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REGULATING CRAs' CIVIL LIABILITY: A COMMON LAW VS CIVIL LAW COMPARISON

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Abstract

The article focuses on the civil liability of credit rating agencies (CRAs) in a comparative way. It starts from the historical evolution of CRAs as international standard setters to justify an economic rationale for their liability regime. It discusses the statutory law introduced in the US and the EU for CRA's civil liability and analyses the approaches of common law and civil law to private enforcement. The analysis shows that common law countries are better equipped to tackle global market challenges since the judicial reforms of certain common law courts have been more effective than statutory rules implemented in many civil law countries. For an effective private enforcement, the EU countries must harmonise national legal traditions of private law and procedural law tools. Such a result can be achieved not much through statutory intervention but especially through developing new interpretative tools that might best assist the civil law courts.

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Abstract........1

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1. Introduction

Globalization has eroded the sovereignty of States by promoting the diffusion of authority away from States to markets, firms, local and supranational bodies, and sometimes to no authority at all. This process has been so robust that States have had no choice but to conform to market pressures. As Susan Strange – an eminent scholar of global political economy – pointed out in her work,[1] some of the most revolutionary effects of globalization on institutional changes coincide with the new

[1] S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge University Press, 1996, p. 4.

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role of the State and the law. Concerning the former, we have witnessed a shift in productive activities and service management from public administration to private organisms. Regarding the latter, there has been an actual genetic alteration of the law. The actors and the modalities of the production and functioning of the legal rules have changed. A wide variety of actors, and not only States, nowadays express the law. Non-state actors are an integral part of global governance. Their involvement does not only include the possibility to influence States but also to fulfill real governance profiles, replacing the States and their delegated authorities.[2]

This is the case, for instance, of Credit Rating Agencies (CRAs) – *private* rating agencies playing a decisive role in ordering *public* financial markets worldwide.[3] CRAs evaluate the credit risks and profiles of entities and financial instruments issued by them. The assessment of these securities may require specific knowledge and be highly time-consuming, making it attractive for institutional and non-institutional investors to rely on the ratings by CRAs. The qualified financial opinions issued by CRAs through their ratings indirectly promote specific organizational procedures. By establishing a shared understanding of what constitutes creditworthiness, CRAs generate standards, and their activity is that of international standard-setters for global financial markets similar to, for instance, OECD recommendations (on best practices) for corporate governance. Being *de facto* international standard-setters for global financial markets has granted them a mode of governance that, on one side, could be socially useful to harmonize the praxis and uses of the markets effectively; on the other side, it has been criticized by several scholars because considered sometimes as socially unequal. Their standards mainly benefit (and result from) the politics and regulatory needs of the world's largest financial centers, which are the places where these companies have their publicly-registered headquarters. Therefore, their ratings

[2] Y. Dezalay and B. *Garth, Merchants of law as moral entrepreneurs: constructing international justice from the competition for transnational business disputes*, in 29 *Law & Society Review*, 1995, pp. 27-64.

[3] See S.L. Schwarcz, *Private ordering of public markets: the rating agency paradox*, in 1 *U. Ill. L. Rev.,* 2002, pp. 12-26, where the author inquires whether market forces sufficiently restrain rating agencies or whether public sector regulation is warranted. See also S.L. Schwarcz, *Private ordering*, in 97 *Nw. UL Rev.,* 2002, pp. 319-349, at 344-347; J.R. Macey, *Public and private ordering and the production of legitimate and illegitimate legal rules,* 82 *Cornell L. Rev.,* 1996-97, pp. 1123-1149, at 1140-1147.

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could unfairly penalize countries sharing different societal setups and stages of economic development.[4]

Empirical research showed that a different perception of the same credit risk existed from one rating agency to another, resulting in a difference between the ratings issued by the American agencies Moody's and S&P and the more "Europe-oriented" Fitch. According to the study, the latter rated Eurozone crisis countries on average between 0.25 and 0.59 rating notches more favourably than the former.[5] At the same time, while CRAs have been chiefly criticized for not having acted at the right time in the last financial crisis, sometimes criticisms were voiced for having acted at the most inconvenient time, spreading undue panic. National governments raising finance in global financial markets can be severely affected by the rating of CRAs.[6] In such cases, the main problem remains to what extent the private ordering of CRAs should undercut democratic authority.[7]

After the last financial crisis of 2008, there have been an overhaul of the regulation concerning CRAs worldwide. For the first time, the States have begun to elaborate an accountability model to adopt for CRAs. To catch up with the US counterparty, the EU legislator introduced a public and a private legal regime for CRAs to improve the regulatory governance of the financial markets. Accordingly, in the EU, financial authorities of regulated markets have been empowered with higher supervisory

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[4] D. Kerwer, *Holding global regulators accountable: the case of credit rating agencies,* 18 *Governance,* 2005, pp. 453-475.

[5] However, the study also found out that Fitch's ratings had no significant impact on investors' behaviour, which instead followed the ratings of Moody's and S&P. See the Halle Institute for the Economic Research (IWH), Worse ratings by U.S. rating agencies for European sovereigns no argument for European rating agency, press release (4 January 2017), available at https://www.iwh-halle.de/en/press/press-releases/detail/worse-ratings-by-us-rating-agencies-for-european-sovereigns-no-argument-for-european-rating-agency-1 (accessed 17 December 2024).

[6] In the summer of 2011, S&P declared that it would classify any planned or voluntary restructuring of the Greek debt as default. The European leaders were re-negotiating a second rescue package for Greece, which was more expensive. See Council on Foreign Relations, The credit rating controversy (19 February 2015), https://www.cfr.org/backgrounder/credit-rating-controversy (accessed 17 December 2024). In July 2011, Mr Wolfgang Schäuble and Mr Jose Manuel Barroso claimed an anti-Europe bias following the downgrading of Moody's, S&P, and Fitch at the expense of several countries in Europe. See *The EU and credit rating agencies: poor standards?* in *The Economist*, 20 December 2013; *Europe threatens 'mad' rating agencies*, in *The Independent*, 6 July 2011.

[7] S.L. Schwarcz, *Private ordering of public markets*, before (n 3), p. 319; M. Bussani, *Credit Rating Agencies' Accountability: Short Notes on a Global Issue*, 10(1) *Global Jurist,* August 2010, pp. 1-20.

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powers and specific powers of public enforcement, which have been granted to them due to their direct day-to-day supervision. In addition, a civil liability regime has been introduced as a form of *ex-post* private enforcement. The private enforcement provides investors and issuers with a standalone cause of action for losses suffered due to a CRA's reckless behaviour.[8]

This article draws some considerations on the civil liability regime implemented in the US and EU, with a special focus on the different approaches taken by the States reflecting respectively a tradition of common law and civil law. The various reforms that have concerned CRAs in Europe have mainly remained ineffective due to the lack of harmonization of private law within the EU and the persistence of the different national legal traditions. This problem causes at the EU Member States level the existence of a mosaic of private enforcement mechanisms throughout the EU. While the harmonization of private enforcement is undoubtedly a political issue, the article shows that common law jurisdictions are better equipped to discipline global standard setters as CRAs when they cause investment loss to third parties for reckless or fraudulent behaviour. As evidenced by the case law analysed in the article, the different scaled-back *roles* of judges in civil law jurisdictions compared to that of common law has a more substantial impact on private enforcement efficacy.

The article continues as follows: section (2) is dedicated to the historical evolution of CRAs and their ascent as international standard setters for global financial markets. Section (3) comments on the economic rationale for having a civil liability regime. Section (4) analyses in a comparative way the different approaches – common law and civil law – to extra-contractual liability (torts and delictual liability) and the different features that characterize them. Section (5) draws some conclusive considerations.

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[8] In the EU, the European Commission has several times amended its Regulation on CRAs to increase investors' protection. See Regulation (EC) No. 462/2013 (CRA III) of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No. 1060/2009 (CRA I) on credit rating agencies and Regulation (EC) No. 513/2011 (CRA II); in the US, see the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, HR 4173, 111th Congress, 2d Session (2010) (Dodd-Frank Act), Sec. 931–939H (Title IX, Subtitle C 'Improvements to Regulation of Credit Rating Agencies'); in Russia, the Central Bank of Russia approved a detailed range of regulatory measures to reduce CRAs' conflicts of interest and increase their supervision, see Federal Law No. 222-FZ of the Russian Federation dated 15 of July 2015 on The activities of the rating agencies in the Russian Federation.

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2. CRAs ascent as international standard setters for global financial markets

Since their appearance on the world stage, CRAs have acquired great importance and a strong reputation, so potential borrowers looking for new finance in the capital markets often feel obliged to obtain a credit rating beforehand. A significant share of CRAs' importance in global financial markets was a direct consequence of the involvement of ratings in financial regulation. The role of CRAs as independent providers of financial opinions has existed since the beginning of the last century.[9]

The use of credit ratings for risk regulation started in the US during the New Deal regulation of the 1930s and the birth of the modern administrative state.[10] In 1931, the Office of the Comptroller of the Currency (OCC) enacted a rule that included sovereign debt, municipal bonds, and specific domestic and foreign securities among the financial instruments to account for capital requirements. They could be entered in the accounts at their face value or market value depending on whether or not they obtained one of the four highest ratings by CRAs. The rationale was to oblige an issuer with a higher default risk to maintain higher capital provision. Later, the OCC introduced a second rule requiring US banks to hold only those securities in the top four rating categories. In those years, the terms "credit rating agency" and "rating agency" spread in banking and academic circles, contributing to giving ratings a quasi-regulatory imprimatur and facilitating the widespread reliance on ratings by

[9] Moody's was the first to start in 1909 with its Analysis of Railroad Investments manuals, and subsequently measuring the credit rating solvability of industrial and public utilities, which were raising finance through bond issues. In 1916, the Poor's Rating Agency started issuing corporate ratings. Later, two competitors – Standard Statistics and Fitch Ratings (Fitch) – entered the business in 1922 and 1924 respectively. In 1941, Standard Statistics and Poor's merged to form Standard & Poor's (S&P), which, together with Moody's and Fitch, accounted (in 2015) for 96.5 percent of the world market in ratings. See SEC, Annual Report on Nationally Recognized Statistical Rating Organizations (December 2016), p. 11, Chart 2, available at https://www.sec.gov/ocr/reportspubs/annual-reports/2016-annual-report-on-nrsros.pdf (accessed 17 December 2024).

