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Regulation and Liability of Credit Rating Agencies under Belgian Law

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Abstract

This article is the Belgian report concerning rating agencies to the 2006 Congress of the International Academy of Comparative Law to be held in Utrecht. After describing credit rating practices in Belgium, the report considers the extent to which Belgian regulation requires, or relies upon, credit ratings. It then describes Belgian regulation applicable to credit rating agencies and credit rating activities. The remainder of the report analyzes when Belgian law provides civil remedies against a rating agency which issues a credit rating not correctly reflecting the creditworthiness of the rated entity.

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Regulation and Liability of Credit Rating Agencies under Belgian Law [†]

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[†] Country Report prepared for the 2006 International Congress of Comparative Law organized by the International Academy of Comparative Law in Utrecht.

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A. Credit Ratings and Credit Rating Agencies in General

The activity referred to as credit rating consists of the evaluation of the creditworthiness of financial instruments or issuers of such instruments, *i.e.* the risk that payment of interest and capital will not or not completely take place at the promised time.[1] The resulting credit ratings reflect the concluding opinion of this evaluation, using a simple classification system of gradation.[2] Credit rating agencies are private independent companies that attribute and publish such credit ratings.[3]

Credit ratings emerged in the early twentieth century in the United States, when Moody's Investors Service,[4] the Fitch Publishing Company now known as Fitch Ratings,[5] and the Poor Company and Standard Statistics, that later merged into Standard & Poor's (also referred to as "S&P"),[6] started publishing bond ratings using a pre-defined scale of letters each indicating a quantified level of risk.[7] Around the same time, larger American corporations started to require more capital than they could assemble using traditional relational techniques, so they were driven to issue debt paper among the broader, anonymous public.[8] This is only possible if the anonymous investors have enough confidence in the creditworthiness of issuers they do not know themselves or with whom they do not have a personal relationship. In this sense, credit ratings help to "pierce the fog of asymmetric information that surrounds lending

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1 Credit ratings are therefore distinguished from financial analysts' recommendations to "buy", "accumulate", "hold", "neutral", "reduce", or "sell", etc., which sometimes are also referred to as "ratings".

2 U.S. SECURITIES AND EXCHANGE COMMISSION, *Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets*, as Required by Section 702(b) of the Sarbanes-Oxley Act of 2002, January 2003, p. 5, available at the SEC's web site at <www.sec.gov/news/studies.shtml> (hereinafter the "SEC Report"). For a description of the rating process, *see e.g.* STANDARD & POOR'S, *Corporate Ratings Criteria*, 2006; *see also* "SEC Report" (*supra*), p. 25-27; P. HEUSE & T. TIMMERMANS, "Le rating: modalités et critères d'attribution des notes", *Revue de la Banque*, 1994/4, 191-203; L. EDERINGTON & J. YAWITZ, "The Bond Rating Process", in E. ALTMAN & M.J. MCKINNEY (ed.), *Handbook of Financial Markets and Institutions*, New York: John Wiley & Sons, 6th edition, 1987, Chapter 23; T.J. SINCLAIR, "Global Monitor. Bond Rating Agencies", *New Political Economy*, Vol. 8, nr 1, 2003, 147-161, p. 150-151.

3 L.J. WHITE, "The Credit Rating Industry: An Industrial Organization Analysis", in R.M. LEVICH, G. MAJNONI & C.M. REINHART (ed.), *Ratings, Rating Agencies and the Global Financial System*, Boston: Kluwer Academic Publishers, 2002, 41-64 (references here are to the NYU Ctr for Law and Business Research Paper No 01-001, available in the electronic library of the Social Science Research Network (hereinafter the "SSRN eLibrary") at <http://ssrn.com/abstract=267083>), footnote 7 at p. 4, points out that the name "agency" is in this regard misleading, incorrectly suggesting these entities are in any way different from commercial companies, and suggests to call them "credit rating firms". Although we in principle agree with this observation, we nevertheless use the generic name "agency", as this has been and still remains the term mainly used in the literature and regulation. *See* however *infra* the text accompanying footnote 75.

4 For more details on Moody's Investors Service, *see* their web site at <www.moodys.com>.

5 For more details on Fitch Ratings, *see* their web site at <www.fitchratings.com>.

6 For more details on Standard & Poor's, *see* their web site at <www.standardandpoors.com>.

7 For the history of the emergence of credit rating and these three leading rating agencies, *see* R. CANTOR & F. PACKER, "The Credit Rating Industry", *Federal Reserve Bank of New York Quarterly Review*, Summer/Fall 1994, 1-26; F. PARTNOY, "The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies", *Washington University Law Quarterly*, Vol. 77, nr. 3, 1999, 619-712, p. 636 *et seq.*; R. SYLLA, "A Historical Primer on the Business of Credit Ratings", in R.M. LEVICH, G. MAJNONI & C.M. REINHART (ed.), *Ratings, Rating Agencies and the Global Financial System*, Boston: Kluwer Academic Publishers, 2002, 19-40 (references here are to the working paper version available on the web site of the World Bank at <http://www1.worldbank.org/finance/assets/ images/Historical_Primer.pdf>).

8 C.A. HILL, "Regulating the Rating Agencies", *Washington University Law Quarterly*, Vol. 82, 2004, 43-95, p. 46.

relationships".[9] As such, they are useful to both the investor and the issuer of financial instruments.

For the individual investor who does not have the capacity or time to investigate, monitor and evaluate the quality of available financial instruments, credit ratings provide simple, easy to use information that can help him to make rational investment decisions.[10] Knowing the relative risk attached to different financial instruments allows investors to better and more easily adjust the global risk profile of their investment portfolios to their own investment preferences. However, credit ratings are also useful for professional portfolio managers, as they can serve as the basis for contractual agreements with clients that in advance specify criteria for investment decisions.[11]

Issuers of financial instruments can use credit ratings as a means of signaling their credit quality to market participants.[12] Ratings strengthen the creditor brand name and help the issuer to place financial instruments in foreign and international markets, where the public is less familiar with the issuer and its activities. A higher rating, reflecting a lower risk, allows an issuer to offer a lower interest rate or demand a higher price at which the instrument is issued, resulting in a lower cost of capital.[13]

The importance of ratings has particularly increased since the seventies.[14] Massive defaults, such as Penn Central, brought the reality home that reliance on a widely known company name was not always warranted and focused the attention of issuers and investors on the safety of debt instruments.[15] At the same time, the capital markets rapidly gained in scope and complexity. Rating agencies responded with more thorough evaluations, which required more trained, well paid staff. While rating agencies before

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[9] L.J. WHITE (*supra* footnote 3), p. 4; *see also* ST.L. SCHWARCZ, "Private Ordering of Public Markets: The Rating Agency Paradox", *University of Illinios Law Review*, Vol. 2002, nr. 1, 1-27, p. 12.

[10] BANK FOR INTERNATIONAL SETTLEMENTS, *Credit Ratings and Complementary Sources of Credit Quality Information*, Basel Committee on Banking Supervision Working Papers nr. 3, Basel: BIS, August 2000, p. 11; F. PARTNOY (*supra* footnote 7), p. 631-632; COMMENT, "An Examination of the Current Status of Rating Agencies and Proposals for Limited Oversight of Such Agencies", *San Diego Law Review*, Vol. 30, 1993, 579-620, p. 582 (authored by F.A. BOTTINI, Jr.), reporting that an estimated 79% of individual investors claim that a rating is the most important factor in their investment decision.

[11] *See* M.S. FRIDSON, "Why Do Bond Rating Agencies Exist?", *Merrill Lynch: Extra Credit*, November/December 1999, p. 8, noting that ratings permit the investors in collective investment schemes to protect themselves against errant behavior by the agent managing the portfolio, by contractually agreeing that the scheme can only invest in bonds that are at or above a specified rating. *See also* "SEC Report" (*supra* footnote 2), p. 28; R. SYLLA (*supra* footnote 7), p. 27; L.J. WHITE (*supra* footnote 9), in his footnote 8 on p. 4; C.A. HILL (*supra* footnote 8), p. 61-62.

[12] L.P. HSUEH & D.S. KIDWELL, "Bond Ratings: Are Two Better Than One?", *Financial Management*, Spring 1988, 46-53, p. 47; *see also* F. PARTNOY (*supra* footnote 7), p. 632.

[13] "SEC Report" (*supra* footnote 2), p. 27-28; BANK FOR INTERNATIONAL SETTLEMENTS (*supra* footnote 10), p. 12. For the relation between ratings, actual default rates and market conditions for large issues of corporate non-financial bonds in the U.S. between 1900 and 1943, showing a clear inverse relationship between the height of the credit rating and the expected and actual market return on the bonds, *see e.g.* W.B. HICKMAN, *Corporate Bond Quality and Investor Experience*, Princeton: Princeton University Press, 1958, p. 10-11; *see also* P. HEUSE & T. TIMMERMANS (*supra* footnote 2), p. 191-192, providing comparative data based on S&P numbers for 1992-1993.

[14] *See* F. PARTNOY (*supra* footnote 7), p. 648 *et seq.*; "SEC Report" (*supra* footnote 2), p. 5.

[15] R. CANTOR & F. PACKER (*supra* footnote 7), p. 4; *see also* F. PARTNOY (*supra* footnote 7), p. 647 *et seq.*; C.A. HILL (*supra* footnote 8), p. 47.

had been funded mainly by publication subscriptions, they started charging issuers.[16] This practice was justified by pointing to the substantial value credible ratings provide in terms of market access for issuers.[17]

Nowadays, it would be very difficult if not impossible to issue a public offering of debt instruments in larger, international or foreign capital markets without a credit rating from one of the internationally reputed rating agencies, in particular Moody's, S&P and to a lesser extent Fitch.[18] Moreover, credit ratings have recently become most important in the securitization markets. Not only have these markets been a fast growing segment of the credit markets,[19] but the availability of a rating is a necessary condition to allow a structured finance product to be issued and sold.[20] As U.S. Senator Joseph Lieberman remarked:

> "The credit raters really do hold the key to capital and liquidity, which, after all, are the lifeblood of corporate America and of our capitalist economy. The ratings they give affect a company's ability to borrow money. It affects whether a pension fund, for instance, or a money market fund can invest in a company's bonds, and it affects stock price. So the difference between a good rating and a poor rating can be the difference literally between success and failure, or more intensively stated, prosperity and poverty."[21]

B. Credit Rating Practices in Belgium

Outside of the United States, however, the demand for credit ratings started later.[22] As opposed to the U.S., which has known a market-based financial system for a long time,

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16 R. CANTOR & F. PACKER (*supra* footnote 7), p. 4; F. PARTNOY (*supra* footnote 7), p. 652-653 (who notes that this coincides with the introduction of regulation relying on ratings); L.J. WHITE (*supra* footnote 3), p. 13 (who notes this change coincides with the spread of low-cost photocopying); C.A. HILL (*supra* footnote 8), p. 50 (also pointing to the technological evolution making it impossible to keep one subscriber from giving or selling information to others); R. SYLLA (*supra* footnote 7), p. 24.

17 "Moody's History. A Century of Market Leadership", on the web site of Moody's at <http://www.moodys.com/moodys/cust/AboutMoodys/AboutMoodys.aspx?topic=history>.

18 In 2001, S&P and Moody's had a combined market share of 80%, and Fitch represented apprimately 14% of the market, so the three together covered almost 94% of the market. *See* C.A. HILL (*supra* footnote 8), p. 60.

19 L.M. LOPUCKI, "The Death of Liability", *Yale Law Journal*, Vol. 106, 1996, 1-92, p. 24-30.

20 *See* BANK FOR INTERNATIONAL SETTLEMENTS, *The Role of Ratings in Structured Finance: Issues and Implications*, Report submitted by a Working Group established by the Committee on the Global Financial System, Basel: BIS, January 2005; N.D. BARON, "The Role of Rating Agencies in the Securitization Process", in L.T. KENDALL & M.J. FISHMAN (ed.), *A Primer on Securitization*, Cambridge, Mass. & London, England: MIT Press, 1996, 81-90; J. FLOOD, "Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitizations and Credit Rating Agencies", in M.B. LIKOSKY (ed.), *Privatising Development: Transnational Law, Infrastructure and Human Rights*, Leiden-Boston: Martinus Nijhoff Publishers, 2005, 147-171 (available in the SSRN eLibrary at <http://ssrn.com/abstract=873878>); *see also* ST.L. SCHWARCZ (*supra* footnote 9), p. 18-19; F. PARTNOY (*supra* footnote 7), p. 664-668; C.A. HILL (*supra* footnote 8), p. 49.

21 Statement of U.S. Senator JOSEPH LIEBERMAN, Chairman of the Committee on Governmental Affairs in "Rating the Raters: Enron and the Credit Rating Agencies", Hearing before the U.S. Senate Committee on Governmental Affairs, 107th Congress, 2d Session, S. Hrg. 107–471, Washington: U.S. Government Printing Office, 20 March 2002, p. 2, available at the web site of the U.S. Government Printing Office at <www.gpoaccess.gov/chearings> (hereinafter "Rating the Raters"); at the web site of the Senate Committee on Homeland Security and Governmental Affairs (<http://hsgac.senate.gov/>) a video of the more than 3 hour long hearing can be viewed.

22 On the question why credit ratings appeared first in the United States, *see* R. SYLLA (*supra* footnote 7), p. 5-10 and 21-23.

most European countries traditionally have an institution-based financial system, where companies mainly finance their projects with bank credits. Branches of the banks were, and still are, spread all over the relatively smaller territories of these countries, allowing the banks themselves to be effective and efficient information gatherers, limiting the demand for external credit rating services.[23] It was only as capital flows in international financial markets partially shifted away from the banking sector to capital markets that credit ratings began to take root in continental Europe.[24]

The main American rating agencies started to open branches or subsidiaries in some foreign financial centers, hiring local expertise. The first non-U.S. rating agencies appeared only during the seventies, and most of these companies limited their activities to their national market. Several of these local agencies were later taken over by one of the three large American agencies or became local affiliates of one of the big three, using their standard rating method and applying it to local issuers or issuances.[25] The end result is that the main U.S. rating agencies dominate the market, also outside of the United States.

In Belgium no specialized credit rating agencies exist.[26] Some Belgian banks issue certain types of credit ratings, but these ratings are not intended to reach the quality level aspired by the ratings by the independent credit rating agencies.[27] ING Belgium –

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[23] L.J. WHITE (*supra* footnote 3), p. 10 and in particular his footnote 22. Not only credit rating agencies, but als financial intermediation can of course be explained as an answer to informational asymmetries between suppliers and demanders of capital about the quality of the project the demanders want to finance. *See* H.E. LELAND & D.H. PYLE, "Informational Asymmetries, Financial Structure, and Financial Intermediation", *The Journal of Finance*, Vol. XXXII, nr. 2, May 1977, 371-387, in particular p. 382-384; *see also* D.W. DIAMOND, "Monitoring and Reputation: The Choice between Bank Loans and Directly Placed Debt", *Journal of Political Economy*, Vol. 99, nr. 4, August 1991, 689-721.

[24] R. CANTOR & F. PACKER (*supra* footnote 7), p. 2; *see also* T.J. SINCLAIR (*supra* footnote 2), p. 148; R.S. DALE & ST.H. THOMAS, "The Regulatory Use of Credit Ratings in International Financial Markets", *Journal of International Securities Markets*, Spring 1991, 9-18, p. 10. However, the causal relationship can also run the other way, as lower availability of public information about firms' creditworthiness can explain why European firms rely more on bank finance than their American counterparts. *See* F. DE FIORE & H. UHLIG, "Bank Finance versus Bond Finance: What Explains the Differences Between the U.S. and Europe?", CEPR Discussion Paper nr. 5213, September 2005, available in the SSRN eLibrary at <http://ssrn.com/abstract=822804>.

[25] P. HEUSE & T. TIMMERMANS (*supra* footnote 2), p. 193; R. CANTOR & F. PACKER (*supra* footnote 7), p. 3.

[26] *See* P. HEUSE & T. TIMMERMANS (*supra* footnote 2), p. 193; *see also* BANK FOR INTERNATIONAL SETTLEMENTS (*supra* footnote 10), Annex I.A., p. 21-22, a study by a working group on the basis of information provided by the national – including the Belgian – supervisory authorities and central banks, finding 26 credit rating agencies in the G10 countries, but none in Belgium; *see also* L.J. WHITE (*supra* footnote 3), p. 9, not identifying a credit rating firm in Belgium.
There are, however, other type of rating agencies in Belgium, such as for instance the non-profit organization Ethibel, that attributes corporate social responsibility ("CSR") ratings to issuers of securities that can help collective investment schemes ("CIS") choosing their portfolio investments as needed to qualify for the Ethibel Pioneer or Ethibel Excellence labels, registered in the Member Countries of the E.U., which signal the investors that these CIS only invest in sustainable companies. For more information, *see* the web site of Ethibel at <www.ethibel.be>. As the subject of this report is limited to *credit* rating agencies, so we do not elaborate further on such agencies.

[27] Fortis Bank offers its corporate clients as part of its rating advisory services an assessment of their creditworthiness by determining an indicative rating that can be viewed as a proxy to external ratings. *See* <www.merchantbanking.fortis.com/companies/advisory_research/rating_advisory/>, last visited on 14 December 2005. With these "indicative ratings", Fortis tries to predict for its clients what rating they could expect from one of the major internationally recognized rating agencies before the client decides to invest in that process. These indicative ratings do not reflect Fortis' evaluation of the creditworthiness of the client but only Fortis' prediction

continuing the practice started by its predecessor BBL in July 1975[28] – attributes and publishes its own credit ratings to new issues of Eurobonds.[29] These ratings, which are systematically published by several newspapers listing newly issued bonds,[30] are only based on information that is already in the public domain at the time of the bond offering.[31] ING Belgium also does not follow up on these ratings or adjust them as circumstances change. As such, these ratings only are intended to summarize the publicly available information at one point in time.[32] They therefore do not have the same function and impact as the credit ratings issued by the major American rating agencies.

Until recently, with Belgian companies mainly using equity and local bank loans for their financial needs,[33] few Belgian companies had applied for a credit rating because it was of only marginal value to them. On the relatively small domestic market, most Belgian companies that issue debt instruments are sufficiently known to the local institutional investors and investing public that there is only a limited expected surplus value from the opinion of specialized independent rating agencies. As a result, the high cost of the ratings provided by the major independent rating agencies constituted a prohibitive hurdle for the mostly smaller and medium sized Belgian companies.[34] On the other hand, for offerings of instruments outside of Belgium or on the international market, a credit rating by a local newly established Belgian rating agency would most likely not be sufficient, so in reality the Belgian companies that do tap the international capital markets are in fact forced to apply for a rating by one or more of the big three rating

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of how the major rating agencies would rate that credit risk. These ratings, therefore, are not supposed to be rendered public (based on information informally provided to us by persons from the industry).

[28] *See* P. TALBOT, "Twintig jaar BBL-rating", *Financiële Berichten BBL*, July 1995, nr. 2296, 13-14. The Belgian bank BBL (Bank Brussel Lambert) became a fully owned subsidiary of ING Group in 1998, and in 2003 its name was changed to ING Belgium NV. For more information on the history of the ING Group, *see* its web site at <www.ing.com/group>.

[29] These ratings use only five letter categories (A+ for undisputable quality, A for high quality, B+ for satisfying quality, B for acceptable quality in the short term, and C for insufficient quality), to which three numbers can be added to compare the offered conditions of the bond issue with prevailing market conditions (1 for attractive, 2 for in line with prevailing market conditions, and 3 for considered insufficient). Based on the description of the ING Ratings on ING Belgium's web site at <www.ing.be>. This ranking scale has not changed since 1975; *see* P. TALBOT (*supra* footnote 28), p. 13.

