1761 and Baumgartner 2015, pp. 564-565. *Accord* Dumont du Voitel 2018, p. 240.

182 COM(2011) 747 final, p. 33.

the (possible) consequences, as a reasonable credit rating agency would have thought about the consequences. By approaching the term 'gross negligence' in this objective manner, the burden of proof resting upon issuers and investors is lowered while a credit rating agency is still only liable for serious misconduct, namely for conduct a reasonable credit rating agency placed in the same circumstances would not have reasonably displayed.

Furthermore, it would be helpful for the CRA Regulation to provide more guidance in respect of the attribution of conduct and state of mind to a credit rating agency, in the sense of the level within the organisation of a credit rating agency at which infringements can be committed intentionally or with gross negligence. This dissertation took the position that the wording of infringements of Annex III CRA Regulation determines the relevant circle of organs and persons that can commit the infringements, so that questions of attribution are a matter of EU law and do not to fall within the competence of Member States.[183] But taking into account the approach taken by the UK legislature, which entails that senior management can only commit infringements, and the approaches taken by Gass[184] and, implicitly, by Heuser,[185] the Union legislature should consider describing in more detail who exactly can commit infringements intentionally or with gross negligence. Depending on the wording of the infringement, I would argue in favour of a broad attribution so that the infringement can be committed by the senior management, but also by organs such as rating committees and individual employees and officers.

6.5.4.4 Amending requirement of reasonable reliance (investor claims)

It is generally agreed that the Union legislature should amend the current wording of the investor-specific requirement of reasonable reliance.[186] Not only does this requirement cause uncertainties on the scope of application of Article 35a CRA Regulation, it also completely bars claims for damages of investors who cannot fulfil the requirement of causation due to a lack of evidence of reasonable reliance. Hereby, the current investor-specific requirement under Article 35a (1) CRA Regulation potentially strikes out many civil liability claims brought by investors. In order to achieve a more balanced approach, the Union legislature could consider continuing the investor-specific requirement of reasonable reliance in a different form – the option to remove the investor-specific requirement of reasonable reliance altogether is discussed in section 6.5.4.5 (a).[187]

183 Section 5.3.1.1 (b).
184 Gass considered attribution to be a matter of the applicable national law (Gass 2014, pp. 122-124).
185 Heuser considered attribution to be a matter of the applicable national law (Heuser 2019, p. 137).
186 *E.g.* Heuser 2019, p. 269, Dumont du Voitel 2018, p. 245 and Wimmer 2017, p. 431.
187 *For similar recommendations* Wimmer 2017, pp. 431-433.

For the Union legislature to continue the investor-specific requirement of reasonable reliance, in my opinion, the Union legislature should introduce a distinction between the question of whether the investor relied on the credit rating for its investment decision and the question of whether that reliance was reasonable.[188] In respect of the element of reliance, the Union legislature could facilitate investors, or at least retail investors, in proving reasonable 'reliance'. Such facilitations could take the form of an evidentiary presumption, which is up to credit rating agencies to refute.[189] An advantage of such a presumption is that investor claims do not fail because of a lack of evidence, while the importance of credit ratings for investment decisions is generally known.

In respect of the 'reasonableness' of the reliance, the Union legislature has two options. First, the Union legislature could maintain the current system of risk allocation, *viz.* the system in which it is up to the investor to prove its reliance was reasonable. The 'reasonableness' of the reliance would then become an additional causal requirement, which is for investors to fulfil. Even though the all-or-nothing approach is then continued, the burden resting upon the investor is relieved in comparison to the current situation by means of the evidentiary presumption of reliance. Second, the element of 'reasonableness' could be involved in the stage of calculating the amount of damages awarded to the investor.[190] Credit rating agencies would then be entitled to a defence based on contributory negligence in case the investor's reliance was not reasonable. National courts could reduce the amount of damages in the absence of a lack of 'reasonable' reliance. The advantage of this approach is that national courts can achieve a more balanced result, compared to the situation in which the large majority of claims for damages is disallowed due to a lack of evidence of reasonable reliance. The disadvantage is that framing reasonable reliance in terms of a defence shifts the burden of proof to the side of the credit rating agency, while it concerns information that lies in the sphere of the investor.

6.5.4.5 Linking credit rating agency's duty and the recoverable loss of investors (investor claims)

Defining and quantifying the loss for which credit rating agencies must compensate investors is one of the most complicated aspects of disputes over credit rating agency liability. The risk of overcompensating investors and overburdening credit rating agencies hangs like a sword of Damocles over the debate on the civil liability of credit rating agencies vis-à-vis investors. The CRA Regulation fails to provide guidance in this regard and passes on complex matters

188 *Cf. also* Heuser 2019, pp. 269-270.
189 *As accepted by the Dutch Supreme Court in* Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*).
190 *As proposed by* Heuser 2019, pp. 270-271.

to the national level. Throughout the reports of the Member States investigated, however, the question reoccurred whether an investor should receive compensation for its transaction costs or for mispricing loss or lost yields only. In academic literature, scholars have argued against the 'full' compensation of investors for collapsed market prices of financial instruments.[191] This discomfort with full compensation can be explained by the lack of proximity between the credit rating agency and the investor, and the fact that credit ratings do not involve investment advice.

Exactly because the relationship between credit rating agencies and investors is often remote, creating a right to compensation should go hand in hand with considering which type of loss, and to what extent that type of loss, is eligible for compensation. A first step to provide structure in the debate is thinking more thoroughly about the main function of Article 35a CRA Regulation, the justification of the civil liability of credit rating agencies vis-à-vis investors and the duty of care owed by credit rating agencies vis-à-vis investors, which can help shaping the right of redress of investors – as already argued under section 6.5.4.2. If the Union legislature wishes to provide guidance on limitations of the recoverable loss and the corresponding amount of damages, there are at least two possible ways in which to do so. First, if one considers that Article 35a CRA Regulation mainly fulfils a compensatory function and a credit rating agency owes a duty of care to exercise all reasonable care and skill to provide adequate information, national courts could limit the recoverable loss to mispricing loss or lost yields caused by affected credit ratings. Second, if the main justification for the compensation of investors under Article 35a CRA Regulation is to ensure compliance with regulatory obligations, the Union legislature could consider introducing liability caps or fixed sums of damages.

(a) Limitation recoverable loss to mispricing loss and lost yields

Emphasising the compensatory function of Article 35a CRA Regulation and the duty of credit rating agencies to exercise all reasonable care and skill to provide adequate information, one could argue in favour of limiting the recoverable loss of investors to mispricing loss and lost yields. A credit rating agency is then only held liable for the direct consequences of an infringement and an impacted credit rating, but does not bear responsibility for investment decisions and all harmful consequences flowing from investment decisions. Following this approach, a credit rating agency is hence only responsible for the direct influence of an impacted credit rating on interest rates, yields and market prices of financial instruments.

This approach has at least two important consequences. First, the reliance on a credit rating of an individual investor becomes less relevant in the stage

191 *E.g.* Wimmer 2017, pp. 194-197, Gietzelt & Ungerer 2013, p. 344, *cf.* Wagner 2013, p. 495 and Bertrams 1998, p. 365.

of establishing causation. The compensation is indeed justified by the reliance of the financial markets as a whole, rather than by the reliance of an individual investor. An investor would have to prove causation between an impacted credit rating and an inflated market price or a too low yield or coupon rate, instead of causation between an affected credit rating and an investment decision.[192] Removing the requirement of reliance from the stage of causation, however, does not entail that a credit rating agency is not entitled to a defence based on the contributory negligence of the investor for a lack of reasonable reliance. As a second consequence, the compensation of individual investors is connected to the reliance of the financial markets on credit ratings in general. The less the reaction of financial markets to credit ratings, the less the compensation of investors. And, more extremely, if an affected credit rating does not influence interest rates, yields and market prices,[193] an individual investor will not be considered to have suffered loss that is eligible for compensation from a legal point of view. As the Union legislature aims to reduce the over-reliance on credit ratings,[194] the achievement of this goal results in a reduction of the compensation of individual investors under Article 35a CRA Regulation. Also, one must realise that reliance of the financial markets on a credit rating may also vary from credit rating agency to credit rating agency. One could imagine a credit rating of one of the large credit rating agencies having more influence than a credit rating issued by a small credit rating agency.

From a theoretical point of view, capping the recoverable loss and the corresponding amount of damages at mispricing loss or lost yields forms a proper risk allocation between investors and credit rating agencies and avoids the overcompensation of investors. Nevertheless, I would be hesitant to codify this rule as a general rule in the CRA Regulation, as one cannot exclude situations occurring in which a credit rating agency did take up more responsibility than a duty to provide adequate information only and should be held liable to a larger extent. In order to implement this approach, further economic research is needed to determine how the effects of credit ratings could be separated from other factors determining the price and yields of financial instruments.

(b) Introduction fixed sums or caps

The model described under (a) that concentrates on the compensation of investors can be criticised from the perspective of the regulatory function of Article 35a CRA regulation. If one considers Article 35a CRA Regulation to mainly serve as a regulatory tool and the main duty of credit rating agencies

192 *Contra* Heuser 2019, p. 271. Heuser wished to uphold the requirement of reliance to avoid opening the floodgates to large amounts of civil liability claims.
193 Or, if an investor does not succeed in providing evidence of such effects.
194 Recital 5 CRA III Regulation.

is to comply with their regulatory obligations, it is not appropriate to only compensate investors for mispricing loss or lost yields. Indeed, if interest rates, yields or market prices were not influenced by an affected credit rating, investors are not entitled to damages, while the credit rating agency would have committed an infringement listed in Annex III CRA Regulation that impacted a credit rating. The model described under (a) leads to the conclusion that no loss eligible for compensation from a legal perspective was suffered, and leaves the enforcement of the regulatory obligations to ESMA only.

If the Union legislature in those situations nevertheless wished to award damages to issuers and investors to encourage the private enforcement of a credit rating agency's obligations under the CRA regulation, it could create a liability system based on fixed sums of damages for infringements of Annex III CRA Regulation. The commitment of an infringement that impacted a credit rating then justifies an award of damages. Previous contributions and dissertations already proposed introducing a cap on the civil liability of credit rating agencies[195] or aligning the civil liability of credit rating agencies with the price paid for the assignment of the credit rating,[196] but retained the other conditions for civil liability set under Article 35a (1) CRA Regulation. If the most important objective of the Union legislature is considered to be the private enforcement of the regulatory obligations under the CRA Regulation, one could also think of a system of strict liability for infringements listed in Annex III CRA Regulation combined with the capped amount of damages or a fixed sum of damages.[197] Creating an appropriate system of liability caps of fixed sums of damages is, however, difficult.[198] Not only because the height of the limits

195 Wimmer proposed to 'fully' compensate investors, in the sense that the investor can claim the purchase price of the financial instruments (lowered with the selling price) in exchange for the financial instruments or that the investor can claim the difference between the actual and the hypothetical price of the financial instruments (Wimmer 2017, pp. 438-439). Yet, she also recommended introducing a liability cap ('*eine summenmäßige Beschränkung*'), which renders it easier for credit rating agencies to find insurance and to calculate their civil liability (Wimmer 2017, pp. 428-430). Schantz proposed to limit the amount of damages to 10-20% of the issue of financial instruments (Schantz 2015, p. 371). Haar proposed to limit the damages to investor's loss suffered at the primary markets, to limit the damages to the issuer's loss or to cap the damages at the height of a credit rating agency's fee or the height of the profits made. Haar preferred the last option of 'the disgorgement of profits' (Haar 2014, pp. 331-333). *Also* Dumont du Voitel 2018, pp. 239-240 and Scarso 2013, p. 188.

196 Baumgartner proposed to limit the civil liability of credit rating agencies to the price of the assignment of the credit rating (Baumgartner 2015, p. 565). This option was also described by Haar 2014, p. 332. *See also* Miglionico 2019, no. 9.07.

197 Pacces & Romano proposed a system of strict liability, but their proposal was not linked to infringements of Annex III CRA Regulation. They argued credit rating agencies should be strictly liable 'whenever a bond or a company they rate defaults'. They subsequently severely limited the scope of the liability to a multiplier of the credit rating agency's income, to a certain time frame and by the possibility of credit rating agencies to limit their liability (Pacces & Romano 2014, p. 5).

198 *As stated by* Wimmer 2017, p. 429.

must be assessed, but also because the division of the amounts between investors must be determined.

6.5.4.6 Limitations of civil liability in advance (issuer claims and investor claims)

The Union legislature could also provide further guidance on the admissibility of limitations of civil liability in advance under Article 35a (3) CRA Regulation. Currently, as long as the limitation is reasonable and proportionate, any limitation in accordance with the national applicable law is permitted. As the admissibility of a limitation clause depends greatly on the concrete circumstances of situations, it is difficult to predict when and what type of limitations are allowed. Article 35a (3) CRA Regulation should set some guidelines on when and what type of limitation clause is permitted. The UK Implementing Regulations could serve as an example, as its provisions enumerate multiple circumstances that courts can take into consideration when determining the validity of limitation clauses.[199]

If the Union legislature wishes to increase the civil liability risks for credit rating agencies, Article 35a (3) CRA Regulation should restrict the admissibility of limitation clauses. Limiting civil liability for damages caused by intentionally committed infringements should never be reasonable and proportionate. If an infringement was committed with gross negligence, I would say it is generally not admissible for a credit rating agency to limit its civil liability for damages that were reasonably foreseeable at the moment the infringement was committed. This especially applies when the amount of damages is capped at mispricing loss or missed yields. Moreover, the effect of Article 35a (1) CRA Regulation would be marginalised if credit rating agencies would be allowed to exclude liability for infringements that have been committed with gross negligence. In order to avoid Article 35a (1) CRA Regulation being deprived of its effects by the limitation of liability in advance under Article 35a (3) CRA Regulation, Article 35a (3) CRA Regulation could stipulate that the civil liability of credit rating agencies may only be limited in advance where that limitation is reasonable and proportionate. Furthermore, a limitation is presumed not to be reasonable and proportionate: (a) when the damages were caused by an infringement that the credit rating agency committed intentionally; and (b) when the damages caused by an infringement that the credit rating agency committed with gross negligence were reasonably foreseeable or the amount of damages was reasonably foreseeable at the moment the infringement was committed.

199 Art. 10-12 UK Implementing Regulations.

6.6 Rating the suitability of Article 35a's template for private enforcement

The observations and recommendations of this Chapter were made in the particular context of credit rating agency liability, but part of the observations and recommendations concern the vertical relationship between EU and national law in general. These observations and recommendations provide an insight into the suitability of the current template of Article 35a CRA Regulation for other parts of the financial sector and possibly other legal areas. Considering the broader implications of this study is useful, because the template of Article 35a CRA Regulation may form an attractive political compromise in future legislative proceedings in EU financial law and other legal areas as well.[200] But it is exactly in situations in which little consensus exists on the desirability of a right of redress, that the template is expected to contribute rather little to the level of legal protection, to cause uncertainty for stakeholders involved and not to enhance the convergence and harmonisation of national legal systems.

Rights of redress that combine EU and national law in ways similar to Article 35a CRA Regulation are often expected to have little added value in terms of legal protection. This type of provision may have little legal strength, because the reference to the applicable national law causes the provisions' effects to depend too much on national interpretations and applications. The structure employed underestimates the continuing importance of the general principles underlying national legal systems, while it overestimates the limits EU law can set on the discretion of Member States. As a result, the structure of Article 35a CRA Regulation is successful only if Member States do not restrictively interpret and apply the conditions of the right of redress and heed the previous comments. Although Member States cannot ignore the existence of such legal bases at the EU level, there are few tools to limit national discretion in respect of the civil liability of individuals and other private parties. The UK Implementing Regulations demonstrated the broad discretion national legislatures enjoy in the interpretation and application process and the grey area between restrictive interpretations and applications and actual violations of the principle of effectiveness. The template of Article 35a CRA Regulation may work in straightforward legal disputes and in situations in which consensus exists on the desirability of a right of redress. However, in such situations, the Union legislature has less need to resort to the template of Article 35a CRA Regulation in the first place.

Furthermore, rights of redress that combine EU and national law in ways similar to Article 35a CRA Regulation are expected to easily lead to uncertainty from the perspective of national legislatures, national courts and stakeholders

200 *On the fact that Art. 35a CRA Regulation is a political compromise e.g.* Haar 2014, p. 329. *Also* Deipenbrock 2018, p. 561.

involved in litigation. Through this particular combination of EU and national law, the Union legislature turns the world of EU law upside down. The template is reminiscent of directives and harmonious or consistent interpretation, but in reverse: EU law must be interpreted in accordance with national law, instead of national law being interpreted in accordance with EU law.[201] But whereas the legislative technique of directives respects the structures of national legal systems, in contrast, the template of Article 35a CRA Regulation does not take account of the structures of national legal systems. The broad reference to the applicable national law will continue to raise doubts on whether such provisions have direct effect, or need implementation into national legal orders first. Assuming that such provisions have direct effect, if the European conditions and terms do not fit national legal systems, it has proven to be difficult to pour the applicable national law into the mould provided for by EU law from the perspective of national legislatures and courts. National legislatures may wonder how and to what extent they are allowed to take implementing measures. Furthermore, the lack of substantive guidance at the EU level may cause national courts to have difficulty applying the provision in concrete cases. The uncertainties and complexities extend to the parties involved in litigation as well.

Moreover, rights of redress that combine EU and national law in ways similar to Article 35a CRA Regulation are expected to hardly contribute to the convergence between the civil liability regimes of Member States. One could argue that convergence or harmonisation of national legal systems is not the objective of rights of redress that combine EU and national law in ways similar to Article 35a CRA Regulation. However, this reasoning is flawed. Especially if an EU right of redress aims to reduce regulatory arbitrage between the laws of Member States, the template of Article 35a CRA Regulation will often not be capable of overcoming incentives to shop for the most beneficial liability regime.

Overall, instead of using the template of Article 35a CRA Regulation, the Union legislature should carefully consider other possibilities to arrange for provisions on civil liability at the EU level. The Union legislature could consider requiring that Member States apply their civil liability regimes in situations in which no fundamental differences between Member States exist. As more intrusive legal measures, the Union legislature could decide to impose more detailed obligations upon Member States by describing when issuers and investors are entitled to a right of redress under the applicable national law or to create autonomous rights of redress. These options have their own advantages and disadvantages, but they avoid the problematic combination of EU and national law within EU rights of redress. Especially in situations in which the template of Article 35a CRA Regulation provides a seemingly attractive political compromise because little consensus exists on the desirability of

201 *Cf. in the context of credit rating agencies* Lehmann 2016a, p. 75.

a right of redress, its usefulness for the Union legislature from a legal perspective is generally rated at BB or Ba1[202] and, in other words, is generally rated below investment grade. Legislative investments of the Union legislature in the template of Article 35a CRA Regulation have significant speculative characteristics. There is a high risk that any advantages of using this template are outweighted by a lack of added value, legal uncertainties or a lack of convergence and harmonisation of national legal systems.[203]

6.7 Concluding remarks

This final Chapter investigated whether Article 35a CRA Regulation has achieved its post-crisis goal of being an adequate right of redress for issuers and investors against credit rating agencies, whilst the provision has to be interpreted and applied under various systems of national law. Furthermore, this Chapter analysed whether the civil liability of credit rating agencies should be regulated differently and, if so, in what manner.

The observations made from the perspective of the normative framework in section 6.3 demonstrated that Article 35a CRA Regulation has not achieved its post-crisis goal of forming an adequate right of redress for issuers and investors.[204] Article 35a CRA Regulation is a political compromise;[205] proponents and opponents of credit rating agency liability can present the right of redress under Article 35a CRA Regulation to their own advantage. Yet, a politically balanced right does not necessarily lead to a balanced right from a legal perspective. Moreover, creating a framework for a right of redress at the EU level is in itself not necessarily sufficient to guarantee an adequate right of redress. In summary, four important observations were made from the perspective of the normative framework:

1. Article 35a CRA Regulation has added value in the sense of issuer and investor protection in theory, but has little added value in practice. At least two interacting reasons explain this limited added value. First, the framework for civil liability created by Article 35a CRA Regulation has a narrow

---

202 These credit ratings are the highest non-investment grade ratings pursuant to the rating scales employed by Standard & Poor's (the scale for long-term issue credit ratings available at www.standardandpoors.com//en_US/web/guest/article/-/view/sourceId/504352, last accessed at 31 August 2019) and Moody's (available at www.moodys.com/sites/products/productattachments/ap075378_1_1408_ki.pdf, last accessed at 31 August 2019), respectively.

203 Inspired by the definition of speculative credit ratings employed by Standard & Poor's (the scale for long-term issue credit ratings), available at www.standardandpoors.com//en_US/web/guest/article/-/view/sourceId/504352, last accessed at 31 August 2019. Disclaimer: please note that this rating is an opinion on the usefulness of the template of Art. 35a CRA Regulation to create an adequate right of redress. The opinion reflects the view of the author, yet also forms a recommendation to the Union legislature.

204 *Cf.* Deipenbrock 2018, pp. 574-575.

205 *Cf. e.g.* Haar 2014, p. 329. *Cf. also e.g.* Deipenbrock 2018, p. 561.

scope of application and sets stringent conditions for civil liability. Second, the structure of Article 35a CRA Regulation causes its effects to depend too much on the national interpretations and applications. The structure employed underestimates the continuing importance of the general principles underlying national legal systems and the general national approach of Member States to credit rating agency liability, while it overestimates the limits EU law entails to the discretion left to the Member States.

2. Some European Private International Law rules on jurisdiction and applicable law do not have a foreseeable and predictable outcome and cause uncertainty from the perspective of issuers, investors and credit rating agencies. The issues mostly concern the admissibility of exclusive jurisdiction clauses in favour of the courts of third countries and the assessment of the place where financial loss occurred under Article 7 (2) Brussels I Regulation (recast) and Article 4 (1) Rome II Regulation.
3. Uncertainty exists on the exact interpretation and application of some of the terms of Article 35a CRA Regulation under the four legal systems investigated. This study uncovered uncertainties in the interpretation and application of Article 35a CRA Regulation stemming from three interacting sources: (1) the imprecise drafting and unclear status of terms used by Article 35a CRA Regulation; (2) friction between the terms of Article 35a CRA Regulation and the applicable national law, and its structure and system; and (3) uncertainty on the application of some concepts of national law to credit rating agency liability.
4. The differences found between the interpretations and applications under Dutch, French, German and English law can lead to different outcomes in legal proceedings in practice. To some extent, these differences should be put into perspective as issuers and investors will not easily succeed in a claim for damages under any of the laws investigated. Yet, the current structure of Article 35a CRA Regulation and the currently existing substantive differences between the Member States do not solve risks of regulatory arbitrage.

Article 35a CRA Regulation refers to the applicable national law with ease, but creating an adequate right of redress at the EU level with terms that need to be interpreted and applied at the national level is anything but easy. One is left with the impression that the Union legislature has thought too lightly about the practical implementation of the combination of EU and national law in the right of redress created by Article 35a (1) CRA Regulation.[206] However, this

206 Baumgartner criticised the civil liability regime under Art. 35a CRA Regulation as well, but also added a more positive note (Baumgartner 2015, p. 563: '*ME ist es sehr erfreulich, dass der europäische Gesetzgeber die Haftung von Ratingagenturen ausdrücklich geregelt und damit einen wichtigen Beitrag zur Rechtssicherheit für die Geschädigten ebenso wie für die Ratingagenturen geleistet hat. Die dadurch bewirkte Rechtsklarheit wird aber durch die komplexe Struktur der EU-*

impression deserves qualification in two respects. First, Article 35a CRA Regulation functions better in relation to issuer claims as compared to investor claims. Second, the reasons why Article 35a CRA Regulation does not form an adequate right of redress do not only stem from the structure chosen, but also from the provision's scope of application, the conditions for civil liability and the imprecise wording of Article 35a CRA Regulation itself. Overall, whether one considers the main function of Article 35a CRA Regulation to compensate issuers and investors or to serve as a private enforcement tool to enforce the regulatory obligations of credit rating agencies, reconsideration of the current regime for civil liability is desirable.

The only manner to increase the level of protection of issuers and investors, and to enhance legal certainty, is by reducing the influence of the applicable national law. Therefore, section 6.5.2 recommended that the Union legislature change the basic structure of Article 35a CRA Regulation. The Union legislature could do so in at least two ways: (1) by imposing more detailed obligations upon Member States by describing when issuers and investors are entitled to a right to damages under the applicable national law; and (2) by extending the current system under Article 35a CRA Regulation by severely reducing the importance of the applicable national law. In any case, creating a mould of a right of redress into which national courts must pour national law is not helpful. For this template to be successful, national courts must approach Article 35a CRA Regulation in a way that is friendly to both issuers and investors. EU law, however, contains few tools to force Member States to do so.

The recommendations were not only directed at the structure of Article 35a CRA Regulation. Other recommendations aimed at enhancing legal certainty in the context of Private International Law, by explicitly restricting the use of exclusive jurisdiction clauses in favour of the courts of third countries and by including specific rules on jurisdiction and applicable law within the CRA Regulation. If the Union legislature decides to establish more detailed rules on the civil liability of credit rating agencies at the EU level, which converge the national civil liability regimes to a higher extent, the Union legislature could codify a slightly amended version of Schroeter's approach in the CRA Regulation.[207] The Union legislature could consider adding to Article 35a CRA Regulation that the competent court and the applicable law are determined by the place of establishment and registration of an EU credit rating agency. In addition, the Union legislature could increase the protection of retail

---

RatingVO (und damit auch des Art 35a leg cit) gemindert („Papiertiger").').

207 Schroeter 2014, pp. 835-839.

investors in relation to jurisdiction. Retail investors[208] should then be able to start proceedings before the courts of the place of their domicile.[209]

Finally, the Union legislature should consider providing more detailed substantive guidance on the conditions for civil liability at the EU level. An argument in favour of more substantive guidance is not necessarily an argument in favour of lowering the conditions for the civil liability of credit rating agencies, although some of the recommendations do so. More importantly, a right of redress for credit rating agency liability should strike the right balance: first, in terms of harmonisation and the role of the applicable national law; and, second, in terms of the interests of issuers, investors *and* credit rating agencies. In respect of the right of redress for investors, the Union legislature was recommended to reason from the justification and function of Article 35a CRA Regulation, and the corresponding underlying substantive duties owed by credit rating agencies in further shaping the right of redress under Article 35a CRA Regulation. Depending on whether one emphasises the provision's compensatory or regulatory function, the conditions of reasonable reliance and recoverable loss must be further substantiated at the EU level. Furthermore, in respect of the right of redress for issuers and investors, it was proposed approaching the term 'gross negligence' in an objective manner, so that the burden of proof resting upon issuers and investors is lowered while a credit rating agency is still only liable for serious misconduct; namely for conduct that could not reasonably have been displayed by a reasonable credit rating agency placed in the same position. Finally, Article 35a (3) CRA Regulation should continue to stipulate that the civil liability of credit rating agencies may only be limited in advance where that limitation is reasonable and proportionate. Furthermore, a limitation is presumed not to be reasonable and proportionate: (a) when the damages were caused by an infringement that the credit rating agency committed intentionally; and (b) when the damages caused by an infringement that the credit rating agency committed with gross negligence were reasonably foreseeable or the amount of damages was reasonably foreseeable at the moment the infringement was committed.

The legal analysis made in this dissertation did not lead to a positive judgment of the currently existing right of redress under Article 35a CRA Regulation. However, one should not lose out of sight that Article 35a CRA Regulation forms only a small part of the current legal framework for the credit rating industry. In general, the introduction of the CRA Regulation and the increased public enforcement did bring about positive changes to the credit rating industry. Moreover, one should keep in mind that, even if the Union legislature does strengthen the civil liability regime under Article 35a CRA

208 For the definition of 'retail investor', one could adopt the categorisation of MiFID II or the general definition of a 'consumer' (a natural person acting outside its professional capacity). *See on this topic* Lehmann 2018, p. 13.

209 *As argued in the context of retail investors by* Gargantini 2016, pp. 39 ff.

Regulation in the future, a European right of redress for issuers and, especially, for investors vis-à-vis credit rating agencies will always have a limited scope of application. On the one hand, because the nature of credit rating activities entails that civil liability can only come into play in a limited number of situations of serious misconduct displayed by a credit rating agency. On the other hand, because the credit rating industry is highly oriented towards the US and it is, therefore, difficult to 'catch' non-EU credit rating agencies within an EU right to damages. However, once an EU credit rating agency passes the threshold of serious misconduct, issuers and investors should be entitled to a right of redress subject to realistic conditions. A symbolic right to damages with unrealistically demanding conditions plagued by legal uncertainties sends a misleading signal of legal protection, and serves neither as a regulatory tool, nor as a compensatory tool for issuers and investors.

