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A EUROPEAN PERSPECTIVE ON THE LIABILITY OF CREDIT RATING AGENCIES

By Jan De Bruyne*

I. INTRODUCTION

Credit rating agencies (CRAs) such as Standard & Poor's (S&P), Moody's or Fitch evaluate the creditworthiness of financial instruments or issuers of such instruments.¹ These CRAs examine the risk that the payment of interests and capital will or will not completely take place at the promised time.² CRAs issue ratings in the form of a letter or alphabetic symbol. The higher the given rating, the lower the credit risk for investors.³ By rating financial instruments, CRAs help to reduce informational asymmetries between lenders and investors on one side and borrowers or issuers on the other side.⁴ Investors, who in most cases do not have the capacity or time to examine and evaluate the quality of financial instruments or the creditworthiness of the issuer of such instruments, use the ratings issued by CRAs to make investment decisions.⁵ In sum, the use of those symbols makes "ratings easily comprehensible to even the dullest user and [enables] markets to respond quickly and, more or less, uniformly to changes in ratings".⁶

Incorrect ratings of structured products contributed to the collapse of the subprime-mortgage market in the US, which eventually led to the financial crisis in 2008.⁷ Deceived investors are increasingly trying to hold CRAs liable for the issuance of such flawed ratings.⁸

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¹ John C. Coffee Jr., *Gatekeepers: the role of the professions in corporate governance* 283-284 (1st ed. 2006).

² Eddy Wymeersch & Marc Kruithof, *Regulation and Liability of Credit Rating Agencies in Belgium*, in *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law* 351 (Eric Dirix & Yves-Henri Leleu eds. 2006).

³ Steven L. Schwarcz, *Private Ordering of Public Markets: The Rating Agency Paradox*, 2 U. Ill. L. Rev. 1, 7 (2002); Frank Partnoy, *Rethinking Regulation of Credit Rating Agencies: An Institutional Investor Perspective*, 25 JIBLR 188, 189 (2010).

⁴ Harry McVea, *Credit Rating Agencies, The Subprime Mortgage Debacle and Global Governance: The EU Strikes Back*, 59 Int'L & Comp. L.Q. 701, 706-707 (2010); Frank Partnoy, *The Siskel and Ebert of Financial Markets: Two Thumbs Down for the Credit Rating Agencies*, 77 Wash. U. L.Q. 619, 628-638 (1999); Jan De Bruyne, *How the threat of holding credit rating agencies liable might increase the accuracy of their ratings*, 52 Willamette L. Rev. 173, 174 (2015).

⁵ Wymeersch & Kruithof, *supra* note 2, at 353; Alice Darbellay, *Regulating Credit Rating Agencies* 38 (1st ed. 2013).

⁶ Coffee, *supra* note 1, at 283-284.

⁷ See in this regard: Matt Krantz, *2008 crisis still hangs over credit-rating firms*, USA Today, September 13, 2013, <https://www.usatoday.com/story/money/business/2013/09/13/credit-rating-agencies-2008-financial-crisis-lehman/2759025/>

⁸ See for example *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155 (S.D.N.Y. 2009); *Anschutz Corporation v. Merrill Lynch & Co. Inc.*, 785 F. Supp. 2d 799 (N.D. Cal. 2011); *Tolin v. Standard & Poor's Financial Services*, 950 F.Supp.2d 714 (S.D.N.Y. 2013); Federal Court Australia, *Bathurst*

However, holding CRAs liable towards investors has not always been straightforward. Besides problems with regard to the burden of proof, CRAs traditionally argue that their ratings are mere opinions, the “world’s shortest editorials”⁹ ever written on a company’s creditworthiness. Rating agreements and codes of conduct stipulate ratings and are not absolute assurances of credit quality or exact measures of the probability that an issuer or financial product will default. Ratings are opinions on the credit quality and do not explicitly recommend purchasing, holding or selling securities. Credit rating agencies gather complex information from different sources and transform this into future predictions by using simple symbols.¹⁰

As a consequence, CRAs consider themselves as members of the financial press and their ratings as opinions falling under the freedom of speech protection. The protection of ratings under the First Amendment to the US Constitution has already been extensively examined elsewhere.¹¹ Therefore, this article takes a European perspective on the freedom of speech protection given to CRAs. After a brief discussion of the legal framework on CRAs in the European Union (part II), the contribution focuses on the protection of ratings under Article 10 of the European Convention on Human Rights (ECHR) dealing with the freedom of expression (part III).¹² Even when assuming ratings would fall within the scope of Article 10 ECHR, national governments are allowed to restrict a CRA’s freedom of speech under the conditions set out in the second paragraph of the Article (part IV). I will then conclude with summarizing the main findings of the article (part V).

Regional Council v Local Government Financial Services Pty Ltd (No 5) [2012] FCA 1200 affirmed in Full Federal Court Australia, *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65.

⁹ Gregory Husisian, *What Standard of Care Should Govern the World’s Shortest Editorials? An Analysis of Bond Rating Agency Liability*, 75 Cornell L. REV. 411, 446 (1990).

¹⁰ Rachel Jones, *The Need for a Negligence Standard of Care for Credit Rating Agencies*, 1 Wm. & Mary Bus. L. Rev. 201, 210 (2010). See for an example: Part 7 (“What are Credit Ratings and Their Limits?”) in S&P Global Ratings, *S&P Global Ratings Code of Conduct*, March 1, 2018, https://www.standardandpoors.com/ru_RU/delegate/getPDF?articleId=2001716&type=COMMENTS&subType=REGULATORY.

¹¹ See e.g., Caleb H. Deats, *Talk That Isn’t Cheap: Does the First Amendment Protect Credit Rating Agencies’ Faulty Methodologies from Regulation?*, 110 Colum. L. Rev. 1818 (2010); Lisbeth Freeman, *Who’s Guarding the Gate? Credit-Rating Agency Liability as “Control Person” in the Subprime Credit Crisis*, 33 Vt. L. Rev. 585, 606-608 (2009); Jonathan W. Heggen, *Not Always the World’s Shortest Editorial: Why Credit Rating-Agency Speech is Sometimes Professional Speech*, 96 Iowa L. Rev. 1745 (2011); Parisa Haghshenas, *Obstacles to Credit Rating Agencies’ First Amendment Defense in Light of Abu Dhabi*, 8 First Amend. L. Rev. 452 (2010); De Bruyne, *supra* note 4, at 202-206 with further references in the footnotes; Jan De Bruyne, *Exploring the limits of the freedom of speech for credit rating agencies after the financial crisis*, in Human rights as a basis for reevaluating and reconstructing the law 441 (Arnaud Hoc, Geoffrey Willems & Stéphanie Wattier eds. 2016).

¹² See generally, J. De Bruyne & C. Vanleenhove, *Third-party liability for flawed class certificates: an analysis of the viability of the credit rating agencies’ freedom of speech defence for classification societies*, 22 JIML 304 (2016); J. De Bruyne & C. Vanleenhove, *Class certificates and freedom of speech: classification societies as the credit rating agencies of the maritime sector?* In Current issues in maritime and transport law 99 (Stefano Zunarelli & Massimiliano Musi eds. 2016). See generally, Article 10 of the ECHR: Alastair Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* 671-731 (3rd ed. 2012).

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II. THE EUROPEAN UNION LEGAL FRAMEWORK ON CREDIT RATING AGENCIES

At the international level, the International Organization of Securities Commissions (IOSCO) took several initiatives to regulate CRAs. Examples include the Statement of Principles Regarding the Activities of Credit Rating Agencies¹³ and the Code of Conduct Fundamentals for CRAs.¹⁴ However, none of these initiatives, deals with the liability of CRAs. The Code of Conduct merely contains provisions that can be used by courts to determine the (appropriate) level and standard of care for a reasonable and prudent CRA. Several shortcomings also remain regarding the Code itself. It uses undefined terms (e.g. sufficient or reasonable)¹⁵ and “suffers from critical limitations”.¹⁶ The Code is based on voluntary compliance by CRAs and cannot be enforced by the IOSCO.¹⁷ It does not contain sanctions or a specific liability regime that regulators can use if CRAs violate one of the fundamentals.¹⁸ Furthermore, national legislation in the jurisdictions where CRAs operate prevails over the Code of Conduct Fundamentals.¹⁹

The extent to which CRAs can be held liable is thus primarily determined by supra- or national law. The European Union (EU) addressed the role and functioning of credit rating agencies in different regulations. For instance, Regulation 1060/2009 introduced a regulatory oversight regime on CRAs (Articles 14-20) and contained provisions to avoid conflict of interest with the issuer (Articles 6-7). Credit rating agencies also have to use rigorous, systematic, continuous rating methodologies that are subject to validation based on historical experience.²⁰ The EU adopted additional legislation that explicitly and clearly defined when methodologies are rigorous,²¹ systematic,²² continuous²³ and based on historical experience.²⁴

¹³ The Principles were designed to improve the operation of CRAs. The Principles contain high-level objectives and guidelines that address the quality and integrity of the rating process, improve the independence of CRAs, prevent potential conflicts of interests and enhance the transparency and timelines of ratings disclosure (Technical Committee of the International Organization of Securities Commission, *IOSCO Statement of Principles Regarding the Activities of Credit Rating Agencies*, September 25, 2003, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD151.pdf>).

¹⁴ Technical Committee of the International Organization of Securities Commission, *Code of Conduct Fundamental for Credit Rating Agencies*, August 2008, www.iosco.org/library/pubdocs/pdf/IOSCOPD271.pdf.