[30] For recent examples, *see* for instance "Sélection d'émissions récentes", *L'Echo*, Saturday 3 – Monday 5 December 2005, p. 22; "Nieuwe internationale obligatieleningen", *De Standaard*, Saturday 29 – Sunday 30 October 2005, p. 53.

[31] BBL started rating Eurobonds as the market for such bonds grew and the leading American rating agencies only rated Euro-issuers that were prepared to pay for their services. BBL saw a need to have a homogeneous and systematic system that rated all Eurobonds on the same scale. Also, while banking regulation did not allow it to only advise high rated bonds to its clients, it did allow the bank to provide this "objective" and complete information to its clients with indirectly the same result. *See* P. TALBOT (*supra* footnote 28), p. 13.

[32] Based on the description of the ING Ratings on ING Belgium's web site at <www.ing.be>; *see also* P. TALBOT (*supra* footnote 28), p. 13.

[33] At the end of the second quarter of 2005, the total outstanding amount of financial liabilities of non-financial corporations in Belgium was approximately €1,125 billion, which consisted of approximately €635.5 billion in equity (€121 billion of quoted shares and €514.5 billion of unquoted shares and other equity), €417 billion in loans (€182.5 billion over one year and €234.5 up to one year), and only €35.5 billion in fixed-interest securities (€29 billion over one year and €6.5 billion up to one year). *See* NATIONAL BANK OF BELGIUM, *Statistical Bulletin*, 2005-IV, Table 16.1.4, p. 197, available at the web site of the National Bank of Belgium at <www.nbb.be>.

[34] *Cf.* the remarks of Professor HUBERT OOGHE, interviewed in "Financial Management – A Question of Common Sense and Imagination", *Orator – The House Magazine of Vlerick Leuven Gent Management School*, nr. 8, June-August 2003, 2-3, p. 3, available at <http://www.vlerick.be/news/pdf/orator8.pdf>.

agencies. Therefore, the small size of the domestic market seems to be the principle characteristic explaining the absence of Belgian independent credit rating agencies.[35]

Only a few Belgian companies, however, have effectively obtained a rating by one of the three major credit rating agencies. For example, a review in 1994 revealed that while seven Belgian financial institutions received a Standard & Poor's rating, only two private companies outside the financial sector and two government owned companies had requested a rating from S&P.[36] The 2000 BIS survey on rating agencies reported for Belgian financial institutions twelve ratings by Moody's, six by S&P and six by Fitch – which probably means a dozen institutions each carrying two ratings – and for Belgian industrials/corporates only six ratings by Moody's and four by S&P.[37] A quick – and therefore not fully reliable – search using their web site facilities[38] revealed that at the end of 2005, while most important Belgian credit institutions and insurance companies had obtained a credit rating by at least one of the two main rating agencies, S&P or Moody's, only about a dozen non-financial Belgian companies carried such a rating. Half of these companies at one point in the near past were, or still are, government owned entities, relying on bonds to also obtain some financing from the private markets. Of course, an unknown number of Belgian companies may have obtained a credit rating from one of the major rating agencies without disclosing it,[39] but this number is unlikely to be very high.

This lack of international credit rating practice in Belgium is primarily due to the fact that relatively few historically private Belgian non-financial companies have tapped the international capital markets for funding.[40] However, this most likely is further influenced by the fact that Belgian financial regulation does not often rely on credit

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35 P. HEUSE & T. TIMMERMANS (*supra* footnote 2), p. 193.

36 P. HEUSE & T. TIMMERMANS (*supra* footnote 2), p. 197.

37 BANK FOR INTERNATIONAL SETTLEMENTS (*supra* footnote 10), Annex IV.C and D, p. 35-36.

38 Based on a search using "Belgium" as the "Country" under the "Advanced List Search" feature on the "Credit Ratings Lists" for each "Sector" and each "Business Line" on Standard & Poor's web site (<www.standardandpoors.com>) on 3 December 2005, and a search using "all" as the "Broad Industry" and "Belgium" as the "Country" under the heading "Ratings Lists" on Moody's European web site (<www.moodyseurope.com>) on 19 December 2005.

39 People active in the financial sector have indicated to us that they are aware of several Belgian companies having an undisclosed rating and that some of them have even issued bonds after that rating was issued without disclosing the rating.

40 In September 2005, Belgian entities had in total an amount of $287.3 billion international debt securities outstanding, of which $198.9 billion were for the account of financial institutions and $72.7 billion were for the account of governments, leaving only $15.7 billion issued by non-financial corporate issuers. *See BIS Quarterly Review, International Banking and Financial Market Developments*, Basel: Bank for International Settlements, December 2005, Statistical Annex, Table 12A-12D, p. A86-A89, available at the web site of the BIS at <www.bis.org>.

ratings,[41] so that the demand for ratings induced by such regulation is much smaller than for instance in the United States.[42]

C. Regulatory Incidence on the Demand for Credit Ratings

As already mentioned, the demand for credit ratings increased during the last three decades because of the internationalization of the markets, the growing complexities of financing techniques, and the gradual shift from a creditor-oriented system to a market-oriented system.[43] However, at the same time, the demand for credit ratings was stimulated by several regulatory requirements, imposing mandatory ratings or providing direct or indirect incentives for issuers to obtain credit ratings.

The traditional view on the role of credit rating agencies holds that credit ratings contain information and the success of rating agencies depends on their ability to accumulate and retain reputational capital.[44] By incorporating credit ratings into its financial regulation, the government effectively relies on the specialization and independence of the rating agencies, presumably resulting in a more efficient outcome.[45] However, a more recent and perhaps more cynical view is that rating agencies do not so much supply valuable information to the market, but rather are in the business of selling valuable property rights associated with compliance with government regulation requiring a credit rating or conditional upon credit ratings. Credit ratings, in this view, are mainly valuable as keys to unlock the benefits of various regulatory schemes.[46] This view, of course, is a serious challenge to the efficiency of this type of regulation.

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41 *See infra* Section C.

42 *See infra* footnote 46 and accompanying text. *See also* F. PARTNOY (*supra* footnote 7), p. 702: "Absent American-style regulations that virtually oblige a company to obtain a rating, European corporations often forgo the bother and expense of obtaining a rating, especially if they borrow principally in their domestic markets."

43 *See supra* footnotes 14-17 and 24 accompanying text.

44 *See e.g.* NOTE, "What Standard of Care Should Govern the World's Shortest Editorials?: An Analysis of Bond Rating Agency Liability", *Cornell Law Review*, Vol. 75, 1990, 411-461, p. 426 (authored by G. HUSISIAN): "The very value of an agency's ratings, like an accountant's opinions, lies in their independent, reliable evaluation of a company's financial data"; L.P. HSUEH & D.S. KIDWELL (*supra* footnote 12), p. 47: "Disseminating only correct information is important, because the existence of bond rating agencies depends on the market's acceptance of their signals."

45 *See e.g.* A.K. RHODES, "The Role of the SEC in the Regulation of the Ratings Agencies: Well-Placed Reliance or Free-Market Interference?", *Seton Hall Legislative Journal*, Vol. 20, 1996, 293-361, p. 297: "Federal regulatory reliance on rating agencies prevents intrusion of the government into the field of securities analysis and conserves resources of federal regulators who are not as well-equipped to analyze securities issuances. A regulatory system that relies on ratings can become fine-tuned, less costly for society, as well as simpler to apply for issuers."

46 For this so-called regulatory license view, *see* F. PARTNOY (*supra* footnote 7), p. 681 *et seq*.; *see also* F. PARTNOY, "The Paradox of Credit Ratings", in R.M. LEVICH, G. MAJNONI & C.M. REINHART (ed.), *Ratings, Rating Agencies and the Global Financial System*, Boston: Kluwer Academic Publishers, 2002, 65-84 (references here are to the University of San Diego School of Law Law and Economics Research Paper nr. 20 version, available in the SSRN eLibrary at <http://ssrn.com/abstract=285162>); *see also* C.A. HILL (*supra* footnote 8), p. 65 *et seq*.

While this regulatory phenomenon is undoubtedly much more widespread in the United States,[47] some examples of such regulatory provisions can be identified in Belgian law.

1. Mandatory Credit Ratings

There is no statutory or regulatory rule in Belgium currently requiring bonds or other debt instruments to carry a credit rating of any sort. However, according to the applicable market rules, Euronext Brussels may as a condition to admission to listing require that the relevant corporate bonds be rated by a rating agency.[48]

Under the existing regulations, issuers of bonds are not required to mention their credit rating in the prospectus if a rating would have been obtained.[49] However, if a public undertaking for collective investment holds bonds or debt instruments in its portfolio, the description of its investment policies in its prospectus has to specify the applicable issuer, term and rating requirements for these instruments.[50]

A credit rating is required for securitization vehicles.[51] As a condition for acquiring a license, a management company for such undertakings has to obtain approval by the Belgian Banking, Finance and Insurance Commission (the Commission Bancaire, Financière et des Assurances, hereinafter the "CBFA") of the contract it has entered into with a rating agency with adequate human, technical and financial means.[52] There are,

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47 For overviews of U.S. regulations depending on credit ratings, *see e.g.* "SEC Report" (*supra* footnote 2), p. 6-8; F. PARTNOY, "The Paradox of Credit Ratings" (*supra* footnote 46), p. 14-15; BANK FOR INTERNATIONAL SETTLEMENTS (*supra* footnote 10), Appendix 1, Table 6, p. 54; F. PARTNOY (*supra* footnote 7), p. 686-701; R.S. DALE & ST.H. THOMAS (*supra* footnote 24); for a longer description of a few examples of US regulatory use of credit ratings, *see* F.A. BOTTINI, Jr. (*supra* footnote 10), p. 603-608.

48 *See* Rule 6703/3, Euronext Rules – Book I, Issue Date: 17 June 2005; *see also* Rule 6703/3, Euronext Brussels Rule Book, version 11 July 2005; both rule books are available at the web site of Euronext at <www.euronext.com>.

49 For issuance of bonds on the primary market, *see* Scheme B under the Belgian Prospectus for Public Offering Decree of 1991 (Arrêté royal du 31 octobre 1991 relatif au prospectus à publier en cas d'émission publique de titres et valeurs, *Moniteur Belge – Belgisch Staatsblad*, 25 November 1991), now based on the Belgian Public Offering of Securities Act of 2003 (Loi du 22 avril 2003 relative aux offres publiques de titres, *Moniteur Belge – Belgisch Staatsblad*, 27 May 2003), and for admission of bonds to the stock exchange, *see* Scheme B under the Belgian Prospectus for Admission to the Stock Exchange Decree of 1990 (Arrêté royal du 18 septembre 1990 relatif au prospectus à publier pour l'inscription de valeurs mobilières au premier marché d'une bourse de valeurs mobilières, *Moniteur belge – Belgisch Staatsblad*, 22 September 1990), now also based on the aforementioned Belgian Public Offering of Securities Act of 2003. Neither scheme mentions anything about credit ratings.

50 *See* Point 2.3.c) in Section II of Annex A (Content of the Prospectus) to the Public Undertakings for Collective Investment Decree of 2005 (Arrêté royal du 4 mars 2005 relatif à certains organismes de placement collectif publics, *Moniteur Belge – Belgisch Staatsblad*, 9 March 2005), implementing Article 56 of the Belgian Collective Portfolio Management Act of 2004 (Loi du 20 juillet 2004 relative à certaines formes de gestion collective de portefeuilles d'investissement, *Moniteur Belge – Belgisch Staatsblad*, 9 March 2005), which delegates to the King the power to specify the content of the prospectus.

51 In Belgium, such securitization vehicles are called "public undertakings for collective investment in receivables". As of 1 January 2006, seven such undertakings were licensed by the CBFA. *See* the List of Public Undertakings for Collective Investment governed by Belgian Law (Liste des Organismes de Placement Collectif Publics de Droit Belge), as published and regularly updated on the web site of the CBFA at <http://www.cbfa.be/fr/cs/icb/li/html/ icb1_li.asp>.

52 Article 3, §1, 11° of the Belgian Royal Decree on Public Undertakings for Investment in Receivables of 1993 (Arrêté royal du 29 novembre 1993 relatif aux organismes de placement en créances, *Moniteur Belge – Belgisch Staatsblad*, 7 December 1993, as amended). Institutional undertakings for collective investment in receivables,

however, no published rules as to the procedure the CBFA has to follow and the substantive criteria it has to apply in judging the adequacy of the rating agencies for this purpose.[53]

2. Regulatory Provisions Relying on Credit Ratings

a) Capital Adequacy Provisions

(i) The Current Rules

The existing rules on capital adequacy for credit institutions and stock exchange brokers ("*sociétés de bourse*"),[54] a particular regulatory category of investment firms that are allowed to offer all types of investment services, impose a minimum required level of own funds to cover risk relating to certain bonds and other debt instruments held in their portfolio.[55] The regulations require the lowest percentage of own funds coverage (0%) for instruments issued by the central government and the highest own funds requirement (8%) for instruments that do not qualify for the lowest or intermediate own funds level. The intermediate own funds level (ranging from 0.25% to 1.6%, depending on the duration) is applied to debt instruments with a very low credit risk.[56] As a general rule, this intermediate category only includes instruments that received an "investment grade" rating by at least two of the rating agencies recognized by the CBFA or by one of such rating agencies if no other recognized rating agency assigned it a lower rating.[57]

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the certificates or shares of which are only distributed among institutional investors and not among the general public, are not subject to a mandatory credit rating arrangement, but they can contract with a rating agency if they whish. *See* Article 13 of the Belgian Royal Decree on Institutional Undertakings for Investment in Receivables of 1997 (Arrêté royal du 8 juillet 1997 portant certaines mesures d'exécution relatives aux organismes de placement en créances, *Moniteur Belge – Belgisch Staatsblad*, 26 July 1997).

53 Compare *infra*, footnotes 64-65 and accompanying text.

54 Article 43 of the Belgian Credit Institution Act of 1993 (Loi du 22 mars 1993 relative au statut et au contrôle des établissements de crédit, *Moniteur belge – Belgisch Staatsblad*, 19 April 1993) delegates the task of setting prudential capital requirements for credit institutions to the CBFA. Based on this statutory provision, the CBFA issued the Credit Institutions Own Funds Regulation of 1995 (Arrêté de la Commission Bancaire, Financière et des Assurances du 5 décembre 1995 concernant le règlement relatif aux fonds propres des établissements de crédit, approved by a Ministerial Decree of 31 December 1995, *Moniteur belge – Belgisch Staatsblad*, 22 March 1996). The same delegation of power is included in Article 90 of the Belgian Investment Firms, Intermediaries and Advisors Act of 1995 (Loi du 6 avril 1995 relative au statut des entreprises d'investissement et à leur contrôle, aux intermédiaires et conseillers en placements, *Moniteur Belge – Belgisch Staatsblad*, 3 June 1995), and based on this provision, the CBFA issued the Stock Exchange Brokers Own Funds Regulation of 1995 (Arrêté de la commission bancaire, financière et des assurances concernant le règlement relatif aux fonds propres des sociétés de bourse, approved by a Ministerial Decree of 31 December 1995, *Moniteur Belge – Belgisch Staatsblad*, 22 March 1996). French and Dutch unofficial consolidated versions of both Own Funds Regulations incorporating all amendments since 1995 can be downloaded from the web site of the CBFA (<www.cbfa.be>).

55 *See* Chapter V, CBFA Credit Institutions Own Funds Regulation of 1995 (*supra* footnote 54), as amended, and Chapter V, CBFA Stock Exchange Brokers Own Funds Regulation of 1995 (*supra* footnote 54), as amended.

56 *See* Article 36, CBFA Credit Institutions Own Funds Regulation of 1995 (*supra* footnote 54), as amended, and Article 36, CBFA Stock Exchange Brokers Own Funds Regulation of 1995 (*supra* footnote 54), as amended.

57 *See* Article 37, 3°, CBFA Credit Institutions Own Funds Regulation of 1995 (*supra* footnote 54), as amended, and article 37, 3°, CBFA Stock Exchange Brokers Own Funds Regulation of 1995 (*supra* footnote 54), as amended.

For debt instruments issued by companies included in the BEL20 index,[58] the only requirement is that no recognized rating agency has assigned the instruments a rating lower than investment grade.[59]

The prudential capital requirements for management companies of undertakings for collective investment require the own funds of such management companies to at least equal the statutory minimum capital,[60] increased with 0.02% of the value of the investment portfolios managed exceeding €250 million, without the total required own funds ever having to exceed €10 million.[61] This extra own funds requirement, however, can be reduced by 50% if the management company enjoys an irrevocable, unconditional, direct and explicit guarantee for an amount equal to the reduction in own funds required, issued by a properly prudentially supervised credit institution or an insurance company carrying a rating higher than[62] "investment grade" issued by a rating agency recognized by the CBFA.[63]

So far, the CBFA has not published any fixed criteria it uses to recognize rating agencies for these capital adequacy purposes. Also, there is no fixed and publicly known procedure that has to be followed for a rating agency to obtain such recognition. In its Circular introducing the new credit institutions and stock exchange brokers own funds regulations in 1996, the CBFA merely announced it would publish a list of the rating agencies it recognizes.[64] In June 1996, the CBFA published a list of the recognized rating agencies and their respective minimal ratings required to qualify for the intermediate category:[65]

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[58] The BEL20 index is a weighted price index based on the prices of shares in minimum 10 and maximum 20 leading companies listed on Euronext Brussels. For the rules on its composition, *see* EURONEXT BRUSSELS, *Rules for the BEL20® Index*, Consolidated Version as of the 24 August 2005 – Applicable on 1 December 2005, Euronext Notice B2-01, Version 3.3. (available at the web site of Euronext at <www.euronext.com>).

[59] *See* Article 37, 4°, CBFA Credit Institutions Own Funds Regulation of 1995 (*supra* footnote 54), as amended, and Article 37, 4°, CBFA Stock Exchange Brokers Own Funds Regulation of 1995 (*supra* footnote 54), as amended.

[60] Article 149 of the Belgian Collective Portfolio Management Act of 2004 (Loi du 20 juillet 2004 relative à certaines formes de gestion collective de portefeuilles d'investissement, *Moniteur Belge – Belgisch Staatsblad*, 9 March 2005) requires a minimum capital of €125,000.

[61] Article 6, 2°, a), Collective Investment Management Company Own Funds Regulation of 2004 (Règlement de la Commission, bancaire, financière et des assurances du 14 décembre 2004 concernant les fonds propres des sociétés de gestion d'organismes de placement collectif, approved by Royal Decree of 4 March 2005, *Moniteur Belge – Belgisch Staatsblad*, 9 March 2005), issued based on the delegation of regulatory power to the CBFA by Articles 158 and 184 of the Belgian Collective Portfolio Management Act of 2004 (*supra* footnote 60).

[62] This must be assumed to be a technical drafting mistake: the logical assumption is that the intention of the regulator is to require a rating "not below" investment grade, as there are no ratings "higher than" investment grade.

[63] Article 9, Collective Investment Management Company Own Funds Regulation of 2004 (*supra* footnote 61).

[64] CBFA Circular D1 96/1, p. 25 (Circulaire D1 96/1 aux établissements de crédit concernant le Règlement relatif aux fonds propres des établissements de crédit, 2 april 1996), available in French and Dutch on the CBFA's web site at <www.cbfa.be>.

[65] CBFA Circular D1 96/6, p. 2, paragraph C. (Circulaire D1 96/6 aux établissements de crédit concernant le règlement relative aux fonds propres des établissements de crédit, 18 June 1996), available in French and Dutch on the CBFA's web site at <www.cbfa.be>.

