



The civil liability of Credit Rating Agencies

A comparative perspective within the European Union

Céline Estas

Thesis submitted for assessment with a view to obtaining the degree of
Master in Comparative, European and International Laws (LL.M.)
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SUMMARY

This thesis explores the potential civil liability of Credit Rating Agencies towards investors in the European Union and more especially in France, Germany and the United Kingdom. The recent provision Article 35a of the EU *Regulation on CRAs* facilitating CRAs' liability towards investors has to be added to the legal bases existing under the law of these Member States. Fruitful comparative conclusions can be drawn from this analysis, inspiring judges of these Member States on issues specific to civil liability claims against CRAs such as the limits and characteristics of the class of claimants; the foreseeability of the use of ratings by investors and of their damage in case of incorrect rating; or, the degree of care required of CRAs because of their status as gatekeepers. The main conclusion is, nonetheless, that the area is clouded by legal uncertainty, with no decided cases on this specific matter in any of the Member States examined. To overcome the current legal uncertainty in Member States' approaches to the issue, pertaining to the scope of civil liability, I advance certain proposals aimed at maintaining legal responsibility within reasonable limits in the final chapter of this thesis.

TABLE OF CONTENT

<u>INTRODUCTION.....</u>	<u>1</u>
<u>CHAPTER I : GENERAL OVERVIEW OF THE RATING ENVIRONMENT.....</u>	<u>4</u>
I. RATINGS AND RATING AGENCIES	4
CREDIT RATINGS	4
CREDIT RATING AGENCIES	7
II. EVOLUTION OF THE EXTRA-NATIONAL RULES APPLIED TO CRAS	8
AT FIRST, NO SPECIFIC RULES EXISTED.....	9
WAVE OF LEGAL RULES	10
CONCLUSION	15
<u>CHAPTER II – HEADS OF LIABILITY</u>	<u>16</u>
I. POTENTIALLY RELEVANT FACT PATTERNS	16
A. THE RELATIONSHIP TO BE STUDIED	16
Investors and CRAs	16
Issuers and CRAs.....	18
States and CRAs	18
B. THE INACCURACY OF A CREDIT RATING.....	19
II. OVERVIEW OF THE BASES OF LIABILITY IN EACH MS TO BE STUDIED.....	21
A. EUROPEAN PROVISION: ARTICLE 35A CRA REGULATION 2009.....	21
B. FRANCE.....	24
C. GERMANY	26
(i) Tort law.....	27
(ii) Contract with protective effects towards third party	29
(iii) Liability based on confidence.....	30
D. UNITED KINGDOM.....	32
CONCLUSION	35
<u>CHAPTER III: DETERMINATION OF LIABILITY: THE DIFFERENT REQUIREMENTS.....</u>	<u>37</u>
I. FAULT.....	37
A. ESTABLISHMENT OF FAULT ON THE BASIS OF NATIONAL LAWS FOR BREACH OF A STANDARD OF CARE	38
(i) Establishment of a duty of care in English Law	38
A pertinent Australian case.....	44
(ii) Parallels between English requirements for a duty of care and German requirements for (quasi-)contractual liability.....	46
(iii) Standard of care – breach of duty of care in English, German and French law	50
B. ESTABLISHMENT OF FAULT FOR BREACH OF STATUTE.....	54
II. DAMAGE.....	59
III. CAUSAL LINK	64

IV. OBSTACLES TO LIABILITY70
A. THE IMPACT OF FREEDOM OF SPEECH.....70
B. THE POWER OF DISCLAIMERS72
CONCLUSION75

CHAPTER IV : OVERALL ASSESSMENT77

**I. ANSWERS PROPOSED TO LIMIT THE FEARS OF INDETERMINATE AND UNLIMITED
LIABILITY77**

II. CRAS’ CIVIL LIABILITY IN EUROPE, A REALISTIC CLAIM FOR INVESTORS?79

BIBLIOGRAPHY81

INTRODUCTION

The financial crisis of 2008 shocked the world. No one expected such a major crisis in advance. The Credit Rating Agencies (CRAs) in their role as gatekeepers were supposed to warn financial markets of the risk of default of certain securities; however, they were as taken by surprise as everyone else and were therefore criticized for their failure to anticipate the crisis and warn financial actors. The ongoing sovereign debt crisis in the European Union did not help to restore the reputation of CRAs.

Indeed, since their birth at the turn of the 20th century the core and primary function of CRAs has been to provide information.¹ This role is considered a valuable one, as without this information on investments, investors from the general public would be at a disadvantage on financial markets in comparison to banks and other investors.² In this context, credit ratings have been developed to reduce information asymmetries on financial markets.³

The oligopolistic structure of the ratings market amplified the impact of their failure. The ratings market is dominated by three agencies, all of which are based in the US: Moody's, Standard & Poor's and Fitch⁴. Together, these three CRAs account for 95% of the worldwide rating market.⁵ The remaining 5% is held by small CRAs acting in specific geographic areas (such as the Domination Bond Rating Service in Canada).⁶ The role of CRAs was, therefore, placed under the spotlight by the 2008 financial crisis and the subsequent sovereign debt crisis.

¹ For further information on the history of the rating industry: Bruno Quentin, 'Les Agences De Notation', *Revue de Droit bancaire et financier*, 2004/6, at p. 1; Fabienne Collard, 'Au Coeur Des Agences De Notation', *Les analyses du CRISP en ligne*, (2011), at p. 4 & 8; Richard Levich, e.a., *Ratings, Rating Agencies and the Global Financial System* (Boston: Kluwer Academic Publishers, 2002), at p. 19 & 24; Kim Oosterlinck, 'Rôle Et Nécessité Des Agences De Notation : Une Perspective Historique', *Les Agences De Notation Financière. Entre Marchés Et Etats* (Bruxelles: Larcier, 2013), at pp. 17-24.

² Reinhart, *op. cit.*, at p. 43.

³ Uwe Blaurock, 'Control and Responsibility of Credit Rating Agencies', *Electronic Journal of Comparative Law*, 11.3 (2007), at p. 6. For this reason, credit ratings were integrated in US regulations in the 1930s: Reinhart, *op. cit.*, at p. 34.

⁴ Reinhart, *op. cit.*, at p. 44. Fitch is a rating agency owned partially by a French company: Herwig Langhor, Patricia Langohr, *The Rating Agencies and Their Credit Ratings: What They Are, How They Work and Why They Are Relevant* (Chichester: Wiley, 2008), at p. 399; Raquel García Alcubilla, Javier Ruiz Del Pozo, *Credit Rating Agencies on the Watch List : Analysis of European Regulation* (Oxford: Oxford University Press, 2012), at p. 9.

⁵ Autorité Des Marchés Financiers, 'Les Agences De Notations : Comprendre Et Utiliser Leurs Notes De Crédit', (2013), at p. 3; Collard, *op. cit.*, at p. 9.

⁶ Collard, *op. cit.*, at p. 9. However, according to certain sources, no less than 130 CRAs would exist on earth: *ibid.*, at p. 7; Mikael Petitjean, 'De L'(in)Utilité Des Agences De Notation', *Problèmes économiques*, 3057 (2012), at p. 57; Aymeri de Montesquiou, 'Rapport D'information : Les Agences De Notation: Pour Une Profession Réglementée', (598 (2011-2012): Sénat français, 2012), at p. 11.

Both the 2008 financial crisis and sovereign debt crisis have drawn the public attention to the power of CRAs. This power was rightly underlined by Thomas Friedman in 1996 when he said that “[t]here are two superpowers in the world today ... the United States and ... Moody’s Bond Rating Service. The United States can destroy you by dropping bombs, and Moody’s can destroy you by downgrading your bonds. And believe me, it’s not clear sometimes who’s more powerful.”⁷ The 2008 financial crisis together with the sovereign debt crisis revealed how important it was to provide a framework for the exercise of such power. Indeed, these crises highlighted the existence of issues in the way rating activity was conducted by the Agencies:⁸ the problem of independence and the possibility of conflicts of interest; the method they use; and their liability. In response to the problems highlighted by the crises, both US and EU legislators started adopting rules to discipline their behaviour.

More specifically, the civil liability of CRAs began to be discussed in the aftermath of the crises. Before then, CRAs faced few lawsuits and the few they did face they almost always won; after the crisis, the number of lawsuits rose.⁹ Claimants faced hurdles when seeking CRAs’ civil liability. Lawmakers started reflecting on these obstacles. The EU Regulation on CRAs of 2009 was amended in May 2013 to introduce a specific provision for the civil liability of CRAs. The impact of this new provision must be evaluated as it does not create an autonomous liability regime for CRAs, but rather establishes rules that need to be combined with national legislation.

Civil liability is important for two reasons: first, it compensates damaged parties; second, it constitutes an incentive for CRAs to comply with their legal obligations. The presence of the threat of being held liable by courts also influences competition on the market – which, in the present case, is particularly oligopolistic.¹⁰

In this dissertation I will analyse the civil liability of CRAs in three Member States of the European Union: Germany, France and the United Kingdom. I will focus especially on civil liability towards investors. My aim is to ascertain whether CRAs’ civil liability can be engaged and what improvements can be made to render it more effective. To this end, having first presented the general context in which CRAs evolved and currently move, I will assess how investors may bring civil liability lawsuits against CRAs. First, I establish an exemplary fact-pattern that I will use as the factual basis of this thesis, in which the relationship to be

⁷ <http://www.pbs.org/newshour/gergen/friedman.html> (last accessed on 21/01/2014).

⁸ Alessandro Scarso, 'The Liability of Credit Rating Agencies in a Comparative Perspective', *Journal of European Tort Law*, 4/2 (2013), at p. 164.

⁹ de Montesquiou, *op. cit.*, at pp. 155-58.

¹⁰ Aline Darbellay, *Regulating Credit Rating Agencies* (Cheltenham: Edward Elgar, 2013), at p. 76.

studied is explained as well as what might be considered as an “inaccurate” rating. I then determine the legal bases that fit this fact pattern in the EU, France, Germany and the UK, and emphasise the similarities and differences between them. The third chapter of the thesis is dedicated to the requirements of liability that were found in the legal bases detailed in the second part. At that juncture, the analysis is no longer divided by legal system but by requirement, through an integrated comparative analysis of the requirements in each legal system. At the end of the third chapter, I explore the possible limits of liability in terms of damages or constitutional obstacles such as Freedom of Speech. Finally, I draw the final conclusions in the fourth chapter dedicated to the overall assessment which also provides thoughts for improving CRAs’ civil liability.

CHAPTER I : GENERAL OVERVIEW OF THE RATING ENVIRONMENT

This first chapter depicts the general context in which CRAs act and demonstrates why the study of their civil liability is of great importance. Before looking in detail at the specific rules applied to CRAs regarding their civil liability, several issues must be addressed to frame the general context in which this liability will be interpreted: first, the main definitions of the research; second, the evolution of the legislative control of CRAs and the reliance on credit ratings.

I. Ratings and Rating Agencies

The concepts of credit ratings and Credit Rating Agencies can be defined in several ways. By examining their different characteristics we can establish the framework of our research and the relevant features of each concept. The definitions of ratings and rating agencies indeed frame the way the civil liability regime is to be understood because they create the basis for the determination of an inaccurate rating, which will be defined in Chapter II.

Credit Ratings

A credit rating can be defined as an assessment of the creditworthiness of a borrower and in consequence of his debt default risk. In addition, it can also be an assessment of the creditworthiness of various financial instruments. As my research focuses on the civil liability of CRAs in the European Union, the definition of a credit rating established by the European Regulation of 2009 should also be taken into account. A credit rating is defined in this Regulation as “an opinion regarding the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, or of an issuer of such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories”.¹¹ This definition is a broad one, encompassing the considerable diversity of the subject matter of credit ratings. Stated more precisely, the assessed products can be structured financial products, debts, bonds, or sovereign debt.¹² Moreover, CRAs themselves define their ratings as *opinions* and

¹¹ Regulation (EC) 1060/2009 of the European Parliament and of the Council of 16 September 2009 on Credit Rating Agencies, O.J.E.U., 17 November 2009, L 302/1, Article 3(1) a).

¹² Jan Oster, 'Who Rates the Raters ? The Regulation of Credit Rating Agencies in the Eu', *MJ*, 17/4 (2010), at p. 355.

they insist that these opinions do not constitute recommendations to invest.¹³ We will examine the relevance of the definition of credit ratings as opinions when the concept of inaccurate rating will be analysed.¹⁴

As this study comprises a comparative analysis of three Member States, the common point of reference is the definition established by the EU Regulation. It should also be noted that credit ratings are the result of rating processes developed by each CRA – these rating processes being recognised as trade secrets.¹⁵ Moreover, the results are usually expressed in letter rankings – this is what the EU definition refers to with regard to “issued using an established and defined ranking system of rating categories”.¹⁶ The letters’ format, however, differs from CRA to CRA: for instance, Moody’s uses ratings from Aaa to C¹⁷; while Standard & Poor’s¹⁸ and Fitch¹⁹ use AAA to D. The method and, in particular, the specificity of the rating process are significant features for the definition of the scope of CRAs’ liability.

Finally, several distinctions exist between ratings. First, ratings can be internal or external, which means that the issuer can produce internally its own ratings or decide to externalise this activity and delegate it to a CRA.²⁰ A second important distinction is the one between solicited and unsolicited ratings. The first are issued by a CRA on the basis of a client request²¹ – in other words, on the basis of a contractual relationship between the two.²² By contrast, unsolicited ratings are based only on public data and are not rooted in a contractual relationship between the CRA and the issuer.²³ They are issued, therefore, on the agency’s own initiative.²⁴ This distinction is of particular importance for the basis used in liability claims as, under certain laws, contracts can protect the investors.²⁵

¹³ Andreas Kruck, *Private Ratings, Public Regulations. Credit Rating Agencies and Global Financial Governance* (Basingstoke: Palgrave MacMillan), 2011, at p. 20; it is clearly expressed on S&P website: <http://www.standardandpoors.com/aboutcreditratings/> ‘What Credit Ratings Are & Are Not’ (last accessed on 08/01/2014).

¹⁴ See Chapter II.

¹⁵ De Montesquiou, *op. cit.*, at p. 11; Collard, *op. cit.*, at p. 7 and p. 18.

¹⁶ Kruck, *op. cit.*, at p. 20.

¹⁷ <https://www.moodys.com/Pages/amr002002.aspx?lang=fr&cy=fra> (last accessed on 08/01/2014).

¹⁸ <http://www.standardandpoors.com/aboutcreditratings/> ‘The ABCs of Rating Scales’, (last accessed on 08/01/2014).

¹⁹ <https://www.fitchratings.com/web/en/dynamic/about-us/about-us.jsp> (last accessed on 08/01/2014).

²⁰ Blaurock, *op. cit.*, at p. 2.

²¹ Thierry Bonneau, ‘Coup De Projecteur Sur Les Agences De Notation’, *La Semaine Juridique Edition Générale*, 45 (2011), p. 1968 – 69, at p. 1968.

²² Blaurock, *op. cit.*, at pp. 3-4.

²³ Yves Chaput, ‘Contrôle Et Responsabilité De La Notation Financière : Les Agences De Rating En Droit Français’, *Revue Internationale de Droit Comparé*, 2006/2, pp. 493 – 502, at p. 498.

²⁴ Blaurock, *op. cit.*, at p. 4.

²⁵ See Chapter II. Gerhard Wildmoser; Jan Schiffer; Bernd Langoth, ‘Haftung Von Ratingagenturen Gegenüber Anlegern?’, *Recht der Internationalen Wirtschaft*, 10 (2009), at p. 664.

A third distinction is that the ratings can be free or regulated. Free ratings are not subject to any regulation, whereas, regulated ratings must correspond to regulatory requirements. For instance, credit ratings issued in the EU must be issued by a registered CRA within the EU.²⁶ The fourth distinction is the delimitation between investment grades and speculative grades.²⁷ Investment grades are grades given to “issuers and issues with relatively higher levels of creditworthiness and credit quality.”²⁸ Speculative grades, on the other hand, indicate that “the issue or issuer [that] currently has the ability to repay but faces uncertainties, such as adverse business or financial circumstances, which could increase the likelihood of default, or failure to meet its financial obligations in accordance with the terms of those obligations.”²⁹ This last distinction is important for the use of ratings in certain legislation. Indeed, references to ratings and the distinction between investment and speculative grades can be found, for instance, in bank supervisory laws and in securities and insurance laws.³⁰ These last two distinctions help us understand the kind of ratings on which investors based their decisions and will be addressed separately in the subsequent chapters.

²⁶ Bonneau, *op. cit.*, at p. 1968.

²⁷ Edith Weemaels, 'Les Agences De Notation En Europe : Contrôle, Responsabilité Et Légitimité', *Les Agences De Notation Financière. Entre Marchés Et Etats* (Bruxelles: Larcier, 2013), at p. 66.

²⁸ <http://www.standardandpoors.com/aboutcreditratings/> 'The ABCs of Rating Scales', (last accessed on 08/01/2014). In the ratings of the three big agencies, investment grades are between AAA and BBB- for S&P and Fitch and Aaa to Baa for Moody's: see respectively, <http://www.standardandpoors.com/aboutcreditratings/> 'Opinions Reflected by S&P's Ratings' (last accessed on 08/01/2014); Autorité des marchés financiers, 'Les Agences De Notations : Comprendre Et Utiliser Leurs Notes De Crédit', at p. 4; https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_79004 at p. 5 (last accessed on 08/01/2014).

²⁹ <http://www.standardandpoors.com/aboutcreditratings/> 'The ABCs of Rating Scales', (last accessed on 08/01/2014). The speculative grades are therefore the lowest grades: from BB+ to D for S&P and Fitch and from Ba to C for Moody's. See respectively: <http://www.standardandpoors.com/aboutcreditratings/> 'Opinions Reflected by S&P's Ratings' (last accessed on 08/01/2014); *ibid.* https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_79004 at p. 5 (last accessed on 08/01/2014).

³⁰ Eddy Wymeersch; Marc Kruithof, 'Regulation and Liability of Credit Rating Agencies under Belgian Law', *Financial Law Institute - Working Paper Series*, 2006-05 (2006), at p. 368; Blaurock, *op. cit.*, at p. 9.

Credit Rating Agencies

Credit Ratings Agencies can be defined on the basis of their activities and the functions they fulfil. They should also be seen as part of a market presenting specific attributes as both definitions influence the way CRAs are viewed by market actors, in political debate and by the public. These perspectives give an understanding of the functioning of these agencies whose liability is in issue. Such an understanding is important for the purposes of our research as their functioning has, in fact, a direct impact on their civil liability.³¹

A Credit Rating Agency is defined in the EU as “a legal person whose occupation includes the issuing of credit ratings on a professional basis”³². The definition refers to the rating activity of CRAs. As noted above, the rating activity is the main and first activity of CRAs. In the context of the present research, I will use the EU definition as we will focus solely on the CRAs’ civil liability on the basis of their rating activity.

Other activities are, nevertheless, performed by CRAs. Indeed, the selling of studies, data and statistical information constitute an auxiliary activity of CRAs.³³ Moreover, as structured products have been developed, CRAs have moved to advisory activities for the creation of these products.³⁴ This means that CRAs may evaluate a product that they helped create³⁵, placing them in a conflict of interest.³⁶ The other kind of conflict of interest in which CRAs can be placed with issuers comes from the way CRAs are paid: at the beginning of the rating industry, investors paid the CRAs to obtain ratings on the creditworthiness of an issuer; since the beginning of 1970s, the model has changed³⁷ and the issuers now pay for the ratings.³⁸ This new model is referred to as the ‘issuer-pays’ model.³⁹ Thus, both multiple activities with issuers rated and the ‘issuer-pays’ model lead to conflicts of interest. These key features can, to a certain extent, influence the CRAs’ civil liability.⁴⁰

³¹ See *infra*, for instance, the description of the conflicts of interest.

³² Regulation (EC) 1060/2009, *supra*, Article 3(1)b.

³³ Collard, *op. cit.*, at p. 4; Mireille Bardos, 'Les Grandes Agences De Notation Internationales: Leur Rôle Annoncé Dans La Crise, Vers Quelle Régulation ?', *Les Cahiers Lasaire*, 2009/38, at p. 9.

³⁴ Collard, *op. cit.*, at p. 4.

³⁵ Blaurock, *op. cit.*, at p. 31.

³⁶ The technical Committee of the International Organization of Securities Commissions ‘Report on the activities of Credit Rating Agencies’ (2003) p. 11 <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD153.pdf>.

³⁷ This change of model is commonly attributed to the free-rider risks that appeared with the invention of the photocopiers: Oster, *op. cit.*, at p. 361.

³⁸ De Montesquiou, *op. cit.*, at p. 16.

³⁹ Weemaels, *op. cit.*, at p. 68.

⁴⁰ See Chapter II.

The rating activity implies that CRAs have three functions: to inform, license and advertise.⁴¹ As noted earlier, their first function is to reduce the information asymmetry between investors and issuers.⁴² This function is important to lower transaction costs in financial relations.⁴³ Second, CRAs are empowered by regulations to act as gatekeepers for banking and insurance sectors, as well as for institutional investors. Their last role consists of an advertising function: credit ratings can be used as advertising by the issuer as they assess their trustworthiness.⁴⁴ The carrying on of these functions gives CRAs an unavoidable and powerful position in financial markets.

The last remark concerning the activities of CRAs is that their profession should be distinguished from others such as financial analysts.⁴⁵ The recent EU Regulation of 2013 clearly makes this distinction in its preamble: “Credit Rating Agencies are not mere financial analysts or investment advisors.”⁴⁶ This distinction is important with regard to the scope of certain legal instruments and will also determine whether certain parallels can be drawn with the civil liability regime applicable to other professions.

The definition and description of credit ratings as well as CRAs have therefore highlighted core elements that will either constitute the basis of a civil liability lawsuit against a rating agency or, on the contrary, place a limit on their liability.⁴⁷

II. Evolution of the extra-national rules applied to CRAs

For a long time, CRAs were not subject to laws except those applicable to all businesses and legal persons. Certain rules have, however, been applied to them. In this context, CRAs developed standards by themselves (i). This dynamic changed again after the 2008 financial crisis: many laws were adopted in a very short period of time after the crisis (ii). This evolution not only shows the general legal context in which CRAs evolve but also emphasizes the legal regulatory wave that started after the crisis from self/internal-regulation to public/external regulation. This tendency should not be forgotten while assessing the recently developed liability rules.

⁴¹ Oster, *op. cit.*, at p. 356.

⁴² Piero Cinquegrana, 'The Reform of the Credit Rating Agencies: A Comparative Perspective', *ECMI Policy Brief*, 2009/12, at p. 2.

⁴³ Oster, *op. cit.*, at pp. 355-56; Aline Darbellay, *Regulating Ratings. The Credit Rating Agency Oligopoly from a Regulatory Perspective*, (Basel: Schulthess, 2011), at p. 4.

⁴⁴ Oster, *op. cit.*, at p. 356.

⁴⁵ Chaput, *op. cit.*, at p. 495.

⁴⁶ Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013, amending Regulation (EC) No 1060/2009 on Credit Rating Agencies, O.J.E.U., 31 May 2013, L 146/1, preamble (8).

⁴⁷ See Chapter II.

At first, no specific rules existed

The first rule that was applied uniquely to CRAs is the obligation of being recognized as a “Nationally recognized statistical rating organization” (NRSRO) in order to issue ratings used for supervisory purposes in the United States.⁴⁸ This rule adopted in 1975 by the SEC authorized it to give the NRSRO status to CRAs⁴⁹; however, the criteria for the acquisition of this status were not clear.⁵⁰ It was not until 2006 that a clear recognition procedure was adopted under the Credit Rating Agency Reform Act.⁵¹ Except for this American rule on recognition, no specific legal requirement was placed on CRAs in the 20th century.⁵² According to Pagliari, at that time, market discipline was the key to the “regulation” of CRAs.⁵³ We can, in consequence, speak of a “self-regulation” of CRAs until recently.⁵⁴

In the absence of public rules, standards were adopted and CRAs themselves integrated those standards. First of all, the International Organisation of Securities Commission (IOSC), an organisation that “brings together the world's securities regulators and is recognized as the global standard setter for the securities sector”⁵⁵ adopted the IOSCO Code of Conduct for CRAs in 2004. This Code contains rules mainly protecting the quality of the rating process, the independence of CRAs and the avoidance of conflicts of interest, assuring their responsibility towards third parties and issuers of securities and finally the disclosure to the public of their code of conduct.⁵⁶ The Code was reviewed after the crisis.⁵⁷ In the EU, an annual review was performed by the Committee of European Securities Regulators (CESR) to verify compliance with the Code of Conduct.⁵⁸ However, the Code is not legally binding⁵⁹ and its incorporation within the CRAs is governed by the requirement to *comply or explain*⁶⁰.