¹⁵ McVea, *supra* note 4, at 718.

¹⁶ McVea, *supra* note 4, at 719; Kristina St Charles, *Regulatory Imperialism: The Worldwide Export of European Regulatory Principles on Credit Rating Agencies*, 19 Minn. J. Int'l L. 399, 409-410 (2010).

¹⁷ Jakob de Haan & Fabian Amtenbrink, *Credit Rating Agencies*, DNB Working Paper No. 278, January 2011, 17-18, papers.ssrn.com/sol3/papers.cfm?abstract_id=1760951; Charles, *supra* note 16, at 409-410.

¹⁸ Mohammed B. Hemraj, *Soft law regulation of the credit rating agencies*, 35 Comp. Law 10, 15-16 (2014).

¹⁹ Technical Committee of the International Organization of Securities Commission, *supra* note 14, at 2; Jan De Bruyne & Cedric Vanleenhove, *Rating the EU regulatory framework on the liability of credit rating agencies: triple a or junk?*, 2 ESLR 117, 118-120 (2015); De Bruyne, *supra* note 4, at 196-199.

²⁰ Article 8.3 Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ L 302. See for more information: Iris H.Y. Chiu, *Regulating Credit Rating Agencies in the EU: In Search of a Coherent Regulatory Regime*, 271 European Bus. L. Rev. 269, 285 (2014).

²¹ Article 4 Commission Delegated Regulation 447/2012 supplementing Regulation 1060/2009 on credit rating agencies by laying down regulatory technical standards for the assessment of compliance of credit rating methodologies, OJ L 140/14.

²² Article 5 Commission Delegated Regulation 447/2012.

²³ Article 6 Commission Delegated Regulation 447/2012.

There are also several provisions in EU legislation dealing with the registration of CRAs. Credit rating agencies have to apply for registration before they can provide their services in the EU.²⁵ They have to submit an application for registration to the European Securities and Markets Authority (ESMA). CRAs are granted registration only when they demonstrate their ability to meet the applicable regulatory requirements. The application for registration needs to contain information on those elements in Annex II of Regulation 1060/2009 on CRAs.²⁶ ESMA has to ensure the Regulation on credit rating agencies is applied and can conduct all necessary investigations of CRAs to that end.²⁷ After registration, ESMA supervises the registered rating agencies through a combination of desk-based supervisory activities and investigation.²⁸ It can withdraw the registration if the CRA expressly renounces the registration or has provided no ratings for the preceding six months, obtained the registration by making false statements or by any other irregular means, or no longer meets the conditions under which it was registered.²⁹ Moreover, if ESMA's Board of Supervisors finds that a CRA has committed one of the infringements listed in Annex III of Regulation 513/2011, it can take several actions. These, for instance, include a withdrawal of the CRA's registration, a temporary prohibition for the CRA to issue ratings until the infringement has been brought to an end, or the suspension of the rating's use for regulatory purposes until the infringement has been brought to an end.³⁰

More importantly, Article 35a of Regulation 1060/2009 as introduced by Article 1(22) of Regulation 462/2013 contains provisions on the liability of CRAs towards both the issuers and investors. This is remarkable because the EU often leaves the private law effects out of financial market legislation.³¹ A liability regime for CRAs is even more surprising when taking into account that supranational regulators were not always able to effectively regulate the liability of other certifiers such as classification societies (maritime law),³²

²⁴ Article 7 Commission Delegated Regulation 447/2012.

²⁵ Articles 14-19 Regulation 1060/2009 on credit rating agencies.

²⁶ Article 15 Regulation 1060/2009 on credit rating agencies as replaced by Article 1(9) Regulation 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation 1060/2009 on credit rating agencies, OJ L 145.

²⁷ Article 21 Regulation 1060/2009 on credit rating agencies as replaced by Article 1(9) Regulation 513/2011; Article 23c Regulation 1060/2009 as replaced by Article 1(11) Regulation 513/2011 amending Regulation 1060/2009 on credit rating agencies.

²⁸ Article 21 Regulation 1060/2009 on credit rating agencies as replaced by Article 1(9) Regulation 513/2011.

²⁹ Article 20 Regulation 1060/2009 on credit rating agencies as replaced by Article 1(9) Regulation 513/2011.

³⁰ Article 24 Regulation 1060/2009 on credit rating agencies as replaced by Article 1(11) Regulation 513/2011.

³¹ Wouter den Hollander, *European tort law through the front door: civil liability for credit rating agencies*, Leiden Law Blog, July 8, 2013, leidenlawblog.nl/articles/european-tort-law-through-the-front-door-civil-liability-of-credit-rating-a. See for the discussion of the effects of the Markets in Financial Instruments Directive (MiFID) on private law: Marc Kruitthof, *De privaatrechtelijke werking van de MiFID-2004 gedragsregels: een analyse van de mate waarin zij de wederzijdse rechten en plichten van dienstverlener en cliënt kunnen aanvullen en beperken*, in Financiële regulering in de kring 273-356 (Instituut Financieel Recht ed. 2012); Olivier Eloot & Helena Tilley, *Beleggersbescherming in MiFID II en MiFIR: een overzicht en toetsing van enkele recente nationale beleggersbeschermende maatregelen*, Bank- en Financieel Recht 179 (2014).

³² The European Union only addressed the liability of classification societies in their public role acting as Recognized Organizations on behalf of flag States (Article 5 Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, OJ L 131).

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auditors (financial law)³³ and notified bodies (medical devices)³⁴. CRAs are liable when they intentionally or with gross negligence commit any of the infringements listed in Annex III.³⁵ CRAs cannot face liability under the Regulation for simple negligence or only because they issued a 'wrong' rating. In addition, the Regulation does not impose liability for CRAs when they commit the infringement by mistake or because they did not display reasonable care when issuing the rating. Such a standard of fault is appropriate as rating activities involve a degree of assessment of complex economic factors. Using different methodologies may lead to contrasting rating results, none of which can be considered incorrect.³⁶

Any exclusion of liability for a CRA's gross negligence or intention in rating contracts is deprived of legal effect. CRAs are able to limit their liability in advance where that limitation is reasonable and proportionate, and allowed by the applicable national law.³⁷ Any limitation that does not comply with these requirements or any contractual exclusion of the liability is deprived of legal effect.³⁸ Whether a limitation is reasonable and proportionate has to be interpreted in the light of national legislation. The English Credit Rating Agencies (Civil Liability) Regulations of 2013, for example, contain elements to determine whether the limitation of liability is reasonable and proportionate.³⁹ This depends on whether the claimant is an investor or an issuer (regulation 12) and the extent to which the rating was solicited (regulation 10) or unsolicited (regulation 11).⁴⁰ However, the Regulation on CRAs does not contain rules on the limitation or exclusion of the liability of CRAs for ordinary negligence. Consequently, the opposability and validity of such clauses is governed by national law.

The infringement of the Regulation must also have (had) an impact on the rating. It is the investor who has to present accurate and detailed evidence indicating the CRA has committed an infringement of this Regulation and that this infringement had an impact on the rating. This implies the rating issued by the CRA has to be different from the rating that would have been issued if the CRA had not committed that infringement.⁴¹ The competent court has to assess whether the presented information is accurate and detailed, taking into

³³ The European Union only adopted a Recommendation with regard to the limitation of an auditor's liability (Commission Recommendation of 5 June 2008 concerning the limitation of the civil liability of statutory auditors and audit firms, OJ J L 162).

³⁴ Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC, OJ L 117.

³⁵ Article 35a, 1. Regulation 1060/2009 as introduced by Article 1(22) of Regulation 462/2013.

³⁶ Recital (33) Regulation 462/2013 amending Regulation 1060/2009 on credit rating agencies; De Bruyne, *supra* note 4, at 196-199.

³⁷ Article 35a, 3. Regulation 1060/2009 as introduced by Article 1(22) of Regulation 462/2013.

³⁸ Article 35a, 3. Regulation 1060/2009 as introduced by Article 1(22) of Regulation 462/2013.

³⁹ For instance, if the claimant is an issuer who has entered into a contract with a CRA to assign a rating, the following factors indicate that a limitation of liability is reasonable and proportionate: (a) the limitation resulted from contractual negotiations between the issuer and the CRA; (b) the price agreed between the issuer and the CRA reflects the extent of the limitation of liability; (c) the CRA gave the issuer a reasonable opportunity to submit additional factual information not previously available, or to clarify any factual inaccuracies regarding the proposed rating, before the credit rating was issued, and took account of those submissions or comments when finalising the credit rating; and (d) the limitation relates to losses which the credit rating agency could not reasonably have foreseen when it assigned the credit rating.

⁴⁰ The Credit Rating Agencies (Civil Liability) Regulations 2013, No. 1637. Also see: De Bruyne, *supra* note 4, at 197.