Recognized Rating Agency	Minimal Rating Required	
	Long Term (> 1 year)	Short Term (≤ 1 year)
Moody's Investor Service	Baa3	P3
Standard & Poor's Corporation	BBB–	A3
IBCA Ltd.	BBB–	A3
Thomson Bankwatch	BBB–	A3

Moody's Investor Service and Standard & Poor's Corporation are, of course, the world wide active and generally recognized American rating agencies, recognized in the United States as "Nationally Recognized Statistical Rating Organizations" (NRSRO) since this phrase was first used by the SEC.[66] The other two agencies mentioned in the list might be less known to the general public. IBCA, Ltd., since 1991 recognized by the SEC as a NRSRO for financial institutions only, was the world's third largest international rating agency, based in London; in 1997, it merged with the third largest American rating agency Fitch, also recognized as a NRSRO since the seventies. Thomson Bankwatch, since 1992 recognized by the SEC as a NRSRO limited to financial institutions, was the world's largest specialized bank credit rating agency during the nineties; since 1999, it was recognized by the SEC as a full NRSRO, and it merged with Fitch in 2000.[67] Although the CBFA has never officially published an updated list, one can safely assume that today Moody's, Standard & Poor's and Fitch Ratings are the recognized rating agencies for financial institution capital adequacy purposes in Belgium.[68]

(ii) The Upcoming Implementation of the Basel II Accord

In the near future, the Basel II Accord's rules on capital measurement and capital standards agreed at the G-10 level[69] will be implemented in the EU by transposing the recently adopted Capital Requirement Directive (hereinafter the "CRD") into national law.[70] Credit institutions and investment firms will have to cover for their credit risk by

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66 R. CANTOR & F. PACKER (*supra* footnote 7), p. 8. About the NRSRO designation in general, *see* K. RHODES (*supra* footnote 45), p. 321-333; "SEC Report" (*supra* footnote 2), p. 8-15; F.A. BOTTINI, Jr. (*supra* footnote 10), p. 611-613; C.A. HILL (*supra* footnote 8), p. 53-59.

67 *See* "The History of Fitch Ratings" on Fitch's site at <www.fitchratings.com/corporate/aboutFitch.cfm>; *see also* L.J. WHITE (*supra* footnote 3), p. 11.

68 *See* BANK FOR INTERNATIONAL SETTLEMENTS (*supra* footnote 10), Table 3, p. 48, where based on information provided by the Belgian authorities it is reported that apart from Moody's, S&P, IBCA and Thomson Bankwatch, afterwards Fitch and Duff & Phelps were added to the list. Duff & Phelps Credit Rating Co., headquartered in Chicago, was acquired by Fitch in April 2000. *See* "The History of Fitch Ratings" (*supra* footnote 67).

69 For the most recent version of this Basle II Accord, *see* BASEL COMMITTEE ON BANKING SUPERVISION, *International Convergence of Capital Measurement and Capital Standards – A Revised Framework*, Basel: BIS, November 2005 (available at the web site of the BIS at <http://www.bis.org/publ/bcbs118.pdf>); for a general discussion, *see e.g.* B. CALMANT, V. DELFOSSE, J.-PH. PETERS & B. RAUÏS, *Les accords de Bâle II pour le secteur bancaire*, Cahiers Financiers, Brussels: Larcier, 2005.

70 What is generally referred to as the Capital Requirements Directive for Credit Institutions and Investment Firms, in short "CRD", are in fact two directives recasting Directive 2000/12/EC relating to the Taking Up and Pursuit of the Business of Credit Institutions and Directive 93/6/EEC on the Capital Adequacy of Investment Firms and Credit Institutions. At the time of finishing this report, the adopted CRD had not been published yet in the *Official Journal*, so references are to Council Document 12890/05 of 18 October 2005, available on the Council's

providing own funds in proportion to the total of their risk-weighted exposure amounts.[71]

Under the CRD, two methods are allowed to calculate these risk-weighted exposure amounts: the "Standardized Approach" or the "Internal Ratings Based Approach" ("IRB Approach").[72] In the latter system the credit institution determines its own risk-weighted exposure.[73] The use of the IRB Approach is conditional upon the receipt of permission from the competent national authorities based on its approval of the credit institution's internal system for the management and rating of credit risk exposures.[74] The Standardized Approach allows the credit institutions to determine the credit quality of its exposures by reference to ratings attributed by "External Credit Assessment Institutions" (also referred to as "ECAIs").[75] To use this external credit assessment, the competent authorities must expressly recognize the ECAI providing the rating as eligible for those purposes.[76]

To be recognized as eligible, the ECAI's credit risk assessment methodology must comply with the requirements of objectivity, independence, ongoing review and transparency, and the resulting credit assessments have to meet the requirements of credibility and transparency.[77] For both purposes, technical criteria have been set out.[78]

Under this system, a credit institution can only use the credit assessments of ECAIs that have been recognized as eligible by the competent authority of its Home Country, which means that ECAIs have to be recognized as eligible in all Member States in which credit institutions are established that intend to use their credit assessments. While the system does not provide for a so-called Community Passport for ECAIs, the competent authorities of Member States are allowed to recognize ECAIs as eligible based on their recognition by the authorities of other Member States, without having to carry out their own evaluation process.[79]

Recently, the Committee of European Banking Supervisors ("CEBS") agreed on guidelines establishing procedures for recognizing ECAIs, including a so-called joint assess-

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web site (<http://ue.eu.int/docCenter.asp?lang=en>) and on the Commission's web site (*see* <http://europa.eu.int/comm/ internal_market/bank/regcapital/index_en.htm>).

71 Article 75(a), Directive 2000/12/EC (Recast) (*supra* footnote 70). In addition, credit institutions also have to provide for own funds to cover for their position risk, settlement and counter-party risk, foreign-exchange risk and for commodities risk, and operational risk. *See* Article 75(b)-(d), Directive 2000/12/EC (Recast). These own funds requirements specified in Directive 2000/12/EC are also applicable to certain investment firms. *See* Article 13 of Directive 93/6/EC (Recast) (*supra* footnote 70).

72 Article 76, Directive 2000/12/EC (Recast) (*supra* footnote 70).

73 *See* Articles 84-89, Directive 2000/12/EC (Recast) (*supra* footnote 70).

74 Article 76 *juncto* 84, Directive 2000/12/EC (Recast) (*supra* footnote 70).

75 Article 80(1), Directive 2000/12/EC (Recast) (*supra* footnote 70).

76 *See* Article 81(1), Directive 2000/12/EC (Recast) (*supra* footnote 70).

77 Article 80(2), Directive 2000/12/EC (Recast) (*supra* footnote 70).

78 *See* Annex VI, Part 2, Directive 2000/12/EC (Recast) (*supra* footnote 70).

79 Article 81(3), Directive 2000/12/EC (Recast) (*supra* footnote 70).

ment process, streamlining the recognition of cross-border ECAIs.[80] This will most likely result in a consistent assessment of the eligibility of credit rating agencies for capital adequacy purposes throughout the European Union, even though the actual eligibility decisions will ultimately be taken by each national supervisory authority, which in Belgium is the CBFA.

As these developments are not specific to Belgium but are common to all EU Member States, they are not discussed any further in this national report.

b) Regulated Investments

In general, the Belgian legislator and regulators have not often used credit ratings as a criterion for restricting eligible investments for companies in regulated industries.

The investment portfolios of credit institutions and investment firms as such are not directly or specifically regulated, but only indirectly influenced by the overall risk assessment under the applicable capital adequacy rules.

The assets that are eligible to form the technical reserves of insurance companies are regulated,[81] but these requirements do not contain any limitations as to the credit rating attributed to issuers of financial instruments or debtors.

The same is true for the technical reserves of the pension funds that provide private insurance for old age, disability and death benefits.[82] The assets of private pension funds that qualify for deductible contributions under the income tax rules have to be invested in particular categories of assets, aimed at supporting the Belgian local economy in general and in particular at stimulating investment in risk bearing assets, but no special requirements as to ratings are imposed.[83]

Only with respect to the funds of the Belgian National Pensions Service, the public entity administering the system of public pensions for employees in Belgium, did we find investment limitations based on credit ratings. Up to 10% of these funds can be invested in bonds issued by Belgian companies, on the condition that these companies are either listed on the stock exchange or if they are not listed, have received a rating of at

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[80] COMMITTEE OF EUROPEAN BANKING SUPERVISORS, *Guidelines on the recognition of External Credit Assessment Institutions*, CEBS GL07, 20 January 2006 (available at the web site of CEBS at <www.c-ebs.org>).

[81] *See* Article 10 of the Belgian General Insurance Companies Supervision Regulation (Arrêté royal du 22 février 1991 portant règlement général relatif au contrôle des entreprises d'assurances, *Moniteur belge – Belgisch Staatsblad*, 11 April 1991, as amended), implementing the Belgian Insurance Company Act of 1975 (Loi du 9 juillet 1975 relative au contrôle des entreprises d'assurances, *Moniteur belge – Belgisch Staatsblad*, 29 July 1975, as amended).

[82] *See* Article 6 of the Belgian Pension Funds Regulation, (Arrêté royal du 7 mai 2000 relatif aux activités des institutions de prévoyance, *Moniteur Belge – Belgisch Staatsblad*, 1 July 2000, as amended), implementing the Belgian Insurance Company Act of 1975 (*supra* footnote 81) as applicable to pension funds.

[83] *See* Article 145.11 of the Belgian Income Tax Code of 1992 (Code des impôts sur les revenus 1992, *Moniteur Belge – Belgisch Staatsblad*, 30 July 1992, as amended).

least AA by an "internationally recognized rating agency".[84] A similar rule, but with a maximum of 15% of the assets, exists for the funds of the former capitalization pension systems.[85]

Here again, however, no general rules are published as to the procedure to be followed and the substantive criteria to be applied in recognizing the rating agencies. Moreover, the rules themselves do not even make clear which governmental entity has jurisdiction to decide which rating agencies will be recognized for this purpose and which will not.

c) Other Regulations referring to Credit Ratings

The Belgian regulation of nuclear power plants imposes the provision of reserves covering the foreseeable cost of the decommissioning of nuclear plants and the management of the so-called backend of the fuel cycle. These reserves, contributed by the companies responsible for the exploitation of the existing nuclear power plants in Belgium, are to be managed by the Nuclear Provision Company,[86] at present the Belgian Nuclear Combustibles Company Synatom, a subsidiary of Electrabel, which manages the nuclear fuel cycle for all Belgian nuclear power plants.[87] The nuclear plant exploitation companies, however, can borrow up to 75% of these funds back from the Nuclear Provision Company if they are considered debtors of good quality.[88] This quality of the exploitation company as a debtor must be measured and periodically evaluated based on its debt ratio on a consolidated basis and on a credit rating issued by an "internationally

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[84] Article 1, d. of the Belgian Royal Decree of 1993 on the Investment of Funds of the National Pensions Service (Arrêté royal du 12 août 1993 modifiant les règles relatives au placement des disponibilités de l'Office national des pensions, *Moniteur Belge – Belgisch Staatsblad*, 1 October 1993). Article 52, third paragraph, of the Belgian Employee Pensions Act of 1967 (Arrêté royal n° 50 du 24 octobre 1967 relatif à la pension de retraite et de survie des travailleurs salariés, *Moniteur Belge – Belgisch Staatsblad*, 27 October 1967, as amended) delegated the powers to regulate the investment of the funds of the National Pension Service to the King.

[85] *See* Article 16, d) of the Belgian Royal Decree of 1971 implementing Chapter I of the Belgian Pension Capitalization System Unification and Harmonization Act of 1971 (Arrêté royal du 13 septembre 1971 portant exécution du chapitre Ier de la loi du 28 mai 1971, réalisant l'unification et l'harmonisation des régimes de capitalisation institués dans le cadre des lois relatives à l'assurance en vue de la vieillesse et du décès prématuré, *Moniteur belge – Belgisch Staatsblad*, 13 November 1971, as amended).

[86] Article 11 and 13 of the Belgian Nuclear Plants Decommission Provision Act of 2003 (Loi du 11 avril 2003 sur les provisions constituées pour le démantèlement des centrales nucléaires et pour la gestion des matières fissiles irradiées dans ces centrales, *Moniteur Belge – Belgisch Staatsblad*, 15 July 2003).

[87] *See* Article 179, §1 of the Belgian 1979-1980 Budgetary Proposals Act (Loi du 8 août 1980 relative aux propositions budgétaires 1979-1980, *Moniteur belge – Belgisch Staatsblad*, 15 August 1980, as amended). Originally, the Belgian State participated for 50% in the capital and management of Synatom (*see* the now repealed Arrêté royal du 8 mars 1983 portant approbation de la création, par la Société nationale d'Investissement, d'une filiale spécialisée en matière de gestion des activités du cycle des combustibles nucléaires, *Moniteur belge – Belgisch Staatsblad*, 2 April 1983). Since the privatizations of 1994, the Belgian State only has a so-called golden share in Synotom providing it with veto powers (Arrêté royal du 10 juin 1994 instituant au profit de l'Etat une action spécifique de Synatom, *Moniteur belge – Belgisch Staatsblad*, 28 June 1994).

[88] Article 14, §1, Belgian Nuclear Plants Decommission Provision Act of 2003 (*supra* footnote 86).

recognized" rating agency. Specifics are to be set in an agreement between the Belgian Federal State, the Nuclear Provision Company and the exploitation companies.[89]

Here, also, no clear rules exist as to the procedure to be followed and the substantive criteria to be applied in judging which rating agencies are qualified for this purpose. Also, the governmental entity with jurisdiction to decide on the recognition is not specified in the regulations.

D. Regulation of Credit Rating Agencies

Belgium does not specifically regulate the activity of credit rating or credit rating agencies. At present, there are no plans or proposals for such regulation to be imposed. Another question is whether the activity of credit rating is subject to more generally applicable regulations or whether the credit rating agencies themselves are subject to regulation that is applicable to a broader category of institutions.

Even before the new Market in Financial Instruments Directive (hereinafter the "MiFID") will require the EU Member States to regulate stand-alone investment advisors,[90] Belgian regulation has subjected investment advisors to an authorization regime since 1990.[91] However, under the definition used in this statute, only the provision of investment advice to the public against remuneration is regulated.[92] As credit rating agencies do not charge the public any fee for the supply of the ratings, they are not subject to these rules.[93]

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[89] Article 14, §2, Belgian Nuclear Plants Decommission Provision Act of 2003 (*supra* footnote 86). At the time of finalizing this report, the only existing agreement was the agreement between the Belgian State, Electrabel and Synatom, published in annex to the Memorandum accompanying the legislative proposal that later became the Belgian Nuclear Plants Decommission Provision Act of 2003 (Projet de loi sur les provisions constituées pour le démantèlement des centrales nucléaires et pour la gestion de matières fissiles irradiées dans ces centrales nucléaires, Chambre des représentants, Session ordinaire, 2002/2003, Document parlementaire 50K2238/001, 22 January 2003, p. 42 *et seq*.).

[90] Investment advice is one of the investment services and activities listed in Annex I, A, of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments Amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and Repealing Council Directive 93/22/EEC, *Official Journal* L145/1 of 30 April 2004 (usually and hereinafter referred to as the "MiFID"). This means that according to Article 5.1 of this MiFID, the performance of investment advice as a regular occupation or business on a professional basis is subject to prior authorization. Under the soon to be replaced Investment Services Directive (Council Directive 93/22/EEC of 10 May 1993 on Investment Services in the Securities Field, *Official Journal* L141/27 of 11 June 1993, usually referred to as the "ISD"), investment advice was a non-core service, which meant that Member States were free to decide whether to subject stand alone investment advisors to authorization or not.

[91] *See* Book III, Title II of the Belgian Investment Firms, Intermediaries and Advisors Act of 1995 (*supra* footnote 54); for the years before, *see* Book IV of the Financial Transactions and Markets Act of 1990 (Loi du 4 décembre 1990 relative aux opérations financières et aux marchés financiers, *Moniteur belge – Belgisch Staatsblad*, 22 December 1990), repealed by the Act of 1995.

[92] *See* Article 119 of the Belgian Investment Firms, Intermediaries and Advisors Act of 1995 (*supra* footnote 54).

[93] The present Belgian statutory rules clearly limit investment advice to an activity where the person that is intended to act upon the advice is the client of the investment advisor. *See* Article 127 of the Belgian Investment Firms, Intermediaries and Advisors Act of 1995 (*supra* footnote 54), which requires the investment advisor to act solely in the interest of its client. This is clearly inconsistent with the credit rating practice, where the client is the rated entity.

This element in the regulation will have to be amended to conform to the MiFID, which defines investment advice as "the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments".[94] As a result, the provision of investment advice that is not paid for by the client will also be caught. However, credit rating agencies that restrict their activities to credit rating and do not also provide other services that qualify as investment services will still remain outside the scope of this regulation.[95] The reason is that credit ratings try to establish the creditworthiness of a rated entity and thereby predict as accurately as possible the likelihood of full, timely and correct service of its debt obligations without any explicit or implicit element of a recommendation to buy, hold or sell the instruments involved. Therefore, one cannot qualify the attribution of credit ratings and publication thereof as investment advice under this regulation.

Turning to the new regulation of market abuse, both the European Market Abuse Directive (hereinafter the "MAD") and its implementing directives[96] as the statutory provisions transposing it into Belgian law[97] contain certain elements that could be relevant for credit rating agencies. This regulation first and foremost prohibits market manipulation.[98]

As a prophylactic measure, however, the MAD also requires national regulation to ensure that persons who produce or disseminate research concerning financial instruments or issuers of financial instruments and persons who produce or disseminate other information recommending or suggesting investment strategy intended for distribution channels or for the public, take reasonable care to ensure that such information is fairly pre-

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94 *See* Article 4.1.4) of the MiFID (*supra* footnote 90).

95 *See also* the Communication from the Commission on Credit Rating Agencies, 2005/11990, 23 December 2005, p. 7 (available at <http://europa.eu.int/comm/internal_market/securities/agencies/index_en.htm>).

96 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on Insider Dealing and Market Manipulation (Market Abuse), *Official Journal* L96/16 of 12 April 2003 (usually and hereinafter referred to as the "MAD"); Commission Directive 2003/125/EC of 22 December 2003 Implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the Fair Presentation of Investment Recommendations and the Disclosure of Conflicts of Interest, *Official Journal* L339/73 of 24 December 2003 (hereinafter referred to as "Directive 2003/125/EC").

97 The MAD (*supra* footnote 96) was transposed into Belgian law through amendments to the Belgian Financial Sector and Services Supervision Act of 2002 (Loi du 2 août 2002 relative à la surveillance du secteur financier et aux services financiers, *Moniteur belge – Belgisch Staatsblad*, 4 September 2002) introduced by Royal Decree of 24 August 2005 (Arrêté royal modifiant, en ce qui concerne les dispositions en matière d'abus de marché, la loi du 2 août 2002 relative à la surveillance du secteur financier et aux services financiers, *Moniteur belge – Belgisch Staatsblad*, 9 September 2005).