Summary

The first ideas for this PhD research developed in the aftermath of the global financial crisis. At that time, the Union legislature developed rules addressing the parties that were considered responsible for the crisis in order to stabilise the financial markets and to avoid another financial crisis. Although most of these European rules had a 'public law character', the Union legislature also introduced rules on civil liability that private parties could enforce. Consequently, in certain situations, private parties can sue the institution responsible for loss they suffered based on EU law, or are explicitly entitled to do so by EU law on the basis of national law.[1] This possibility was considered to represent a radical change, as non-contractual liability law and civil liability rules traditionally belonged to the competence of the Member States. This study concentrated on the most prominent example of a post-crisis pan-European rule on civil liability in the context of the financial sector: the legal basis for the civil liability of credit rating agencies under Article 35a CRA Regulation.

Article 35a (1) CRA Regulation provides issuers and investors with the opportunity to hold a credit rating agency liable if such agency has committed – intentionally or with gross negligence – one of the infringements listed in Annex III of the Regulation. Although the provision for civil liability under Article 35a CRA Regulation forms only a small part of the European regulatory framework for credit rating agencies, the provision has drawn the attention of legal scholars because of its remarkable structure.[2] Article 35a CRA Regulation introduced a basis for civil liability at the European level, but general tort law has not been harmonised at the EU level. Instead, the Union legislature attributed a crucial role to national private law: under Article 35a (4) CRA Regulation, the national laws of the Member States remain to be of crucial importance to interpret and apply the elements of Article 35a (1) CRA Regulation that were not defined. Article 35a CRA Regulation thus created a mould for civil liability, into which national legislatures or courts must pour the applicable national law.

1 *E.g.* Art. 11 (2) PRIIPs Regulation, Art. 31 (2) and Art. 55 (3) PEPP Regulation and Art. 11 (2) Prospectus Regulation. Outside the scope of EU financial law, Art. 82 General Data Protection Regulation. Section 2.5.

2 On the relationship to other research on the civil liability of credit rating agencies, section 1.7.

This dissertation searched an answer to the following main questions:

> *Will the post-crisis goal of an adequate right of redress for issuers and investors against credit rating agencies be achieved whilst Article 35a CRA Regulation has to be interpreted under various systems of national law? Should civil liability be regulated differently based on that analysis and if so, in what manner?*

In order to answer these main questions, this study investigated the legal basis for civil liability under Article 35a CRA Regulation thoroughly and also investigated other ways in which European rules influence private law relationships and (national) non-contractual liability law. The following sub-questions were analysed:

1. *In which ways does EU law influence (national) rules on civil liability?*
2. *Which issues occur, if any, in determining the competent court and the applicable national law in respect of claims based on Article 35a CRA Regulation?*
3. *How will the conditions of Article 35a CRA Regulation be interpreted and applied under Dutch, French, German and English law?*
4. *If differences exist between the national interpretations and applications, to what extent could such differences lead to different outcomes in decisions on civil liability claims based on Article 35a CRA Regulation?*
5. *In light of the answers given to sub-questions 2-4, should Article 35a CRA Regulation be amended? If so, in what manner(s)?*

This study approached the subject of credit rating agency liability under Article 35a CRA Regulation from a legal perspective, with a focus on the vertical interaction between EU law and national private law. To that end, the research combined the legal disciplines of EU law, Private International Law, private law and regulatory law. The research was of a descriptive and normative nature: it provided an in-depth analysis of the functioning, interpretation and application of Article 35a CRA Regulation and determined how the current European civil liability regime for credit rating agencies could be improved from the perspective of a normative framework. The dissertation can roughly be divided into three main parts.

As the first part, Chapter 2 'Influence of EU law on civil liability' and Chapter 3 'Credit rating industry and its regulation' provided the context in which the specific analyses of Article 35a CRA Regulation made in Chapters 4 and 5 must be considered.

Chapter 2 aimed to map the ways in which EU law (regulations, directives and decisions of the CJEU) currently influences rules on civil liability and rights of redress, with a particular focus on examples derived from EU financial law. By providing the broader European legal context, it aimed to contribute to the understanding of the status, main features and effects of Article 35a CRA

Regulation. To analyse the influence of EU law on civil liability, section 2.5 distinguished three situations: (1) situations in which EU law leaves the enforcement of rights established at the EU level completely to Member States; (2) situations in which EU law imposes obligations on Member States in respect of their rules on civil liability or requires the application of their national civil liability regimes; and (3) situations in which EU law creates directly effective rights to damages or compensation for individuals and other private parties at the EU level for the violation of EU rights and obligations. The difference in result between situations 2 and 3 is a matter of degree; it is sometimes difficult to draw the line between situation 2 and 3, and the influence of the provisions falling in these categories can be similar.

The roadmap demonstrated that the introduction of the right of redress for issuers and investors under Article 35a CRA Regulation does not stand on its own. One can find a growing number of provisions of a private law nature in regulations and directives.[3] EU law leaves its traces on (national) civil liability rules mainly by setting common, and mostly minimal, standards of conduct for private parties at the EU level and by requiring Member States to apply their national regimes for civil liability to violations of EU law.[4] The Union legislature has not developed a uniform approach to civil liability matters and regulates civil liability in a 'fragmented' way.[5] Provisions of EU law that explicitly arrange for civil liability and rights of redress do so in all sorts of wordings and are often included in a broader package of rules to achieve certain objectives set at the EU level.[6] From this perspective, Article 35a CRA Regulation is exemplary for the approach taken by the Union legislature in private law matters. The structure of Article 35a CRA Regulation is unique, and Article 35a CRA Regulation was included in a broader regulatory package for credit rating agencies. Furthermore, Article 35a CRA Regulation is exemplary for the approach to civil liability taken by the Union legislature in the area of EU financial law: the influence of EU law increases, but national civil liability regimes continue to play a large role.[7] Issuers and investors can base a claim directly on Article 35a CRA Regulation, but Article 35a CRA Regulation is not an independent and autonomous EU legal basis for civil liability.

3 *E.g.* Ackermann 2018 and, *focusing on regulations*, De Graaff & Verheij 2017.
4 *Cf.* Vandendriessche 2015, no. 71. Vandendriessche concluded that liability rules 'have been harmonized in a fragmented fashion and to a very limited degree only', but, at the same time that 'some impact nevertheless has been felt' (Vandendriessche 2015, no. 72 and no. 71, respectively).
5 Vandendriessche 2015, no. 71. *Also e.g.* Ackermann 2018, p. 743 and pp. 761-762 and Kuipers 2014, p. 161.
6 *See* Ackermann 2018, pp. 761-762 and De Graaff & Verheij 2017, p. 992.
7 *Cf. in general (i.e. not in the specific context of credit rating agencies)* Vandendriessche 2015, no. 71. Art. 82 General Data Protection Regulation is the only example of a right to compensation with direct horizontal effect established at the EU level, which the CJEU can interpret autonomously.

Whereas Chapter 2 broadened the scope of the study to include the European legal context in which Article 35a CRA Regulation could be considered, Chapter 3 zoomed in on the credit rating industry and its regulation in particular. It provided relevant background information on (the history of) the credit rating industry, credit ratings, the EU regulatory framework for credit rating agencies, and the factual side of credit rating agency liability. The historical analysis made in section 3.2 demonstrated that debates on the position of the credit rating agency industry and, in particular, on its civil liability have taken place since the establishment of the first credit reporting agencies in the mid-19th century. The criticism addressed at credit rating agencies in the aftermath of the financial crisis was not new, and, instead, a pattern throughout history can be noticed. Despite the returning commotion on the inaccuracy of credit ratings, credit rating agencies faced few civil liability threats throughout their existence. From this perspective, the introduction of Article 35a CRA Regulation was a breakthrough.

As a prelude to Chapters 4 and 5, section 3.5 paid attention to the legislative history of Article 35a CRA Regulation and investigated the scope of application of Article 35a CRA Regulation by describing which credit rating agencies, issuers and investors could be involved in legal proceedings based on Article 35a CRA Regulation.[8] The analysis revealed that the scope of application of Article 35a CRA Regulation is limited in several respects. Issuers and investors can only bring claims for damages under Article 35a CRA Regulation against credit rating agencies established and registered in the EU, and not against the headquarters of Moody's and Standard & Poor's in the US. Furthermore, the strictly grammatical interpretation of the investor-specific requirement of reasonable reliance of the German lower courts severely limits the scope of application of Article 35a CRA Regulation, namely to investors who relied on a credit rating for the decisions to invest in, hold onto or divest themselves of financial instruments only. Even though the first sentence of Article 35a (1) CRA Regulation, which creates the right of redress, does not provide for such restrictions and one cannot see why the Union legislature would restrict the scope of application of Article 35a in this manner, the wording of the investor-specific requirement does not excel in clarity.

As the second part of this dissertation, Chapter 4 'Private International Law aspects' and Chapter 5 'Interpretation and application Article 35a under Dutch, French, German and English law' provided an in-depth analysis of the current functioning, interpretation and application of Article 35a CRA Regulation.

Chapter 4 discussed the main elements of Private International Law in the context of the civil liability of credit rating agencies. The Chapter centred around the three main questions of Private International Law: which national

8 Section 5.3 discussed the conditions for civil liability under Art. 35a CRA Regulation in detail in the context of the legal comparison.

court can assume jurisdiction? What law is applicable? And, how shall an eventual judgment be enforced? Through this broad overview of the relevant Private International Law aspects, this Chapter addressed several issues that could occur when a national court must determine its competence in respect of claims based on Article 35a CRA Regulation and the law applicable to claims based on Article 35a CRA Regulation. It was concluded that issues – in terms of foreseeability and predictability for the stakeholders involved – mainly arise: (1) if a jurisdiction clause exists in favour of the courts of a third country (a non-Member State); and (2) if a national court must determine the *Erfolgsort* of financial loss under Article 7 (2) Brussels I Regulation (recast) or the place where the damage occurred under Article 4 (1) Rome II Regulation.

If an exclusive jurisdiction clause exists in favour of the courts of a third country, European rules of Private International Law do not provide guidance as to how national courts must assess the validity of such clauses: in accordance with national Private International Law or in accordance with the other – i.e. not Art. 25 Brussels I Regulation (recast) – provisions of the Brussels I Regulation (recast).[9] As contracts concluded by credit rating agencies can often include jurisdiction clauses in favour of the US courts, it is, hence, currently difficult for parties to predict whether Member State courts will uphold an exclusive jurisdiction clause in favour of third country courts.

In addition, it is uncertain how a national court must determine the *Erfolgsort* of financial loss under Article 7 (2) Brussels I Regulation (recast) and the place where the damage occurred under Article 4 (1) Rome II Regulation. The unforeseeability and unpredictability stemming from the CJEU's case law in the context of the *Erfolgsort* is most problematic in relation to the assessment of the applicable national law, as the *lex loci damni* is the main rule. Both in relation to jurisdiction and choice of law, the intangible nature of financial loss lies at the heart of the current uncertainty. Indeed, the *Erfolgsort* under Article 7 (2) Brussels I Regulation (recast) and the place where the damage occurred under Article 4 (1) Rome II Regulation assume that loss occurs at a physical place, while the intangible nature of financial loss renders it difficult, if not impossible, to pin financial loss down to a physical place. In its recent decisions in *Universal Music*[10] and *Helga Löber v Barclays Bank*,[11] the CJEU did not designate a single, decisive connecting factor to locate financial loss. The approach does not help solve cases in which the relevant connectors are spread over multiple countries, because it fails to make a fundamental choice with regard to the location of financial loss. In the context of Article 35a CRA Regulation, the lack of certainty is especially unfortunate, because the applicable national law is the cornerstone for stakeholders to structure their claims

9 Assuming that the Hague Choice of Court Convention does not apply.
10 CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
11 CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*).

and defences and is essential for stakeholders involved to assess whether a claim may be successful.

Chapter 5 investigated how the requirements of Article 35a (1) and Article 35a (3) CRA Regulation are interpreted and applied under Dutch, French, German and English law. As national courts cannot apply Article 35a CRA Regulation without assistance of the applicable national law, an understanding of the meaning of its terms under Member State laws was needed in order to be able to conclude in Chapter 6 whether Article 35a CRA Regulation has created an adequate right of redress for issuers and investors. Prior to the presentation of the national law reports, section 5.3 provided for an analysis of the framework set by Article 35a CRA Regulation. Section 5.3 already revealed several issues in relation to the wording of Article 35a CRA Regulation. For instance, it addressed issues in relation to the attribution of acts and omissions to credit rating agencies, issues in relation to the wording of the investor-specific requirement of reasonable reliance and inconsistencies in the wording of Article 35a CRA Regulation in relation to the remedy involved (damages or compensation). Subsequently, sections 5.4-5.7 involved reports of the interpretation and application of Article 35a CRA Regulation under Dutch, French, German and English law. The national law reports revealed uncertainties as regards the exact interpretation and application of Article 35a CRA Regulation. It was sometimes difficult to predict the exact interpretation and application due to a scarcity or even a lack of legal sources in respect of credit rating agency liability. Furthermore, the sometimes imprecise wording of Article 35a CRA Regulation, disparities between the conditions of Article 35a CRA Regulation and the structure of Article 35a CRA Regulation caused uncertainties and frictions.

Finally, section 5.8 investigated which similarities and differences exist between the four national interpretations and applications and whether any differences can lead to different decisions on civil liability claims based on Article 35a CRA Regulation. At the risk of oversimplifying the results of the legal comparison, French law generally adopts the most flexible approach to the interpretation and application of Article 35a CRA Regulation (to the benefit of issuers and investors), while the English interpretation and application under the UK Implementing Regulations is very restrictive (to the disadvantage of issuers and investors). Dutch and German law take up middle positions, the former system being inclined to the French interpretation and application and the latter system being inclined to the English interpretation and application. It was observed that English law stands out in adopting a restrictive approach to almost all terms and subjects investigated, leading to rather limited possibilities for issuers and investors to hold credit rating agencies liable when English law applies to their claims. The advantage of the method adopted by the UK legislature is, however, that English law at least provides rather clear guidance on how national courts should deal with credit rating agency liability, while this guidance is lacking and causing uncertainty within the other legal systems investigated. The final question then is whether the four national approaches to Article 35a CRA Regulation can lead to different results in legal proceedings, depending on what national law applies. It was concluded that the differences can have effects on decisions in concrete cases, but that one must put these differences into perspective. The current combination of stringent conditions set at the EU level and restrictive national interpretations (will) cause(s) many claims to strand.

As the third part, Chapter 6 aimed to answer the main research questions of whether Article 35a CRA Regulation creates an adequate right of redress for issuers and investors, and of whether Article 35a CRA Regulation should be amended and, if so, how. To that end, Chapter 6 discussed the findings of Chapters 2-5 from the perspective of the normative framework. Subsequently, it formulated recommendations to improve Article 35a CRA Regulation.

The observations within the normative framework demonstrated that Article 35a CRA Regulation currently does not form an adequate right of redress for issuers and investors. Article 35a CRA Regulation is a political compromise;[12] proponents and opponents of credit rating agency liability can present the right of redress under Article 35a CRA Regulation to their own advantage. Yet, a politically balanced right does not necessarily entail a legally substantively balanced right as well. Creating a framework for a right to damages at the EU level is in itself not necessarily sufficient to increase issuer and investor protection. On the contrary, the structure of Article 35a CRA Regulation itself marginalises the provision's added value as compared to the civil liability regimes of the Member States investigated. In addition, uncertainties exist in relation to the way in which national courts must determine the competent court and the applicable national law. These uncertainties are especially unfortunate, because Article 35a CRA Regulation depends on the applicable national law for its interpretation and application. Finally, it was concluded that Article 35a CRA Regulation does not provide sufficient substantive guidance on the conditions of civil liability.

The only manner to increase the level of protection of issuers and investors, and to enhance legal certainty, is by reducing the influence of the applicable national law.[13] To that end, the Union legislature could change the structure of Article 35a CRA Regulation in two ways: (1) by imposing more detailed obligations on Member States by describing when issuers and investors are entitled to damages under the applicable national law; and (2) by extending the current system under Article 35a CRA Regulation by severely reducing the importance of the applicable national law. Other recommendations involve

12 *Cf. e.g.* Haar 2014, p. 329. *Also* Deipenbrock 2018, p. 561.
13 *For this recommendation also* Heuser 2019, p. 267. Furthermore, Wimmer proposed to codify part of the additional substantive guidance in a new Annex IV CRA Regulation (Wimmer 2017, p. 440).

restricting the use of exclusive jurisdiction clauses in favour of the courts of third countries and including specific rules on jurisdiction and applicable law within the CRA Regulation. Finally, the Union legislature could consider providing more detailed substantive guidance on terms such as 'gross negligence', on relaxing the requirement of reasonable reliance, and on deciding what type of investor loss is eligible for compensation by analysing the initial justification for credit rating agency liability and restricting the opportunities for credit rating agency's to limit their civil liability in advance.

Finally, the broader implications of this study were analysed. It was concluded that, instead of using the template of Article 35a CRA Regulation, the Union legislature should rather consider other possibilities to arrange for provisions on civil liability at the EU level. In situations in which no fundamental differences between Member States exist, the Union legislature could simply require Member States to apply their civil liability regimes. As a more intrusive legal measure, the Union legislature could decide to impose more detailed obligations on Member States by describing when issuers and investors have a right of redress under the applicable national law or to create autonomous rights of redress. These options have their own advantages and disadvantages, but they avoid the problematic combination of EU law and national law within EU rights of redress. Especially in situations in which the template of Article 35a CRA Regulation provides an attractive political compromise because little consensus exists on the desirability of a right of redress, its usefulness for the Union legislature from a legal perspective is generally rated at BB or Ba1[14] and, in other words, is generally rated below investment grade.

14 These credit ratings are the highest non-investment grade ratings pursuant to the rating scales employed by Standard & Poor's (the scale for long-term issue credit ratings available at www.standardandpoors.com//en_US/web/guest/article/-/view/sourceId/504352, last accessed at 31 August 2019) and Moody's (available at www.moodys.com/sites/products/productattachments/ap075378_1_1408_ki.pdf, last accessed at 31 August 2019), respectively.

Samenvatting (Dutch summary)

AANSPRAKELIJKHEID VAN RATINGBUREAUS IN EUROPA

Over de wisselwerking tussen de EU en nationaal recht in verhaalsrechten

De eerste ideeën voor dit promotieonderzoek zijn ontstaan in de nasleep van de wereldwijde financiële crisis. In deze periode introduceerde de Uniewetgever regelgeving voor de partijen die verantwoordelijk werden gehouden voor de financiële crisis om de financiële markten te stabiliseren en een nieuwe crisis te voorkomen. Deze Europese regelgeving had doorgaans een 'publiekrechtelijk karakter'. De Uniewetgever introduceerde echter ook bepalingen over privaatrechtelijke aansprakelijkheid die kunnen worden afgedwongen door private partijen. Deze bepalingen stellen private partijen in staat om door hen geleden schade te verhalen op grond van EU recht, of geven private partijen het recht om door hen geleden schade te verhalen op grond van nationaal recht.[1] Deze ontwikkeling is baanbrekend, aangezien buiten-contractueel aansprakelijkheidsrecht en regels over privaatrechtelijke aansprakelijkheid van oudsher voornamelijk tot de competentie van de lidstaten werden gerekend. Dit onderzoek heeft zich geconcentreerd op het meest prominente voorbeeld van een pan-Europese regel over privaatrechtelijke aansprakelijkheid in de context van de financiële sector: de grondslag voor privaatrechtelijke aansprakelijkheid van ratingbureaus opgenomen in artikel 35 bis CRA-verordening.

Artikel 35 bis CRA-verordening bevat een wettelijke grondslag op basis waarvan uitgevende instellingen en beleggers ratingbureaus aansprakelijk kunnen houden indien ratingbureaus – opzettelijk of met grove nalatigheid – één of meer in de lijst van bijlage III van de CRA-verordening opgenomen inbreuken hebben begaan. Hoewel deze bepaling slechts een klein onderdeel vormt van de Europese regelgeving voor ratingbureaus heeft artikel 35 bis CRA-verordening de aandacht getrokken van wetenschappers vanwege zijn opmerkelijke structuur.[2] Artikel 35 bis CRA-verordening introduceerde namelijk

1 O.a. art. 11 PRIIPs-verordening, art. 31 lid 2 en art. 55 lid 3 PEPP-verordening en art. 11 lid 2 Prospectus verordening. Zie buiten het gebied van Europees financieel recht: art. 82 Algemene verordening gegevensbescherming (par. 2.5).

2 Zie par. 1.7 over de manier waarop dit onderzoek zich verhoudt tot ander onderzoek over de privaatrechtelijke aansprakelijkheid van ratingbureaus.

een grondslag voor privaatrechtelijke aansprakelijkheid op Europees niveau, terwijl algemeen aansprakelijkheidsrecht niet op Europees niveau werd geharmoniseerd. In plaats van nationaal aansprakelijkheidsrecht te harmoniseren, heeft de Uniewetgever een cruciale rol toebedeeld aan het toepasselijke nationaal recht: artikel 35 bis lid 4 CRA-verordening bepaalt dat de begrippen die in artikel 35 bis CRA-verordening worden gebruikt maar niet worden gedefinieerd, worden uitgelegd en toegepast in overeenstemming met het toepasselijke nationaal recht. Artikel 35 bis CRA-verordening creëert als het ware een 'mal' voor privaatrechtelijke aansprakelijkheid, waarin nationale wetgevers en rechters het toepasselijk nationaal recht moeten 'gieten'.

Dit onderzoek concentreerde zich op de volgende hoofdvragen:

Wordt het doel van het bieden van een adequaat verhaalsrecht voor uitgevende instellingen en beleggers tegen ratingbureaus bereikt, terwijl artikel 35 bis CRA-verordening moet worden geïnterpreteerd volgens verschillende nationale rechtssystemen? Moet, op basis van deze analyse, de privaatrechtelijke aansprakelijkheid anders worden geregeld en, zo ja, op welke wijze?

Voor de beantwoording van deze hoofdvragen is het aansprakelijkheidsregime van artikel 35 bis CRA-verordening onderzocht, en zijn tevens andere manieren onderzocht waarop Europese bepalingen horizontale privaatrechtelijke verhoudingen en (nationaal) buiten-contractueel aansprakelijkheidsrecht beïnvloeden. Dit onderzoek omvatte de volgende deelvragen:

1. *Op welke manieren beïnvloedt Europees recht (nationale) regels voor privaatrechtelijke aansprakelijkheid?*
2. *Welke problemen kunnen zich voordoen bij het bepalen van de bevoegde rechter en het toepasselijke nationaal recht bij vorderingen gebaseerd op artikel 35 bis CRA-verordening?*
3. *Op welke manier worden de vereisten van artikel 35 bis CRA-verordening uitgelegd en toegepast naar Nederlands, Frans, Duits en Engels recht?*
4. *Mochten er verschillen bestaan tussen de nationale interpretaties en toepassingen van artikel 35 bis CRA-verordening, in hoeverre kunnen deze verschillen leiden tot verschillende rechterlijke uitspraken over vorderingen gebaseerd op artikel 35 bis CRA-verordening?*
5. *Moet artikel 35 bis CRA-verordening worden geamendeerd in het licht van de antwoorden op deelvragen 2-4? En zo ja, op welke manier?*

De aansprakelijkheid van ratingbureaus op grond van artikel 35 bis CRA-verordening is onderzocht vanuit een juridisch perspectief, met de nadruk op de verticale interactie tussen EU recht en nationaal privaatrecht. Het onderzoek combineert EU recht, Internationaal Privaatrecht, nationaal privaatrecht en toezichtsrecht en is zowel beschrijvend als normatief van aard. Aan de ene kant is de werking, interpretatie en toepassing van artikel 35 bis CRA-verordening bestudeerd en aan de andere kant is geanalyseerd hoe het huidige Europese aansprakelijkheidsregime voor ratingbureaus kan worden verbeterd vanuit het perspectief van een normatief kader. Het proefschrift bestaat uit drie delen.

Het eerste deel van het proefschrift omvat hoofdstuk 2 'Invloed van EU recht op privaatrechtelijke aansprakelijkheid' en hoofdstuk 3 'Ratingbureaus en regelgeving'. Deze hoofdstukken vormen de achtergrond waartegen de analyse van artikel 35 bis CRA-verordening in hoofdstukken 4 en 5 moet worden bezien.

In hoofdstuk 2 is in kaart gebracht hoe EU recht (verordeningen, richtlijnen en uitspraken van het HvJ EU) regels van privaatrechtelijke aansprakelijkheid beïnvloedt. De focus lag in het bijzonder op voorbeelden vanuit Europees financieel recht. Door de bredere Europees-juridische context te schetsen, diende dit hoofdstuk bij te dragen aan het begrip van de status, de belangrijkste kenmerken en effecten van artikel 35 bis CRA-verordening. In paragraaf 2.5 zijn drie situaties onderscheiden waarin EU recht van invloed is op privaatrechtelijke aansprakelijkheid: (1) situaties waarin het EU recht de handhaving van op Europees niveau vastgestelde rechten en plichten volledig aan de lidstaten overlaat; (2) situaties waarin het EU recht de lidstaten verplichtingen oplegt ten aanzien van (de toepassing van) nationale regels over privaatrechtelijke aansprakelijkheid of de toepassing vereist van nationale regelingen inzake privaatrechtelijke aansprakelijkheid; en (3) situaties waarin het EU recht rechtstreeks werkende verhaalsrechten creëert voor individuen en andere private partijen. Het verschil in resultaat tussen situaties 2 en 3 is een glijdende schaal. Het kan moeilijk zijn een grens te trekken tussen situatie 2 en 3, en de invloed van de bepalingen uit deze categorieën kan vergelijkbaar zijn.

Uit het overzicht gegeven in paragraaf 2.5 is gebleken dat de invoering van artikel 35 bis CRA-verordening niet op zichzelf staat. In een groeiend aantal verordeningen en richtlijnen zijn bepalingen van privaatrechtelijke aard te vinden.[3] EU recht beïnvloedt (nationale) regels over privaatrechtelijke aansprakelijkheid voornamelijk door middel van gemeenschappelijke gedragsnormen voor private partijen (minimumharmonisatie) en door de lidstaten te verplichten hun nationale aansprakelijkheidsregimes toe te passen op schendingen van EU recht.[4] De Uniewetgever heeft echter geen uniforme aanpak ontwikkeld en reguleert privaatrechtelijke aansprakelijkheid op "gefragmenteerde" wijze.[5] Europese bepalingen die expliciet zien op privaatrechtelijke aansprakelijkheid komen voor in allerlei bewoordingen en zijn veelal terecht gekomen in een breder pakket aan Europese regelgeving op een bepaald terrein.[6] Bezien tegen

3 O.a. Ackermann 2018 en De Graaff & Verheij 2017 (met de focus op verordeningen).
4 Vgl. Vandendriessche 2015, nr. 71. Vandendriessche concludeerde dat de aansprakelijkheidsregels 'versnipperd en slechts in zeer beperkte mate zijn geharmoniseerd', maar dat deze regels desalniettemin enige vorm van impact hebben (Vandendriessche 2015, nrs. 71-72).
5 Vandendriessche 2015, nr. 71. Ook o.a. Ackermann 2018, p. 743 en p. 761-762 en Kuipers 2014, p. 161.
6 Zie Ackermann 2018, p. 761-762 en De Graaff & Verheij 2017, p. 992.

deze achtergrond is artikel 35 bis CRA-verordening geen vreemde eend in de bijt, maar juist illustratief voor de benadering van de Uniewetgever op het gebied van privaatrechtelijke aansprakelijkheid. De structuur van artikel 35 bis CRA-verordening is immers uniek en de bepaling is bovendien opgenomen in een breder Europees wettelijk kader voor ratingbureaus. Tevens is artikel 35 bis CRA-verordening illustratief voor de aanpak van de Uniewetgever op het gebied van het Europees financieel recht: de invloed van EU recht neemt weliswaar steeds verder toe, maar de rol van nationale aansprakelijkheidsregels blijft groot.[7] In de context van de aansprakelijkheid van ratingbureaus: uitgevende instellingen en beleggers kunnen hun vordering tot schadevergoeding rechtstreeks baseren op artikel 35 bis CRA-verordening, maar deze bepaling vormt geen onafhankelijke en autonome grondslag voor privaatrechtelijke aansprakelijkheid.