⁴¹ Article 35a, 1. & 2. Regulation 1060/2009 as introduced by Article 1(22) of Regulation 462/2013.

account the investor or issuer may not have access to information, which is purely within the sphere of the CRA.⁴² The Regulation also requires a link between the infringement and the loss suffered by the investor in two ways. First, the investor has to establish that he reasonably relied on the rating in accordance with Article 5a(1) of the Regulation⁴³ or otherwise with due care.⁴⁴ What is to be understood under the notion ‘reasonable reliance’ is unclear and not defined in the Regulation. It could imply that a CRA will not incur liability if the investors mentioned in the Regulation (e.g. investment firms, insurance undertakings, reinsurance undertakings or institutions for occupational retirement provision) did not make their own credit risk assessment but relied solely on ratings to assess the creditworthiness of an entity or financial instrument.⁴⁵ Second, the investor must have reasonably relied on the rating for a decision to invest into, hold onto, or divest from a financial instrument covered by that credit rating.⁴⁶

III. ARTICLE 10 ECHR AND THE FREEDOM OF EXPRESSION FOR CREDIT RATING AGENCIES

The European Convention on Human Rights is a treaty that was drafted in 1950. Each of the articles in the Convention protects a basic human right.⁴⁷ According to Article 10 ECHR, for instance, everyone has the right to freedom of expression. The European Court of Human Rights (ECtHR) has interpreted the right to freedom of speech in Article 10 as “one of the basic conditions for [the] progress of a democratic society and for the development of every man”.⁴⁸ This right includes the freedom to hold opinions and to receive and impart information or ideas without interference by a public authority. Several categories of speech exist, each of them receiving protection under Article 10 ECHR. Expressions can be labelled as value judgments (part A), factual statements (part B) or commercial speech (part C).⁴⁹

A. Protection for Credit Ratings Under Article 10 ECHR as Value Judgements

The ECtHR makes a distinction between facts on the one hand and value judgments on the other hand. This distinction is of importance when it comes to the application of the restrictions contained in the second paragraph of Article 10 ECHR. Whereas the existence of facts can be demonstrated, the truth and accuracy of value judgments is not susceptible of proof.⁵⁰ The requirement of proof for value judgments “is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article

⁴² Article 35a, 2. Regulation 1060/2009 as introduced by Article 1(22) of Regulation 462/2013.

⁴³ This article tries to overcome over-reliance by financial institutions on credit ratings.

⁴⁴ Article 35a, 1. Regulation 1060/2009 as introduced by Article 1(22) of Regulation 462/2013.

⁴⁵ Article 5a, 1. Regulation 1060/2009 as inserted by Article 1(6) Regulation 462/2013.

⁴⁶ Article 35a, 1. Regulation 1060/2009 as introduced by Article 1(22) of Regulation 462/2013. See for an analysis of the remaining problems under the Regulation on credit rating agencies and further references: De Bruyne & Vanleenhove, *supra* note 19, at 123-125; De Bruyne, *supra* note 4, at 196-199.

⁴⁷ See Human Rights News, Views & Info, *European Convention on Human Rights*, <https://rightsinfo.org/the-rights-in-the-european-convention/>.

⁴⁸ Case 5493/72, *Handyside v the United Kingdom*, [1976] ECHR 5, paragraph 49.

⁴⁹ See De Bruyne & Vanleenhove, *supra* note 12, at 304.

⁵⁰ Case 9815/82, *Lingens v Austria*, [1986] ECHR 7, paragraph 46; Dirk Voorhoof, *Guaranteeing the freedom and independence of the media*, in *Media and Democracy* 45 (Council of Europe 1998).

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10 of the Convention.” Value judgments thus receive more protection than factual statements.⁵¹ Value judgments, especially the “strong” ones,⁵² benefit from a wide, almost absolute protection as long as the opinion put forward is not lacking any factual basis and is made in good faith.⁵³ The communicator of the information has to act in good faith and ensure that the statement is based on sufficient facts to constitute a “fair comment.”⁵⁴ Value judgments without a sufficient factual basis may thus be excessive, which the government is allowed to regulate and restrict.⁵⁵

One might think ratings are value judgments. Arguably, they are based on information provided by the issuer of financial instruments or on information that is publicly available. Therefore, ratings will probably have a sufficient basis in fact. It is also conceivable that CRAs will in most cases issue the rating in good faith without knowing that it is flawed or unreliable.⁵⁶ Taking into account the precautionary wording used by CRAs in their terms and conditions,⁵⁷ ratings could be qualified as subjective assessments of information, facts, or

⁵¹ Case 9815/82, *Lingens v Austria*, [1986] ECHR 7, paragraph 46; Case 11662/85, *Oberschlick v. Austria*, [1991] ECHR 30, paragraph 63. Also see: Wolfgang Sakulin, *Trademark Protection and Freedom of Expression: An Inquiry Into the Conflict Between Trademark Rights and Freedom of Expression Under European Law* 112 (1st ed. 2011).

⁵² Oliver Castendyk, E. J. Dommering & Alexander Scheuer, *European Media Law* 55 referring to case law (1st ed. 2008).

⁵³ Jean-François Flassus, *The European Court of Human Rights and the Freedom of Expression*, 3 Ind. L.J. 809, 817 (2009) with further references to case law (e.g. *Jerusalem v Austria* (Case 26958/95) [2003] 37 EHRR 567; *De Haes and Gijssels v Belgium* (Case 19983/92) [1997] 25 EHRR 1). See for example: Case 29723/11, *Szima v Hungary*, [2012] ECHR 1788, paragraph 30 and the discussion in Monica Macovei, *A guide to the implementation of Article 10 of the European Convention on Human Rights* 10 & 50-52 (Human rights handbooks 2004).

⁵⁴ Javier García Roca & Pablo Santolaya, *Europe of Rights: A Compendium on the European Convention of Human Rights* 379 with further references to case law (1st 2012).

⁵⁵ See e.g. Case 26958/95, *Jerusalem v Austria*, [2003] 37 EHRR 567, paragraph 43; Case 19983/92, *De Haes and Gijssels v Belgium*, [1997] 25 EHRR 1, paragraph 47; Case 10807/04, *Veraart v. the Netherlands*, [2008] 46 EHRR, November 30, 2006, paragraph 55. Also see: Philip Leach, *Taking a Case to the European Court of Human Rights* 362 with references to several decisions (3rd ed. 2011); Macovei, *supra* note 53, at 10; De Bruyne & Vanleenhove, *supra* note 12, at 309.

⁵⁶ In this regard, reference can be made the situation in the US where deceived investors have at several occasions targeted CRAs alleging violations of Section 10(b) of the Securities and Exchange Act of 1934 and the thereunder promulgated SEC Rule 10b-5. Claims under Rule 10b-5 require a plaintiff to establish the CRA made a material misrepresentation or omitted to disclose material information (that is a misstatement or omission of material fact) with scienter in connection with the purchase or sale of securities justifiably relied on by plaintiffs and proximately causing them injury. Scienter has been defined by the Supreme Court as a “mental state embracing intent to deceive, manipulate or defraud” (*Tellabs Inc. v. Makor Issues & Rights*, 551 U.S. 308, 319 (2007); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-194 (1976)). Prior to the enactment of the Dodd-Frank Act, a plaintiff thus had to plead with particularity facts giving rise to a strong inference that the CRA acted with scienter. CRAs had to act with the intention to deceive, manipulate or defraud (15 U.S.C § 78u-4, (b)(2)(A)). Investors did not always succeed in proving such a strong inference that the CRA acted with scienter (e.g. *In re National Century Financial Enterprise*, 580 F. Supp. 2d 630, 634 (S.D. Ohio 2008)).

⁵⁷ For instance, Moody’s Code of Professional Conduct stipulates that “MIS is in no way providing a guarantee with regard to the accuracy, timeliness, or completeness of factual information reflected, or contained, in the Credit Rating or any related MIS publication” (Moody’s, *Code of Professional Conduct*, June 2017, 7, https://www.moody.com/uploadpage/Mco%20Documents/Documents_professional_conduct.pdf). Paragraph 7.2. in the S&P’s Code of Conduct indicates that “Ratings do not constitute investment, financial, or other advice [...] Credit Ratings do not comment on the suitability of an investment for a particular investor and should not be relied on when making any investment decision [...] Credit Ratings are not verifiable statements

products. Ratings might thus constitute a “fair comment”⁵⁸ worth of protection as value judgment. However, this conclusion is too far-stretching and needs to be placed in a more nuanced perspective for two reasons.

First, the way in which CRAs come to their conclusions shows that the rating is not merely a subjective assessment of the rated product. It is not equivalent to editorials or opinions given by journalists. For example, it has already been mentioned that CRAs are required to use rigorous, systematic, and continuous methodologies under Article 8 of the EU Regulation on CRAs.⁵⁹ In addition, a CRA has to adopt, implement, and enforce adequate measures to ensure its ratings are based on a thorough analysis of all the available and relevant information. CRAs have to adopt all necessary measures to safeguard and ensure that the information they use in assigning a rating is of sufficient quality and comes from reliable sources.⁶⁰ The Australian *Bathurst* decision also illustrates that the truth and accuracy of credit ratings might be susceptible of proof. S&P did not develop its own model for rating CPDOs, but instead relied on the model created by ABN Amro. The CRA did not give any consideration to the model risk when assigning the credit rating.⁶¹ S&P adopted a 15% volatility figure which had been provided to it by ABN Amro. There was no evidence that S&P checked the 15% volatility figure itself. However, S&P could have easily calculated the volatility and would then have realized that the correct figure was around 28%. A reasonable and prudent CRA would have done its own calculations and surely not have adopted a volatility figure of 15%.⁶² Against this background, the court held that the analysis of S&P did not comprise mere mistakes or errors of judgment. Rather, it “involve[s] failures of such a character that no reasonable ratings agency exercising reasonable care and skill could have committed in the rating of the CPDOs”. In sum, the “[rating] analysis was fundamentally flawed, unreasonable and irrational in numerous respects.”⁶³

Second, judgments of the ECtHR take into account the specific context in which the statement is made to determine its protection.⁶⁴ The contextual factors clearly do not speak to the benefit of CRAs when it comes to the protection of their ratings as value judgement. The Regulation on CRAs, for instance, is clear when stipulating ratings are not opinions about a value or a price for a financial instrument or a financial obligation. CRAs are not financial analysts or investment advisors. Ratings have regulatory value for investors such as credit institutions, insurance companies or investors. Credit ratings drive investment choices notably

of fact” (Standard & Poor’s Rating Services, *Standard & Poor’s Ratings Services Code of Conduct*, December 31, 2015, 8, www.maalot.co.il/publications/PAR20160316144028.pdf).