98 Article 5, MAD (*supra* footnote 96). For what constitutes market manipulation under the EU rules, *see* Commission Directive 2003/124/EC of 22 December 2003 Implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the Definition and Public Disclosure of Inside Information and the Definition of Market Manipulation, *Official Journal* L339/70 of 24 December 2003. For the transposition into Belgian law, *see* Article 25, §1, 2°-5° of the Belgian Financial Sector and Services Supervision Act of 2002 (*supra* footnote 97).

sented and disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates.[99]

These rules, intended for financial analysts, were introduced as a reaction to the conflicts of interest problems faced by securities analysts.[100] Although there are similarities between the functions of stock analysts and credit rating agencies,[101] these rules are as such not applicable to rating agencies, because the opinions of credit rating agencies do not constitute nor contain a recommendation within the meaning of this type of regulation.[102]

In the preamble to the MAD implementing Directive 2003/125/EC, the EU Commission remarked expressly that although credit rating agencies were not subject to the MAD rules as such, they:[103]

> "[…] should consider adopting internal policies and procedures designed to ensure that credit ratings published by them are fairly presented and that they appropriately disclose any significant interests or conflicts of interest concerning the financial instruments or the issuers to which their credit ratings relate."

Since the publication of this Directive, the European Parliament has called on the European Commission to consider the need for specific regulation of credit rating agencies[104] and the Commission has subsequently requested the technical advice of the Committee

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[99] Article 6(5), MAD (*supra* footnote 96); for the Belgian transposition, *see* Article 25*bis*, §3, Belgian Financial Sector and Services Supervision Act of 2002 (*supra* footnote 97); the technical arrangements for various categories of persons for fair presentation of research and other information recommending investment strategy and for disclosure of particular interests or conflicts of interest are elaborated in Directive 2003/125/EC (*supra* footnote 96); the Belgian statutory transposition provision already referred to in this footnote delegates the power to regulate the technical arrangements to the executive branch, that recently has regulated these matters by royal decree (Arrêté royal du 5 mars 2006 relatif à la présentation équitable des recommandations d'investissement et à la mention des conflits d'intérêts, *Moniteur belge – Belgisch Staatsblad*, 10 March 2006).

[100] *See* in general *Report on Analyst Conflicts of Interest*, A Report of the Technical Committee of the International Organization of Securities Commissions, IOSCOPD152, September 2003, and *IOSCO Statement of Principles for Addressing Sell-Side Securities Analyst Conflicts of Interest*, The Technical Committee of the International Organization of Securities Commissions, IOSCOPD150, 25 September 2003.

[101] *See* R. CANTOR & F. PACKER (*supra* footnote 7), p. 2. For a study of the relation between the informational value of ratings and analysts earnings forecasts, *see* L.H. EDERINGTON & J.C. GOH, "Bond Rating Agencies and Stock Analysts: Who Knows What When?", *Journal of Financial and Quantitative Analysis*, Vol. 33, nr. 4, December 1998, 569-585.

[102] This was explicitly mentioned by the EU Commission in Recital 10 in the Preamble to Directive 2003/125/EC (*supra* footnote 96): "Credit rating agencies issue opinions on the creditworthiness of a particular issuer or financial instrument as of a given date. As such, these opinions do not constitute a recommendation within the meaning of this Directive." The Belgian Minister of Finance remarked in his Report to the King accompanying the Royal Decree of 24 August 2005 transposing the MAD into Belgian law (*supra* footnote 97) that "Les avis fournis par des agences de notation n'entrent pas dans la définition de « recommandation ». Les agences de notation produisent des analyses portant sur la solvabilité des émetteurs ou sur la qualité de certains instruments financiers, sans toutefois recommander ou proposer explicitement ou implicitement une stratégie d'investissement" (Rapport au Roi, *Moniteur belge – Belgisch Staatsblad*, 9 September 2005, p. 39502).

[103] Recital 10 in the Preamble to Directive 2003/125/EC (*supra* footnote 96); *see also* Communication from the Commission on Credit Rating Agencies (*supra* footnote 95), p. 5.

[104] *See* European Parliament Resolution on Role and Methods of Rating Agencies (2003/2081(INI)), P5_TA(2004)0080, approved 10 February 2004 (available at the web site of the European Parliament at <http://www.europarl.eu.int>). Previously, the Committee on Economic and Monetary Affairs of the European Parliament had published its Report on Role and Methods of Rating Agencies (2003/2081(INI)), Final A5-0040/2004, PE 333.078, RR\333078EN.doc, rapporteur G. Katiforis, 24 January 2004.

of European Securities Regulators ("CESR").[105] CESR had advised the Commission not to regulate but to rely on self-regulation of credit rating agencies established around an internationally agreed code,[106] and the Commission has decided to follow this advice.[107] CESR recently reached an understanding with both Moody's and Standard & Poor's about a voluntary framework of co-operation between them in relation to the implementation of the International Organization of Securities Commissions' ("IOSCO") Code of Conduct for Credit Rating Agencies.[108] However, as this initiative and the substantive content is not specifically Belgian but common to the whole European Union, it will not be discussed in this national report.

E. Civil Liability of Credit Rating Agencies

1. Liability *vis-à-vis* the Client of the Rating Agency

a) Contractual Liability *vis-à-vis* the Client

(i) The Default Contractual Liability Standard

In most instances, rating agencies cover entities at their own request.[109] In that case, the rating agency and the rated entity enter into a contract specifying their mutual obligations. At present, there are no statutory or regulatory rules specifically designed for this type of contract in Belgium. In the absence of such specific rules, a credit rating contract is governed by general contract law, as it is applicable to all types of contracts for paid services that are not employment contracts.[110]

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[105] *See* THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS, Call to CESR for Technical Advice on Possible Measures Concerning Credit Rating Agencies – Call for Evidence, CESR/04-294, 28 July 2004 (available at the web site of CESR at <http://www.cesr-eu.org>).

[106] *See* THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS, CESR's Technical Advice to the European Commission on Possible Measures Concerning Credit Rating Agencies, CESR/05-139b, March 2005 (available at the web site of CESR at <http://www.cesr-eu.org>).

[107] Commissioner C. MCCREEVY announced this policy decision in "Regulation – Right and Wrong", Speech at the Annual Conference on Financial Service Action Plan held in Dublin Castle on 5 April 2005, SPEECH/05/199, available at <http://europa.eu.int/comm/commission_barroso/mccreevy/index_en.htm>; it was confirmed in the Commission White Paper on Financial Services Policy (2005-2010), published 5 December 2005, point 4.3., p. 13 (available at <http://europa.eu.int/documents/index_en.htm>), and in the Communication from the Commission on Credit Rating Agencies (*supra* footnote 95), where the Commissions explains its conviction that the existing financial services directives that are potentially applicable to or relevant for credit rating activities – the MAD (*supra* footnote 96), MiFID (*supra* footnote 90) and CRD (*supra* footnote 70) – when combined with self regulation by the credit rating agencies themselves on the basis of the newly adopted IOSCO Code will provide an answer to all the major issues of concern raised by the European Parliament.

[108] The letters of understanding were published by CESR in Press Release 05-751 of 13 December 2005 titled "CESR's dialogue with Credit Rating Agencies to review how the IOSCO Code of Conduct is being implemented", available at the web site of CESR at <http://www.cesr-eu.org>; for the IOSCO Code itself, *see* THE TECHNICAL COMMITTEE OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, *Code of Conduct Fundamentals for Credit Rating Agencies*, IOSCOPD180, December 2004 (available in the "Library" at the web site of IOSCO at <http://www.iosco.org>).

[109] *See supra* footnote 17 and accompanying text.

[110] The few statutory rules specifically dealing with contracts for paid services in general (Article 1787-1799 of the Belgian Civil Code) were designed with a building construction contract in mind, but these rules are *mutatis*

The liability of a service provider *vis-à-vis* his client when the intended outcome of the contract is not realized, depends on who is contractually bound to bear the risk of external factors influencing the outcome.[111]

If the service provider has to deliver a specific result to the client, he will be liable whenever this result is not achieved, except when he can prove that this failure is due to *force majeure* or impossibility.[112] As a result, the service provider bears the risk of external factors negatively affecting the outcome or increasing his cost of compliance as long as these factors do not render his performance under the contract impossible.

However, if the service provider is only bound to apply a specific effort or undertake specified actions geared towards an anticipated result, the fact that the intended result has not been reached is not sufficient to render him liable. The client will have to show that the failure to reach the desired result is caused by a lack of effort or another wrongful act by the service provider.[113] In that case, the risk of external factors influencing the outcome of the contract rests with the client.

In case of dispute, the court will thus have to establish how the contract defines the parties' obligations and hence attributes this risk.[114] Whether a service provider is bound to deliver a specified result or is only required to spend a specified or a reasonable amount of effort towards achieving the desired result depends on the common intent of the parties at the time they entered into the contract.[115] If it is impossible to determine the parties' explicit or implicit but actual agreement on this issue, the usual gap filling techniques will be applied. These techniques try to establish a presumed or hypothetical agreement among the parties, such as assuming that the parties intended to make the most common deal (*quod plerumque fit*) or the deal normally rational and reasonable

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mutandis applicable to all contracts for paid services that are not employment contracts and thus also to contracts for paid intellectual services such as a credit rating contract. The issues not specifically dealt with by these rules are governed by the general rules of common contract law, applicable to all types of contracts (*see* Article 1107 of the Belgian Civil Code). *See* J. HERBOTS, R. BUTZLER & A. VASTERSAVENDTS, "Overzicht van Rechtspraak Bijzondere Overeenkomsten (1961-1969)", *Tijdschrift voor Privaatrecht*, 1973, 195-270, par. 46, p. 253.

[111] For a clear description of the distinction between so-called "result obligations" and "effort obligations", as proposed by R. DEMOGUE in his *Traité des obligations en générale* (Paris: Rousseau, 1925, Vol. V, par. 1237) and as now generally recognized not only in French but also in Belgian contract law, *see* J.H. HERBOTS, "Quasi-delictuele aansprakelijkheid en overeenkomsten", *Tijdschrift voor Privaatrecht*, 1980, 1055-1094, par. 17-22, p. 1062-1065; *see also* H. VANDENBERGHE, "De grondslag van kontraktuele en extra-kontractuele aansprakelijkheid voor eigen daad", *Tijdschrift voor Privaatrecht*, 1984, 127-154, par. 8-9, p. 151-154.

[112] *See* Article 1147 of the Belgian Civil Code; Cass., 10 December 1953, *Pasicrisie belge*, 1954, I, p. 290; Cass., 26 November 1954, *Pasicrisie belge*, 1955, I, p. 271; for a more recent ruling, *See e.g.* Cass., 18 October 2001, *Pasicrisie belge*, 2001, 1656.

[113] *See* Articles 1137 and 1789 of the Belgian Civil Code; Cass., 26 February 1962, *Pasicrisie belge*, 1962, I, p. 723; Cass., 29 November 1963, *Pasicrisie belge*, 1964, I, p. 342.

[114] *See* Cass., 5 December 2002, *Pasicrisie belge*, 2002/12, p. 2339, holding that the court deciding on the liability of a service provider has to first determine whether the service provider is bound by an obligation to reach a specified result or by an obligation to spend a certain amount of effort towards reaching a result. A decision by a first instance or appellate court that a specific contract contains an obligation to deliver a specific result or an obligation to spend a specific amount of effort and care is a factual finding, which cannot as such be challenged before the Cour de Cassation; *see* Cass., 7 February 1992, *Pasicrisie belge*, 1992, I, 503.

[115] *See* Cass., 3 May 1984, *Pasicrisie belge*, 1984, I, 1081; *see also* Cass., 18 May 1990, *Pasicrisie belge*, 1990, I, 1068; Cass., 7 February 1992, *Pasicrisie belge*, 1992, I, 503.

parties would have made in similar circumstances. Generally, when the outcome of the contract is relatively certain, an obligation to reach a specific result is presumed to have been agreed by the parties, while in cases of contractual tasks that tend to have relatively uncertain outcomes, the service provider is not presumed to have accepted the risk of the result if no actual intent by the parties to do so can be shown.[116]

We have found no court decisions qualifying the contractual obligations of a credit rating agency under Belgian law, nor does there seem to be doctrine on the issue. However, given the nature of the credit rating techniques and procedure, one can safely assume that the global obligation of the credit rating agency to attribute a "correct" rating to a client will be interpreted as an obligation to spend a reasonable effort to attain that goal.[117] This would mean that the attribution of a rating that does not correctly reflect the creditworthiness of the rated entity would not automatically or necessarily bring about the liability of the rating agency *vis-à-vis* its client, the rated entity. For a contractual claim against the rating agency to be successful, the rated entity would have to prove that the incorrect rating is the result of insufficient effort, negligence or more generally wrongful behavior of the rating agency. In other words, the client has to show that a normally prudent rating agency, if placed in the same circumstances, would not have attributed this incorrect rating.[118]

However, this does not necessarily mean that a credit rating agency does not assume *any* obligation to reach a specific result. Certain subtasks or elements in the performance of the credit rating service, such as the fact that a rating is issued and in fact distributed in time, might very well be regarded as involving the liability of the agency unless there is an actual impossibility to perform this obligation.[119] One can, for instance, imagine that a published rating which is incorrect because of mistakes in the

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[116] For an overview of decisions on this issue in a variety of contracts, *see* J.H. HERBOTS, S. STIJNS, E. DEGROOTE, W. LAUWERS & I. SAMOY, "Overzicht van Rechtspraak Bijzondere Overeenkomsten – 1995-1998", *Tijdschrift voor Privaatrecht*, 2002, 57-923, par. 602-618, p. 538-547; J.H. HERBOTS, C. PAUWELS & E. DEGROOTE, "Overzicht van Rechtspraak Bijzondere Overeenkomsten – 1988-1994", *Tijdschrift voor Privaatrecht*, 1997, 647-1281, par. 584-607, p. 1007-1021; R. KRUITHOF, H. BOCKEN, F. DE LY & B. DE TEMMERMAN, "Overzicht van Rechtspraak Verbintenissen (1981-1992)", *Tijdschrift voor Privaatrecht*, 1994, 171-721, par. 207-211, p. 496-504; R. KRUITHOF, "Overzicht van Rechtspraak Verbintenissen (1974-1980)", *Tijdschrift voor Privaatrecht*, 1983, 495-717, par. 110, p. 616-619.

[117] Compare the task of company auditors, discussed in H. DE WULF & I. DE POORTER, "De aansprakelijkheid van vennootschapsbestuurders en commissarissen", in VLAAMSE CONFERENTIE DER BALIE VAN GENT (ed.), *Aansprakelijkheidsrecht*, Antwerpen: Maklu, 2004, 195-284, p. 256-257; *see also* P. VAN OMMESLAGHE, "La responsabilité des professionnels de la comptabilité et de la révision comptable", *Revue Belge de la Comptabilité et de l'Informatique*, Vol. 22, nr. 1, March 1981, 2-16, par. 9, p. 8-10; P.A. FORIERS & M. VON KEUGELGEN, "La responsabilité civile des reviseurs et experts-comptables", *Revue de Droit de l'ULB*, Vol. 6, 1992-2, 11-61, p. 32, par. 36*bis*.

[118] For this general liability standard for professional service providers, compare Cass., 25 October 1974, *Pasicrisie belge*, 1975, I, p. 241; *see also* R. KRUITHOF e.a. 1994 (*supra* footnote 116), par. 214, p. 506-510; R. KRUITHOF 1983 (*supra* footnote 116), par. 111, p. 619-621.

[119] Compare the obligation of an attorney to meet procedural deadlines, which under Belgian law is generally accepted to constitute an obligation to reach a promised result, rendering the attorney liable *vis-à-vis* the client whenever the deadlines are not met except if he can prove that this fact was caused by a wrongful act of the client himself or by *force majeure*, even though in general the obligation of an attorney to represent his client and defend his interests is understood to be an obligation to spend a normal, reasonable effort and amount of care, which only renders the attorney liable if the client can prove his fault. *See* H. VANDENBERGHE (*supra* footnote 111), par. 9, p. 153, and the case law cited in his footnote 150.

rating process might not necessarily render the agency liable, while a rating which is incorrect because of a typing or writing error in the publication would render the agency liable unless it can prove *force majeure*. Also, a rating agency that would not use relevant publicly available information or that would rely on financial information that contains a manifest error would risk liability.

(ii) Validity of Exoneration of Contractual Liability

These general contractual liability principles, however, are typically default rules, to be applied only when the parties failed to specify and/or limit their potential contractual liability in the credit rating contract. In practice, a rating agency will stipulate its liability *vis-à-vis* the client by specifically limiting or excluding any liability for losses the client could suffer as a result of an incorrect rating.

Among professional parties, Belgian law allows the principle of contractual freedom to govern such clauses to a large extent. In contracts with professional clients, a service provider can stipulate that he will not be liable for any losses caused by his breach, even his material breach or grave fault.[120] Under established case law, only three exceptions to this contractual freedom are recognized.

First, exoneration or limitation of liability is obviously not allowed in instances where it is forbidden by a specific statutory provision, such as a provision that imposes a mandatory minimum level of contractual liability.[121] This exception is not relevant for credit rating contracts, as at present there are no specific statutory provisions for such contracts or for the liability of credit rating agencies in Belgium.

Second, exoneration or limitation of liability is not possible for losses caused by an intentional breach, by fraud or by acts in bad faith.[122] However, Belgian law does not contain a presumption that a grave wrong can in this respect be held equivalent to an

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[120] *See* R. KRUITHOF e.a. 1994 (*supra* footnote 116), par. 229-234, p. 531-537; E. DIRIX, "Exoneratiebedingen", *Tijdschrift voor Privaatrecht*, 1988, 1171-1204, par. 16-26, p. 1185-1195; R. KRUITHOF, "Contractuele Aansprakelijkheidsregelingen", *Tijdschrift voor Privaatrecht*, 1984, 233-298, p. 240, par. 6, p. 264-283, par. 26-37; R. KRUITHOF e.a. 1983 (*supra* footnote 116), par. 120-124, p. 629-633; L. CORNELIS, "Les clauses d'exonération de responsabilité couvrant la faute personnelle et leur interpretation", *Revue Critique de Jurisprudence Belge*, 1981, 196-219, par. 7, p. 200-201; H. DE PAGE, *Traité élémentaire de droit civil belge*, Brussels: Bruylant, Vol. II, 1964, par. 608, p. 610-611, par. 1056, p. 1110-1111; R.O. DALCQ, *Traité de la responsabilité civil*, II, Brussels: Larcier, 1962, p. 781 *et seq*.

[121] *See e.g.* Article 9*bis* of the Registered Company Auditors Act of 1953 (Loi du 22 juillet 1953 créant un Institut des Reviseurs d'Entreprises, *Moniteur belge – Belgisch Staatsblad*, 2 September 1953, as amended), stating that a registered company auditor is liable according to the common rules and cannot limit this liability by contract; for a discussion of the liability of registered company auditors under Belgian law, *see* the contributions referred to *supra* in footnote 117.

[122] *See e.g.* Cass., 28 February 1980, *Pasicrisie belge*, 1980, I, 794, upholding a lower court's decision to refuse to apply the contractual limitation of a supplier's liability to a specified sum when the hidden construction defect of the supplied material that caused the damage was known to this supplier before the accident happened and he did not caution the client, even though he was bound by a maintenance contract, because, as the Cour de Cassation said, a person that causes damages that "acts in bad faith, cannot avail himself of a clause excluding or limiting his liability" (our own free translation).

intentional wrong.[123] Thus, for the exception to apply and the exoneration to be invalid, it has to cover actually intentional breaches. Although this exception is in principle applicable to credit rating contracts, one would expect that cases of intentional attribution of an incorrect credit rating and cases of fraud or bad faith are sufficiently exceptional so as to be economically irrelevant.[124]

The third exception renders exoneration of contractual liability invalid if it in effect eliminates or renders meaningless the essential object of the contract the parties intended to enter into.[125] Based on this rule, a hypothetical exoneration for any liability based on the fact that a rating agency has *failed to issue* a rating while it contractually was bound to do so, would be invalid. However, a clause excluding or limiting liability of the rating agency for financial losses suffered by the client as a consequence of a credit rating that *incorrectly reflects its true creditworthiness* does not presumably render nugatory the object of the contractual promise of the rating agency, so it would be valid under Belgian law.