Waar in hoofdstuk 2 de blik van het onderzoek werd verruimd naar de bredere Europese juridische context, concentreerde hoofdstuk 3 zich op ratingbureaus en de Europese regelgeving voor de ratingsector. In hoofdstuk 3 is achtergrondinformatie gegeven over (de geschiedenis van) de ratingsector, ratings, de Europese regelgeving voor ratingbureaus en de feitelijke kant van de aansprakelijkheid van ratingbureaus. De historische analyse in paragraaf 3.2 liet zien dat er wordt gediscussieerd over de positie van de ratingsector en zijn privaatrechtelijke aansprakelijkheid sinds de oprichting van de eerste ratingbureaus. De kritiek op ratingbureaus in de nasleep van de financiële crisis was aldus niet nieuw. Hoewel het debat over de onnauwkeurigheid van ratings om de zoveel tijd opnieuw oplaait, bleef het risico op privaatrechtelijke aansprakelijkheid voor ratingbureaus beperkt. Vanuit historisch perspectief bezien, was de invoering van artikel 35 bis CRA-verordening dan ook een doorbraak.

Als opstapje naar hoofdstuk 4 en 5 besteedde paragraaf 3.5 aandacht aan de wetsgeschiedenis van artikel 35 bis CRA-verordening. Daarnaast onderzocht paragraaf 3.5 het toepassingsgebied van artikel 35 bis CRA-verordening door de aandacht te besteden aan ratingbureaus, uitgevende instellingen en investeerders.[8] Het toepassingsgebied van artikel 35 bis CRA-verordening is in meerdere opzichten beperkt. Zo kunnen uitgevende instellingen en beleggers slechts schadevergoeding vorderen op grond van artikel 35a bis CRA-verordening van in de EU gevestigde en geregistreerde ratingbureaus, en niet van de hoofdkantoren van Moody's en Standard & Poor's in de VS. Bovendien wordt het toepassingsgebied van artikel 35 bis CRA-verordening aanzienlijk beperkt doordat het mogelijk is om het vereiste van 'redelijk vertrouwen' dat geldt

7 Vgl. in het algemeen (d.w.z. niet in de specifieke context van ratingbureaus) Vandendriessche 2015, nr. 71. Art. 82 AVG is het enige voorbeeld van een autonoom recht op schadevergoeding met directe horizontale werking.

8 Par. 5.3 besteedde vervolgens aandacht aan de voorwaarden voor aansprakelijkheid gesteld in art. 35 bis CRA-verordening in het kader van de rechtsvergelijking.

voor beleggers strikt grammaticaal te interpreteren (zoals wordt gedaan door Duitse lagere rechters). Bij een dergelijke interpretatie is artikel 35 bis CRA-verordening alleen van toepassing op beleggers die daadwerkelijk op ratings hebben vertrouwd voor concrete investeringsbeslissingen. Hoewel niet kan worden afgeleid of en, zo ja, waarom de Uniewetgever het toepassingsgebied van artikel 35 bis CRA-verordening op deze manier heeft willen beperken, moet worden vastgesteld dat de formulering van dit specifieke vereiste niet duidelijk is.

In het tweede deel van dit proefschrift zijn in hoofdstuk 4 'Internationaal Privaatrechtelijke aspecten' en hoofdstuk 5 'Interpretatie en toepassing artikel 35a naar Nederlands, Frans, Duits en Engels recht' de huidige werking, interpretatie en toepassing van artikel 35 bis CRA-verordening onderzocht.

Hoofdstuk 4 concentreerde zich op de belangrijkste aspecten van Internationaal Privaatrecht in relatie tot de aansprakelijkheid van ratingbureaus. De focus lag daarbij op de drie hoofdvragen van het Internationaal Privaatrecht: welke nationale rechter is bevoegd? Welk recht is van toepassing? En, hoe wordt een eventuele rechterlijke uitspraak ten uitvoer gelegd? Aan de hand van deze vragen heeft hoofdstuk 4 een overzicht gegeven van vragen en problemen die kunnen rijzen in procedures die betrekking hebben op vorderingen gebaseerd op artikel 35 bis CRA-verordening. Vragen en problemen – in de zin van een gebrek aan voorzienbaarheid en voorspelbaarheid voor de betrokken actoren – doen zich voornamelijk voor: (1) indien een forumkeuze bestaat voor de rechters van een derde land; en (2) indien een nationale rechter het *Erfolgsort* van zuivere vermogensschade moet vaststellen op grond van artikel 7 lid 2 Brussel I-verordening (herschikking) of de plaats waar de zuivere vermogensschade is ontstaan moet vaststellen op grond van artikel 4 lid 1 Rome II-verordening.

Het Europees Internationaal Privaatrecht biedt geen duidelijke handvatten voor de wijze waarop een exclusieve forumkeuze voor rechters van een derde land moet worden beoordeeld: naar nationale regels van Internationaal Privaatrecht of volgens de andere – d.w.z. niet artikel 25 Brussel I-verordening (herschikking) – bepalingen van de Brussel I-verordening (herschikking).[9] Aangezien overeenkomsten die zijn gesloten met ratingbureaus veelal forumkeuzes voor rechters uit de Verenigde Staten zullen bevatten, kan de hierdoor bestaande onzekerheid ten aanzien van de toelaatbaarheid van exclusieve forumkeuzes voor rechters van derde landen lastig zijn voor de praktijk.

Daarnaast is niet duidelijk hoe nationale rechters het *Erfolgsort* van zuivere vermogensschade in de zin van artikel 7 lid 2 Brussel I-verordening (herschikking) moeten bepalen en hoe nationale rechters de plaats waar de zuivere vermogensschade zich heeft voorgedaan in de zin van artikel 4 lid 1 Rome II-verordening moeten bepalen. De jurisprudentie van het HvJ EU over het *Erfolgs-*

9 Aangenomen dat het Haagse Verdrag betreffende forumkeuzebedingen niet van toepassing is.

ort biedt hiervoor geen goede handvatten. Het gebrek aan voorzienbaarheid en voorspelbaarheid is met name problematisch voor de bepaling van het toepasselijke nationaal recht, omdat de *lex loci damni* hiervoor de hoofdregel is. Het gebrek aan voorzienbaarheid en voorspelbaarheid hangt samen met het immateriële karakter van zuivere vermogensschade. Waar artikel 7 lid 2 Brussel I-verordening (herschikking) en artikel 4 lid 1 Rome II-verordening er vanuit gaan dat schade kan worden gelokaliseerd op een fysieke plaats, maakt het immateriële karakter van zuivere vermogensschade toepassing van deze regels moeilijk, zo niet onmogelijk. In de recente uitspraken *Universal Music*[10] en *Helga Löber/Barclays Bank*[11] heeft het HvJ EU geen aanknopingspunt aangewezen dat van doorslaggevend belang is voor de lokalisering van zuivere vermogensschade. Met name in situaties waarin de mogelijk relevante aanknopingspunten zijn verspreid over meerdere landen, bieden deze uitspraken aldus geen uitkomst. In de context van artikel 35 bis CRA-verordening is het gebrek aan een duidelijke aanknopingsfactor problematisch, nu de betrokken actoren het toepasselijke nationaal recht nodig hebben om vorderingen en verweren te structureren en om te beoordelen of vorderingen en verweren kans van slagen hebben.

In hoofdstuk 5 is onderzocht hoe de vereisten van artikel 35 bis lid 1 en 3 CRA-verordening worden uitgelegd en toegepast naar Nederlands, Frans, Duits en Engels recht. Aangezien artikel 35 bis CRA-verordening niet kan worden toegepast zonder hulp van het toepasselijke nationaal recht, was inzicht in de nationale uitleg van de Europese vereisten nodig om in hoofdstuk 6 te kunnen concluderen of artikel 35 bis CRA-verordening een adequaat verhaalsrecht vormt voor uitgevende instellingen en beleggers. Paragraaf 5.3 besteedde, voorafgaand aan de landenrapporten, aandacht aan de vereisten van artikel 35 bis CRA-verordening in het algemeen. In deze paragraaf kwamen al verschillende problematische aspecten van de bepaling aan de orde, zoals de toerekening van handelen en nalaten aan ratingbureaus, het vereiste van redelijk vertrouwen voor beleggers en de inconsistenties in de bewoordingen van artikel 35 bis CRA-verordening als het gaat om de aangewezen remedie. In paragraaf 5.4-5.7 werd vervolgens de uitleg en toepassing van artikel 35 bis CRA-verordening naar Nederlands, Frans, Duits en Engels recht beschreven. De landenrapporten gaven inzicht in verscheidene onzekerheden met betrekking tot de exacte uitleg en toepassing van artikel 35 bis CRA-verordening. Deze uitleg en toepassing was niet altijd eenvoudig te voorspellen vanwege een schaarste of een gebrek aan juridische bronnen met betrekking tot de aansprakelijkheid van ratingbureaus. Bovendien kwamen onzekerheden en fricties aan het licht die werden veroorzaakt door de soms onnauwkeurige formulering van artikel 35 bis CRA-verordening, de verschillen tussen taalversies en de structuur van artikel 35 bis CRA-verordening.

10 HvJ EU 16 juni 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*).
11 HvJ EU 12 september 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber/Barclays Bank*).

Tot slot zijn in paragraaf 5.8 de verschillen en overeenkomsten geanalyseerd tussen de uitleg en toepassing van artikel 35 bis CRA-verordening in de vier onderzochte lidstaten. Tevens is kort bezien of de bestaande verschillen tot verschillende uitkomsten in rechterlijke procedures zouden kunnen leiden. Op hoofdlijnen kan worden gesteld dat artikel 35 bis CRA-verordening naar Frans recht het meest breed wordt geïnterpreteerd (ten gunste van uitgevende instellingen en beleggers), terwijl de *UK Implementing Regulations* de minst brede interpretatie van artikel 35 bis CRA-verordening geven. De interpretaties naar Nederlands en Duits recht vallen hier tussenin. De Nederlandse interpretatie neigt meer naar de Franse interpretatie, terwijl de interpretatie naar Duits recht restrictiever lijkt. Het is opgevallen dat de Engelse interpretatie van artikel 35 bis CRA-verordening dermate restrictief is, dat de mogelijkheden voor de aansprakelijkheid van ratingbureaus slechts zeer beperkt zijn indien Engels recht van toepassing is. Het voordeel van de Engelse benadering is dat de *UK Implementing Regulations* relatief veel zekerheid bieden over de uitleg en toepassing van artikel 35 bis CRA-verordening, waar dergelijke richtsnoeren in de andere onderzochte rechtssystemen ontbreken. De laatste vraag van paragraaf 5.8 was of de geconstateerde verschillen daadwerkelijk tot verschillende uitkomsten in rechterlijke procedures kunnen leiden. Geconcludeerd werd dat de verschillen in specifieke zaken tot verschillende uitkomsten kunnen leiden, maar dat de verschillen tegelijkertijd in perspectief moeten worden gezien. In het algemeen zijn de mogelijkheden tot kredietbeoordelaarsaansprakelijkheid beperkt, door een combinatie van strenge vereisten op Europees niveau en restrictieve nationale interpretaties van deze Europese vereisten.

In het derde deel van dit proefschrift, hoofdstuk 6, is getracht de hoofdvragen van dit onderzoek – namelijk of het doel van het bieden van een adequaat verhaalsrecht wordt bereikt en of de bepaling in het licht van deze analyse moet worden aangepast – te beantwoorden. Hoofdstuk 6 analyseerde de bevindingen van hoofdstuk 2-5 vanuit het perspectief van het normatief kader en formuleerde vervolgens een aantal aanbevelingen.

De observaties gedaan vanuit het perspectief van het normatief kader hebben aangetoond dat artikel 35 bis CRA-verordening op dit moment geen adequaat verhaalsrecht biedt voor uitgevende instellingen en beleggers. Artikel 35 bis CRA-verordening is een politiek compromis,[12] dat in het voordeel kan worden uitgelegd van zowel voor- als tegenstanders van de aansprakelijkheid van ratingbureaus. Een politiek uitgebalanceerd verhaalsrecht staat echter niet garant voor een juridisch adequaat verhaalsrecht. Dit onderzoek toont aan dat de bescherming van uitgevende instellingen en beleggers lastig is nu alleen een raamwerk voor privaatrechtelijke aansprakelijkheid op Europees niveau is gecreëerd. Er kan zelfs worden gesteld dat de structuur van artikel 35 bis

12 Zie o.a. Haar 2014, p. 329. Ook Deipenbrock 2018, p. 561.

CRA-verordening de toegevoegde waarde van de aansprakelijkheidsgrond vermindert in vergelijking tot sommige nationale aansprakelijkheidsregimes. Het is daarnaast problematisch voor de toepassing van de bepaling dat onzekerheid bestaat over de manier waarop jurisdictie en toepasselijk recht moeten worden vastgesteld. Hoewel deze onzekerheden zich vaker voordoen in geschillen die zuivere vermogensschade betreffen, is deze onzekerheid in de context van artikel 35 bis CRA-verordening bijzonder ongelukkig vanwege de afhankelijkheid van deze bepaling van nationaal recht. Tot slot werd geconcludeerd dat artikel 35 bis CRA-verordening onvoldoende inhoudelijke sturing geeft op het gebied van de voorwaarden voor aansprakelijkheid.

Alleen door de invloed van nationaal recht te beperken kan het niveau van bescherming van uitgevende instellingen en beleggers worden verhoogd en kan de rechtszekerheid worden verbeterd.[13] De Uniewetgever kan artikel 35 bis CRA-verordening op twee manieren aanpassen: (1) door meer gedetailleerd aan lidstaten op te leggen wanneer uitgevende instellingen en beleggers recht hebben op schadevergoeding naar nationaal recht; (2) door de aansprakelijkheid van ratingbureaus verder te harmoniseren. Andere aanbevelingen waren om het gebruik van exclusieve forumkeuzes voor derde landen te beperken en om specifieke regels over jurisdictie en toepasselijk recht vast te leggen in de CRA-verordening. De Uniewetgever zou daarnaast kunnen overwegen om meer richtsnoeren te geven ten aanzien van de betekenis van termen als 'grove nalatigheid', om het vereiste van 'redelijk vertrouwen' te versoepelen, om te verduidelijken welke schade wordt vergoed (beredeneerd vanuit de ratio van kredietbeoordelaarsaansprakelijkheid) en om de mogelijkheden tot beperking van aansprakelijkheid te limiteren.

Tot slot zijn de bredere implicaties van dit onderzoek besproken. Als de Uniewetgever in de toekomst meer wettelijke grondslagen voor privaatrechtelijke aansprakelijkheid op Europees niveau wil introduceren, wordt afgeraden om de vorm van artikel 35 bis CRA-verordening te gebruiken. In situaties waarin er geen fundamentele verschillen tussen de lidstaten bestaan, kan de Uniewetgever volstaan met het opleggen van een verplichting aan de lidstaten om hun nationale aansprakelijkheidsregimes toe te passen. Daarnaast kan de Uniewetgever ervoor kiezen om in detail aan lidstaten op te leggen wanneer partijen recht hebben op schadevergoeding naar nationaal recht of om autonome verhaalsrechten op Europees niveau te introduceren. Deze opties hebben hun eigen voor- en nadelen, maar voorkomen in ieder geval de problematische combinatie van Europees en nationaal recht zoals bij artikel 35 bis CRA-verordening het geval is. Vooral in situaties waarin de vorm van artikel 35 bis CRA-verordening een aantrekkelijk politiek compromis lijkt omdat er geen consensus is over (de wenselijkheid van) een verhaalsrecht of aansprakelijkheid, krijgt

13 Zie voor deze aanbeveling ook Heuser 2019, p. 267. Wimmer heeft voorgesteld om extra richtlijnen te geven in een nieuw Annex IV CRA-Verordening (Wimmer 2017, p. 440).

de bruikbaarheid van deze vorm een kredietbeoordeling van BB of Ba1[14] en wordt, in andere woorden, beoordeeld onder het niveau *investment grade*.

14 Deze ratings zijn de hoogste *non-investment grade* ratings volgens de ratingschalen die worden gehanteerd door Standard & Poor's (de schaal voor lange-termijn ratings, beschikbaar is op www.standardandpoors.com//en_US/web/guest/article/-/view/sourceId/504352, laatst geraadpleegd op 31 augustus 2019) en Moody's (beschikbaar op www.moodys.com/sites/products/productattachments/ap075378_1_1408_ki.pdf, laatst geraadpleegd op 31 augustus 2019).

References

LITERATURE

Abad-Romero & Robles-Fernández 2007
P. Abad-Romero & M.D. Robles-Fernández, 'Bond rating changes and stock returns: evidence from the Spanish stock market', *Spanish Economic Review* 2007, pp. 79-103.

Ackermann 2018
T. Ackermann, 'Sektorielles EU-Recht und allgemeine Privatrechtssystematik', *ZEuP* 2018, pp. 741-781.

Adam & Winter 1996
T. Adam & G. Winter, 'Framework elements in regulations', in: G. Winter (ed.), *Sources and Categories of European Union Law. A Comparative and Reform Perspective,* Baden-Baden: Nomos Verlagsgesellschaft 1996, pp. 507-519.

Adams & Bomhoff 2012
M. Adams & J. Bomhoff, 'Comparing law: practice and theory', M. Adams & J. Bomhoff (eds.), *Practice and Theory in Comparative Law*, Cambridge: Cambridge University Press 2012.

Affourtit & Lubach 2012
V.H. Affourtit & R.D. Lubach, 'Toezichthoudersaansprakelijkheid onder de Wet aansprakelijkheidsbeperking DNB en AFM', *O&A* 2012/84.

Afonso, Furceri & Gomes 2011
A. Afonso, D. Furceri & P. Gomes, 'Sovereign credit ratings and financial markets linkages: Application to European data', ECB Working Paper Series June 2011, available at www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1347.pdf?af8437707498f9ee33f5da6775c3460f.

Van den Akker 2001
E.J.A.M. van den Akker, *Beroepsaansprakelijkheid ten opzicht van derden. Een rechtsvergelijkend onderzoek naar de zorgplichten van accountants, advocaten en notarissen ten opzichte van anderen dan hun opdrachtgever*, Den Haag: Boom Juridische Uitgevers 2001.

Akkermans & Van Dijk 2012
A.J. Akkermans & H. van Dijk, 'Proportionele aansprakelijkheid, omkeringsregel, bewijslastverlichting en eigen schuld: een inventarisatie van de stand van zaken', *AV&S* 2012/17.

Alexander 2015
S.K. Alexander, 'Tort Liability for Ratings of Structured Securities under English Law', University of Oslo Faculty of Law Research Paper No. 2015-06, available at https://ssrn.com/abstract=2547517.

Alpa 2019
G. Alpa, 'General Remarks on Civil Liability in the European Context', *European Business Law Review* 2019-1, pp. 101-116.
Amort 2013
M. Amort, 'Haftung und Regulierung von Ratingagenturen. Ansätze einer Krisenprävention', *EuR* 2013, pp. 272-285.
Angelé 2014
S. Angelé, *Das Rating von CDOs*, Tübingen: Mohr Siebeck 2014.
Armour, Awrey, Davies et al. 2018
J. Armour, D. Awrey, P. Davies et al, *Principles of Financial Regulation*, Oxford: Oxford University Press 2018.
Arntz 2012
M.M. Arntz, 'Die Haftung von Ratingagenturen gegenüber fehlerhaft bewerteten Staten und Unternehmen', *BKR* 2012, pp. 89-95.
Arons 2013
T.M.C. Arons, 'Aansprakelijkheid van financieel analysten', in: D. Busch, C.J.M. Klaassen & T.M.C. Arons (eds.), *Aansprakelijkheid in de financiële sector* (Serie Onderneming en Recht, deel 78), Deventer: Kluwer 2013, pp. 773-832.
Arons 2015
T.M.C. Arons, 'On Financial Losses, Prospectuses, Liability, Jurisdiction (Clauses) and Applicable Law. European Court of Justice 28 January 2015, Case C-375/13 (*Kolassa/Barclays Bank*)', 2015-3, pp. 377-382.
Arons & Pijls 2010
A.C.W. Pijls & T.M.C. Arons, 'Prospectus Liability in the Netherlands. Consequences of the Unfair Commercial Practice Rules (Wet Oneerlijke Handelspraktijken, Wet OHP)', in: C.A. van den Nieuwenhuijzen (ed.), *Financial Law in the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2010, pp. 443-485.
Ashcraft, Goldsmith-Pinkham & Vickery 2010
A. Ashcraft, P. Goldsmith-Pinkham & J. Vickery, 'MBS Rating and the Mortgage Credit Boom', European Banking Center Discussion Paper No. 2010-24S, 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1615613.
Asser 2004
W.D.H. Asser, *Bewijslastverdeling*, Deventer: Kluwer 2004.
Asser/Hartkamp & Sieburgh 6-IV 2015
A.S. Hartkamp & C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel IV. De verbintenis uit de wet*, Deventer: Wolters Kluwer 2015.
Asser/Maeijer/Van Solinge & Nieuwe Weme 2-II* 2009
G. van Solinge & M.P. Nieuwe Weme, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 2. Rechtspersonenrecht. Deel II*. De naamloze en besloten vennootschap*, Deventer: Kluwer 2009.
Asser/Scholten Algemeen deel* 1974
P. Scholten & G.J. Scholten, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Algemeen deel*, third edition, Zwolle: W.E.J. Tjeenk Willink 1974.

Asser/De Serière 2-IV 2018
V.P.G. de Serière, *Asser 2-IV Effectenrecht. Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 2. Rechtspersonenrecht. Deel IV. Effectenrecht*, Deventer: Wolters Kluwer 2018.
Asser/Sieburgh 6-II 2017
C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte*, Deventer: Wolters Kluwer 2017.
Asser/Tjong Tjin Tai 7-IV 2018
T.F.E. Tjong Tjin Tai, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 7. Bijzondere overeenkomsten. Deel IV. Opdracht, incl. de geneeskundige behandelingsovereenkomst en de reisovereenkomst*, Deventer: Wolters Kluwer 2018.
[…] in Assmann/Schütze, HdB KapitalanlageR 2015, § […], para […]
H.D. Assmann & R.A. Schütze, *Handbuch des Kapitalanlagerechts*, fourth edition, München: Beck 2015.
Atema & Peek 2013
J.J. Atema & S.M. Peek, 'Credit rating agencies en civielrechtelijke aansprakelijkheid', in: D. Busch, C.J.M. Klaassen & T.M.C. Arons (eds.), *Aansprakelijkheid in de financiële sector* (Serie Onderneming en Recht, deel 78), Deventer: Kluwer 2013, pp. 931-972.
Athanassiou 2011
P. Athanassiou, 'Financial sector supervisor's accountability. A European perspective', ECB Legal Working Paper No. 12 2011, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1807174.
Audit & d'Avout 2013
B. Audit & L. d'Avout, *Droit International Privé*, seventh edition, Paris: Economica 2013.

Bacache-Gibeili 2016
M. Bacache-Gibeili, *Les obligations. La responsabilité civile extracontractuelle*, third edition, Paris: Economica 2016.
Barendrecht 1998
J.M. Barendrecht, 'Pure Economic Loss in the Netherlands', in: E. H. Hondius (ed.), *Netherlands Reports to the Fifteenth International Congress of Comparative Law*, Antwerpen/Groningen: Intersentia 1998, pp. 115-135.
Barents & Brinkhorst 2012
R. Barents & L.J. Brinkhorst, *Grondlijnen van Europees Recht*, thirteenth edition, Deventer: Kluwer 2012.
Barron, Clare & Thomas 1997
M.J. Barron, A.D. Clare & S.H. Thomas, 'The effect of bond rating changes and new ratings on UK stock returns', *Journal of Business Finance & Accounting* April 1997, pp. 497-509.
Baumbach/Lauterbach/Albers/Hartmann 2015
A. Baumbach, W. Lauterbach, J. Albers & P. Hartmann, *Zivilprozessordnung*, seventy-third edition, München: Beck 2015.

Baumgartner 2015
M.A. Baumgartner, *Die (Dritt-)Haftung von Ratingagenturen und anderer Informationsexperten – zugleich ein Beitrag zur Auslegung der § 275 UGB, § 11 KMG, §§ 1300, 1330 ABGB, Art 35a EU-RatingVO* (diss. Universität Wien), Wien 2015, available at http://othes.univie.ac.at/41317/1/2015-08-29_0749223.pdf.
Beatson, Burrows & Cartwright 2016
J. Beatson, A. Burrows & J. Cartwright, *Anson's Law of Contract,* thirtieth edition, Oxford: Oxford University Press 2016.
Bedendo, Cathcart, El-Jahel & Evans 2013
M. Bedendo, L. Cathcart, L. El-Jahel & L. Evans, 'The Credit Rating Crisis and the Informational Content of Corporate Credit Ratings', 2013, available at SSRN 1729231 and at https://pdfs.semanticscholar.org/84bc/39a784ca54a31f8e7bad63b1929f960d50d6.pdf.
Bell 2001
J. Bell, *French Legal Cultures*, London, Edinburgh, Dublin: Butterworths 2001.
Bell & Boyron 2008
J. Bell & S. Boyron, 'Sources of Law', in: J. Bell, S. Boyron & S. Whittaker, *Principles of French Law,* second edition, Oxford: Oxford University Press 2008, pp. 13-54.
Bénabent 2016
A. Bénabent, *Droit des obligations*, fifteenth edition, Issy-les-Moulineaux Cedex: LGDJ, Lextenso éditions 2016.
Berger & Ryborz 2014
K.P. Berger & S. Ryborz, 'Die Haftung von Ratingagenturen zwischen Kompensation und Verhaltenssteuerung', *WM* 2014, pp. 2241-2249.
Berger & Ryborz 2018
K.P. Berger & S. Ryborz, 'OLG Düsseldorf: Keine Schadenskompensation nach Art. 35a Rating-VO für Anleger bei fehlerhaftem Emittentenrating', *Betriebs-Berater* 2018, p. 1236.
Berger & Stemper 2010
K.P. Berger & M.M. Stemper, 'Haftung von Ratingagenturen gegenüber Anlegern', *WM* 2010, pp. 2289-2295.
Bergier 2018
C. Bergier, *Le contrôle international des agences de notation financières*, 2018, available at https://tel.archives-ouvertes.fr/tel-01863563/document.
Bertrams 1998
R.I.V.F. Bertrams, 'Rating agencies en hun aansprakelijkheid', in: S.C.J.J. Kortmann, W.A.K. Rank, M.H.E. Rongen et al. (eds.), *Onderneming en effecten* (Serie Onderneming en Recht, deel 13), Deventer: W.E.J. Tjeenk Willink 1998, pp. 341-367.
Bhatia 2002
A.V. Bhatia, 'Sovereign Credit Ratings Methodology: An Evaluation', IMF Working Paper WP/02/170 2002, pp. 1-60, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880211.
De Bie Leuveling Tjeenk 2014
J. de Bie Leuveling Tjeenk, 'Het csqn-verband in het financiële aansprakelijkheidsrecht', *MvV* 2014-13, pp. 317-324.

Bikhchandani & Sharma 2001
S. Bikhchandani & S. Sharma, 'Herd Behavior in Financial Markets', *IMF Staff Papers* 2001/3, p. 279-310, available at www.imf.org/External/Pubs/FT/staffp/2001/01/pdf/Bikhchan.pdf.

Bissoondoyal-Bheenick & Brooks 2015
E. Bissoondoyal-Bheenick & R. Brooks, 'Stock Market Impact of Sovereign Rating Changes: Alternative Benchmark Models', in: N. Finch (eds.), *Emerging Markets and Sovereign Risk*, London: Palgrave Macmillan 2015.

Blaurock 2007
U. Blaurock, 'Verantwortlichkeit von Ratingagenturen – Steuerung durch Privat- oder Aufsichtsrecht?', *ZGR* 2007, pp. 603-653.

Van Bochove 2016
L.M. van Bochove, 'Purely economic loss in conflict of laws: the case of tortious interference with contract', *NIPR* 2016-3, pp. 456-465.

Van Bochove 2017
L.M. van Bochove, 'De herschikte EEX-Vo en derde landen: het formele toepassingsgebied van de Verordening nader bezien', *TCR* 2017-1, pp. 1-10.