[10] See W.A. Morton, *Liquidity and solvency,* in 29 *The American Economic Review,* 1939, pp. 272-285, at 277: "The Banking Act of 1935 had in effect transferred the responsibility for deciding upon the classes of securities to be purchased to governmental agencies, which in turn have delegated it to private institutions: Fitch, Moody, Poor and Standard Statistics."

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government agencies such as the Securities and Exchange Commission (SEC), and by investors.[11]

The US regulator relying on CRAs' historical reputation and methodologies has incorporated credit rating into regulatory rules since the 1930s and continued to do so after World War II. For instance, in 1951, the National Association of Insurance Commissioners imposed higher capital requirements on insurers' lower-rated bonds. Later, in 1975 and 1982, the SEC imposed higher capital haircuts on broker-dealers' speculative-grade securities (Rule 15c3-1, which has now been amended) and eased disclosure requirements for investment-grade bonds.[12]

An essential element of CRAs coming to exercise a *de facto* regulatory function was the establishment of the so-called Nationally Recognized Statistic Rating Organization (NRSRO) in 1975 by the SEC. This institute aimed to designate CRAs that could be used for regulatory purposes. NRSROs increased the market power of established CRAs and led to further reliance on credit ratings. After 2003, for the most part, there were only three CRAs because the three nationally recognized organizations bought all the other smaller players in the market in the 1990s. Only in the 2000s was the oligopoly of NRSRO status broken when the Dominion Bond Rating Service obtained the NRSRO designation in 2003, followed by A.M. Best in 2005. At the end of 2024, the list of US-recognized rating organizations amounted to ten.[13]

Since the 1980s, US capital markets have made CRAs extremely powerful. Investors have increased their reliance on CRAs, and the use of rating agencies has become an accepted best practice worldwide. In 2001, the Basel Committee on Banking Supervision (BCBS) recommended using ratings to define the capital reserve requirements of banks. This new set of rules on banking laws and regulations was implemented by means of the Basel II Accord (Basel II) in 2004. The rules established that the calculation of a minimum capital requirement was contingent upon the ratings

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[11] N. Gaillard and M. Waibel, *The Icarus syndrome: how credit rating agencies lost their quasi-immunity*, Cambridge Legal Studies Research Series, Paper No. 12/2017, at 11-12.

[12] R. Cantor and F. Packer, *The credit rating industry*, in 19 *Federal Reserve Bank of New York Quarterly Review*, 1994, pp. 1-26.

[13] The number has not changed, see SEC, "Current NRSROs", https://www.sec.gov/ocr/ocr-current-nrsros.html (accessed 17 December 2024).

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assigned to the entities a bank had a claim on – the so-called "standardized approach": the higher the rating, the lower the capital requirement.[14]

Nowadays, the evaluations issued by CRAs through their ratings do not only signal the probability of default risk to investors and, thus, influence the price level, but also determine which regulatory measures apply. On the one hand, the embedding of ratings in regulatory rules and the creation of the status of a nationally recognized statistical rating organization (NRSRO) in the USA in 1975, on the other hand, have arguably contributed to transforming CRAs into quasi-regulatory bodies. Ratings have become an actual regulatory stamp capable of influencing the judgment of other stakeholders, such as investors (lenders) and regulatory authorities.[15]

3. How States have coped with CRAs

The last financial crisis brought to light several shortcomings characterizing CRA's business model the so-called "issuer-pays", which has been labelled as a source of potential conflicts of interest.[16] Furthermore, it was said a lack of competition in the industry has vastly reduced market control mechanisms.[17] Finally, the involvement of

[14] See Basel Committee on Banking Supervision (BCBS), *Basel II, International Convergence of Capital Measurement and Capital Standards: A Revised Framework* (June 2004), available at https://www.bis.org/publ/bcbs107.htm (accessed 17 December 2024).

[15] F. Parmeggiani, *Gli effetti distorsivi del crediti rating sul rischio di insolvenza,* Milano, Giuffrè, 2023, pp. 58-67; H. Weber and A. Darbellay, *The regulatory use of credit ratings in bank capital requirements regulations*, in *Journal of Banking Regulation,* 2008, 10, pp. 1-16, at 18; F. Partnoy, *Rethinking regulation of credit-rating agencies: an institutional investor perspective*, in 25 *Journal of International Banking Law and Regulation,* 2010, p. 188.

[16] A. Miglionico, *The Governance of Credit Rating Agencies: Regulatory Regimes and Liability Issues,* Cheltenham, Edward Elgar, 2019, Ch. 2; M. Lamandini, *Le agenzie di rating: alcune riflessioni in tema di proprietà e conflitto di interessi,* in *Le agenzie di rating. Atti del Convegno* (Principe eds.), Milano, Giuffrè, 2014, p. 179; F. Parmeggiani, *Some rating failures and several regulatory weaknesses: the US and EU perspectives*, in *Le agenzie di rating*, p. 75; K. Alexander, *The risk of ratings in bank capital regulation*, in 24 *EBOR*, 2013, pp. 295-313, at 305– 306; Weber and Darbellay, *The regulatory use of credit ratings*, op. ult. cit. (n 15), pp. 10 ff.; H. McVea, *Credit rating agencies, the subprime mortgage debacle and global governance: the EU strikes back*, in 59 *International and Comparative Law Quarterly*, 2010, pp. 701-730, particularly at 716; G. Alpa, *Responsabilità civile delle agenzie di rating. Alcuni rilievi sistematici*, in I *Rivista trimestrale di diritto dell'economia*, 2013, p. 71; F. Amtenbrink and J. De Haan, *Regulating credit ratings in the European Union: a critical first assessment of regulation 1060/2009 on credit rating agencies*, in 46 *Common Market L. Rev.*, 2009, pp. 1915-1949, at 1943 ff.

[17] Darbellay, *Regulating Credit Rating Agencies,* Edward Elgar, 2013, p. 215; Libertini-Fabbio, *Concorrenza e rating finanziario*, in *Le Agenzie di Rating*, Atti del convegno. Salerno, 8-9 novembre 2012 (A. Principe ed.), Milano,

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CRA's activity in the banking capital regulation of the Basel Accords has created a ratings-embedded regulation, which has arguably weaken the monitoring role of banks as financial intermediaries while providing them with another great incentive for engaging in creative financial engineering.[18] Therefore, facing the opportunity to increase their profits, CRAs contributed to the causes of the financial crisis by issuing inaccurate ratings for complex structured finance based on flawed methodologies, which arguably lowered the perception of credit risk for financial supervisors and investors.[19] CRAs have always claimed the role of neutral information providers, who have based their reliability and reputation on their know-how and conduct. That is why regulators have always preferred market control mechanisms to legal strategies of accountability to oversight CRAs' operations.[20]

The International Organization of Securities Commissions (IOSCO) that is the international body regulating the world's securities' and futures' markets, including CRAs, drew a Code of Conduct called 'Fundamentals for Credit Rating Agencies'. This Code provides CRAs with a set of guidelines targeted to protect the integrity of the rating process, the fair treatment of all participants and the safeguard of any confidential material information given to CRAs by issuers. However, it does not regulate CRAs' liability for breach of their duties. Assuming that CRAs can certify the

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Giuffrè, 2014, p. 160.

[18] L. Sasso, *Bank capital structure and financial innovation: antagonists or two sides of the same coin?* in 2 *Journal of Financial Regulation*, 2016, pp. 225-263, where the opportunistic behaviour of banks engaging in regulatory arbitrage is treated in more detail.

[19] See the Financial Stability Forum, Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience (7 April 2008), available at <http://www.financialstabilityboard.org/publications/r_0804.pdf> (accessed 17 December 2024); see also, Financial Services Authority, The Turner Review: A Regulatory Response to the Global Banking Crisis (March 2009), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/18_03_09_turner_review.pdf (accessed 17 December 2024); Securities and Exchange Commission (SEC), Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies (July 2008), available at https://www.sec.gov/files/craexamination070808.pdf (accessed 17 December 2024); Report of the High-Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière (February 2009), available at https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf (accessed 17 December 2024).