As opposed to among professional contract parties, the extent to which professional service providers can contractually limit their liability *vis-à-vis* consumers is specifically regulated in Belgium. In addition to the rules that transpose the two restrictions on exoneration and limitation of liability included in the EU Unfair Terms in Consumer Contracts Directive,[126] the Belgian Trade Practices and Consumer Protection and Information Act forbids contractual clauses that exonerate the professional supplier of

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[123] *See* Cass., 25 September 1959, *Pasicrisie belge*, 1960, I, 112, which in effect repealed the maxim "*culpa lato dolo aequiparatur*" under Belgian law.

[124] However, this exception might become relevant in cases where the credit rating agency is confronted with a conflict of interest, if one is prepared to characterize the attribution of too low a rating to a client in circumstances where it is in the interest of the rating agency to minimize the credit rating of that client because of conflicting interests it has or represents as an act of bad faith.

[125] *See* Cass., 25 September 1959, *Pasicrisie belge*, 1960, I, 112; *see also more recently e.g.* Cass., 27 September 1990, *Pasicrisie belge*, 1991, I, 82, upholding a lower court's decision to ignore a clause in the general conditions of a bank excluding all liability of the bank for not properly verifying the signatures on orders, proxies or written consents. Of course, discussion is possible about whether or not a particular exoneration clause does or does not in fact annihilate the object of the contract, as this depends on the interpretation given to the exoneration clause. *Compare e.g.* Cass., 26 March 2004, *Pasicrisie belge*, 2004/3, p. 513 (upholding a lower court's decision to ignore a clause in a contract for the supply of electricity limiting the supplier's liability for damages to goods of the client to those goods only used for private purposes and thereby holding the supplier liable for damages to professionally used goods, as that lower court had interpreted this clause to in effect exclude all liability of the electricity supplier *vis-à-vis* professional clients because of disruptions in the supply of electricity and such interpretation was not inconsistent with the terms of the clause according to the Cour de Cassation) with Cass., 23 November 1987, Pasicrisie belge, 1988, I, 347 (upholding a lower court's decision to recognize an electricity supplier's exoneration clause that was worded even broader than the one discussed in the 2004 decision when the lower court had interpreted this clause not to strip the supplier's contractual obligation of all its meaning).

[126] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, *Official Journal* L95/29 of 21 April 1993. These two rules are the prohibition of clauses excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier, point (a) in the Annex to the Directive which is transposed in Article 32(22*bis*) of the Belgian Trade Practices and Consumer Protection and Information Act (Loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur, *Moniteur Belge – Belgisch Staatsblad*, 20 August 1991), and the prohibition of clauses inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, point (b) in the Annex to the Directive which is transposed in Article 32(27) of this Act. According to Article 33, §1, of the same Act, such clauses are null and void.

services or goods of his liability for intentional breaches of contract, grave wrongs, or the non-performance of an obligation that constitutes one of the main elements of the agreement.[127]

This Trade Practices and Consumer Protection and Information Act defines a consumer as a person acquiring marketed goods or services exclusively for non-professional use.[128] The qualification of a person as a consumer in this context is thus determined by the characterization of the intended use for which the services or goods are purchased, not the level of sophistication of the buyer in relation to the services or goods acquired.[129] Based on these rules one would reasonably assume that a rated entity cannot enjoy this statutory protection with respect to its acquisition of the credit rating services because it cannot be considered to be a consumer, as the credit rating in practice is only acquired for use in relation to financing of activities that must be qualified as professional.

However, a recent decision of the Court of Appeal of Antwerp of 30 November 2004 possible throws some doubt on this issue. In this case, the City of Antwerp surprisingly was held to be a consumer under the Belgian Trade Practices and Consumer Protection and Information Act with respect to a contract it allegedly had entered into with the publisher of the yellow pages about an advertisement for its sports facilities.[130] The Court considered providing sports facilities not to be a professional activity of the City, because this was part of a public service and in the public interest of the city, and because in this activity the City did not participate in economic transactions nor was it running a commercial, financial or industrial business.

This reasoning apparently assumes that the normal public service activities of a public or governmental entity are by definition not to be considered "professional" in the sense to be attributed to this term in the definition of a consumer in the Belgian Trade Practices and Consumer Protection and Information Act. One therefore could read the case

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[127] *See* Article 32(11), of the Belgian Trade Practices and Consumer Protection and Information Act (*supra* footnote 126). According to Article 33, §1, of the same Act, such clauses are null and void. For recent case law applying this rule, *see* R. STEENNOT, "Overzicht van Rechtspraak Consumentenbescherming (1998-2002)", *Tijdschrift voor Privaatrecht*, 2004, 1721-2056, par. 193, p. 1861-1863; P. DE VROEDE, Y. MERCHIERS & I. DEMUYNCK, "Overzicht van Rechtspraak Algemeen Handelsrecht, Handelspraktijken en Consumentenbescherming 1992-1997", *Tijdschrift voor Privaatrecht*, 1999, 131-512, par. 613, p. 483-485.

[128] Article 1(7) of the Belgian Trade Practices and Consumer Protection and Information Act (*supra* footnote 126).

[129] *See* P. WÉRY, "Les clauses abusives relatives à l'inexécution des obligations contractuelles dans les lois de protection des consommateurs du 14 juillet 1991 et du 2 août 2002", *Journal des Tribunaux*, 2003, 797-809, par. 6, p. 800; *see also* J. STUYCK, *Handelspraktijken*, in R. DILLEMANS & W. VAN GERVEN (ed.), *Beginselen van Belgisch Privaatrecht, XIII, Handels- en Economisch Recht, Deel II, Mededigingsrecht*, Mechelen: Kluwer, 2003, par. 38, p. 40; I. DEMUYNCK, "De consument en de onrechtmatige contractuele bedingen", in Y. MERCHIERS (ed.), *Consumentenrecht*, Brugge: die Keure, 1998, 49-122, p. 57 *et seq*. For example, a professional software engineer buying a personal computer for his personal use at home during his free time can enjoy the special consumer protection offered by the statute for this purchase, while a hairdresser buying a personal computer to be used in his shop will not qualify for such protection. For other examples in the case law, *see* R. STEENNOT (*supra* footnote 127), par. 1-4, p. 1734-1737; P. DE VROEDE et al. (*supra* footnote 127), par. 440-441, p. 342-343.

[130] Antwerpen, 30 November 2004, *Nieuw Juridisch Weekblad*, 2005, 91-93; *see also* B. PONET, "Overheid kan ook consument zijn", *De Juristenkrant*, 15 December 2004, nr. 100, p. 1 and 5; R. STEENNOT, "Kroniek handelspraktijken (1999-2004)", *Rechtskundig Weekblad*, 2005-2006, 521-538, p. 522.

as stating that a public entity has to be dealt with according to the standard of protection afforded to consumers. If this interpretation is correct, the surprising consequence could be that a public or governmental entity also has to be considered to be a "consumer" with respect to a credit rating contract it enters into, because the intended use of this credit rating service is necessarily related to the activities of this entity that in this Court's reasoning are by definition in the public interest.

Given the fact that the Belgian Trade Practices and Consumer Protection and Information Act also recognizes legal persons (*i.e.* incorporated entities) as consumers[131] and applies the rules on unfair terms in consumer agreements not only to contracts that are not individually negotiated, as intended by the EU Directive,[132] but to *all* contracts between professionals and consumers, irrespective whether they are individually negotiated or not,[133] this ruling by the Antwerp Court is relevant for credit rating agencies. If this ruling would become established law, contractual exoneration of the credit rating agency's liability for losses resulting from material or grave breaches or exoneration or merely limitation of its liability for losses caused by incorrect ratings that a court considers to be inappropriate could under Belgian law be set aside in credit rating contracts with public entities.

However, we have trouble believing that this decision will find much following by other courts. As the reasoning on which this decision is based could be read to qualify the Federal State that purchases military equipment for its army as a consumer with respect to that transaction, we think this decision is better considered to be an unfortunate slip by this Court.

b) Extra-Contractual Liability *vis-à-vis* the Client

Given the obstacles to claiming damages based on contractual liability when the contract contains an exoneration clause, the client might be interested in basing its claim against the rating agency on the general rules of extra-contractual liability, in particular the general liability for damages resulting from one's wrongful act.[134]

However, Belgian law has not allowed the so-called "concurrence" of contractual and extra-contractual liability since the 1970s, when the highest court, the Cour de Cassation, reversed its position on this issue.[135] It is now established case law that a con-

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[131] Article 1(7) of the Belgian Trade Practices and Consumer Protection and Information Act (*supra* footnote 126), defining the term "consumer", explicitely refers to natural and legal persons; *see also* J. STUYCK (*supra* footnote 129), par. 38, p. 39-40; I. DEMUYNCK (*supra* footnote 129), par. 10, p. 58.

[132] *See* Article 3 of the Unfair Terms in Consumer Contracts Directive (*supra* footnote 126).

[133] *See* I. DEMUYNCK (*supra* footnote 129), par. 30-33, p. 74-76; J. STUYCK (*supra* footnote 129), par. 374, p. 324.

[134] *See infra* Section E.2.

[135] *See* P. WÉRY, "Les rapports entre responsabilité aquilienne et responsabilité contractuelle à la lumière de la jurisprudence récente", *Revue Générale de Droit Civil Belge*, 1998, 81-108; H. VANDENBERGHE, M. VAN QUICKENBORNE, L. WYNANT & M. DEBAENE, "Overzicht van Rechtspraak Aansprakelijkheid uit Onrechtmatige Daad (1994-1999)", *Tijdschrift voor Privaatrecht*, 2000, 1551-1955, par. 175-179, p. 1935-1944; H. VANDENBERGHE, M. VAN QUICKENBORNE & L. WYNANT, "Overzicht van Rechtspraak Aansprakelijkheid uit Onrechtmatige Daad

tract party cannot sue his counter party for damages based on extra-contractual liability if the wrongful act that constitutes the basis for his claim is a breach of their contract or if the loss for which he claims compensation is in fact the loss resulting from a contract breach.[136]

The rationale of this rule is based on the principle of *pacta sunt servanda* or the binding force of contracts: if the parties validly agree on a specific liability regime for their mutual relationship that is different from the general extra-contractual liability regime, they cannot be allowed to afterwards unilaterally invoke general extra-contractual liability rules inconsistent with those specifically agreed to in the contract, as this would amount to the same as allowing them to unilaterally repudiate the contract.[137]

There is one generally accepted exception to this rule. If the wrongful act that constitutes the basis for the extra-contractual claim does not only constitute a breach of contract and a wrongful act under the general standard of prudence and diligence but at the same time also constitutes a criminal offence, recourse to extra-contractual liability is always possible.[138] This outcome is based on the rationale that criminal law is part of public policy ("*ordre publique*") and therefore cannot be evaded by contractually setting it aside.[139] The existing contract, to the extent it would allow a party to commit a criminal offence without liability, would be null and void, and therefore cannot stand in the way of an extra-contractual claim.

In reality, it is hard to imagine a wrongful act by a credit rating agency that causes losses for its client that does not at the same time constitute a manner of performance under the contract for which the parties can be assumed to have specified the liability principles contractually. Barring very rare circumstances, therefore, a credit rating agency cannot be held liable based on extra-contractual liability *vis-à-vis* its client, ex-

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(1985-1993)", *Tijdschrift voor Privaatrecht*, 1995, 1115-1534, par. 195-198, p. 1514-1527; R. KRUITHOF e.a. 1994 (*supra* footnote 116), par. 202, p. 488-489; H. VANDENBERGHE, M. VAN QUICKENBORNE, K. GEELEN & S. DE COSTER, "Overzicht van Rechtspraak Aansprakelijkheid uit Onrechtmatige Daad (1979-1984), *Tijdschrift voor Privaatrecht*, 1987, 1255-1615, par. 204-207, p. 1595-1608; R. KRUITHOF 1983 (*supra* footnote 116), par. 106, p. 609-611; H. VANDENBERGHE, M. VAN QUICKENBORNE & P. HAMELINK, "Overzicht van Rechtspraak Aansprakelijkheid uit Onrechtmatige Daad (1964-1978)", *Tijdschrift voor Privaatrecht*, 1980, 1139-1475, par. 232-242, p. 1445-1463.

[136] The two basic decisions of the Belgian Cour de Cassation are Cass., 4 June 1971, *Pasicrisie belge*, 1971, I, p. 940, and Cass., 7 December 1973, *Pasicrisie belge*, 1974, I, p. 376; for more recent examples, *see e.g.* Cass., 21 June 2002, *Pasicrisie belge*, 2002/5-6, p. 1407; Cass., 26 April 2002, *Pasicrisie belge*, 2002/4, p. 1017; Cass., 23 May 1997, *Pasicrisie belge*, 1997, I, 236; Cass., 28 September 1995, *Pasicrisie belge*, 1995, I, 856.

[137] Justice Rutsaert, who presided the Chamber that issued the 4 June 1971 ruling (*supra* footnote 136), wrote about the decision as a reporter to an international congress of the "Comité Européen des Assurances" in Venice in 1977 that "l'action délictuelle est exclue lorsqu'il s'agit d'une faute commise dans l'exécution d'une obligation résultant d'un contrat, car ce serait en quelque sorte permettre la violation du contrat que d'en tourner les clauses en recourant aux principes de la responsabilité délictuelle, par exemple, dans l'hypothèse où le régime de la responsabilité contractuelle serait moins favorable à la victime". *See* J. RUTSAERT & H. MEEUS, "La responsabilité civile contractuelle du prestataire de services en droit privé", *Bulletin des Assurances – De Verzekering*, 1977, 219-272, p. 225.

[138] *See e.g.* Cass., 31 January 1980, *Pasicrisie belge*, 1980, I, p. 622; Cass., 5 February 1981, *Pasicrisie belge*, 1981, I, p. 613; Cass., 28 June 1982, *Pasicrisie belge*, 1982, I, p. 1277; Cass., 26 October 1990, *Pasicrisie belge*, 1991, I, p. 216.

[139] Based on Article 6 and 1131 of the Belgian Civil Code.

cept for when the act that constitutes its breach of contract also constitutes a criminal offence.

Although this last category of exception at first sight may seem theoretical in the context of credit rating, one should not forget that market manipulation and insider trading are criminal offences in Belgium,[140] and that it is conceivable that a credit rating agency would breach its contract with the rated entity by committing an act that can be qualified as market manipulation.[141] In that case, the client could claim damages based on extra-contractual liability, notwithstanding the fact that the behavior of the rating agency constituted a breach of their contract and that this contract may contain an exoneration clause excluding or limiting the liability of the rating agency.

2. Extra-Contractual Liability *vis-à-vis* Non-Clients

In addition to breaching a contract, ratings can also harm individuals or entities that have no contractual relationship with the rating agency. Theoretically, there are two such categories of persons that could claim to have suffered losses because of the acts of credit rating agencies. On the one hand, there are the entities that have received an unsolicited rating, and on the other hand, there are the persons that have suffered losses as creditors or investors.[142] These persons could try to recover damages from the credit rating agency based on Article 1382 of the Belgian Civil Code, the general standard for extra-contractual liability.

However, before addressing the requirements for such liability, the first question one must ask is whether credit ratings are protected speech or expression and whether credit rating agencies can enjoy the protection awarded to the press under the fundamental freedoms recognized by Belgian constitutional law.

a) Possible Constitutional Hurdles for Credit Rating Agency Liability

(i) Free Speech and the Protection of Reputations

A first constitutional issue that potentially could stand in the way of civil liability of credit rating agencies for incorrect ratings would be the fundamental right of free speech

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[140] *See* Articles 39 and 40 of the Belgian Financial Sector and Services Supervision Act of 2002 (*supra* footnote 97).

[141] In case a credit rating agency knew or ought to have known that the credit rating it issued was false or misleading, the prohibition of market manipulation may apply to credit ratings. *See* Article 25, §1, 4° of the Article 25, §1, 4° of the Belgian Financial Sector and Services Supervision Act of 2002 (*supra* footnote 97); *see also* Article 1(2)(c) of the MAD (*supra* footnote 96); *see also* Communication from the Commission on Credit Rating Agencies (*supra* footnote 95), p. 5.

[142] Under Belgian law, persons having purchased or sold the shares of a corporation are considered to be third parties in relation to a contract the corporation has entered into. *See e.g.* Court of First Instance of Brussels, 12 December 1996, *Tijdschrift voor Rechtspersoon en Vennootschap*, 1997, 38.

or expression, as it is protected by Article 19 of the Belgian Constitution[143] and Article 10 of the European Convention on Human Rights.[144]

The European Court of Human Rights has explicitly stated that information of a commercial nature "cannot be excluded from the scope of Article 10 §1 (art. 10-1) which does not apply solely to certain types of information or ideas or forms of expression."[145] The letter symbol that is usually referred to as the "rating" is in fact the standardized quantified conclusion of a credit rating report issued by the rating agency in which it states its opinion as to the creditworthiness of the rated entity, based on its own standardized procedures. As such, it is an opinion, not a statement of fact. Therefore, such a rating should be considered to be part of a critical review of business and financial activities of companies or governmental entities. Speech consisting of such critical review comes within the ambit of protection of the fundamental protection of the freedom of expression.[146] As one author noted, "bond ratings are the world's shortest editorials".[147]

As a general matter, however, Belgian courts have repeatedly held that the fundamental freedom of speech and expression does not provide the author with immunity from liability based on Article 1382 of the Belgian Civil Code, nor does it change the substantive standard of liability from negligence to a more lenient behavioral standard such as for instance recklessness or intentional faults.[148] The Belgian Cour de Cassation has

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[143] Article 19 of the Belgian Coordinated Constitution of 1994 reads in its French version: "La liberté des cultes, celle de leur exercice public, ainsi que la liberté de manifester ses opinions en toute matière, sont garanties, sauf la répression des délits commis à l'occasion de l'usage de ces libertés."

[144] Consistent with its Article 1, The European Convention on Human Rights has direct effect within the Belgian legal system and is recognized to have supremacy over inconsistent Belgian law. *See* already Cass., 24 October 1960, *Pasicrisie belge*, 1961, I, 207; more recently: Cass., 4 September 2001, *Pasicrisie belge*, 2001, 1336; Cass., 16 November 2004, *Pasicrisie belge*, 2004/11, forthcoming (decision number P040644N, unofficial version available through the portal site of the judicial branch in Belgium at <www.juridat.be/juris/jucn.htm>).

[145] Markt Intern Verlag GmbH and Klaus Beermann v. Germany, judgment of the E.C.H.R. of 20 November 1989, Serie A no 165, §26; *see also* Stambuk v. Allemagne, nr. 37928/97, §39, judgment of the E.C.H.R. of 17 October 2002.

[146] *Cf*. D. VOORHOOF, "De vordering tot staking van denigrerende of slechtmakende kritiek in persartikelen", in *Liber Amicorum Paul De Vroede*, Diegem: Kluwer Rechtswetenschappen België, 1994, 1540-1559, p. 1545-1547; E. GULDIX, "Balancerend tussen grondwettelijke vrijheden en economische integriteit: het recht op commerciële kritiek", *Jaarboek Handelspraktijken*, 1990, 514-530, p. 518-519; D. VOORHOOF, "Artikel 10 E.V.R.M., commerciële informatie en kritiek in de economische berichtgeving. Enkele beschouwingen bij het Markt Internarrest", *Rechtskundig Weekblad*, 1990-91, 696-700; L. NEELS, "Vrijheid van meningsuiting en handelspubliciteit", in *Liber Amicorum Josse Mertens de Wilmars*, Antwerpen: Kluwer Rechtswetenschappen – Zwolle: W.E.J. Tjeenk Willink, 1982, 185-211, p. 192 *et seq*.