⁴⁸ Caroline Lequesne-Roth; Arnaud Van Waeyenberge, 'La Réglementation Européenne : De La Négligence À L'impuissance?', *Les Agences De Notation Financière. Entre Marchés Et Etats* (Bruxelles: Larcier, 2013), at p. 115; Oster, *op. cit.*, at p. 360.

⁴⁹ Reinhart, *op. cit.*, at p. 51.

⁵⁰ Collard, *op. cit.*, at p. 48.

⁵¹ Blaurock, *op. cit.*, at p. 11.

⁵² *Ibid.*, at p. 14.

⁵³ Stefano Pagliari, 'Who Governs Finance? The Shifting Public-Private Divide in the Regulation of Derivatives, Rating Agencies and Hedge Funds', at p. 52.

⁵⁴ *Ibid.*, at p. 50 & 54.

⁵⁵ 'The International Organization of Securities Commissions', <http://www.iosco.org/about/> (last accessed on 11/01/2014).

⁵⁶ OICV-IOSCO, 'Code of Conduct Fundamentals for Credit Rating Agencies. A Consultation Report of the Chairmen's Task Force of the Technical Committee of the International Organization of Securities Commissions' (2004), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD173.pdf> (last accessed on 11/01/2014).

⁵⁷ The Code was revised in May 2008: Pagliari, *op. cit.*, at p. 61; Oster, *op. cit.*, at p. 357, footnote 18.

⁵⁸ Oster, *op. cit.*, at p. 357.

⁵⁹ Blaurock, *op. cit.*, at p. 26.

⁶⁰ Oster, *op. cit.*, at p. 357.

In conjunction with the development of these standards, CRAs adopted internal reforms to show that the sector was self-regulating. Thus, the main CRAs implemented internal rules assuring more independence and a more transparent rating process.⁶¹

Wave of legal rules

The tendency to leave the sector out of legal regulation *stricto sensu* ended in 2006 in the US with the adoption of the Credit Rating Agency Reform Act.⁶² This reform aimed to render the NRSRO recognition by the SEC more objective by introducing official and objective criteria.⁶³ After this reform, five CRAs were recognized as NRSROs by the SEC, leading to a total of ten NRSROs.⁶⁴ This act was the first legal act adopted before the large number of acts adopted in reaction of the 2008 financial crisis.

This crisis highlighted the existence of problems in ratings such as the over-evaluation of several products⁶⁵ and CRAs were blamed for these errors in ratings.⁶⁶ The failure of the past model of CRAs' regulation identified in the aftermath of the crisis pushed politicians to react by taking legal measures on both sides of the Atlantic.⁶⁷ In the context of the general legal rules developed for CRAs and, more specifically, in the context of the civil liability rules for CRAs, the legal developments in the US were a step ahead of the EU interventions; we can therefore argue that they inspired both EU and European national legislators. Indeed, in 2010, the US Congress then adopted the Dodd-Frank Act,⁶⁸ which reformed the financial system in the United States. Its main innovations are the reinforcement of the SEC's powers⁶⁹, the creation of civil liability rules for CRAs and the removal of any use of ratings for regulatory

⁶¹ Ibid., at p. 363, footnote 48; Collard, *op. cit.*, at pp. 51-52: measures taken in the second half of the 2000s.

⁶² John De Luca; Paul Russo, *Credit Rating Agency Reform* (New York: Nova Science Publishers, 2009), at p. 2; Petitjean, *op. cit.*, at p. 56.

⁶³ Petitjean, *op. cit.*, at p. 56. Such as a system for the evaluation of applications: *ibid.*; Collard, *op. cit.*, at pp. 49-50.

⁶⁴ Oster, *op. cit.*, at p. 360 footnote 33.

⁶⁵ Petitjean, *op. cit.*, at p. 58.

⁶⁶ '2008 crisis still hangs over credit-rating firms', <http://www.usatoday.com/story/money/business/2013/09/13/credit-rating-agencies-2008-financial-crisis-lehman/2759025/> (last accessed on 20/02/2014).

⁶⁷ For a more extensive study of these legal developments: Lequesne-Roth, 'La Réglementation Européenne : De La Négligence À L'impuissance?'.

⁶⁸ One Hundred Eleventh Congress of the United States Of America, 'Dodd-Frank Wall Street Reform and Consumer Protection Act', (H. R. 4173, 2010).

⁶⁹ It also implies the creation of a specific 'Office of Credit Ratings' within the SEC which supervises the application of SEC's rules by CRAs. This office exists since 2012: <http://www.sec.gov/about/offices/ocr.shtml> (14/01/2014); Collard, 'Au Coeur Des Agences De Notation', at p. 51.

purposes.⁷⁰ This last measure marks the first important step in the movement to reduce reliance on ratings, which is currently ongoing at the EU and the international level as well. With regard to civil liability, a new regime for the liability of NRSROs has been established⁷¹ to counter the immunity that CRAs obtained under the protection of the First Amendment in the US.⁷² The new regime of liability allows investors to sue CRAs where they “knowingly or recklessly failed ... to conduct a reasonable investigation of the rated security ... or ... to obtain reasonable verification of such factual elements”⁷³.

In the EU, there were vigorous reactions against CRAs in the EU after the financial crisis which persisted during the ongoing sovereign debt crisis. In 2008, the European Commission considered that the self-regulatory scheme of CRAs was insufficient “to cope with the severe problems and restore the confidence in the markets”⁷⁴.⁷⁵ In turn, the EU adopted its first specific regulation of CRAs in 2009. This Regulation aimed to establish a direct oversight over CRAs in the EU. This control, which was performed by the CESR,⁷⁶ took, for instance, the form of a registration of the CRA or a certification if the CRA had no subsidiary in the EU.⁷⁷ Under this first Regulation, registrations and certifications were granted by national authorities and not directly by the CESR.⁷⁸ In addition, this first Regulation contained rules relating to independence and prevention of conflicts of interest in the rating process.⁷⁹

The national competence changed in 2011 when the initial Regulation was modified for the first time. The Regulation of 2011⁸⁰ reinforced the powers of the European supervision authorities by creating the European Securities and Markets Authority (ESMA) and by giving to this authority the competence for registrations and certifications as well as a power to investigate⁸¹ and a power to impose sanctions.⁸²

⁷⁰ Dodd-Frank Act, SEC. 939-939A.(Removal of Statutory references to credit ratings; Review of reliance on ratings); Darbellay, *Regulating Ratings. The Credit Rating Agency Oligopoly from a Regulatory Perspective*, at p. 7.

⁷¹ America, 'Dodd-Frank Wall Street Reform and Consumer Protection Act', at SEC.933. (State of mind in private actions).

⁷² This issue will be further discussed at the end of Chapter III.

⁷³ America, 'Dodd-Frank Wall Street Reform and Consumer Protection Act', at SEC.933. (State of mind in private actions).

⁷⁴ European Commission, Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies, 12 November 2008, at p. 3.

⁷⁵ Pagliari, *op. cit.*, at p. 61.

⁷⁶ Oster, *op. cit.*, at p. 366.

⁷⁷ Bonneau, *op. cit.*, at p.1968.

⁷⁸ The Commission adopted delegated regulations to complete the 2009 Regulation in detailing information that CRAs should give to CESR for the registration/certification. Collard, *op. cit.*, at p. 54.

⁷⁹ Regulation (EC) 1060/2009, *supra*, Article 6 and Annex I; Bonneau, *op. cit.*, at p. 1969.

⁸⁰ Regulation (EU) n°513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) n° 1060/2009 on Credit Rating Agencies, O.J.E.U., L 145/30, 31 May 2011.

⁸¹ Regulation (EU) n°513/2011, *supra*, Article 23 quater.

The EU did not stop there, the initial Regulation was modified again in 2013 (here after “CRA3 Regulation”).⁸³ Two main changes are worth mentioning. First, the CRA3 Regulation contains two articles reducing the reliance on ratings. On the one hand, the new Article 5a provides that investors should not rely solely on credit ratings for their investments and that they also should perform their own risk assessment of products.⁸⁴ On the other hand, the new Article 5c copes with the “cliff effect” problem: when the credit rating of a product is downgraded, investors with investment guidelines may be obliged to sell the product; the cliff effect happens when there is a massive sale of this product, amplifying the consequences of the downgrade on the market.⁸⁵ To pursue this aim, the Regulation empowers the Commission to assess the impact of references to ratings in legislation and to suppress all the references to ratings in the legislation by 2020.⁸⁶

Second, the CRA3 Regulation deals with the problems that issuers and/or investors face when they try to obtain civil liability of CRAs for their defective ratings.⁸⁷ The new Article 35a states that “[w]here a credit rating agency has committed, intentionally or with gross negligence, any of the infringements listed in Annex III having an impact on a credit rating, an investor or issuer may claim damages from that credit rating agency for damage caused to it due to that infringement.”⁸⁸ Then, it introduces a common basis of action for issuers and investors. However, this basis does not cover *all* incorrect ratings⁸⁹, but only those infringing Annex III. The second part of this thesis will focus on the scope and consequences of this provision.

In conclusion, a number of legal reforms took place after the 2008 financial crisis. Whilst they were self-regulated in the beginning, CRAs are now the object of public rules. In both the US and the EU legislators reflected on how to increase the scope of CRAs’ civil liability in the aftermath of the crisis and started adopting rules to this end. These developments demonstrate how important the question is, but also that in the EU the civil liability provision

⁸² Regulation (EU) n°513/2011, *supra*, Article 24; Bonneau, *op. cit.*, at p. 1969.

⁸³ Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013, amending Regulation (EC) No 1060/2009 on Credit Rating Agencies, O.J.E.U., 31 May 2013, L 146/1.

⁸⁴ This provision is mainly addressed to different institutional investors that have investment guidelines determined by a credit rating threshold: Harry Edwards, 'Cra 3 and the Liability of Rating Agencies: Inconsistent Messages from the Regulation on Credit Rating Agencies in Europe', *Law and Financial Markets Review*, 7/4 (2013), at p. 187.

⁸⁵ *Ibid.*, at p. 186; Financial Stability Board, Principles for Reducing Reliance on CRA Ratings, 27 October 2010, http://www.financialstabilityboard.org/publications/r_101027.pdf (last accessed on 20/02/2014).

⁸⁶ Regulation (EU) No 462/2013, *supra*, Article 5c.

⁸⁷ Regulation (EU) No 462/2013, *supra*, Recital 32.

⁸⁸ Regulation (EU) No 462/2013, *supra*, Article 35a.

⁸⁹ Edwards, *op. cit.*, at p. 188.

is clearly conceived as a way to ensure the correct application of the obligations stated in the Regulation and its Annexes. CRAs' civil liability is, consequently, more strictly framed now in both the US and in the EU.

I would add a word specifically on the reliance on ratings. Whereas it is clear that US and EU legislators try to reduce reliance on ratings by reducing references to ratings in legislation, next to this latter phenomenon that we can call "legal reliance", factual reliance on ratings exist on financial markets. The use of credit ratings in financial market transactions on the basis of the investors and issuers' own initiative created an additional movement of reliance on credit ratings. This phenomenon has been recognised by the European legislator.⁹⁰ The use of ratings by financial actors allowed them to become "factual entry requirement" to markets in Europe for instance.⁹¹ Indeed, as CRAs constitute the informational link between borrowers and lenders on financial markets, the increasing complexity of finance (its globalization, the new financial products, the number of actors) gave CRAs a central role to play in financial relationships. This complexity led therefore to an increase in the use of ratings and made them unavoidable in certain situations.⁹²

An example of factual reliance is the contractual reference to credit ratings. There can be contracts between private investors and their investor managers where a minimum rating is set for the decision to invest.⁹³ There can also be contracts between a lender and a borrower including, for instance, "rating triggers" which are clauses organizing specific contractual consequences, such as the termination of the contract,⁹⁴ in case of a downgrade of the borrowers.⁹⁵

The two aspects of reliance, legal and factual, have led to a so-called "over-reliance" on credit ratings⁹⁶ identified by certain authors as one of the origins of the 2008 financial crisis,⁹⁷ the reason why EU and US legislators attempt to reduce it. This tendency to reduce the regulatory references to credit ratings must, however, be tempered. First, uncertainty

⁹⁰ Regulation (EC) 1060/2009, *supra*, Recital (1); Regulation (EU) No 462/2013, *supra*, Recital (32): "Credit ratings, whether issued for regulatory purposes or not, have a significant impact on investment decisions and on the image and financial attractiveness of issuers."

⁹¹ Blaurock, *op. cit.*, at p. 7.

⁹² Darbellay, *Regulating Ratings. The Credit Rating Agency Oligopoly from a Regulatory Perspective*, at p. 4-5.

⁹³ Edwards, *op. cit.*, at p. 186.

⁹⁴ Uwe Blaurock, 'Verantwortlichkeit Von Ratingagenturen – Steuerung Durch Privat- Oder Aufsichtsrecht?', *ZGR*, 5 (2007), at p. 611: *Gestaltungsrechten*.

⁹⁵ Darbellay, *Regulating Ratings. The Credit Rating Agency Oligopoly from a Regulatory Perspective*, at p. 163.

⁹⁶ Jakob de Haan; Fabian Amtenbrink, 'Credit Rating Agencies', *DNB Working Paper*, 278 (2011), at pp. 13 & 33.

⁹⁷ Frank Partnoy, 'Overdependence of Credit Ratings Was a Primary Cause of the Crisis', *San Diego Legal Studies Paper*, 09-015 (2009), at p. 17.

exists as for the availability of alternatives.⁹⁸ Second, difficulties already arose when US authorities tried to implement the reduction of references to ratings.⁹⁹ And third, factual reliance on ratings continued after the crisis.¹⁰⁰ These three elements¹⁰¹ allow us to see a continuation in the use of credit ratings by financial actors, especially by investors. Consequently, the application of civil liability rules to CRAs remains an important safeguard of *ex post* investor protection.

⁹⁸ Edwards, *op. cit.*, at p. 187.

⁹⁹ Gregory Lewkowicz, 'Les Agences De Notation Financière Contre Les Etats : Une Lutte Globale Pour Le Droit À L'issue Incertaine', *Série des Working Papers du Centre Perelman de Philosophie du Droit*, 2 (2013), at p. 33; The Washington Post, 'SEC poses plan to curb reliance on credit ratings, but regulators cite difficulties', 27 April 2011, http://www.washingtonpost.com/business/economy/sec-poses-plan-to-curb-reliance-on-credit-ratings-but-regulators-cite-difficulties/2011/04/27/AFv2yp0E_story.html (last accessed on 21/02/2014).

¹⁰⁰ Darbellay, *Regulating Ratings. The Credit Rating Agency Oligopoly from a Regulatory Perspective*, at p. 6.

¹⁰¹ Lewkowicz, *op. cit.*, at p. 33.

Conclusion

Credit Ratings Agencies have obtained significant power to shape financial markets over the years. The recent crisis brought into relief the necessity of legal intervention, especially to create a civil liability framework. Because of the trust financial actors have in CRAs and because of the issues highlighted by the crisis, the study of CRA civil liability is of great relevance. In short, the judgments of rating agencies are not infallible. However, not every rating can serve as a basis for a civil liability lawsuit, this is why the concepts defined above will allow us to determine what should be understood as an inaccurate rating, possibly constituting a basis for a successful lawsuit. In this respect, the way the conflicts of interest above-described can be relied upon as the basis of a civil liability claim requires clarification.

In this context, the supranational instruments analysed constitute the general framework in which national laws are to be interpreted. This research constitutes a comparative law analysis. Even though the last EU Regulation on CRAs establishes rules for their civil liability, it does not create an independent and new kind of liability action. The established basis of liability needs to be enshrined in national law. The preamble of the CRA3 Regulation states clearly: “[r]egarding matters concerning the civil liability of a credit rating agency which are not covered by or defined in this Regulation, including causation and the concept of gross negligence, such matters should be governed by the applicable national law”.¹⁰²

The EU Member States examined – France, Germany and the United Kingdom – have been selected because of the differences in their legal approaches and systems. While France¹⁰³ and the UK adopted specific rules for the civil liability of CRAs; Germany did not, but instead decided to leave its system as it was.¹⁰⁴ Moreover, Germany is the only Member State to have developed specific legal instruments and arguments to cope with the issue of CRAs’ civil liability. This comparative perspective aims to give an overview of the three main tendencies and of the significant national doctrines framing the civil liability of rating agencies in the European Union.

¹⁰² Regulation (EU) No 462/2013, *supra*, Recital (35).

¹⁰³ Darbellay, *Regulating Credit Rating Agencies*, at p. 80.

¹⁰⁴ *Ibid.*

CHAPTER II – HEADS OF LIABILITY

Several questions arise when one thinks about the civil liability of Credit Rating Agencies: what are the limits of this liability, who can realistically sue CRAs, what are the rules to be applied? These are the questions I will answer in this chapter. These answers are essential to provide a framework in which both parties – claimant and defendant – can expect civil liability issues to be brought to courts. First, an exemplary fact pattern of the claim has to be established (I.). This encompasses the identity of the claimant, but also the characteristics of the rating that will be the basis of the claim. Second, this example of fact pattern will have to be confronted with national laws to assess whether they can serve as a cause of action for investors (II.).

I. Potentially relevant fact patterns

Facts – as obvious as this may seem – are important in lawsuits. They are important because the construction of a fact pattern, including the key elements of a potential lawsuit against a Credit Rating Agency, will guide us in the analysis of suitable legal bases for this particular kind of lawsuit. This description of a considered situation includes two factors: the claimant's identity and the characteristics of the rating that can give rise to a lawsuit.

A. The relationship to be studied

An inaccurate rating can damage more than one category of actor: from issuers, including states, to investors. All these situations can possibly involve civil liability issues but are quite different as the relationships between these actors and the CRAs are not developed on the same grounds. While this thesis focuses solely on the relationship between CRAs and investors, an overview of the other situations is nevertheless useful to situate this relationship in a broader perspective.

Investors and CRAs

The category of investors in rated securities is a very broad group containing highly diverse actors. For the purposes of this study, I distinguish between investors who have access to substantial resources, and small investors drawn from the general public, who have little or no expertise in investment decisions.¹⁰⁵

¹⁰⁵ Christophe Rosset, 'Haftung Von Ratingagenturen', *KCU-Schriftenreihe*, 2 (2013), at p. 5.

The relationship between CRAs and investors differs from that between CRAs and issuers in that the former often lacks contractual regulation. This relationship exists because investors rely on ratings issued by rating agencies as the basis of their investment decisions.¹⁰⁶ In certain cases, however, ‘subscription’ contracts tie investors to CRAs for the provision of ratings on a regular basis; investors are then sometimes CRAs’ clients.¹⁰⁷ Even if ratings are often publicly available on CRAs’ websites, it is possible to obtain more detailed ratings or information on the basis of these ‘subscription’ contracts.¹⁰⁸ With the exception of this ‘subscription’ contracts, the general sphere of the investor-CRAs relationship is extra-contractual.

Another distinction can be drawn between investors. First, one might distinguish between investors who do not have any contact with CRAs, even indirectly, and investors who do interact with CRAs, albeit through an intermediary. In this last particular relationship, investors delegate to a third party – a bank for instance – the management of their wealth.¹⁰⁹ In this latter case, an extra-contractual liability issue in respect of CRAs may arise when the information obtained from the CRA by the intermediary was inaccurate, and in the absence of attribution to the intermediary for failure to pass on accurate information on to its clients.¹¹⁰

In conclusion, three kinds of investor exist: those who are paying clients of a CRA (contractual relationship); those who obtain investment advice from a third party that has a relationship with a CRA (extra-contractual, third party effects); and those who rely on publicly available ratings (extra-contractual, general duty of care). The last two kinds of investors are the main focus of this thesis. The first category of investors falls outside the scope of this thesis and will not be studied here.

I chose to study the extra-contractual liability of CRAs towards investors not only because it appears to be the most difficult to obtain in practice, but also because it is a crucial and current issue. The final aim of empowering investors to sue CRAs has a broader policy aim than that of simply providing them with compensation for their damage. Indeed, it is a way of punishing CRAs when they behave against their obligations towards third parties or

¹⁰⁶ Ibid., at p. 24.

¹⁰⁷ Ibid., at p. 25; Susan Emmenegger, 'Rating Und Haftung', *Basel II - Die Rechtlichen Konsequenzen* (12: Berner Bankrechtstag, 2006), at pp. 84-85; Julius Forschner, 'Die Haftung Der Ratingagenturen', *Jura Studium & Examen*, 1 (2012), at p. 15.

¹⁰⁸ Alessandro Scarso, 'The Liability of Credit Rating Agencies in a Comparative Perspective', *Journal of European Tort Law*, 4/2 (2013), at p. 174.

¹⁰⁹ Ibid., at p. 175.

¹¹⁰ Ibid., at p. 179.

the care that can be required of them. It has, therefore, a utility as an *ex post* control mechanism.

Issuers and CRAs

The relationship between an issuer and a rating agency can be contractual (solicited rating) or non-contractual (unsolicited rating).¹¹¹ Moreover, the rating's object can be either a corporation or a financial product.¹¹² The form of the latter varies from private placements to preferred stocks or structured financial products.¹¹³ These structured financial products have attracted particular attention since the financial crisis.¹¹⁴

When the rating is unsolicited, potential liability can only be extra-contractual; but most of the time, the relationship between investor and CRA is contractual. This contract can be defined in multiple ways: employment contract¹¹⁵; *contrat innommé*; and so on. The contractual character of their relationship renders it difficult to study in general, as contractual terms vary considerably. Parties are free to organize their own obligations. It is true that several common clauses are often exemplified and appear to be problematic when issuers seek CRAs' civil liability. Among them is the case of clauses which limit a CRA's liability. I will not analyse these clauses in this thesis. It suffices to say that close attention has been paid in recent years to these contractual clauses leading, for instance, France to declare them unwritten and therefore of no legal effect.¹¹⁶ The success of a civil liability lawsuit brought by an issuer on the basis of an inaccurate rating will, therefore, depend on the content of their contractual agreement.

States and CRAs

Rating agencies started issuing ratings of public bodies in the early 20th century. These ratings include ratings of States. Here, the task of an agency could be different since “the central issue in sovereign borrowing is not the ability to pay but rather the willingness to pay”.¹¹⁷ This ratings task, which does not seem easy, has not been spared criticisms. CRAs were indeed blamed for their role in the recent Euro-debt crisis and for their tendency to

¹¹¹ See Chapter I.

¹¹² Aline Darbellay, *Regulating Ratings. The Credit Rating Agency Oligopoly from a Regulatory Perspective* (Basel: Schulthess, 2011), at p. 27.

¹¹³ *Ibid.*, at p. 26.

¹¹⁴ *Ibid.*, at p. 23.

¹¹⁵ Rosset, *op. cit.*, at p. 19.

¹¹⁶ Article L.544- 6 of the *Code monétaire et financier*.

¹¹⁷ Darbellay, *Regulating Ratings. The Credit Rating Agency Oligopoly from a Regulatory Perspective*, at pp. 27-28.

‘condemn’ political regimes that did not correspond to their standards. The question of sovereign debt ratings was thus a crucial issue when the European legislator adopted the CRA3 Regulation. The timing of their disclosure is now more strictly regulated in order to avoid market volatility that may influence, directly or indirectly, the outcome of democratic elections.¹¹⁸

Most sovereign ratings are unsolicited but several states have contracts with a particular CRA.¹¹⁹ The basis of a possible lawsuit here is, in the main, extra-contractual. This relationship will not, however, be studied here – the narrow focus of this thesis is the liability of CRAs towards investors.

B. The inaccuracy of a credit rating

A rating is inaccurate when the prediction it makes about the creditworthiness of an issuer or about an issue rated is not confirmed by facts. In this respect, two problems can occur either when the rating is too positive, or when it is too negative.

The last possibility does not concern investors but only issuers as it is in the issuers’ interest to obtain the highest possible rating. Obtaining too low a rating will therefore damage them – as the rating should, in fact, have been higher – the financial situation not being as bad as what was reflected in the ratings. Issuers will thus have a double interest in finding CRAs liable for inaccurate ratings: financial losses and reputational damage.¹²⁰

Investors will suffer losses when the rating given was higher than an accurate assessment of the financial situation justified. A high rating will lead investors to think that the product and/or the issuer is profitable, and it will, therefore, lead them to invest more money than they should have.¹²¹ Claimants might also want to initiate proceedings against a CRA if there is a sudden downgrade of an issuer or a product issued, meaning that the rating should have been downgraded beforehand and the CRA did not react timeously. These two situations are examples of inaccurate ratings as they do not reflect reality accurately, or, in time. All these situations are damaging to investors as they may have paid more than they should have for

¹¹⁸ Article 8 (3) of the CRA3 Regulation.

¹¹⁹ For instance, Belgium has a contract with Fitch Ratings, but these are the only solicited ratings on Belgium’s debt, the others are unsolicited ratings: Collard, *op. cit.*, at p. 2.