[20] C.A.E. Goodhart, *The Regulatory Response to the Financial Crisis,* Edward Elgar, 2009, p. 121; Schwarcz, *Private ordering of public markets*, before (n 3), p. 26. The control mechanism for these inefficiencies is "exit" rather than "voice"; see A.O. Hirschman, *Exit Voice and Loyalty: Responses to Decline in Firms, Organizations and States,* Harvard University Press, 1970, *passim.*

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quality of complex structured finance products through ratings and that no better alternative can be found for measuring credit risk in global financial markets, it is questionable whether the fear of losing reputation is still a strong enough deterrent for CRAs against negligent, reckless and fraudulent practices.[21]

CRAs' oligopoly was mainly due to the high knowledge and technical skills required to perform credit risk assessments and their undisputed (at least until the last financial crisis) reputation.[22] However, as demonstrated by the lawsuits against CRAs that followed the last financial crisis, rating agencies have operated not continuously in good faith or at least with professional diligence.[23] Since CRAs affect through their ratings the asset value of any financial entity by requiring specific capital adequacy requirements if the entities can use those assets as collateral, their activity may pose a systemic risk to financial stability when the mechanistic reliance by investors on credit ratings reveals to be misplaced.[24]

A straightforward solution would be to remove any rating involvement in regulation to reduce over-reliance on ratings by making them simple financial journalists. This approach has been followed by the US and EU governments – unsuccessfully

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[21] J.P. Hunt, *Credit Rating Agencies and the "Worldwide Credit Crisis": The Limits of Reputation, the Insufficiency of Reform, and a Proposal for Improvement*, in *Columbia Business Law Review*, 2009, 109. The Author argues that reputational constraints may fail to work for novel products.

[22] In this sense, it has been argued that an unchecked increase in competition would have lowered not only the price but also the quality of ratings, see Hunt, op. ult. cit., pp. 112-114, 127-128; Cantor - Packer, *The credit rating industry*, before (n 12), pp. 25 f.

[23] See S. Fleming and H. Carnegy, *EU Watchdog Censures S&P for French Rating Cut Error,* in FT (3 June 2014) https://www.ft.com/content/326b279c-eafb-11e3-bab6-00144feabdc0 (accessed 17 December 2024). S&P, attempting to change an incorrect display of the 'Banking Industry Country Risk Assessments' ('BICRAs') for France, sent an email alert to all its subscribers, erroneously informing them that the rating of French debt had been downgraded. It took nearly two hours to correct the mistake, by which point the market had closed.

[24] Darbellay, *Regulating Credit Rating Agencies,* Edward Elgar, 2013, ch. 4-6; G. Risso, *Investor Protection in Credit Rating Agencies' Non-Contractual Liability: The Need for a Fully Harmonised Regime,* in 40(5) *EL Rev*, 2015, pp. 706-721; H. Gildehaus, *The Rating Agency Oligopoly and its Consequences for European Competition Law*, in 37(2) *EL Rev*, 2012, pp. 269-293; F. Partnoy, *Rethinking regulation of credit-rating agencies*, before (n 15), pp. 190 ff.; A. Miglionico, *Il giudizio di rating: incidenza sulle negoziazioni finanziarie e sulla stabilità dei mercati*, in II *Riv. trim dir. econ.*, 2010, p. 87; D.J. Matthews, *Ruined in a Conventional Way: Responses to Credit Ratings' Role in Credit Crises*, in 29 *Nw. J. Int'l L. & Bus.,* 2009, p. 245.

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though.[25] In late 2014, the Basel Committee in Banking Supervision (BCBS) proposed a complete overhaul of the "standardised approach", excluding the intervention of a CRA and a recalibration of risk-weight based on a limited number of alternative risk drivers, including revenue and leverage for risk-weighting exposures to corporates.[26] However, most of the participants criticized the proposals in the subsequent consultations, admitting that any other alternative to evaluate their credit risk than CRAs would be extremely expensive due to a lack of resources and expertise needed to carry out the assessment. For this reason, later in 2016, the BCBS reintroduced external ratings, where available and permitted by national supervisors, for exposure to banks and corporates.[27] Accordingly, the final standards removed the Internal rating-based (IRB) option for equities and the advanced IRB option for exposures to banks, other financial institutions, and large and medium-sized corporates. Eventually, the BCBS also removed the internal model option from the credit valuation adjustment framework.[28]

3.1 Economic rationale for a CRA liability regime

The matter of regulating CRAs has traditionally been examined through the lens of the principal-agent model.[29] CRAs act as agents to perform tasks on behalf of principals: States, investors, and entities issuing financial instruments. However, this paradigm, which is very effective in identifying the conflicts of interest between a company's constituencies,[30] is not entirely valid for CRAs because States and state-owned corporations are also ratings' final recipients. Therefore, a State implementing

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[25] In particular, sec. 939(a-f) and 939A of the Dodd-Frank Act of 2010 and Art. 5 Sections b and c of the EU Regulation No. 462/2013 on credit rating agencies (CRA III) were expressly targeted to the purpose of removing references to rating within US and EU legislation altogether.

[26] BCBS, *Consultative Document: Revisions to the Standardised Approach for Credit Risk* (March 2015), available at http://www.bis.org/bcbs/publ/d307.pdf (accessed 17 December 2024). See also the changes to BCBS, *Standardised Approach for Measuring Counterparty Credit Risk Exposures* (March 2014), available at www.bis.org/publ/bcbs279.pdf (accessed 17 December 2024).

[27] BCBS, *Second Consultative Document: Revisions to the Standardised Approach for Credit Risk* (December 2015), available at https://www.bis.org/bcbs/publ/d347.htm (accessed 17 December 2024).

[28] BCBS, *Basel III: Finalising Post-Crisis Reforms* (December 2017), available at http://www.bis.org/bcbs/publ/d424.pdf (accessed 17 December 2024).

[29] R. Mulgan, *Accountability: An Ever-Expanding Concept?* in 78(3) *Public Administration*, December 2002, pp. 555 – 573, particularly at 555.

[30] See the IOSCO's 'Code of Conduct Fundamentals for Credit Rating Agencies', Final Report, March 2015, available at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD482.pdf (accessed December 2023).

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a regulatory regime to discipline CRAs can be seen as attempting to impact their independence negatively. Not surprisingly, political reactions to hold rating agencies accountable have often provoked a termination of CRA activity in a specific country rather than a revision of their operations by public demands. CRAs prefer not to establish subsidiaries or branches in countries that do not grant a certain degree of independence. They operate instead through offshore companies. The increasing complexity of modern corporate finance and the development of highly interconnected financial markets have pushed States' governments to delegate unelected bodies – better equipped to deal with highly technical areas – to regulate those markets in the name of efficiency. This phenomenon is called *agencification* and the new delegated institutions for specific policy objectives non-majoritarian institutions (NMIs). By doing so, States have lost (political) control in exchange for efficiency in financial markets.[31] Unfortunately, these (a-political) NMIs have increasingly taken political decisions with clearly distributive implications favouring some at the expense of others.[32] However, their independence from direct political control does not mean freedom from public accountability.[33]

CRAs have been compared to NMIs with whom they share all their legitimacy problems.[34]

Generally, NMIs possess specialized public authority, separate from other institutions, but are neither directly elected by people nor directly managed by elected officials. Their legitimacy depends on their capacity to engender and maintain the belief that they are the most appropriate for the functions entrusted to them. CRAs possess specialized public authority, which is their capacity to issue standards for the market participants (entities issuing securities). Standardizing is a mode of governance – bottom-up approach – that is sometimes more effective than hierarchical rules, which are a top-down approach to harmonize the praxis and uses of the global

[31] L. Enriques and M. Gargantini, *Regolazione dei mercati finanziari, rating e regolazione del rating*, in 2 *Banca Impresa Società*, 2010, p. 475.

[32] B. Levy and P. Spiller, *The Institutional Foundation of Regulatory Commitment*, in *The Journal of Law, Economics, and Organization*, 1994, 10(2), pp. 201-246; M. Thatcher and A. Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, in *West European Politics*, 2002, 25(1), pp. 1-22.

[33] G. Majone, *The Regulatory State and its Legitimacy Problems*, in 22(1) *West European Politics*, 1999, pp. 1-24.

[34] T.J. Sinclair, *Bond-rating agencies and co-ordination in the global political economy*, in Cutler, Haufler and Porter (eds.), *Private Authority and International Affairs*, State University Press of New York, 1999, pp. 153-168.

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financial market.[35] Although standards are generally non-binding (*vs* rules) and for the *optional* use of the issuers who may or may not adopt them, CRAs' standards have been enforced hierarchically by the States through the regulatory involvement of ratings (i.e. The Basel Accords). However, NMIs are generally agents operating on behalf of the States and are always part of the institutional design of delegation through public authorities. CRAs, instead, do not qualify as state agencies, and they are not an independent sub-branch of government since there has been no formal delegation of powers by the U.S. Congress or any other government or legislation to CRAs. Therefore, CRAs are not directly accountable to anybody for their *public* activity other than their shareholders, who are *private* individuals. They do not act in the common interest, as would be the case if they were regulatory agencies mandated by a State. In situations where private interests and public imperatives diverge, conflicts of interest may arise and undermine the credibility of the regulatory process. In light of this, it could be inferred that the "principal-trustee model" would represent CRA's relationships better than the principal-agent model. According to the principal-trustee model, CRAs are trustees delegated by the regulatory national authorities (principal) to perform a task on their behalf and for the benefit of the beneficiaries, namely the investors (although they do not pay for these services). In such a model, CRAs would owe fiduciary duties (duties of care) to two constituencies: the regulatory authorities and the investors for whom the task is performed.[36] Thus, it seems appropriate to assign on CRAs a civil liability for tort liability in addition to an administrative liability for infringements of a procedural nature, which includes a CRA's non-compliance with the appropriate procedures.