[147] G. HUSISIAN (*supra* footnote 44), p. 446.

[148] This, of course, is the standard introduced in the United States of America by *New York Times v. Sullivan*, 376 U.S. 254 (1964), in which Justice Brennan wrote: "the constitutional guarantees require […] a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not". *See* however a remarkable deviation from the Belgian standard rule in the decision of the Court of First Instance of Veurne, 18 February 2000, *Auteurs & Média*, 2000, 341, holding that only criminal offences can render an author liable, under existing Belgian law correctly reversed on appeal by the Court of Appeal of Ghent, 28 March 2002, *Auteurs & Média*, 2003, p. 129, *Nieuw Juridisch Weekblad*, 2002/13, 465; *see* already Court of Appeal of Brussels, 10 April 1862, *La Belgique judiciaire*, 1862, col. 561 *et seq*.; Cass., 24 January 1863, *Pasicrisie belge*, 1864, I, 110; Cass., 14 June 1883, *Pasicrisie belge*, 1883, I, 267; *see also* Court of Appeal of Brussels, 16 February 2001, *Auteurs & Média*, 2002, p. 282; *Revue Gé-*

on several occasions approved judgments by lower courts ordering authors of speech that negligently hurt the legitimate interests of others to compensate these victims by paying damages.[149]

The rationale justifying this result is that the basis for such civil liability, Article 1382 of the Belgian Civil Code, can be considered to be "law" under Article 10, §2, of the European Convention on Human Rights.[150] Therefore, Article 10 does allow this type of liability if the resulting limitation of the freedom of expression is necessary for one of the purposes listed in the second paragraph of that Article. One of the recognized legitimate public interests listed is the protection of the reputation of others. The creditworthiness of an entity is in essence nothing but its financial reputation, so civil liability of credit rating agencies easily passes this test.[151]

However, this does not mean that the fact that a credit rating is issued without the consent of the rated entity in and of itself would constitute a fault under Belgian law. As was noted in a Belgian report to a previous congress of the International Academy of Comparative Law:[152]

> "La liberté de la presse implique le droit de donner toute information sur les faits qui relevant de la vie publique et l'on entend par là notamment les faits […] qui ressortissent à ce qu'on pourrait appeler l'activité sociale […]. Le principe est que la presse peut publier des informations au sujet des faits notoires et publics à condition que ces informations soient exactes et que les commentaires ne viennent pas dénaturer le fait lui-même."

It is generally recognized that 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 will have to endure more public comments and criticism than an anonymous citizen would have to accept.[153] The same goes to some extent for critical reviews of activities in the markets

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nérale des Assurances et des Responsabilités, 2002, nr. 13.590; Court of Appeal of Brussels, 20 September 2001, *Auteurs & Média*, 2002, p. 524.

[149] Cass., 4 December 1952, *Pasicrisie belge*, 1953, I, p. 215; *see also* J. MILQUET, "La responsabilité aquilienne de la presse", *Annales de Droit de Louvain*, 1989, 33-104; H. VANDENBERGHE, "Over civielrechtelijke pers-aansprakelijkheid. Een stand van zaken", in M. DEBAENE & P. SOENS (ed.), *Aansprakelijkheidsrecht. Actuele tendensen*, Brussels: De Boeck & Larcier, 2005, 109-155, p. 112.

[150] Cass., 13 September 1991, *Pasicrisie belge*, 1992, I, 41, and in the same matter De Haes and Gijsels v. Belgium, judgment of the E.C.H.R. of 24 February 1997, Reports, 1997-I, §33; *see also* Court of Appeal of Brussels, 30 September 1998, *Rechtskundig Weekblad*, 2000-2001, 93; Court of Appeal of Liège, 14 March 1995, *Jaarboek Handelspraktijken & Mededinging 1995-1996*, 300; *see also* Editions Plon v. France, no 58148/00, §29, E.C.H.R. 2004-IV, judgment of the E.C.H.R. of 18 May 2004; Radio France a.o. v. France, no 53984/00, §30, E.C.H.R. 2004-II, judgment of the E.C.H.R. of 30 March 2004.

[151] Under Belgian law, a moral person or a corporate entity can invoke its right to a good name and reputation to claim damages. *See* Cass., 9 February 1948, *Pasicrisie belge*, 1948, p. 88; Cass., 7 October 1985, *Journal des Tribunaux*, 1986, 59.

[152] R.O. DALCQ, "La responsabilité des dommages causés par les moyens d'information de masse", in CENTRE INTERUNIVERSITAIRE DE DROIT COMPARE, *Rapports belges au IXe Congrès de l'Académie internationale de droit comparé – Téhéran, 27 september – 4 octobre 1974*, Brussels, 1974, 124-138, p. 134.

[153] *See* for instance the cases involving criticism of politicians, such as *e.g.* Court of Appeal of Brussels, 25 June 1986, *Rechtskundig Weekblad*, 1986-1987, 804; Court of Appeal of Brussels, 25 September 1996, *Auteurs & Média*, 1997, 76; Court of First Instance of Brussels, 21 September 1999, *Auteurs & Média*, 2000, 334; *see also* D. VOORHOOF, *Handboek mediarecht*, Brussels: Larcier, 2003, p. 136-141; D. VOORHOOF, "De eer en goede naam van politici", *Rechtskundig Weekblad*, 1986-1987, 1775-1785; J. MILQUET (*supra* footnote 149), p. 69-70.

that affect the interests of the public participating in these markets.[154] With respect to critical economic reviews, the European Court of Human Rights has noted that

> "[i]n a market economy an undertaking which seeks to set up a business inevitably exposes itself to close scrutiny of its practices by its competitors. Its commercial strategy and the manner in which it honours its commitments may give rise to criticism on the part of consumers and the specialised press. In order to carry out this task, the specialised press must be able to disclose facts which could be of interest to its readers and thereby contribute to the openness of business activities".[155]

So the fact that the published credit rating incorrectly reflects the creditworthiness of the rated entity in itself is not enough to render the rating agency liable. Entities that enter the capital markets to solicit investments should not only expect their financial reputations to become an issue that will be publicly discussed, but by the same token should also accept that inaccuracies in these public discussions are inevitable and might even from time to time cause unwarranted fluctuations in public opinion about their creditworthiness.[156] Entities such as rating agencies that contribute to the information production in the business and capital markets should enjoy some leeway in this regard and therefore cannot be held liable solely on the basis that the information they distribute damages the interests of others such as the rated entity or on the basis that the information they distribute turns out to be inaccurate. In order to permit sufficient voluntary production of information that is generally beneficial for society, a strict standard of liability for any information that turns out to be incorrect cannot be maintained.[157]

(ii) Press Freedom and Cascade Liability

A second constitutional question that may come into play under Belgian law is whether the freedom of the press regime is relevant for the liability of rating agencies. Article 25 of the Belgian Constitution, which in its first paragraph prohibits government cen-

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[154] *See e.g.* President of the Commercial Court of Brussels, 23 April 1985, *Revue de Droit Intellectuel – l'Ingénieur-Conseil*, 1985, 205, stating, about the publication of a gastronomical guide, "tout ce qui est public est susceptible de compte-rendu, à condition de se limiter à la vie publique des directeurs de restaurant".

[155] Markt Intern Verlag GmbH and Klaus Beermann v. Germany, judgment of the E.C.H.R. of 20 November 1989, Serie A no 165, §35.

[156] *Cf.* G.L. BALLON, "Restaurant- en hotelgidsen", *Rechtskundig Weekblad*, 1982-1983, 1002-1003, p. 1003, stating that a restaurant owner cannot object to this restaurant being reviewed in a restaurant guide, because a person that runs a business in a democratic society should accept that this business will be subject to criticism. *See also* President of the Commercial Court of Antwerp, 6 December 1990, *Jaarboek Handelspraktijken*, 1990, 511-514, p. 514.

[157] *See e.g.* Court of First Instance of Brussels, 21 November 1990, *Revue de Jurisprudence de Liège, Mons et Bruxelles*, 1991, p. 24; Court of First Instance of Liège, 20 March 1980, *Journal des Tribunaux*, 1980, p. 437, both decisions showing a reasoning resembling the "chilling effect" doctrine in the U.S. but resulting in the conclusion that absolute certainty and scientific precision cannot be required from journalists and that liability only attaches if they did not apply reasonable efforts and care. *See* K. LEMMENS, "Se taire par peur: l'effet dissuasif de la responsabilité civile sur la liberté d'expression", *Auteurs & Média*, 2005, 32-40, p. 37 & 38: "L'on constatera […] que les soucis qui ont inspire le juge Brennan dans l'affaire New York Times v. Sullivan, ont été appréhendés également par la jurisprudence belge. Celle-ci a créé le standard du bon journaliste diligent qui inclut clairement une certaine marge de manœuvre."

sorship, in its second paragraph provides for a so-called cascade prosecution system for press offences.[158] Under this regime, a publisher, printer or distributor cannot be prosecuted for any offence caused by an article or opinion he publishes, prints or distributes whenever the identity of the author of the piece is known and he resides in Belgium.[159] The rationale of this provision is to avoid private censorship of authors by their publishers, printers or distributors being substituted for the prohibited government censorship.[160]

While nobody doubts the applicability of this principle to criminal prosecutions, there has been serious disagreement among Belgian courts, commentators and scholars as to the question whether this constitutional cascade system is also applicable to civil claims based on extra-contractual liability.

Certain courts have found that a publisher is personally liable for the damage caused by his negligence or tort, such as the lack of supervision or verification of the publication.[161] Furthermore, some courts have specifically stated that the Constitution by recognizing the press freedom has not imposed a restriction on the fundamental principle of Article 1382 of the Civil Code.[162] These decisions refuse to apply Article 25, paragraph 2, of the Belgian Constitution in civil cases.[163] This interpretation is vigorously defended by some authors.[164]

On the other hand, other courts have applied the cascade responsibility to claims in civil court involving published materials.[165] This way, they seek to maximize the legal

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[158] The constitutional cascade liability system for press offences is according to standard interpretation not applicable to so-called printing offences or publishing offences. These are offences that do involve the publishing or printing of something but do not involve "speech" or an expression of an opinion, which is constitutionally protected. *See* D. VOORHOOF, *Handboek mediarecht*, Brussels: Larcier, 2003, p. 128-129; S. HOEBEKE & B. MOUFFE, *Le droit de la presse*, Brussels: Bruylant, 2000, p. 598 *et seq*., par. 985 *et seq*.; K. LEMMENS, *La presse et la protection juridique de l'individu*, Brussels: Larcier, 2004, p. 348 *et seq*., par. 479 *et seq*.; *see e.g.* Court of Appeal of Ghent, 25 May 2004, *Auteurs & Média*, 2004, p. 363; Court of Appeal of Ghent, 18 May 1999, *Algemeen Juridisch Tijdschrift*, 1999-2000, 4. However, as we have already noted (*see supra* footnotes 145-147 and accompanying text), credit ratings are the conclusion of an opinion, and therefore do enjoy the constitutional protection offered to speech and the free press.

[159] Article 25, paragraph 2, Belgian Coordinated Constitution of 1994.

[160] *See* M. HANOTIAU, "La responsabilité en cascade en matière civile", *Revue Critique de Jurisprudence Belge*, 1998, 359-387, p. 361; P. ROBERT, "La responsabilité civile du journaliste", *Auteurs et Média*. 2000, 18-26, p. 18 & 24; H. VANDENBERGHE, "Over persaansprakelijkheid", *Tijdschrift voor Privaatrecht*, 1993, 843-883, p. 848; D. VOORHOOF, "De regel van de getrapte verantwoordelijkheid: van de 19de naar de 21ste eeuw?", *Recente Arresten van het Hof van Cassatie,* 1996, 385-389, p. 386.

[161] *See e.g.* Court of First Instance of Brussels, 13 September 1994, *Algemeen Juridisch Tijdschrift*, 1994-1995, p. 128; Court of Appeal of Ghent, 14 March 1995, *Auteurs & Média*, 1996, 159.

[162] *See e.g.* Court of First Instance of Brussels, 23 March 1993, *Journal des Tribunaux*, 1993, p. 579; Court of First Instance of Brussels, 13 September 1994, *Algemeen Juridisch Tijdschrift*, 1994-1995, p. 128; *cf.* Court of Appeal of Brussels, 5 February 1990, *Rechtskundig Weekblad*, 1989-1990, p. 1464; Court of Appeal of Ghent, 3 March 1995, *Algemeen Juridisch Tijdschrift*, 1995-1996, 255, *Rechtskundig Weekblad*, 1996-1997, 540.

[163] For a list of references to cases not applying the cascade liability system to civil claims, *see* M. HANOTIAU (*supra* footnote 160), footnote 43 on p. 369, and J. MILQUET (*supra* footnote 149), footnotes 25-28 on p. 37-38.

[164] *See e.g.* H. VANDENBERGHE (*supra* footnote 149), p. 113-118; H. VANDENBERGHE (*supra* footnote 160), p. 848-852; J. MILQUET (*supra* footnote 149), p. 38; R.O. DALCQ, *Traité de la responsabilité civil*, I, Brussels: Larcier, 1967, par. 1245-1247.

[165] For a list of references to cases applying the cascade liability system to civil claims, *see* M. HANOTIAU (*supra* footnote 160), footnote 30 on p. 367, and J. MILQUET (*supra* footnote 149), footnote 22 on p. 37.

guarantee of press freedom.[166] This interpretation finds some support in a decision by the Cour de Cassation of 24 January 1863,[167] and is also supported by several authors.[168]

More recently, the Cour de Cassation reconfirmed this interpretation in a case where the appellate court's decision had held a publisher liable because "si la « responsabilité par cascade » a été consacrée en matière pénale en application de l'article 25, alinéa 2 […] de la Constitution, il n'en reste pas moins que cette règle dérogatoire au droit commun ne s'applique pas en matière civile". In its decision of 31 May 1996, the Cour de Cassation wrote that the second paragraph of Article 25 of the Constitution "confère aux éditeurs, imprimeurs et distributeurs, le privilège de pouvoir se soustraire à toute responsabilité, tant pénale que civile, lorsque l'auteur est connu et domicilié en Belgique ; qu'il apporte, dans cette mesure, une restriction à l'applicabilité de l'article 1382 du Code civil […]".[169]

The application of this Constitutional provision to civil liability claims seems to exclude the possibility to invoke the vicarious liability of the employer/publisher of the author based on Article 1384 paragraph 3 of the Belgian Civil Code.[170] Moreover, if the author is an employee of the publisher, the author himself is protected by a limitation of employee liability imposed by labor law and therefore will not be personally liable except if the losses were caused by his intentional or grave fault or by a light but recurrent fault.[171] As a result, in these cases the victim of losses caused by a fault committed in the form of speech or expression of an opinion will not be able to claim compensation from anybody.[172] To avoid this unwanted result, some courts have been prepared to either ignore the immunity from liability offered to employees,[173] or to explicitly de-

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166 *See e.g.* Court of First Instance of Antwerp, 28 October 1987, *Rechtskundig Weekblad*, 1987-1988, 820; President of the Court of First Instance of Antwerp, 4 July 1994, *Algemeen Juridisch Tijdschrift*, 1994-1995, p. 84; Court of First Instance of Brussels, 29 September 1988, *Recht en Kritiek*, 1989, p. 302.

167 Cass. 24 January 1863, *Pasicrisie belge*, 1864, I, 110, in which the court said that "la seule restriction apportée par l'article [25 de la Constitution] au principe général déposé dans l'article 1382 du Code civil consiste en ce que l'imprimeur, l'éditeur ou le distributeur ne peuvent être poursuivis lorsque l'auteur est connu et domicilié en Belgique".

168 *See e.g.* J. VELAERS, *De beperkingen van de vrijheid van meningsuiting*, Antwerpen/Apeldoorn: Maklu Uitgevers, 1991, 215-217; D. VOORHOOF, "De burgerlijke aansprakelijkheid voor drukpersmisdrijven en de regel van de getrapte verantwoordelijkheid", *Rechtskundig Weekblad*, 1984-1985, 1909-1913; D. VOORHOOF (*supra* footnote 160).

169 Cass. 31 May 1996, *Pasicrisie belge*, 1996, I, p. 559.

170 Article 1384 paragraph 3 of the Belgian Civil code contains a strict liability regime declaring employers liable for all damage wrongfully caused by their employees. *See e.g.* Court of First Instance of Brussels, 28 October 1999, *Auteurs & Média*, 2000/1-2, 113; Court of First Instance of Brussels, 21 March 2000, *Auteurs & Média*, 2000/4, 460; Court of First Instance of Brussels, 18 December 2001, *Revue de Jurisprudence de Liège, Mons et Bruxelles*, 2002, 433; Court of First Instance of Brussels, 25 June 2002, *Auteurs & Média*, 2004, 368; *see also* M. HANOTIAU (*supra* footnote 160), p. 382-383.

171 Article 18 of the Belgian Employment Contract Act (Loi du 3 juillet 1978 relative aux contrats de travail, *Moniteur belge – Belgisch Staatsblad*, 22 August 1978) shields employees from any liability *vis-à-vis* their employer and *vis-à-vis* third parties and only leaves the exceptions mentioned in the text.

172 *See* H. VANDENBERGHE (*supra* footnote 149), p. 115-116; M. HANOTIAU (*supra* footnote 160), p. 383.

173 *See e.g.* Court of First Instance of Brussels, 28 October 1999, *Auteurs & Média*, 2000, p. 113.

clare it not applicable to authors,[174] as it is perceived to be inconsistent with the constitutional cascade liability system.[175] Other courts have tended to easily qualify a fault by an author or journalist as a "grave fault", allowing the author/employee to be personally liable under the labor law rule.[176]

Several authors consider this to be an unwanted result and use this as an argument to propose to limit the application of the cascade liability system imposed by Article 25 of the Belgian Constitution to criminal prosecutions. There is also some support for this position in case law,[177] even after the Cour de Cassation seemed to have decided the issue otherwise.[178]

However, the dominate view seems to consider this unfortunate risk for the victim the "price" to be paid to limit the private censure of authors as much as possible: by freeing publishers, printers and distributors not only from their eventual vicarious liability for faults committed by authors but also from liability for their own faults or negligence in relation to the published work, the constitution cascade liability system removes one of the reasons or incentives for editorial supervision or control by publishers, printers and distributors.[179] A lack of supervision or negligence in the control over an author by a publisher is by itself not a basis for liability.[180]

But this does not mean that in practice victims of faults committed by authors working as employees of publishers – as most journalists are – have no recourse. If a publisher or editor, printer or distributor in fact does edit the content of the publication or in fact does supervise and control the author and his work, as is the case with most periodical publications, he is no longer a mere editor, publisher, printer or distributor but can be considered to be a co-author of the published piece. As a result, it would be consistent with Article 25, paragraph 2 of the Belgian Constitution for him to be sued based on his liability as author.[181]

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[174] *See e.g.* Court of First Instance of Namur, 26 September 2003, *Revue Générale des Assurances et des Responsabilités*, 2004, nr. 13.896; H. VANDENBERGHE (*supra* footnote 149), p. 116.

[175] *See* in particular M. HANOTIAU (*supra* footnote 160), p. 383.