¹²⁰ Gerhard Oellinger, *Die Haftung Für Ratings. Eine Betrachtung Nach Österreichischem Und Deutschem Recht* (Wien: Linde, 2005), at pp. 76-77.

¹²¹ Scarso, *op. cit.*, at p. 164; Joachim Hennrichs, ‘Haftungsrechtliche Aspekte Des Ratings’, *Festschrift Für Walther Hadding Zum 70. Geburtstag* (Berlin: De Guyter Recht, 2004), p. 875-91; Fabio Squillaci, ‘La Responsabilità Civile Delle Società Di Rating Tra Crisi Economica E Riforma Dei Mercati Finanziari’, *Diritto civile e commerciale*, (2012), at § 3.

the financial product obtained. They may be left with smaller benefits than what they expected, or with no financial benefit at all if the issuer went into liquidation after the downgrade.

Even though these inaccuracies can occur and result in losses for investors, they are not of themselves a source of civil liability. Indeed, to take CRAs to court, investors need to prove more than a mis-match between the rating issued and the factual reality because this fact alone is not considered enough to constitute fault.¹²² Credit ratings are, in fact, an evaluation performed by the CRAs, not entirely a statement of facts but the result of a process conducted by the agencies. For this reason, a mismatch can occur. Indeed, “a multiplicity of uncertain factors influences the issuer's creditworthiness and these are not (always and/or to their fullest extent) foreseeable, even by a professional party such as a CRA.”¹²³ Causation alone is insufficient. Fault, whether ordinary or gross, needs to be established. Otherwise, one fails to account for the fact that CRAs operate in a world of uncertainty in which judgments must be made. It is submitted that, we should avoid the danger of the hindsight judgments by courts particularly in negligence actions, which exaggerate the information available to CRAs based on the fuller picture that always emerges in the aftermath of an event.

In a nutshell, an investor who bases her investment decision on an overly-positive credit rating, and suffers losses as a result of her investment decision could only take this credit rating as a basis for a civil liability lawsuit if it derives from blameworthy behaviour of the rating agency, according to the qualification given by each legal approach under scrutiny.

¹²² Blaurock, *op. cit.*, at p. 17.

¹²³ Koen Donkers; Piet Duffhues; Wim Weterings, 'Credit Rating Agency's: Informatieasymmetrie En Civiele Aansprakelijkheid', (2010), at p. 513.

II. Overview of the bases of liability in each MS to be studied

When an investor suffers a loss from a financial investment that she considers the consequence of an overly positive credit rating, she may have the choice between different jurisdictions where she can bring the lawsuit and if not, she will in any case ascertain which legal basis is suitable for her lawsuit. The overview of the different liability regimes applied to CRAs in the European Union provided here could help investors ascertain the feasibility of obtaining damages against CRAs.

The choice of Germany, France and the United Kingdom was made on the basis of a twofold approach: first, these three Member States adopt different approaches with regard to the civil liability of CRAs since the 2008 financial crisis; second, they are representative of the main legal traditions that exist in Europe – Common Law and Civil Law. The purpose of this section is to give a broad overview of the various legal bases that could be used under each national law. I will start with the rules contained in the recent EU provision on CRAs' civil liability and then study the legal bases in each Member State chosen, to see more clearly how this EU cause of action will fit into national systems.

A. European Provision: Article 35a CRA Regulation 2009

At the European level, the new Regulation on Credit Rating Agencies (CRA3) of June 2013 provides a new basis of liability for CRAs. Concerned with the impossibility of financial actors to obtain the civil liability of CRAs, the European legislator decided to take measures facilitating the accountability of CRAs towards issuers and investors.¹²⁴ The basis of competence used in this field by the EU is Article 114 of the Treaty on the Functioning of the European Union.

The adoption of an amendment on CRAs liability did not follow an easy path. Its legislative development illustrates quite well the difficulties existing in this area as well as the different interests at stake. The amendment, that has now become Article 35a of the CRA Regulation 2009, was initially proposed by the European Commission, following a non-legislative resolution of the European Parliament encouraging the Commission to render CRAs “accountable for the consistent application of the underlying methodology of their credit ratings. [Members] recommend therefore that CRAs’ exposure to civil liability in the event of gross negligence or misconduct be defined on a consistent basis across the EU and

¹²⁴ Brigitte Haar, 'Civil Liability of Credit Rating Agencies after CRA3 - Regulatory All-or-Nothing Approaches between Immunity and Over-Deterrence', *University of Oslo Faculty of Law Research Paper*, 2 (2013), at p. 2.

that the Commission should identify ways for such civil liability to be anchored in Member States' civil law."¹²⁵ The Commission's proposal adopted on 15th March 2011¹²⁶ was understood as introducing "a very strict liability rule"¹²⁷, in the sense that it strongly facilitated investors' ability to bring civil liability claims.

One of the most problematic parts of the Commission's proposal was paragraph 4, which introduced a reversal of the burden of proof: "[w]here an investor establishes facts from which it may be inferred that a credit rating agency has committed any of the infringements listed in Annex III, it will be for the credit rating agency to prove that it has not committed that infringement or that that infringement did not have an impact on the issued credit rating."¹²⁸ This reversal aimed at solving the factual impossibility for investors to demonstrate proof in their claims and, overall, at resolving the establishment of a causal link, which was one of the main hurdles encountered by investors. While greatly helping investors, this proposal was however controversial. As Haar rightly pinpoints "an investor will always find some questionable practice to exploit as an infringement, (and under the Draft Proposal the rating agencies would then have to carry the burden of proof to establish their innocence)."¹²⁹ This one-sided approach was, therefore, severely criticized in the later legislative process. The Council of the European Union reflected these criticisms in its amendments¹³⁰, which mainly alleviated the liability imposed to CRAs, compared to the Commission's proposal.¹³¹ The amendments made are mainly a suppression of the reversal of the burden of proof, the introduction of a possibility of imposing limits on CRAs' liability and the recognition of Member States' leeway to interpret non-defined terms of the provision.

¹²⁵ European Parliament, 2010/2302(INI) – 08/06/2011 Text adopted by Parliament, single reading, T7-0258/2011, 08/06/2011, <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1155735&t=d&l=en> (last accessed 30/05/2014).

¹²⁶ European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on Credit Rating Agencies, COM(2011) 747 final, http://ec.europa.eu/internal_market/securities/docs/agencies/COM_2011_747_en.pdf (last accessed 30/05/2014).

¹²⁷ Haar, *op. cit.*, at p. 13.

¹²⁸ European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on Credit Rating Agencies, COM(2011) 747 final, http://ec.europa.eu/internal_market/securities/docs/agencies/COM_2011_747_en.pdf last accessed 30/05/2014, p. 33.

¹²⁹ Haar, *op. cit.*, at p. 14.

¹³⁰ *Ibid.*, at p. 15.

¹³¹ Council of the European Union, Note on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No1060/2009 on credit rating agencies – General approach, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010452%202012%20INIT> (last accessed on 30 May 2014).

The liability framework was lightened to rebalance investor and CRA interests, but failed to resolve the main problems of the area such as proof and causation.¹³²

A stricter view, compared to that of the Council, was finally proposed by the Committee on Economic and Monetary Affairs in its report of 23 August 2012.¹³³ Its report underlines that “the European Parliament and the Legal Affairs Committee in particular have favoured the inclusion of common civil liability rules for deliberate and negligent infringements of the rules of the EU Rating Regulation.”¹³⁴ Not all amendments made by this Committee were introduced into the final regulation. After negotiations, the new Regulation on CRAs was finally adopted on 21 May 2013.

The final version of the provision contains six paragraphs. The first states the main conditions of the liability, including the type of behaviour required – an infringement listed in Annex III committed intentionally or with gross negligence – and the kind of causal link – an impact of the infringement on the rating and a causal link between the infringement and investor’s damage. It also requires investors to have relied ‘reasonably’ on credit ratings meaning *either*, in accordance with Article 5a(1), that they did “not solely or mechanistically rely on credit ratings for assessing the creditworthiness of an entity or financial instrument”¹³⁵, *or* that they used the credit ratings “with due care”.

With regard to national laws, this new provision respects the particularities of each Member State by giving them leeway in the definition of terms such as the form of the wrongful behaviour (e.g. gross negligence) or other important parameters peculiar to the legal system in which it is applied, such as ‘damage’.¹³⁶ Paragraph 5 of the provision also ensures that this new liability regime “does not exclude further civil liability claims in accordance with national law”.

The disadvantage is that the new provision does not resolve the causation problem. As the issue of proof is finally not resolved, with it goes the problem of causation for investors, a problem that had disappeared in the initial proposal. However, the rapporteur of the Committee for Economic and Monetary Affairs disagrees “that it would be appropriate to

¹³² Haar, *op. cit.*, at p. 15.

¹³³ Committee on Economic and Monetary Affairs, Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on Credit Rating Agencies (COM(2011)0747 – C7-0420/2011 – 2011/0361(COD)), A7-0221/2012.

¹³⁴ Haar, *op. cit.*, at p. 15.

¹³⁵ Article 5 a (1) of the CRA3 Regulation.

¹³⁶ Article 35a (4) of the CRA3 Regulation.

impose a reversed burden of proof on CRA to demonstrate their innocence when it comes to the issue of whether an infringement had an impact on the resulting rating.”¹³⁷

At this early stage of our analysis, we can already say that the new EU provision on CRAs’ liability did not resolve the issues relating to civil liability. Investors will still face hurdles when they try to establish fault or a causal link between the fault alleged and the damage occasioned. It will be even more difficult for them as they have to prove intentional or grossly negligent behaviours compared to mere negligence on which they could try to base their claim on the basis of national laws.

The question that remains is how this new liability regime will be integrated into the existing liability regimes of the Member States. An analysis of each national legal basis in the next pages, will allow us to grasp the answer to this question.

B. France

French law is rooted in the Roman law tradition and is therefore part of the Civil Law tradition.¹³⁸ Though its Civil code – the *Code Napoléon* – was written more than two centuries ago, it has lost neither its importance nor its elegance.¹³⁹ In our context, this code constitutes the major piece of legislation containing the basic rules applied to contractual and extra-contractual relationships.¹⁴⁰ Other significant pieces of legislation have been adopted across time and were also codified. In addition, decisions of high courts do not constitute precedent but are usually followed by lower courts, recorded because they interpret laws that are often written in general terms.¹⁴¹

France was the first Member State to adopt specific liability rules for CRAs in 2010, laid down in Articles L.544-5 and following of the *Code monétaire et financier*¹⁴².

"Article L.544-5: The credit rating agencies referred to in Article L. 544-4 shall assume liability in tort and liability for negligence towards their clients, and towards third parties, for the prejudicial consequences of any wilful misconduct or negligence committed by them in discharging the obligations laid down in the aforementioned Regulation (EC) No. 1060/2009 of the European Parliament and the Council, of 16 September 2009.

¹³⁷ Committee on Economic and Monetary Affairs, *op. cit.*, p. 83.

¹³⁸ Joseph Dainow, 'The Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil Law and Common Law Systems', *Indiana Law Journal*, 37/1 (1961), at p. 1.

¹³⁹ With reference to the famous quote of Stendhal.

¹⁴⁰ Michael Bogdan, *Concise Introduction to Comparative Law* (Amsterdam: Europa Law Publishing, 2013), at pp. 138-39.

¹⁴¹ Raymond Youngs, *English, French and German Comparative Law* (3rd edn.; New York: Routledge, 2014) at p. 75.

¹⁴² Morgan Maréchal; Marie Razafindrakoto, 'Les Conséquences De La Qualification Des Notations Financières Sur La Responsabilité Des Agences', *La Semaine Juridique Entreprise et Affaires*, 37 (2013) at § 3 & 9. Aline Darbellay, *Regulating Credit Rating Agencies* (Cheltenham: Edward Elgar, 2013) at p. 80.

Any agreement having the effect of submitting, in advance and exclusively, to the courts of a third-party State to the European Union a dispute relating to the provisions of the aforementioned Regulation (EC) No. 1060/2009 of the European Parliament and the Council, of 16 September 2009, which the French courts would have had jurisdiction to hear in the absence of such an agreement, shall be deemed null and void and unwritten.

Article L.544-6: Any clause which seeks to exclude the liability of the credit rating agencies referred to in Article L. 544-4 shall be prohibited and deemed underwritten.”

This special rule does not create a new kind of liability but specifies the application of the general rules provided by tort law.¹⁴³ These rules, rooted in Article 1382 of the French Civil Code, require claimants to prove three elements: fault, damage, and a causal link between the two.¹⁴⁴ This provision has to be read in combination with Article 1383 of the Civil Code:

“Article 1382: Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.

Article 1383: Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.”¹⁴⁵

The French tort law is described as a general clause system because it “is based on the simple enough principle of reparation for any loss or injury resulting from fault”¹⁴⁶, given that damage and causal link are demonstrated. Articles 1382 and 1383 of the Civil Code allow for liability based on fault – wilful misconduct or negligence (respectively ‘*faute volontaire*’ and ‘*faute de négligence*’).¹⁴⁷ But these articles do not explain what faulty or negligent behaviour is. From the case-law and the literature, we learn that fault exists not only when there is a breach of a formal written legislation, but also when the defendant’s behaviour breaches the general norm of behaviour, which one cannot find in a legal written text but which is, in contrast, developed by the judiciary.¹⁴⁸ The liability provided in EU provision as well as in the specific Article L.544-5 of the *Code monétaire et financier* are examples of tort liability based on breach of formal legislation.

The innovation brought about by the specific French law of 2010 was to make possible lawsuits under French law for breach of the obligations imposed on CRAs in the first EU Regulation applied to CRAs (2009) and its Annexes. This spirit was later adopted by the

¹⁴³ Anne-Dominique Merville, 'La Responsabilité Civile, Pénale Et Administrative Des Agences De Notation', *Revue de Droit bancaire et financier*, 3 (2013), at p. 4, § 12.

Tort law is commonly referred as “extra-contractual” law. I chose to use the term tort law for the three jurisdictions not to confuse the reader.

¹⁴⁴ De Montesquiou, *op. cit.*, at C. 1) c).

¹⁴⁵ <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (last accessed 21/05/2014).

¹⁴⁶ Stathis Banakas, 'Liability for Incorrect Financial Information: Theory and Practice in a General Clause System and in a Protected Interests System', *European Review of Private Law*, 7 (1999), at p. 262.

¹⁴⁷ Amandine Assaillit, 'Les fondements de la responsabilité civile délictuelle', http://www.transfert-facility.fr/files/Articles%201382%20et%201386%20du%20Code%20Civil_Les_fondements_responsabilite_civile_delictuelle.pdf last accessed on July 6 2014.

¹⁴⁸ Jacques Ghestin, *Les Conditions De La Responsabilité* (3rd edn.; Paris: L.G.D.J., 2006), at p. 374.

European legislator when Article 35a was adopted in the CRAs Regulation of 2013: as explained above, every breach of an obligation imposed by this Regulation and its Annexes, if it impacts the rating, constitutes new grounds for civil liability lawsuits in the Member States. However, French law goes further as it also prohibits contract terms limiting CRAs' liability, rendering them unwritten¹⁴⁹ and as the fault in French tort law does not require a particular level of negligence.¹⁵⁰

Specific concerns were raised in France with regard to the civil liability of CRAs. In 2012, the French Senate published a report on the situation of CRAs', to reflect about their lack of accountability and regulation.¹⁵¹ The few cases in which the CRAs' liability could be obtained was a major issue.¹⁵² The problem in France is not the determination of the harm, because French law does not have problems with the recovery of economic losses; the hurdles still faced by investors are the proof of fault – even though the French general clause system allows for some flexibility – especially because the burden of proof lies on the claimant's shoulders,¹⁵³ and mainly the establishment of the causal link between damage and fault.¹⁵⁴ The extent of these hurdles is analysed in detail in the following chapter.

C. Germany

Like French law, German law belongs to the Roman legal tradition. In 1900, the German civil law was unified with the entry into force of the German Civil Code, *Bürgerliches Geetzbuch* (BGB), established earlier in 1896.¹⁵⁵ This legal tradition is based on the adoption of written legal rules adopted both at the federal level and at the level of the *Länders*.¹⁵⁶ These are the formal sources of law and have to be distinguished from case-law which, by virtue of Montesquieu's separation of powers theory, is only an 'informal' source of law. Indeed, even if there is no application of the rule of precedent in Germany, rulings made in similar cases by judges commanding respect are likely to be followed by other judges.¹⁵⁷

¹⁴⁹ Art. L.544-6 *Code monétaire et financier*. Cécile Thépot, 'L'encadrement Légal De L'activité Des Agences De Notation Par La Loi De Régulation Bancaire Et Financière', *Petites Affiches*, 250 (2010), p. 26.

¹⁵⁰ See on this principle Ghestin, *op. cit.*, at p. 618 and following.

¹⁵¹ De Montesquiou, *op. cit.*

¹⁵² *Ibid.*; Thépot, *op. cit.*

¹⁵³ Ivan Tchotourian, 'Agences De Notation : Encadrement Et Responsabilité', *Bulletin Joly Bourse*, 2 (2011), at § 12.

¹⁵⁴ Chaput, *op. cit.*, at p. 498: the author insists that even if the fault is proved, many authors consider the proof of a causal link as a real difficulty. Thépot, *op. cit.*, at p. 2.

¹⁵⁵ Bogdan, *op. cit.*, at p. 151; Reinhard Zimmermann, *The New German Law of Obligations* (New York: Oxford University Press, 2005), at p. 13.

¹⁵⁶ Bogdan, *op. cit.*, at p. 152.

¹⁵⁷ Youngs, *op. cit.*, at p. 75.

Another important characteristic of this legal order is the status given to legal doctrine writing: scholarly opinion is so significant that it is often repeated in judgments.¹⁵⁸

The particularity of German law with respect to CRAs' civil liability is that this specific situation remains governed by general liability rules¹⁵⁹ implying that a lawsuit brought against CRAs can be grounded on any of three different doctrines: tort liability, contractual liability and quasi-contractual liability. Because tort law provisions have a narrow scope of application, the German judiciary and authors have developed contractual and quasi-contractual mechanisms to overcome the hurdles raised by tort law.

(i) Tort law

With regard, first, to tort liability, it should be noted that “Germany lacks a basis for extra-contractual liability in negligence for damage to assets.”¹⁶⁰ Indeed, § 823 I BGB, the main German extra-contractual liability provision, cannot be used to recover pure economic loss caused by a negligent conduct¹⁶¹ and protects only breaches of absolute rights (such as property or honour). This provision could not, therefore, be applied in our case, since investors will suffer pure economic loss. In this regard, § 823 II could be of some help as it allows recovery for pure economic loss; but only when there is some additional statute aimed at protecting the interests of the claimant.¹⁶² This implies that investors are able to prove a breach of a statute protecting them against their financial loss, which is complicated. The cause of action provided at the EU level could, however, take the form of a claim based on § 823 II or at least on similar principles because, as Forscher notes, the Regulation aims at protecting the market but this provision especially aims at protecting individuals: investors and issuers.¹⁶³ The degree of fault is however not the same as § 823 II and applies more generally to mere negligence.¹⁶⁴

¹⁵⁸ Bogdan, *op. cit.*, at p. 152.

¹⁵⁹ Darbellay, *Regulating Credit Rating Agencies*, at p. 80.

¹⁶⁰ Blaurock, *op. cit.*, at p. 23.

¹⁶¹ Markesinis; Lorenz; Dannemann, *The German Law of Obligations* (vol. 1: The Law of contracts and restitution; Oxford: Clarendon Press, 1997), at p. 276.

¹⁶² Michael Coester; Basil Markesinis, 'Liability of Financial Experts in German and American Law: An Exercise in Comparative Methodology', *Am. J. Comp. L.*, 51/275 (2003), at p. 278.

¹⁶³ In 2011 the survey conducted by ESMA for the Commission in CRAs civil liability towards investors in the Member States was not however completely certain about this: “In Germany, civil liability vis-à-vis investors that do not have a contractual relationship with the CRA could theoretically be based on delict (Art. 823 (2) of Bürgerliches Gesetzbuch (German civil code), however this requires that courts consider that the specific provision of the CRA Regulation that has been infringed intends to protect the investors and it is not clear whether courts will actually make this assumption.” in Commission Staff Working Paper, Impact Assessment accompanying the document: Proposal for a Regulation amending Regulation (EC) No 1060/2009 on credit rating agencies and a Proposal for a Directive amending Directive 2009/65/EC on coordination on laws, regulations and administrative provisions relating to undertakings for collective investment in transferable

Another provision of the BGB could be applied but it requires a high level of ‘fault’, § 826 BGB:

“A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.”¹⁶⁵

Under this provision, five elements have to be proven for liability to be recognized: first, “intentional unethical conduct, also known as intentional infliction of damage *contra bonos mores*” (*Tatbestandswidrigkeit*); second, unlawfulness (*Rechtswidrigkeit*), which flows from the first condition; third, intention or gross negligence¹⁶⁶, according to the wider interpretation given by the judiciary¹⁶⁷ (*Verschulden*); fourth, causation (*Kausalität*) and fifth, damage (*Schaden*).¹⁶⁸

In this respect, two points need to be clarified. First, acting *contra bonos mores* in the current interpretation means acting “contrary to the existing economic and legal order or the *ordre public*” and also “contrary to ethical principles (*Sittenwidrigkeit*)”.¹⁶⁹ Second, with respect to the *Verschulden* and especially to gross negligence, the German High Court has recognised that advice given by an expert knowing that it will potentially harm someone constitutes a case of gross negligence which triggers the application of § 826 BGB¹⁷⁰; this conclusion should furthermore be applied in a situation like the one of rating firms where “the author of such a statement claimed particular competence for himself”.¹⁷¹ A particular advantage of this provision is that it allows the recovery of purely economic losses. It presents disadvantages, however, in terms of the causal link¹⁷² and limits investors’ chances to succeed as it requires high standard of proof. Therefore, its practical application seems restricted. The judicial definitions of intention or gross negligence could nevertheless be used by German Courts for infringements of the CRA3 Regulation.

securities (UCITS) and Directive 2011/61/EU on Alternative Investment Fund Managers, SEC(2011) 1355 final, at p. 142.

¹⁶⁴ Forscher, *op. cit.*, at p. 19.

¹⁶⁵ http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3427 (last accessed on 19/03/2013).

¹⁶⁶ Forscher, *op. cit.*, at pp. 12 & 16.

¹⁶⁷ Gerhard Wagner, 'Gatekeeper Liability: A Response to the Financial Crisis', http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2317213, (August 28, 2013), at p. 12.

¹⁶⁸ Cees Van Dam, *European Tort Law* (Oxford: Oxford University Press, 2013), at p. 79.

¹⁶⁹ *Ibid.*, at p. 83.

¹⁷⁰ BGH, 14 April 1986, WM 1986, 904.

¹⁷¹ Oliver Von Schweinitz, *Rating Agencies: Their Business, Regulation and Liability under U.S., U.K. And German Law* (Bloomington: Unlimited Publishing, 2007), at p. 188.

¹⁷² Haar, *op. cit.*, at p. 5.

(ii) *Contract with protective effects towards third party*

Because of the limits of German tort law, courts and authors have had to find other ways to tackle issues of pure economic loss caused by negligence. This is the reason why two legal doctrines were created: the contract with protective effects towards third parties on the one hand, a contractual basis; and liability based on confidence on the other hand, a quasi-contractual basis.

Contractual liability is relevant for issuers but will not often concern investors; however, even without being in a contractual relationship with an agency, investors could obtain protection in certain cases on the basis of ‘contract with protective effects for the benefit of third parties’.¹⁷³ This German institution, *Verträge mit Schutzwirkung für Dritter*¹⁷⁴ situated between contractual and tortious spheres, was created by German Courts from the combination of § 328 (1) & (2)¹⁷⁵, § 311 (3) and § 241 (2) BGB and the principle of good faith, to offer to third parties legal protection stemming from a contract.¹⁷⁶ Under this theory, investors have a claim for damages for their economic loss “caused by [the obligor] breach of accessory fiduciary obligations” but would not be in a position to require the fulfilment of contractual obligations.¹⁷⁷ In that sense, the privity of contract is protected. While the original case-law concerned only physical harm, the principle was later extended to many situations and became applicable to pure economic loss.¹⁷⁸

Four conditions are required for this institution to be applied:

- Sufficient proximity between the third party and the performance (*Leistungsnähe*);
- Sufficient proximity between the third party and the creditor (*Gläubignähe*);
- Recognisability of third parties (*Erkennbarkeit*);
- Vulnerability of third parties (*Schutzbedürftigkeit*).

Because of their similarities, these conditions will be analysed in comparison with the requirements of a duty of care in English law in the next part. For the moment, one has to note that this legal mechanism will only be applied in case of solicited ratings; the contractual

¹⁷³ Ibid., at p. 3; Jan Oster, 'The Commission Proposal to Amend the Regulation on Credit Rating Agencies', *MJ*, 19/1 (2012), 206-11 at p. 210, footnote 35.