3.2 Holding CRAs accountable for compensation and damages

Introducing a liability regime for CRAs has been one of the most controversial aspects of the new CRA reforms. Already in 2002, the loan default of the US giants Enron and WorldCom led to the approval in the USA of the Credit Rating Agency Reform

[35] Standardizing and hierarchical rule-making differ in how rules' underlying legitimacy is secured. While the legitimacy of hierarchical rules depends on the authority of the regulatory authority, standards rely on the legitimacy of the underlying expertise. See this discussion in D. Kerwer, *Standardising as Governance: The Case of Credit Rating Agencies,* Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter, 2001, p. 8.

[36] G. Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, in 2/1 *European Union Politics,* 2001, p. 113.

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Act of 2006 (CRARA), which increased the SEC's supervisory powers over CRAs. However, the CRARA avoided addressing CRAs' civil liability for damages caused by inaccurate ratings and even impeded the SEC from dealing with it.[37] It is only after the last financial crisis that the US legislator introduced the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ('Dodd-Frank Act'), which dealt with this matter by providing at least two ways of bringing a claim against CRAs for losses suffered due to their reckless behaviour. First, like any other forward-looking statements, ratings are no longer exempt from liability. As a result, the same enforcement and penalty provisions that apply to statements made by registered public accounting firms and financial analysts apply to CRAs.[38] Generally, negligent misrepresentation claims should prove the *scienter* of the offending party, that is, their (CRAs') intent or knowledge of wrongdoing while issuing the disputed rating. However, the US legislator has relaxed this strict provision, introducing a notable exception for financial damages brought against a CRA. Accordingly, it is sufficient for the complaint to state that the CRA knowingly or recklessly failed to conduct a reasonable investigation of the rated security or to obtain reasonable verification of such factual elements from sources (other than the issuer and underwriter) that the CRA considered competent.[39]

Second, the Dodd-Frank Act has repealed section 11 of the Securities Act 1933 concerning liability for false registration statements.[40] Consequently, the law now considers ratings as registration statements and CRAs as qualified professionals in credit risk management, and, as such, they can be sued in their capacity as experts for false registration statements.[41] Although the claimant does not have the burden to prove the causation or that it relied on the CRA's statement, as is the case under the

[37] Because the government deemed the SEC not competent enough to set the standards of conduct and the models for CRAs to comply with. See J.C. Coffee Jr, *Ratings Reform: The Good, The Bad and the Ugly,* in 1 *Harv Bus L Rev*, 2011, p. 231 ff., at 247; T.M. Sullivan, *Federal Preemption and the Rating Agencies: Eliminating State Law Liability to Promote Quality Ratings*, in 94 *Minn. L Rev*, 2010, p. 2136 and 2151-2156; C. Picciau, *The Evolution of the Liability of Credit Rating Agencies in the United States and in the European Union: Regulation after the Crisis*, in 2 *ECFR*, 2018, pp. 339-402.

[38] See sec. 15E(m)(1) of the Securities Exchange Act 1934 (15 U.S. Code §78o–7(m)(1)) as amended by sec. 933(1), Dodd-Frank Act.

[39] See sec. 21D(b)(2)(A), Securities Exchange Act 1934 (15 U.S. Code § 78u–4(b)(2)) as amended by sec. 933(2), Dodd-Frank Act.

[40] See sec. 939G Dodd-Frank Act. Rule 436(g) 17 CFR § 230.436(g).

[41] See sec. 11(a)(4) of the Securities Act 1933.

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Securities Exchange Act of 1934, seeing a claim through to victory may not be so easy. US courts have refused to qualify CRAs as underwriters in the sense of this provision.[42] Besides, following the refusal of CRAs to have their ratings included in the registration statements, the SEC issued a no-action letter in which it postponed the enforcement of liability indefinitely under section 11 of the Securities Act of 1933 for ratings issued Asset-Backed Securities (ABSs). This decision was needed to facilitate a transition for asset-backed issuers since the rule could have paralyzed the market for ABSs.[43]

In the EU, a Regulation on CRAs was first introduced in 2009 (CRA I) and then overhauled in several steps with two amendments in 2011 (CRA II) and 2013 (CRA III).[44] Chapter II of the CRA I entrusts to ESMA the day-to-day supervision of CRAs. According to Art. 36(a) of the CRA II, ESMA has the power to request information, conduct necessary investigations and on-site inspections, and even take supervisory measures or impose fines for administrative infringements. Rules on CRAs' civil liability are introduced by Article 35(a) of the CRA III.[45] The CRA III regulation does not refer to false or erroneous ratings as the cause of damage. It instead provides a list of infringements of regulatory provisions, which may cause damage to the investor or the issuer.[46] These infringements must have impacted the rating, resulting in a patrimonial loss for the claimant.[47] Regarding the standard of care for civil

[42] See *In Re: Lehman Bros Mortgage-Backed Securities Litigation*, 650 F.3d 167, 175-85 (2d Cir 2011).

[43] SEC, No action letter to the Ford Motor Credit Company LLC and Ford Credit Auto Receivables Two LLC, 23 November 2010.

[44] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ L 302, 17.11.2009, p. 1 (CRA I); Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 145, 31.5.2011, p. 30 (CRA II); 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, OJ L 146, 31.5.2013, p. 1 (CRA III).

[45] For an analysis, cfr. C. Picciau, *The civil liability of credit rating agencies to investors in the EU*, in Cherednychenko O.O. and M. Andinas (eds.) *Financial regulation and civil liability in European law*, EE, 2020, p. 181; C. Picciau, *Diffusione di giudizi inesatti nel mercato finanziario e responsabilità delle agenzie di rating*, Milano, Egea, 2018, Ch.4; E. Maciariello, *La responsabilità da rating: analisi dell'articolo 35-bis del Regolamento CE n. 1060/2009*, in *BIS*, 2018, p. 157; A. Sacco Ginevri, *Le società di rating nel Regolamento CE n. 1060/2009: profili organizzativi dell'attività*, in *Nuove leggi civili commentate*, 2010, pp. 335 ff.

[46] The same list introduced to impose administrative sanctions by EU Regulation No. 1060/2009 as amended, Annex III, Section I, point 42 also applies to civil wrongs.

[47] See Art. 35(a), sec. 2 of the EU Regulation as amended in 2013.

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enforcement, Article 35(a) states that the infringement shall be committed "intentionally or with gross negligence."[48] Therefore, it excludes cases of mere negligence. However, CRA III allows for "further liability claims in accordance with national law," which allows countries to sue CRAs in any European national court for all breaches of extra-contractual liability.[49] The investor willing to establish a claim under Art. 35(a) must show that they reasonably relied on "in accordance with Art. 5a(1) or otherwise with due care" the credit rating for their decision to invest in, hold, or divest from the asset that the infringement has caused damage.[50] The CRA's liability *vis-à-vis* the investor is extra-contractual and, therefore, he or she has the burden of proof. At first, the EU Commission proposed to reverse this rule, but the change did not survive in the final draft of Art. 35(a), sec. 2. In this regard, it was said that an excess of liability would also be counterproductive and destructive to the industry. Civil liability regimes should not and were not primarily introduced to compensate investors for their investment loss but rather to improve the regulatory governance of the financial markets.[51]

4. The different approach of common law and civil law to regulate global economy

4.1 Tort vs delictual liability

Although the concepts of delictual liability in civil law and tort in common law are theoretically similar, they differ in many substantive ways. At the same time, the evolution of the delictual liability since the 19th-century codifications in continental Europe – rooted in Roman Law – has brought different approaches in the various

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

[49] See Art. 35(a) sec. 5 of the CRA III.

[50] See Recitals 26 of the Proposal of CRA III.

[51] See B. Haar, *Civil liability of credit rating agencies – regulatory all-or-nothing approaches between immunity and overdeterrence*, University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2013-02, available at http://ssrn.com/abstract=2198293 (accessed 17 December 2024); M. Lehmann, *Civil liability of rating agencies – an insipid sprout from Brussels*, in 11 *Capital Markets Law Journal*, 2016, pp. 60-83, at 74-75. CRAs' liability should be secondary and perhaps capped at a certain amount for these authors. See also C. Picciau *The civil liability of credit rating agencies to investors in the EU*, before (n 45), p. 181; A.M. Pacces, A. Romano e A. Troisi, *Agenzie di rating responsabilità civile: una soluzione contrattuale*, in 16(3) *Mercato concorrenza regole*, 2014, p. 571.