⁵⁸ García Roca & Santolaya, *supra* note 54, at 379.

⁵⁹ Article 8 Regulation 1060/2009 on credit rating agencies. See in this regards also: Article 4 (defining rigorous), Article 5 (defining systematic) and Article 6 (defining continuous) of the Commission Delegated Regulation 447/2012.

⁶⁰ Article 8 Regulation 1060/2009 on credit rating agencies; De Bruyne & Vanleenhove, *supra* note 12, at 309-310.

⁶¹ *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200, paragraphs 2547, 2555-2590.

⁶² *Id.* at paragraphs 2611-2669.

⁶³ *Id.* at paragraph 2836; *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, paragraphs 12, 566-722; Jan De Bruyne, *Liability of Credit Rating Agencies Regulatory Changes & Tendencies in Case Law Following the Financial Crisis*, (27) I.C.C.L.R. 87 (2016).

⁶⁴ García Roca & Santolaya, *supra* note 54, at 379 with further references to case law; Wolfgang Benedek & Matthias C. Kettemann, *Freedom of expression and the Internet* 89 (1st ed. 2014).

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because of information asymmetries and efficiency purposes.⁶⁵ The market values ratings as certification and benchmark and not as a mere opinion or information. Ratings are often required by law or by the market, which indicates that they are not the equivalent of editorials.⁶⁶

B. Protection for Credit Ratings Under Article 10 ECHR as Factual Statements

Value judgments receive more protection than statements of facts under Article 10 ECHR.⁶⁷ That is because factual statements can be proven true or false, which paves the way to impose liability on CRAs when their credit ratings are inaccurate.⁶⁸ CRAs, especially when issuing unsolicited ratings, argue that they act as member of the press. The freedom of press has obtained the greatest protection by the ECtHR under Article 10.⁶⁹ The press does not only have the task of disseminating information and ideas on matters of public interest, but the public also has a right to receive them.⁷⁰ The press would be unable to play its vital role of “public watchdog” if this was different.⁷¹

At several occasions, the ECtHR held that Article 10 protects a journalist’s right to divulge information even when the respective facts prove to be untrue if a journalist or a publication has a legitimate purpose, the publication covers a matter of public concern, and reasonable efforts have been made to verify the facts.⁷² The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the requirement that they are acting in good faith on an accurate factual basis, and provide reliable and precise information in accordance with the ethics of journalism.⁷³ The problem with the protection of ratings does not necessarily lie in the requirement that credit rating agencies have to act in good faith. CRAs will in most cases act in good faith when issuing their ratings, even without knowing they are flawed or inaccurate. Moreover, the rating will also most likely be based on

⁶⁵ Recital (8) Regulation 462/2013 amending Regulation 1060/2009 on credit rating agencies.

⁶⁶ Committee on Governmental Affairs United States Senate, *Financial Oversight of Enron: The SEC and Private-Sector Watchdogs*, Washington, U.S. Government Printing Office, October 7, 2006, 97; De Bruyne & Vanleenhove, *supra* note 12, at 310.

⁶⁷ See for example: Case 9815/82, *Lingens v Austria*, [1986] ECHR 7, paragraph 46; Case 29723/11, *Szima v Hungary* [2012] ECHR 1788, paragraph 30.

⁶⁸ Case 9815/82, *Lingens v Austria*, [1986] ECHR 7, paragraph 46; Case 11662/85, *Oberschlick v Austria*, [1991] ECHR 30 paragraph 63. Also see: Sakulin, *supra* at note 51, at 112.

⁶⁹ García Roca & Santolaya, *supra* note 54, at 379.

⁷⁰ See for example: Case 13585/88, *Observer and Guardian v the United Kingdom*, [1991] 14 EHRR 153, paragraph 75; Case 15890/89, *Jersild v Denmark*, [1994] ECHR 33, paragraph 31.

⁷¹ Case 51279/99, *Colombani and Others v France*, [2002] ECHR 5, paragraph 55; Case 13778/88, *Thorgeir Thorgeirson v Iceland*, [1992] 14 EHRR 843, paragraph 63; Case 28525/95, *Unabhängige Initiative Informationsvielfalt v Austria*, [2003] 37 EHRR 33, paragraph 37; Case 15890/89, *Jersild v Denmark*, [1994] ECHR 33, paragraph 30; De Bruyne & Vanleenhove, *supra* note 12, at 311.

⁷² See for example: Case 29183/95, *Fressoz and Roire v France*, [1999] ECHR 1, paragraph 54; Case 13704/88, *Schwabe v Austria*, [1993] 14 HRLJ, paragraph 34. See for a discussion and further references: Macovei, *supra* note 53, at 10, 24 & 50-51; Mario Oetheimer, *Freedom of Expression in Europe: Case-law Concerning Article 10 of the European Convention of Human Rights 19-20* (Council of Europe Publishing 2007).

⁷³ Case 29183/95, *Fressoz and Roire v France*, [1999] ECHR 1, paragraph 54; Case 21980/93, *Bladet Tromsø and Stensaa v Norway*, [2000] 29 EHRR 125, paragraph 65; Case 51279/99, *Colombani and Others v France*, [2002] ECHR 5, paragraph 65; Case 17488/90, *Goodwin v United Kingdom*, [1996] 22 EHRR 12, paragraph 39.

an accurate factual basis (e.g. information provided by the issuer). There are two bigger concerns that might restrict the protection of ratings as factual statements under Article 10 ECHR. Whereas the first relates to the notion of public interest, the second concerns the definition of members of the press traditionally protected by Article 10.

First, ratings have to contribute to a public debate on a matter of general interest if they want to receive protection under Article 10 ECHR.⁷⁴ The ECtHR frequently holds that, although the press should not overstep the boundaries set *inter alia* for the protection of the reputation of others,⁷⁵ the need to prevent disclosure of confidential information⁷⁶ or the safeguard of the interests of proper administration of justice,⁷⁷ it is incumbent on it to impart information and ideas on political issues “just as on those in other areas of public interest.”⁷⁸ The duty of the press is to convey information and ideas on all matters or ongoing debates on questions of public interest in a way that is consistent with its obligations and responsibilities.⁷⁹

As a consequence, not only political expressions are protected. The general interest also relates to issues that arouse public concern among citizens in general.⁸⁰ The public interest involves anything affecting the rights, health, or finances of the public at large. The public interest is a common concern among citizens in the management and affairs of local, state and national governments.⁸¹ It is the benefit or advantage of the community as a whole⁸² and relates to the fact that the public has a right to know about something as it affects them.⁸³ For example, this includes a publication regarding the earnings and pay raises of the managing director of a company. The ECtHR held in *Fressoz and Roire* that the purpose of the published article was not to infringe upon the rights of the company chairman but to “contribute to the more general debate on a topic that interested the public [employment and pay].”⁸⁴ The publication can also relate to important aspects of human health (e.g. cosmetic surgery such as in the PIP case) and raise issues affecting the public interest, even if the article was not published as part of an ongoing general debate, but focused on the standard of treatment provided in a single clinic.⁸⁵

⁷⁴ Case 29183/95, *Fressoz and Roire v France*, [1999] ECHR 1, paragraph 50; Case 13704/88, *Schwabe v Austria*, [1993] 14 HRLJ, paragraph 34; Case 21980/93, *Bladet Tromsø and Stensaas v Norway*, [2000] 29 EHRR 125, paragraph 68.

⁷⁵ Case 9815/82, *Lingens v Austria*, [1986] ECHR 7, paragraph 41.

⁷⁶ Case 21980/93, *Bladet Tromsø and Stensaas v Norway*, [2000] 29 EHRR 125, paragraph 59.

⁷⁷ Case 22714/93, *Worm v Austria* [1998] 25 EHRR 454, paragraph 50.

⁷⁸ Case 9815/82, *Lingens v Austria*, [1986] ECHR 7, paragraph 41.

⁷⁹ Case 19983/92, *De Haes and Gijssels v Belgium*, [1997] 25 EHRR 1, paragraph 37; Case 51279/99, *Colombani and Others v France* [2002] ECHR 5, paragraph 55; Case 26131/95, *Bergens Tidende and Others v Norway*, [2001] 31 EHRR 430, paragraph 49; *Bladet Tromsø and Stensaas v Norway*, [2000] 29 EHRR 125, paragraph 59; De Bruyne & Vanleenhove, *supra* note 12, at 312.

⁸⁰ García Roca & Santolaya, *supra* note 54, at 377.

⁸¹ See “public interest” on the Free (Legal) Dictionary, legal-dictionary.thefreedictionary.com/Public+Interest.

⁸² See “public interest” in the Oxford Dictionaries, www.oxforddictionaries.com/definition/english/public-interest.

⁸³ See “public interest” in the MacMillan Dictionary, www.macmillandictionary.com/dictionary/british/public-interest.