[176] *See e.g.* Court of Appeal of Brussels, 9 November 2001, *Auteurs & Média*, 2002, p. 527, *Journal des Tribunaux*, 2002, p. 167; Court of Appeal of Brussels, 16 February 2001, *Auteurs & Média*, 2002, p. 282, *Revue Générale des Assurances et des Responsabilités*, 2002, nr. 13.590; Court of Appeal of Brussels, 5 February 1999, *Auteurs & Média*, 1999, 274; *Revue Générale des Assurances et des Responsabilités*, 2000, nr. 13.296; Court of First Instance of Brussels, 13 September 1994, *Algemeen Juridisch Tijdschrift*, 1994-1995, p. 128; *see* H. VANDENBERGHE (*supra* footnote 149), p. 116-117.

[177] *See e.g.* Court of Appeal of Ghent, 14 March 1995, *Auteurs & Média*, 1996, p. 159.

[178] *See e.g.* Court of Appeal of Liège, 30 June 1997, *Revue de Jurisprudence de Liège, Mons et Bruxelles*, 1998, p. 9.

[179] M. HANOTIAU (*supra* footnote 160), p. 381-382; D. VOORHOOF (*supra* footnote 160), p. 386.

[180] *See e.g.* Court of Appeal of Brussels, 10 March 1998, *Auteurs & Média*, 1998, 377; P. ROBERT (*supra* footnote 160), p. 20.

[181] J. VELAERS (*supra* footnote 168), p. 205-206; D. VOORHOOF, "De rechtsbescherming in geval van misbruik van persvrijheid: overzicht van rechtspraak", *Droit de la Consommation – Consumentenrecht*, 1993/19, 198-243, p. 230; D. VOORHOOF (*supra* footnote 160), p. 386-387; M. HANOTIAU (*supra* footnote 160), p. 369; J. MILQUET (*supra* footnote 149), p. 37; *see e.g.* Court of Appeal of Liège, 30 June 1997, *Revue de Jurisprudence de Liège, Mons et Bruxelles*, 1998, p. 9; Court of Appeal of Brussels, 10 March 1998, *Auteurs & Média*, 1998, p. 377.

The same reasoning could be applied to credit rating agencies. Although the credit ratings published by such agencies are in fact the product of the work of some employees that can be considered to be the authors of the opinion, the procedures used by these credit rating agencies clearly show that the ratings are not merely the opinion of the individual analysts that work on the specific case.[182] After these individuals analyze the data and present an internal report, this report is discussed in a larger group of analysts, to ensure the consistency of the rating with the ratings of other entities. Plus the rating process might not be exact science, it nevertheless follows strict procedures and methods the rating agency uses for all its clients, precisely to enhance the comparability of the ratings.[183] It is therefore obvious that the individual employees working on the rating process for a client are not the only authors of the opinion the rating is; in fact, the credit rating agency itself is the author, as it not only monitors, supervises and controls its analysts and the rating process, but deliberately, explicitly, and systematically steers the rating process and method based on its own models.[184] Therefore, the cascade liability system for published opinions provided for in the Belgian Constitution does not stand in the way of a claim for damages against the rating agency based on an incorrect rating.

b) Liability under Article 1382 of the Belgian Civil Code

The basic rule for extra-contractual liability under Belgian law is stated in Article 1382 of the Belgian Civil Code. It contains a generally applicable obligation to restore or compensate damage caused by one's wrongful act.[185] For a claim based on this provision to be successful, the claimant has to prove that (1) he has suffered "damage", (2) the respondent has committed a "fault" and (3) there exists a "causal relationship" between this wrongful act and his damage. Each of these elements will be discussed in the following subsections.

(i) Losses and Damage

The first question that is relevant for determining liability, therefore, is whether the person claiming compensation in fact suffered a loss, which is an issue of fact, and whether this loss can legally be considered to be "damage" as this concept is understood in the context of Article 1382 of the Belgian Civil Code, which is a legal qualification issue.

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[182] This is very different from sell side financial analysts, whose reports, earnings forecasts, and recommendations are personal opinions, published under their own individual name.

[183] For S&P's procedure and methodology, *see* STANDARD & POOR'S, *Corporate Ratings Criteria*, 2006, available at the company's web site at <www.standardandpoors.com>; *see also* "SEC Report" (*supra* footnote 2), p. 25-27; R. CANTOR & F. PACKER (*supra* footnote 7), p. 5; L. EDERINGTON & J. YAWITZ (*supra* footnote 2), p. 23/19-27; T.J. SINCLAIR (*supra* footnote 2), p. 150-151.

[184] *See* D. KERWER, "Standardising as Governance: The Case of Credit Rating Agencies", MPI Collective Goods Preprint nr. 2001/3, March 2001, p. 13, available in the SSRN eLibrary at <http://ssrn.com/abstract=269311>.

[185] The French version of Article 1382 of the Belgian Civil Code reads as follows: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."

The answer to this question differs depending on whether the claimant is an entity that received an unsolicited rating or a person that suffered a loss by relying upon the rating.

The first category, the entities having received an unsolicited rating, can base a claim on Article 1382 of the Belgian Civil Code as they did not enter into a contract with the credit rating agency. Such an entity could hypothetically claim to have suffered a loss because the published unsolicited rating does not correctly reflect the entity's credit-worthiness. As a result, the conditions against which this entity was or is able to obtain financing in the capital markets were or are less advantageous than they would have been if no incorrect rating had been issued.[186]

As a matter of principle, we consider that this loss – namely the extra cost of financing for the entity – would legally constitute damage under Belgian extra-contractual liability law. The fact that the rated entity did not have any enforceable right to the lower cost of financing is by itself no bar to liability: under Belgian law, the violation of a mere interest is sufficient to justify a claim for damages based on Article 1382 of the Belgian Civil Code, no infringement of a right is required.[187] However, proving that this loss actually exists, would require the entity to show that the conditions at which it would have been able to obtain financing would have been better if the rating would have been correct.[188]

The second category of persons that could try to recover damages based on extra-contractual liability are investors. When a published rating incorrectly reflects the credit-worthiness of the rated entity, investors can in fact suffer losses that legally qualify as damage under Article 1382 of the Belgian Civil Code. As a basic rule under Belgian extra-contractual liability, the damage includes both the losses incurred and the gains missed (*damnum emergens* and *lucrum cessans*).[189] Depending on the view one takes on causality, this damage can be quantified in different ways.[190]

Under the traditional approach, this amounts to the difference between the investor's actual financial position having made the investment that turned out worse than expected and the hypothetical financial position he would have been in if he would not have made the investment. This entails first restoring the investor to the financial situation he was in before making the investment (*damnum emergens*). If necessary under the circumstances, this is then corrected for the return the investor would have made

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[186] This basically was the fact pattern underlying the dispute in the American case *Jefferson County School District v. Moody's Investor's Services, Inc.*, 988 F. Supp. 1341 (D. Colo. 1997), aff'd, 175 F.3d 848 (10th Cir. 1999).

[187] *See e.g.* Cass., 4 September 1972, *Pasicrisie belge*, 1973, I, at p. 3, where the Cour de Cassation stated: "que la circonstance que le bénéficiaire d'un avantage licite ne disposait pas, contre la personne qui le lui procurait bénévolement, d'une action en justice pour l'y contraindre, n'exclut pas que le préjudice résultant de la privation d'un tel avantage par le fait fautif d'un tiers puisse faire l'objet, contre celui-ci, de la part de celui qui le subit, d'une action en réparation fondée sur l'article 1382 du Code civil, dès lors que l'avantage présentait pour le bénéficiaire une stabilité suffisante pour faire considérer son dommage comme certain".

[188] There are economic studies showing the correlation between issued credit ratings and financial conditions. *See supra* footnote 13 and *infra* footnote 223.

[189] E. DIRIX, *Het begrip schade*, Antwerpen: Maklu, 1998, 46.

[190] *See infra* footnotes 220-226 and accompanying text.

under an alternative investment decision he would most likely have taken (*lucrum cessans*),[191] or by granting compensatory interest based on the statutory rate to cover lost alternative returns in general, as some courts have done.[192]

Under a more modern approach,[193] attention would be focused on the fact that the market conditions at which the investor purchased or sold the instruments issued by the rated entity were at least partially based on an incorrect quantification of the credit risk in discounting their future value, and that this has most likely resulted in too high or too low a price being paid. This means that the investor has taken on a risk for which he has not been compensated *ex ante*, as this risk was not correctly reflected in the market price at which he dealt. Either this uncompensated risk or the lack of *ex ante* compensation for it by means of a price discount – both should amount to the same when valued at the time of investing or divesting – represents the investor's loss. However, we are not aware of any Belgian court decisions applying this loss measuring method, although it is fully consistent with the general principles of Belgian tort law.

(ii) Fault

Liability based on Article 1382 of the Belgian Civil Code requires the liable person to have committed a wrongful act, usually referred to as a "fault". As a general rule, such a fault can consist of a violation of a statutory or regulatory duty to behave in a specified manner or of an act which a normally prudent and cautious person would not commit.[194] The general liability standard, therefore, is the behavior of a normally reasonable person placed in the same circumstances.[195] We are not aware of any Belgian court decisions on the liability of a credit rating agency *vis-à-vis* either entities that received an unsolicited rating or creditors or investors that relied on one. One therefore can only apply the principles developed in cases involving other situations to the credit rating setting, and attempt to predict what the Belgian courts would do if they were confronted with the question.

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[191] *See e.g.* Commercial Court of Brussels, 17 October 2003, *Droit des Affaires – Ondernemingsrecht*, 2004/69, 83; Court of Appeal of Brussels, 9 September 2003, *Forum Financier / Droit Bancaire et Financier*, 2005/V-VI, 332; *see also* S. DELAYE, "Barrack Mines: prospectusaansprakelijkheid van de kredietinstelling", *Droit des Affaires – Ondernemingsrecht*, 2004/69, 87-96, p. 94-95.

[192] *See e.g.* Court of Appeal of Brussels, 6 July 1992, *Journal des Tribunaux*, 1992, 710-718.

[193] Compare the efficient market hypothesis, *infra* footnotes 222-226 and accompanying text.

[194] *See e.g.* Cass., 8 December 1994, *Pasicrisie belge*, 1994, I, 1063; Cass., 26 juni 1998, *Pasicrisie belge*, 1998, I, 343.

[195] L. CORNELIS, *Beginselen van het Belgische buitencontractuele aansprakelijkheidsrecht*, Vol. 1, Antwerpen-Apeldoorn: Maklu Uitgevers – Brussel: ced.samson, 1989, par. 21-24, p. 34-41. It is often stated that under Belgian tort law a normally prudent cautious person, the *bonus pater familias*, per definition does not violate statutory or regulatory rules that require him to behave in a specified manner. Therefore, if such a violation occurs, a court has to conclude that a fault was committed and cannot hold that this specific violation would maybe also have been committed by a normally reasonable person in the same circumstances. L. CORNELIS, *Op.Cit.*, par. 40, p. 61.

Like any other professional, a credit rating agency can be held liable under Article 1382 of the Belgian Civil Code if it violated a statutory or regulatory provision requiring or prohibiting a specific behavior.

For persons under a statutory duty to provide certain information, such as issuers of publicly traded securities, this might result in a basis for liability whenever this information is not correctly provided.[196] For credit rating agencies, however, such statutory or regulatory provisions imposing a duty to inform do not exist in Belgium. Also, as opposed to the persons responsible for the content of a prospectus published upon the issuing of financial instruments or the issuer or assigned financial intermediaries that issue publicity for an issue of securities,[197] there is no statutory provision imposing a liability *vis-à-vis* the public on credit rating agencies for the correctness of the information they distribute. The fact that a published credit rating turns out to be incorrect is therefore not a sufficient basis for extra-contractual liability.[198]

However, other violations of specific statutory or regulatory duties not particularly designed for credit rating agencies but nevertheless applicable to them, might be relevant in certain situations. Here, special attention has to be paid to one of the statutory provisions curtailing market manipulation, which forbids the spreading of rumors that can give incorrect or misleading signals about financial instruments if the person spreading the rumor knew or should have known that the information was incorrect or misleading.[199] Also, any criminal offence is automatically considered to be a violation of a

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[196] *See e.g.* the Royal Decree of 2003 on the Obligations of Issuers of Financial Instruments traded on a Belgian Regulated Market (Arrêté royal du 31 mars 2003 relatif aux obligations des émetteurs d'instruments financiers admis aux négociations sur un marché réglementé belge, *Moniteur belge – Belgisch Staatsblad*, 29 April 2003), implementing Article 10 of the Belgian Financial Sector and Services Supervision Act of 2002 (*supra* footnote 97); *see* V. DE SCHRYVER, "Prospectusaansprakelijkheid", in E. WYMEERSCH (ed.), *Financieel recht tussen oud en nieuw*, Antwerpen-Apeldoorn: Maklu Uitgevers, 1996, 336-364, p. 353, footnote 46; *see also* E. WYMEERSCH, "De nieuwe reglementering van de openbare uitgifte van effecten en de financiële informatie", in G. SCHRANS & E. WYMEERSCH (ed.), *Financiële Herregulering in België*, Antwerpen: Kluwer Rechtswetenschappen, 1991, 101-156.

[197] Article 17 of the Belgian Public Offering of Securities Act of 2003 (*supra* footnote 49) renders the persons listed in the prospectus as responsible for its content liable for any damage that is directly and immediately caused by the absence or incorrectness of information in the prospectus, its additions or amendments, notwithstanding any other agreement and contains a similar clause for the issuer or financial intermediary that distributes publicity materials. *Cf.* Article 6.1 of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the Prospectus to be Published when Securities are Offered to the Public or Admitted to Trading and Amending Directive 2001/34/EC, *Official Journal* L345/64 of 31 December 2003.

[198] Compare the decision of the Brussels Court of Appeal in the Confederation Life case (Brussels, 8 March 2002, *Forum Financier / Droit Bancaire et Financier*, 2002/IV, 234-237), where the fact that the lead manager in a bank consortium placing a bond issued by a Canadian Insurance Company on the Belgian and Luxemburg markets had not identified the true financial situation of the issuer because it had not performed its own due diligence but relied on information gathered and furnished by others was not considered to be a sufficient basis for liability for the losses suffered by investors after the issuer defaulted when it went into bankruptcy, as in Belgium a lead manager is under no statutory or regulatory duty to perform such a due diligence, nor is there a custom in this matter that can be a source of law. For a critical review of this decision, in particular the holding that a lead manager would not have a duty to perform a due diligence under Belgian law, *see* F. DE BAUW & M. DUPLAT, "Emission d'euro-obligations et devoir de due diligence du banquier chef de file. Observations à propos de l'arrêt Confederation Life", *Forum Financier / Droit Bancaire et Financier*, 2003/II-III, 136-144.

[199] *See* Article 25, §1, 4° of the Belgian Financial Sector and Services Supervision Act of 2002 (*supra* footnote 97); *see also* Article 1(2)(c) of the MAD (*supra* footnote 96); *see also* Communication from the Commission on Credit Rating Agencies (*supra* footnote 95), p. 5.

statutory or regulatory provision imposing a specific duty or prohibiting specific behavior, so a criminal offense is a *per se* fault under Article 1382 of the Belgian Civil Code.[200] This means that a credit rating agency that would commit market manipulation, which is a criminal offence in Belgium,[201] would automatically be liable for any damage this offence might have caused to third parties.

Can a credit rating agency be held liable based on the general standard of prudence and diligence under Belgian law? Here, a potential theoretical problem is that a credit rating agency that issues a rating in doing so typically is performing a contractual duty. By itself, the fact that the behavior that constitutes the fault invoked by a third party at the same time constitutes a breach of contract with the issuer does not preclude a claim based on Article 1382 of the Belgian Civil Code by third parties.[202] But if one were to assume that a normally reasonable person would not breach his contractual duties, the result would be that a breach of contract with the issuer *per se* constitutes a fault under Article 1382 of the Belgian Civil Code that could be invoked by third parties. This would result in transforming the mutual contractual duties of parties automatically into duties towards third parties, as they would enjoy a remedy against every breach of a contract to which they were not a party if it causes them damage. Because this is inconsistent with the principle of relativity of contracts under Belgian law,[203] it is generally recognized that a breach of contract does not by itself automatically and always constitute a fault under Article 1382 of the Belgian Civil Code that can be invoked by third parties.

So, it is often stated that for a successful claim based on extra-contractual liability, the act constituting a breach of contract at the same time and independently of the contract has to constitute a fault under Article 1382 of the Belgian Civil Code.[204] In certain circumstances, however, the breach of a contractual duty will be considered as a violation of the general standard of prudence and diligence, in particular when the contractual duty is specifically aimed at effects on third parties and the contract party owing this contractual duty in effect has accepted an enlarged extra-contractual duty of care towards these "related" third parties.[205] This has led the courts to recognize such extra-

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[200] *See* L. CORNELIS, (*supra* footnote 195), par. 41, p. 62-63; *see e.g.* Cass., 31 January 1980, *Pasicrisie belge*, 1980, I, p. 622.

[201] Article 39 of the Belgian Financial Sector and Services Supervision Act of 2002 (*supra* footnote 97); *see* already *supra* footnote 140 and accompanying text.

[202] *See e.g.* Cass., 20 June 1997, *Pasicrisie belge*, 1997, I, p. 708; Cass., 26 March 1992, *Pasicrisie belge*, 1992, I, p. 675; Cass., 21 January 1988, *Pasicrisie belge*, 1988, I, 602; Cass., 11 June 1981, *Pasicrisie belge*, 1981, I, p. 1159.

[203] Article 1165 of the Belgian Civil Code. *See* in general E. DIRIX, *Obligatoire verhoudingen tussen contractanten en derden*, Antwerpen/Apeldoorn: Maarten Kluwer's Internationale Uitgeversonderneming, 1984, par. 231 *et seq*., p. 171 *et seq*.

[204] *See e.g.* Cass., 26 March 1992, *Pasicrisie belge*, 1992, I, p. 675; *Cf.* Cass., 4 June 1993, *Pasicrisie belge*, 1993, I, p. 549.

[205] The school book example of this is the extra-contractual liability of an elevator maintenance company *vis-à-vis* third parties being hurt in an elevator accident caused by its breach of its maintenance contract with the owner of the elevator: although the general public does not have a duty to maintain elevators, those who contractually accept such a duty at the same token assume a duty to perform this contractual duty with care towards the persons

contractual liability *vis-à-vis* third parties relatively easily in cases of so-called professional faults.[206] For example, faults company directors or auditors commit in the performance of their function, which do constitute a breach of their contract with the corporation, can also constitute the basis for an extra-contractual claim by third parties such as investors not only based on specific provisions of the Belgian Company Code when the director has violated the company charter or the Company Code,[207] but also based on Article 1382 of the Belgian Civil Code.[208]

In general, the fault criterion that will be applicable to the liability of credit rating agencies consists of an objective element and a subjective element. The objective element is the fact that the issued credit rating does not correctly reflect the creditworthiness of the rated entity. The subjective element is that the rating agency knew or should have known that this rating was objectively incorrect. In other words, the fact that the rating is objectively wrong can only be attributed to the rating agency if it has not sufficiently diligently investigated the creditworthiness of the rated entity and if the incorrectness of the credit rating would have been uncovered if the credit rating agency would have acted diligently. In this respect, it is useful to compare the situation of credit rating agencies with the situation of other professional service providers, such as banks on the one hand and financial or economic journalists critically reviewing the performance and/or quality of products, services or companies, on the other.