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nations (of civil law traditions) that mirror the different expressions of fundamental societal policies.[52] Tort law, the source of liability for CRAs in common law countries, focuses on securing compensation when a third party has suffered unjust damage (including a pure economic loss). In civil law countries, this liability is also called delictual (or *Aquilian*) liability, from the Latin word *delictum*, which means offense or civil wrong, and, initially, it was meant to provide for an appropriate sanction for a wrong suffered by the victim, rather than a fair compensation of losses. While the common law of torts arises from case law, the civil law of delict is statutory. Thus, while many specific types of torts exist in common law, only an abstract definition in terms of infringement of rights exists in the law of delict.[53]

Delictual liability provides a general liability for the wrongful invasion of a person's rights. Delicts were considered acts of direct (deliberate) injury or damage without justification (classified as unlawful intention), typically done with malicious intent (*dolus*). Later, a comprehensive principle of fault (*culpa*) appeared as a legal category in the Roman law of delict, albeit only in the shape of negligence.[54] However, intentional wrong remained the dominant form of delict throughout, whereas acts of negligence and some cases of no-fault liability were considered *quasi*-delicts.[55]

The law of delict of the 19th century, with its distinct focus on individuals and fault, soon reached its limits when faced with the new technical, economic, and social challenges of industrialization that began in England and then spread across continental Europe. The English common law of torts instead, which initially

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[52] For instance, concerning the description of the protected interests and the relation between the traditional fault liability and strict liability, which are among the central structural decisions of every system of extra-contractual liability, while French law strongly favours the victims of accidents offering a far-reaching regime of strict liability and French judges are keen to compensate pure economic losses, English law is much more restrictive, assuming that free citizens are typically themselves responsible for their wealth and luck. Likewise, German law generally refuses to compensate pure economic loss through the medium of tort rules. Their liability under s. 823(1) and (2) BGB is fault-based and requires the presence of causality and damage as any action in German tort law. Alternatively, s. 826 BGB covers damage caused by a person acting contrary to public policy (*sittenwidrig*). However, mere negligence is not enough because this provision requires the tortfeasor's malicious intent.

[53] For a comparative analysis, see G. Brüggemeier, *The Civilian Law of Delict: A Comparative and Historical Analysis*, in 7 *EJCL*, 2000, pp. 339-383, at 342 ff.

[54] Culpa was differentiated into various degrees of faults: gross negligence (*culpa lata*), ordinary negligence (*culpa levis*), and slight negligence (*culpa levissima*).

[55] It is not the causing of damage that triggers liability and obliges compensation, but the injury of protected legal interests and the infringement of property-like absolute rights.

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consisted of many typified individual torts – seen independent of one another – quickly adapted and developed into the separate tort of negligence also to cover, apart from omission and indirect injuries, direct non-intentional acts of infringement.[56] The tort of negligence is not usually concerned with intentionally inflicted harm but with protecting against accidental harm where the defendant has been at fault. While intention appears essential to some torts, like tortious conspiracy and inducement of breach of contract, it is not a definitional criterion of negligent misstatement. Although historically, the courts' approach has been to exclude or limit pure economic loss from the scope of negligence because of concerns about a floodgate of litigation and indeterminate liability, the last six decades have witnessed an expansion towards pure economic loss negligently inflicted. Negligent misstatement does not involve an intention to injure.[57] Common lawyers elaborated a "duty to take reasonable care not to injure one's neighbour" as a legal concept to justify this extension of liability and restriction of freedom of action.[58] Therefore, the common law of torts consists of four essential elements: duty of care, breach of duty (fault), injury/damage/loss, and causation, while the objective elements of the law of delict are the conduct (action or omission), damage/injury (of a right or protected interest), causation, and fault/wrongfulness (unlawful intent and negligence).[59] In addition, while in the civilian tradition, a delict is a wrongful injury, in common law, a wrong/tort is generally conceived as a breach of a legal duty.[60]

4.2 State sovereignty vs role of judiciary

Civil law countries share the traditional idea of state sovereignty, where each nation has the exclusive monopoly of creating and enacting statutory law through a legislative body. This notion sharply contrasts with the role of the judiciary in common-law countries. Indeed, common law judges enjoy significant discretion in their operations and hold law-making powers, which are certainly denied to their civil law

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[56] See the eminent cases: *Brown v. Kendall*, 60 Mass 292 (1850); fundamental for American Common Law, and *Donoghue v Stevenson* (1932) AC 562, 580 in England.

[57] C. Brennan, *Tort Law Directions*, Oxford University Press, 8th ed., 2022, p. 49.

[58] The "neighbour principle" of proximity became a decisive factor in the English tort law of negligence. See Brüggemeier, *The Civilian Law of Delict*, before (n 54), pp. 358-359.

[59] P. Giudici, *La responsabilità civile nel diritto dei mercati finanziari,* Milano, Giuffrè, 2008, p. 214 ff.

[60] P. Birks, *The Concept of a Civil Wrong*, in D. G. Owen (ed.), *Philosophical Foundations of Tort Law,* Oxford University Press, 1995, pp. 31-51.

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counterparts. Civil law judges have traditionally been considered la *bouche de la loi* ("the mouthpiece of the law")[61] and indeed cannot be said to act as "occasional legislators"[62].

The idea of the uniqueness of the legislator as the sole creator of the law has always been opposed, for instance, in the US, where its intervention has always been merely residual. The direct impulse of private individuals has instead supported the legal evolution. Their inputs, supported by the judge-made law designed by the US courts in response to the clashes of interests as they have presented themselves in economic history, have improved the legal system. Accordingly, the evolution of US legal history can be described in nautical terms as a "set and drift," namely decision-making based upon widely-held and persistent attitudes and values and the method used to adjust them. All the drifts gradually merge into a direction.[63]

Unfortunately, the EU legislator approved a regulation for CRA civil liability instead a directive[64], and thus, the role of the European Court of Justice in bringing uniformity through preliminary ruling is vastly diminished.[65] In addition, the regulation refers to the principles of private international law to determine the applicable national law, contributing unnecessary complexity to the EU liability regime by allowing as many autonomous interpretations of the civil liability regime as the EU Member States.[66] For these reasons, the new regulation hardly added something to the European legal background already available.[67]

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[61] This famous idiom was coined by C. de Secondat Montesquieu, *The Spirit of the Laws*, Vol. 11, first published 1748, Cambridge University Press, 1989, chapter 6.

[62] This is Posner's claim; see R.A. Posner, *How Judges Think*, Harvard University Press, 2008, p. 81.

[63] M.R. Ferrarese, *Le istituzioni della globalizzazione: diritto e diritti nella società transnazionale*, Bologna, Mulino ed. 2000, Ch. 2 para 7 and Ch. 4 para 3, 6 and 7; J.W. Hurst, *Law and Social Process in United States History*, Da Capo Press, 1960, p. 42.

[64] The Product Liability Directive, for instance, gives an autonomous meaning to the many terms of tort law adopted in the text. See Art. 1 of the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

[65] See M. Lehmann, *Civil liability of rating agencies – an insipid sprout from Brussels,* 11 *CMLJ,* 2016, p. 77.

[66] G. Deipenbrock, *The European civil liability regime for credit rating agencies from the perspective of private international law – opening Pandora's box?* in 11 *ICCLJ*, 2015, pp. 6-16.

[67] For instance, in France, since 2010, Art. L 544-5 of the French Code monétaire et financier (CMF ou COMOFI) provides that CRAs are liable both in tort and for negligence for violation of Regulation (EC) n.

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4.3 (Lack of) flexible procedural law tools

The legal trajectory designed in the process of globalization presents significant similarities with the evolution of US legal history. Not surprisingly, the US legal structure contains all features typical of globalization in its DNA; for this reason, it is more suitable to regulate it. For instance, a tool of procedural law such as the class action supported by the fraud-on-the-market presumption of reliance developed by the US Supreme Court has created a tort litigation culture in the US that does not seem to exist in Europe.[68] The fraud-on-the-market theory assumes that information regarding a security traded, whether incorrect or false, always impacts its market price. There is, thus, an inherent causal link between any public misrepresentation and any investors who purchased that security since the misrepresentation defrauded the entire market by affecting its stock price.[69] By assuming that simply investing in a given security– unaware of the fraudulent conduct – investors relied upon allegedly fraudulent information, the fraud-on-the-market theory releases them from proving the individual reliance on an alleged corporate misstatement and from the difficulties

1060/2009. In Germany, the doctrine of the Vertrag mit Schutzwirkung für Dritte (VSD) extends contractual protection to third parties who show sufficient proximity to the performance and the creditor of the performance, as long as the debtor could have recognized their existence or of the doctrine of liability based on confidence or trust (Vertrauenshaftung), see A. Darbelley, *Regulating Credit Rating Agencies,* Edward Elgar Publishing, 2013, p. 82; B. Haar *Civil Liability of Credit Rating Agencies after CRA 3 – Regulatory All-or-Nothing Approaches between Immunity and Over-Deterrence*, 25 *EBLR*, 2014, pp. 317-318. In England, Art. 35(a) looks like a less protective duplication of the tort of deceit. Deceit consists in making a false statement, knowing it to be false, or 'recklessly, careless whether it be true or false.' The claimant then acts to his or her detriment in reliance on it; see N. Hoggard, *What a Tangled Web We Weave: Conflicts in Rating Agency Liability*, 5(2) *Cambridge Journal of International and Comparative Law,* 2016, pp. 363-377, at 366; *contra* T.M. J. Möllers and C. Niedorf, *Regulation and Liability of Credit Rating Agencies—A More Efficient European Law?* in 11(3) *ECFR,* 2014, p. 333 and pp. 355-56.

[68] The US Supreme Court has reaffirmed the validity of this presumption, see *Halliburton Co. v. Erica P. John Fund, Inc.* (Halliburton II), 134 S. Ct. 2398 (2014), after 30 years from its adoption in *Basic, Inc. v. Levinson*, 485 U.S. 224, 247 (1988). See also U. Magnus, *Why is US Tort Law so Different?* in 1(1) *Journal of European Tort Law,* pp. 102-124.

[69] In *Basic v. Levinson*, that theory holds that "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public misrepresentation, therefore, may be presumed for purposes of a Rule 10b-5 action."