⁸⁴ Case 29183/95, *Fressoz and Roire v France*, [1999] ECHR 1, paragraph 50.

⁸⁵ Case 26131/95, *Bergens Tidende and Others v Norway*, [2001] 31 EHRR 430, paragraph 51; Case 25181/94, *Hertel v Switzerland* [1998] 28 EHRR 534, paragraph 47. Also see: García Roca & Santolaya, *supra* note 54, at 377; De Bruyne & Vanleenhove, *supra* note 12, at 312.

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It is unlikely that ratings will contribute to a public debate on a matter of general interest worth of protection. To start with, ratings do necessarily relate to a matter of general or public concern. For instance, reference can be made to case law in the U.S. as a source of inspiration. Courts in the U.S. already held that ratings of complex asset-backed securities leading to the 2008 financial crisis were not a matter of public concern but were issued to the benefit of only a few sophisticated investors.⁸⁶ When looking at the cases where the ECtHR did grant broader protection to statements or articles, one sees that such articles and statements are published within an entire different context than ratings. Most statements that have been granted protection under Article 10 ECHR because of their link with the public debate or general interest deal with defamed politicians or other (prominent) public persons (e.g. police men, civil servants, politicians, judges and journalists).⁸⁷

Yet, there might be some ways to link the issuance of certain ratings with the general or public interest. Recital (8) of Regulation 462/2013 stipulates that CRAs have to be registered and supervised as their services have a considerable impact on the “public interest.”⁸⁸ Particularly, sovereign ratings given to a country or sovereign entity are important in this regard. Sovereign ratings could indeed affect debates of public interest because they pertain to an important political issue of outstanding political interest affecting both today’s and the following generations, namely the ability of states to repay their loans.⁸⁹

Even when assuming ratings do indeed relate to a matter of general or public concern, it remains unlikely they contribute to a public debate. It will mostly be only one CRA that issues a rating for a particular instrument. It is therefore unlikely that there is an ongoing debate, regardless of the question of whether it concerns a matter of general or public concern. An exception might occur with sovereign ratings or with ratings given to certain multinational companies headquartered in a country. A (potential) downgrade of a given rating can lead to a discussion at the political level and in the financial press.⁹⁰

It is also not the actual rating that contributes to a debate, but the underlying facts leading to the default of the financial instrument or issuer. Moreover, the consequences of incorrect ratings leading to the financial crisis illustrate that the general public only becomes aware of the role of the CRA once such catastrophic events have occurred. This is long after the actual issuance of the rating. Thus, a public debate only arises once the rating has been issued and the rated item defaults. An exception can occur for some ratings, where there might be a public debate about the financial health of an institution/country preceding the

⁸⁶ *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155, 175-176 (S.D.N.Y. 2009); *In Re National Century Financial Enterprise Inc.*, 580 F. Supp. 2d 630, 640-648 (S.D. Ohio 2008); *Anschutz Corp. v. Merrill Lynch & Co.*, 785 F. Supp. 2d 799, 831-832 (N.D. Cal. 2011).

⁸⁷ See for example: Case 9815/82, *Lingens v Austria*, [1986] ECHR 7 (Austrian Chancellor); Case 28114/95, *Dalban v Romania*, [2001] 31 EHRR (prominent figures); Case 37698/97, *Lopes Gomes da Silva v Portugal*, [2002] 34 EHRR 56 (candidate in municipal elections); Case 11508/85, *Barfod v Denmark*, [1989] 13 EHRR 493 (lay judges); Case 41205/98, *Tammer v Estonia*, [2001] ECHR 263 (politician’s assistant); Case 29271/95, *Dichand and others v Austria* (Chair of a parliamentary legislative committee); Case 53984/00, *Radio France and Others v France*, [2005] 40 EHRR 706 (former deputy prefect); Case 15974/90, *Prager and Oberschlick v Austria*, [1996] 21 EHRR 1 (judges); Case 11798/85, *Castells v Spain*, [1992] 14 EHRR 445 (Basque militant and member of the Spanish Parliament).

⁸⁸ Recital (8) of Regulation 462/2013 amending Regulation 1060/2009 on credit rating agencies.

⁸⁹ J. Oster, *Media Freedom as a Fundamental Right* 251 (1st 2015).

⁹⁰ See for example: G. Reilhac & A. Breidhardt, *EU slams ratings agencies after Portugal downgraded*, Reuters, July 6, 2011, www.reuters.com/article/us-eurozone/eu-slams-ratings-agencies-after-portugal-downgraded-idUSTRE7651EK20110706.

issuance of the rating. In any case, the existence of a freedom of speech defense does not enhance the public debate with regard to ratings.

Second, even if ratings would contribute to the more general debate on a topic of general interest, there might be another argument to deny CRAs the broad protection under the freedom of expression. Credit rating agencies will likely not be qualified as journalists to whom the ECtHR traditionally grants broad protection under Article 10 ECHR. CRAs do not comment on facts that contribute to the public debate such as the behavior of a Chancellor in an Austrian magazine⁹¹ or a complaint on the inactivity on the part of the authorities with regard to numerous attacks and murders that took place in the Basque Country.⁹² Labelling CRAs as journalists is also not straightforward when looking over the fence to case law by the European Court of Justice (ECJ). In *Tietosuojavaluuttetu v Satakunnan Markkinapörssi Oy*, the ECJ established a test of what comprises “journalistic purposes.” The Court defined journalistic purposes as referred to in Article 9 of Directive 95/46/EC⁹³ as encompassing all activities with the “sole object of [...] the disclosure to the public, irrespective of the medium which is used to transmit them, of information, opinions or ideas.”⁹⁴ It remains unclear whether CRAs, even when issuing unsolicited sovereign ratings, pursue the sole objective of disclosing information to the public.

C. Protection for Credit Ratings Under Article 10 ECHR as Commercial Speech

Credit rating agencies could also argue that their ratings qualify as commercial speech, which deserves protection as well under Article 10 ECHR. The European Court of Human Rights does not make a distinction between various forms of speech and expression.⁹⁵ Consequently, all forms of expressions, whatever their content, fall within the scope of Article 10 ECHR. This also includes commercial speech.⁹⁶ The legal status of a company or the fact that its activities are commercial and profit-making cannot deprive the statement of protection under Article 10.⁹⁷ In other words, speech does not necessarily fall outside the scope of Article 10 of the ECHR by reason of the content of the publication and the nature of

⁹¹ Case 9815/82, *Lingens v Austria*, [1986] ECHR 7.

⁹² Case 11798/85, *Castells v Spain*, [1992] 14 EHRR 445.

⁹³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281.

⁹⁴ Case C-73/07, *Tietosuojavaluuttetu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, December 16, 2008 paragraph 62; De Bruyne & Vanleenhove, *supra* note 12, at 313-314.

⁹⁵ Case 10737/84, *Müller v Switzerland*, [1991] 13 EHRR 212 paragraph 27.

⁹⁶ In *Casado Coca v Spain*, the ECtHR held that the freedom of speech does not apply solely to certain types of information, ideas or forms of expression in particular those of a political nature. It also encompasses artistic expression and information of a commercial nature (Case 15450/89, *Casado Coca v Spain*, [1994] 18 EHRR 1, paragraph 35). In *Müller and others v Switzerland*, the Court concluded Article 10 ECHR did not specify that freedom of artistic expression comes within its ambit. However, it does also not distinguish between various forms of expression. It includes freedom to receive and impart information and ideas which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. As such, this also includes commercial speech (Case 10737/84, *Müller v Switzerland*, [1991] 13 EHRR 212, paragraph 27). The Court in *Jakubowski* noted that freedom of expression exercised in another way than in discussions of matters of public interest (e.g. commercial speech) does not deprive it of the protection under Article 10 ECHR (Case 15088/89, *Jakubowski v Germany* [1994] 19 EHRR 64, paragraph 25). See in this regard also: Oetheimer, *supra* note 72, at 82.

⁹⁷ Case 12726/87, *Autronic AG v Switzerland*, [1990] ECHR 12, paragraphs 44-48.

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the disseminator's activities.⁹⁸ The fact that a person defends a given interest, whether it is an economic interest or any other interest, does not deprive him of the benefit of freedom of expression.⁹⁹

However, several decisions show that commercial speech is given less protection than political expressions.¹⁰⁰ For instance, the European Commission of Human Rights held in *Church of Scientology v. Sweden* that commercial speech does not fall outside the protection given by Article 10 ECHR. The level of protection should, nonetheless, be less than that accorded to expressions of political ideas.¹⁰¹ The wider margin of appreciation for national authorities when it comes to commercial speech, which is further discussed in part IV, also illustrates commercial speech is offered less protection under Article 10 ECHR than political expressions. In *Demuth v. Switzerland*, the ECtHR, for example, the court concluded that the standard of scrutiny for the national authorities' margin of appreciation may be less severe for commercial speech.¹⁰² The obvious question is whether ratings can be considered as commercial speech and thus also deserving of protection under Article 10 ECHR.¹⁰³

Ratings could, on the one hand, be qualified as commercial speech because they intend to promote and further the sale of the financial instruments even if CRAs or their ratings contribute to an on-going general debate.¹⁰⁴ It is the specific context in which the rating was issued that determines whether it is commercial speech or not. Solicited ratings could in one way or another qualify as commercial speech. Favorable credit ratings stimulate the interests of investors to purchase securities that are covered by such ratings.¹⁰⁵ Credit ratings fall inside the "regular commercial context in the sense of inciting the public to purchase a particular product."¹⁰⁶ Optimistic ratings of complex securities often promote and further the sale of the issuer's securities. Investors are more likely to invest in companies that have a high rating. Phrased differently, securities leading to the financial crisis would not have been sold successfully if they did not have an advantageous rating. Such ratings are issued in the interest of the CRA and its audience.¹⁰⁷

⁹⁸ Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v Germany*, [1990] 12 EHRR 161, paragraphs 25-26.