Boersma 2010
B.A. Boersma, 'Bijdrage van ratingbureaus aan ontstaan kredietcrisis onderzocht. Doet de verordening inzake ratingbureaus genoeg om een nieuwe zeperd te voorkomen?', *Onderneming en Financiering* 2010-1, pp. 4-24.

Boonekamp, *GS Schadevergoeding*
R.J.B. Boonekamp, *Groene Serie Schadevergoeding*, Deventer: Kluwer (available online).

Boonekamp, *Stelplicht & Bewijslast*
R.J.B. Boonekamp & W.L. Valk (eds.), *Stelplicht & Bewijslast*, Deventer: Wolters Kluwer (online).

Borghetti 2013
J.S. Borghetti, 'La perte de chance, rapport introductif', *Issu de Petites Affiches* 2013-218, pp. 3 ff..

Bradley 2015
M. Bradley, 'Three years post-Rubenstein: causation and loss revisited', *Butterworths Journal of International Banking and Financial Law* 2015, pp. 513-515.

Brand 2018
R.A. Brand, 'New Challenges in the Recognition and Enforcement of Judgments', Working Paper No. 2018-19, September 2018, available at https://ssrn.com/abstract=3246053.

Briggs 2008
A. Briggs, *Agreements on jurisdiction and choice of law*, Oxford: Oxford University Press 2008.

Briggs 2013
A. Briggs, *The Conflict of Laws,* third edition, Oxford: Oxford University Press 2013.

Van den Brink 2000
V. van den Brink, 'Opzet, grove schuld en exoneratiebedingen', *Nieuwsbrief BW* 2000-7/8, pp. 94-98.

Van den Brink, Den Ouden, Prechal et al. 2015
J.E. van den Brink, W. den Ouden, S. Prechal et al., 'General Principles of Law', in: J.H. Jans, S. Prechal & R.J.G.M. Widdershoven (eds.), *Europeanisation of Public Law*, second edition, Groningen: Europa Law Publishing 2015.
Brownlow 2011
B.H. Brownlow, 'Rating Agency Reform: Preserving the Registered Market for Asset-Backed Securities', *N.C. Banking Inst.* 2011, pp. 111-138.
Brugman & Schonewille 2013
G.J. Brugman & W.M. Schonewille, 'Credit rating agencies in toenemende mate voor de rechter gesleept', *VFP* 2013-3, pp. 11-13.
Brunner 1981
C.J.H. Brunner, 'Causaliteit en toerekening van schade (I)', *Verkeersrecht* 1981, pp. 210-217.
De Bruyne 2019
J. de Bruyne, 'Liability of Credit Rating Agencies – A Legal Comparative Analysis', *Forum Financier / Droit Bancaire et Financier* 2019/II, pp. 149-163.
Van de Bunt 2016
J.E. van de Bunt, *Het rampenfonds* (diss. Leiden), Deventer: Wolters Kluwer 2016.
Burgers 2017
D.E. Burgers, 'Het aanvangsmoment van de korte verjaringstermijn van art. 3:310 BW: is bekendheid met mogelijke schadeveroorzaker 'voldoende zekerheid'?', *BB* 2017/52, pp. 177-179.
Busch 2012
D. Busch, 'Why MiFID matters to private law – the example of MiFID's impact on an asset manager's civil liability', *Capital Markets Law Journal* 2012-4, pp. 386-413.
Busch 2015
D. Busch, *MiFID II/MiFIR: nieuwe regels voor beleggingsondernemingen en financiële markten. Preadvies voor de Vereniging van Financieel Recht 2015,* Deventer: Kluwer 2015.
Busch 2016
D. Busch, 'Het civiel effect van de Marktmisbruikverordening', *TFR* 2016-12, pp. 525-537.
Busch 2017
D. Busch, 'De invloed van het Europees financieel toezichtrecht op het Nederlands privaatrecht', *WPNR* 2017/7175, pp. 1011-1019.
Busch & Arons 2015
D. Busch & T.M.C. Arons, 'Van woekerpolissen, rechtszekerheid en privaatrechtelijke gevolgen door een Luxemburgse bril', *Ars Aequi* 2015, pp. 696-701.

Van Calster 2016
G.A. van Calster, *European Private International Law*, second edition, Oxford, Portland, Oregon: Hart Publishing 2016.
Cantor & Packer 1994
R. Cantor & F. Packer, 'The Credit Rating Industry', *FRBNY Quarterly Review* 1994, pp. 1-26.

Cantor, Packer & Cole 1997
R. Cantor, F. Packer & K. Cole, 'Split ratings and the pricing of credit risk', Report FED February 1997, available at www.newyorkfed.org/medialibrary/media/research/staff_reports/research_papers/9711.html.

Cappelie 2014
J. Cappelie, 'L'encadrement juridique des agences de notation', *Le Petit Juriste* 2014.

Cartwright 1996
J. Cartwright, 'Remoteness of Damage in Contract and Tort: a Reconsideration', *Cambridge Law Journal* 1996-3, pp. 488-514.

Cartwright 2016
J. Cartwright, *Contract Law. An Introduction to the English Law of Contract for the Civil Lawyer*, third edition, Oxford and Portland, Oregon: Hart Publishing 2016.

Cartwright 2017
J. Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, fourth edition, London: Sweet & Maxwell 2017.

Cash 2019
D. Cash, *Regulation and the Credit Rating Agencies. Restraining Ancillary Services,* New York: Routledge 2019.

Castermans, Dankers-Hagenaars & Dejean de la Batie 2017
A.G. Castermans, D. Dankers-Hagenaars & A. Dejean de la Batie, 'Le rapprochement des responsabilités contractuelle et délictuelle dans l'avant-projet de réforme, abordé sous l'angle du droit comparé', *Revue internationale de droit comparé* 2017-1, pp. 7-44.

Castermans & Den Hollander 2013
A.G. Castermans & P.W. den Hollander, 'Omgaan met onzekerheid', *NTBR* 2013/21.

Caton & Goh 2003
G.L. Caton & J. Goh, 'Are All Rivals Affected Equally by Bond Rating Downgrades?', *Review of Quantitative Finance and Accounting* 2003, pp. 49-62.

Chacornac 2014
J. Chacornac, *Essai sur les fonctions de l'information en droit des instruments financiers*, Paris: Dalloz 2014.

Chacornac 2016
J. Charcornac, 'l'Indemnisation des investisseurs lésés', in: A. Reygrobellet & N. Huet (eds.), *La réforme du contentieux boursier. Répression des abus de marché en France et solutions étrangères*, Bruxelles: Larcier 2016.

Chalmers, Davies & Monti 2014
D. Chalmers, G. Davies & G. Monti, *European Union Law,* third edition, Cambridge: Cambridge University Press 2014.

Charlesworth & Percy 2018
C.T. Walton, M. Armitage & R. Cooper et al. (eds.), *Charlesworth & Percy on Negligence,* fourteenth edition, London: Sweet & Maxwell 2018.

Cherednychenko 2012
O.O. Cherednychenko, 'Het private in het publiekrecht: over de opmars van het financiële 'toezichprivaatrecht' en zijn betekenis voor het verbintenissenrecht', *Themis* 2012-5, pp. 223-235.

Clédat 2012
X. Clédat, 'Agences de notation: de la délicate mise en oeuvre de leur responsabilité civile', *Revue Lamy Droit Civil* 2012, no. 96, pp. 59-63.
Clerk & Lindsell 2018
M.A. Jones, A.M. Dugdale, M. Simpson et al. (eds.), *Clerk & Lindsell on Torts*, twenty-second edition, London: Sweet & Maxwell 2018.
Coffee 2006
J.C. Coffee, *Gatekeepers. The Professions and Corporate Governance*, Oxford: Oxford University Press 2006.
Coffee 2013
J.C. Coffee, 'Ratings Reform: The Good, The Bad, and The Ugly', in: J. Kleineman, L. Gorton & A. Verständig (eds.), *Perspectives on Credit Rating Agencies*, Mölnlycke: Elanders Sverige AB 2013, pp. 83-138.
Coskun 2008
D. Coskun, 'Toezicht op Credit Rating Agencies. De rol van CRAs bij financieringsbeslissingen', *Ondernemingsrecht* 2008/181.
Couret 2003
A. Couret, 'Les agences de notation: observations sur une angle mort de la réglementation', *Revue de sociétés* 2003, pp. 765 ff..
Coval, Jurek & Stafford 2008
J.D. Coval, J. Jurek & E. Stafford, 'The Economics of Structured Finance', Harvard Business School Working Paper 2008, No. 09-060, available at www.hbs.edu/faculty/Publication%20Files/09-060.pdf.
Cox 2016
R.L.M. Cox, 'Proportionele aansprakelijkheid versus kansverlies – Tussen dogmatiek en praktijk', *NTBR* 2016/40, pp. 271-279.
Craig & De Búrca 2016
P. Craig & G. de Búrca, *EU Law. Text, Cases and Materials*, sixth edition, Oxford: Oxford University Press 2016.

Daigre 2011
J.-J. Daigre, 'Avant-propos', *Bulletin Joly Bourse* 2011-2, pp. 113 ff..
Dalton 2008
B. Dalton, *Financial Products. An Introduction Using Mathematics and Excel*, Cambridge: Cambridge University Press 2008.
Van Dam 2013
C. van Dam, *European tort law*, second edition, Oxford: Oxford University Press 2013.
Dannemann 2006
G. Dannemann, 'Comparative Law: Study of Similarities or Differences?', in: M. Reimann & R. Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press 2006.
Darbellay 2013
A. Darbellay, *Regulating Credit Rating Agencies*, Cheltenham: Edward Elgar 2013.
Darbellay & Partnoy 2012
A. Darbellay & F. Partnoy, 'Credit Rating Agencies and Regulatory Reform', in: C.A. Hill & B.H. McDonall (eds.), *Research Handbook on the Economics of Corporate*

Law, Cheltenham: Edward Elgar 2012, also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042111.

Dedek & Schermaier 2012
H. Dedek & M.J. Schermaier, '30. German Law', in: J.M. Smits, *Elgar Encyclopedia of Comparative Law*, second edition, Cheltenham: Elgar 2012, pp. 349-370.

Deipenbrock 2014
G. Deipenbrock, 'Trying or Failing Better Next Time? – The European Legal Framework for Credit Rating Agencies after Its Second Reform', *EBLR* 2014, pp. 207-225.

Deipenbrock 2015
G. Deipenbrock, 'The European Civil Liability Regime for Credit Rating Agencies from the Perspective of Private International Law – Opening Pandora's Box?', *International and Comparative Corporate Law Journal* 2015-2, also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2546268##.

Deipenbrock 2018
G. Deipenbrock, 'Private Enforcement in the Realm of European Capital Markets Law Revisited and the Case of Credit Rating Agencies from the Perspective of European and German Law', *European Business Law Review* 2018-4, pp. 549–575.

Della Negra 2014
F. Della Negra, 'The private enforcement of the MiFID conduct of business rules. An overview of the Italian and Spanish experiences', *ERCL* 2014-4, pp. 571-595.

Denis 2011
F. Denis, 'La nouvelle responsabilité civile des agences de notation', *RLDA* 2011, pp. 73-78.

Dezeuze 2004
E. Dezeuze, 'La responsabilité civile découlant de la diffusion d'information incomplète', *Bulletin Joly Bourse* 2004-1, pp. 43 ff..

Dicey, Morris & Collins 2012
L.A. Collins, A. Briggs, A. Dickinson et al. (eds.), *Dicey, Morris and Collins on the conflict of laws*, fifteenth edition, London: Sweet & Maxwell 2012.

Dichev & Piotroski 2001
I.D. Dichev & J.D. Piotroski, 'The Long-Run Stock Returns Following Bond Rating Changes', *Journal of Finance* 2001, pp. 173-203.

Dickinson 2008
A. Dickinson, *The Rome II Regulation. The Law Applicable to Non-Contractual Obligations*, Oxford: Oxford University Press 2008.

Van Dijk 2013
Chr.H. van Dijk, 'Causale perikelen: het is moeilijk en het zal moeilijk blijven', *TVP* 2013-3, pp. 61-84.

Van Dijk 2016
J.M. van Dijk, *Over opinions. Handleiding voor het opstellen en beoordelen van Nederlandsrechtelijke legal opinions*, Den Haag: Boom Juridisch 2016.

Dijkshoorn 2011
W. Dijkshoorn, 'De leer van de redelijke toerekening: back to the eighties', *AV&S* 2011/30.

Dondero, Haschke-Dournaux & Sylvestre 2004
B. Dondero, M. Haschke-Dournaux & S. Sylvestre, 'Les agences de notation', *Actes Pratiques – Sociétés* 2004, pp. 5-26.
Van Dongen 2014
E.G.D. van Dongen, *Contributory Negligence. A Historical and Comparative Study*, Leiden: Brill Nijhoff 2014.
Duffhues & Weterings 2011
P.J.W. Duffhues & W.C.T. Weterings, 'The quality of credit ratings and liability: the Dutch view', *International Journal of Disclosure and Governance* 2011, pp. 1-21.
Dumont du Voitel 2018
A. Dumont du Voitel, *Die zivilrechtliche Verantwortlichkeit von Ratingagenturen nach deutschem, europäischem und US-amerikanischem Recht*, Berlin: Peter Lang 2018.
Duncan & Neill 2015
B. Neill, R. Rampton, H. Rogers et al., *Butterworths Common Law Series Duncan and Neill on Defamation*, fourth edition, London: LexisNexis 2015.
Van Dunné 2005
J.M. van Dunné, 'Beperking van aansprakelijkheid in contracten: exoneratie en verzekering, zoals in geval van 'bewuste roekeloosheid'', *TMA* 2005-3, pp. 89-104.
Dutta 2013
A. Dutta, 'Die neuen Haftungsregeln für Ratingagenturen in der Europäischen Union: Zwischen Sachrechtsvereinheitlichung und europäischem Entscheidungseinklang', *WM Wirtschafts- und Bankrecht* 2013, pp. 1729-1736.
Dutta 2014
A. Dutta, 'Die Haftung amerikanischer Ratingagenturen in Europa – Die Rolle des internationalen Privatrechts', *Praxis des Internationalen Privat- und Verfahrensrechts* 2014-1, pp. 33-41.
Duyvensz 2003
J.H. Duyvensz, *De redelijkheid van de exoneratieclausule*, Den Haag: Boom Juridische Uitgevers 2003.
Duyvensz 2011
J.H. Duyvensz, 'Exoneraties en bewuste roekeloosheid', *WPNR* 2011(6867), pp. 225-231.

Ebenroth & Dillon 1992
C.T. Ebenroth & T.J. Dillon, 'The international rating game: an analysis of the liability of rating agencies in Europe, England, and the United States', *Law & Pol'y Int'l Bus.* 1992, pp. 783-834.
Edwards 2013
H. Edwards, 'CRA 3 and the liability of rating agencies: inconsistent messages from the regulation on credit rating agencies in Europe', *Law and Financial Markets Review* 2013, pp. 186-191.
Empelmann 2007
T. Empelmann, 'ThyssenKrupp AG', in: P. Seethaler & M. Steitz (eds.), *Praxishandbuch Treasury-Management. Leitfaden für die Praxis des Finanzmanagements*, Wiesbaden: Gabler 2007.

Van Esch 2013
R.E. van Esch, 'De privaatrechtelijke aansprakelijkheid voor schade als gevolg van misbruik van een betaalinstrument', in: D. Busch, C.J.M. Klaassen & T.M.C. Arons (eds.), *Aansprakelijkheid in de financiële sector* (Serie Onderneming en Recht, deel 78), Deventer: Kluwer 2013, pp. 1031-1082.

Fairhurst 2016
J. Fairhurst, *Law of the European Union*, eleventh edition, Harlow: Pearson 2016.

Fauvarque-Cosson & Fournier 2012
B. Fauvarque-Cosson & A. Fournier, '29. France', in: J.M. Smits, *Elgar Encyclopedia of Comparative Law*, second edition, Cheltenham: Edward Elgar 2012, pp. 344-348.

Fentiman 2006
R. Fentiman, 'Civil Jurisdiction and Third States: *Owusu* and after', *Common Market Law Review* 2006-3, pp. 705-734.

Ferrarini & Giudici 2005
G. Ferrarini & P. Giudici, 'Financial Scandals and the Role of Private Enforcement: The Parmalat Case', European Corporate Governance Institute, Law Working Paper 2005, No. 40/2005, available at https://ecgi.global/sites/default/files/working_papers/documents/SSRN-id730403.pdf.

Flandreau, Gaillard & Packer 2010
M. Flandreau, N. Gaillard & F. Packer, 'To err is human: rating agencies and the interwar foreign government debt crisis', BIS Working Papers 2010 No. 335, available at www.bis.org/publ/work335.pdf.

Flinterman & Santella 2013
F. Flinterman & P. Santella, 'ESMA: the European supervisor of credit rating agencies in the EU', in: J. Kleineman, L. Gorton & A. Verständig, *Perspectives on Credit Rating Agencies,* Mölnlycke: Elanders Sverige AB 2013.

Fluitsma & Lubach 2017
J.M. Fluitsma & R.D. Lubach, 'Wanneer start de korte verjaringstermijn? De Hoge Raad houdt koers. HR 31 maart 2017, ECLI:NL:HR:2017:552 (*De Mispelhoef*)', *MvV* 2017, pp. 257-262.

Franx 2017
J.P. Franx, *Prospectusaansprakelijkheid uit onrechtmatige daad en contract*, Deventer: Wolters Kluwer 2017.

Frielink 2009
K. Frielink, 'Aansprakelijkheidsvragen rond het prospectus: van Groningen tot Rome II', *Tijdschrift voor Financieel Recht* 2009-7/8, pp. 300-305.

Fröhlich 2008
C.W. Fröhlich, *The Private International Law of Non-Contractual Obligations According to the Rome-II Regulation. A Comparative Study of the Choice of Law Rules in Tort Under European, English and German Law*, Hamburg: Verslag Dr. Kovač 2008.

Gabbi & Sironi 2005
G. Gabbi & A. Sironi, 'Which factors affect corporate bonds pricing? Empirical evidence from eurobonds primary market spreads', *The European Journal of Finance* 2005, pp. 59-74.

Gaillard 2010
N. Gaillard, *Les agencies de notation*, Paris: La Découverte 2010.
Garciìa Alcubilla & Ruiz del Pozo 2012
R. Garciìa Alcubilla & J. Ruiz del Pozo, *Credit Rating Agencies on the Watch List: Analysis of European Regulation*, Oxford: Oxford University Press 2012.
Garcimartín 2011
F. Garcimartín, 'The law applicable to prospectus liability in the European Union', *Law and Financial Markets Review* 2011, pp. 449-457.
Garcimartín 2015
F. Garcimartín, 'Prorogation of Jurisdiction', in: A. Dickinson & E. Lein (eds.), *The Brussels I Regulation Recast*, Oxford: Oxford University Press 2015.
Gargantini 2016
M. Gargantini, 'Capital Markets and the Market for Judicial Decisions: in Search of Consistency', *MPILux Working Paper* 1 (2016), available at www.mpi.lu/filead min/mpi/medien/research/Gargantini_Capital_Markets_Brux_I_2016-01-11_MPI. pdf.
Gass 2014
M. Gass, *Haftung für fehlerhafte Ratings nach dem Artikel 35a der Ratingagenturverordnung*, Wien 2014, available at http://othes.univie.ac.at/33361/1/2014-04-15_ 9948129.pdf.
Van Gerven 2000
W. van Gerven, 'Of Rights, Remedies and Procedures', *Common Market Law Review* 2000-3, p. 510.
Van Gerven, Lever & Larouche 2000
W. van Gerven, J. Lever & P. Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law*, Oxford and Portland, Oregon: Hart Publishing 2000.
Getzler & Whelan 2017
J.S. Getzler & A. Whelan, 'Common Law and the Making of Financial Markets: Credit Ratings Agencies as a Test Case', in: K. Barker, K. Fairweather & R. Grantham (eds.), *Private Law in the 21st Century*, Oxford and Portland, Oregon: Hart Publishing 2017, also available at www.law.ox.ac.uk/sites/files/oxlaw/ getzlerwhelan_-_common_law_and_the_making_of_financial_markets_-_credit_ ratings_agencies_as_a_test_case_-_29feb16_for_workshop.pdf.
GF-ZPO/[…], § […], no. […] 2019
I. Saenger, C. Ullrich & O. Siebert, *Gesetzesformulare Zivilprozessordnung*, fourth edition, Baden-Baden: Nomos 2019.
Giesen & Maes 2014
I. Giesen & K.L. Maes, 'Omgaan met bewijsnood bij de vaststelling van het causaal verband in geval van verzuimde informatieplichten', *NTBR* 2014/27, pp. 219-232.
Giesen & Rijnhout 2017
Giesen & Rijnhout, 'Case 4 Financial Judgments. The Netherlands', in: M. Infantino & E. Zervogianni, *Causation in European Tort Law*, Cambridge & New York: Cambridge University Press 2017.

Gietzelt & Ungerer 2013
M. Gietzelt & J. Ungerer, 'Die neue zivilrechtliche Haftung von Ratingagenturen nach Unionsrecht', *Zeitschrift für das Privatrecht der Europäischen Union* 2013-6, pp. 333–346.
Gillies 2008
L.E. Gillies, *Electronic Commerce and International Private Law. A Study of Electronic Consumer Contracts*, Aldershot and Burlington: Ashgate 2008.
Goh & Ederington 1993
J.C. Goh & L.H. Ederington, 'Is a Bond Rating Downgrade Bad News, Good News, or No News for Stockholders?', *The Journal of Finance* 1993, pp. 2001-2008.
De Graaf 2006
T.J. de Graaf, *Exoneraties in ICT-contracten tussen professionele partijen* (diss. Leiden), Deventer: Kluwer 2006.
De Graaff 2017
R. de Graaff, 'Concurrent Claims in Contract and Tort: A Comparative Perspective', *European Review of Private Law* 2017-4, pp. 701-726.
De Graaff & Bakker, *Groene Serie Onrechtmatige Daad*
R. de Graaff & P.S. Bakker, 'III.3 Samenloop onrechtmatige daad en wanprestatie', in: C.J.J.M. Stolker, *Groene Serie Onrechtmatige Daad*, Deventer: Kluwer (available online).
De Graaff & Verheij 2017
R. de Graaff & D.J. Verheij, 'Europese verordeningen en Nederlands vermogensrecht', *AA* 2017, pp. 988-994.
De Graaff & Verheij 2019
R. de Graaff & D.J. Verheij, 'Regulating Private Law. The Rise of Regulations and their Impact on National Codifications', in: P. Popelier & J.T. Silveira, *Lawmaking in multi-level settings*, Hart Publishing 2019.
De Graaff 2020 (forthcoming).
Green 2015
S. Green, *Causation in Negligence*, Oxford and Portland: Hart Publishing 2015.
Griffin & Tang 2010
J.M. Griffin & D.Y. Tang, 'Did Subjectivity Play a Role in CDO Credit Ratings?', AFA 2010 Atlanta Meetings Paper; CELS 2009 4th Annual Conference on Empirical Legal Studies Paper; McCombs Research Paper Series No. FIN-04-10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1364933.
Gropp & Richards 2001
R. Gropp & A.J. Richards, 'Rating agency actions and the pricing of debt and equity of European banks: what can we infer about private sector monitoring of bank soundness?', ECB Working Paper Series August 2001, available at www.ecb.europa.eu/pub/pdf/scpwps/ecbwp076.pdf?759ddbfc3896a33f9555f23aeeb8a675.
Grothe 2013
M. Grothe, 'Market pricing of credit rating signals', Working Paper Series ECB No. 1623 2013, www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1623.pdf.
Groussot 2006
X. Groussot, *General Principles of Community Law,* Groningen: Europa Law Publishing 2006.

Grundmann 2013
S. Grundmann, 'The Bankinter Case on MiFID Regulation and Contract Law', *ERCL* 2013-3, pp. 267-280.

Haar 2010
B. Haar, 'Haftung für fehlerhafte Ratings von Lehman-Zertifikaten – Ein neuer Baustein für ein verbessertes Regulierungsdesign im Ratingsektor?', *NZG* 2010, pp. 1281-1285.

Haar 2013
B. Haar, 'Neues zur Haftung von Ratingagenturen im Zuge der zweiten Novelle der Rating-Verordnung (CRA III)?', *DB* 2013, pp. 2489 ff..

Haar 2014
B. Haar, 'Civil liability of Credit Rating Agencies after CRA3 – Regulatory All-or-Nothing Approaches between Immunity and Over-Deterrence', *EBLR* 2014, pp. 315-334.

Haazen 2004
I. Haazen, 'Roekeloosheid en bewuste roekeloosheid in de systematiek van het Burgerlijk Wetboek (I)', *WPNR* 2004(6569), pp. 193-198.

Haentjens 2019
M. Haentjens, 'European Harmonisation of Intermediated Securities Law: Dispossession and Segregation in Regulatory and Private Law', in: L. Gullifer L. & J. Payne (eds.), *Intermediation and Beyond*, Oxford: Hart Publishing 2019, pp. 259-287.

Haentjens & De Gioia-Carabellese 2015
M. Haentjens & P. de Gioia-Carabellese, *European Banking and Financial Law*, Abingdon and New York: Routledge 2015.

Haentjens & Den Hollander 2013
M. Haentjens & P.W. den Hollander, 'Europees aansprakelijkheidsrecht door de voordeur: de aangescherpte verordening inzake ratingbureaus', *WPNR* 2013 (6985), pp. 623-624.

Haentjens & Verheij 2016
M. Haentjens & D.J. Verheij, 'Finding Nemo: Locating Financial Losses after *Kolassa/Barclays Bank* and *Profit*', *JIBLR* 2016-6, pp. 346-358.

Halfmeier 2014
A. Halfmeier, 'Die Haftung von Ratingagenturen gegenüber Kapitalanlegern: Von Sydney lernen?', *VuR* 2014, pp. 327-334.

Hand, Holthausen & Leftwich 1992
J.R.M. Hand, R.W. Holthausen & R.W. Leftwich, 'The Effect of Bond Rating Agency Announcements on Bond and Stock Prices', *The Journal of Finance* 1992, pp. 733-752.

Happ 2015
C. Happ, *Internationaler Rechtsschutz gegen fehlerhafte Ratings. Eine Betrachtung des Internationalen Zivilverfahrens- und Privatrechts sowie der Rating-Verordnung*, Frankfurt am Main: Peter Lang 2015.

Harding-Farrenberg & Donovan 2015
R. Harding-Farrenberg & K. Donovan, '*ABN AMRO Bank NV v Bathurst Regional Council* Case Comment', *Business Law International* 2015-1, pp. 91-98.

Hartkamp 2014
A.S. Hartkamp, ''Horizontal effects' (or 'effects in relationships between individuals') of EU Law', in: A.S. Hartkamp, L.A.D. Keus, J.S. Kortmann et al. (eds.), *De invloed van het Europese recht op het Nederlandse privaatrecht. Algemeen deel*, second edition, Deventer: Kluwer 2014, pp. 57-71.
Hartkamp 2016
A.S. Hartkamp, 'Chapter 10 – Law of Obligations', in: M.J. Chorus, E.H. Hondius & W.J.M. Voermans, *Introduction to Dutch Law*, fifth edition, Alphen aan den Rijn: Kluwer Law International 2016.
Hartkamp 2017
A.S. Hartkamp, *Aard en opzet van het vermogensrecht (Monografieën BW A1)*, fifth edition, Deventer: Wolters Kluwer 2017.
Hartley 2013
T.C. Hartley, *Choice-of-Court Agreements under the European and International Instruments*, Oxford: Oxford University Press 2013.
Hartley 2015
T.C. Hartley, *International Commercial Litigation. Text, Cases and Materials on Private International Law*, second edition, Cambridge: Cambridge University Press 2015.
Hartlief 2014
T. Hartlief, 'Een vak apart', *NJB* 2014/2108, p. 2917.
Hartlief, Keirse, Lindenbergh et al. 2018
T. Hartlief, A.L.M. Keirse, S.D. Lindenbergh et al., *Verbintenissen uit de wet en schadevergoeding,* eighth edition, Deventer: Kluwer 2018.
Heiss 2015
H. Heiss, 'Anlegerschutz bei Versicherungsprodukten', in: E. Lorenz (ed.), *Karlsruher Forum 2014: Anlegerschutz durch Haftung nach deutschem und europäischem Kapitalmarktrecht:Mit Vorträgen von Katja Langenbucher und Helmut Heiss und Dokumentation der Diskussion*, Karlsruhe: Verlag Versicherungswirtschaft GmbH 2015, pp. 41 ff..
Hemraj 2015
M. Hemraj, *Credit Rating Agencies. Self-regulation, Statutory Regulation and Case Law Regulation in the United States and European Union,* Switzerland: Springer International Publishing 2015.
Heuser 2018
M. Heuser, 'Haftung einer Ratingagentur wegen fehlerhaftem Unternehmensrating', *IWRZ* 2018, pp. 83-84.
Heuser 2019
M. Heuser, *Die zivilrechtliche Haftung von Ratingagenturen nach Art. 35a Rating-VO (EU) Nr. 462/2013* (diss. Universität Heidelberg), Berlin: Peter Lang 2019.
Hijma 2016
Jac. Hijma, *Algemene voorwaarden (Monografieën BW B55)*, fourth edition, Deventer: Wolters Kluwer 2016.
Hillen 2013
M.F.E. Hillen, 'De Hoge Raad en het leerstuk van de proportionele aansprakelijkheid en kansschade', *MvV* 2013-4, pp. 122-127.