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of establishing loss causation.[70] So doing, the presumption facilitates securities fraud class actions, allowing common issues of class to predominate over individual issues and making class treatment the perfect tool against the abuses of large corporate defendants.[71]

The presumption of reliance has mainly been criticized by scholars,[72] who claim that a disproportional use of it could create wrong incentives in the market by developing the idea of the existence of a cost-free form of insurance against stock price drops. The fraud-on-the-market theory is probably not applicable to CRAs' liability cases since CRAs evaluate, especially debt instruments and debt markets are generally less efficient than share markets.[73] However, it is an example of the tools available to judges that could be wisely used at their discretion. If, on the one hand, the US Supreme Court confirmed the ongoing validity of the fraud-on-the-market presumption, on the other hand, it also recognized a new avenue for corporate defendants to rebut it at the class certification stage by presenting evidence that an alleged corporate misstatement had no impact on the price of the stock.[74]

A civil law judge deeming the law inadequate to protect a plaintiff could apply a presumption of reliance in his or her reasoning. In Italy, for instance, a legal presumption could apply if, without causation proof, the fact results from "serious, precise, and consistent" elements pointing in the same direction.[75] However, in the

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70 Federal Rules of Civil Procedure, Rule 23(b)(3): "A class action can be maintained if Rule 23(a) is satisfied and if […]: the Court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy."

71 The argument goes: because fraudulent information disseminated on an efficient market leads to an artificially inflated price of the stock at issue, loss causation exists because plaintiffs would not have purchased the stock if they had known it was falsely inflated or because they paid too much for it.

72 See W.W. Bratton and M.L. Wachter, *The political economy of fraud on the market,* 160 *U. Pa. L. Rev.,* 2011, pp. 69-168, at 77; L.A. Stout, *Are stock markets costly casinos? Disagreement, market failure, and securities regulation,* 81 *Virginia Law Review,* 1995, pp. 611-712, at 650; J. Macey and G. Miller, *Good finance, bad economics: an analysis of the fraud on the market theory*, 42 *Stanford Law Review,* 1990, pp. 1059-1092; D.C. Langevoort, *Theories, assumptions, and securities regulation: market efficiency revisited*, 140 *U. Pa. L. Rev.,* 1992, pp. 851-920, at 857-69.

73 D. Darcy, *Credit Rating Agencies and the Credit Crisis: How the "Issuer Pays" Conflict Contributed and What Regulators Might Do about It*, in *Colum Bus L Rev.,* 2009, p. 656.

74 *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II),* 134 S. Ct. 2398 (2014).

75 In Italy, Art. 2727, Civil Code; in France, Art. 1353, Civil Code.

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case of CRAs, the presumption would be simple and always rebuttable. It could be argued that different would be the case of a claim brought under Art 11(2) of the Prospect Regulation[76] against CRAs for misstatement in prospectus rather than for damage compensation because, for instance, the rating has negatively impacted the stock price in the market. The courts' approach of applying a presumption of liability for CRAs' misstatement in the prospectus would also be justified by prospectuses' central role nowadays among the means of financial information available to companies for raising finance in the market.[77] However, the effective influence on the stock price must be measured and proved. Furthermore, like CRA III, the Prospectus Regulation has not harmonized prospectus liability law amongst Member States: the effective legal protection must be provided in accordance with the rules of national law.[78]

In tort liability, it is essential for establishing liability under negligent misstatements that the endangered person must be in a relationship of proximity with the actor – in this case, the CRA. In such a scenario, there would be an assumption of responsibility as a basis for liability.[79] The proximity requirement also appears in German law with similar traits, but not everywhere in continental Europe.[80] To have a relation of proximity, the claimant must prove he or she had a special position of trust due to the special skill of the defendant that made it reasonable for him or her to rely on the

[76] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

[77] In Italy see Cass. Civ., sez. I, 11 giugno 2010, n. 14056, commented by S. Cicchinelli, *La fattispecie della responsabilità da prospetto informativo. Problemi e prospettive*, in 2 *Rivista di Diritto Societario*, 2014, pp. 212 ff. where, according to the Supreme Court, any false information included in the prospectus should generate a presumption of distortion of financial information, which should be rebutted by the party who disclosed it.

[78] S. Lombardo, *Stabilization and underpricing in IPOs*, in *Prospectus Regulation and Prospectus Liability*, Busch, Ferrarini, Franx (eds.), Oxford University Press, 2020, 49-71; P. Giudici, *Prospectus Liability and Litigation. Italy*, idem, Ch. 22; Alvaro, Lener, Lucantoni; in collaboration with Adriani, Ciotti, Parziale, *The Prospectus Regulation. The long and winding road*, in *Quaderni giuridici*, Ottobre 2020, 60-73; P. Giudici and S. Lombardo, *La tutela degli investitori nelle IPO con prezzo di vendita aperto*, in *Rivista delle Società*, 2012, 907.

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

[80] Unlike England and Germany, Swedish tort law does not contain a proximity requirement limiting liability to an identifiable or recognizable class; neither is this requirement present in French tort law. For an analysis of the national tort laws of several main jurisdictions in Europe, see E. Nästegård, *The Tort Liability of CRAs in Europe and the Need for a Harmonized Proximity Requirement at the Union Level*, 31 *EBLR*, 2020, pp. 804-813.

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statement made by the defendant. At the same time, the defendant must know, or ought to know, that the claimant relied on it.[81] In theory, these requirements could apply to CRAs, who present themselves to the market as financial experts on whose creditworthiness assessment depends an excellent part of the investors. The claimant must be a member of an identifiable or recognizable class (i.e. limited class) to establish liability. However, so far, the Courts in the UK and in Germany have shown that the use of the proximity requirement mainly targeted to limit the extension of liability.[82]

In England, the Davies Review commissioned by the HM Treasury in 2007 evaluated whether to strengthen and extend or not the issuer's liability on regulated markets[83] and decided not to take action in any direction and to trigger liability in tort only in the presence of intentional deception (fraud) of an issuer while excluding rating agencies from the range of potential fraudulent issuers. The fear of floodgates of "American-style" litigation to get the financial multinationals to share investors' losses has always resulted in strong pressure from the UK, supported by the industry, not to introduce mechanisms of investor litigation against investment funds or financial companies so as not to provide the market with perverse incentives.[84] In any case, due to the many differences at the European level about the interpretation and application of the liability requirements, CRAs could easily incur regulatory arbitrage and forum shopping to avoid liability.[85]

[81] In England, see *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (UKHL) 650. In Germany, the quasi-contractual doctrine is based on confidence.

[82] See M. Bussani, A.J. Sebok, M. Infantino, *Common law and civil law perspectives on tort law*, Oxford University Press, 2022, Ch. 6 on *Compensation for Pure Economic Loss*; B.S. Markesinis, J. Bell and Janssen A., Markesinis's *German Law of Torts: A Comparative Treatise*, Hart Publishing: Oxford, 5th ed., 2019, pp. 88 ff.

[83] See Section 90A and 90B of the Financial Service and Markets Act 2000 (FSMA), which is the detailed provision implementing issuer liability provisions into English law in relation to reports and statements made under the EU Transparency Obligations Directive. In particular, see also HM Treasury, Davies Review of Issuer Liability: Final Report (March 2007) (Davies Report 2007), discussion paper available at https://www.treasurers.org/ACTmedia/daviesdiscussion260307.pdf (accessed 17 December 2024).

[84] For the same reason, the EU Commission's proposal to reverse the burden of proof in favour of the investors in CRA III art. 35(a), sec. 2 did not survive in the final draft of the article. See M. Andenas and I.H-Y. Chiu, *The Foundations and Future of Financial Regulation: Governance for Responsibility*, Routledge, 2014, pp. 223-225.

[85] Nästegård, *The Tort Liability of CRAs in Europe*, before (n 81), pp. 814-818.

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4.4 Judicial activism *vs* judicial restraint

Judiciary review exists with different intensity both in common law and civil law countries, regardless of which theory of democracy – legislative supremacy or separation of power –the legal system is based on. However, judicial *activism* is a peculiarity of common law countries. Judicial activism refers to that approach to the exercise of judicial review or description of a particular judicial decision, in which a judge overlooks legal precedents invalidating those legislative or executive actions conflicting with the Constitution or with the spirit of the time. In such a way, judges can protect people from powerful institutions and restore social justice where it is threatened. Sometimes, this approach has also been taken to limit liability *vis-à-vis* third parties when it was perceived that such extra-contractual liability would have been too heavy a burden and would have provided the market with perverse incentives. For instance, in the eminent English case of *Caparo Industries v. Dickman*,[86] the House of Lords dismissed the action of a shareholder (Caparo) against the auditors (Dickman) even though they negligently pictured a healthier financial situation of the audited company (Fidelity Plc) in which the shareholder – holding 29.9 percent – had launched a takeover bid for the remaining shares. The House of Lords refined the criteria applied in the assumption of responsibility to provide professional or quasi-professional services for another who relied on those services.[87] They elaborated a threefold test on the concept of proximity, foreseeability, and whether it is just and reasonable to impose a duty of care. While proximity and foreseeability are a similar concept and essential elements in determining negligence claims, the reasonableness test does not really belong to the structure of tort law. In the absence of foreseeability, the harm in question would be unavoidable and, therefore, a duty of care impossible. Likewise, without proximity it would be impossible to assume the actor (i.e. a CRA) owns fiduciary duties towards a multitude of defendants (i.e. investors). However, the third stage for the court involves balancing policy factors and private justice and, therefore, a public policy reason, to decide whether imposing a duty of care responds to the principles of 'fairness, justice and reasonableness'.[88]

[86] *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (UKHL) 650.
[87] See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, [1994] 3 All ER 506.
[88] J. Stapleton, *Three Essays on Torts,* Oxford University Press, 2021, ch 2, pp. 29-32.