¹⁷⁴ Gerhard Wildmoser; Jan Schiffer; Bernd Langoth, 'Haftung Von Ratingagenturen Gegenüber Anlegern?', *Recht der Internationalen Wirtschaft*, 10 (2009), at p. 664.

¹⁷⁵ “Real contracts in favour of third parties” and “unreal contract to the benefit of third parties”, Von Schweinitz, *op. cit.*, at p. 170.

¹⁷⁶ Wildmoser, *op. cit.*, at 664. Dannemann e.a., *op. cit.*, at p. 277-78.

¹⁷⁷ Von Schweinitz, *op. cit.*, at p. 170. What Markesinis calls “secondary duties of care” in Coester and Markesinis, *op. cit.*, at p. 281.

¹⁷⁸ Dannemann e.a., *op. cit.*, at p. 279.

link between the rating agency and the issuer being the source of protection for the third party.

The litigation can be depicted as follows:



(iii) *Liability based on confidence*

With regard to liability based on confidence, the point of view changes. It is no longer a matter of third party protection but of third party liability.¹⁷⁹ This quasi-contractual liability called *Vertrauenshaftung* and also seen by several authors as a principle for a liability towards the general public (*Haftung gegenüber dem allgemeinen Anlegerpublikum*), is laid down in § 311 III 2 BGB:¹⁸⁰

‘Section 311 – Obligations created by legal transaction and obligations similar to legal transactions: (...)

(3) An obligation with duties under section 241 (2)¹⁸¹ may also come into existence in relation to persons who are not themselves intended to be parties to the contract. Such an obligation comes into existence in particular if the third party, by laying claim to being given a particularly high degree of trust, substantially influences the pre-contract negotiations or the entering into of the contract.’¹⁸²

This legal basis comes from a reform of the BGB that took place in 2002 aiming to reform *culpa in contrahendo*, grouped together different cases that were based on the combination of § 280, 282, 241 (2) BGB¹⁸³ and was inspired by doctrinal considerations.¹⁸⁴ Under this recent provision, a third party to a contract can incur liability if she inspired confidence in one of the pre-contractual parties and thereby influenced the negotiations or the conclusion of a contract.¹⁸⁵ It applies, therefore, to experts.

¹⁷⁹ Hennrichs, *op. cit.*, at p. 889.

¹⁸⁰ Forschner, *op. cit.*, at p. 17.

¹⁸¹ § 241 (2) BGB: “Each party to the obligation may, according to the content of the obligation, be required to apply proper care as to the rights and interests of the other party.”

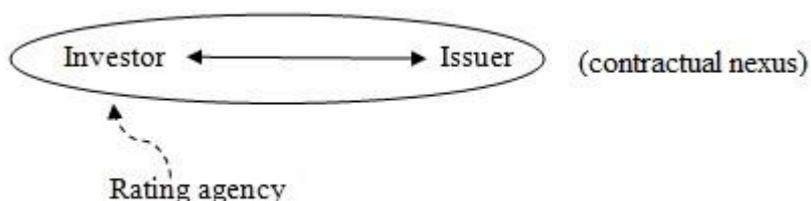
¹⁸² http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3427 last accessed on 19/03/2014.

¹⁸³ Rosset, *op. cit.*, at p. 34.

¹⁸⁴ Coester and Markesinis, *op. cit.*, p. 289, especially by the theory developed by Canaris.

¹⁸⁵ Haar, *op. cit.*, at p. 4.

The litigation can be depicted as follows:



Several conditions are required to apply this particular concept: the ‘special position of trust’ (*Sonderverbindung*) including a decisive influence (*erheblich beeinflussen*), and the ‘disappointment of confidence’ (*Vertrauensenttäuschung*).¹⁸⁶ The third party, here the rating agency, must inspire confidence in the sense that investors trust their expertise, the reliability of their ratings¹⁸⁷ and therefore act according to their ratings.¹⁸⁸ Authors recognise that a special relation of trust exists between CRAs and investors, implying therefore the application of this legal institution.¹⁸⁹ Because of their role as gatekeepers, CRAs can be seen as experts placed in this ‘special position of trust’, their ratings having a decisive influence on investors’ investment decisions.

Here the interest of the issuer does not come into play.¹⁹⁰ One can interpret § 311 (3) sentence 2 BGB as a provision that does not require any contractual link between the expert and the person who trusted him. This provision is therefore of great interest in case of unsolicited ratings, unlike the contract with protective effects towards third parties.

It has to be underlined, however, that there is a doctrinal controversy on whether the contract with protective effects towards third parties or the liability based on confidence should prevail on the other in the case of CRAs’ civil liability. To my knowledge, the majority of authors are in favour of the contract with protective effects towards third parties.¹⁹¹ Until the German High Court decides this issue, I propose studying both mechanisms, to provide the widest view of investors’ possibilities under German law.

¹⁸⁶ Darbellay, *Regulating Credit Rating Agencies*, at p. 82; Forschner, *op. cit.*, p. 16.

¹⁸⁷ Hennrichs, *op. cit.*, at p. 889: „weil der andere Teil auf dessen Zuverlässigkeit und Sachkunde vertraue“.

¹⁸⁸ Rosset, *op. cit.*, at p. 34.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Just to cite few of them: Von Schweinitz, Forschner and Rosset; whereas Haar seems more favourable to the application of the liability based on confidence.

D. United Kingdom

The *fons et origo* of the Common Law tradition, the legal system of the United Kingdom is constructed in a different way than German and French ones. The predominance of the rule of precedent implies that courts' rulings have an *erga omnes* application and that their *ratio decidendi* have to be followed by lower courts in similar factual situations.¹⁹² This fact-driven approach is then one of the crucial distinctions between the Common Law and the code-based legal traditions.¹⁹³ This particularity influences our interpretation of how English law construes CRAs civil liability.

In the context of financial markets, examining the Common Law is necessary because London is one of the most important financial centres in the world. London has also this importance vis-à-vis rating firms, the 'big three' have important subsidiaries there.¹⁹⁴

It should also be pointed out that the UK's position during the adoption process of the new European rule on CRAs' civil liability was against the establishment of a civil liability regime for CRAs because, in their view, such liability would undermine the market participant's incentives to behave in a more responsible way on capital markets.¹⁹⁵ However, once the specific provision on CRAs' civil liability was adopted, the UK quickly adopted regulations explaining the application of Article 35a of the CRA3 Regulation in its legal order and defining the interpretation of several terms contained in this article.¹⁹⁶

When one tries to determine the legal basis that investors could use for their claim in the UK, one can find two suggestions in the literature: the tort of negligence on the one hand; and the estoppel doctrine on the other. The estoppel doctrine, however, is not of much help in the case of investors because it can only be used "as a shield but not but a sword"¹⁹⁷, even though

¹⁹² Von Schweinitz, *op. cit.*, at p. 119; Youngs, *op. cit.*, at p. 76.

¹⁹³ Von Schweinitz, *op. cit.*, at p. 120.

¹⁹⁴ *Ibid.*, at p. 118.

¹⁹⁵ Darbellay, *Regulating Credit Rating Agencies*, at p. 83; 'The United Kingdom authorities response to the European Commission internal market and services consultation document on Credit Rating Agencies', https://circabc.europa.eu/d/d/workspace/SpacesStore/0d1ea101-b6d0-470b-b8b3-e28e4c1cba30/BoE-FSA-Treasury_EN.pdf (last accessed on 20/03/2014).

¹⁹⁶ <http://www.legislation.gov.uk/ukxi/2013/1637/contents/made> (last accessed on 24/02/2014); The Credit Rating Agencies (Civil Liability) Regulations 2013 that came into force on 25th July 2013.

¹⁹⁷ For promissory estoppel: *Combe v Combe* [1951] 2 KB 215 (CA); Cartwright, *Contract Law. An Introduction to the English Law of Contract for the Civil Lawyer*, at pp. 146-47.

For Estoppel by representation: Treitel, *The Law of Contract*, at p. 403; *Low v Bouverie* [1891] 3 Ch 82 (CA); *The Anemone* [1987] 1 Lloyd.

some authors plead for its use as a cause of action.¹⁹⁸ This doctrine will not, therefore, be examined here.¹⁹⁹

As third parties to contracts between rating agencies and issuers, investors cannot rely on contractual basis to obtain damages from CRAs.²⁰⁰ The basis that seems suited for them is the ‘generic tort’: negligence.²⁰¹ To be applied, this legal institution requires the fulfilment of three conditions: first, the demonstration that the defendant has a duty of care towards the claimant; second, that the defendant breached this duty; third, that this breach damaged the claimant.²⁰²

In this context, a duty of care then needs to be established. The proximity required for a duty of care can result from statutory legal requirements or be found on the basis of general Common Law principles.²⁰³ The existence of a duty of care for CRAs remains debated in the literature but could be interpreted as existing by taking inspiration from a recent Australian ruling that found a duty of care for CRAs. MacNeil writing in 2012 stated that “the liability of rating agencies for negligence is a matter that appears to be untested in the UK courts”²⁰⁴ and, from my knowledge, this remains the case, which leaves the matter open. As stated before, the factual approach applied by common law courts leads the courts to be bound by *stare decisis* only when the facts are similar. In this particular situation, however, no ruling has been delivered by an English Court. Therefore, we will have to base our reflections on situations that are close to CRAs’, for instance, the case of the liability of auditors.²⁰⁵

Moreover, a claim based on the EU Regulation will more than probably be analysed by courts in the light of principles applied to the tort of negligence because of the many

¹⁹⁸ Miglionico, *Enhancing the Regulation of Credit Rating Agencies, in Search of a Method*, at p. 74.

¹⁹⁹ For further information on the estoppel doctrine: Andrea Miglionico, *Enhancing the Regulation of Credit Rating Agencies, in Search of a Method* (Edizioni Scientifiche Italiane, 2012), at p. 72; Randy Barnett; Mary Becker, ‘Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations’, *Hofstra Law Review*, (1987); John Cartwright, ‘Protecting Legitimate Expectations and Estoppel in English Law’, *Electronic Journal of Comparative Law*, 10.3 (2006); John Cartwright, *Contract Law. An Introduction to the English Law of Contract for the Civil Lawyer* (2nd edn.; Oxford and Portland: Hart Publishing, 2013), at p. 139; A.L. Pickering, ‘Estoppel by Conduct’, *Law Quarterly Review*, 55/3 (1939), at p. 407; Miglionico, *Enhancing the Regulation of Credit Rating Agencies, in Search of a Method*, at p. 72.

²⁰⁰ Von Schweinitz, *op. cit.*, at p. 123.

²⁰¹ Blaurock, *op. cit.*, at p. 23. By contrast with the other particular torts: Eva Frades, ‘Negligent Professional Advice and Third Parties’ Economic Loss. Liability between Contract and Tort.’, (European University Institute, 1997), at p. 58.

²⁰² Von Schweinitz, *op. cit.*, at p. 124. Raymond Youngs, *English, French and German Comparative Law* (2nd edn.; Oxon: Routledge-Cavendish, 2007), at p. 340.

²⁰³ Von Schweinitz, *op. cit.*, at p. 124.

²⁰⁴ Iain Macneil, *An Introduction to the Law on Financial Investment* (2nd edn.; Oxford: Hart Publishing, 2012), at p. 437.

²⁰⁵ Von Schweinitz, *op. cit.*, at p. 120.

references to this tort in the Regulations on Credit Rating Agencies.²⁰⁶ The cause of action could in my opinion form the basis of a duty of care and determine its breach in requiring that a breach of an obligation stated in Annex III being demonstrated by the claimant; but the other elements of liability will be based on tort principles and especially principles applied in cases of negligence: for damage and causation for instance. The tort of deceit could also be partially considered for the establishment of the intentional or grossly negligent behaviour as deceit requires a level of fault that is higher than mere negligence. This will be considered in the next Chapter.

The several criteria required for the establishment of a duty of care, its breach, the investors' damage and the need of a causal link will be studied in detail in the next Chapter.

²⁰⁶ The Credit Rating Agencies (Civil Liability) Regulations 2013 that came into force on 25th July 2013, especially Regulations 6 (“Reasonably relied”); 8 (“Caused”); 14 (“Investors: general approach to determining damages”).

Conclusion

Investors who suffered pecuniary losses because they based their investment decision on a credit rating that turned out to be too high compared to the real creditworthiness of the issuer have several options in the EU. Since 2013, European Union law has offered them a specific legal basis in a Regulation to make CRAs liable in case of breach of the obligations imposed by the EU Regulation on CRAs. This provision cannot be used, however, without linking it to existing legal instruments provided by national law that has to be applied in a given case.

In France, its application will probably take the path of tort law, in the line with the specific provision that the French legislator introduced in 2010 for breaches of the EU Regulation on CRAs. Tort law principles will also be applied in the UK, with some adaptations, as confirmed by the regulations adopted by the English legislator in July 2013. More uncertainty surrounds its application in Germany, where the application of tort law could also be relevant, possibly by a combination of § 823 II and § 826 BGB.

With regard to independent national legal bases, the most flexible is, in my opinion, the general clause system of France. Even if the French situation seems to be the clearest out of the three Member States, the specific requirements for liability that will be studied in the next chapter render this general clause system less open. In the line of tortious liability, the tort of negligence for negligent misstatement offers a good solution in the UK, though its application to the specific liability of rating agencies towards investors does not avoid controversies. The most distinctive solutions can be found in German law, in which contractual and quasi-contractual mechanisms were developed by the judiciary and the literature to overcome limits raised by tort law. Controversies in the literature surround this area, but the majority of authors give precedence to the theory of contract with protective effects towards third parties over that of liability based on confidence.

Within these three national legal regimes, the main differences to underline are the distinction between countries with codified law and the UK with a common law tradition. This first and obvious distinction greatly explains why mechanisms had to be found outside tort law in Germany, to comply with the strict letter of § 832 BGB. It also explains why interpretations of the French judiciary are of great importance to control the limits of its general clause system. Another striking difference between the systems analysed is the use of tort law in France and the UK, but the use of contractual mechanisms in Germany, in a situation in which no contractual bonds link investors and rating agencies. Similar

considerations can, however, be found in English law and German law, such as a restrictive view of claims for recovery of pure economic loss; whereas this consideration is absent in French law, as it will be underlined in the next chapter. The last distinction that has to be underlined here is the differences in the structure of claims for liability: in France three requirements have to be demonstrated (fault, damage and causal link); in Germany there are five requirements under tort law and with regard to (quasi-)contractual doctrines, prior requirements have to be fulfilled before the demonstration of a wrongful behaviour, damage and causal link. The latter situation is also what is applied in the UK where a duty of care has first to be established and then its breach, damage and causation.

CHAPTER III: DETERMINATION OF LIABILITY: THE DIFFERENT REQUIREMENTS

Fulfilling the liability requirements is the next step after the determination of the appropriate cause of action. These requirements adopt peculiar forms, they sometimes consist of sub-requirements and they have sometimes different function under each national law. Despite differences that can often be important, I will group these requirements into three categories: ‘fault’, ‘causal link’ and ‘damage’. As stated previously, the European legal basis will only differ from national law with regard to the fault; causal link and damage are determined by national laws themselves.

In this third chapter, I intend to compare the constitutive elements of the liability in each of the legal systems studied. This comparison will provide an overview of the positive and negative factors of each law and therefore help to emphasize areas that can be improved and how. Comparisons are, however, sometimes rendered difficult by differences, this echoing back to legal culture specific to each of these three Member States; but also policy considerations that exist in one Member State but not in another.²⁰⁷ The first requirement studied – *blameworthy behaviour* – illustrates well this issue because one can find policy considerations regarding the extent of the liability already addressed at this stage in English or German law, but less in French law. One can draw, however, insightful comparisons after having examined all of the requirements because, as we will notice during the following analysis, policy considerations concerning the extent of liability will be found at another stage in French law – in damage or causality, the second and third requirements herein examined. Finally, I will make references to the burden of proof for each requirement, because this procedural aspect has a significant impact on CRAs’ civil liability in practice.

I. Fault

I start with the requirements of fault at national level for breach of the care required on the part of CRAs and end the analysis with breaches of statute such as the new European provision. It is preferable to start with the specific requirements of the United Kingdom, Germany and then France because the sub-requirements of fault decrease in this order: specific requirements exist in English law and in Germany prior to the breach of duty, which can be compared to the requirement of fault in France. The CRA3 Regulation, however,

²⁰⁷ See for policy considerations Stathis Banakas, *op. cit.* (1999).

unifies the requirements of fault by stating specific rules in case of infringement of this regulation.

a. Establishment of fault on the basis of national laws for breach of a standard of care

In the UK and in Germany, prior to the establishment of the fault itself, specific requirements have to be met such that the claim enters the scope of these legal mechanisms (i -iii). In this area, similar policy considerations are encountered such as the foreseeability of investors' reliance by the rating agency, or the problem of indeterminate liability. These similar considerations are the reason why I will first canvass the situation in the UK – where the situation is still unclear – before comparing it to the German requirements. In addition, I will briefly explore a recent Australian case that supports a finding of CRA liability. After the presentation of these prior requirements, I will examine the standard of care that could be required from CRAs.

(i) *Establishment of a duty of care in English Law*

A duty of care in English law can be found in Common Law principles. In *D v East*, Lord Rodger described the importance of the concept of duty of care as follows:

“[w]hile foreseeability and causation are necessary elements in any successful claim for damages based on negligence, they are not sufficient: in the contemplation of the law, the respondents are liable to the appellants only if the doctor owed them a duty of care. The concept of the duty of care was famously described, some seventy years ago, as ‘an unnecessary fifth wheel on the coach’, but it remains an integral part of the way the courts determine whether there is liability for negligence.”²⁰⁸

Claims introduced by investors against CRAs on the basis of the tort of negligence will pursue recovery on the basis of their economic losses. As in Germany, claims for recovery of pure economic loss have a specific status in English law. Recovery for pure economic loss has been allowed by English courts only in exceptional circumstances.²⁰⁹ Moreover, such a claim implies that a duty of care is imposed on CRAs towards third parties. Since *Donoghue v. Stevenson*²¹⁰, duties of care towards third parties have existed in English law. This case

²⁰⁸ Lord Rodger in *D v East Berkshire Community Health NHS Trust and others*, [2005] UKHL, at 98, <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd050421/east-4.htm> (last accessed 08/06/2014).

²⁰⁹ The rule is that there is no duty of care to avoid causing pure economic loss: *Murphy v Brentwood DC*, [1991] AC 398. Mauro Bussani; Vernon Valentine Palmer, *Pure Economic Loss in Europe* (Cambridge: Cambridge University Press, 2003), at p. 140; Basil Markesinis, Simon Deakin and Angus Johnston, *Markesinis and Deakin's Tort Law* (7th edn.; Oxford: Clarendon Press, 2013), at p. 141.

²¹⁰ *Donoghue v. Stevenson* [1932], House of Lords 26 May 1923.

imposed liability on “persons whom one ought reasonably to have contemplated as being affected”.²¹¹ Yet this case was limited to latent physical injuries. It was later extended to recovery for pure economic loss in *Hedley Byrne v. Heller*.²¹² This development was not difficult compared to the complexity surrounding the recognition of a duty of care towards third parties who relied on defective statements.²¹³ Indeed, the case-law concerning the duty of care for negligent misrepresentation is less than clear.²¹⁴ The conditions required to establish a duty of care for these claims differ in light of the circumstances of each case. The liability for negligent misstatements was applied to auditors in certain cases that are studied below. I will examine the extent to which cases involving auditors could be applied to CRAs, as no case involving CRAs has ever been decided by English courts.

*Candler v. Crane*²¹⁵ involved proceedings brought against an auditor for a defective report, in circumstances in which he knew that a person would make an investment on the basis of the report. It was the first case in which a strong statement was made in favour of a duty of care in these circumstances. The statement was, however, made by Denning MR in his minority judgment. The majority denied that the auditor had a duty of care towards the investor. Denning MR decided in favour of a duty of care owed by auditors “to all persons to whom the auditor knew the report would be presented,” rather than only towards their immediate clients, as was required by the law.²¹⁶

In time, MR Denning’s minority judgment became more convincing than the majority judgment because, in 1963, the House of Lords relied on it in *Hedley Byrne v. Heller*. This case is one of the landmarks of British tort law. The factual circumstances of *Hedley Byrne* differ from *Candler’s* case. In *Hedley*, the case involved a bank and not an auditor.²¹⁷ It was a difficult case as the Court had to treat two problematic legal questions: negligent statements on the one hand, and pure economic loss on the other. Unlike in *Candler*, the Court in *Hedley* recognised, in principle, the existence of a duty of care towards third parties for negligent misstatement in cases of pure economic loss when a *special relationship* exists and, at the same time, it stated that the advisor can limit its liability by introducing a disclaimer.²¹⁸

²¹¹ Von Schweinitz, *op. cit.*, at p. 130.

²¹² *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465.

²¹³ Von Schweinitz, *op. cit.*, at p. 130.

²¹⁴ *Ibid.*, at p. 132.

²¹⁵ *Candler v. Crane, Christmas & Co.*, [1951] 2 KB 164 (CA).

²¹⁶ Von Schweinitz, *op. cit.*, at p. 133.

²¹⁷ For details on facts of the case: *Ibid.*, at p. 134; Charles Mitchell and Paul Mitchell, *Landmark Cases in the Law of Tort* (Portland: Hart Publishing, 2010), at p. 173-174.

²¹⁸ Von Schweinitz, *op. cit.*, at p. 135. The question of disclaimers is discussed at the end of this Chapter.

The question of whether sufficient proximity exists between the parties before the court is central to the recognition of a duty of care towards third parties for negligent misstatement.²¹⁹ This question of proximity was faced in *Hedley Byrne*, where the determination of a *special relationship* between claimant and defendant was discussed.²²⁰ Here the House of Lords stated three conditions to determine whether such a *special relationship* exists, this test being often referred to as the *assumption of responsibility test*: first, whether the person to whom the advice is addressed “would rely on the knowledge and abilities of the advisor”²²¹; second, whether the person giving advice “knew or should have known that” the person receiving the advice would rely “on the accuracy of the advice”²²²; third, whether the person receiving the advice “could justifiably act in reliance on the advice” according to the facts of the case.²²³ The House of Lords also underlined that “giving advice construed a ‘special relationship’ requiring the duty of care of the advisor”.²²⁴

We will now attempt to apply this test to CRAs. As in *Hedley Byrne*, the bank was in an expert position compared to the person receiving the advice; this case should be applicable to rating agencies, as they are also in a position of specific expertise compared to investors.²²⁵ Moreover, as von Schweinitz supports, “the term ‘advice’ [used in *Hedley Byrne*] does not necessarily imply that the advisor recommends or describes a particular investment with the intention of making it more attractive to the advisee”.²²⁶ According to this author, it can also be considered as an advice when a person makes a statement that inspires confidence, considering him/herself an expert in a specific field. Because of the specific gatekeeper role that CRAs exert on financial markets, they know that third parties will rely on their statement.²²⁷ For the purpose of liability, only foreseeability of the inducement by the advice is required, not the specific intent of causing the harm done.²²⁸ Moreover, investors will have to demonstrate that they reasonably relied on the rating. Given the importance of ratings in

²¹⁹ Ibid., at p. 131.

²²⁰ Carsten Thomas Ebenroth; Thomas J. Jr. Dillon, 'The International Rating Game: An Analysis of the Liability of Rating Agencies in Europe, England, and the United States', *Law and Policy in International Business*, 24/3 (1993) at p. 790, citing *Hedley Byrne* § 482.

²²¹ Von Schweinitz, *op. cit.*, at p. 134.

²²² Ibid. *Hedley Byrne* is famous for having developed the test of ‘(voluntary) assumption of responsibility’.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid., at p. 135. This case seems also to be important in the determination of auditor’s liability before *Caparo*: Ingrid De Poorter, 'Auditor’s Liability Towards Third Parties within the Eu: A Comparative Study between the United Kingdom, the Netherlands, Germany and Belgium', *Journal of International Commercial Law and Technology*, 3/1 (2008), at p. 69.

²²⁶ This argument echoes back the fact that credit ratings are not considered as investment advice in the MiFID, see further in this chapter.

²²⁷ Von Schweinitz, *op. cit.*, at pp. 135-36.

²²⁸ Ibid., at p. 135-36.

financial markets with regard to the creditworthiness of financial products, it appears to me that it can be reasonable for investors to rely on credit ratings when they take their investment decisions; but the reasonableness test will depend upon the specific circumstances of each case (e.g. the expertise of the investor or the complexity of financial products). On the basis of these elements, I consider that the findings of *Hedley Byrne* can be applied to CRAs and lead to recognition of a duty of care imposed on CRAs towards investors.

