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

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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]

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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.

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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.

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