⁹⁹ Joint dissenting opinion in Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v Germany*, [1990] 12 EHRR 161, part I; De Bruyne & Vanleenhove, *supra* note 12, at 314-315.

¹⁰⁰ See in this regard also: D. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* 397 (1st 1995).

¹⁰¹ Case 7805/77, *X. and Church of Scientology v Sweden*, [1979] 16 DR 68, paragraph 5. See for a discussion: A T Yutaka, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* 107 (1st ed. 2002).

¹⁰² Case 38743/97, *Demuth v. Switzerland*, [2002] 38 EHRR 423, paragraph 42.

¹⁰³ See in this regard for example: J. Krzeminska-Vamvaka, *Freedom of Commercial Speech in Europe*, Research Training Network Fundamental Rights and Private Law in the European Union, 10-14 identifying three tendencies in decisions by the ECtHR concerning the qualification of commercial speech. First, speech can be labelled commercial by using balancing factors, which implies that one should look at the interest which is served by the speech. Second, the distinction between commercial and non-commercial speech can be determined by applying the public debate test. Third, the commercial character of the speech can be determined by the enterprise's commercial objectives.

¹⁰⁴ See in this regard for example: Case 38743/97, *Demuth v Switzerland*, [2002] 38 EHRR 423, paragraph 41.

¹⁰⁵ Case 7805/77, *X. and Church of Scientology v Sweden*, [1979] 16 DR 68, paragraph 5.

¹⁰⁶ Case 24699/94, *VgT Verein gegen Tierfabriken v Switzerland*, [2002] 34 EHRR 159, paragraph 57.

¹⁰⁷ See in this regard also the different cases in the United States discussed *supra* in parts I and III.B; De Bruyne & Vanleenhove, *supra* note 12, at 315.

On the other hand, there are also decisions that do not consider whether statements aim to promote products and further their sale to label them as commercial. Instead, they focus on the interests served by the statement. These decisions take into account the extent to which statements have a wider impact on society when deciding on the applicability of Article 10.¹⁰⁸ For instance, protection is given to notices that contain a lawyer's name, profession, address and telephone number which are not only published with the aim of advertising but also provide persons requiring legal assistance with information that is of definite use and likely to facilitate their access to justice.¹⁰⁹ If statements do not have such a wide impact on society, they are more likely to qualify as commercial speech, and thus benefit from less protection under Article 10 ECHR.¹¹⁰ Even if the statement contains factual data and assertions regarding the speaker or his business, these components can overlap to make up a whole, the gist of which is the expression of opinions and the imparting of information on a "topic of general interest" (e.g. public health). In such circumstances, it is not possible to dissociate from this whole, those elements that go more to manner of presentation than to substance and which have a publicity-like effect.¹¹¹

Thus, the question arises whether ratings have such a wider impact on society. This needs to be seen in connection with the previously discussed circumstances under which ratings affect the public interest or can be qualified as a matter of general concern.¹¹² Certainly, CRAs can have a public role to the extent that third parties rely on their ratings to make decisions. Such a public role has even been acknowledged in Belgium for other certifiers in such classification societies as the maritime sector,¹¹³ auditors in the financial sector¹¹⁴ and notified bodies in the medical sector.¹¹⁵ Yet, it remains unsure whether credit ratings actually relate to the imparting of information on a topic of general interest. Ratings themselves do not necessarily contribute to a general debate on a topic of general interest. Instead, the underlying facts and role of CRAs in a particular scandal can become the subject of public debate long after the ratings have been issued. Thus, with the exception of sovereign ratings, it will not be easy to show that ratings relate to the imparting of information on a topic of general interest.

¹⁰⁸ Krzeminska-Vamvaka also concludes that several cases show that the distinction between commercial and non-commercial speech is determined by the "public debate test" (Krzeminska-Vamvaka, *supra* note 103, at 11-12).

¹⁰⁹ Case 15450/89, *Casado Coca v Spain*, [1994] 18 EHRR 1, paragraph 33-36.

¹¹⁰ Krzeminska-Vamvaka, *supra* note 103, at 11-12.

¹¹¹ Case 8734/79, *Barthold v Germany*, [1985] 7 EHRR 383, paragraphs 40-42; De Bruyne & Vanleenhove, *supra* note 12, at 316-317.

¹¹² See in this regard the discussion *supra* in part III.B.

¹¹³ See for example: Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 321 (1995); Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 301 (1995).

¹¹⁴ See for example: Court of First Instance Brussels, December 12, 1996, *Tijdschrift voor Rechtspersoon en Vennootschap* 41-42 (1997).

¹¹⁵ See for example: C-219/15, *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH*, February 16, 2017, paragraphs 50-53 (PIP breast implant case).

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IV. RESTRICTIONS ON THE FREEDOM OF EXPRESSION UNDER ARTICLE 10 ECHR

Regardless of the level of protection given to speech under Article 10 ECHR, the freedom of expression can be subject to exceptions and restrictions. These exceptions and restrictions must be construed strictly and established by clear and convincing evidence.¹¹⁶ Even if assuming that ratings would qualify as protected speech, governments are allowed to restrict the CRA's freedom of speech by imposing liability for an allegedly inaccurate rating. Freedom of speech can be restricted under the conditions in the second paragraph of Article 10 ECHR. More specifically, it has to be established whether the government's interference with and restriction of the freedom of expression is prescribed by law (part A), pursues a legitimate interest included in the second paragraph (part B) and is necessary in a democratic society to achieve the legitimate interest (C).¹¹⁷

A. Restriction of the CRA's Freedom of Expression Prescribed by Law

In most cases dealing with the protection of speech, the requirement that the restriction needs to be prescribed by law is not the major problem.¹¹⁸ The interference can be prescribed by law through legislation prohibiting the spreading of false and misleading information.¹¹⁹ Moreover, the basis for tort liability following from, for instance, Article 1382 in the Belgian Civil Code (BCC), can be considered 'law' under the second paragraph of Article 10 ECHR.¹²⁰ The law must be accessible, clear, and sufficiently precise, enabling citizens to regulate their conduct.¹²¹ This is the case for Article 1382 BCC taking into account the extensive case law on that provision published and discussed in overviews and academic

¹¹⁶ Case 25181/94, *Hertel v Switzerland*, [1998] 28 EHRR 534, paragraph 46; Case 5493/72, *Handyside v the United Kingdom* [1976] ECHR 5 paragraph 49; Case 15890/89, *Jersild v Denmark*, [1994] ECHR 33, paragraph 37.

¹¹⁷ See for example: Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v Germany*, [1990] 12 EHRR 161, paragraphs 25-38; Case 13778/88, *Thorgeir Thorgeirson v Iceland*, [1992] 14 EHRR 843, paragraphs 55-70; Case 8734/79, *Barthold v Germany* (Case 8734/79) [1985] 7 EHRR 383 paragraphs 44-59. Also see: De Bruyne & Vanleenhove, *supra* note 12, at 317-321.

¹¹⁸ See for example in the context of commercial speech: Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v Germany*, [1990] 12 EHRR 161 (interference was based on Section 1 of the 1909 Unfair Competition Act); Case 7805/77, *X. and Church of Scientology v Sweden*, [1979] 16 DR 68 (interference was based on the Marketing Improper Practices Act); Case 15450/89, *Casado Coca v Spain* 1994, 18 EHRR 1 (interference was based on the Statute of the Spanish Bar and by the Statute of the Barcelona Bar); Case 37928/97, *Slambuk v Germany*, [2002] 37 EHRR 845 (interference was based on sections 25 and 27 of the Baden-Württemberg Rules of Professional Conduct of the Medical Practitioners' Council and sections 55 and 58 of the Baden-Württemberg Act on the Councils for the Medical Professions).

¹¹⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149 and Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376.

¹²⁰ Court of Appeal Ghent, June 6, 2005, 129 Nieuw Juridisch Weekblad 1247 (2005).

¹²¹ Case 26229/95, *Gaweda v. Poland*, [2002] ECHR 301, paragraph 39; Case 8691/79, *Malone v The United Kingdom*, [1984] ECHR 10, paragraph 67; Case 23224/94, *Kopp v Switzerland*, [1998] ECHR 18, paragraph 55.

journals.¹²² Belgian courts already held that freedom of expression does not provide immunity from liability in torts based on Article 1382 BCC.¹²³ Thus, Article 10 ECHR allows holding CRAs liable for an incorrect rating if the resulting limitation of the freedom of expression is necessary for one of the purposes mentioned in the second paragraph of that Article.¹²⁴

B. Restriction of the CRA's Freedom of Expression Pursues a Legitimate Interest

The second requirement will also not be a major challenge in the context of CRAs.¹²⁵ The restriction by imposing liability can pursue a legitimate aim such as protecting the interest of the public in general, the rights of market participants, or the reputation of the requesting entities. The creditworthiness of an entity that is to be rated is actually nothing more than its financial reputation. Therefore, imposing liability on CRAs for ratings that affect this reputation does not violate their freedom of speech.¹²⁶

At the same time, however, persons or entities that have a public function or occupy a position that is in the public's interest because of their function or position have to endure more public comments and criticism than an anonymous citizen.¹²⁷ In this regard, a comparison can be made to critical reviews in restaurant guides. A restaurant owner cannot object to the review of his restaurant in a guide because a person running a business in a democratic society should expect that this business will be the subject of criticism.¹²⁸ The same goes to some extent for critical reviews of activities in the capital markets affecting the interests of the public participating in these markets.¹²⁹ For instance, the fact that the published rating incorrectly reflects the creditworthiness of the rated entity in itself is not enough to render the CRA liable. Entities entering the capital markets for investment purposes should expect their financial reputations to become an issue that will be publicly

¹²² Court of Appeal Ghent, June 6, 2005, 129 *Nieuw Juridisch Weekblad* 1247 (2005).