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In the Caparo case, the House of Lords found that there was not sufficient proximity or "closeness" between the auditors and the shareholder, and, therefore, no duty of care was owed to the shareholders at large. In other words, it would have been necessary to prove that the auditor knew that its financial opinions would be communicated to the third party, who would have relied upon those opinions to perform a specific transaction.[89] This decision overturned the Court of Appeal, which held that it followed from the general rule that the auditors should be liable. For this reason, Lord Bingham referred to the decision as "judicial activism" (although here used) to limit liability.[90]

Indeed, the courts of common law have traditionally upheld the principle of *caveat emptor* and followed the doctrine of *privity*. However, judicial cases, which are regarded as the most important source of law, have given judges an active role in developing rules and new categories of negligence.[91] This capacity – to fill the legal vacuum produced by the globalization process constantly adapting to innovation – makes the courts of common law better equipped to govern the global economy. By contrast, claims presented under delictual liability in courts of civil law countries face severe proof difficulties relating to causation.[92] In the famous Italian case of Parmalat, the

[89] This judgment and its extent were further discussed in *Her Majesty's Commissioners of Customs and Excise v. Barclays Bank plc* [2006] UKHL 28 [2007] AC 181. The House of Lords' decision established that under English law, a duty of care in a tort claim for pure losses could arise, irrespective of whether a contractual relationship exists between the parties, if one of the following tests is met: assumption of responsibility, threefold test (see *Caparo*), incremental test that the law should develop novel categories of negligence incrementally and by analogy with established categories (see the Australian case *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481).

[90] Lord Bingham of Cornhill, *The judges: active or passive*, in 139 *Proceedings of the British Academy*, 2005, p. 64.

[91] See K. Alexander, *Tort liability for ratings of structured securities under English law*, in 11 *International and Comparative Corporate Law Journal,* 2015, pp. 12-15.

[92] On CRA's extra-contractual liability in Italy among the many, see F. Parmeggiani, *Gli effetti distorsivi del credit rating*, before (n 15), pp. 169-199; C. Picciau, *Diffusione di giudizi inesatti*, before (n 45), p. 309 ff.; C. Rinaldo, *Rating incongrui e tutele di mercato,* Milano, Giuffrè, 2017, pp. 167 ff., 216 ff.; E. Depetris, *La responsabilità civile delle agenzie di rating del credito nella disciplina italiana ed europea*, Torino, Giappichelli, 2015, 377 ff.; R. Rosapepe, *Intervento*, in *Le agenzie di rating. Atti del Convegno,* 2014, 177; L. Di Donna, *Danni da rating e rimedi degli investitori*, in *Le agenzie di rating,* ult.cit., p. 286; G. Fauceglia, *Intervento*, in *Le agenzie di rating.,* 2014, 253; F. Greco, *La responsabilità "extracontrattuale" dell'agenzia di rating nei confronti dell'investitore*, in *Resp. civ. e prev.,* 2013, p. 1461; C. Scaroni, *La responsabilità delle agenzie di rating nei confronti degli investitori*, in *Contratto e Impresa,* 2011, p. 806; P. Giudici, *L'agenzia di rating danneggia l'emittente con i propri rating eccessivamente favorevoli?* in *Società*, 2011, 12, 1454; G. Facci, *Le agenzie di rating e la responsabilità per informazioni inesatte*, in *Contratto e impresa*, 2008, p. 164.

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action against Standard & Poor's (S&P) was brought by the receiver appointed to restructure the company. The court refused the request of 4 billion euros for damages but, at least, granted the restitution of all the fees (about 800,000 euros) paid by Parmalat to S&P during the period from 2000 until 2003 (just before Parmalat's financial meltdown), when S&P constantly considered the company "investment grade".[93] In a recent German case, the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf)[94] rejected an investor's lawsuit against a CRA brought both under Art. 35(a) of the CRA III and the national (German) private law. The Court argued that the ratings published only covered the company and not the company's bonds as the internal structure of Art. 35(a) of the CRA III requires.[95] The Court's judgement shed light on the German doctrine concerning contracts with protective effect to the benefit of third parties, making clear that corporate ratings fall outside the protective scope of the doctrine. Ratings are disseminated to the investment market, and a CRA cannot foresee who will rely on its corporate rating once published. If we were in the presence of a limited and recognizable category of investors sufficiently close to the CRA, i.e. linked by a relationship of proximity, it would be theoretically possible to assume an assumption of responsibility by the CRA as a basis for its own liability.

While the English courts have consistently demonstrated a reluctance to impose obligations (such as a duty of care to avoid economic loss) on a party in the absence of a contractual relationship, in the Australian case *Bathurst*,[96] the Federal Court of Australia found that S&P owed a common law duty of care to investors, notwithstanding that there was no contract between them, and was liable to the investors who purchased complex collateralized debt obligation notes rated AAA, which later became junk bonds. This decision showed that liability for financial loss suffered by professional investors who had relied on ratings could be imposed on a

[93] *Parmalat v Standard & Poor's*, Tribunale di Milano, 1 luglio 2011, in *Riv. Dir. trim. dir. econ.*, 2012, II, 83 followed by the comment of Troisi, *I giudizi di rating sulle società emittenti: tecniche di valutazione e problematica giuridica*, at pp. 93-106.

[94] I-6 U 50/17 (8 February 2018).

[95] That states an issuer may claim damages for credit ratings that cover 'it [i.e. the issuer] or its financial instruments, while an investor may claim damages only if it has relied on a credit rating covering a financial instrument'.

[96] *Bathurst Regional Council v Local Government Financial Service Pty Ltd* (No. 5) [2012] FCA 1200. The first instance was later confirmed in *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65.

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bank and the CRA that issued the defective rating if the risk of loss was foreseeable because of a negligent act of misrepresentation by the CRA.[97] In Bathurst, the rating agency did not give any consideration to the model risk when assigning the rating. S&P accepted a 15 percent volatility figure from the issuer bank (ABN Amro). In such circumstances – without any evidence of the accuracy of that percentage – S&P should not have issued any rating. Conversely, they adopted this percentage even if they could have easily calculated the absolute volatility percentage and realized that the correct figure was around 28 percent.[98] On appeal, the court stated that the class of investors who acquired the securities rated by S&P and the foreseeable loss were determined by the function that the CRA undertook, which was "delineated by the purpose of the rating … and the known reasonable reliance".[99] Although S&P alleged it could not owe a duty of care because there was no direct dealings or contractual relationship with the class of investors, the court deemed a contractual nexus between S&P and the investors not necessary in such circumstances. S&P knew that its rating was functional to finding finance, given that the investors were only waiting for it to be able to buy securities. In light of this, since the purpose of the rating was to attract finance from professional investors through marketing financial products issued by a bank, it was considered fair, just, and reasonable to impose a duty on CRAs to issue independent and competent ratings.[100]

In the US, CRAs' ratings have historically been considered financial opinions and have, therefore, been protected as freedom of speech by the US Constitution's First Amendment. The reason is that, through their ratings, CRAs touched on matters of public concern – the credit risk of a rated entity. However, over the years, the US courts have developed the idea that whether or not a public concern is touched upon depends on the content, form, and context. In several cases where it was said that CRAs touched on private rather than public concerns, their status as financial

[97] The British court arrived at different conclusions in a comparable case, *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2007] EWCA Civ 910, [2008] 2 BCLC 22 [56], in which it stated that mere foresight is not enough to give rise to a duty of care to third parties; assumption of responsibility is needed. See *also Barclays Bank plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm), 2 BCLC 537.

[98] *Bathurst Regional Council v Local Government Financial Services Pty Ltd* (No. 5) [2012] FCA 1200. In the judge's words: '[a] reasonably competent rating agency could not have rated the Rembrandt 2006-3 CPDO AAA in these circumstances.'

[99] *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [1260].

[100] *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [1270] – [1271].

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journalists and, therefore, the protection granted by the First Amendment for political speech was rejected.[101] The idea that CRAs could not be considered by default as performing the journalists' professional activity and, thus, benefitting from the immunity granted by the First Amendment was already growing in the US courts, even before the enactment of the Dodd-Frank Act.[102] In the case *In re Fitch, Inc.*,[103] the Court of Appeals for the Second Circuit concluded that when a CRA is significantly involved in the client's operations (as, for instance, because it is consulting the client on how to structure a particular transaction), all its information disseminating activity (in this case the rating was solicited) does not seem to be 'based on a judgment about newsworthiness, but rather on client needs'.[104]

After 2008, in light of the last financial crisis, the US courts changed their approach, and CRAs lost their permanent status as financial journalists, particularly with regard to the rating of structured products. US courts took up the idea that structured financial products addressed for a specific business audience, such as investment banks and selected groups of investment bankers were only of private, not public, concern, and, as a consequence, the constitutional protection did not apply. By requalifying CRAs' ratings no longer as political, but as commercial speech that does not touch public concerns,[105] the US courts managed to shift their approach from quasi-judicial immunity toward the possibility of holding CRAs liable. This approach of the courts materialized in the *Abu Dhabi* case, where CRA had to prove that the

[101] In *LaSalle Nat'l Bank v Duff & Phelps Credit Rating Co.*, 951 F.Supp.1071, 1086 (SDNY 1996), since LaSalle privately contracted Duff & Phelps concerning a private placement of securities, there was no such public concern. Similarly, in *Dun & Bradstreet, Inc. v Greenmoss Builders*, 472 U.S. 749, 763 (1985), the court said that, unlike the traditional media, Dun & Bradstreet was in the business of selling financial information to subscribers who paid substantial fees for their services and they were solely motivated by the desire for profits.