Following the evolution of the case-law²²⁹, the House of Lords developed a two-stage test in *Anns v. Merton London Borough*²³⁰ but later dismissed it²³¹ and replaced it in *Caparo Industries Plc. Respondents v. Dickman and other appellants*²³² with a three-stage test requiring reasonable foreseeability of the claimant's damage "as a result of the defendant's negligence"²³³, sufficient proximity between the parties, and that imposing liability would be "fair, just and reasonable".²³⁴ This case involved auditors' liability for issuing a report on which the claimant, Caparo, relied on to make a takeover-bid of Fidelity, a company in which Caparo already owned shares but instead of making profits from this investment, Caparo incurred large losses²³⁵.

Here judges had to face a crucial question: how far should this liability go? In claims for misleading statements there is a fear of indeterminate liability towards third parties.²³⁶ The scope of liability was the reason why the House of Lords dismissed Caparo's action, fearing that it "would be to create a liability wholly indefinite in area, duration and amount and would open up a limitless vista of uninsurable risk for the professional man".²³⁷ In addition, Lord Oliver developed in this case a four-step analysis to ascertain the existence of the *special relationship* needed for a duty of care to arise, i.e. the sufficient proximity. The first element is the *purpose* of the advice. According to the House of Lords, the auditors' report was not made to serve for investment decisions in a company but to allow the control of the board of this company.²³⁸ In the words of Lord Oliver, the purpose of the advice should

²²⁹ In *Murphy v. Brentwood DC*, another view was adopted by the House of Lords: the incremental approach. To recognise a duty of care in a specific case, this action should correspond to already fact-patterns already recognised as involving a duty of care.

²³⁰ *Anns v. Merton London Borough*, [1977] 2 AllER 492, HL (especially Lord Wilberforce at 489 f). Robert Stevens, *Torts and Rights* (New York: Oxford University Press, 2007) at p. 1-2.

²³¹ In *Murphy v. Brentwood DC*.

²³² *Caparo Industries plc v Dickman* [1990] 2 AC 605. Mitchell, *op. cit.*, at p. 172.

²³³ Stevens, *Torts and Rights*, at p. 1.

²³⁴ *Ibid.*, at pp. 1-2.

²³⁵ Von Schweinitz, *op. cit.*, at p. 137.

²³⁶ Richard A. Buckley, *Buckley: The Law of Negligence* (London: LexisNexis Butterworths, 2005), p. 93.

²³⁷ *Ibid.*, at p. 96. [1990] 2 AC 605 at 643 per Lord Oliver.

²³⁸ *Ibid.*

be “made known either actually or inferentially, to the adviser at the time when the advice is given”.²³⁹ The second criteria is that the adviser knows, “actually or inferentially,” when he makes the statement, to whom his statement will be communicated, these people being specific persons or members of *an ascertainable class* to which the ‘advice’ is communicated. Third, it must be likely that it will *be acted on the advice given* “without independent inquiry”; and, fourth, it is required *that it was actually acted on the advice*, to the claimant’s detriment.²⁴⁰ Similar considerations were also stated in *Al Saudi Banque v. Pixley* in which the House of Lords found that no duty of care was owed by creditors towards third parties according to two conditions given to limit the scope of such duty of care: “(i) to limit the transaction in which the defendant’s statement may be relied upon to the transaction in which he intended it, or knew it was intended, to be relied upon; and (ii) to limit the plaintiff or class of plaintiff to the person or persons to whom the defendant made the statement, or to whom he intended or knew that it was intended to be communicated.”²⁴¹

The conditions developed in *Caparo* and *Al Saudi* cannot be profitably applied to credit ratings because two conditions could be difficult to satisfy: the purpose condition and the condition of the class to which the advice is communicated. CRAs could argue that the purpose of ratings is only to assess the creditworthiness of a financial product and that the class of claimants could be too wide and, therefore, lead to indeterminate liability. Moreover, the determination of whether imposing liability on CRAs would be “fair, just and reasonable” will certainly be the most uncertain element of a court ruling; the application of the *Caparo* test would then probably lead to the non-imposition of a duty of care on CRAs. However, as von Schweinitz stresses, “rating actions do not generally have an internal purpose, but rather, are geared towards the reliance of the capital markets” and it could also be considered that the foreseeability of claimant’s damage and of the class of claimants are fulfilled as CRAs are aware that investors would rely upon the ratings issued for their investment decision.²⁴²

Both *Caparo* and the assumption of responsibility tests were considered together by the House of Lords in *The Customs and Excise Commissioners v. Barclays Bank plc*.²⁴³ The House of Lords ruled that the bank did not owe a duty of care to the Customs and Excise

²³⁹ [1990] 2 AC 605. Markesinis, e.a., *Markesinis and Deakin’s Tort Law* (2013), at p. 149.

²⁴⁰ Von Schweinitz, *op. cit.*, at p. 138.

²⁴¹ *Al Saudi Banque v Pixley* [1990] 2 WLR 344.

²⁴² Von Schweinitz, *op. cit.*, at p. 140.

²⁴³ [2007] 1 AC 171. For facts see: W.V.H. Rogers, *Winfield and Jolowicz on Tort* (18th edn.; London: Thomson Reuters, 2010), at p. 161.

Commissioners.²⁴⁴ The ultimate decision in favour of Barclays Bank was based on the *Caparo* test, more specifically on the “fair, just and reasonable” condition, however, both the assumption of duty test as well as the incremental approach were considered.²⁴⁵ In a nutshell, as Roger notes, all three tests have “a role to play in suitable cases, perhaps in a mutually supportive way, for there are some signs of running the concepts together.”²⁴⁶

To sum up, what conditions should we apply to determine whether CRAs owe a duty of care to investors? Certain authors are in favour of the application of the *Caparo* test to CRAs²⁴⁷; others are not and plead for a feasible establishment of a duty of care towards investors.²⁴⁸ In my opinion, and on the basis of the suggestion made by Rogers above, the assumption of responsibility test should be applied to CRAs but could be combined with considerations stated in *Caparo*; these considerations should, however, be given another understanding that the one used in *Caparo*. Indeed, even if auditors and CRAs are both gatekeepers, they are not identical. On the one hand, auditors are internal gatekeepers whose aim is to inform current shareholders, people who have already invested in companies. On the other hand, rating firms are external gatekeepers whose aim is to inform investors, in a very large scope, making therefore their investment decision with the necessary consideration. The purpose of their statement is different and the people to whom their statement is addressed also differs. I agree with Harry’s opinion according to which “it might be said to be fair, just and reasonable to impose a duty on a party whose purpose is the provision of an independent opinion on the credit worthiness of an issuer, to ensure that those opinions are: (i) independent; and (ii) competently arrived at, particularly where it is known that its purpose is to assist in the marketing of products to investors. The position of the rating agency can, on this basis, be distinguished from the auditors of a company because an audit is for the company’s benefit, the purpose of which is the fulfilment of a statutory

²⁴⁴ Rebecca Huand; Brett Harrison, ‘House of Lords holds that a bank owes no duty of care to beneficiaries of Mareva Orders’, *Financial Services Litigation Bulletin* (2007), http://www.mcmillan.ca/Files/House_of_Lords_0307.pdf

²⁴⁵ Rogers, *op. cit.*, at p. 162. The incremental approach being however the least important test.

²⁴⁶ *Ibid.*, at p. 163.

²⁴⁷ Harry Edwards, ‘Liability for the Rating and Sale of Structured Credit Products: Australian Cases and Their (Much) Wider Implications’, *Law and Financial Markets Review*, 7/2 (2013b), 88-96; Arad Reisberg, ‘The Future Role of Credit Rating Agencies in Contemporary Financial Markets - a Theoretical Perspective’, *Corporate Finance Law in the UK and EU* (Oxford: Oxford University Press, 2011).

²⁴⁸ Von Schweinitz, *op. cit.*

requirement, rather than the provision of information to prospective purchasers of the company's shares."²⁴⁹

A pertinent Australian case

A recent Australian ruling about the imposition of a duty of care on CRAs towards investors could inspire foreign judges and especially English ones.²⁵⁰ In 2012, the Federal Court of Australia found a credit rating agency – Standard & Poor – liable for economic losses suffered by investors. In this case, *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)*²⁵¹, thirteen Local Councils of Australia brought a claim against the Local Government Financial Services (financial advisor), ABN Amro (investment bank), and Standard & Poor's for breaching their statutory duties, as well as for negligence. All three were found liable for the economic losses suffered by the claimants. The claimants bought structured financial products²⁵², which had received a triple A rating from Standard & Poor's. At first instance, the Federal Court of Australia recognised that S&P owed a duty of care to investors because investors' reliance was reasonably foreseeable as S&P knew that its rating would be used for investors' investments decisions.²⁵³ This decision was confirmed by the Full Federal Court of Australia in June 2014, with the damages for all losses divided between the three defendants.²⁵⁴

Three interesting aspects characterize this case: first, how the courts concluded that a duty of care existed; second, how the courts dealt with the question of potentially indeterminate class of claimants; and, third, the width of the standard of conduct imposed on CRAs.

With regard to the establishment of a duty of care towards the councils and potential buyers, the Federal Court used similar factors as those used in the previously analysed

²⁴⁹ Edwards, 'Liability for the Rating and Sale of Structured Credit Products: Australian Cases and Their (Much) Wider Implications', at p. 90.

²⁵⁰ Australian court ruling could have serious global repercussions for credit rating agencies, 4th September 2013, *Intheblack* magazine, <http://www.itbdigital.com/opinion/2013/09/04/australian-court-ruling-could-have-serious-global-repercussions-for-credit-rating-agencies/>.

²⁵¹ For a thorough analysis of this case see Rommel Harding-Farrenberg; Kieran Donovan, 'Case Note Duty of Care, Rating Agencies and the 'Grotesquely Complicated' Rembrandt: Bathurst Regional Council V Local Government Financial Services Pty Ltd (No 5)', *Business Law internationalL*, 14/2 (2013).

²⁵² Known as "Rembrandt 2006-3 constant proportion debt obligation (CPDO)".

²⁵³ [2012] FCA 1200 at [2455]; Harding-Farrenberg, *op. cit.*, at p. 190.

²⁵⁴ *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65; Simon; Edwards Clarke, Harry, 'Liability of Credit Rating Agencies Confirmed by Australian Appeal Court', *Banking Litigation E-Bulletin* <http://herbertsmithfreehills.com>, (10 June 2014 2014). Financial Times, "S&P loses Australia appeal over misleading investors", 6 June 2014, <http://www.ft.com/intl/cms/s/0/681d754a-ed1f-11e3-8963-00144feabdc0.html> (last accessed on 23/06/2014).

English cases.²⁵⁵ The court first looked at *the aim pursued by the issuer* when the rating contract was made, i.e. to entice investors to invest in the issuer's product.²⁵⁶ It was then established that S&P knew that its rating would have been used for the purpose of investors' investment decisions²⁵⁷; reasonable foreseeability of investors' reliance on ratings was, therefore, demonstrated.²⁵⁸ The court then went on to consider the claimants' *vulnerability*. It was held that S&P owed a duty of care to vulnerable investors, that is "investors ...unable to assess the creditworthiness of the relevant financial products or to challenge the rating agency's rating of the products."²⁵⁹

"In these circumstances the very nature of S&P's business of assigning ratings to complex financial instruments such as the CPDO, where few if any investors other than financial institutions would have the resources to assess the validity of the rating, assumes and in a real way depends upon the vulnerability of the investors to the consequences of S&P's actions."²⁶⁰

The issue of a potentially indeterminate class of claimants was also considered by the courts. In any case, it should be noted that the facts at stake are peculiar because it was not a case of liability towards the wide general public but towards a small group of potential investors. The product had indeed been created by ABN Amro for a specific scope of investors.²⁶¹ On appeal, the Full Federal Court went even further in upholding the assessment of the class made by the first judge and stated that it was sufficient for S&P to know the class and to identify it:

"Liability was not indeterminate because S&P did not know the precise identity of the members of the *class*, the exact number of members in the class or the exact loss. S&P knew what it needed to know. It knew the characteristics of the class. S&P knew that a characteristic of the class (some might say a critical characteristic of the class) was that each was an investor in the Rembrandt notes and S&P also knew the foreseeable type of loss. It is the nature of the loss, not the precise amount which is relevant."²⁶²

²⁵⁵ For instance: indeterminate liability (12.5.2); vulnerability (12.5.3.); the contractual and extra-contractual relationships existing between the different parties (12.5.4. & 5.)

²⁵⁶ Haar, *op. cit.*, at p. 11. [2012] FCA 1200 at [2455] (2).

²⁵⁷ Harding-Farrenberg, 'Case Note Duty of Care, Rating Agencies and the 'Grotesquely Complicated' Rembrandt: Bathurst Regional Council V Local Government Financial Services Pty Ltd (No 5)', at p. 191.

²⁵⁸ [2012] FCA 1200 at [1833-1840 & 2816].

²⁵⁹ Harding-Farrenberg, *op. cit.*, at p. 190.

²⁶⁰ [2014] FCAFC 65, at [593 & 1260].

²⁶¹ [2012] FCA 1200 at 2749 "In these circumstances, the submission that the assignment of the rating exposed S&P to liability to an indeterminate number of purchasers is not persuasive. The class of people to which any potential duty of care would be owed would be limited to those potential purchasers of the instrument who relied on the rating as assigned and communicated by S&P to the issuing institution such as ABN Amro in this case." Edwards, 'Liability for the Rating and Sale of Structured Credit Products: Australian Cases and Their (Much) Wider Implications', at p. 90.

²⁶² *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, at [1260], emphasis added.

As for the content of the duty of care imposed on S&P, the first ruling found that S&P owed a duty to investors to issue its ratings on a reasonable basis, since the rating agency knew that its rating would have been used by investors for the purpose of investment decisions. The Court then went on to consider that the “modelling inputs” used by S&P would not have been used by another agency in the same circumstances. As Harding-Farrenberg and Donovan emphasize, a breach of that duty of care is not established by the proof of a possible alternative rating, but instead by the lack of reasonable basis for the rating compared to what another agency, with comparable skill in comparable circumstances would have done.²⁶³

This case was an influential one, whose consequences reach far beyond Australia.²⁶⁴ As Edwards writes “the finding by a common law court that, in issuing a financial product with a credit rating, the rating agency owed a duty of care to the end investor of such a wide scope is novel and controversial, and will be of great interest.”²⁶⁵ In particular, this case could inspire English judges to rule in favour of a duty of care, considering that the English model of compensation for economic losses is very similar to the Australian one.²⁶⁶ The question is whether a realistic transposition of the findings of this case into other legal systems is possible. Inspiration for European courts, especially English courts, could be drawn from the segregation of claimants according to their vulnerability in distinguishing between sophisticated and unsophisticated investors.

(ii) Parallels between English requirements for a duty of care and German requirements for (quasi-)contractual liability

Similar requirements exist in German law both in the contract with protective effects towards third parties and in liability based on confidence.

As stated earlier, the contract with protective effects towards third parties requires four conditions to be fulfilled:

- Sufficient proximity between the third party and the performance (*Leistungsnähe*);
- Sufficient proximity between the third party and the creditor (*Gläubigernähe*)
- Recognisability of third parties (*Erkennbarkeit*)

²⁶³ Harding-Farrenberg, *op. cit.*, at p. 192.

²⁶⁴ Edwards, 'Liability for the Rating and Sale of Structured Credit Products: Australian Cases and Their (Much) Wider Implications'; Haar, *op. cit.*, at p. 12. <http://www.itbdigital.com/opinion/2013/09/04/australian-court-ruling-could-have-serious-global-repercussions-for-credit-rating-agencies/> last accessed on 20/06/2014.

²⁶⁵ Edwards, 'Liability for the Rating and Sale of Structured Credit Products: Australian Cases and Their (Much) Wider Implications', at pp. 89-90.

²⁶⁶ *Ibid.*, at p. 90.

- Vulnerability of third parties (*Schutzbedürftigkeit*)

At first sight, a main difference with the English developments is the focus of the test: the relationship under scrutiny is that between the issuer and the investor; rather than the relationship between the investor and the rating agency. A sufficient proximity between the claimant/third party and the performance is required (*Leistungsnahe*). Even if ratings are requested by issuers with the aim of obtaining financing on financial markets,²⁶⁷ investors are linked to the performance because ratings constitute a basis of their investment decision.²⁶⁸ Third parties are also exposed to the same risks as the issuer in case of failure of protection (*Gefahrennahe*) as they are also affected by the rating.²⁶⁹ Another condition is the proximity between third parties and the creditor (*Gläubigernahe*) meaning that the creditor intends to include the third party within the protective scope of the contract, on the basis of good faith.²⁷⁰ An interesting evolution of the case-law in this respect shows that German cases have evolved in the sense of loosening the second criterion by abandoning the requirement that “the creditor must be responsible for the third party for better or for worse: *für ihr Wohl und Wehe*”²⁷¹ leading to determine only whether “the objective interests involved permit the inference that the parties [debtor/creditor] have [even] implicitly stipulated a duty of care towards third parties”.²⁷² Establishing that kind of intent is however difficult and a special link between the creditor and third parties is now often presumed by German courts. In the context of experts’ opinions, the German High Court went further in considering that the interests of these two parties do not need to be identical anymore (*Einbeziehungsinteresse* condition)²⁷³: it relaxed the requirement of similarity of interests such that the institution of contract with protective effects towards third parties has been applied where creditor and third party had opposing interests.²⁷⁴ This relaxation of the requirement reduces, therefore, the difference with the English approach which does not focus on the relationship between issuers and investors. Here, issuers and investors have divergent interests regarding the level of the rating: issuers seek the highest grade whereas investors would prefer a lower one.²⁷⁵

²⁶⁷ Rosset, *op. cit.*, at p. 30.

²⁶⁸ Forschner, *op. cit.*, at p. 18.

²⁶⁹ Rosset, *op. cit.*, at p. 30.

²⁷⁰ Von Schweinitz, *op. cit.*, at p. 174.

²⁷¹ Dannemann e.a., *op. cit.*, at p. 279.

²⁷² BGH, 2 November 1983, NJW 1984, 355, 356 (‘group buyer case’). And ‘Danish Consul’ case: BGH, 23 January 1985, JZ, 1985, 951. For a good overview of this evolution in the case-law of the German High Court: Coester and Markesinis, *op. cit.*, at pp. 283-84.

²⁷³ Rosset, *op. cit.*, at p. 31.

²⁷⁴ The ‘vendor case’: BGH, 10 November 1994, NJW 1995, 392.

²⁷⁵ Haar, *op. cit.*, at p. 4.

Nevertheless, the aim of the rating is identical for both investors and issuers as it is to give investment information to the investors²⁷⁶ that reflects accurately the issuer's situation.²⁷⁷

Until this point, German authors unanimously consider that these conditions are met.²⁷⁸ The two last conditions are more disputed. They recall concerns that also exist in English law. The recognisability of third parties (*Erkennbarkeit*) is indeed a sensitive issue. For many authors this condition is particularly difficult to meet because the class of claimants is very wide. For instance, the scope of investors is not limited to the primary sale of financial products but would also be extended to the secondary market.²⁷⁹ The risk is to open the 'floodgates' too widely and create an incalculable liability for CRAs.²⁸⁰ This argument echoes the fear of indeterminate liability highlighted in *Caparo*. With regard to this criterion, the German case-law now requires that the category of people potentially harmed can be determined on the basis of objective standards²⁸¹, though there is no need to know the exact identity of third parties or the number of third parties affected.²⁸² The whole question is therefore what can be considered as 'objective standards': is it sufficient that CRAs can foresee investors' reliance? According to von Schweinitz, it requires that "[t]he debtor can recognize both the risks arising to the third party and the interests of the creditor to include this party."²⁸³ In this view, the knowledge of the rating agency that the rating is meant to be used by investors suffices.²⁸⁴ The fulfilment of this criterion is, therefore, debated and will have to be decided by the judiciary. Inspiration could be drawn from the Australian case *Bathurst* in which the foreseeability of the class of claimants depended upon the characteristics of the class (investors in a specific financial product, with the foreseeability of the type of loss).²⁸⁵

Finally, the need for protection (*Schutzbedürftigkeit*) has to be demonstrated. This last requirement is fulfilled when the third party does not have an alternate claim to recover damages: no claim based on tort law or quasi-contractual claim against the rating agency is obtaining. It is considered that no protection is needed when a claim against a financial

²⁷⁶ Forschner, *op. cit.*, at p. 18.

²⁷⁷ Rosset, *op. cit.*, at p. 31.

²⁷⁸ Wildmoser, *op. cit.*, at p. 665.

²⁷⁹ Forschner, *op. cit.*, at p. 18.

²⁸⁰ Rosset, *op. cit.*, at p. 32.

²⁸¹ Dannemann e.a., *op. cit.*, at p. 282.

²⁸² BGH, NJW 1984, 355, 356.

²⁸³ Von Schweinitz, *op. cit.*, at p. 174.

²⁸⁴ Rosset, *op. cit.*, at p. 32.

²⁸⁵ See above, [2014] FCAFC 65, at [1260].

intermediary with the same purpose is at the disposal of the investor.²⁸⁶ The situation is different, however, if the claim is not equal, for instance if it is based on prospectus liability, where the purpose of the claim is different. In that case, a need for protection would exist.²⁸⁷ This need for protection is assessed on the basis of good faith.²⁸⁸

On the other hand, conditions required for the application of liability based on confidence have stronger parallels with the English assumption of responsibility test and focus on the relationship between the rating agency as an expert and investors, in the sense that the importance of the foreseeable and actual reliance on the statement is underlined in *Hedley*.

First, the rating agency has to be in a 'special position of trust' (*Sonderverbindung*), requirement that clearly echoes back the condition of 'reliance on the knowledge and abilities' of the person who made the statement. There is no controversy here as to whether CRAs fulfil this requirement; their important influence on financial markets proves it. Second, a decisive influence (*erheblich beeinflussen*) is required.²⁸⁹ This requirement implies that the expert's behaviour induces third parties to base their decision on the expert's opinion, which is in fact the case for investors who base their investment decisions on credit ratings because CRAs claim particular trust for themselves. Reliance is therefore also important here as in the latter German institution with proximity to the performance or in English law with the foreseeable and actual reliance. Finally, the last condition is the disappointment of the trust the third party placed on the CRA (*Vertrauensenttäuschung*).²⁹⁰ It is, however, unclear whether this mechanism will be applied by German courts to CRAs. The new § 311 III 2 BGB offers a good basis for this expert liability²⁹¹, and parallels can be drawn with cases on appraisal experts, as, in case of solicited ratings, stronger links exist between the rating agency and the issuer. However, many authors do not expect German courts to use this mechanism for rating agencies, because even in the case of appraisal experts, the German High Court has continued to use the contract with protective effects towards third parties instead of taking this new path.²⁹²

As it requires reliance, and position of trust, the quasi-contractual liability of expert in German law is close to the conditions developed in English law regarding the assumption of

²⁸⁶ Brigitte Haar, 'Haftung Für Fehlerhafte Ratings Von Lehman-Zertifikaten – Ein Neuer Baustein Für Ein Verbessertes Regulierungsdesign Im Ratingsektor?', *NZG*, (2010), p. 1281.

²⁸⁷ Rosset, *op. cit.*, at p. 33.

²⁸⁸ *Ibid.*

²⁸⁹ Forschner, *op. cit.*

²⁹⁰ Darbellay, *Regulating Credit Rating Agencies*, at p. 82.

²⁹¹ See in this respect Coester and Markesinis, *op. cit.*, at p. 291.

²⁹² Von Schweinitz, *op. cit.*, at p. 178-80.

responsibility; whereas one could consider the conditions applied for the contract with protective effects towards third parties closer to the conditions developed in *Caparo*: limitation of the scope of claimants via proximity requirements and fear of indeterminate liability. According to the criteria determined by Heukamp on the basis of civil liability for experts, an important criterion is the foreseeability by the expert of the use of its statement; the two other conditions developed being the specific and known competence of the person and that the statement was required “in order that it may be used vis-à-vis third parties”.²⁹³ I consider that these conditions could be met in the settings of the fact pattern followed here; but sensible conditions related to the limits of liability will depend on the specific circumstances of each case.

(iii) Standard of care – breach of duty of care in English, German and French law

The requirements stated above about the establishment of a duty of care and its parallels with the application of (quasi-) contractual liability in German law serve as a filter to limit the number of claimants allowed to bring a civil liability claim on these bases. The next step is to determine what breach of the duty of care is relevant and, therefore, what standard of care applied. It is important to recall here that French law does not contain such a distinction between the assessment of whether a duty of care exists and the content of this duty of care. Only one step exists in French law: the determination of the standard of care, applied in specific circumstances. This is the reason why discussion about the French system comes only at this stage.

Let us have a closer look to *fault* in itself now (*une faute*, the breach of the standard of care, the breach of investors’ protected interests). All three national laws have set an objective standard to which the defendant’s behaviour has to be compared²⁹⁴: the behaviour that a reasonable man will in any case adopt. Peculiarities of the defendant will not be taken into account: his behaviour will not be compared to the way he usually conducts his affairs, but to the objective standard.²⁹⁵ This objective standard will however vary according to the

²⁹³ Ibid., at p. 147, who cites Wessel Heukamp, “Brauchen wir eine kapitalmarktrechtliche Dritthaftung von Wirtschaftsprüfern?”, *ZHR* 69 (2005), 471-494 [477].