¹²³ Court of Appeal Antwerp, October 11, 2005, 2 *Auteur en Media* 207 (2006) with annotation by K. Lemmens; Court of Appeal Brussels, September 20, 2001, 6 *Auteur en Media* 524 (2002); Court of First Instance Brussels, October 7, *Auteur en Media* 80 (2003); Court of Appeal Brussels, January 16, 2001, 3 *Auteur en Media* 282 (2002); Court of First Instance Antwerp, January 9, 2006, 1 *Auteur en Media* 97 (2006); Court of First Instance, Antwerp, December 21, 2000, *Algemeen Juridisch Tijdschrift* 557 (2001); Court of Appeal, Ghent, March 28, 2002, 13 *Nieuw Juridisch Weekblad* 465 (2003); Court of Appeal Ghent, June 6, 2005, 129 *Nieuw Juridisch Weekblad* 2005, 1243; Court of First Instance Tongeren, April 12, 2013, 43 *Limburgs Rechtsleven* 132 (2017). See in this regard also the discussion and further references in Marc Van Quickenborne & Hugo Vandenberghe, "Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad. 2000-2008", 4 *Tijdschrift voor Privaat Recht* 1816 (2010); J. Corbet, *Censures: Actes du colloque du 16 mai 2003* 85-89 (1st. ed. 2003); Dirk Voorhoof, *Vrijheid van meningsuiting en drukpersvrijheid* in: *Handboek Belgisch publiek recht, Deel I: inleiding tot het Belgisch publiek recht* 597 (Johan Vande Lanotte, Geert Goedertier, Yves Haeck, Jurgen Goossens & Tom De Pelsmaeker eds. 2015).

¹²⁴ Wymeersch & Kruithof, *supra* note 2, at 386; Hugo Vandenberghe, *Over persaansprakelijkheid. De specifieke context*, 4 *Tijdschrift voor Privaat Recht* 1816 (2010).

¹²⁵ This, for example, includes the protection of the reputation and the rights of others (Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v Germany*, [1990] 12 EHRR 161), of the interests of the public while ensuring respect for members of the Bar (Case 15450/89, *Casado Coca v Spain*, [1994] 18 EHRR 1), rights of consumers (Case 7805/77, *X. and Church of Scientology v Sweden*, [1979] 16 DR 68) and health or the rights of others (Case 37928/97, *Stambuk v Germany*, [2002] 37 EHRR 845).

¹²⁶ Wymeersch & Kruithof, *supra* note 2, at 386.

¹²⁷ *Id.* at 386-387.

¹²⁸ Commercial Court Antwerp, December 6, 1990, *Jaarboek Handelspraktijken* 511 (1990).

¹²⁹ Wymeersch & Kruithof, *supra* note 2, at 386-387.

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discussed. For the same reasons, they should accept that inaccuracies in these public discussions are inevitable and might sometimes even cause fluctuations in the public opinion about their creditworthiness. Entities such as CRAs contribute to the production of information in the business and capital markets. Therefore, they should enjoy some leeway.¹³⁰ In order to permit sufficient voluntary production of information that is beneficial for the financial sector and the society in general, a strict standard of liability for any information that turns out to be incorrect should not be upheld.¹³¹ Nonetheless, the situation for CRAs is still quite different than a critical review of a restaurant or other market participants written by a journalist. Journalists do not get paid and issue the information about the restaurant to the benefit of the general public. CRAs, on the other hand, are paid by the issuer to give their opinion on the latter's reputation. Credit ratings often follow from a contractual relationship between the CRA and the issuer, which is atypical for a journalist. The journalist is not directly involved in the commercial activities of the party on which he reports. In sum, imposing liability on CRAs when issuing an incorrect rating might become necessary to protect the reputation of the issuer or the interest of the general public.

C. Restriction of the CRA's Freedom of Expression is Necessary in a Democratic Society to Achieve the Legitimate Interest

When deciding if the restriction imposed by the government is necessary in a democratic society, the ECtHR weighs opposing interests at stake in the particular case (e.g. public health, consumer protection, protection of identity, fair competition, or the reputation and rights of others against the freedom of expression).¹³² In exercising its supervisory jurisdiction, the ECtHR looks at the interference in the light of the case as a whole. This includes the content and general context of the publication.¹³³ The necessity test cannot be applied in absolute terms but requires an assessment of various factors, including the nature of the rights involved, the degree of the interference, whether the restriction was proportionate to the legitimate aim pursued, the nature of the public interest and the degree to which the latter requires protection in the circumstances of the case.¹³⁴

The adjective 'necessary' implies the existence of a "pressing social need".¹³⁵ The Court looks at the interference in the light of the case and determines if it was proportionate to the legitimate aim pursued and whether the reasons invoked by the national authorities to justify the restriction are relevant and sufficient.¹³⁶ The Court confines its review to the question of whether the measures taken by the government are justifiable in principle and proportionate. In this regard, the margin of appreciation given to governments is essential to

¹³⁰ *Id.* at 384-388.

¹³¹ *Id.* at 388.

¹³² Case 8734/79, *Barthold v Germany*, [1985] 7 EHRR 383, paragraph 58; Case 15088/89, *Jakubowski v Germany*, [1994] 19 EHRR 64, paragraph 27; Case 24699/94, *VgT Verein gegen Tierfabriken v Switzerland*, [2002] 34 EHRR 159, paragraphs 67-79; Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v Germany*, [1990] 12 EHRR 161, paragraphs 34.

¹³³ Case 37928/97, *Stambuk v Germany*, [2002] 37 EHRR 845, paragraph 38.

¹³⁴ Case 7805/77, *X. and Church of Scientology v Sweden*, [1979] 16 DR 68, paragraph 5.

¹³⁵ Case 5493/72, *Handyside v the United Kingdom*, [1976] ECHR 5, paragraph 48.

¹³⁶ See e.g. Case 25181/94, *Hertel v Switzerland*, [1998] 28 EHRR 534, paragraph 46; Case 37928/97, *Stambuk v Germany*, [2002] 37 EHRR 845, paragraph 38.

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regulate, restrict, or forbid speech. Two factors seem to have an influence on the margin of appreciation and the stance that courts will take regarding the protection of ratings.

First, the margin of appreciation is wide and particularly essential for national governments when it concerns (purely) commercial matters¹³⁷ or advertisements.¹³⁸ In other words, authorities have more discretion to regulate speech related to commercial matters or advertisements than to value judgements. The ECtHR, nonetheless, recalled that a strict and narrow margin of appreciation in cases of advertising and commercial matters for liberal professions would not be consonant with the freedom of expression. A strict application risks discouraging members of liberal professions from contributing to the public debate on topics affecting the life of the community if there is the slightest likelihood of their statements being treated as entailing an advertising effect.¹³⁹ The government's margin of appreciation is, however, reduced when the claim does not relate to an individual's purely commercial statements or advertisements, but concerns a contribution to and participation in a debate affecting the public at large/general interest.¹⁴⁰ This includes public health (e.g. effects of microwaves on human health),¹⁴¹ the protection of the rights of others,¹⁴² and maintaining the welfare of animals.¹⁴³

Against this background, the ECtHR concluded in several cases that a particular restriction or injunction on the freedom of speech was not proportionate to the legitimate aim pursued, and accordingly, not necessary in a democratic society. This resulted in a violation of Article 10 ECHR. Those decisions were especially related to statements that were not purely within the commercial or advertising sphere but instead had a wider link to the society.¹⁴⁴ In several other cases, the ECtHR found that the injunctions were proportionate and necessary. They did not constitute a violation of Article 10 ECHR. These cases in particular were related to purely commercial statements or advertisements.¹⁴⁵

CRA's will probably argue that imposing liability for an incorrect rating is not necessary in a democratic society. More specifically, they might claim their ratings are not purely commercial statements or advertisements but instead have a wider link to the society

¹³⁷ See e.g. Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v Germany*, [1990] 12 EHRR 161, paragraph 33-37; Case 15088/89, *Jakubowski v Germany*, [1994] 19 EHRR 64, paragraph 26; Case 24699/94, *VgT Verein gegen Tierfabriken v Switzerland*, [2002] 34 EHRR 159, paragraph 69.

¹³⁸ See e.g. Case 15450/89, *Casado Coca v Spain*, [1994] 18 EHRR 1, paragraph 50; Case 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45, paragraph 45; Case 37928/97, *Stambuk v Germany*, [2002] 37 EHRR 845, paragraphs 38-54. See in this regard also: Steve Foster, *Human Rights and Civil Liberties* 359 (1st. 2008).