[102] In *re Enron Corp Sec, Derivatives & "Erisa" Litig,* 511 F Supp 2d 742, 817 (SD Tex 2005). The District Court for the Southern District of Texas observed that 'there is no automatic, blanket, absolute First Amendment protection for reports from the credit rating agencies based on their status as credit rating agencies'. See also *First Fin Sav Bank, Inc v American Bankers Ins Co of Florida, Inc*, 1989 US Dist LEXIS 16400, 13 (EDNC 1989); In *re Taxable Mun Bond Sec Litig,* 1993 US Dist LEXIS 18592, 13 (ED La 1993).

[103] *In re Fitch v UBS Painewebber, Inc.*, 330 F 3d 104 (2d Cir 2003).

[104] *In re Fitch, Inc*, 330 F 3d 104, 110–11 (2d Cir 2003).

[105] The Supreme Court has defined commercial speech as "solely related to the interest of the speaker and its audience", see Virginia. *State Board of Pharmacy v Va. Citizens Consumer Council Inc.*, 425 U.S. 748, 762 (1976). The First Amendment still protects this type of speech but does not reach the same level of constitutional protection. See *Central Hudson Gas and Electricity Corporation v Public Service Commission*, 447 US 557, 561 (1980).

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ratings were a matter of public concern to benefit from First Amendment protection. The rating was communicated only to a selected group of qualified investors in that case. The Court denied its applicability, arguing that a rating directed to a selected group of investors, although not a small group, cannot be considered a matter of public concern.[106]

Not surprisingly, in the US States, we have witnessed in the years following the financial crisis an exponential increase in lawsuits against CRAs brought by investors and regulators.[107] In King County,[108] the Southern District of New York held that the relationship between the CRA and investors was privity-like but this was not sufficient to avoid liability for negligent misrepresentation. The rating was issued for a selected group of qualified investors and prepared with the aim of inducing them to invest in a particular structured investment vehicle.[109] Similar conclusions were reached in the eminent cases of *USA v. McGraw-Hill and S&Ps*,[110] where the US Department of Justice and 19 states claimed civil penalties against S&P for allegedly defrauding investors out of $5 billion in mortgage-related securities,[111] and *CalPERS case*,[112] the nation's largest public pension fund that put $1.3 billion into plain vanilla bonds in 2006, at the height of the subprime-fuelled housing boom.[113] According to the court in the CalPERS case, ratings are not mere predictions of the future value of a

[106] The case was settled, but the terms remained unknown. See *Abu Dhabi Comm. Bank v Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 175-76 (SDNY 2009). To support its statement, *the District Court cited Dun & Bradstreet Inc. v Greenmoss Builders Inc.*, 472 U.S. 749, 751, 762, 763 (1985), where the rating grade was made available to a small group of investors bound to confidentiality.

[107] *Genesee County Employees' Retirement System v Thornburg Mortgage Securities Trust 2006-3,* 825 F. Supp. 2d 1082 (D.N.M. 2011).

[108] *King County, Washington et al. v IKB Deutsche Industriebank AG et al*, no. 09-08387, 31-50 (S.D.N.Y. 2012).

[109] The claim for negligence and breach of fiduciary duty were dismissed but not that for negligent misrepresentation.

[110] *USA v. McGraw-Hill Companies Inc. and Standard & Poor's Financial Services LLC,* No. CV 13-00779 DOC (JCGx) available at https://www.justice.gov/file/338701/download (accessed January 2024).

[111] The ratings gave a wrong picture of the market, portraying the securities as much safer than they were. The case was settled in February 2015 for the unprecedented sum of $1,375 billion.

[112] *Cal. Pub. Employees' Ret. Sys. v Moody's Investors Serv. Inc*, 226 Cal. App. 4th 643, (Cal. Ct. App. 2014). A similar approach was adopted in *Genesee County Employees' Retirement System v Thornburg Mortgage Securities Trust 2006-3*, 825 F. Supp. 2d 1082 (D.N.M. 2011).

[113] According to court filings, the fund estimates it lost as much as $1 billion when the bonds lost their value in the ensuing crash. The case was settled in 2016 before judgment for $130 million, a few months after S&P agreed to settle with CalPERS for $ 125 million.

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particular structured investment vehicle, but affirmative representations regarding the present state of the rated entity, its solvability, and its capacity to generate cash flow to repay interest and capital to the investors. For this reason, CRAs have to continuously monitor the structured finance products to ensure that the given rating remains accurate. This process involves withdrawing any rating that no longer represents the issuer's creditworthiness. The case resulted in a published appellate court opinion finding that CRAs can, in certain circumstances, be liable for negligent misrepresentations of their ratings of privately placed securities. Of course, the circumstances that would preclude the First Amendment defence might be examined case by case. In other circumstances, where it was not possible to establish a relationship, the principle of privity prevailed. Since there was no direct contact or communication between the CRA and the investors, claims for negligent misrepresentation were dismissed.[114]

5. Conclusion

The idea of the new global and interconnected markets, such as the financial markets, sharply contrasts with the notion of 'State', which is an entity delimited by geographical and political boundaries.[115] Many national codifications cannot regulate the global economy. Unfortunately, the civil liability regime introduced by the EU legislator, by allowing *renvois* to the applicable national law to interpret critical terms concerning the proof of causation and reliance, attempts just that. CRAs perform their activity in a global market; therefore, *ex-ante* supervision and *ex-post* enforcement

[114] *Anschutz Corp. v Merrill Lynch & Co.*, 690 F.3d 98 (2d Cir. 2012); *Ohio Police & Fire Pension Fund v Standard & Poor's Financial Services LLC,* 813 F. Supp.2d 871 (S.D. Ohio 2011); *Federal Home Loan Bank of Boston v Ally Financial Inc* No.11-10952-GAO, 3 (D. Mass. 2012); in *re Merrill Lynch Auction Rate Sec Litig,* 2011 US Dist LEXIS 14053, 38–39 (SDNY 2011), the Court rejected the claim holding that 'credit ratings are statements of opinion' and are therefore not actionable. In the Court's reasoning, the only exception to this rule is if the agency knew that the credit rating was false or inaccurate. Also see: *In re National Century Financial Enterprises, Inc.,* 580 F. Supp. 2d 630 (S.D. Ohio 2008), where "the Court's review of Ohio case law on negligent misrepresentation supports the conclusion in National Mulch that even though a special relationship is not an express element of a negligent misrepresentation claim, it is an apt characterization of the requirements that the defendant supply false information in a business transaction for plaintiffs guidance and that the plaintiff be the person or part of a limited class for whom defendant intended to supply the information".

[115] In Europe, the law of a single State – no matter how powerful – is as threatening as "the roar of a mouse". See F. Galgano, *La globalizzazione nello specchio del diritto*, Bologna, Mulino, 2005, pp. 115-156.

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should also relate to the entire market. However, as the analysis above shows, statutory law seems to be too rigid a tool for regulating global markets. More flexible tools that can quickly adapt to circumstances should be adopted. This article evidences that the judicial reforms of certain common law courts have been more effective than many statutory (written) rules. Legal structures such as those of common law countries are better equipped to tackle global market challenges and improve the overall governance of CRAs. To reduce this gap, it becomes essential to identify the optimum means that would extend to the judiciary the flexibility to balance investors' protection and sustainable development in financial markets in any given factual circumstance; in other words, to contextualize to do justice.[116]

Increasing and extending the powers of the delegated financial authority ESMA is undoubtedly a good step forward. Compensation is not a goal of the ESMA's enforcement policy. However, it could become. Empirical evidence from the UK's practice shows that such a model (called 'integration model') is already adopted, prompted by a need of restorative justice, which sought to link the sanctioning activity of the authority with the redress of any damage caused by the CRA's infringement.[117] Alternatively, since the main problem concerns a lack of harmonization of civil law countries' various legal traditions and procedural law tools, a solution could be to start from the commonalities among the national tort laws regarding the application and interpretation of the proximity requirement to form the basis for harmonizing it as well as its central liability elements.[118] It could be helpful to develop always more accurate standards, professional norms, and best practices about CRA's activities on which the national courts could rely. Standards could be imposed on CRAs even contractually through *ad-hoc* designed clauses. Their role would be pivotal in private law enforcement because of their strong connection with contractual and extra-contractual liability. They could harmonize the private law and private enforcement procedures in the EU financial market and provide national courts with a model of behaviour against which CRAs must be assessed

[116] See P. Giliker, *Codification, consolidation, restatement? How best to systemise the modern law of tort*, 70(2) *International and Comparative Law Quarterly*, April 2021, pp. 271–305.

[117] See O.O. Cherednychenko, Regulatory Agencies and Private Damages in the EU: Bridging the Gap between Theory and Practice', (2021) Yearbook of European Law, Vol. 40, No. 1, p. 163.

[118] E. Nästegård, *The Tort Liability of CRAs in Europe*, before (n 81), pp. 804-814.

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