²⁹⁴ G. H. Treitel, *Remedies for Breach of Contract : A Comparative Account* (Oxford; New York: Clarendon Press; Oxford University Press, 1988), at p. 11; *Blyth v Company of Proprietors of the Birmingham Waterworks* (1856) 156 ER 1047, 1049: “[n]egligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”; Van Dam, *op. cit.*, at p. 230.

²⁹⁵ Allan Beever, *Rediscovering the Law of Negligence* (Oxford; Portland, Or.: Hart, 2007), at p. 78; Treitel, *Remedies for Breach of Contract : A Comparative Account*, at p. 12.

circumstances.²⁹⁶ The whole question is to determine in our context, what constitutes a prudent and reasonable rating agency. In France, the general norm of behaviour requires each person to behave in a prudent and diligent way, in all circumstances.²⁹⁷ The definition of this category is much imprinted with an extended power taken by the judiciary.²⁹⁸ As no case-law exists on this particular issue in any of the three jurisdictions, I attempt here to determine what could be this general norm of behaviour for CRAs.

In English law, the question is also “what, in the circumstances, the reasonable man would have foreseen.”²⁹⁹ This concept of foreseeability refers to an event that is at the same time imaginable and that implies “some reasonable prospect or expectation that it will arise”.³⁰⁰ Foreseeability depends also upon knowledge and experience of the reasonable man, it is not simple probability.³⁰¹ It is even more the case when it comes to professionals like rating agencies. For professionals who hold themselves out “as having professional skill, the law expects [them] to show the amount of competence associated with the proper discharge of the duties of that profession ... and if [they fall] short of that and [injure] someone in consequence, [they are] not behaving reasonably.”³⁰² Therefore, as is underlined in French literature, a high *degree of diligence* is to be imposed on CRAs as they are considered as professional actors, knowing that their rating will have an impact.³⁰³ This high standard is explained by the use of in *abstracto* concepts – the comparison with ‘*prudente et diligente*’ behaviour of other CRA in France – to determine whether there is a fault or not.³⁰⁴ On the basis of many elements detailed earlier, such as CRAs’ role as gatekeepers or the prominent influence of their ratings in financial relationships, I consider that CRAs should be view as professional actors, like other gatekeepers such as auditors or accountants.

A professional standard behaviour will respect standards applied to the profession in question, including then rules of conduct. Rules of the IOSCO Code of Conduct therefore be

²⁹⁶ Rogers, *op. cit.*, at § 5-76.

²⁹⁷ Ghestin, *op. cit.*, at p. 380. In addition, investors could theoretically base their claim under Article 1382 of the Code civil, on a breach of a contractual duty that the CRA owes to the issuer, if such a failure harms them (Cass. Ass. Plen., Bull n°9, December 1 2006). Frédéric Leclerc, 'La Responsabilité Des Agences De Notation', in Faculté De Droit Et D'économie De La Martinique Université Des Antilles Et De La Guyane, Cerjda (ed.), *La Notation Des Entreprises : Colloque Du 28 Novembre 2008* (Paris: Harmattan, 2010), at p. 146; Christophe Quézel-Ambrunaz, 'Fault, Damage and the Equivalence Principle in French Law', *Journal of European Tort Law*, 3/1 (2012), at p. 27.

²⁹⁸ Ghestin, *op. cit.*, at p. 381.

²⁹⁹ Rogers, *op. cit.*, at § 5-77.

³⁰⁰ *Ibid.* quoting *Fallowka v Royal Oak Ventures Inc* [2008] NWTCA 4; [2008] 7 W.W.R. 411 at [53].

³⁰¹ *Ibid.*, at § 5-77.

³⁰² *Ibid.*, at § 5-79.

³⁰³ Leclerc, *op. cit.*, at p. 154; Merville, *op. cit.*, at p. 5.

³⁰⁴ Leclerc, *op. cit.*, at p. 154.

the basis of standard of care here as these rules shape the way CRAs are expected to behave³⁰⁵ and constitute the roots of “standards of care and diligence usually expected from CRAs”.³⁰⁶ Rogers speaks of a “considerable deference” of English Courts to professional standards.³⁰⁷ Most of these rules have been integrated in the EU Regulation on CRAs; but not all of them. Merville rightly points out that the requirement of having a sufficient number of analysts (recommendation 1.9) is not included in the EU Regulation, but on the basis of the IOSCO Code, an insufficient number of analysts assigned could constitute fault if all the human resources needed were not devoted to the rating process in question.³⁰⁸ On the basis of these standards, one can expect a credit rating to be an objective, cautious and prospective result.³⁰⁹ The objectivity of the rating reflects the independent and unbiased rating process; the caution implies a communication of all necessary nuances and verifications of the information on which the rating is based; the prospective character implies the consideration of known and predictable future elements.³¹⁰ Caution should also include the obligation to be fully informed and “to use this information in the most efficient way”.³¹¹ A conflict of interest between the rating agency and the issuer rated could in my opinion create serious doubts for a judge as to the objectivity of the rating, in case the proofs brought by claimants do not meet the standards for fault required by the EU Regulation.

An error in the rating process would be the result of negligent behaviour or an ‘*incompétence*’, meaning an act that another professional, in the same circumstances would not have committed because the normal methods of this profession would differ from the ones used by the defendant.³¹² It is true that rating firms issue ratings on the basis of their own peculiar rating process, implying that a different evaluation of the several elements taken into account could happen. Fault would be demonstrated, however, if the rating process exceeded its evaluative leeway.³¹³ Behaviour which would not follow the professionalism required, for instance, by issuing a rating without all the due care required, *e.g.* without the procurement of all the relevant information, would be consider wrongful. In this respect, Leclerc draws inspiration from the case-law on contracts to provide information (*contrat de*

³⁰⁵ For France: *ibid.*, at pp. 145-46.

³⁰⁶ Merville, *op. cit.*, at § 18.

³⁰⁷ For the UK: Rogers, *op. cit.*, at § 5-80.

³⁰⁸ Merville, *op. cit.*, at p. 6.

³⁰⁹ Leclerc, *op. cit.*, at p. 154.

³¹⁰ *Ibid.*, at p. 154.

³¹¹ Edith Weemaels, 'La Responsabilité Des Agences De Notation', *Revue Pratique des Sociétés*, 2 (2012), 123-230 at 169.

³¹² Leclerc, *op. cit.*, at p. 153.

³¹³ *Ibid.*, at p. 153 and note 67.

renseignement) which obliges the provider of information to “inform himself in order to inform in full awareness”.³¹⁴

French authors consider that the proof of such wrongful behaviour would be easier. First, when the rating awarded was very high, or the highest, but followed by a quick and strong downgrade; second, with regard to an investment grade rating that fell quickly into the speculative grade category.³¹⁵ These situations would indicate fault. If the rating in question was awarding the highest grade, it means that the rating agency should have awarded it with all the care required. A quick downgrade of such high rating leads to the assumption that all the carefulness required was not given to the awarding of the highest grade.³¹⁶

In Germany, the standard of care required is established on the basis of the principle of good faith. In contrast to French and English law, thanks to the institution of contract with protective effects towards third parties, investors will be able the use of legal principles applied to contracts. Indeed, on the one hand, § 280 I (1) BGB presumes the existence of a negligent behaviour³¹⁷ and, on the other hand, § 278 I (1) BGB establishes “the imputation of an agent’s fault in the course of performance”.³¹⁸ Investors will only have to demonstrate the existence of a contract between the CRA and the issuer (the source of its protection) and the inaccuracy of the rating, which constitutes a breach of the protection of his interests.³¹⁹ The burden of proof is thus considerably lightened for claimants as they will only have to establish a contract involving the rating agency and the issuer as well as the inaccuracy of the rating.³²⁰ Once this is established, it will be for the rating agency to prove that it met the standard of care because, according to § 280 I (1) BGB, the proof that the debtor “is not liable for the failure to comply with a duty always rests with him”. Finally, the liability based on confidence triggers the application of § 241 BGB that imposes an obligation “not to harm the ‘interests’ of others”.³²¹

A specific question arises however under German law about the defences that could be raised by rating agencies, as liability mainly takes place in a contractual framework. Indeed, § 334 BGB provides contractual defences that parties can use against each other. Specifically,

³¹⁴ Ibid., at p. 154. Cass. Civ. 2, October 19 1994, Bull. Civ. II, n°200, D. 1995

³¹⁵ Ibid., at pp. 160-61; Merville, *op. cit.*, at p. 19.

³¹⁶ Leclerc, *op. cit.*, at p. 160.

³¹⁷ Treitel, *Remedies for Breach of Contract : A Comparative Account*, at p. 8. Negligence is one of the two behaviours that could be proven on the basis of § 276 BGB: “the debtor is responsible for deliberate acts and negligence” - *Vorsatz und Fahrlässigkeit*.

³¹⁸ Von Schweinitz, *op. cit.*, at p. 173.

³¹⁹ Ibid., at p. 177. Wildmoser, 'Haftung Von Ratingagenturen Gegenüber Anlegern?', at p. 664.

³²⁰ Von Schweinitz, *op. cit.*, at p. 177.

³²¹ Basil Markesinis e.a., *The German Law of Contract : A Comparative Treatise* (Oxford: Hart, 2006), at p. 93.

rating firms could sustain that their rating was inaccurate because of wrong information provided by the issuer.³²² It is recognised in the German literature that the use of these objections would be logical, since third parties are not supposed to have more rights than the actual party to the contract. However, this solution would lead to inequitable consequences for investors as their interests are not aligned with that of the issuer.³²³ Nevertheless, as Rosset argues, not applying this provision when the issuer was in fact responsible for the inaccuracy of information provided would be against the principle of good faith.³²⁴

b. Establishment of fault for breach of statute

Next to the breach of standard of care on the basis of the different national laws, the other option of investors is to claim breach of statute, especially breach of the new EU Regulation.

To assess whether an investor could claim a fault of an agency based on the breach of a law under French law, it is required that the provision violated has an “imperative” characteristic,³²⁵ meaning that the contractual parties cannot set terms that are contrary, or that the behaviour breaches the right given by this legal provision.³²⁶ As we saw, in Germany, it is § 823 II BGB that provides a cause of action for breach of statute but only if it can be established that the particular statute protected the rights of the claimant. In English law, statute can be the source of a duty of care, whose breach is sanctioned under the tort of negligence.

What are the relevant legal norms that apply to CRAs and that could base such a claim?

First, it is to be noted that CRAs are excluded from the scope of the new Market in Financial Instruments Directive (MiFID)³²⁷ as ratings cannot be classified as investment advice because they do not implicitly or explicitly give recommendations to buy.³²⁸ Then, does the Market Abuse Regulation (MAR) apply? This new regulation aims at ensuring investors’ protection and market integrity by prohibiting market abuses: insider dealing, unlawful disclosure of inside information and market manipulations.³²⁹ Under the former

³²² Rosset, *op. cit.*, at p. 180; Von Schweinitz, *op. cit.*, p. 180.

³²³ Coester, *op. cit.*, at p. 286.

³²⁴ Rosset, *op. cit.*, at p. 35.

³²⁵ Ghestin, *op. cit.*, at p. 375.

³²⁶ *Ibid.*, at p. 377.

³²⁷ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Article 4.1.4.

³²⁸ Communication from the Commission on Credit Rating Agencies (2006/C 59/02), O.J.E.U., 11.3.2006, p. 5. Eddy Wymeersch; Marc Kruithof, 'Regulation and Liability of Credit Rating Agencies under Belgian Law', *Financial Law Institute - Working Paper Series*, /2006-05 (2006), at p. 16.

³²⁹ MAR, preamble (2), (7), (8).

regime of the implementing Directive on conflict of interests³³⁰, credit ratings again fell outside the definition of ‘financial recommendation’ for the purposes of this directive; rating firms were only invited to adopt internal measures insuring the disclosure of potential conflict of interests. That was an incentive of the Commission to push CRAs toward more transparency, before the adoption of the Regulation on CRAs themselves. The new MAR’s provision on insider information and market manipulation will, however, apply to CRAs because they can have access to inside information.³³¹ The insider dealing and unlawful disclosure of inside information provisions apply both to the inside sources that issuers provide to CRAs and to the ratings themselves if for instance the rating firm had access to “non-public information of the issuer”³³². Rating firms could also be subject to the provisions on market manipulation when they “knew, or ought to have known, that the credit rating was false or misleading”.³³³ It appears difficult, however, to make out a specific duty of care towards investors from this legislation in either the UK or in France. Nor will this legislation be of use in Germany because there is no right nor protected interest in this legislation that could be protected by German tort law provisions.

What is left is only the obligations stated in the EU Regulation on CRAs. The Article 35a of the CRA3 Regulation states that the first condition for CRAs’ civil liability to arise is a breach of an obligation laid down in Annex III of the CRA Regulation. In sum, these obligations cover both procedural and substantial requirements, and insure the quality of ratings, transparency, that ratings are based on sufficient information or that CRAs take necessary measures to avoid conflicts of interest.³³⁴ For instance, CRAs should ensure that their “business interest does not impair the independence or accuracy of the credit rating activities.”³³⁵ An illustration would be the existence of a conflict of interest between the rating agency and the issuer rated: let us imagine that the analyst working on the elaboration of the credit rating had in fact worked for the issuer in some way before. That situation would amount to a breach of the Regulation. It is considered that the settings of the Australian case explained above could be an illustration of an infringement of the EU Regulation as the

³³⁰ Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interests, O.J.E.U., 24.12.2003, L 339/73, preamble (10).

³³¹ MAR, Article 18 (1).

³³² Communication Commission 2006, *op. cit.*, p. 4 ; Von Schweinitz, *op. cit.*, at pp. 127-28.

³³³ Communication Commission 2006, *op. cit.*, p. 4.

³³⁴ Harry Edwards, 'Cra 3 and the Liability of Rating Agencies: Inconsistent Messages from the Regulation on Credit Rating Agencies in Europe', *Law and Financial Markets Review*, 7/4 (2013a), at p. 188; Merville, *op. cit.*, at § 18.

³³⁵ Annex III to the CRA Regulation Section I (4).

ruling was based on the information and methodologies used by the rating agency, which would be punished under Article 35a of the Regulation.³³⁶

The burden of proof of one of these infringements lies with the claimant, who will have to “present *accurate and detailed information* indicating that the credit rating agency has committed an infringement of this Regulation, and that that infringement had an impact on the credit rating issued.”³³⁷ It is not without difficulty for the claimant to prove the elements mentioned above, because they require, for instance, access to documents used by CRAs to make their ratings. These documents are often confidential because they are provided by the issuer to the rating agency directly.³³⁸

This statutory cause of action requires that a breach of one of these obligations must have been committed “intentionally or with gross negligence.” The level of characterisation of the proscribed behaviour was not put at the lowest level, which reflects an idea of avoiding over-deterrence. Requiring intentional or grossly negligent behaviour serves already as a filter to select the potential claims. However, even if the elements of the fault are determined at the European level, the notions of “fraud”, “gross negligence” are to be defined by the competent national judge on the basis of the pertinent national law. This definition can either open or close the possibility of recovery for investors.

In the UK, the Credit Rating Agencies (Civil liability) Regulations 2013 provide definitions of which behaviour is qualified as intentional or reckless:

“3. In Article 35a, an infringement shall be considered to have been committed *intentionally*³³⁹ by the credit rating agency if the senior management of the credit rating agency acted deliberately to commit the infringement.

4. (1) In Article 35a, an infringement shall be considered to have been committed with *gross negligence*³⁴⁰ if the senior management of the credit rating agency were reckless as to whether the infringement occurred.

(2) For the purposes of this regulation, the senior management of a credit rating agency are reckless if they act without caring whether an infringement occurs.”

The tort of deceit could guide English courts in the interpretation of these provisions as “the tort of deceit requires that the defendant knew of the falsity of his statement or was reckless as to its veracity. This must be coupled with a deliberate intention upon which to induce the claimant to rely.”³⁴¹ It should be noted, however, that the rest of the provisions of

³³⁶ For instance on the basis of Annex III Section I (42) or (43). Edwards, 'Cra 3 and the Liability of Rating Agencies: Inconsistent Messages from the Regulation on Credit Rating Agencies in Europe', at p. 188.

³³⁷ Article 35 (2) of the CRA3 Regulation. Emphasis added.

³³⁸ Thépot, *op. cit.*, at p. 7.

³³⁹ Emphasis added.

³⁴⁰ Emphasis added.

³⁴¹ Van dam, *op. cit.*, p. 229.

the regulations adopted by the UK literally refers to the tort of negligence for the other elements of civil liability.

The solution has still to be found in Germany and France, for France it is likely that negligence will suffice, in line with articles L. 544-5 and following of the *Code monétaire et financier* for infringements of the initial EU Regulation on CRAs and as Article 35 (5) states that “[t]his Article does not exclude further civil liability claims in accordance with national law.”³⁴² It is highly unlikely that investors would base their claim in France on this EU provision, which requires a higher level of proof for the same breach that can be condemned on the basis of simple negligence, in virtue of the *Code monétaire et financier*. The Rapporteur during the adoption procedure of the specific French provision emphasised the possibility of fault when the breach of the EU obligations resulted from negligent or a non-cautious behaviour.³⁴³

In Germany, as we have seen, if we consider that this Regulation protects investors’ interests, § 823 II BGB should apply, but as this general provision only requires negligence, we can expect German Courts to apply the high level of behaviour required in the Regulation as a *lex specialis*.³⁴⁴ The interpretation given by the judiciary will determine which behaviour really corresponds to a fault committed “intentionally or with gross negligence”. If the judiciary applies similar reasoning to that developed under § 826 BGB – the provision requiring an intentional or grossly negligent action *contra bona mores* – then one can expect that the degree of fault required will be lower than what could have been expected. Indeed, the interpretation given by courts to this provision has widened its scope and allowed its application in case of *dolus eventualis*, “meaning that a person accepts the consequences of his conduct as being inevitable even if he did not wish those consequences to occur.”³⁴⁵ Courts’ interpretation also includes recklessness (*Leichtfertigkeit*) and applied it to auditors when the auditor was aware of the reckless character of his act³⁴⁶, knowing that the

³⁴² This consideration can also be found in the preamble of the CRA3 Regulation: “(35) (...) In particular, Member States should be able to maintain national civil liability regimes which are more favourable to investors or issuers or which are not based on an infringement of Regulation (EC) No 1060/2009”.

³⁴³ J. Chartier, Report in the name of the Commission of finances, general economy and budgetary control of the proposal of “la loi de regulation bancaire et financière”, n°2165, discussion on Article 3.

³⁴⁴ Forscher, *op. cit.*, p. 20.

³⁴⁵ Van Dam, *op. cit.*, at p. 83: Moreover, the intentional character is limited to the infringement and neither does imply the willingness of damage consequential to the infringement nor the knowledge of the identity of the person harmed.

³⁴⁶ *Ibid.*, at p. 84.

information provided was of particular importance for a third party.³⁴⁷ Given the known impact that ratings have on financial markets, we consider that rating agencies are aware that damage can result from erroneous ratings because, in my opinion, CRAs know that investors rely on their ratings; but establishing that the rating agency knew its conduct was reckless is more difficult.³⁴⁸

Finally, to succeed in their claim, investors will have to demonstrate that they have “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.”³⁴⁹ These concepts were defined in the Regulations adopted by the UK, first as a reference to the test of reasonable reliance in negligence claims³⁵⁰, and second, as a reference to “the care a reasonably prudent investor would have exercised in the circumstances.”³⁵¹ This requirement is a way of verifying that investors do not detrimentally rely on credit ratings.

In sum, the choice of investor’s cause of action will mainly depend on evidence she has at her disposal. Thus, if she has detailed information on an infringement of the CRA Regulation, proving a gross negligence or a fraud on the part of the agency, this new provision will assist her claim. However, if she does not have detailed information or only evidence of negligent behaviour – except in France – it is more likely that her claim will be based directly on national liability regimes. In this latter case, additional hurdles to those in the EU Regulation will still exist, however, such as conditions limiting the liability according to the class of claimants. Uncertainties remain as to how judges will apply these conditions in the UK and in Germany, but also as to how judges will apply the requirements of the new EU provision.

³⁴⁷ Gerald Rieckers Oliver Spindler, *Tort Law in Germany* (Alphen aan den Rijn, The Netherlands; Frederick, Md.: Kluwer Law International; Sold and distributed in North, Central, and South America by Aspen Publishers, 2011) at p. 64, § 93.

³⁴⁸ Von Schweinitz, *op. cit.*, at p. 189. “[a] wrongful rating will, however, only qualify as having been rendered in an unconscionable manner if the rating is the result of gross negligence.” Rosset, *op. cit.*, at p. 27. This author takes the example of collusion between the rating agency and the issuer to influence the rating, that is however highly difficult to prove.

³⁴⁹ Article 35a (1) of the CRA3 Regulation.

³⁵⁰ Regulation 6 of the Credit Rating Agencies (Civil Liability) Regulation adopted in the UK in July 2013.

³⁵¹ Regulation 7 of the Credit Rating Agencies (Civil Liability) Regulation adopted in the UK in July 2013.

II. Damage

The following requirement is damage, *dommage* or *Schaden*. This requirement has a different importance in France and the other two Member States studied. Because strict conditions are not imposed in French law prior to the establishment of a duty of care, control mechanisms occur at the stage of the second and third liability requirements, damage and causal link.

In each of the three legal traditions herein examined, damage is required for a liability claim to succeed.³⁵² Even though damage covered by the EU Regulation³⁵³ is “any damage caused to investors”, damage suffered by investors will usually be economic. Indeed, their harm will consist of economic losses, losses of the money they invested in companies with high ratings at first and which were (strongly) downgraded afterwards, but also the loss of money they could have obtained if they had invested in another company or product. Economic loss is a concept that has a distinct legal meaning in several legal traditions to be studied. The meaning of ‘pure economic loss’ appears to be the same both in German and English law: damage not connected to physical injury, harm to property or other rights protected by law.³⁵⁴ As it has already been underlined above, this notion brings about policy questions as well as practical hurdles for investors because recovery of economic losses is more difficult under German and English law than the recovery of physical damage. Such a distinction and such a strong disinclination towards recovery does not find a place in French law.

In Germany, the recovery of pure economic loss, called *reiner Vermögensschaden*, differs according to the legal basis chosen. Pure economic loss is recoverable under contract with protective effects towards third parties and liability based on confidence. The development of these two doctrines is indeed explained by the limits to the recovery of pure economic loss in German tort law. In the UK, since *Hedley Byrne* the House of Lords has applied the law of negligence towards third parties who suffered pure economic loss.³⁵⁵ Once the cause of action chosen authorises recovery for this specific kind of loss – after having put specific conditions for the use of that cause of action for instance in English law – the problem of the

³⁵² Van Dam, *op. cit.*, at § 1202-1.

³⁵³ Article 35(a) of the CRA3 Regulation does not specify the kind of damage suffered by investors, its definition is instead left to judges of the Member States who should interpret it in accordance with the national law applicable.

³⁵⁴ Christian Von Bar, 'Liability for Information and Opinions Causing Pure Economic Loss to Third Parties: A Comparison of English and German Case Law', *The Gradual Convergence* (1994), at p. 106.

³⁵⁵ Von Schweinitz, *op. cit.*, at p. 130.

nature of the loss is no longer problematic. In France, the scope of the definition of harm is very wide³⁵⁶ and the damage is governed by the principle of full recovery (*restitutio in integrum*).³⁵⁷ This principle applies to every kind of damage without distinction and implies a correspondence between the harm suffered and the recovery. Therefore, the distinction between pure economic loss and damages arising on the basis of physical injury does not matter much in French law, as the liability regime allows for “a recovery of everything or almost [everything]”.³⁵⁸

With regard to the conditions required for damage³⁵⁹, the main condition that is similar in the three laws is that the harm suffered by the claimant has to be compensable.³⁶⁰ This condition will not be problematic for investors; it seems obvious that their damage is reparable, due to the economic nature of the damage. The demonstration by investors of the amount of their quantifiable monetary loss suffices in the UK³⁶¹ and in Germany.³⁶²

Other conditions are required in French law, which were inspired by articles of the Civil Code regarding contracts (1146-1155 C.c.) and further developed by the judiciary. The damage should be reparable, personal, certain, direct and legitimate.³⁶³ The condition of certainty implies that only harms that are ‘sure’ will be recovered. Hypothetical or eventual harms are not covered by civil liability. This is not the case here. Investors’ damage is the money they put into issuers in which they would not have invested without the rating in question. Second, the directness of the harm requires the harm to be an outcome of the act that caused it.³⁶⁴ It comes, in fact, only from the requirement of a causal link.³⁶⁵ In this respect, I refer to the developments regarding the causal link in French law in the next section. Third, the legitimate character of the harm aims to avoid recovery based on

³⁵⁶ Ghestin, *op. cit.*, at p. 15.