Van Hoecke 2015
M. van Hoecke, 'Methodology of Comparative Legal Research', *Law and Method* 2015, pp. 1-35.
Den Hoed 2018
J. den Hoed, 'Scheidslijnen tussen kansschade, proportionele aansprakelijkheid en de omkeringsregel', *MvV* 2018-6, pp. 189-201.
Hoekzema, *Groene Serie Onrechtmatige Daad*
J.W. Hoekzema, 'VIII.7.1 De aansprakelijkheid van de rechtspersoon', in: C.J.J.M. Stolker, *Groene Serie Onrechtmatige Daad*, Deventer: Kluwer (available online).
Hoekzema 2000
J.W. Hoekzema, *Kwalitatieve aansprakelijkheid voor ondergeschikten en aansprakelijkheid voor eigen onrechtmatige daad. Een rechtsvergelijkende studie* (diss. Groningen), Den Haag: Boom Juridische Uitgevers 2000.
Hoggard 2016
N. Hoggard, 'What a tangled web we weave: conflicts in rating agency liability', *Cambridge Journal of International and Comparative Law* 2016, pp. 363-377.
Holthuijsen-van der Kop 2015
C.C.H.A. Holthuijsen-van der Kop, 'De redelijke toerekening en de deelregels anno 2015: een update', *WPNR* 2015/7065, pp. 520-527.
Horsch 2014
A. Horsch, 'Regulation of Credit Rating Companies: An Economic Point of View', *EBLR* 2014, pp. 227-248.
Hull, Predescu & White 2004
J. Hull, M. Predescu & A. White, 'The relationship between credit default swap spreads, bond yields, and credit rating announcements', *Journal of Banking & Finance* 2004, pp. 2789-2811.
Husa 2003
J. Husa, 'Farewell to Functionalism or Methodological Tolerance?', *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2003, pp. 419-447.

Infantino & Zervogianni 2017
M. Infantino & E. Zervogianni, 'The European Ways to Causation', in: M. Infantino & E. Zervogianni, *Causation in European Tort Law*, Cambridge & New York: Cambridge University Press 2017.

Jaakke 2014
J.C. Jaakke, 'Strengere regels voor ratingbureaus. Een vereenvoudiging van de aansprakelijkheidstelling onder Nederlands recht?', *Ars Aequi* 2014, pp. 190-193.
Jackson & Powell 2017
J.L. Powell & R. Stewart (eds.), *Jackson & Powell on Professional Liability,* eighth edition, London: Sweet & Maxwell 2017.
Jans, Prechal & Widdershoven 2015
J.H. Jans, S. Prechal & R.J.G.M. Widdershoven (eds.), *Europeanisation of Public Law*, second edition, Groningen: Europa Law Publishing 2015.
Jansen 1999
N. Jansen, 'The Idea of a Lost Chance', *Oxford Journal of Legal Studies* 1999, pp. 271-296.

Janssen 2017a
I.P.M.J. Janssen, 'De civielrechtelijke zorgplicht van de beleggingsdienstverlener bij niet-particuliere beleggers. Het publiekrecht bepaalt!', *Ars Aequi* 2017-11, pp. 1033-1037.
Janssen 2017b
I.P.M.J. Janssen, *De civielrechtelijke zorgplicht van de beleggingsdienstverlener jegens de niet-particuliere cliënt* (diss. Nijmegen), Deventer: Wolters Kluwer 2017.
Jansen, Kästle-Lamparter & Rademacher 2017
N. Jansen, D. Kästle-Lamparter & L. Rademacher, 'Case 4 Financial Judgments. Germany', in: M. Infantino & E. Zervogianni, *Causation in European Tort Law*, Cambridge & New York: Cambridge University Press 2017.
De Jong 2010
B.J. de Jong, *Schade door misleiding op de effectenmarkt. Een onderzoek naar de vereisten van causaal verband en schade bij schadevergoedingsacties van beleggers wegens misleiding door beursvennootschappen, met beschouwingen over Amerikaans recht*, Deventer: Kluwer 2010.
De Jong 2011
B.J. de Jong, 'Liability for Misrepresentation – European Lessons on Causation from the Netherlands', *ECFR* 2011, pp. 352-375.
De Jong 2016
B.J. de Jong, 'Schade door misleiding op de effectenmarkt revisited', *Ondernemingsrecht* 2016-3, pp. 122-129.
De Jong & Pijls 2013
B.J. de Jong & A.C.W. Pijls, 'Schadevergoeding voor zittende aandeelhouders bij misleidende berichtgeving?', *Ondernemingsrecht* 2013/2.
Jongeneel 2017a
R.H.C. Jongeneel, 'Gebondenheid', in B. Wessels & R.H.C. Jongeneel (eds.), *Algemene voorwaarden*, sixth edition, Deventer: Wolters Kluwer 2017.
Jongeneel 2017b
R.H.C. Jongeneel, 'Aansprakelijkheidsbeperking', in B. Wessels & R.H.C. Jongeneel (eds.), *Algemene voorwaarden*, sixth edition, Deventer: Wolters Kluwer 2017.
Jongeneel & Pavillon 2017
R.H.C. Jongeneel & C.M.D.S. Pavillon, 'Algemene vernietigingsgronden; de open norm', in B. Wessels & R.H.C. Jongeneel (eds.), *Algemene voorwaarden*, sixth edition, Deventer: Wolters Kluwer 2017.

Kalkman 2016
W.M.A. Kalkman, '"Nationale-Nederlanden/Van Leeuwen: was de uitspraak het wachten waard?" – een reactie', *NTBR* 2016/27.
Kapteyn & VerLoren van Themaat 1998
P.J.G. Kapteyn & P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, third edition, Londen: Kluwer Law International 1998.
Katan 2017
B.M. Katan, *Toerekening van kennis aan rechtspersonen*, Deventer: Wolters Kluwer 2017.

Keirse & Jongeneel 2013

A.L.M. Keirse & R.H.C. Jongeneel, *Eigen schuld en mede-aansprakelijkheid (Monografieën Privaatrecht 16)*, Deventer: Kluwer 2013.

Kisgen & Strahan 2009

D.J. Kisgen & P.E. Strahan, 'Do regulations based on credit ratings affect a firm's cost of capital?', NBER Working Paper Series April 2009, available at www.nber.org/papers/w14890.

Kistler 2018

A.R.E. Kistler, 'Effect of exclusive choice-of-court agreements in favour of third states within the Brussels I Regulation Recast', *Journal of Private International Law* 2018-1, pp. 66-95.

Klaassen 2012

C.J.M. Klaassen & J. Spier, *Causaliteitsperikelen. Preadviezen van de VASR*, Deventer: Wolters Kluwer 2012.

Klaassen 2013

C.J.M. Klaassen, 'Bewijs van causaal verband tussen beweerdelijk geleden beleggingsschade en schending van een informatie- of waarschuwingsplicht,' in: D. Busch, C.J.M. Klaassen & T.M.C. Arons (eds.), *Aansprakelijkheid in de financiële sector* (Serie Onderneming en Recht, deel 78), Deventer: Kluwer 2013, pp. 127-174.

Klaassen 2017

C.J.M. Klaassen, *Schadevergoeding: algemeen, deel 2 (Monografieën BW B35)*, Deventer: Wolters Kluwer 2017.

Klein 2013

J. Klein, *Le point de départ de la prescription*, Paris: Economica 2013.

Kliger & Sarig 2000

D. Kliger & O. Sarig, 'The Information Value of Bond Ratings', *The Journal of Finance* 2000, pp. 2879-2902.

Knigge 2012

M.W. Knigge, 'Tegenstrijdige Europese regelgeving? De verhouding tussen de EEX-verordening en de Richtlijn oneerlijke bedingen', *MvV* 2012-4, pp. 95-100.

Koch 2005

H. Koch, 'The Law of Torts', in: J. Zekoll and M. Reimann (eds.), *Introduction to German Law*, second edition, The Hague: Kluwer Law International 2005, pp. 205-226.

Koch 2017

P. Koch, '§ 19 Disclosure of Inside Information', in R. Veil (ed.), *European Capital Markets Law*, second edition, Oxford and Portland, Oregon: Hart Publishing 2017.

Koopmann 2010

M.W.E. Koopmann, *Bevrijdende verjaring (Monografieën BW B14)*, Deventer: Wolters Kluwer 2010.

Koopmann, *GS Vermogensrecht*

M.W.E. Koopmann, *Groene Serie Vermogensrecht*, Deventer: Kluwer (available online).

Kontogeorgou 2014

M. Kontogeorgou, 'Externes Rating und Anlegerschutz im Spiegel der neuen Verordnung (EU) Nr. 462/2013', *Deutsches Steuerrecht* 2014, pp. 1397-1404.

Kötz 1993
H. Kötz, 'Rechtsvergleichung und gemeineuropäisches Privatrecht', in: P.C. Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, Baden-Baden: Nomos Verslagsgesellschaft 1993, pp. 95-108.
Kötz & Wagner 2013
H. Kötz & G. Wagner, *Deliktsrecht*, twelfth edition, München: Verlag Franz Vahlen 2013.
Kraaipoel 2009
B.I. Kraaipoel, 'Bewuste roekeloosheid en een beroep op een exoneratieclausule', *BB* 2009/24.
Král 2008
R. Král, 'National normative implementation of EC Regulations: An exceptional or rather common matter?', *European Law Review* 2008, pp. 243-256.
Kramer 2017a
A. Kramer, *The Law of Contract Damages*, second edition, Oxford and Portland, Oregon: Hart Publishing 2017.
Kramer 2017b
P.H. Kramer, 'De zorgplicht van beroepsbeoefenaren jegens derden en de invloed van gebruiksbedingen en exoneraties in rapportages', *Maandblad voor Vermogensrecht* 2017-11, pp. 315-324.
Krans 2010
H.B. Krans, *Nederlands burgerlijk procesrecht en materieel EU-recht*, Deventer: Kluwer 2010.
Krause 2018
L. Krause, *Der Deutsche Rat für Internationales Privatrecht. Wirken und Wirkung im Kontext kollisionsrechtlicher Entwicklung in Deutschland seit 1953*, Baden-Baden: Nomos Verlagsgesellschaft 2018.
Kroeze, Timmerman & Wezeman 2013
M.J. Kroeze, L. Timmerman & J.B. Wezeman, *De kern van het ondernemingsrecht*, third edition, Deventer: Kluwer 2013.
Kronenberger 2001
V. Kronenberger, 'Case C-403/98, *Azienda Agricola Monte Arcosu Srl v. Regione Autonoma della Sardegna, Organismo Comprensoriale No. 24 della Sardegna, Ente Regionale per l'Assistenza Tecnica in Agricoltura (ERSAT)*', *Common Market Law Review* 2001-6, pp. 1545–1556.
Kuipers 2013
J.J. Kuipers, 'The European Union and the Hague Conference on Private International Law – Forced Marriage or Fortunate Partnership', in: H. de Waele & J.J. Kuipers, *The European Union's Emerging International Identity*, Leiden: Brill Nijhoff 2013.
Kuipers 2014
J.J. Kuipers, 'The Competence of the European Union in Private Law', in: A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus et al. (eds.), *The Influence of EU Law on National Private Law. General Part*, second edition, Deventer: Kluwer 2014, pp. 159-185.

Kuypers 2008
P.H.L.M. Kuypers, *Forumkeuze in het Nederlandse internationaal privaatrecht*, Deventer: Kluwer 2008.

Labão, Pacheco & Campos 2018
J. Labão, L. Pacheco & S. Campos, 'Stock price effects of bank rating announcements: An application to European Union countries', *Int J Fin Econ* 2018, pp. 4-19.
Langohr & Langohr 2008
H.M. Langohr & P.T. Langohr, *The Rating Agencies and their Credit Ratings. What They Are, How They Work and Why They Are Relevant*, Chichester: John Wiley & Sons Ltd 2008.
Leclerc 2010
F. Leclerc, 'La responsabilité des agences de notation', in: G. Virassamy, *La notation d'entreprises*, Paris: L'Harmattan 2010, pp. 129-162.
Leczykiewicz 2009-2010
D. Leczykiewicz, 'Private Party Liability in EU Law: In Search of the General Regime', *Cambridge Yearbook of European Legal Studies* 2009-2010, pp. 257-282.
Leczykiewicz & Weatherill 2013
D. Leczykiewicz & S. Weatherill , 'Private law relationships and EU law', in: D. Leczykiewicz & S. Weatherill (eds.), *The involvement of EU law in private law relationships,* Oxford: Hart Publishing Ltd. 2013.
Lehmann 2011
M. Lehmann, 'Where does economic loss occur?', *Journal of Private International Law* 2011-3, pp. 527-550.
Lehmann 2012
M. Lehmann, 'Vorschlag für eine Reform der Rom II-Verordnung im Bereich der Finanzmarktdelikte', *IPRax* 2012, pp. 399-405.
Lehmann 2015a
M. Lehmann, 'Special jurisdiction', commentary on article 7(1), (3), (5), (6) and (7), in: A. Dickinson & E. Lein (eds.), *The Brussels I Regulation Recast,* Oxford: Oxford University Press 2015.
Lehmann 2015b
M. Lehmann*, Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB Band 11: Internationales Privatrecht II, Internationales Wirtschaftsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 25-248): IPR II, IntWR, Art. 25-248, EGBGB,* sixth edition, München: C.H. Beck 2015.
Lehmann 2016a
M. Lehmann, 'Civil Liability of Rating Agencies – An Insipid Sprout from Brussels', *Capital Markets Law Journal* 2016-1, pp. 60-83.
Lehmann 2016b
M. Lehmann, 'Prospectus Liability and Private International Law – Assessing the Landscape after the CJEU Kolassa Ruling (Case C-375/13)', *Journal of Private International Law* 2016-2, pp. 318-343.
Lehmann 2018
M. Lehmann, 'Private international law and finance: nothing special?', *NIPR* 2018-1, pp. 3-25.

Lenaerts & Guttiérrez-Fons 2014
K. Lenaerts & J.A. Guttiérrez-Fons, 'To say what the law of the EU is: methods of interpretation and the European Court of Justice', *Columbia Journal of European Law* 2014-2, pp. 3-61.
Leveneur-Azémar 2017
A. Leveneur-Azémar, *Étude sur les clauses limitatives ou exonératoires de responsabilité*, Issy-Les-Moulineaux: LGDJ-Lextenso, DL 2017.
Levinson 2002
J. Levinson, *Contributory Negligence*, Welwyn Garden City: EMIS Professional Publishing Ltd 2002.
Lindenbergh 2014
S.D. Lindenbergh, *Schadevergoeding: algemeen, deel 1 (Monografieën BW B34)*, fourth edition, Deventer: Kluwer 2014.
Lipartito 2013
K. Lipartito, 'Mediating Reputation: Credit Reporting Systems in American History', *Business History Review* 2013-4, pp. 655-677.
Loos 2018
M.B.M. Loos, *Algemene voorwaarden*, third edition, The Hague: Boom Juridisch 2018.
Loussouarn, Bourel & De Vareilles-Sommières 2013
Y. Loussouarn, P. Bourel & P. de Vareilles-Sommières, *Droit international privé*, tenth edition, Paris: Dalloz 2013.
Lunney, Nolan & Oliphant 2017
M. Lunney, D. Nolan & K. Oliphant, *Tort Law. Text and Materials*, sixth edition, Oxford: Oxford University Press 2017.

Madison 1974
J.H. Madison, 'The evolution of Commercial Credit Reporting Agencies in the Nineteenth-Century America', *The Business History Review* 1974-2, pp. 164-186.
Magnus 2000
U. Magnus, 'Causation in German Tort Law', in: J. Spier (ed.), *Unification of Tort Law: Causation*, The Hague, London, Boston: Kluwer Law International 2000.
Magnus 2013
U. Magnus, 'Causal Uncertainty and Proportional Liability in Germany' in: I. Gilead, M.D. Green & B.A. Koch (eds.), *Proportional Liability: Analytical and Comparative Perspectives*, Berlin: De Gruyter 2013.
Magnus & Mankowski 2016
U. Magnus & P. Mankowski, *Brussels Ibis Regulation: commentary*, third edition, Cologne: Otto Schmidt 2016.
Maier 2017
A. Maier, 'Haftung einer Ratingagentur gegenüber dem Anleger wegen Erstellung eines fehlerhaften Ratings (Anspruchsgrundlagen)', *VuR* 2017, pp. 383-387.
Malaurie, Aynès & Stoffel-Munck 2018
P. Malaurie, L. Aynès & P. Stoffel-Munck, *Droit des obligations*, tenth edition, Issy-les-Moulineaux Cedex: LGDJ, Lextenso éditions 2018.

Mandery 2014
M. Mandery, *Party Autonomy in Contractual and Non-Contractual Obligations: A European and Anglo-Common Law perspective on the freedom of choice of law in the Rome I Regulation on the law applicable to contractual obligations and the Rome II Regulation on the law applicable to non-contractual obligations*, Frankfurt am Main: Peter Lang GmbH, Internationaler Verlag der Wissenschaften 2014.

Mañko 2015
R. Mañko, 'EU competence in private law. The Treaty framework for a European private law and challenges for coherence', European Parliamentary Research Service 2015, PE 545.711, available at www.europarl.europa.eu/RegData/etudes/IDAN/2015/545711/EPRS_IDA(2015)545711_REV1_EN.pdf.

Marino 2016
J.L. Marino, '§ 8:452.Foreign country money judgments (CPLR art. 53)', in: *West's McKinney's Forms Civil Practice Law & Rules*, March 2016 update.

Martin & Franker 2011
D.B.H. Martin & M.C. Franker, 'Rating Agency Regulation After The Dodd-Frank Act: A Mid-Course Review', *Insights* 2011-12, pp. 19-28.

Matthies 2013
A.B. Matthies, 'Empirical Research on Corporate Credit-Ratings: A Literature Review', SFB 649 Discussion Paper 2013-003 available at http://sfb649.wiwi.hu-berlin.de/papers/pdf/SFB649DP2013-003.pdf.

May 2010
A.D. May, 'The impact of bond rating changes on corporate bond prices: New evidence from the over-the-counter market', *Journal of Banking & Finance* 2010, pp. 2822-2836.

McDonnell 2018
A. McDonnell, 'Application and Enforcement of EU law in the Member States', in: P.J. Kuijper, F. Ambtenbrink, D. Curtin et al. (eds.), *The Law of the European Union*, Alphen aan den Rijn: Kluwer Law International 2018, pp. 413-468.

McGregor 2018
J. Edelman, S. Colton & J.N.E. Varuhas, *McGregor on Damages*, twentieth edition, London: Sweet & Maxwell 2018.

McKendrick 2017
E. McKendrick, *Contract Law,* twelfth edition, London: Palgrave Law Masters 2017.

Mendel 1993
M.M. Mendel, 'Enkele aspecten van opzet en grove schuld in het schadeverzekeringsrecht', in: H.A. Bouman, C.C. van Dam, R.H.C. Jongeneel et al., *In volle verzekerdheid: opstellen aangeboden aan Prof. mr. A.J.O. baron van Wassenaer van Catwijck ter gelegenheid van zijn afscheid als hoogleraar privaatrecht aan de Vrije Universiteit te Amsterdam*, Zwolle: W.E.J. Tjeenk Willink 1993.

Merville 2013
A.-D. Merville, 'La responsabilité civile, pénale et administrative des agences de notation', *Revue de Droit bancaire et financier*, 2013-3.

Michaels 2006
R. Michaels, 'The Functional Method of Comparative Law' in: M. Reimann & R. Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press 2006.

Micu, Remolona & Wooldridge 2004
M. Micu, E.M. Remolona & P.D. Wooldridge, 'The price impact of rating announcements: evidence from the credit default swap market', *BIS Quarterly Review* June 2004.
Micu, Remolona & Wooldridge 2006
M. Micu, E.M. Remolona & P.D. Wooldridge, 'The price impact of rating announcements: which announcements matter?', BIS Working Papers No 207, June 2006, available at www.bis.org/publ/work207.pdf.
Miglionico 2014
A. Miglionico, *Recasting Credit Rating Agencies' Responsibility: Suggestions for Reform* (diss. Queen Mary University of London), 2014, available at https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/12986/Miglionico_Andrea_PhD_Final_260216.pdf?sequence=1.
Miglionico 2019
A. Miglionico, *The Governance of Credit Rating Agencies. Regulatory Regimes and Liability Issues*, Cheltenham: Edward Elgar 2019.
Moloney 2014
N. Moloney, *EU Securities and Financial Markets Regulation*, third edition, Oxford: Oxford University Press 2014.
Montesquieu 1748
C. de Montesquieu, *De l'esprit des lois*, 1748.
Moron-Puech 2017
B. Moron-Puech, 'Regards critiques sur la consécration du dualisme des responsabilités contractuelle et extracontractuelle', *Tribonien, Revue critique de législation et de jurisprudence* 2017, available at https://hal.archives-ouvertes.fr/hal-01651459/document.
MüKoAktG/[…], 4. Aufl. 2017, WpÜG § […], para […]
W. Goette, M. Habersack & S. Kalss, *Münchener Kommentar zum Aktiengesetz*, fourth edition, München: Beck 2017.
MüKoBGB/[…], […], BGB § […], para […]
F.J. Säcker, R. Rixecker, H. Oetker & B. Limperg, *Münchener Kommentar zum BGB*, eighth edition, München: Beck 2019.
Mullard 2012
M. Mullard, 'The Credit Rating Agencies and Their Contribution to the Financial Crisis', *The Political Quarterly* 2012-1, pp. 77-95.
Müller 2016
M.F. Müller, 'EuGH 16.06. 16 – C-12/15. Deliktsgerichtsstand am Erfolgsort bei reinen Vermögensschäden', *Neue Juristische Wochenschrift* 2016, pp. 2167-2170.
Mullis & Oliphant 2011
A. Mullis & K. Oliphant, *Torts*, fourth edition, Basingstoke: Palgrave Macmillan 2011.
Murray & Stürner 2004
P.L. Murray & R. Stürner, *German Civil Justice,* Durham: Carolina Academic press 2004.
Musielak/Voit/[…], 15. Aufl. 2018, ZPO § […] Rn. […]
H.J. Musielak & W. Voit, *Zivilprozessordnung*, fifteenth edition, München: Franz Vahlen GmbH 2018.

Nuninga 2019
W.T. Nuninga, 'Het recht op een kans', *NTBR* 2019-3, pp. 41-52.
Nuninga, Verheij, Kahn, Auvray & Borucki 2020 (forthcoming)
W.T. Nuninga, D.J. Verheij, C. Kahn, F. Auvray & C. Borucki, 'Chances as legally protected assets', *ERPL* 2020-1 (forthcoming).
Nye 2014
R.P. Nye, *Understanding and Managing the Credit Rating Agencies. A Guide for Fixed Income Issuers*, London: Euromoney Institutional Investor PLC 2014.

Oderkerk 2015
M. Oderkerk, 'The Need for a Methodological Framework for Comparative Legal Research. Sense and Nonsense of "Methodological Pluralism" in Comparative Law', *Rabels Zeitschrift für ausländische und internationales Privatrecht* 2015, pp. 589-623.
Olaerts 2014
M. Olaerts, 'Concernrecht anno 2014', *Tijdschrift voor vennootschaps- en rechtspersonenrecht* 2014-1, pp. 11-15.
Örücü 2012
A.E. Örücü, 'Methodology of comparative law', in: J.M. Smits, *Elgar Encyclopedia of Comparative Law*, second edition, Cheltenham: Elgar 2012, pp. 560-576.

Pacces & Romano 2014
A.M. Pacces & A. Romano, 'A Strict Liability Regime for Rating Agencies', ECGI Law Working Paper No. 245/2014, March 2014, available at https://ecgi.global/sites/default/files/working_papers/documents/SSRN-id2405509.pdf.
Pagano & Volpin 2010
M. Pagano & P. Volpin, 'Rating agencies. Credit rating failures and policy options', *Economic Policy* 2010, pp. 401-431.
Palandt/[…] 2019, BGB § […], no. […]
G. Brudermüller, J. Ellenberger, I. Götz et al., *Palandt Bürgerliches Gesetzbuch*, seventy-eighth edition, München: Verlag C.H. Beck 2019.
Partnoy 2002
F. Partnoy, 'The Paradox of Credit Ratings', in: R.M. Levich, G. Majnoni & C.M. Reinhart (eds.), *Ratings, Rating Agencies and the Global Financial System*, New York: Springer Science+Business Media 2012, also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=285162.
Partnoy 2006
F. Partnoy, 'How and Why Credit Rating Agencies are Not Like Other Gatekeepers', in: Y. Fuchita & R.E. Litan (eds.), *Financial Gatekeepers: Can They Protect Investors?*, Washington: Brookings Institution Press and the Nomura Institute of Capital Markets Research 2006, also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900257.
De Pascalis 2015
F. de Pascalis, 'Civil Liability of Credit Rating Agencies from a European Perspective: Development and Contents of Art 35(a) of Regulation (EU) No 462/2013', *International and Comparative Corporate Law Journal* 2015-2, pp. 41-70.

Le Pautremat 2006
S. le Pautremat, 'Mitigation of damage: a French perspective', *ICLQ* 2006, p. 205-218, available at www.cambridge.org/core/services/aop-cambridge-core/content/view/00E0A9DDBAA11FDE8A0FD41F10B2CAF5/S0020589300069165a.pdf/mitigation_of_damage_a_french_perspective.pdf.
Pescatore 2015
P. Pescatore, 'The doctrine of "direct effect": an infant disease of Community law', *European Law Review* 2015, pp. 135-153.
Picciau 2018a
C. Picciau, *Diffusione di giudizi inesatti nel mercato finanziario e responsabilita' delle agenzie di rating*, Milano: Egea 2018.
Picciau 2018b
C. Picciau, 'The Evolution of the Liability of Credit Rating Agencies in the United States and in the European Union: Regulation after the Crisis', *ECFR* 2018, pp. 339-402.
Pijls 2017
A.C.W. Pijls, 'Het toerekeningsverband van art. 6:98 BW bij bestuurdersaansprakelijkheid wegens misleiding van het beleggende publiek', in: B.F. Assink, L. Timmerman & J.B. Wezeman (eds.), *De vele gezichten van Maarten Kroeze's 'bange bestuurders'. Opstellen voor Prof. mr. M.J. Kroeze, vanwege zijn toetreden als raadsheer tot de civiele kamer van de Hoge Raad der Nederlanden per 1 september 2016*, Deventer: Kluwer 2017, pp. 447-462.
Pijls 2018
A.C.W. Pijls, *Misleidende beursberichten. Kwesties van causaal verband en schade* (diss. Erasmus University Rotterdam), 2018 [forthcoming].
Pijls & Van Boom 2010
A.C.W. Pijls & W.H. van Boom, 'Handhaving prospectusaansprakelijkheid niet illusoir: vermoeden van causaal verband bij prospectusaansprakelijkheid', *WPNR* 2010(6834), pp. 194-200.
Pitlo/Rutgers & Krans 2014
G.R. Rutgers & H.B. Krans, *Bewijs*, ninth edition, Deventer: Kluwer 2014.
Ploeger, *GS Zakelijke Rechten*
H.D. Ploeger, 'Artikel 23. Opsporen voorwerp of dier', in: F.J. Vonck (ed.), *Groene Serie Zakelijke Rechten*, Deventer: Wolters Kluwer (available online).
Van Praag 2013
E.J. van Praag, 'Toezichthoudersaansprakelijkheid voor onvoldoende toezicht en onrechtmatige besluiten', in: D. Busch, C.J.M. Klaassen & T.M.C. Arons (eds.), *Aansprakelijkheid in de financiële sector* (Serie Onderneming en Recht, deel 78), Deventer: Kluwer 2013, pp. 871-930.
Van Praag 2014
E.J. van Praag, 'Aansprakelijkheid van financiële toezichthouders naar Europees recht', *SEW* 2014, pp. 214-231.
Prechal 2000
S. Prechal, 'Does Direct Effect Still Matter?', *Common Market Law Review* 2000, pp. 1047-1069.

