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

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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:

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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

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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.

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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.

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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]

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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

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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.

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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.