³⁵⁷ Christian Deschamps Lapoyade, ‘La Réparation Du Préjudice Économique En Droit Français’, in Efstathios K. Banakas (ed.), *Civil Liability for Pure Economic Loss* (London: Kluwer Law International, 1996).

³⁵⁸ *Ibid.*, at p. 89.

³⁵⁹ I chose to study the remoteness of the damage in English law in the following section on causation.

³⁶⁰ For Germany see Rosset, *op. cit.*, at p. 38.

³⁶¹ Christian Von Bar, *The Common European Law of Torts* (Volume Two; Oxford: Oxford University Press, 2000) at p. 6: In English law “damage as a general term represents the detriment the duty of care was intended to avoid”. Regulation n°14 on Credit Rating Agencies (Civil liability) of July 30 2003 establishes that “[t]he damages recoverable by an investor in a claim under Article 35a are (...) (b) where there is no such contract, the damages that would be recoverable by the investor if the investor had succeeded in a claim against the credit rating agency in the tort of negligence.”

³⁶² For Germany see Rosset, *op. cit.*, at p. 38. For the UK see Van Dam, *op. cit.*, at § 1203-3.

³⁶³ See Van Dam, *op. cit.*, at § 1203-1 who cites e.g. Civ. 2e, 3 October 1990, Bull. civ. II, no. 184; Civ. 2e 20 June 1985, Bull. civ. 1985. II, no. 125. Some authors consider that the certainty and directness conditions are essential conditions and the personality and legitimacy are ‘discussed’ conditions but at the end of the day, all of them have to be fulfilled to trigger the application of 1382 C.c. see Deschamps, *op. cit.*

³⁶⁴ Deschamps, *op. cit.*, at pp. 94-95.

³⁶⁵ Ghestin, *op. cit.*, at p. 15.

illegitimate claims - for people in an illegal situation. The certain character of the damage should not be in question, nor should be the condition of legitimacy. In other words, these conditions will be fulfilled as long as a real harm done to the claimant is demonstrated, the quick downgrade of a rating alone is insufficient to show the certainty and directness of the loss.³⁶⁶ However, the last condition, the personal character of the damage could pose a problem for investors. According to Leclerc, to establish that personal damage, it does not suffice to invoke the harm caused to the financial market as this harm constitutes a damage of general interest and not damage specific to the individual investor.³⁶⁷ Next to the causation requirement, the conditions for recoverable damage are designed to control the limits of recovery in the French liability system, especially the requirement for *personal* damage that limits the number of claimants.³⁶⁸

The recovery awarded will of course be in money.³⁶⁹ The amount of damages awarded differs from one legal system to another. In every situation, especially in German and French laws, the aim of the litigation will be to place the claimant in the same position had he not trusted the rating.³⁷⁰ French law does not take into account the gravity of the wrongful act to determine the amount of damages awarded.³⁷¹ However, financial harm can be difficult to determine and judges can impose a fixed recovery when it is impossible to determine the required harm.³⁷² In addition, investors could argue that they lost an opportunity to gain if they had invested their money in other products. This loss of chance is argued to be recoverable under French law according to French literature³⁷³, implying also a loosening of the causality requirements.³⁷⁴ I will however not expend more space on this subject here.

³⁶⁶ Leclerc, *op. cit.*, at p. 161.

³⁶⁷ *Ibid.*

³⁶⁸ Van Dam, *op. cit.*, at § 1203-1.

³⁶⁹ A pecuniary loss cannot be compensation by restoration. Both French and German laws take as principle that compensation in money comes only when restoration is not possible or not suitable (§ 251 (1) BGB) – see Rosset, *op. cit.*, at p. 38; Van Dam, *op. cit.*, at § 1203-2: Recovery of damages is covered in German law by Sections 249 to 254 BGB, which contains general principles applicable to breach of contracts as well as tort law. On the contrary, in English law the principle is that damages are a sum of money. On the contrary, in English law the principle is that damages are a sum of money – see *ibid.*, at § 1203-3. Tony Weir, *Tort Law* (New York: Oxford University Press, 2002), at p. 192.

³⁷⁰ § 249 I BGB; Rosset, *op. cit.*, at p. 38.

³⁷¹ Deschamps, *op. cit.*, at p. 92.

³⁷² *Ibid.*

³⁷³ Maréchal, 'Les Conséquences De La Qualification Des Notations Financières Sur La Responsabilité Des Agences', at § 13; Banakas, 'Liability for Incorrect Financial Information: Theory and Practice in a General Clause System and in a Protected Interests System', at p. 262; De Montesquiou, *op. cit.*, at p. 166.

³⁷⁴ Vernon Valentine; Bussani Palmer, Mauro, 'Pure Economic Loss: The Ways to Recovery', *Electronic Journal of Comparative Law*, vol. 11.3 (2007), at p. 37.

It seems, however, that a full recovery of losses incurred by investors will rarely be given by courts given the uncertainty of investors' behaviour in absence of flawed rating.³⁷⁵ In addition, two ways exist to reduce the amount of damages awarded. On the one hand, on the basis of the new EU provision, CRAs can limit the amount of their liability towards investors, for the purpose of their civil liability for breach of CRA3 Regulation; on the other hand, contributory negligence may apply.

The only relevant impact on damages of the CRA3 Regulation is the possibility given by paragraph 3 of the civil liability provision to rating agencies to limit the amount of damages they would give in a case of civil liability:

“3. The civil liability of Credit Rating Agencies, as referred to in paragraph 1, shall only be limited in advance where that limitation is:

(a) reasonable and proportionate; and

(b) allowed by the applicable national law in accordance with paragraph 4.

Any limitation that does not comply with the first subparagraph, or any exclusion of civil liability shall be deprived of any legal effect.”

The reasonable and proportionate conditions leave the answer to the national judiciary as to what kind of clause will be allowed, as the interpretation of concepts of ‘reasonable’ and ‘proportionate’ are the task of national courts.³⁷⁶ This new provision departs from the usual rule applicable to limitations of liability that allows limitations only when consented to by both parties or provided by statute since, as Wagner underlines, the rating agencies can determine the amount of damages that they are willing to pay.³⁷⁷

On the other hand, a claimant's own negligence can lead to a reduction of damages: in France such a device was developed by the judiciary (*la faute de la victime*); whereas in Germany and the UK statutes cover contributory negligence, respectively § 254 BGB (*Mitverschulden*) in Germany and the Law Reform (Contributory Negligence) Act of 1945 in the UK.³⁷⁸ This is indeed a *partial* defence leading only to a reduction of damages and not to a dismissal of the action as was the case in the UK prior to the legislator's intervention in 1945.³⁷⁹ Contributory negligence is also a question of causality. A claimant's behaviour will

³⁷⁵ De Montesquiou, *op. cit.*, at p. 166.

³⁷⁶ Article 35(a) 4. CRA3 Regulation; Wagner, 'Gatekeeper Liability: A Response to the Financial Crisis', at p. 26.

³⁷⁷ *Ibid.*

³⁷⁸ Van Dam, *op. cit.*, at § 1208-1. In the UK, the application of the obligation for the claimant to mitigate its loss and the application of the Law Reform (Contributory Negligence) Act of 1945 are recalled in Regulation 15 (2) on Credit Rating Agencies (Civil liability) of July 2013.

³⁷⁹ <http://www.legislation.gov.uk/ukpga/Geo6/8-9/28/section/1> (last accessed 06/06/2014).

¹ Apportionment of liability in case of contributory negligence.

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person

imply a reduction of damages only if his damage was linked to his own negligent conduct.³⁸⁰ For the application of contributory negligence, “[i]t is considered decisive whether the claimant behaved as could have been expected from a reasonable person in the given circumstances.”³⁸¹ The standard of behaviour applied in this respect to the claimant is “the same as that of the ‘reasonable person’ in negligence liability generally.”³⁸² The test applied under German law is laid out in § 276 BGB (*Fahrlässigkeit*). An objective test is also applied under French law but it has to be underlined that *la faute de la victime* can constitute a complete defence under French law, if the defendant manages to prove that “the victim’s conduct was the only cause of the damage, which means that it must have been unforeseeable and unavoidable (*imprévisible et irrésistible*)”.³⁸³ In more concrete terms, Buckley recognises that English contributory negligence can be used in the context of negligent misstatement if the claimant can be blamed for failing to have searched for further advice.³⁸⁴ It can also be applied when the investor’s own credit assessment was *flawed*.³⁸⁵ This defence is, however, difficult to establish. It recalls in a sense the requirement of reasonable reliance of investors in the EU Regulation, but these mechanisms do not have the same function.

The use of this defence should be distinguished according to the kind of claimant: if the claimant is a small investor it will be more reasonable for her to rely solely on a credit rating to make her investment decision, but it would not be that reasonable for institutional investors, according to von Schweinitz, as they have access to much more information.³⁸⁶ This will only be obviously the case when the rating is clearly flawed and that the institutional investor relied on it.³⁸⁷ The application of this defence and the extent to which it can be used will therefore depend upon the factual circumstances of each case.

These two last mechanisms are important in the context of CRAs’ civil liability in order to keep this liability within equitable boundaries.

suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage. ...’

Wright, ‘Contributory Negligence’, *The Modern Law Review*, 13/1 (1950), 2-23 at p. 2.

³⁸⁰ Van Dam, *op. cit.*, § 1208-3.

³⁸¹ *Ibid.*, at p. 375.

³⁸² Van Dam, *op. cit.*, at p. 376 who quotes Basil Markesinis, Simon Deakin and Angus Johnston, *Markesinis and Deakin’s Tort Law* (6th edn.; Oxford: Clarendon Press, 2008) at 897–899; *Standard Chartered Bank v Pakistan National Shipping*[2003] 1 AC 959 (HL).

³⁸³ Van Dam, *op. cit.*, at p. 376.

³⁸⁴ Buckley, *op. cit.*, at p. 113.

³⁸⁵ Edwards, ‘Cra 3 and the Liability of Rating Agencies: Inconsistent Messages from the Regulation on Credit Rating Agencies in Europe’, at p. 189.

³⁸⁶ Von Schweinitz, *op. cit.*, at p. 143.

³⁸⁷ Carsten Thomas; Konstanz Ebenroth, Thomas Daum, ‘Die Rechtlichen Aspekte Des Ratings Von Emittenten Und Emissionen’, *Zeitschrift für Wirtschafts- und Bankrecht*, 43 (1992), at p. 20.

III. Causal link

Each of the three legal systems examined requires a causal link between the losses suffered and the acts or omissions of the relevant CRA. Each Member State examined does not treat the causal link in an identical manner.³⁸⁸ A common feature is that in all three cases, the causal link is rather complicated to establish because the burden of proof lies on the claimant's shoulders. Two causal links have to be demonstrated: one between the investor's decision to invest and the rating; the other between the CRA's blameworthy behaviour and the rating.³⁸⁹ Concerning the second causal link, Article 35a of the CRA3 Regulation requires that the impact of the infringement on the credit rating be demonstrated. In the UK regulations concerning CRAs, it is considered that "an infringement has an impact on a credit rating if it results in a different rating category being assigned to the issuer or the financial instrument of the issuer to which the credit rating relates"³⁹⁰ whereas the term 'caused' referring to the fact that the infringement caused the investor's damage refers to the test of causation applied in negligence "for the purposes of determining whether an infringement caused damage."³⁹¹ For France and Germany, I consider that the theories of causation developed for the relevant legal bases will be applied to these concepts.

I will briefly expand the theories on causation in the three Member States to assess the concrete causation requirements afterwards. Diverse theories of causation exist in Europe. A distinction between two aspects of causation exists in Germany³⁹² as well as in the UK³⁹³: the test that establishes liability (respectively *haftungsbegründende Kausalität* and factual causation); and the test that limits the extent of liability (respectively *haftungsausfüllende Kausalität* and legal causation or remoteness of damage). As regard to the first aspect, both German and English laws apply similar tests respectively called the *conditio sine qua non* or the "but-for" test. The "but-for" test³⁹⁴ refers as a cause to the wrongful act if the harm would not have happened if this act had not happened either³⁹⁵: "but for the defendant's act would

³⁸⁸ For important contributions on causation see A.-M. Honoré, 'Causation and remoteness of damage', *International Encyclopedia of Comparative Law*, vol. XI, chapter 7; H.L.A. Hart; Tony Honoré, *Causation in the Law* (2nd edn.; Oxford: Clarendon, 1985).

³⁸⁹ Maréchal, 'Les Conséquences De La Qualification Des Notations Financières Sur La Responsabilité Des Agences', at § 14.

³⁹⁰ Regulation n°5.

³⁹¹ Regulation n°8.

³⁹² Van Dam, *op. cit.*, at p. 312.

³⁹³ Frades, *op. cit.*, at p. 131.

³⁹⁴ *Ibid.*, at p. 132. In English law, the purpose of this test is not to allocate the responsibility, but more to "exclude from the causal chain the irrelevant".

³⁹⁵ *Ibid.*, at p. 131; Weir, *op. cit.*, at p. 67.

the damage have occurred?”³⁹⁶ The test is then based on a hypothetical inquiry.³⁹⁷ Therefore, it points as a cause to the act that was “a necessary condition for the occurrence of the injury”,³⁹⁸ echoing back to the *conditio sine qua non* test. To pass these tests, investors will have to demonstrate that ‘but for’ the credit rating, they would not have made their investment decision, which is already difficult to establish if other elements intervened in the decision.

In German and English law the latter stage of causation refers to concepts of foreseeability or predictability of the harm. The theory of *adequate causality* in Germany (“*adäquate Kausalität*”)³⁹⁹ is based on an idea of ‘*predictability*’: a fact will be considered as having caused harm if, when it occurred, it could usually have been predicted that it will cause harm, on the basis of scientific data.⁴⁰⁰ The test of adequacy was established as follows by the German High Court⁴⁰¹:

“A circumstance is an adequate condition of a consequence where it has not inconsiderably increased the objective probability of a consequence of the type which occurred. Consideration shall be given to (a) all the circumstances of the case recognizable to the optimal observer and (b) any further circumstances known to the person creating the condition. The assessment is to be made in the light of the sum of all knowledge and experience available at the time of the assessment. This assessment of adequacy is not really a question of causality but rather the identification of *the extent to which the person creating the condition can equitably be held liable*⁴⁰² for its results.”⁴⁰³

In the main, what differentiates Germany from France and the UK is that *effective certainty* that the defendant's conduct caused some form of harm is required (§ 286 ZPO (Code of Civil Procedure)).

In English law, the ‘legal cause’ also calls for a limitation of the indefinite causes that could exist.⁴⁰⁴ To distinguish between the ‘legal’ causes and factual cause, the judiciary used the concept of remoteness, thereby implying that the defendant’s act should be sufficiently close to the harm.⁴⁰⁵ Close to the spirit of the German adequacy test, English judges use the

³⁹⁶ Rogers, *op. cit.*, at p. 307.

³⁹⁷ *Ibid.*, at p. 308. Richard W. Wright, 'Causation in Tort Law', *California Law Review*, 73/6 (1985) at p. 1776.

³⁹⁸ Frades, *op. cit.*, at p. 131.

³⁹⁹ Ghestin, *op. cit.*, at p. 189.

⁴⁰⁰ *Ibid.*, at p. 189: 'un fait peut être qualifié "cause" d'un dommage, si, au moment où il s'est produit, il pouvait normalement, par référence aux données de la science, faire prévoir la survenance du dommage'.

⁴⁰¹ Von Bar, *The Common European Law of Torts*, at p. 439.

⁴⁰² Emphasis added

⁴⁰³ BGH 23 Oct. 1951, BGHZ 3 p. 261

⁴⁰⁴ Rogers, *op. cit.*, at p. 334. “No defendant is responsible ad infinitum for all the consequences of his wrongful conduct, (...) for otherwise human activity would be unreasonably hampered.”

⁴⁰⁵ Frades, *op. cit.*, at p. 136: This issue of remoteness is ‘everywhere’ in the law of tort: if interferes in the establishment of a duty of care as well as in the determination of the recoverability of the damage. Remoteness

concept of *foreseeability* to determine if the cause is not too remote.⁴⁰⁶ Landmark cases in this area are the *Re Polemis* case (Court of Appeal 1921), *the Wagon Mound* Case (Privy Council 1961)⁴⁰⁷; *The Wagon Mound n°2* case (Privy Council): “[i]t is the *type of harm*, not the precise *way* it occurs nor yet its *extent* which has to be foreseeable.”⁴⁰⁸ The difficulty lies in the determination of “how narrowly the kind of damage in question in any given case must be defined.”⁴⁰⁹ It appears, however, that the approach to foreseeability is rather broad because “[t]he defendant [in tort] will be liable for any type of damage which is reasonably foreseeable *as liable to happen*, even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it.”⁴¹⁰

The standard of proof required for causation is “proof on a balance of probabilities” in the UK, close to what is required by French law but far from German law: “when there are several possible causes of an injury, the plaintiff must show that the defendant’s negligence is the most likely cause of his harm”.⁴¹¹ It is not a matter of certainty but of *probability*.⁴¹²

It has to be underlined that an interplay exists between the requirements for the existence of a duty of care and causation requirements in the UK. Causation issues are less likely to arise, as sufficient proximity between the parties is required “prior to the commission of the tort” for the establishment of a duty of care.⁴¹³ There might be a risk, therefore, that hurdles avoided at the earlier stage of the establishment of a duty of care would reappear at the stage of causation when using the EU cause of action.

The question of causation is treated differently in France, however, because two theories compete: the theory of adequate causality (*théorie de la causalité adéquate*)⁴¹⁴ and the theory of equivalence of conditions (*théorie de l’équivalence des conditions*). According

is therefore not an exclusive question of liability. However, English courts treat this issue at the stage of the legal cause.

⁴⁰⁶ Stathis Banakas, 'Causalité Juridique Et Imputation : Réflexions Sur Quelques Développements Récents En Droit Anglais', *Revue Lamy Droit Civil*, 40 (2007), pp. 93-99 at p. 2.

⁴⁰⁷ Rogers, *op. cit.*, at p. 336: “The essence of *The Wagon Mound* is that in negligence foreseeability is the criterion not only for the existence of a duty of care but also for remoteness of damage, and the Privy Council clearly attached importance to the supposed illogicality of using different tests at different stages of the inquiry in a given case.”

⁴⁰⁸ Weir, *op. cit.*, at p. 78; Van Dam, *op. cit.*, at pp. 317-18: she quotes Lord Guest in *Hughes v Lord Advocate* [1963] AC 837: “it is sufficient if the accident which occurred is of a type which should have been foreseeable by a reasonable careful person ...; the precise concatenation of circumstances need not be envisaged.”; Rogers, *op. cit.*, at p. 339.

⁴⁰⁹ Rogers, *op. cit.*, at p. 339.

⁴¹⁰ *Ibid.*, at p. 340 who quotes from Lord Reid, *C Czarnikow Ltd v Koufos* [1969] 1 A.C. 350 at 385.

⁴¹¹ Frades, *op. cit.*, at p. 132, note 552.

⁴¹² Weir, *op. cit.*, at p. 74.

⁴¹³ Van Dam, *op. cit.*, at p. 318.

⁴¹⁴ Influenced by the German adequacy theory: Ghestin, *op. cit.*; Banakas, 'Liability for Incorrect Financial Information: Theory and Practice in a General Clause System and in a Protected Interests System', at p. 264.

to the latter, a lot of different elements can enter into play to create harm, all these elements being the “conditions” as long as they are *indispensable* to cause it. In this theory, the demonstration of only one of these conditions suffices to establish the causal link required.⁴¹⁵ The legal requirements developed during the time are a combination of both. Inspired by the principles of *certainty* and *directness* stated for causal requirements in the law of contracts (Article 1151 of the Civil Code⁴¹⁶), the *Cour de cassation* determined the conditions required for the causal link.⁴¹⁷ To be the cause of harm, the respondent’s action must be necessary to the occurrence of the harm, meaning that the act should be the *conditio sine qua non* of the harm: would the damage have occurred if the respondent’s action did not happen?⁴¹⁸ A condition of ‘relativity’ can also be drawn from cases. Relativity is to be understood as an “intellectual relationship of correspondence”. In this sense, the illegality of the wrongful act cannot be without link to the harm, it has to be able to explain the causal sequence between the wrongful act and the harm done.⁴¹⁹ Even if “the doubt benefits the respondent”, the required certainty is a ‘sufficient probability’; which is close to what is required by the Common Law and far from what exists in German law.⁴²⁰

Once we look at the concrete causation in the case of CRAs’ civil liability towards investors, we see that several problems will be faced by investors when establishing causation. First, because the harm to the investor appears primarily caused by the failure of the financial product itself, investors will have to prove “that [they] had only undertaken the investment due to the too optimistic grading by the CRA”⁴²¹; second, the fact that in most of cases they did not base their investment decision solely on the basis of a rating; third, even if investors manage to prove wrongful behaviour on the part of the rating agency, not every wrongful behaviour is liable to affect the rating issued. Merville takes the example of a breach of the obligation to rotate analysts: what are the consequences of this breach on the value of the rating issued?⁴²² This nuance is also well illustrated by fault resulting from an insufficient number of analysts and that resulting from insufficient information gathered by

⁴¹⁵ Ghestin, *op. cit.*, at p. 188.

⁴¹⁶ Translation found on <http://www.legifrance.gouv.fr/Traductions/> (last accessed 21/05/2014): “Even in the case where the non-performance of the agreement is due to the debtor’s intentional breach, damages may include, with respect to the loss suffered by the creditor and the profit which he has been deprived of, only what is an immediate and direct consequence of the non-performance of the agreement.”

⁴¹⁷ Ghestin, *op. cit.*, at p. 194.

⁴¹⁸ *Ibid.*, at p. 197-98. Case-law also shows that a causal link exists when the wrongful act worsened the consequences of the damage.

⁴¹⁹ *Ibid.*, at p. 204.

⁴²⁰ *Ibid.*, at p. 250.

⁴²¹ Blaurock, *op. cit.*, at p. 24.

⁴²² Merville, *op. cit.*, at § 19.

the agency.⁴²³ The link appears obvious in the second case whereas in the first, even if fault is recognised, the actual liability would be more difficult to demonstrate. Investors will then have to prove that the credit rating was impacted by the wrongful conduct of the agency, the infringement for instance in the case of conflicts of interests. If we follow the English interpretation it will then suffice to bring sufficient elements showing that the conflict of interest led the rating firm to award a credit rating of a higher category.

The link will be more easily established under English law, because of the “proof on a balance of probabilities”. According to French authors, it appears that the demonstration of a causal link would be the other most difficult element in French law, after the demonstration of the wrongful act.⁴²⁴ According to Leclerc, the problem is that the *Cour de Cassation* gives priority to the *théorie de la causalité adéquate* over the *théorie de l'équivalence des conditions*. This tendency renders the establishment of a causal link more difficult because it would require that the sole reliance on the rating determined the investor to make its investment decision.⁴²⁵ The problem is that, usually, an investment decision will not be based solely on the rating, even if it is mainly based on it. Therefore, elements other than the rating will come into play in the investment decision, rendering the ‘exclusive’ causal link between the rating and the damage incurred because of the financial decision difficult to establish.

Leclerc is of the opinion that the sole grade of the rating would probably not suffice to demonstrate the link between the wrongful act and the damage alleged. Many authors suggest thus to distinguish between small individual investors and institutional investors, implying that it would be easier for institutional investors to establish such causal link on the basis of their internal requirements, obliging them to buy or sell financial products according to their rating.⁴²⁶

Finally, I put forward two suggestions to ease claimants’ task regarding this last requirement. First, inspiration could be drawn by courts from the presumption of causal link existing in German law in the case of prospectus liability.⁴²⁷ In civil cases, German courts have found that causation is presumed between the investment decision and the statement made in the prospectus,⁴²⁸ “if [investors] proved ‘an investment mood’ was created by the

⁴²³ Ibid., at p. 6.

⁴²⁴ Leclerc, *op. cit.*, at p. 161; Maréchal, *op. cit.*, at § 14.

⁴²⁵ Leclerc, *op. cit.*, at p. 161.

⁴²⁶ Ibid., at p. 162; Rosset, *op. cit.*, at p. 38.

⁴²⁷ Blaurock, *op. cit.*, at p. 24. Such a presumption also exists in Dutch law.

⁴²⁸ Forschner, *op. cit.*, at p. 16; Haar, *op. cit.* (2013), at p. 5.

prospectus.”⁴²⁹ German courts went even further in the field of liability for ad hoc disclosure by using the ‘fraud-on-the-market-theory’: the court presumed “relevance of information for securities prices in highly volatile markets”.⁴³⁰ A lot of German authors suggest applying similar mechanisms to the case of rating agencies in order to increase investor’s chances of success.⁴³¹

The second suggestion is to draw inspiration from the recent Australian case-law. In *Bathurst*, the AAA rating was not the sole element on which the councils based their decision, they also took into account LGFS’s recommendation.⁴³² The Australian court appeared flexible as to the issue of causation as it did not require that the rating was the sole cause of councils’ decision and, therefore, the councils’ losses.