¹³⁹ Case 8734/79, *Barthold v Germany*, [1985] 7 EHRR 383, paragraphs 52-59.

¹⁴⁰ See e.g. Case 8734/79, *Barthold v Germany*, [1985] 7 EHRR 383, paragraph 58; Case 25181/94, *Hertel v Switzerland*, [1998] 28 EHRR 534, paragraph 47; Case 24699/94, *VgT Verein gegen Tierfabriken v Switzerland*, [2002] 34 EHRR 159, paragraph 71.

¹⁴¹ Case 25181/94, *Hertel v Switzerland*, [1998] 28 EHRR 534, paragraph 47.

¹⁴² Case 37928/97, *Stambuk v Germany*, [2002] 37 EHRR 845, paragraphs 46-49.

¹⁴³ Case 24699/94, *VgT Verein gegen Tierfabriken v Switzerland*, [2002] 34 EHRR 159, paragraphs 70-71.

¹⁴⁴ Case 8734/79, *Barthold v Germany*, [1985] 7 EHRR 383, paragraphs 52-59; Case 24699/94, *VgT Verein gegen Tierfabriken v Switzerland*, [2002] 34 EHRR 159, paragraphs 70-71; Case 37928/97, *Stambuk v Germany*, [2002] 37 EHRR 845, paragraphs 46-49; Case 25181/94, *Hertel v Switzerland*, [1998] 28 EHRR 534, paragraph 47.

¹⁴⁵ See e.g. Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v Germany*, [1990] 12 EHRR 161, paragraphs 32-38; Case 15088/89, *Jakubowski v Germany*, [1994] 19 EHRR 64, paragraphs 23-30; Case 7805/77, *X. and Church of Scientology v Sweden*, [1979] 16 DR 68, paragraph 5. See in this regard also: Foster, *supra* note 138, at 359.

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(e.g. general welfare). The issuance of such ratings actually helps the wider public to receive information on the rated product. This gives national authorities a restricted margin of appreciation which means that a violation of Article 10 ECHR might be more easily established. However, ratings could also fall within the definition of “advertising” often at stake in cases dealing with commercial speech.¹⁴⁶ Advertising refers to the making of a representation in any form in connection with a trade, business, or profession in order to promote the supply of goods or services.¹⁴⁷ The *European Convention on Transfrontier Television* uses a similar wording when defining advertising as any public announcement in return for payment or similar consideration or for self-promotional purposes, which is intended to promote the sale, purchase, or rental of a product or service, to advance a cause or idea or to bring about some other effect desired by the advertiser or the broadcaster itself.¹⁴⁸ Such a broad conception is not surprising from a comparative legal perspective within the EU either. In the *Belgian Electronic Sorting Technology* case, the European Court of Justice, decided that it was desirable to provide a broad concept of comparative advertising to cover all modes of advertising. It is not limited to traditional forms of advertising, but also includes very varied forms of promotional messages.¹⁴⁹ Arguably, ratings given to complex securities and leading to the financial crisis could be qualified as advertisements. Such ratings have been issued to institutional investors to make commercial decisions. The financial products would not have been sold if they were not covered by favorable ratings. A rating might be a public announcement in return for payment.

Second, there is also another element that has an influence on the national authorities’ margin of appreciation, namely whether the provider of information has a more public role in society. Lawyers, for instance, have a “central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar and also the monitoring and supervisory powers vested in Bar councils.”¹⁵⁰ Members of the bar cannot be compared with commercial undertakings such as insurance companies, which are not subject to restrictions on advertising their legal consulting services.¹⁵¹ Lawyers play a key role in ensuring courts enjoy confidence from the public. Therefore, it is legitimate to expect them to contribute to the proper administration of justice and thus to maintain public confidence therein. Lawyers are certainly entitled to publicly comment on the administration of justice. However, their criticism must not overstep certain bounds and restrictions on their freedom of expression may be justified. Account must be taken of the need to strike the right balance between various interests involved. These include the public’s right to receive legal information, the requirements of the proper administration of justice and the dignity of the legal profession.¹⁵² Similarly, the

¹⁴⁶ See the conclusion by Maya Hertig Randall, *Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?*, 6 Human Rights Law Review 53, 59 (2006)

¹⁴⁷ Article 2(a) Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376.

¹⁴⁸ European Convention on Transfrontier Television, CETS No. 132, May 5, 1989 as referred to in Randall, *supra* note 146, at 60.

¹⁴⁹ Case C-65/11 *Belgian Electronic Sorting Technology NV v Bert Peelaers Visys NV*, paragraphs 21-26.

¹⁵⁰ Case 15450/89, *Casado Coca v Spain*, [1994] 18 EHRR 1, paragraph 54; Case 25405/94, *Schöpfer v Switzerland*, [2001] 33 EHRR 845, paragraph 29.

¹⁵¹ Case 15450/89, *Casado Coca v Spain*, [1994] 18 EHRR 1, paragraph 53.

¹⁵² Case 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45, paragraph 45; Case 25405/94, *Schöpfer v Switzerland*, [2001] 33 EHRR 845, paragraphs 29-30. Also see: Leach, *supra* note 56, at 368.

medical practitioners' general professional obligation of care of the health of each individual and of the community as a whole may explain restrictions on their conduct, including rules on public communications or participation in public communications on professional issues. These rules of conduct in relation to the press have to be balanced against the legitimate interest of the public in information and are limited to preserve the well-function of the profession as a whole.¹⁵³ Thus, national authorities might have a wider margin of appreciation and a violation of Article 10 ECHR will be less easily established when the speaker fulfils a more public role.¹⁵⁴

One can argue that CRAs to a certain extent have such a public role. This has been acknowledged in Regulation 462/2013 on CRAs which stipulates that ratings, whether issued for regulatory purposes or not, have a significant impact on investment decisions and on the image and financial attractiveness of issuers.¹⁵⁵ CRAs are important for participants in the financial markets such as credit institutions and insurance companies. Ratings still drive investment choices in particular because of information asymmetries and for efficiency purposes.¹⁵⁶ The public role of other certifiers such as classification societies has already explicitly been acknowledged by several decisions in Belgium.¹⁵⁷

V. CONCLUDING REMARKS

The article examined some issues related to credit rating agencies, thereby taking a European perspective. Even though there is supranational legislation dealing with the liability of CRAs, its application remains problematic due to several elements such as the high threshold of proof (e.g. reasonable reliance on the rating and the impact on decision-making processes).¹⁵⁸ The contribution then proceeded with an analysis of a CRA's freedom of expression pursuant to Article 10 of the European Convention on Human Rights. This question might become important considering that claims against CRAs can be initiated in European countries. The Italian's *Corte dei Conti* already threatened to prosecute Standard & Poor's as the CRA did not value Italy's historical and cultural treasures when downgrading the sovereign rating.¹⁵⁹ The aim of the article is to give judges in European countries a

¹⁵³ Case 37928/97, *Stambuk v Germany*, [2002] 37 EHRR 845, paragraph 41.

¹⁵⁴ Case 15450/89, [1994] 18 EHRR 1, paragraphs 54-55; Case 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45, paragraphs 45-46; Case 25405/94, *Schöpfer v Switzerland*, [2001] 33 EHRR 845, paragraphs 29-30.

¹⁵⁵ Recital (32) Regulation 462/2013 amending Regulation 1060/2009 on credit rating agencies.

¹⁵⁶ Recital (8) Regulation 462/2013 amending Regulation 1060/2009 on credit rating agencies.

¹⁵⁷ See for example the case of the *Spero*, Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 321 (1995) and the case of the *Paula*, Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 301 (1995).

¹⁵⁸ See for an extensive discussion and further references: De Bruyne, *supra* note 4, at 196-199; De Bruyne & Vanleenhove, *supra* note 19, at 120-128.

¹⁵⁹ It has been reported in several press releases that the *Corte dei Conti* wrote that "S&P never in its ratings pointed out Italy's history, art or landscape which, as universally recognised, are the basis of its economic strength". See in this regard for example: Stephen Foley & Guy Dinmore, *Italy accuses S&P of not getting 'la dolce vita'*, Financial Times, February 4, 2014, www.ft.com/content/6ed9649e-8dab-11e3-bbe7-00144feab7de; Francesco Forte, *Il Ft sbertuccia l'economia poetica della Corte dei Conti*, Il Foglio, February 5, 2014, www.ilfoglio.it/articoli/2014/02/05/news/il-ft-sbertuccia-leconomia-poetica-della-corte-dei-conti-51188/.

Credit ratings of national government (sovereign rating) have to be issued in a manner that ensures that the individual specificity of a particular Member State has been taken into account (Article 8(a) Regulation 1060/2009 as inserted by Article 1(11) Regulation 462/2013 on credit rating agencies).

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toolbox they can use when confronted with the question whether and under which circumstances ratings, and by extension other certificates,¹⁶⁰ qualify as protected speech. Although it remains uncertain which stance courts in Europe will take on this issue, the article showed there are some openings for CRAs to benefit from the freedom of expression protection. Protection will more likely be given to ratings that are a matter of general concern and contribute to the public debate, and when CRAs act as financial journalists. Commercial speech is also afforded some protection under Article 10 ECHR. Nevertheless, the government can restrict a credit rating agency's freedom of speech under the conditions set out in the second paragraph of the Article 10 ECHR.

¹⁶⁰ See for a similar analysis for class certificates issued by classification societies in their private and public role as Recognized Organization: De Bruyne & Vanleenhove, *supra* note 12, 304-322.