Prechal 2001
S. Prechal, 'Judge-Made Harmonisation of National Procedural Rules: A Bridging Perspective', in: J. Wouters & J. Struyck (eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune,* Antwerpen/Groningen/Oxford: Intersentia 2001 pp. 39-58.
Prechal 2005
S. Prechal, *Directives in EC Law*, second edition, Oxford: Oxford University Press 2005.
Prorok 2016
J. Prorok, *La responsabilité civile sur les marchés financiers*, 2016, available at https://docassas.u-paris2.fr/nuxeo/site/esupversions/6ab2ccdd-b621-4b14-b68d-d2241e5203db.

Quézel-Ambrunaz 2010
C. Quézel-Ambrunaz, *Essai sur la causalité en droit de la responsabilité civile*, Paris Cedex: Dalloz, 2010.
Quézel-Ambrunaz 2017
C. Quézel-Ambrunaz, 'Case 4 Financial Judgments. France', in: M. Infantino & E. Zervogianni, *Causation in European Tort Law*, Cambridge & New York: Cambridge University Press 2017.

Raitio 2013
J. Raitio, 'The Expectation of Legal Certainty and Horizontal Effect of EU Law', in: U. Bernitz, X. Groussot & F. Schulyok (eds.), *General Principles of EU Law and European Private Law,* Alphen aan den Rijn: Kluwer Law International 2013.
Rank, in: T&C Burgerlijk Wetboek, Art. 7:528 BW, note […]
W.A.K. Rank, 'Commentaar op titel 7B Boek 7 BW', in: H.B. Krans, C.J.J.M. Stolker & W.L. Valk (eds.), *T&C Burgerlijk Wetboek*, thirteenth edition, Deventer: Kluwer 2019.
Rank 2019
W.A.K. Rank, 'Betalingstransacties onder PSD2', *MvV* 2019-4, pp. 107-123.
Reich 2014
N. Reich, *General Principles of EU Civil Law,* Cambridge: Intersentia 2014.
Rijken 1983
G.J. Rijken, *Exoneratieclausules*, Deventer: Kluwer 1983.
Von Rimon 2014
N. von Rimon, *Ratings in Deutschland. Rechtsrahmen und Haftung*, Göttingen: V&R Unipress 2014.
Rinaldo 2017
C. Rinaldo, *Die Haftung Dritter in Deutschland und Italien. Eine handelsrechtliche Untersuchung zu Ratingagenturen und PartG*, Walter De Gruyter 2017.
Risso 2015
G. Risso, 'Investor protection in credit rating agencies' non-contractual liability: the need for a fully harmonised regime', *European Law Review* 2015, pp. 706-721.

Risso 2016
G. Risso, 'Financial Torts and Investor Protection: Is the Europeanisation of Third State Cases a Viable Solution?', *Netherlands International Law Review* 2016, pp. 313-334.
Robbers 2017
G. Robbers, *An Introduction to German Law*, sixth edition, Baden-Baden: Nomos 2017.
Rogge 2016
E. Rogge, *Better Banking for Britain* (diss. University of London), 2016, available at https://eprints.soas.ac.uk/23791/1/Rogge_4312.pdf.
Rohe 2005
M. Rohe, 'Schadenersatzrechtliche Aspekte des Ratings und Haftungsbegrenzung', in: A.K. Achleitner & O. Everling, *Rechtsfragen im Rating: Grundlagen und Implikationen von Ratings für Agenturen, Investoren und geratete Unternehmen*, Wiesbaden: Gabler Verlag 2005.
Röhl 1974
K.F. Röhl, 'Zur Abgrenzung der groben von der einfachen Fahrlässigkeit', *Juristenzeitung* 1974, pp. 521-528.
Rontchevsky 2011
N. Rontchevsky, 'Chronique / Infractions financières. TGI Paris, 11e Ch. corr., 21 janvier 2011, MP c/ X et autres', *RTDF* 2011-3, pp. 102-104.
Rosset 2013
C. Rosset, 'Haftung von Ratingagenturen', *KCU-Schriftenreihe* Band 2 2013, pp. 1-48.
Van Rossum 2014
A.A. van Rossum, 'De wettelijke aansprakelijkheidsbeperking van DNB en AFM: een bijzondere regel in aansprakelijkheids- en schadevergoedingsrecht', in: T.W. Franssen, R.D. Harteman, B.J.P.G. Roozendaal et al. (eds.), *Op het grensvlak. Opstellen aangeboden aan prof. mr. drs. B.P.M. van Ravels*, Den Haag: Stichting Instituut voor Bouwrecht 2014, pp. 177-186.

Sahore 2015
A. Sahore, 'Case Note. *ABN Amro Bank NV v Bathurst Regional Council*: Credit Rating Agencies and Liability to Investors', *Sydney Law Review* 2015, pp. 437-455.
Sahtie 2012
S. Sahtie, 'Wettelijke aansprakelijkheidsbeperking voor DNB en AFM. Hoe hoog komt de nieuwe lat te liggen?', *MvV* 2012-10, pp. 271-278.
Samuel 2014
G. Samuel, *An Introduction to Comparative Law Theory and Method*, Oxford and Portland, Oregon: Hart Publishing 2014.
De Savornin Lohman & Van 't Westeinde 2007
H.A. de Savornin Lohman & M.G. van 't Westeinde, 'Control and liability of credit rating agencies under Netherlands law', *Electronic Journal of Comparative Law*, 2007-1, pp. 1-20, available at www.ejcl.org/111/art111-18.pdf.
Scarso 2013
A. Scarso, 'The Liability of Credit Rating Agencies in a Comparative Perspective', *Journal of European Tort Law* 2013-2, pp. 163–189.

Schantz 2015
P. Schantz, *Die zivilrechtliche Verantwortlichkeit von Ratingagenturen gegenüber Investoren,* Berlin: Duncker & Humblot 2015.
Schelhaas 2017
H.N. Schelhaas, *Redelijkheid en billijkheid (Monografieën BW A5)*, second edition, Deventer: Wolters Kluwer 2017.
Schroeter 2014
U.G. Schroeter, *Ratings – Bonitätsbeurteilungen durch Dritte im System des Finanzmarkt-, Gesellschafts- und Vertragsrechts. Ein rechtsvergleichende Untersuchung*, Tübingen: Mohr Siebeck 2014.
Schroeter 2018
U.G. Schroeter, 'Haftung von Rating-Agenturen gegenüber Anlegern: Haftungshürden in der deutschen Gerichtspraxis', *Zeitschrift für Bankrecht und Bankwirtschaft* 2018-6, pp. 353-416.
Schütze 2018
R. Schütze, *European Union Law*, second edition, Cambridge: Cambridge University Press 2018.
Von Schweinitz 2007
O. von Schweinitz, *Rating Agencies: their Business, Regulation and Liability under U.S., U.K. and German Law*, Bloomington: Unlimited Publishing LLC 2007.
Seibold 2016
S. Seibold, *Die Haftung von Ratingagenturen nach deutschem, französischem, englischem under europäischem Recht*, Tübingen: Mohr Siebeck 2016.
Sieburgh 2014
C.H. Sieburgh, 'EU Law and Non-Contractual Liability', in: A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus et al. (eds.), *The Influence of EU Law on National Private Law*, second edition, Deventer: Kluwer 2014.
Siemerink, Van Eijk & Van Esch 2006
L.A.R. Siemerink, M. van Eijden & R.E. van Esch, 'Uitsluiting of beperking van aansprakelijkheid via disclaimers op een website', *Computerrecht* 2006/69, pp. 143-149.
Siems 2018
M. Siems, *Comparative Law,* second edition, Cambridge: Cambridge University Press 2018.
Simon 2017
Y. Simon, *Notation et Agences de Rating*, Paris: Economica 2017.
Smits 2012
J.M. Smits, 'The Netherlands', in: J.M. Smits, *Elgar Encyclopedia of Comparative Law*, second edition, Cheltenham: Elgar 2012, pp. 620-624.
Snijders, Klaassen & Meijer 2017
H.J. Snijders, C.J.M. Klaassen & G.J. Meijer, *Nederlands burgerlijk procesrecht*, sixth edition, Deventer: Wolters Kluwer 2017.
Sorkowitz 1991
A.J. Sorkowitz, 'Enforcing Judgments under the Uniform Foreign Money-Judgments Recognition Act', *Practical Lawyer* 1991-5, pp. 57-66.

Sotiropoulou 2012
A. Sotiropoulou, *Les obligations d'information des sociétés cotées en droit de l'union Européenne*, Bruxelles: Larcier 2012.
Sotiropoulou 2013
A. Sotiropoulou, 'La responsabilité civile des agences de notation', *Bulletin Joly Bourse* 2013-1.
Sotiropoulou 2016
A. Sotiropoulou, 'Calculating damages in securities litigation in France', *Revue trimestrielle de droit financier* 2016-3, pp. 50-55.
Spitz 2010
N. Spitz, *La réparation des préjudices boursiers*, Paris Cedex: Revue Banque Édition 2010.
Staudinger/[…] (2009) § […], para […]
J. Hager, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch. Buch 2: Recht der Schuldverhältnisse §§ 823E-I, 824, 825 (Unerlaubte Handlungen 1 – Teilband 2)*, Berlin: Sellier – de Gruyter 2009.
Staudinger/[…] (2014) § […], para […]
C. Bittner, G. Caspers, C. Feldmann et al., *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch. Buch 2: Recht der Schuldverhältnisse §§ 255-304 (Leistungsstörungsrecht 1)*, sixteenth edition, Berlin: Sellier – de Gruyter 2014.
Staudinger/[…] (2015) § […], para […]
D. Looschelders, D. Olzen & G. Schiemann, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch. Buch 2: Recht der Schuldverhältnisse §§ 241-243 (Treu und Glauben)*, Berlin: Sellier – de Gruyter 2015.
Staudinger/[…] (2017) § […], para […]
J. Hager, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch. Buch 2: Recht der Schuldverhältnisse §§ 823A-D (Unerlaubte Handlungen 1 – Rechtsgüter und Rechte, Persönlichkeitsrecht, Gewerbebetrieb)*, Berlin: Sellier – de Gruyter 2017.
Staudinger/[…] (2017) § […], para […]
G. Schiemann, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch. Buch 2: Recht der Schuldverhältnisse §§ 249-254 (Schadensersatzrecht)*, Berlin: Sellier – de Gruyter 2017.
Steel 2015
S. Steel, *Proof of Causation in Tort Law*, Cambridge: Cambridge University Press 2015.
Steiner 2018
E. Steiner, *French Law. A Comparative Approach*, second edition, Oxford: Oxford University Press 2018.
Steinrötter 2015
B. Steinrötter, 'Zuständigkeits- und kollisionsrechtliche Implikationen des europäischen Haftungstatbestands für fehlerhaftes Rating', *ZIP – Zeitschrift für Wirtschaftsrecht* 2015-3, pp. 110-115
Stolker, in: *T&C BW* 2015
C.J.J.M. Stolker, 'Opsporen voorwerp of dier', in: J.H. Nieuwenhuis, C.J.J.M. Stolker & W.L. Valk (eds.), *Tekst & Commentaar Burgerlijk Wetboek*, eleventh edition, Deventer: Kluwer 2015 (also available online).

Strikwerda & Schaafsma 2019
L. Strikwerda & S.J. Schaafsma, *Inleiding tot het Nederlandse internationaal privaatrecht,* twelfth edition, Deventer: Kluwer 2019.
Sylla 2001
R. Sylla, 'A Historical Primer on the Business of Credit Ratings', paper prepared for the conference on 'The Role of Credit Reporting Systems in the International Economy', The World Bank, Washington, March 2001, available at www.etcases.com/media/clnews/1422509293717634043.pdf.
Symeonides 2008
S.C. Symeonides, *American Private International Law,* Alphen aan den Rijn: Kluwer Law International 2008.

Taekema, De Roo & Elion-Valter 2011
S. Taekema, A. de Roo & C. Elion-Valter (eds.), *Understanding Dutch Law,* second edition, The Hague: Eleven International Publishing 2011.
Tallon 2008
D. Tallon, 'Contract Law', in: G.A. Bermann & E. Picard, *Introduction to French Law*, Alphen aan den Rijn: Kluwer Law International 2008, pp. 205-236.
Tang 2015
Z.S. Tang, *Electronic Consumer Contracts in the Conflict of Laws,* second edition, Oxford and Portland, Oregon: Hart Publishing 2015.
Tegelaar 2016
J.T. Tegelaar, 'Immuun voor de Unie? (Semi-)immuniteit van nationale financiële toezichthouders onder nieuw recht', *Ars Aequi* 2016, pp. 705-715.
Tchotourian 2011
I. Tchotourian, 'Agences de notation: encadrement et responsabilité', *Bulletin Joly Bourse* 2011, no. 2, pp. 119 ff..
Thépot 2010
C. Thépot, 'L'encadrement légal de l'activité des agences de notation par la loi de régulation bancaire et financière', *Les Petites Affiches* 2010, no. 250, pp. 26 ff..
Thiriez 2014
P.Y. Thiriez, 'La mitigation ou l'obligation pour la victime de minimiser son dommage: une exception française', *Issu de Gazette du Palais* 2014/343, pp. 5 ff..
Timmerman 2013
L. Timmerman, 'Enkele kanttekeningen bij de civielrechtelijke buitencontractuele prospectusaansprakelijkheid', in: D. Busch, C.J.M. Klaassen & T.M.C. Arons (eds.), *Aansprakelijkheid in de financiële sector* (Serie Onderneming en Recht, deel 78), Deventer: Kluwer 2013, pp. 647-661.
Tison 2010
M. Tison, 'The Civil Law Effects of MiFID in a Comparative Law Perspective', in: K.J. Hopt & S. Grundmann (eds.), *Festschrift für Klaus J. Hopt zum 70. Geburtstag am 24. August 2010*, Berlin/Boston: De Gruyter 2010.
Tjong Tjin Tai 2018
T.F.E. Tjong Tjin Tai, 'Meervoudige causaliteit', *WPNR* 2018/7186, pp. 237-245.
Treitel 2015
E. Peel, *Treitel. The Law of Contract*, fourteenth edition, London: Sweet & Maxwell 2015.

[…] in Ulmer/Brandner/Hensen, AGB-Recht, 12. Aufl., § […] BGB, no. […]
P. Ulmer, H.E. Brandner & H.D. Hensen, *AGB-Recht. Kommentar zu den §§ 305-310 BGB und zum UKlaG*, twelfth edition, Köln: Otto Schmidt 2016.

De Valk 2009
S.N. de Valk, *Aansprakelijkheid van leidinggevenden naar privaatrechtelijke, strafrechtelijke en bestuursrechtelijke maatstaven*, Deventer: Kluwer 2009.
Vandendriessche 2015
E. Vandendriessche, *Investor Losses. A Comparative Legal Analysis of Causation and Assessment of Damages in Investor Litigation*, Cambridge, Antwerp, Portland: Intersentia 2015.
Veil 2017
R. Veil, '§ 27 Rating Agencies', in R. Veil (ed.), *European Capital Markets Law*, second edition, Oxford and Portland, Oregon: Hart Publishing 2017.
Van Velthoven 2018
B.C.J. van Velthoven, 'Verlies van een kans en proportionele aansprakelijkheid: verschillende figuren voor verschillende gevallen? (II)', *NTBR* 2018/15, pp. 102-112.
Verbruggen 2018
P.W.J. Verbruggen, 'Privaatrechtelijke zorgplichten en Europese maximumharmonisatie', *WPNR* 2018, pp. 849-850.
Verkade 2011
D.W.F. Verkade, *Misleidende (B2B) reclame en vergelijkende reclame (Monografieën BW B49b)*, Deventer: Kluwer 2011.
Verkade 2016
D.W.F. Verkade, *Oneerlijke handelspraktijken jegens consumenten (Monografieën BW B49a)*, second edition, Deventer: Wolters Kluwer 2016.
Verschuur 2003
A.M.E. Verschuur, *Vergoeding van zuivere vermogensschade van derden. Een vergelijking van het recht in Nederland, Engeland en Duitsland*, Nijmegen: Ars Aequi Libri 2003.
Verständig 2014
A. Verständig, 'Civil Liability for Credit Rating Agencies: A Swedish Perspective', *EBLR* 2014, pp. 335-347.
Vidal & Joosten 2011
E. Vidal & J.J.H. Joosten, *US Securities Regulation. A Guidebook for International Companies*, London: Globe Law and Business 2011.
Viney 2008
G. Viney, 'Tort Liability', in: G.A. Bermann & E. Picard, *Introduction to French Law*, Alphen aan den Rijn: Kluwer Law International 2008, pp. 237-262.
Viney 2014
G. Viney, 'La faute de l'investisseur en bourse « non averti » justifiant un partage de responsabilité avec l'intermédiaire financier qui a manqué à ses obligations de mise en garde et de conseil', *Revue des contrats* 2015-2, pp. 235 ff.
Viney, Jourdain & Carval 2013
G. Viney, P. Jourdain & S. Carval, *Les conditions de la responsabilité*, fourth edition, Paris Cedex: LGDJ, Lextenso éditions 2013.

Viney, Jourdain & Carval 2017
G. Viney, P. Jourdain & S. Carval, *Les effects de la responsabilité*, fourth edition, Issy-les-Moulineaux Cedex: LGDJ, Lextenso éditions 2017.

Wagner 2013
G. Wagner, 'Die Haftung von Ratingagenturen gegenüber dem Anlegerpublikum', in: P. Jung, P. Lamprecht, K. Blasek & M. Schmidt-Kessel, *Einheit und Vielheit im Unternehmensrecht. Festschrift für Uwe Blaurock zum 70. Geburtstag*, Tübingen: Mohr Siebeck 2013.
Wallinga 2014
M.W. Wallinga, 'Financiële dienstverlening, publiekrechtelijke gedragsregels en privaatrechtelijke normstelling: lessen uit Duitsland en Europa', *NTBR* 2014/35.
Wallinga 2015
M.W. Wallinga, 'De invloed van Europese *soft law* op pivaatrechtelijke normstelling op het gebied van financiële dienstverlening', *NTBR* 2015/40, pp. 266-273.
Wallinga & Cherednychenko 2016
M.W. Wallinga & O.O. Cherednychenko, 'Nationale Nederlanden/Van Leeuwen: was de uitspraak het wachten waard?', *NTBR* 2016/3.
Wallinga & Pijls 2018
M.W. Wallinga & A.C.W. Pijls, 'De wisselwerking tussen Europees financieel toezicht en nationaal privaatrecht – De indirecte invloed van de MiFID II op privaatrechtelijke aansprakelijkheid op het gebied van beleggingsdienstverlening en de onderbelichte invloed van de Richtlijn OHP', *RMThemis* 2018-1, pp. 12-25.
Wanambwa 2014
A. Wanambwa, 'Civil Liability of Credit Rating Agencies', *JIBLR* 2014, pp. 519-521.
Warendorf et al
H. Warendorf et al (ed.), *Warendorf Dutch Civil and Commercial Law Legislation*, Deventer: Wolters Kluwer.
Van Wechem 2007
T.H.M. van Wechem, *Toepasselijkheid van algemene voorwaarden*, Deventer: Wolters Kluwer 2007.
Van der Weide 2013
M. van der Weide, 'Nieuwe Europese regelgeving voor ratingbureaus inzake het beoordelen van uitgevende instellingen en securitisatietransacties', *V&O* 2013-12, pp. 209-218.
Weinstein 1977
M.I. Weinstein, 'The effect of a rating change announcement on bond price', *Journal of Financial Economics* 1977, pp. 329-350.
Wessels 2015
B. Wessels, *Koop: algemeen (Monografieën BW B65a)*, fourth edition, Deventer: Wolters Kluwer 2015.
Van 't Westeinde 2009
M.G. van 't Westeinde, 'De kredietcrisis: gevolgen voor de credit rating agencies binnen de EU', *TFR* 2009-2/3, pp. 60-68.
Westenbroek 2016
W.A. Westenbroek, 'Artikel 2:9 BW en de 'ernstig verwijt'-maatstaf bij bestuurdersaansprakelijkheid', *RMThemis* 2016-4, pp. 175-192.

White 2009
L.J. White, 'A Brief History of Credit Rating Agencies: How Financial Regulation Entrenched this Industry's Role in the Subprime Mortgage Debacle of 2007–2008', *Mercatus on Policy* 2009-59, pp. 1-4, available at http://mercatus.org/sites/default/files/publication/59_CRA_history_(web).pdf.
White 2010
L.J. White, 'Financial Regulation and the Current Crisis: A Guide for the Antitrust Community', in: C.T. Compton, B.A. Nigro & M.K. Ohlhausen (eds.), *Competition as Public Policy*, Chicago: American Bar Association 2010.
Whittaker 2008
S. Whittaker, 'The Law of Obligations', in: J. Bell, S. Boyron & S. Whittaker, *Principles of French Law,* second edition, Oxford: Oxford University Press 2008, pp. 294-452.
Wildmoser, Schiffer & Langoth 2009
G. Wildmoser, K.J. Schiffer & B. Langoth, 'Haftung von Ratingagenturen gegenüber Anlegern?', *Recht der Internationalen Wirtschaft* 2009, pp. 657-668.
Wilman 2014
F.G. Wilman, *The vigilance of individuals. How, when and why the EU legislates to facilitate the private enforcement of EU law before national courts*, Leiden: Meijers Research and Graduate School of the Leiden Law School, Faculty of Law, Leiden University 2014.
Wimmer 2017
V. Wimmer, *Auswirkungen des Art. 35a der Verordnung (EU) Nr. 462/2013 auf die zivilrechtliche Haftung von Ratingagenturen,* Baden-Baden: Nomos 2017.
Winfield & Jolowicz 2014
W.E. Peel & J. Goudkamp, *Winfield & Jolowicz on Tort,* nineteenth edition, London: Sweet & Maxwell 2014.
Winter 1972
J.A. Winter, 'Direct Applicability and Direct Effect Two Distinct and Different Concepts in Community Law', *Common Market Law Review* 1972-4, pp. 425-438.
Wojcik 2013
K.P. Wojcik, 'Zivilrechtliche Haftung von Ratingagenturen nach europäischem Recht', *NJW* 2013, pp. 2385-2389.
[…] in Wolf/Lindacher/Pfeiffer, § […], no. […]
J. Dammann, W. Hau, W.F. Lindacher et al., *Wolf/Lindacher/Pfeiffer AGB-Recht: Kommentar*, sixth edition, Mu¨nchen: Beck 2013.
Wood 2008
P.R. Wood, *Law and Practice of International Finance,* London: Sweet & Maxwell 2008.
Woods, Watson & Costa 2017
L. Woods, P. Watson & M. Costa, *Steiner & Woods EU Law,* thirteenth edition, Oxford: Oxford University Press 2017.

Van Zeben, De Pon & Olthof 1981
C.J. van Zeben, J.W. du Pon & M.M. Olthof, *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek. Boek 5 Zakelijke Rechten,* Deventer: Kluwer 1981.

Zimmermann 2005
R. Zimmermann, 'Characteristic Aspects of German Legal Culture', in: J. Zekoll & M. Reimann (eds.), *Introduction to German Law*, second edition, The Hague: Kluwer Law International 2005.
Zimmermann & Kleinschmidt 2007
R. Zimmermann & J. Kleinschmidt, 'Haftungsbegründende und haftungsausfüllende Kausalität. 2. Germany', in: B. Winiger, H. Koziol, B.A. Koch & R. Zimmermann (eds.), *Digest of European Tort Law. Volume 1: Essential Cases on Natural Causation*, Wien, New York: Springer 2007.
Zweigert & Kötz 1998
K. Zweigert & H. Kötz (translation by T. Weir), *An Introduction to Comparative Law*, third edition, Oxford: Oxford University Press 1998

Case law

Court of Justice of the European Union

- ECJ 5 February 1963, C-26/62, ECLI:EU:C:1963:1 (*Van Gend en Loos*)
- ECJ 17 May 1972, C-93/71, ECLI:EU:C:1972:39 (*Leonensio v Minstero dell' Agricoltura e Foreste*)
- ECJ 7 February 1973, C-39/72, ECLI:EU:C:1973:13 (*Commission of the European Communities v Italian Republic*)
- ECJ 10 October 1973, C-34/73, ECLI:EU:C:1973:101 (*Fratelli Variola Spa v Amministrazione delle finanze dello Stato*)
- ECJ 21 June 1974, C-2/74, ECLI:EU:C:1974:68 (*Reyners v Belgian State*)
- ECJ 8 April 1976, C-43/75, ECLI:EU:C:1976:56 (*Defrenne v SABENA*)
- ECJ 30 November 1976, C-21/76, ECLI:EU:C:1976:166 (*Handelskwekerij Bier v Mines de Potasse d'Alsace*)
- ECJ 16 December 1976, C-33/76, ECLI:EU:C:1976:188 (*Rewe v Landwirtschaftskammer für das Saarland*)
- ECJ 16 December 1980, C-814/79, ECLI:EU:C:1980:291 (*Netherlands v Rüffer*)
- ECJ 9 November 1983, C-199/82, ECLI:EU:C:1983:318 (*Amministrazione delle finanze dello Stato v San Giorgio*)
- ECJ 13 December 1983, C-222/82, ECLI:EU:C:1983:370 (*Apple and Pear Development Council v K.J. Lewis Ltd and others*)
- ECJ 18 January 1984, C-327/82, ECLI:EU:C:1984:11 (*Ekro*)
- ECJ 10 April 1984, C-14/83, ECLI:EU:C:1984:153 (*Von Colson and Kamann v Land Nordrhein-Westfalen*)
- ECJ 10 April 1984, C-79/83, ECLI:EU:C:1984:155 (*Harz v Deutsche Tradax*)
- ECJ 26 February 1986, C-152/84, ECLI:EU:C:1986:84 (*Marshall v Southampton and South-West Hampshire Area Health Authority*)
- ECJ 27 September 1988, C-189/87, ECLI:EU:C:1988:459 (*Kalfelis v Bank Schröder*)
- ECJ 11 January 1990, C-220/88, ECLI:EU:C:1990:8 (*Dumez France and Others v Hessische Landesbank and Others*)
- ECJ 13 November 1990, C-331/88, ECLI:EU:C:1990:391 (*The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*)