We should take the path of facilitating the proof of a causal link for investors because of the role of gatekeepers that CRAs play on the market and because of the great factual reliance brought about by this role. This was the path first taken by the EU legislator but this was later amended and finally the new EU provision does not help investors very much on the side of the burden of proof.

⁴²⁹ Von Schweinitz, *op. cit.*, at p. 181.

⁴³⁰ Haar, *op. cit.* (2013), at p. 6.

⁴³¹ Forscher and Haar as cited above, but also Blaurock, *op. cit.*, at p. 24.

⁴³² [2012] FCA 1200 at [2458].

IV. Obstacles to liability

a. The impact of Freedom of Speech

In the same line of reasoning, the extent to which the freedom of speech protection can impact the actual liability of CRAs is a significant question: does it create an obstacle to any civil liability lawsuit?

This question arises from the ‘quasi-impunity of CRAs’⁴³³ that was developed in the United States on the basis of the First Amendment protection.⁴³⁴ In this respect, the definition of a credit rating as an ‘opinion’, as underlined in the first part, has a significant role to play.⁴³⁵ Ratings are indeed opinions because they are “report(s) issued by the rating agency... based on its own standardized procedures.”⁴³⁶ To summarise⁴³⁷, this qualification as opinions allowed CRAs to claim the protection of the freedom of speech and to consequently obtain *de facto* ‘impunity/immunity’ because the US Courts raised the required liability standard to the level applied to journalists. Claimants had then to bring proof meeting the *actual malice standard*.⁴³⁸ This situation lasted until 2009 when US courts became more circumspect⁴³⁹, a tendency reinforced in 2010 when the Dodd-Frank Act⁴⁴⁰ reformed US civil liability to facilitate lawsuits brought against CRAs.

In Europe, the question of freedom of speech has to be examined in light of both national constitutions and Article 10 ECHR.⁴⁴¹ This latter provision includes ratings in its scope of

⁴³³ Maréchal, 'Les Conséquences De La Qualification Des Notations Financières Sur La Responsabilité Des Agences', at §2.

⁴³⁴ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

⁴³⁵ <http://www.standardandpoors.com/aboutcreditratings/> (last accessed on 08/01/2014): As Standard & Poor’s clearly states on their website: “Credit ratings are opinions (...) They express opinions [and they] should not be viewed as assurances of credit quality or exact measures of the likelihood of default.”

⁴³⁶ Wymeersch, *op. cit.*, at p. 27.

⁴³⁷ For further detail see: Tim Bruyninckx, 'Rating Agencies: Inhoud, Reglementering En Aansprakelijkheid', *jura falconis*, 44/1 (2007-2008), 75-98; T. Nagy, 'Credit Rating Agencies and the First Amendment: Applying Constitutional Journalistic Protections to Subprime Mortgage Litigation', *Minnesota Law Review*, 94/1 (Nov 2009), 140-67.

⁴³⁸ Nagy, *op. cit.*, at p. 142.

⁴³⁹ *Abu Dhabi Commercial Bank v. Et al. V. Morgan Stanley & Co.*, et al. [2009] District Court of New York, No 08-7508; Oster, *op. cit.* (2010), at p. 372, footnote 107, *ibid.*; Miglionico, *Enhancing the Regulation of Credit Rating Agencies, in Search of a Method*, at p. 11.

⁴⁴⁰ One Hundred Eleventh Congress of the United States Of America, 'Dodd-Frank Wall Street Reform and Consumer Protection Act', (H. R. 4173, 2010) at SEC.933. (State of mind in private actions).

⁴⁴¹ Blaurock, *op. cit.*, at p. 20: In Europe, the right to the freedom of speech exists in European instruments and in national Constitutions of the Member States to be studied: Article 11 French Declaration of the Rights of Man and of Citizens; Article 5 Grundgesetz in Germany; Article 10 ECHR and the Article 11 of the Charter of Fundamental Rights of the European Union. http://www.findlaw.co.uk/law/government/constitutional_law/fundamental_rights/500150.html (last accessed

protection.⁴⁴² Here, however, the freedom of speech provisions do not have the same impact as in the US: they do not render rating agencies immune and they do not imply a change in the standard of liability to be applied.⁴⁴³ Two main arguments can be made in the sense of limiting the impact of the freedom of speech on CRAs' civil liability.

On the one hand, the definition of a credit rating also has a role to play in Europe but in a different way. Credit ratings are defined as opinions, both in legislation and on CRA websites. Therefore, they have to be protected by the free speech provisions as they are subjective statements. Even if this view reflected the reality at the origins of the rating industry, legal scholars consider nowadays that credit ratings are not anymore *solely* subjective statements.⁴⁴⁴ Ratings are based on factual elements (companies' accounts, fulfilment of their legal obligations, etc.), they are sometimes accompanied by facts when they are published in the context of a broader report, and can be considered at some point themselves as statement of facts.⁴⁴⁵ Indeed, according to Maréchal & Razafindrakoto, credit ratings can be qualified as *financial information*⁴⁴⁶ because of their significant role for financial markets.⁴⁴⁷ This implies that the qualification of credit ratings in fact changed according to the reliance underlined in the first chapter leading them to become objective statements, statements of facts. We can therefore conclude that, as ratings are both subjective statements and statement of facts⁴⁴⁸, even if the freedom of speech could protect their subjective aspect, it could not in any event protect the entire rating especially its financial information aspect. This is especially true when one thinks that liability claims will criticize questionable behaviour of the rating agency in the rating process which impacted the rating. The result-rating will then not be the sole basis of investors' claim.

On the other hand, Article 10(2) ECHR clearly allows for restrictions if they are set in laws and pursue a legitimate interest. The civil liability rules of each country to be studied can be considered as laws in the sense of Article 10(2) ECHR and they aim at fulfilling a

on 04/03/2014). - Human Rights Act; Oellinger, *Die Haftung Für Ratings. Eine Betrachtung Nach Österreichischem Und Deutschem Recht*, at p. 126.

⁴⁴² Wymeersch, *op. cit.*, at p. 27.

⁴⁴³ *Ibid.*, at p. 27.

⁴⁴⁴ Duffhues, 'The Quality of Credit Ratings and Liability: The Dutch View', p. 3; Uwe Blaurock, 'Verantwortlichkeit Von Ratingagenturen – Steuerung Durch Privat- Oder Aufsichtsrecht?', *ZGR*, 5 (2007a), 603-53.

⁴⁴⁵ Emmenegger, 'Rating Und Haftung', p. 59.

⁴⁴⁶ Maréchal, *op. cit.*, at §2 & §7.

⁴⁴⁷ See above Chapter I.

⁴⁴⁸ Oellinger, *op. cit.*, at p. 90.

legitimate interest: “the protection of the reputation of others.”⁴⁴⁹ This reasoning can also be applied to other Constitutional provisions, as Oellinger clearly states in relation to the German Constitution.⁴⁵⁰ For these reasons, the freedom of speech provision of the ECHR cannot be construed in the same way as its American equivalent but rather forms a safe harbour protecting CRAs as long as they do not infringe civil liability rules.

From all this, I consider that freedom of speech is an unavoidable issue in the context of CRAs’ civil liability, but that its function is not to immunize CRAs against any lawsuit, it is to make sure that the proceedings are based on inaccurate ratings that could validly serve as liability bases. In this sense, it justifies the margin of discretion given to CRAs within which they will conduct their own rating processes.

b. The power of disclaimers

A defence that could be raised by CRAs is the disclaimer of responsibility they display on their website, such as: “Fitch IBCA Ltd. has used due care in the preparation of this document. Our information has been obtained from sources we consider to be reliable but its accuracy or completeness is not guaranteed. Fitch IBCA Ltd. shall owe no liability whatsoever to any person for any loss or damage caused by or resulting from any error in such information.”⁴⁵¹ The legal approach to the question of *ex ante* disclaimers is even more important in the context of claims brought by third parties.⁴⁵²

Such disclaimers issued by CRAs on their website will not immunise CRAs in French law.⁴⁵³ Indeed, according to the case-law of the Cour de Cassation⁴⁵⁴, such contractual clause is null and void in respect to tort liability because of the *public policy* character of articles 1382 & 1383 of the Civil Code. A similar situation exists in Germany where disclaimers will probably be disallowed on the basis of *good faith* because the Credit Rating Agency knew that its rating would be used to induce third parties to take their investment decision, in the light of what the Supreme Federal Court decided in a case involving a contract with

⁴⁴⁹ Wymeersch, *op. cit.*, at p. 28.

⁴⁵⁰ Oellinger, *op. cit.*, at p. 127: „In Deutschland findet es nach Art. 5 Abs. 2 GG seine Schranken in den Vorschriften der allgemeinen Gesetze (wie zB. den §§ 185ff. dStGB), den gesetzlichen Vorschriften zum Schutze der Jugend und dem Recht der persönlichen Ehre.“

⁴⁵¹ Like reproduced by Von Schweinitz, *op. cit.*, at p. 166.

⁴⁵² Buckley, *op. cit.*, at p. 110.

⁴⁵³ Leclerc, 'La Responsabilité Des Agences De Notation', at p. 157.

⁴⁵⁴ <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000006952758> Cass. Civ., February 17 1955: « Mais attendu, d'une part, que sont nulles les clauses d'exonération ou d'atténuation de responsabilité en matière délictuelle, les articles 1382 et 1383 du Code Civil étant d'ordre public et leur application ne pouvant être paralysée d'avance par une convention ».

protective effects towards third parties.⁴⁵⁵ Moreover, such a disclaimer creates an exclusion of liability for deficient performance of a credit rating, which is counter to the primary obligation in the contract with issuers. In Germany, “exclusion of liability for defective performance of primary obligations” is contrary to the law.⁴⁵⁶

The situation is less certain in the UK. In the UK, the impact of disclaimers is regulated by the Unfair Contract Terms Act of 1977, which provides that disclaimers have to be reasonable⁴⁵⁷ and adequate⁴⁵⁸ to be valid. To assess the reasonableness of the disclaimer, the Court will take all the circumstances into account, especially the knowledge of the defendant that the claimant would have relied on his statement, or the insurance of the liability risk.⁴⁵⁹ It will be the defendant’s task to prove that this requirement was met.⁴⁶⁰ It appears from the case-law that dismissal of disclaimers is more likely when the third party is in a consumer position than in a professional position.⁴⁶¹ Reproducing such a distinction in respect of credit ratings – between small investors and institutional investors – would not be adequate according to von Schweinitz. This author is of the opinion that this distinction is not defensible in this situation, for two reasons. First, when CRAs make their disclaimer, they disclose it with the rating to the general public and cannot reasonably know who – between small investors and institutional investors – is going to obtain this information. Second, disallowing disclaimers only for institutional investors would not reflect the reality on financial markets, as institutional investors are more likely to have a quicker access to credit ratings than small investors.⁴⁶²

Disclaimers in *Bathurst*, an Australian judgment, were ineffective because of the way they were communicated to the claimants. The other argument was that S&P mainly intended to avoid investors’ reliance where it was in fact paid to issue the rating for the purpose of informing potential investors.⁴⁶³ This judgment is a good example of von Schweinitz

⁴⁵⁵ BGH, 20 April 2004, NJW, 2004, 3034-3039; Von Schweinitz, *op. cit.*, at p. 168.

⁴⁵⁶ *Ibid.*, at p. 169. Wildmoser, *op. cit.*, p. 667.

⁴⁵⁷ Section 2 (2) of this Act.

⁴⁵⁸ Section 11 (3) of this Act.

⁴⁵⁹ As the House of Lords stated it in *Smith v Eric S Bush*, [1989] 2 W.L.R. 790. The Court also took into account other circumstances such as “equality of bargaining power” or “the practicability of obtaining advice from an alternative source”. For an analysis see Buckley, *op. cit.*, at p. 111.

⁴⁶⁰ Von Schweinitz, *op. cit.*, at p. 145.

⁴⁶¹ Cf. the difference between *Smith v Eric S Bush*, [1989] 2 W.L.R. 790 (consumer position – disclaimer dismissed) and *McCullagh v Lane Fox and Partners*, [1996] PNLR 205, CA.

⁴⁶² Von Schweinitz, *op. cit.*, at p. 146-47. This author is also of the opinion that the same standard of care than that applied to issuers for prospectuses should be applied to CRAs, because their credit ratings would have the same value than prospectus information to investors.

⁴⁶³ Edwards, 'Liability for the Rating and Sale of Structured Credit Products: Australian Cases and Their (Much) Wider Implications', at pp. 91-92. For the second argument, [2012] FCA 1200 at [2422].

argument according to which “[i]f an expert makes an opinion knowing of the reliance he will thereby induce, he should not be allowed to act contradictorily by allowing such inducement and waiving all responsibility for the statement.”⁴⁶⁴

Finally, with respect to infringements of obligations imposed by the EU Regulation, the Regulation⁴⁶⁵ as well as the specific provision under French law⁴⁶⁶ renders exclusionary clauses null and void.

Once again, we notice a marked difference between the three legal systems, a difference that could influence investors’ decision to bring their claim in one of the three Member States, if they have this option under private international law rules. This situation is an additional source of legal uncertainty in the UK, because even if investors succeed in proving the existence of a duty of care and causation on the basis of negligence misstatement, courts could consider the disclaimers valid. This was, in fact, the legal outcome in the landmark *Hedley Byrne* judgment.

⁴⁶⁴ Von Schweinitz, *op. cit.*, at p. 148.

⁴⁶⁵ Article 35a (3) of the CRA3 Regulation.

⁴⁶⁶ Article 544-6 of the *Code monétaire et financier*.

Conclusion

In sum, we can observe important differences in the way national laws deal with the question of civil liability of CRAs, but also parallels in the standard of care imposed or the use of contributory negligence mechanisms.

Many uncertainties still exist as how national courts of these three Member States will react to a civil liability lawsuit opposing investors and CRAs. In the UK, the issue will mainly depend on the test that courts will use to establish a duty of care. In Germany, similar uncertainties exist as to whether the recognisability of the claimants will be met, but also whether sufficient causality will be demonstrated by claimants. In France, the proof of a fault is considered to be difficult, but even if the fault is demonstrated, the required certain and direct causal link will be the main challenge. For the application of the EU provision, the high level of fault together with the required proof of detailed information on the infringement as well as the poorly developed causal link allows me to consider that the actual application of this provision will be unsuccessful. The causal link, because its requirements are not made explicit, means, in effect, it rests with national courts to determine its requirements. This means that the law is not fully harmonised, and that focus on national law is justified because it is in the application of the conditions in national law that we will find the true extent of the scope of the new regulation.

We can say, therefore, that the main obstacles to recovery faced by investors do not take place at the same stage in the different laws here studied. Problems are even different according to the national law applied because of policy considerations lying behind these laws. Let me summarize three considerations that appeared throughout this analysis of national laws. First, the problem of recovery of pure economic loss: this constitutes a central problem in our area in English law as well as in German law. On the German side, the restricted recovery of pure economic loss, available in our case only on the basis of § 826 BGB, obliges claimants to find a cause of action somewhere else, in contractual or quasi-contractual contexts. On the English side, cases involving pure economic loss require stricter criteria for the establishment of a duty of care. Second, the floodgate argument is dealt with in Germany and in the UK respectively through conditions of liability based on confidence or contract with protective effects towards third parties, and the conditions for the establishment of a duty of care, whereas, in France, this is done through the development of detailed liability requirements such as damage and causal link. This latter point well explains why the proof of a valid causal link under French law is a central question for investors. Third, the

relationship on which the focus is placed to determine whether liability arises is not the same everywhere. English and French laws focus on the relationship between investors and the rating agency. This is also the case in Germany when liability based on confidence is applied, but the majority of German authors prefer the application of contract with protective effects towards third parties, which initially focused on the relationship between investors and the issuer. However, given the evolution of case-law on the condition of proximity between creditor and third parties in the latter institution, we consider that the actual requirement appears closer to an analysis of the relationship between the rating agency and investors. In sum, we observe important differences in the way the three national laws examined deal with the question of civil liability of CRAs, but also parallels in the standard of care imposed and the use of contributory negligence mechanisms.

CHAPTER IV : OVERALL ASSESSMENT

Imposing liability on Credit Rating Agencies was one of the tools brought forward after the financial crises to make CRAs aware of their obligations. Civil liability can deter breaches of CRAs' obligations or codes of conduct, but also can punish CRAs, for non-compliance. These functions require a difficult balancing act, as there is always the risk of creating a civil liability regime that is under-deterrent or over-deterrent. At the end of this analysis, I still have two questions I want to discuss: first, what are the limitations that could render this liability more realistic? Second, is a civil liability regime realistic, even with the procedural rules provided by EU law?

I. Answers proposed to limit the fears of indeterminate and unlimited liability

In the final analysis, the whole question is to determine where the limits to liability should be placed. To engender a positive impact on CRAs' behaviour, civil liability provisions should not be under-deterrent. This is the reason why courts should facilitate investors' claim for damages by lowering requirements for causation for instance⁴⁶⁷, but they should also take into account the specific circumstances of each case and apply when necessary corrective mechanisms such as contributory negligence. This will help courts guard against over-deterrence. In addition, suggestions can be made to provide answers to the unlimited liability and the floodgate problems.

With regard to the limits of liability in terms of damages, it is clear that if CRAs' civil liability appears to be realistic, litigation costs will increase for CRAs but there will be "a danger that the insolvency risk is shifted to the rating agency."⁴⁶⁸ Indeed, one should not forget that the exemplary fact pattern used here concerns investors relying on credit ratings without paying for it.⁴⁶⁹ As noted earlier, CRAs could try to limit the amount of damages paid by using defences such as contributory negligence, or limitation clauses within the limits of the new EU provision.

A question that courts will probably have to answer is whether liability caps should be introduced here.⁴⁷⁰ This question will most probably have to be answered when national courts will have to decide civil liability cases directly based on national laws and less

⁴⁶⁷ Cf above, the extreme suggestion being the use of the fraud-on-the-market-theory, which should be used only within reasonable boundaries: Haar, *op. cit.* (2013), at p. 20.

⁴⁶⁸ *Ibid.*, at p. 4.

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*

probably on an infringement of the CRA3 Regulation. The whole interest of liability caps is indeed to limit the damages paid by rating firms when they face a lawsuit that can have an over-deterrent effect, mostly a lawsuit for mere negligence, which is already less the case of lawsuits for intentional or grossly negligent behaviour. A first cap could be the limitation of damages to losses incurred in the primary market. A distinction could indeed be drawn between transactions on the primary and the secondary market, because authors consider that there is redistribution at the level of the secondary market.⁴⁷¹ According to Haar, this first cap would not be practical, however, because it would imply a collective claim “by the investment community”.⁴⁷² The liability cap that could be the most suitable is a cap based on the fee rating firms received for the rating issued,⁴⁷³ possibly multiplied by a certain factor to increase deterrence, if needed.⁴⁷⁴ This could be a good solution because if CRAs are obliged to pay the full value of investor’s investment, it could lead to over-deterrence, at least in cases of simple negligence. The last cap⁴⁷⁵ that could be used by courts, and which could be applied both in case of solicited and unsolicited ratings is a limitation based on “the difference between the value the CRA attributed to the investment and the true value of that investment”, a cap which was applied in the UK in *Banque Bruxelles Lambert v Eagle Star* (SAAMCo).⁴⁷⁶ Whatever is used by courts to set a cap on damages, “[t]he agency will have an incentive to invest in care as long as such precautions cost less than the expected liability towards third parties.”⁴⁷⁷

The amount of damages should be proportionate with the degree of fault involved. In principle, the greater the degree of fault, the greater the sum of damages that should be awarded should hold. In this sense, liability caps should be relaxed in cases of gross negligence or intentional behaviour, and more strictly applied in cases of ordinary

⁴⁷¹ Ibid., at p. 19. “In these latter cases, the financial loss of the acquirer is compensated by the gain in the security price of the seller, so that the damage can be looked at as a matter of redistribution rather than an actual loss of resources.” – Parallels with Wagner’s theory.

⁴⁷² Ibid., at p. 20.

⁴⁷³ Wagner, 'Gatekeeper Liability: A Response to the Financial Crisis', at p. 27.

⁴⁷⁴ Ibid., at p. 29.

⁴⁷⁵ This is the last liability cap studied here; however, for more example of liability caps see Haar, *op. cit.* (2013), at p. 20-21.

⁴⁷⁶ (SAAMCo) [1996] UKHL 10, at [48-49].

<http://www.nortonrosefulbright.com/knowledge/publications/114278/civil-liability-of-credit-rating-agencies> (last accessed 6th August 2014); for a case note see: Nick Hegan, 'Saamco, the Scope of the Duty and Liability for Consequences', *VUWLR*, 38 (2007).

⁴⁷⁷ Wagner, *op. cit.*, at p. 28.

negligence.⁴⁷⁸ These considerations should have been introduced, but were not, in the new EU provision.

As to the size of the class of claimants, the factual circumstances will be relevant as sometimes the financial product is thought only for a specific and limited class of claimants. Moreover, distinctions will probably appear between small investors and institutional investors, given the difference in terms of experience that exists between the two types. We see this distinction gaining ground in Australia already, and I submit that it is a sensible one.

Finally, the last parameter I would like to insist on is a possible distinction between solicited ratings and unsolicited ratings. Indeed, effects that solicited ratings have on markets can be considered to be greater than unsolicited ratings because solicited ratings are mainly based on information not available to investors leading, therefore, to greater attention given to it by investors.⁴⁷⁹ Courts should take this parameter into account when they have to decide cases.

II. CRAs' civil liability in Europe, a realistic claim for investors?

We consider the recent EU provision on CRAs' civil liability as a good step forward on the issue. The amendments made to this provision went too far, in my opinion. It is true that the high degree of fault required by the recent EU provision aims at avoiding over-deterrence, but as we saw, it does not assist investors very much. The upshot is that legal hurdles that were supposed to be erased for investors are still present: the burden of proof for fault is not reversed, leading to difficulties for claimants to prove it without the necessary documents, the causal link remains as well difficult to prove. True, this new provision has the advantage of giving a clear cause of action to investors when an obligation of the EU Regulation is breached, but the way it will be implemented at Member State level can also be a source of uncertainty and of forum shopping. It is clear to me that French, German, or English courts will not react in the same way to this kind of claim, given their different cultures and the different policy considerations that vex them.

The contribution of investors to the regulation of CRAs in the EU remains quite limited for the time being. This situation may change if certain requirements are interpreted in a lenient way by courts in the EU.

⁴⁷⁸ Haar, *op. cit.* (2013), at p. 21.

⁴⁷⁹ Rosset, 'Haftung Von Ratingagenturen', at p. 39.

The outcome of a civil liability lawsuit brought by investors against CRAs remains uncertain and will depend a lot on the facts of the case. If claimants can prove that the rating agency breached one of its obligations imposed by the CRA Regulation intentionally or with gross negligence, the cause of action based on Article 35(a) will prevail. Otherwise, they could try to base their claim on national provisions for ordinary negligence, tort or contract law according to the Member State chosen. Both exercises will however be difficult.

Several elements should, therefore, be taken into account in the future when courts or legislators will deal with the civil liability of rating agencies. First, I consider that the vulnerability of the claimant/investor should play a role. As I detailed earlier, the vulnerability of investors was taken into account by Australian courts when they decided that investors could not by themselves evaluate the creditworthiness of financial products. Vulnerability could be part of the analysis of “reasonable reliance” as required by the EU provision. This consideration may also be a way to resolve the problem of indeterminacy, to reduce the potential claimants only to those who are vulnerable.

Because of the wide diversity of civil liability regimes in Member States, the aim of the EU Regulation is undermined. The divergent approaches, not only between Common Law and Civil Law systems, but also within the Civil Law tradition lead to a different implementation of the EU provision and will also most probably lead to different rulings according to the sensitivity of national judges to policy issues in this context.

The other side of the floodgate problem is the risk of providing no remedy at all. The best answer, as Von Schweinitz suggests, is to avoid closing the gate at the duty stage as in English or German law, but rather to establish a standard of care that would be adequate for Credit Rating Agencies.⁴⁸⁰

To conclude, the CRA3 Regulation is disappointing as it simple leaves the question of determination of liability on Member State’s shoulders. Investors should, therefore, seek solutions at Member State’s level both for the application of this provision and for remedy in case of ordinary negligence, which the CRA3 Regulation does not cover. Legal uncertainty thus defines this area but adequate measures could be taken in the future based on comparative law and full harmonisation, to reduce this legal uncertainty and avoid uncertainty for investors on financial markets.

⁴⁸⁰ Von Schweinitz, *op. cit.*, at p. 181.

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