- ECJ 13 November 1990, C-106/89, ECLI:EU:C:1990:395 (*Marleasing v Comercial Internacional de Alimentación*)
- ECJ 12 December 1990, C-100/89 and C-101/89, ECLI:EU:C:1990:456 (*Kaefer and Procacci v French State*)
- ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*)
- ECJ 10 March 1992, C-214/89, ECLI:EU:C:1992:115 (*Powell Duffryn plc v Wolfgang Petereit*)
- ECJ 17 June 1992, C-26/91, ECLI:EU:C:1992:268 (*Handte v TMCS*)
- ECJ 14 July 1994, C-91/92, ECLI:EU:C:1994:292 (*Faccini Dori v Recreb*)
- ECJ 7 March 1995, C-68/93, ECLI:EU:C:1995:61 (*Shevill and Others v Presse Alliance*)
- ECJ 19 September 1995, C-364/93, ECLI:EU:C:1995:289 (*Marinari v Lloyd's Bank*)
- ECJ 17 September 1996, C-246/94, C-247/94, C-248/94 and C-249/94, ECLI:EU:C:1996:329 (*Cooperativa Agricola Zootecnica S. Antonio a.o. v Amministrazione delle Finanze dello Stato*)
- ECJ 27 February 1997, C-177/95, ECLI:EU:C:1997:89 (*Ebony Maritime and Loten Navigation*)
- ECJ 27 June 2000, C-240/98, ECLI:EU:C:2000:346 (*Océano Grupo Editorial and Salvat Editores*)
- ECJ 19 September 2000, C-287/98, ECLI:EU:C:2000:468 (*Linster*)
- ECJ 26 September 2000, C-443/98, ECLI:EU:C:2000:496 (*Unilever Italia SpA v Central Food SpA*)
- ECJ 9 November 2000, C-387/98, ECLI:EU:C:2000:606 (*Coreck Maritime GmbH v Handelsveem BV and Others*)
- ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*)
- ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*)
- ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*)
- ECJ 7 January 2004, C-201/02, ECLI:EU:C:2004:12 (*Wells*)
- ECJ 10 June 2004, C-168/02, ECLI:EU:C:2004:364 (*Kronhofer v Maier)*
- ECJ 5 October 2004, C-397/01, ECLI:EU:C:2004:584 (*Pfeiffer and Others*)
- ECJ 12 October 2004, C-222/02, ECLI:EU:C:2004:606 (*Paul and Others*)
- ECJ 1 March 2005, C-281/02, ECLI:EU:C:2005:120 (*Andrew Owusu v N.B. Jackson*)
- ECJ 17 March 2005, C-170/03, ECLI:EU:C:2005:176 (*Feron*)
- ECJ 14 April 2005, C-110/03, ECLI:EU:C:2005:223 (*Belgium v Commission*)
- ECJ 13 July 2006, C-295/04, ECLI:EU:C:2006:461 (*Manfredi)*
- ECJ 14 December 2006, C-316/05, ECLI:EU:C:2006:789 (*Nokia*)
- ECJ 18 October 2007, C-195/06, ECLI:EU:C:2007:613 (*Österreichischer Rundfunk (ORF)*)
- ECJ 11 December 2007, C-438/05, ECLI:EU:C:2007:772 (*ITWF v Viking Line ABP*)
- ECJ 18 December 2007, C-341/05, ECLI:EU:C:2007:809 (*Laval un Partneri*)
- ECJ 3 June 2008, C-308/06, ECLI:EU:C:2008:312 (*Intertanko and Others*)
- ECJ 17 July 2008, C-66/08, ECLI:EU:C:2008:437 (*Szymon Kozlowski*)
- ECJ 17 July 2008, C-226/07, ECLI:EU:C:2008:429 (*Flughafen Köln v Bonn*)
- ECJ 12 February 2009, C-138/07, ECLI:EU:C:2009:82 (*Belgische Staat v Cobelfret NV*)
- ECJ 4 June 2009, C-243/08, ECLI:EU:C:2009:350 (*Pannon GSM*)
- ECJ 29 October 2009, C-174/08, ECLI:EU:C:2009:669 (*NCC Construction Danmark*)

- CJEU 1 July 2010, C-194/08, ECLI:EU:C:2010:386 (*Gassmayr*)
- CJEU 28 October 2010, C-367/09, ECLI:EU:C:2010:648 (*SGS Belgium and Others*)
- CJEU 9 November 2010, C-137/08, ECLI:EU:C:2010:659 (*VB Pénzügyi Lízing*)
- CJEU 25 October 2011, C-509/09 and C-161/10, ECLI:EU:C:2011:685 (*eDate Advertising and Others)*
- CJEU 24 January 2012, C-282/10, ECLI:EU:C:2012:33 (*Dominguez*)
- CJEU 19 April 2012, C-523/10, ECLI:EU:C:2012:220 (*Wintersteiger*)
- CJEU 19 July 2012, C-154/11, ECLI:EU:C:2012:491 (*Mahamdia*)
- CJEU 25 October 2012, C-133/11, ECLI:EU:C:2012:664 (*Folien Fischer AG*)
- CJEU 22 November 2012, C-139/11, ECLI:EU:C:2012:741 (*Cuadrench Moré*)
- CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*)
- CJEU 6 June 2013, C-536/11, ECLI:EU:C:2013:366 (*Donau Chemie and Others*)
- CJEU 18 July 2013, C-147/12, ECLI:EU:C:2013:490 (*ÖFAB v Koot*)
- CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*
- CJEU 16 January 2014, C-45/13, ECLI:EU:C:2014:7 (*Kainz v Pantherwerke*)
- CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*)
- CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37 (*Kolassa v Barclays Bank*)
- CJEU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelmus van Leeuwen*)
- CJEU 21 May 2015, C-322/14, ECLI:EU:C:2015:334 (*El Majdoub v CarsOnTheWeb. Deutschland GmbH*)
- CJEU 21 May 2015, C-352/13, ECLI:EU:C:2015:335 (*CDC Hydrogen Peroxide*)
- CJEU 16 June 2015, C-62/14, ECLI:EU:C:2015:400 (*Gauweiler and Others*)
- CJEU 21 January 2016, C-359/14 and C-475/14, ECLI:EU:C:2016:40 (*ERGO Insurance*)
- CJEU 17 March 2016, C-175/15, ECLI:EU:C:2016:176 (*Taser International*)
- CJEU 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding*)
- CJEU 7 July 2016, C-222/15, ECLI:EU:C:2016:525 (*Höszig*)
- CJEU 28 July 2016, C-191/15, ECLI:EU:C:2016:612 (*Verein für Konsumenteninformation*)
- CJEU 17 October 2017, C-194/16, ECLI:EU:C:2017:766 (*Bolagsupplysningen and Ilsjan*)
- CJEU 12 September 2018, C-304/17, ECLI:EU:C:2018:701 (*Helga Löber v Barclays Bank*)
- CJEU 4 October 2018, C-571/16, ECLI:EU:C:2018:807 (*Kantarev*)

Australian Courts

High Court of Australia
- *Wallace v Kam* [2013] HCA 19, 250 CLR 375

Federal Court of Australia
- *Bathurst Regional Council v Local Government Financial Service Pty Ltd (No 5)* [2012] FCA 1200

Federal Court of Appeal
- *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65

Dutch Courts

Supreme Court
- Hoge Raad 26 March 1920, ECLI:NL:HR:1920:141, *NJ* 1920, pp. 476-479 (*Curiël v Suriname*)
- Hoge Raad 11 December 1931, *NJ* 1932, pp. 157-162 (*Aeilkema v Veenkoloniale Bank*)
- Hoge Raad 12 March 1954, *NJ* 1955/386, pp. 689-696 (*Codam 75 v Merwede*)
- Hoge Raad 19 May 1967, ECLI:NL:HR:1967:AC4745, *NJ* 1967/261 annotated by G.J. Scholten (*Saladin v HBU*)
- Hoge Raad 6 April 1979, ECLI:NL:HR:1979:AH8595, *NJ* 1980/34 annotated by C.J.H. Brunner (*Kleuterschool Babbel v Zwolle*)
- Hoge Raad 9 October 1987, ECLI:NL:HR:1987:AC1068, *NJ* 1988/537 annotated by C.J.H. Brunner (*Consumentenbond v Westerkamp Haweka*)
- Hoge Raad 31 December 1993, ECLI:NL:HR:1993:ZC1210, *NJ* 1995/389 annotated by C.J.H. Brunner (*Matatag v De Schelde*)
- Hoge Raad 2 December 1994, ECLI:NL:HR:1994:ZC1562, *NJ* 1996/246 annotated by D.W.F. Verkade (*ABN AMRO v Coopag Finance*)
- Hoge Raad 24 October 1997, ECLI:NL:HR:1997:AM1905, *NJ* 1998/257 annotated by P.A. Stein (*Baijings v Mr. H*)
- Hoge Raad 12 December 1997, ECLI:NL:HR:1997:ZC2524, *NJ* 1998/208 (*Gemeente Stein v Driessen*)
- Hoge Raad 9 January 1998, ECLI:NL:HR:1998:ZC2536, *NJ* 1999/285 annotated by W.M. Kleijn (*MeesPierson v Ten Bos*)
- Hoge Raad 4 February 2000, ECLI:NL:HR:2000:AA4731, *NJ* 2000/429 annotated by K.F. Haak (*UAP v Van Woudenberg*)
- Hoge Raad 9 June 2000, ECLI:NL:HR:2000:AA6159, *NJ* 2000/460 (*S. v V.*)
- Hoge Raad 6 April 2001, ECLI:NL:HR:2001:AB0900, *NJ* 2002/383 annotated by H.J. Snijders (*Vellekoop v Wilton Feijenoord*)
- Hoge Raad 29 November 2002, ECLI:NL:HR:2002:AE7345, *NJ* 2004/304 (*TFS v NS*)
- Hoge Raad 29 November 2002, ECLI:NL:HR:2002:AE7351, *NJ* 2004/305 annotated by W.D.H. Asser (*Kastelijn v Achtkarspelen*)
- Hoge Raad 31 October 2003, ECLI:NL:HR:2003:AL8168, *NJ* 2006/112 annotated by C.E. du Perron (*Saelman*)
- Hoge Raad 11 November 2005, ECLI:NL:HR:2005:AT6018, *NJ* 2007/231 annotated by J.B.M. Vranken (*Ontvanger v Voorsluijs*)
- Hoge Raad 23 December 2005, ECLI:NL:HR:2005:AU3713, *NJ* 2006/289 annotated by M.R. Mok (*Safe Haven*)
- Hoge Raad 31 March 2006, ECLI:NL:HR:2006:AU6092, *NJ* 2011/250 annotated by T.F.E. Tjong Tjin Tai (*Nefalit v Karamus*)
- Hoge Raad 13 October 2006, ECLI:NL:HR:2006:AW2080, *NJ* 2008/528 annotated by C.C. van Dam (*Deloitte Touche e.a. v Vie d'Or*)
- Hoge Raad 28 March 2008, ECLI:NL:HR:2008:BC1242, *NJ* 2008/353 annotated by F.M.J. Verstijlen (*Nelemans v Scheepswerf*)

- Hoge Raad 30 May 2008, ECLI:NL:HR:2008:BD2820, *NJ* 2010/622 annotated by J.B.M. Vranken (*TMF v De Boer*)
- Hoge Raad 5 September 2008, ECLI:NL:HR:2008:BD2984, *NJ* 2008/480 (*Telfort v Scaramea*)
- Hoge Raad 19 December 2008, ECLI:NL:HR:2008:BG1890, *NJ* 2009/28 (*Smeets v Gemeente Heerlen*)
- Hoge Raad 5 June 2009, ECLI:NL:HR:2009:BH2811, *NJ* 2012/183 annotated by J.B.M. Vranken (*Levob v Bolle*)
- Hoge Raad 5 June 2009, ECLI:NL:HR:2009:BH2815, *NJ* 2012/182 annotated by J.B.M. Vranken (*De Treek v Dexia*)
- Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*)
- Hoge Raad 24 December 2010, ECLI:NL:HR:2010:BO1799, *NJ* 2011/251 annotated by T.F.E. Tjong Tjin Tai (*Fortis v Bourgonje*)
- Hoge Raad 10 June 2011, ECLI:NL:HR:2011:BP9994, *NJ* 2012/405 annotated by T.F.E. Tjong Tjin Tai (*Van den Hoek v Pots*)
- Hoge Raad 3 February 2012, ECLI:NL:HR:2012:BU4914, *NJ* 2012/95, *JOR* 2012/116 annotated by S.B. van Baalen (*Rabobank Vaart en Vecht v X*)
- Hoge Raad 27 April 2012, ECLI:NL:HR:2012:BV1301, *NJ* 2012/293 (*De Beeldbrigade v Hulskamp*)
- Hoge Raad 21 December 2012, ECLI:NL:HR:2012:BX7491, *NJ* 2013/237 annotated by S.D. Lindenbergh (*Deloitte Belastingadviseurs v H&H Beheer*)
- Hoge Raad 8 February 2013, ECLI:NL:HR:2013:BX7846, *NJ* 2014/495 annotated by Jac. Hijma (*Van Lanschot Bankiers v Grove*)
- Hoge Raad 19 June 2015, ECLI:NL:HR:2015:1683, *NJ* 2016/1 annotated by T.F.E. Tjong Tjin Tai (*Overzee v Gemeente Zoeterwoude*)
- Hoge Raad 27 November 2015, ECLI:NL:HR:2015:3399, *NJ* 2016/245 annotated by T.F.E. Tjong Tjin Tai (*ABN AMRO v Van den Berg*)
- Hoge Raad 3 June 2016, ECLI:NL:HR:2016:1054, *NJ* 2016/354 annotated by Th.M. de Boer (*A. v Dahabshiil*)
- Hoge Raad 9 September 2016, ECLI:NL:HR:2016:2044 (*Rabobank v X*)
- Hoge Raad 16 December 2016, ECLI:NL:HR:2016:2876
- Hoge Raad 23 December 2016, ECLI:NL:HR:2016:2987, *NJ* 2017/133 annotated by S.D. Lindenbergh (*Baby Esther*)
- Hoge Raad 10 February 2017, ECLI:NL:HR:2017:214, *NJ* 2018/115 (*Avi Cranes Ltd. v Van Adrighem*)
- Hoge Raad 31 March 2017, ECLI:NL:HR:2017:552, *NJ* 2017/165 (*Mispelhoef v Staat*)
- Hoge Raad 27 October 2017, ECLI:NL:HR:2017:2786, *NJ* 2017/422 (*X v AZM*)
- Hoge Raad 9 March 2018, ECLI:NL:HR:2018:309, *NJ* 2018/228 annotated by V.P.G. de Serière (*GSFS v DNB*)

Court of Appeal
- Gerechtshof Arnhem-Leeuwarden 23 September 2014, ECLI:NL:GHARL:2014:7353, *NJ* 2016/483 (*Rabobank v X*)
- Gerechtshof Arnhem-Leeuwarden 16 June 2015, ECLI:NL:GHARL:2015:4385, *NJ* 2017/97

- Gerechtshof Amsterdam 23 May 2017, ECLI:NL:GHAMS:2017:1960 (*Hama Holding v ABN AMRO*)
- Gerechtshof Den Haag 7 August 2018, ECLI:NL:GHDHA:2018:1865 (*X v ING Bank*)
- Gerechtshof Den Haag 9 October 2018, ECLI:NL:GHDHA:2018:2558 (*X v Stichting Wijdezorg*)
- Gerechtshof Amsterdam 14 May 2019, ECLI:NL:GHAMS:2019:1611 (*ING v Food-locker*)

District Courts
- Rechtbank Rotterdam (vzr.) 5 December 2002, ECLI:NL:RBROT:2002:AF2059, *Computerrecht* 2003, p. 149 annotated by A.R. Lodder (*Netwise Publications v NTS Computers*)
- Rechtbank Rotterdam 29 December 2010, ECLI:NL:RBROT:2010:BP5369, *JOR* 2011/388 annotated by S.R. Damminga (interim judgment, case removed from the register on the request of both parties)
- Rechtbank Rotterdam 23 May 2013, ECLI:NL:RBROT:2013:CA0879 (*Goltex v Autoriteit Consument & Markt*)
- Rechtbank Amsterdam 14 January 2015, ECLI:NL:RBAMS:2015:6 (*GLS v Graydon*)
- Rechtbank Den Haag 30 September 2015, ECLI:NL:RBDHA:2015:11224 (*ANWB v Consumentenbond*)
- Rechtbank Rotterdam 5 November 2015, ECLI:NL:RBROT:2015:9378 (*X v Rabobank*)
- Rechtbank Amsterdam 20 April 2016, ECLI:NL:RBAMS:2016:6235 (*Eisers v Deutsche Bank Nederland N.V.*)
- Rechtbank Amsterdam 8 September 2016, ECLI:NL:RBAMS:2016:5698 (*X v De Persgroep Nederland*)
- Rechtbank Den Haag 6 November 2018, ECLI:NL:RBDHA:2018:13142 (*Australian Gold LLC v Consumentenbond*)
- Rechtbank Overijssel 28 May 2019, ECLI:NL:RBOVE:2019:1827 (*X v College B&W Deventer*)

English Courts

Supreme Court (House of Lords)
- *Derry v Peek* (1889) 14 App. Cas. 337
- *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No.2)* [1912] A.C. 673
- *Banco de Portugal v Waterlow & Sons Ltd* [1932] A.C. 452
- *The Wagon Mound* [1961] A.C. 388
- *Hughes v Lord Advocate* [1963] A.C. 837
- *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465
- *The Heron II* [1969] 1 A.C. 350
- *Hotson v East Berkshire Area Health Authority* [1987] A.C. 750
- *Wilsher v Essex Area Health Authority* [1988] A.C. 1074
- *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605
- *Smith v Eric S. Bush* [1990] 1 A.C. 831
- *Henderson v Merrett Syndicates Ltd (No. 1)* [1995] 2 A.C. 145
- *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296

- *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191
- *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1
- *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190
- *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All E.R. 749, [2002] 1 All E.R. (Comm) 97
- *Three Rivers DC v Bank of England (No 3)* [2003] 2 A.C. 1
- *Chester v Afshar* [2004] UKHL 41, [2005] 1 A.C. 134
- *Gregg v Scott* [2005] UKHL 2, [2005] 2 A.C. 176
- *Moy v Pettman Smith (A Firm)* [2005] UKHL 7, [2005] 1 W.L.R. 581
- *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 A.C. 181
- *The Achilleas* [2008] UKHL 48, [2009] 1 A.C. 61
- *BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)* [2017] UKSC 21, [2018] A.C. 599
- *Tiuta International Ltd v De Villiers Surveyors Ltd* [2017] UKSC 77, [2017] 1 W.L.R. 4627
- *Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] A.C.
- *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 W.L.R. 636

Court of Appeal
- *Chaplin v Hicks* [1911] 2 K.B. 786
- *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563
- *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 Q.B. 113
- *Spartan Steel and Alloys Ltd v Martin & Co (Contractor) Ltd* [1973] Q.B. 27, [1972] 3 W.L.R. 502
- *Galoo Ltd v Bright Grahame Murray* [1994] 1 W.L.R. 1360
- *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602
- *Skuse v Granada Television Ltd* [1996] E.M.L.R. 278
- *First Interstate Bank of California v Cohen Arnold & Co* [1996] C.L.C. 174
- *Patel v Hooper & Jackson* [1999] 1 W.L.R. 1792
- *Law Society v KPMG Peat Marwick* [2000] 1 W.L.R. 1921
- *Dixon v Clement Jones Solicitors* [2004] EWCA Civ 1005
- *White v Paul Davidson & Taylor* [2004] EWCA Civ 1511, [2005] P.N.L.R. 15
- *Beary v Pall Mall Investments* [2005] EWCA Civ 415, [2005] P.N.L.R. 35
- *MAN Nutzfahrzeuge AG v Freightlinger Ltd* [2007] EWCA Civ 910
- *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184
- *Zaki v Credit Suisse (UK) Ltd* [2013] EWCA Civ 14
- *Smeaton v Equifax Plc* [2013] EWCA Civ 108
- *Meiklejohn v St George's Healthcare NHS Trust* [2014] EWCA Civ 120
- *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146
- *Main v Giambrone & Law (A firm)* [2017] EWCA Civ 1193
- *Manchester Building Society v Grant Thornton UK LLP* [2019] EWCA Civ 40

Lower Courts
- *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428
- *Alliance and Leicester BS v Edgestop Ltd* [1993] 1 W.L.R. 1462
- *Bristol and West Building Society v Fancy & Jackson* [1997] 4 All E.R. 582

- *Bank Leumi (UK) Plc v Wachner* [2011] EWHC 656 (Comm)
- *Zaki v Credit Suisse (UK) Ltd* [2011] EWHC 2422 (Comm)
- *Gatt v Barclays Bank Plc* [2013] EWHC 2 (QB)
- *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWCH 1250 (Comm)
- *Crossman v St George's Healthcare NHS Trust* [2016] EWHC 2878 (QB)
- *Hincks v Sense Network Ltd* [2018] EWHC 533 (QB)
- *Boyo v Lloyds Bank Plc* [2019] EWHC 2279 (QB)

French courts

Supreme Court
- Cour de Cassation req. 17 July 1889, *S.* 1891, 1, p. 399
- Cour de Cassation (Chambre Civile 1) 11 January 1922 (*Pelletier v Doderet*)
- Cour de Cassation (Chambre Commerciale) 17 December 1951, Bulletin, II, no. 396
- Cour de Cassation (Chambre Civile 2) 28 October 1954, Bulletin, II, no. 328
- Cour de Cassation (Chambre Civile 2) 17 February 1955, 55-02810, Bulletin 1955, II, no. 100, p. 59
- Cour de Cassation (Chambre Civile 1) 5 February 1957, *D*. 1957, p. 232
- Cour de Cassation (Chambre Commerciale) 15 June 1959, 57-12362, Bulletin Chambre Commerciale 1959, no. 265, p. 231
- Cour de Cassation (Chambre Civile 1) 14 December 1965, Bulletin 1965, I, no. 707
- Cour de Cassation (Chambre Civile 2) 17 July 1967, Bulletin 1967, II, no. 261
- Cour de Cassation (Chambre Civile 1) 4 February 1969, 67-11387, Bulletin 1969, I, no. 60 (*Société des Comédiens français*)
- Cour de Cassation (Chambre Civile 2) 8 April 1970, 68-13969, Bulletin 1970, II, no. 111, p. 87
- Cour de Cassation (Chambre Mixte) 28 January 1972, 70-90072, Bulletin criminel Chambre Mixte, no. 37, p. 86
- Cour de Cassation (Chambre Civile 1) 27 March 1973, 71-14587, Bulletin 1973, I, no. 115, p. 105
- Cour de Cassation (Chambre Civile 2) 27 April 1977, 75-14761, Bulletin 1977, II, no. 108, p. 74
- Cour de Cassation (Chambre Civile 2) 7 December 1978, 77-12013, Bulletin 1978, II, no. 269, p. 207
- Cour de Cassation (Chambre Civile 2) 9 July 1981, 80-12142, Bulletin 1981, II, no. 156
- Cour de Cassation (Chambre Civile 1) 17 December 1985, 84-16338, Bulletin 1985, I, no. 354, p. 318 (*CSEE v SORELEC*)
- Cour de Cassation (Chambre Civile 2) 15 November 1989, 88-18310, Bulletin 1989, II, no. 206, p. 106
- Cour de Cassation (Chambre Civile 2) 9 June 1993, 91-21650, Bulletin 1993, II, no. 204, p. 110
- Cour de Cassation (Chambre Civile 1) 2 February 1994, 92-10844, Bulletin 1994, I, no. 37, p. 29

- Cour de Cassation (Chambre Civile 1) 3 July 1996, 94-14820, Bulletin 1996, I, no. 296, p. 206
- Cour de Cassation (Chambre Civile 1) 16 July 1998, 96-15380, Bulletin 1998, I, no. 260, p. 181
- Cour de Cassation (Chambre Civile 1) 18 July 2000, 98-20430, Bulletin 2000, I, no. 224, p. 147
- Cour de Cassation (Chambre Civile 2) 19 June 2003, 00-22302, Bulletin 2003, II, no. 203, p. 171
- Cour de Cassation (Chambre Civile 2) 19 June 2003, 01-13289, Bulletin 2003, II, no. 203, p. 171
- Cour de Cassation (Chambre Mixte) 22 April 2005, 03-14112, Bulletin mixt. 2005, no. 4, p. 10
- Cour de Cassation (Chambre Commerciale) 22 November 2005, 03-20600 (*Pfeiffer v Société Eurodirect Marketing*)
- Cour de Cassation (Chambre Civile 1) 21 November 2006, 05-15674, Bulletin 2006, I, no. 498, p. 443
- Cour de Cassation (Chambre Civile 1) 5 November 2009, 07-21442, Bulletin 2009, I, no. 220
- Cour de Cassation (Chambre Commerciale) 9 March 2010, 08-21547 and 08-21793, Bulletin 2010, IV, no. 48 (*Gaudriot*)
- Cour de Cassation (Chambre Civile 2) 1 July 2010, 09-15594, Bulletin 2010, II, no. 128
- Cour de Cassation (Chambre Civile 1) 14 October 2010, 09-69195, Bulletin 2010, I, no. 200
- Cour de Cassation (Chambre Criminelle) 19 March 2014, 12-87416, ECLI:FR:CCASS:2014:CR01193, Bulletin criminel 2014, no. 86
- Cour de Cassation (Chambre Commerciale) 6 May 2014, 13-17632 and 13-18473, ECLI:FR:CCASS:2014:CO00430, Bulletin 2014, IV, no. 81 (*Marionnaud*)
- Cour de Cassation (Chambre Civile 1) 2 July 2014, 13-17599, ECLI:FR:CCASS:2014:C100826
- Cour de Cassation (Chambre Commerciale) 4 November 2014, 13-24196, ECLI:FR:CCASS:2014:CO00971, Bulletin 2014, IV, no. 156
- Cour de Cassation (Chambre Civile 3) 3 December 2015, 13-22503, ECLI:FR:CCASS:2015:C301335
- Cour de Cassation (Chambre Civile 1) 6 September 2017, 16-19563, ECLI:FR:CCASS:2017:C100920

Courts of Appeal
- Cour d'Appel de Paris 26 September 2003, no. 2001/21885 (*Flammarion*)
- Cour d'Appel de Colmar 14 October 2003, no. 01/03432 (*Pfeiffer v Société Eurodirect Marketing*)
- Cour d'Appel de Paris 30 June 2006, no. 04/06308 (*LVMH v Morgan Stanley*)
- Cour d'Appel de Paris 14 September 2007, no. 07/01477 (*Regina Rubens*)
- Cour d'Appel de Limoges 6 October 2008, no. 07/00286 (*Gaudriot*)
- Cour d'Appel de Paris 17 October 2008, no. 06/09036 (*Sidel*)
- Cour d'Appel de Paris 19 March 2013, no. 2011/06831 (*Marionnaud*)

Lower courts

- Tribunal des Grandes Instances de Paris 15 November 2001, no. 2000/18125 (*Flammaration*)
- Tribunal de Commerce de Paris 12 January 2004, no. 2002/93985 (*LVMH v Morgan Stanley*)
- Tribunal Correctionnel Paris (11th ch.) 12 September 2006, no. 0018992026 (*Sidel*)
- Tribunal Correctionnel de Paris (11th ch.) 21 January 2011, no. 0220696051 (*Vivendi Universal*)

German courts

Federal Supreme Court

- Bundesgerichtshof 23 October 1951, *Entscheidungen des Bundesgerichtshofes*, Band 3, pp. 261-270
- Bundesgerichtshof 11 May 1953, *Entscheidungen des Bundesgerichtshofes*, Band 10, pp. 14-18
- Bundesgerichtshof 30 October 1967, *Entscheidungen des Bundesgerichtshofes*, Band 49, pp. 19-24
- Bundesgerichtshof 17 February 1970, *Entscheidungen des Bundesgerichtshofes*, Band 53, pp. 245-264 (*Anastasia*)
- Bundesgerichtshof 17 February 1971, VIII ZR 4/70, *NJW* 1971, pp. 979-980
- Bundesgerichtshof 5 July 1973, VII ZR 12/73, *NJW* 1973, pp. 1688-1689
- Bundesgerichtshof 18 March 1987, IVa ZR 205/85, *NJW* 1987, pp. 1944-1945
- Bundesgerichtshof 30 January 1990, XI ZR 63/89, *NJW* 1990, pp. 2057-2058
- Bundesgerichtshof 8 July 1992, IV ZR 223/91, *NJW* 1992, pp. 2418-2419
- Bundesgerichtshof 5 November 1992, IX ZR 12/92, *NJW* 1993, pp. 734-735
- Bundesgerichtshof 19 July 2004, II ZR 217/03, *NJW* 2004, pp. 2668-2671 (*Infomatec*)
- Bundesgerichtshof 8 March 2005, XI ZR 170/04, *NJW* 2005, pp. 1579-1581
- Bundesgerichtshof 9 May 2005, II ZR 287/02 (*EM.TV*)
- Bundesgerichtshof 21 July 2005, IX ZR 49/02, *NJW* 2005, pp. 3275-3277
- Bundesgerichtshof 14 June 2006, I ZR 75/03, *NJW* 2006, pp. 2976-2978
- Bundesgerichtshof 4 June 2007, II ZR 147/05, *NZG* 2007, pp. 708-711 (*ComROAD IV*)
- Bundesgerichtshof 27 May 2008, XI ZR 132/07, *NJW-RR* 2008, pp. 1495-1500
- Bundesgerichtshof 13 December 2011, XI ZR 51/10, *NJW* 2012, pp. 1800-1807 (*IKB*)
- Bundesgerichtshof 20 December 2011, VI ZR 309/10, *NJW-RR* 2012, pp. 404-405
- Bundesgerichtshof 8 May 2012, XI ZR 262/10, *NJW* 2012, pp. 2427-2434, *BKR* 2012, pp. 368-377
- Bundesgerichtshof 13 December 2012, III ZR 282/11, *NJW* 2013, pp. 386-387, *BeckRS* 2013, 1088
- Bundesgerichtshof 4 June 2013, VI ZR 288/12, *NJW-RR* 2013, pp. 1448-1451
- Bundesgerichtshof 3 December 2013, XI ZR 295/12, *NJW* 2014, pp. 1098-1101

Higher Regional Court

- Oberlandesgericht München 18 July 2002, 19 U 5630/01, ECLI:DE:OLGMUEN:2002:0718.19U5630.01.0A, *NZG* 2002, pp. 1110-1111 (*EM.TV*)

- Kammergericht Berlin 12 May 2006, 9 U 127/05, ECLI:DE:KG:2006:0512.9U127.05.0A
- Oberlandesgericht Frankfurt 28 November 2011, 21 U 23/11, ECLI:DE:OLGHE:2011:1128.21U23.11.0A, *BeckRS* 2011, 27061
- Oberlandesgericht Frankfurt 7 April 2015, 24 U 82/14, ECLI:DE:OLGHE:2015:0407.24U82.14.0A
- Oberlandesgericht Frankfurt 17 July 2017, 13 U 172/16, ECLI:DE:OLGHE:2017:0717.13U172.16.0A, *BeckRS* 2017, 123020
- Oberlandesgericht Brandenburg 7 December 2017, 6 W 141/17, ECLI:DE:OLGBB:2017:1207.6W141.17.0A, *BeckRS* 2017, 143334
- Oberlandesgericht Düsseldorf 8 February 2018, I-6 U 50/17, ECLI:DE:OLGD:2018:0208.I6U50.17.00, *BeckRS* 2018, 2321
- Oberlandesgericht Dresden 6 March 2019, 5 U 1146/18, ECLI:DE:OLGDRES:2019:0306.5U1146.18.00, *BeckRS* 2019, 4673

Regional Court
- Landgericht Düsseldorf 29 August 2016, 21 O 57/15, ECLI:DE:LGD:2016:0829.21O57.15.00, *BeckRS* 2016, 17265
- Landgericht Stuttgart 28 February 2017, 22 AR 1/17 Kap, ECLI:DE:LGSTUTT:2017:0228.22AR1.17KAP.0A, *BeckRS* 2017, 118702
- Landgericht Düsseldorf 17 March 2017, 10 O 181/15, ECLI:DE:LGD:2017:0317.10O181.15.0A
- Landgericht Darmstadt 22 September 2017, 13 O 195/14, ECLI:DE:LGDARMS:2017:0922.13O195.14.00, *BeckRS* 2017, 144511
- Landgericht Düsseldorf 15 December 2017, 20 S 142/17, ECLI:DE:LGD:2017:1215.20S142.17.0A, *BeckRS* 2017, 144179
- Landgericht Dresden 22 June 2018, 9 O 1314/18, ECLI:DE:LGDRESD:2018:0622.9O1314.18.0A, *BeckRS* 2018, 40872
- Landgericht Stuttgart 12 September 2018, 22 O 101/16, ECLI:DE:LGSTUTT:2018:1024.22O101.16.0A

Local Court
- Amtsgericht Neuss 28 December 2016, 80 C 3954/15, ECLI:DE:AGNE:2016:1228.80C3954.15.00, *BeckRS* 2016, 130332
- Amtsgericht Neuss 20 June 2017, 87 C 175/17, ECLI:DE:AGNE:2017:0620.87C175.17.00, *BeckRS* 2017, 144619

Italian Courts

Court of Cassation
- Corte di Cassazione Civile, Sezioni Unite 22 March 2012, no. 8076

Lower Courts
- Tribunale Catanzaro 2 March 2012, no. 685, Sez. Giurisprudenza, 7041, available at http://www.ilcaso.it/giurisprudenza/archivio/7041.pdf
- Tribunale di Roma 7 February 2014, Sez. Giurisprudenza 11305, available at www.ilcaso.it/giurisprudenza/archivio/11305.pdf

- Tribunale di Roma 27 March 2015, Sez. Giurisprudenza, 13654, available at www.ilcaso.it/giurisprudenza/archivio/13654.pdf
- Tribunale Penale di Trani 26 September 2017, no. 837/17 Reg.Sent.

US Courts

- *Beardsley v Tappan*, 5 Blatchf. 498 (1867)
- Supreme Judicial Court of Massachusetts, November 1855, *Boston Law Reporter* vol. 8, new series, pp. 699 ff. *(Billings v Russell)*
- *Ormsby v Douglass*, 37 N.Y. 484 (1868)
- *Ultramares v Touche* (1931) 174 N.E. 441
- *Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78 (N.Y. 2006)
- *Compuware Corp. v Moody's Investors Services, Inc.*, 499 F.3d 520 (6th Cir. 2007)
- *In Re National Century Financial Enterprises, Inc.*, 580 F. Supp. 2d 630 (S.D. Ohio 2008)
- *Abu Dhabi Commercial Bank v Morgan Stanley & Co.*, 651 F. Supp. 2d 155 (S.D.N.Y. 2009)

DOCUMENTS RELATING TO EU LEGISLATION

COM(2003) 427 final
Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II"), 22 July 2003, COM(2003) 427 final

COM(2008) 704 final
Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies, 12 November 2008, COM(2008) 704 final

SEC(2008) 2745
Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies, Impact Assessment, 12 November 2008, SEC(2008) 2745

COM(2011) 747 final
Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies, 15 November 2011, COM(2011) 747 final

SEC(2011) 1354 final
Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Regulation amending Regulation (EC) No 1060/2009 on credit rating agencies, 15 November 2011, SEC(2011) 1354 final

COM(2012) 352 final
Proposal for a Regulation of the European Parliament and of the Council on key information documents for investment products, 3 July 2012, COM(2012) 352 final

A7-0221/2012
***I Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies (COM(2011)0747 – C7-0420/2011 – 2011/0361(COD)), Committee on Economic

and Monetary Affairs, Rapporteur: Leonardo Domenici, 23 August 2012, A7-0221/2012

P7_TA-PROV(2013)0012
European Parliament legislative resolution of 16 January 2013 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies (COM(2011)0747 – C7-0420/2011 – 2011/0361(COD))

Documents relating to US legislation

SEC, Federal Register 15 September 2014
Securities and Exchange Commission, 'Nationally Recognized Statistical Rating Organizations; Final Rule', Federal Register 15 September 2014, vol. 79, no. 178, pp. 55078- 55314, available at www.gpo.gov/fdsys/pkg/FR-2014-09-15/pdf/2014-20890.pdf

Reports

Schlosser Report 1979
P. Schlosser, 'Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice', C-59/71, October 1978, available at http://aei.pitt.edu/1467/1/commercial_reports_schlosser_C_59_79.pdf

IOSCO Report 2003
International Organization of Securities Commissions, *Report on the Activities of Credit Rating Agencies,* 2003, available at www.iosco.org/library/pubdocs/pdf/IOSCOPD153.pdf

CGFS Report 2005
Committee on the Global Financial System, The role of ratings in structured finance: issues and implications. Report submitted by a Working Group established by the Committee on the Global Financial System, January 2005, available at www.bis.org/publ/cgfs23.pdf

AMF Report 2007
Autorité des Marchés Financiers, *AMF 2007 Report on rating agencies. Credit Rating of Corporate Issuers,* 17 January 2008, available at www.amf-france.org/en_US/Publications/Rapports-etudes-et-analyses/Agences-de-notation?docId=workspace%3A%2F%2FSpacesStore%2Fac935efb-5c88-4a9b-a177-027b27bb540d

IOSCO Report 2008
International Organization of Securities Commissions, *The role of credit rating agencies in structured finance markets,* 2008, available at www.iosco.org/library/pubdocs/pdf/IOSCOPD270.pdf

SEC Summary Report 2008
SEC, 'Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies', July 2008, available at www.sec.gov/news/studies/2008/craexamination070808.pdf
The Joint Forum 2009
The Joint Forum (Basel Committee on Banking Supervision), *Stocktaking on the use of credit ratings*, June 2009, available at www.bis.org/publ/joint22.pdf
The Financial Crisis Report 2011
'The Financial Crisis Inquiry Report. Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States', 25 February 2011, available at www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf
Report on the Asset-Backed Market Stabilization Act 2011
Report from the Committee on Financial Services on the 'Asset-Backed Market Stabilization Act of 2011', 12 August 2011, no. 112-196, available at www.congress.gov/112/crpt/hrpt196/CRPT-112hrpt196.pdf
Rapport du Club des Juristes 2014
A. Levy-Lang, D. Tricot, J. Klein et al., 'l'Évaluation du préjudice financier de l'investisseur dans les sociétés cotées', Rapport du Club des Juristes, November 2014, available at www.leclubdesjuristes.com/wp-content/uploads/2014/11/CDJ_R%C3%A9paration-du-pr%C3%A9judice-financier.pdf

Index

A

Adequate right of redress | p. 437, 467-468

AIFMD | p. 51-52

Alternative Investment Fund Managers Directive | p. 51-52

Anlagestimmung | p. 337-339, 418

Anscheinsbeweis | p. 336-337, 418

Applicable law | p. 177-187

- See also 'Rome II Regulation'
- Location of financial loss | p. 182-186, 453-457
- Location of reputational loss | p. 186-187, 457
- Uncertainty | p. 453-457

Article 35a CRA Regulation

- Added value | p. 440-442
- Adequate right of redress | p. 437, 467-468
- Attribution | p. 206-209, 409-410
- Characterisation Private International Law | p. 137-138
- Conditions | p. 118-119
- Direct effect | p. 61-65
- Friction with national law | p. 460-462
- Function | p. 118, 437
- General suitability template | p. 497-499
- Imprecise drafting | p. 458-460, 459
- Influence national law | p. 65-66, 444-449
- Influence principle of effectiveness | p. 447-449
- Legislative history | p. 114-118
- Scope of application | p. 108-109, 119-121, 442-443
- Status terms | p. 459-460
- Structure | p. 444-449
- Terms | p. 204-222

Assignment of credit ratings | p. 95-99

Attribution | p. 206-209, 409-410, 446-447, 491

B

Brussels I Regulation (recast)

- Forum rei | p. 153-154
- Jurisdiction agreement | p. 140-153, 450-453
- Location of financial loss | p. 159-177
- Recognition and enforcement | p. 187-191
- Scope | p. 139-140
- Special grounds | p. 154-177

But-for test | p. 376-377, 379-381, 414, 418

C

Calculation of damages

- See 'Damages'

Causation

- Comparison | p. 410-419
- Dutch law | p. 245-256
- English law | p. 375-389
- French law | p. 287-294
- General description in CRA context | p. 211-217
- German law | p. 330-343

Causation in fact

- Dutch law | p. 245-247
- German law | p. 333-334
- English law | p. 376-377

Causation in law

- Dutch law | p. 245, 258-262
- English law | p. 385, 422
- German law | p. 333-334

Certainty | p. 438
Certification of credit rating agencies | p. 109
Characterisation | p. 137-138
Choice of court | p. 140-153
Choice of law agreement | p. 181-182
Civil liability
- European fragmented approach | p. 73

Claimant-specific requirements | p. 213-214
Code monétaire et financier | p. 275-281, 449-450
Comparison | p. 403-432
Compensation
- Comparison | p. 419-424
- Dutch law | p. 256-262
- French law | p. 294-300
- General description in CRA context | p. 217-219
- German law | p. 343-346
- Recommendations | p. 492-496

Competence
- Courts | p. 138-177
- Union legislature | p. 18, 473-474

Condicio sine qua non-test
- Comparison | p. 414
- Dutch law | p. 245-246
- French law | p. 287-289
- German law | p. 333-335

Consistent interpretation | p. 30
Contractual liability
- Comparison | p. 404
- Dutch law | p. 225-226
- English law | p. 362
- French law | p. 282-283
- German law | p. 311-312

Contributory negligence
- Dutch law | p. 262-263
- English law | p. 395-396
- French law | p. 300-301
- German law | p. 346-347

Convergence | p. 438-439, 463-466
CRA Regulation
- Infringements Annex III | p. 204-209
- Legal framework | p. 107-114
- Objectives | p. 107-108
- Origins | p. 86
- Private enforcement | p. 114-126
- Public enforcement | p. 112-114
- Scope of application | p. 108-109
- Terms | p. 204-222

Credit rating
- (Un)solicited credit rating | p. 94
- Assignment | p. 95-99
- Character and type | p. 94-95
- Definition | p. 94
- Effects | p. 102-107
- Functions | p. 100-102
- Sovereign rating | p. 94
- Structured finance products | p. 98-100

Credit Rating Agencies (Civil Liability) Regulations 2013 | p. 359-360
Credit rating agency
- Definition | p. 2-3, 119-121
- Functions | p. 100-102
- History | p. 76-93
- Origins | p. 76-78
- (Role in) financial crisis | p. 82-86

Credit rating agency liability
- See also 'Article 35a CRA Regulation'
- See also 'Contractual liability'
- See also 'Non-contractual liability'
- Australian approach | p. 89-91
- Conditions | p. 118-119
- Factual scenarios | p. 126-132
- Function | p. 118
- Public enforcement | p. 112-114
- US approach | p. 87-89

Credit rating industry
- History | p. 76-93
- Origins | p. 76-78

Credit reporting agencies | p. 76-78

D

Damage
- See 'Loss'

Damages
· Comparison | p. 419-424
· Dutch law | p. 256-262
· English law | p. 390-395
· French law | p. 294-300
· General description in CRA context | p. 217-219
· German law | p. 343-346
· Recommendations | p. 492-496
Depletion of assets | p. 188
Direct effect
· Article 35a CRA Regulation | p. 61-65
· Conditions | p. 24-25
· Definition | p. 21
· Directives | p. 30, 31
· Regulations | p. 23-24, 37-41
Directive on Undertakings for Collective Investment in Transferable Securities | p. 51-52
Directives | p. 29
· Influence principle of effectiveness | p. 41-49
Division of competences | p. 18
Duty of care
· Dutch law | p. 232-236
· English law | p. 362-368, 370-374, 390-395
· Recommendations | p. 488-489, 492-493
Duty to provide advice | p. 390-395
Duty to provide information | p. 390-395, 489

E
Effectiveness
· See 'Principle of effectiveness'
Effects of credit rating | p. 102-107
Enforcement of EU law | p. 32-34
Enforcement of judgments | p. 187-191
Equivalence | p. 34
Erfolgsort | p. 155, 159-177, 453-457, 477
Evidentiary presumption | p. 249-253, 417

F
Factual causation
· See 'Causation in fact'
Financial crisis
· Aftermath | p. 91-93
· Credit rating agencies | p. 82-84
· Legal response in relation to credit rating agencies | p. 86-91
Financial loss | p. 159-177
· See also 'Loss'
Forum rei | p. 153-154
Functions of credit rating agency liability | p. 118, 437
Functions of credit ratings | p. 100-102

G
General Data Protection Regulation | p. 67-68
Gross negligence
· Comparison | p. 407-410
· Dutch law | p. 236-245, 458
· English law | p. 374-375, 448
· French law | p. 284-286
· General description in CRA context | p. 210
· German law | p. 327-330
· Recommendations | p. 490-491

H
Haftungsausfüllende Kausalität | p. 330-333, 343-344
Haftungsbegründende Kausalität | p. 330-333
Hague Choice of Court Convention | p. 148-149, 451
Handlungsort | p. 155, 156-159
Harmonious interpretation | p. 30
Horizontal direct effect | p. 22

I
Impact
· Comparison | p. 413-414
· Dutch law | p. 246
· English law | p. 375
· French law | p. 288

· General description in CRA context | p. 211-212
· German law | p. 332-333
Implementing measures | p. 25-26
Influence of EU law
· Categorisation | p. 35, 71-73
· Civil liability | p. 34, 71-73, 469-473
· EU law provisions creating directly effective rights to compensation or damages | p. 58 ff.
· EU law provisions on (the application of) national civil liability regimes | p. 49 ff.
· In the absence of EU law provisions on civil liability | p. 36 ff.
· Roadmap | p. 35, 71-73
Information intermediary | p. 100
Infringements Annex III | p. 204-209
Intention
· Comparison | p. 407-410
· Dutch law | p. 236-245
· English law | p. 374
· French law | p. 284-286
· General description in CRA context | p. 210
· German law | p. 327-330
Investor | p. 121-126
Issuer | p. 121

J

Jurisdiction
· See also 'Brussels I Regulation (recast)'
· In general | p. 138-177
· In matters relating to tort | p. 154-177
· Location of financial loss | p. 159-177
· Uncertainty | p. 450-457
Jurisdiction agreement
· In favour of Member States | p. 141-147
· In favour of non-Member States | p. 147-153, 450-453
· In general | p. 140-153
· Recommendations | p. 475-477
· Uncertainty | p. 450-457

K

Kursdifferenzschade | p. 341-343, 345-346, 418, 423

L

Legal causation
· See 'Causation in law'
Legal certainty | p. 438
Legal Comparison | p. 403-432
Limitation clauses
· Comparison | p. 424-427
· Dutch law | p. 263-269
· English law | p. 398-401
· French law | p. 303-306
· General description in CRA context | p. 219-221
· German law | p. 348-354
Limitation of liability
· Comparison | p. 424-427
· Dutch law | p. 263-269
· English law | p. 398-401
· French law | p. 303-306
· General description in CRA context | p. 219-221
· German law | p. 348-354
· Recommendations | p. 496
Location of financial loss
· Helicopter view | p. 167-169, 453-457
· In the context of applicable law | p. 182-186, 453-457
· In the context of jurisdiction | p. 159-177, 453-457
· Overview connecting factors | p. 478-485
· Recommendations | p. 485-487
· Uncertainty | p. 453-457
Location of reputational loss
· In the context of applicable law | p. 186-187, 457
· In the context of jurisdiction | p. 174-177

Loss
- See also 'Financial loss'
- See also 'Reputational loss'
- Comparison | p. 419-424
- Dutch law | p. 256-262
- English law | p. 390-395
- French law | p. 294-295
- General description in CRA context | p. 217-219
- German law | p. 343-346
- Objective attribution under Dutch law | p. 258-262
- Recommendations | p. 492-496

Loss of chance
- Comparison | p. 416-418, 423
- Dutch law | p. 253-256
- English law | p. 381-385
- French law | p. 289-294, 296-300
- German law | p. 336

M

Market Abuse Regulation | p. 41
Markets in Financial Instruments Directive (II) | p. 43-46
Maximum harmonisation | p. 45-49
Misleading Advertising | p. 231-232
Mitigation of loss
- Dutch law | p. 262-263
- English law | p. 396-398
- French law | p. 301-302
- German law | p. 346-347

N

National implementing measures | p. 25-26
National procedural autonomy | p. 33, 445-446
Non-contractual liability
- Comparison | p. 405-407
- Dutch law | p. 226-236
- English law | p. 362-374
- French law | p. 283-284
- German law | p. 312-327

O

Objective attribution | p. 258-262, 422

P

Payment Services Directive II | p. 53
PEPP Regulation | p. 56-57
Prescription
- Comparison | p. 428-429
- Dutch law | p. 269-270
- English law | p. 401
- French law | p. 306-307
- General description in CRA context | p. 221-222
- German law | p. 354-356

PRIIPs Regulation | p. 55-56
Prima facie evidence | p. 336-337
Principle of conferral | p. 18
Principle of consistent interpretation | p. 30
Principle of effectiveness | p. 34
- Regulations | p. 37-41
- Directives | p. 41-49
- Overarching influence | p. 68-71
- Influence on Article 35a CRA Regulation | p. 447-449

Principle of equivalence | p. 34
Principle of harmonious interpretation | p. 30
Principle of proportionality | p. 19, 439-440, 474-475
Principle of subsidiarity | p. 18-19, 439, 474-475
Private enforcement | p. 114-126
Proportionality | p. 19, 439-440, 474-475
Prospectus Directive | p. 54-55
Prospectus Regulation | p. 54-55
Public enforcement | p. 112-114

R

Rating contract
- Dutch legal qualification | p. 225-226
- English legal qualification | p. 362
- French legal qualification | p. 282-283
- German legal qualification | p. 311-312

Rating proceedings | p. 95-99

Reasonable reliance
- Comparison | p. 414-419
- Dutch law | p. 247-248
- English law | p. 377-379, 448-449
- French law | p. 288, 289-294
- General description in CRA context | p. 215-217
- German law | p. 335-343, 347
- Narrow scope of application | p. 443-443
- Recommendations | p. 491-492

Recognition and enforcement | p. 187-191
Recommendations | p. 468-496
Registration of credit rating agencies | p. 108
Regulations | p. 22
- Direct effect | p. 23-24
- Influence principle of effectiveness | p. 37-41
- (National) implementing measures | p. 25-26

Regulatory arbitrage | p. 466-467
Regulatory function | p. 101-102
Remoteness | p. 386-389
Reputational loss | p. 174-177
- See also 'Loss'

Rome II Regulation | p. 177-187
- Escape clause | p. 187
- Scope of application | p. 177-181

S

Securitisations | p. 98-100
Solicited credit rating | p. 94
Sovereign rating | p. 94
Special jurisdiction | p. 154-177
Structured finance products | p. 98-100
Subsidiarity | p. 18-19, 439, 474-475

T

Time bars
- See 'Prescription'

Tort of deceit | p. 370
Tort of defamation | p. 369-370
Tort of negligence | p. 362-368, 370-374

U

UCITS V | p. 51-52
Unfair Commercial Practices | p. 229-231
Unsolicited credit rating | p. 94

V

Vermutung aufklärungsrichtigen Verhalten | p. 339-341, 418
Vertical direct effect | p. 22
Vertrag mit Schutzwirkung zugunster Dritter | p. 318-321

Curriculum vitae

D.J. (Dorine) Verheij (1991) graduated from Leiden University in 2014. She obtained her Bachelor's degree in Law and her Master's degree in Civil Law in Leiden. Subsequently, Dorine obtained her Magister Juris degree of the University of Oxford (2015, Mansfield College). During her studies, Dorine worked as a student-assistant and as an editor of the law journal Ars Aequi. In 2015, Dorine started her PhD research at Leiden Law School of Leiden University under the supervision of prof.mr.drs. M. Haentjens and prof.mr. A.G. Castermans. She worked as a PhD-candidate at the Hazelhoff Centre for Financial Law from 2015-2019. During her research, in 2017, she worked as a visiting academic at the University of Oxford (United Kingdom) and the University Paris II Panthéon-Assas (France). In 2019, Dorine joined the Dutch law firm NautaDutilh and was admitted to the Amsterdam Bar.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2019 and 2020

MI-315 T.B.D. van der Wal, *Nemo condicit rem suam. Over de samenloop tussen de rei vindicatio en de condictio*, (diss. Leiden), Den Haag: Boom juridisch 2019

MI-316 R. Zandvliet, *Trade, Investment and Labour: Interactions in International Law,* (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-317 M. de Jong-de Kruijf, *Legitimiteit en rechtswaarborgen bij gesloten plaatsingen van kinderen. De externe rechtspositie van kinderen in gesloten jeugdhulp bezien vanuit kinder- en mensenrechten*, (diss. Leiden), Den Haag: Boom juridisch 2019, ISBN 978 94 6290 600 6

MI-318 R.J.W. van Eijk, *Web Privacy Measurement in Real-Time Bidding Systems. A Graph-Based Approach to RTB system classification*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019, ISBN 978 94 028 1323 4

MI-319 M.P. Sombroek-van Doorm, *Medisch beroepsgeheim en de zorgplicht van de arts bij kindermishandeling in de rechtsverhouding tussen arts, kind en ouders,* (diss. Leiden), Den Haag: Boom juridisch 2019, ISBN 978 94 6236 906 1

MI-320 Y. Tan, *The Rome Statute as Evidence of Customary International Law,* (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-321 T. van der Linden, *Aanvullend Verrijkingsrecht,* (diss. Leiden), Den Haag: Boom juridisch 2019, ISBN 978 94 6290 678 5, e-ISBN 978 94 6274 544 5

MI-322 L.B. Louwerse, *The EU's Conceptualisation of the Rule of Law in its External Relations. Case studies on development cooperation and enlargement,* (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-323 I. Antonaki, *Privatisations and golden shares. Bridging the gap between the State and the market in the area of free movement of capital in the EU*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-324 E. Cammeraat, *Economic Effects of Social Protection*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-325 L.B. Esser, *De strafbaarstelling van mensenhandel ontrafeld. Een analyse en heroriëntatie in het licht van rechtsbelangen* (diss. Leiden), Den Haag: Boom juridisch 2019, ISBN 978 94 6290 697 6

MI-326 L.G.A. Janssen, *EU bank resolution framework. A comparative study on the relation with national private law*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-327 L.Y. d'Hondt, *Addressing Industrial Pollution in Indonesia. The Nexus between Regulation and Redress Seeking* (diss. Leiden) Amsterdam: Ipskamp Printing 2019, ISBN 978 94 028 1697 6

MI-328 L.F. Fiallos Pazmiño, *Legal Perspectives on the Cross Border Operations of Unmanned Aircraft Systems,* (diss. Leiden)

MI-329 M. Lochs, *Contempt of court. Een meerwaarde voor de goede strafrechtspleging in Nederland?* (diss. Leiden), Den Haag: Boom juridisch 2019, ISBN 978 94 6290 714 0

MI-330 M.V. Antonov, *Formalism, Realism and Conservatism in Russian Law*, (diss. Leiden) Amsterdam: Ipskamp Printing 2019

MI-331 P. van Berlo, *Human Rights Elephants in an Era of Globalisation. Commodification, Crimmigration, and Human Rights in Confinement* (diss. Leiden), Nijmegen: Wolf Legal Publishers 2020, ISBN 978 94 6240 565 3

MI-332 M. Wensveen, *Eigen haard is goud waard? Een studie naar de woonsituatie, het verhuisgedrag en recidive van (ex-)gedetineerden* (diss. Leiden), Amsterdam: Ipskamp Printing 2019, ISBN 978 94 0281 780 5

MI-333 J. Brouwer, *Detection, Detention, Deportation. Criminal justice and migration control through the lens of crimmigration* (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6236 988 7

MI-334 H. Bosdriesz, *Furthering the fight against impunity in Latin America. The contributions of the Inter-American Court of Human Rights to domestic accountability processes*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-335 M.R. Bruning e.a., *Kind in proces: van communicatie naar effectieve participatie. Het hoorrecht en de procespositie van minderjarigen in familie- en jeugdzaken*, Nijmegen: Wolf Legal Publishers 2020

MI-336 J. van Kralingen, *De ondeelbaarheid van het pand- en hypotheekrecht; deconstructie van een leerstuk. Een historisch-comparatieve studie* (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 782 9

MI-337 J.C.A. van Dam, *Guidance documents of the European Commission in the Dutch legal order*, (diss. Leiden), Ipskamp Printing 2020

MI-338 F. Jiang, *Greening' the WTO Ban on China's Export Duties. Should WTO law allow China to use export duties to protect the environment and, if so, in what manner?*, (diss. Leiden), Ipskamp Printing 2020

MI-339 M.J.R. Broekema, *Cognitive Bias in the Judgment of Business Valuations and Valuators. How Systematic Patterns of Irrationality Affect Entrepreneurs, Legal Professionals and Business Valuators*, (diss. Leiden), Amsterdam, Ipskamp Printing 2020

MI-340 H. Horii, *Child Marriage as a Choice. Rethinking agency in international human rights*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-341 R. de Graaff, *Concurrence in European Private Law*, (diss. Leiden), The Hague: Eleven International Publishing 2020, ISBN 978 94 6236 134 8

MI-342 J.M.M. van der Vliet, *The International Legal Protection of Environmental Refugees. A human rights-based, security and State responsibility approach*, (diss. Leiden), The Hague: Eleven International Publishing 2020, ISBN 978 94 6236 139 3

MI-343 M. Samadi, *Normering en Toezicht in de Opsporing. Een onderzoek naar de normering van het strafvorderlijk optreden van opsporingsambtenaren in het voorbereidend onderzoek en het toezicht op de naleving van deze normen*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 816 1

MI-344 D.J. Verheij, *Credit rating agency liability in Europe. Rating the combination of EU and national law in rights of redress*, (diss. Leiden), The Hague: Eleven International Publishing 2021, ISBN 978 94 6236 144 7