The similarity with banks is that the behavior of a credit rating agency directly influences the public's perception of the creditworthiness of its client in a similar way the decision of a bank to grant or extent credit to a client can do. In cases of bank liability for losses suffered by persons relying on an incorrectly overoptimistic appearance of creditworthiness of a debtor created or sustained by the behavior of the debtor's bank, Belgian liability law has been shown to be very claimant friendly.[209] There have been plenty of court decisions holding a bank liable under Article 1382 of the Belgian Civil Code for damages suffered by persons that have granted credit to a client of the bank

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using the elevators. *See e.g.* Court of Appeal of Brussels, 4 February 1992, *Revue Générale des Assurances et des Responsabilités*, 1995, nr. 12.460.

206 For a general discussion, *see e.g.* X. DIEUX & D. WILLERMAN, "La responsabilité civile du prestataire de services à l'égard des tiers", in *Les contrats de service*, Brussels: Jeune Barreau Bruxelles, 1994, 209-235; L. CORNELIS (*supra* footnote 195), par. 70, p. 120.

207 For company directors, Article 528 of the Belgian Company Code; for company auditors, Article 140, paragraph 2 of the Belgian Company Code. For an example, holding company auditors liable *vis-à-vis* a credit institution that had granted a credit augmentation based on incorrectly verified financial information, *see* Commercial Court of Hasselt, 25 juni 2002, *Tijdschrift voor Rechtspersoon en Vennootschap*, 2003, 81-85.

208 *See* J.-F. GOFFIN, *Responsabilités des dirigeants de sociétés*, Brussels: De Boeck & Larcier, 2004, p. 121-124; H. DE WULF & I. DE POORTER (*supra* footnote 117), p. 209-210.

209 For a general discussion, *see e.g.* J.-P. BUYLE & O. CREPLET, "La responsabilité civile des établissements de crédit", in B. DUBUISSON (ed.), *Les responsabilités professionnelles*, Liège: ULg. Formation permanente CUP par. 50, 2001, 81-226; D. BLOMMAERT, "Aansprakelijkheid van de bank en de bemiddelaar bij kredietverlening herbezocht", in *Liber Amicorum Yvette Merchiers*, Brugge: die Keure, 2001, 353-369; D. BLOMMAERT, "De aansprakelijkheid van de kredietinstelling-kredietverlener: recente trends", in E. WYMEERSCH (ed.), *Financieel Recht tussen Oud en Nieuw*, Antwerpen – Apeldoorn: Maklu, 1996, 687-728; E. WYMEERSCH, "Bank Liability for Improper Credit Decisions in the Civil Law", in R. CRANSTON (ed.), *Banks, Liability and Risk*, London: Lloyd's of London Press Ltd., 1995, 179-216; A. ZENNER & L.M. HENRION, "La responsabilité du dispensateur de crédit en droit belge", *Journal des Tribunaux*, 1984, 469-484.

relying on the apparent creditworthiness of that client created by the decision of the bank to grant or maintain credit to this client even though it knew or should have known that this client was going to fail to honor its commitments.[210] Given that the actions of a credit rating agency not only are indisputably much more geared towards the convictions of the investing public than the credit decisions by a bank, but also are specifically *intended* to influence public opinion about the rated entity in the market, it seems safe to assume that Belgian courts will be as claimant friendly in cases brought against credit rating agencies based on Article 1382 of the Belgian Civil Code as they have shown to be in cases brought against banks.

The similarity with journalists, especially journalists critically reviewing the quality or performance of products, services or companies, is more obvious. In general, journalists are not required to only tell the truth or to write completely accurate information. An inaccurate report does not automatically render them liable.[211] However, a journalist has to spend a normal amount of effort and care in gathering and analyzing his information and drawing his conclusions, compared with a reasonably prudent and diligent journalist.[212] This means, for instance, that he has to verify his sources,[213] and use multiple sources if possible for potentially damaging information.[214] These duties of the journalist become more stringent as the expected consequences of his reporting become more serious, for example because of the serious nature of the reported events and the sensitivity of public opinion on the matter,[215] but also because of the fact that he can expect the public to rely on his reporting.

There are court decisions that, although they were not dealing with the issue of credit rating agency liability but with problems relating to the liability of banks placing securities on the markets, underlined the extent to which the public, including financial professionals such as banks, rely on credit ratings.[216] Moreover, there is even a decision by

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[210] *See e.g.* Commercial Court of Brussels, 15 April 1996, *Revue de Droit Commercial Belge*, 1997, 762; Court of Appeal of Mons, 3 March 1992, *Revue de Droit Commercial Belge*, 1993, 379.

[211] *See e.g.* Court of Appeal of Antwerp, 26 September 1995, *Rechtskundig Weekblad*, 1995-1996, 855; *see also* 1545; E. GULDIX (*supra* footnote 146), p. 523; J. MILQUET (*supra* footnote 149), p. 76.

[212] D. VOORHOOF (*supra* footnote 158), p. 134 *et seq.*; *see* for instance the judgment by the Court of Appeal of Antwerp, 26 September 1995, *Rechtskundig Weekblad*, 1995-1996, 855; Court of First Instance of Brussels, 22 December 1996, *Chroniques de Droit Public – Publiekrechtelijke Kronieken*, 1997, 666, *err. Chroniques de Droit Public – Publiekrechtelijke Kronieken*, 1998, 256; Court of First Instance of Brussels, 9 November 2001, *Auteurs & Média*, 2002, 288.

[213] *See e.g.* Court of Appeal of Ghent, 14 March 1995, *Auteurs & Média*, 1996, 159; Court of First Instance of Brussels, 26 October 2001, *Auteurs & Média*, 2002, 88.

[214] *See e.g.* Council for Deontology (AVBB), 11 February 1998, *Auteurs & Média*, 1998, 160; Court of First Instance of Brussels, 16 November 1997, *Auteurs & Média*, 1998, 153.

[215] *See e.g.* the decision of the Court of First Instance of Nivelle of 11 September 1997, *Auteurs & Média*, 1998, 157.

[216] These decisions explicitly referred to and in fact also partially relied on the function of specialized credit rating agencies, underlining that "professionals and investors attribute a great value to the credit ratings issued by specialized agencies that in an independent manner estimate the probability that an issuer will entirely honor the repayment of capital and interest based on a profound analysis". *See* Commercial Court of Brussels, 26 March 1997, *Tijdschrift voor Rechtspersoon en Vennootschap*, 2000, 109-118, at p. 111, *Revue de la Banque*, 1997/5, 334-340, at p. 335 (the English quoted text is our own translation), literally repeated by Commercial Court of Brussels, 10 February 2000, *Tijdschrift voor Rechtspersoon en Vennootschap*, 2000, 100-104, at p. 103. *See also infra* Section G.

the Brussels Court of Appeal that partially relies on the function of credit rating agencies to hold that a bank cannot be reproached to have relied on a credit rating.[217] Based on these decisions and on the case law dealing with liability of professional service providers *vis-à-vis* third parties in general, one can anticipate that under Belgian law an investor will not on principle be precluded from invoking extra-contractual liability against a credit rating agency merely because the fault in essence consists of a violation of its contractual duties towards the rated entity. More even, we would not be surprised if the extent to which the public and even the financial professionals have come to rely on credit ratings issued by a relatively small number of credit rating agencies would be a factor for a Belgian court to hold these agencies to a relatively high standard of care and diligence in the performance of their function when challenged based on Article 1382 of the Belgian Civil Code.[218]

(iii) Causality

The standard rule for causality under Belgian extra-contractual liability is usually referred to as the equivalence theory. Under this theory, an event A – in the case of liability based on Article 1382 of the Belgian Civil Code, that would be a fault – is legally to be considered a "cause" of an event B – in case of own fault liability, this would be the loss legally qualified as damage – if this event B would not have occurred if event A had not happened, all other circumstances of the case left unchanged. In other words, this theory retains as a cause of losses each and every event that, in the specific circumstances of the case, was a *conditio sine qua non* for the loss.[219] Applying this standard to the potential liability of credit rating agencies *vis-à-vis* the investing public, the investor claiming compensation for losses suffered because of an incorrect rating would have to prove that he would not have suffered these losses if no incorrect rating had been issued.

According to a traditional application of this causality standard in cases of investment losses, this would require the investor to show that he in fact relied on the incorrect rating when making the investment decision – the decision to buy or sell financial instruments – and that he would not have made the same decision if he had had correct

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[217] On appeal against both decisions quoted *supra* in footnote 216, the Court of Appeal of Brussels noted that rating agencies attribute credit ratings after a profound investigation of the commercial and financial situation of the rated entity, and that the analyses by rating agencies are serious and reliable so that one cannot reproach a lead bank in a consortium placing rated securities issued by a rated issuer for not having personally redone the verifications already performed by Standard & Poor's, especially because this rating agency is officially recognized in the United States of America. *See* Brussels, 8 March 2002, *Forum Financier / Droit Bancaire et Financier*, 2002/IV, 234-237, at p. 236. *See also infra* Section G.

[218] Belgian courts also tend to be more demanding when confronted with cases involving journalists having published incorrect information in relation to businesses or professionals. *See* J. MILQUET (*supra* footnote 149), p. 78-79.

[219] H. BOCKEN, "Actuele problemen inzake het oorzakelijk verband", in M. STORME (ed.), *Recht halen uit aansprakelijkheid*, Gent: Mys & Breesch, 1993, 81-121; M. VAN QUICKENBORNE, "Enige aspecten van de causaliteitsproblematiek", in H. VANDENBERGHE (ed.), *Onrechtmatige daad – Actuele tendensen*, Antwerpen: Kluwer, 1979, 159-177.

information.[220] This would mean that if a particular investor cannot prove that the rating was a decisive factor in his decision, the conditions for liability under Article 1382 of the Belgian Civil Code would not be met. It is clear that such a strict causality requirement seriously limits the number of successful claims for damages against credit rating agencies. Although there is no case law on the liability of credit rating agencies in Belgium, there are cases dealing with other types of liability or issues, such as the liability of banks for information they give the investing public about issues of financial instruments, that show the preference of courts to apply this type of reasoning.[221]

There is another way of looking at the causality problem using the so-called efficient market hypothesis.[222] If the incorrect credit rating has any effect at all, it has influenced the market conditions for rated financial instruments or instruments issued by the rated entity. Indeed, there is economic evidence that credit ratings do have an effect on the markets.[223] This means that the market conditions because of the incorrect rating did not correctly reflect the value of the financial instruments, as the future value of these instruments had been discounted to present value on the basis of an incorrect estimation of the risk. In that case, any investor that has made an investment decision under these circumstances suffers consequences that were caused by the incorrect rating, irrespective of whether this individual investor in fact directly relied on the rating or not, more even, irrespective of whether this individual investor was even aware of the credit rating. By acting on the prevailing market conditions that were influenced by the incorrect rating, the investor per definition has indirectly relied on the incorrect rating.[224] In

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[220] *See* CH. RESTEAU (†), *Traité des sociétés anonymes*, Vol. I, Brussels: Ed. Swinnen H., 1981, p. 350-351, par. 558; E. WYMEERSCH (*supra* footnote 196), p. 129; V. DE SCHRYVER (*supra* footnote 196), p. 351.

[221] *See e.g.* Court of Appeal of Brussels, 9 September 2003, *Forum Financier / Droit Bancaire et Financier*, 2005/V-VI, 332-335, followed by a case note by L. VAN DEN STEEN, "De precontractuele aansprakelijkheid van de bank-lead manager ten aanzien van de bank-tussenpersoon en diens client", 335-339; Commercial Court of Brussels, 17 October 2003, *Droit des Affaires – Ondernemingsrecht*, 2004/69, 83-87, followed by a case note by S. DELAEY, "Barrack Mines: Prospectusaansprakelijkheid van de kredietinstelling", 87-96; Court of Appeal of Brussels, 7 December 1976, *Revue Pratique des Sociétés*, 1977, nr. 5926, p. 31. Several court decisions in the famous Confederation Life cases (*see* about these cases *infra* footnotes 256-267 and accompanying text) also applied this type of causality requirement. *See* Commercial Court of Brussels, 26 March 1997, *T.R.V.*, 2000, 109-118, *Revue de la Banque*, 1997/5, 334-340, only declaring the contracts to purchase bonds for which the selling bank gave the clients a wrong rating null and void because of an error in consent by the client in the cases where the client had strong evidence showing he had specifically relied on the given rating in deciding to buy the bonds and denying this claim in the other cases; *see also* the judgments of the Commercial Court of Ghent of 13 February 2001 and the Commercial Court of Charleroi of 1 March 2001, not published as such but summarized by M. DELMEE in "Bank – Financieel Recht. Euro-obligaties, foutieve informatie – gebrek aan informatie", *Revue de Droit Commercial Belge*, 2001, 631-633, par. 15-16, p. 633.

[222] *See* R.J. GILSON & R.H. KRAAKMAN, "The Mechanisms of Market Efficiency", *Virginia Law Review*, Vol. 70, 1984, 549-644; for a review of research on the efficiency of the Brussels stock exchange, *see* R. GILLET, "Efficience informationalle de la Bourse de Bruxelles: une synthèse", *Revue de la Banque*, 1992/2, 75-83.

[223] This apparently is more the case with credit rating downgrades than with upgrades. *See* L.H. EDERINGTON & J.C. GOH (*supra* footnote 101); J. HAND, R. HOLTHAUSEN & R. LEFTWICH, "The Effect of Bond Rating Agency Announcements on Bond and Stock Prices", *Journal of Finance*, Vol. 47, June 1992, 733-752; J. WANSLEY & J. CLAURETIE, "The Impact of Credit Watch Placement on Equity Returns and Bond Prices", *Journal of Financial Research*, Vol. 8, Spring 1985, 31-42; there are, however, also numerous academic studies showing that ratings changes lag the market and that the market anticipates ratings changes. *See e.g.* G. HITE & A. WARGA, "The Effect of Bond-Rating Changes on Bond Price Performance", *Financial Analysts Journal*, May/June 1997, 35-47.

[224] For the typical application of this reliance presumption in the so-called fraud on the market theory, *see* the decision of the U.S. Supreme Court in Basic, Inc. v. Levinson, 485 U.S. 224 (1988); *see* J.R. MACEY, G.P. MILLER, M.L. MITCHELL & J.M. NETTER, "Lessons From Financial Economics: Materiality, Reliance, and Extending the

this way of looking at things, "[t]he defendant's misstatement injures the plaintiff not because it caused her to make a purchase that later, *ex post*, turned out to be a losing transaction, but because, *ex ante*, it caused her to pay a purchase price that is higher than it would have been but for the misstatement. The purchase is one that she might well have made even if the defendant had not made the misstatement."[225]

Since this type of causality is fully consistent with the equivalence theory, there is no principled objection against a Belgian court applying it in cases involving the extra-contractual liability of a credit rating agency *vis-à-vis* investors when an incorrect rating has been issued.[226] As far as we know, however, there have not been any Belgian decisions yet applying this presumed reliance based on the market efficiency hypothesis under Belgian liability principles, so it remains difficult to predict what the future might bring in this regard.

c) Validity of Exoneration of Extra-Contractual Liability

Most credit rating agencies include a disclaimer when they publish a rating or rating report about an entity. The disclaimer at present included in credit rating reports published by Moody's reads in part:[227]

> "All information contained herein is obtained by MOODY'S from sources believed by it to be accurate and reliable. Because of the possibility of human or mechanical error as well as other factors, however, such information is provided "as is" without warranty of any kind and MOODY'S, in particular, makes no representation or warranty, express or implied, as to the accuracy, timeliness, completeness, merchantability or fitness for any particular purpose of any such information. Under no circumstances shall MOODY'S have any liability to any person or entity for (a) any loss or damage in whole or in part caused by, resulting from, or relating to, any error (negligent or otherwise) or other circumstance or contingency within or outside the control of MOODY'S or any of its directors, officers, employees or agents in connection with the procurement, collection, compilation, analysis, interpretation, communication, publication or delivery of any such information, or (b) any direct, indirect, special, consequential, compensatory or incidental damages whatsoever (including without limitation, lost profits), even if MOODY'S is advised in advance of the possibility of such damages, resulting from the use of or inability to use, any such information. The credit ratings and financial reporting analysis observations, if any, constituting part of the information contained herein are, and must be construed solely as, statements of opinion and not statements of fact or recommendations to purchase, sell or hold any securities. NO WARRANTY, EXPRESS OR IMPLIED, AS TO THE AC-

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Reach of Basic v. Levinson", *Virginia Law Review*, Vol. 77, 1991, 1017-1049; for a recent refinement, *see* Dura Pharmaceuticals, Inc. v. Broudo, 125 S.Ct. 1627 (2005); for a discussion, *see* M.B. FOX, "Understanding Dura", *The Business Lawyer*, Vol. 60, nr. 4, August 2005, 1547-1576.

[225] M.B. FOX (*supra* footnote 224), p. 1548.

[226] For the same point with respect to prospectus liability, *see* V. DE SCHRYVER (*supra* footnote 196), p. 352 & 354.

[227] The quoted text is part of the standard disclaimer found at the end of every opinion published by Moody's on its web site (www.moodys.com) at the time of finalizing this report (last visited on March 13, 2006).

> CURACY, TIMELINESS, COMPLETENESS, MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY SUCH RATING OR OTHER OPINION OR INFORMATION IS GIVEN OR MADE BY MOODY'S IN ANY FORM OR MANNER WHATSOEVER. Each rating or other opinion must be weighed solely as one factor in any investment decision made by or on behalf of any user of the information contained herein, and each such user must accordingly make its own study and evaluation of each security and of each issuer and guarantor of, and each provider of credit support for, each security that it may consider purchasing, holding or selling. […]"

While this text may contain some well meant "user instructions" for investors or other persons considering forming their opinion based on the report or the rating included in it, it obviously is mainly intended to shield the credit rating agency against potential extra-contractual liability *vis-à-vis* members of the public. It tries to achieve this result in two ways. First, the clause tries to limit the expectations the reader or user can legitimately have in the accuracy of the information or rating included. By doing so, it tries to avoid that an eventual incorrect rating by itself would already establish a basis for liability: if the rating had never been pretended to be "correct" and the user never expected it to be "correct", then the fact that it turns out to be incorrect is by itself no indication of a problem. Second and more importantly, the clause explicitly excludes any potential liability in the broadest of terms.

In principle, Belgian law recognizes the validity of consensual exonerations of extra-contractual liability.[228] Articles 1382-1386 of the Belgian Civil Code are not considered to be public policy ("*ordre publique*") nor even imperative law, but merely default rules applicable in the relation between two persons that did not contractually agree on different rules.[229] As a result, the validity of so-called Aquilian exonerations is judged using the same criteria as those governing the validity of contractual exonerations, discussed above:[230] such exonerations are valid, except for the cases where a specific statutory or regulatory provision imposes a mandatory liability standard and the cases of intentional faults.[231]

This, however, does not mean that Aquilian exonerations are always successfully invoked in Belgian courts. In a decision that seems to be of particular relevance for the topic under discussion in this report, the Commercial Court of Brussels in the so-called

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[228] *See* H. VANDENBERGHE, "Exoneratie- en vrijwaringsbeding bij onrechtmatige daad – Samenloop en coëxistentie", in J.H. HERBOTS (ed.), *Exoneratiebedingen*, Brugge: die Keure, 1993, 69-100, par. 2, p. 73-77; R. KRUITHOF 1984 (*supra* footnote 120), p. 265; E. DIRIX (*supra* footnote 120), par. 16, p. 1185; R.O. DALCQ (*supra* footnote 120), II, par. 4294; *see e.g.* Cass., 6 December 1991, *Pasicrisie belge*, 1992, I, 266; Cass., 29 September 1972, *Pasicrisie belge*, 1973, I, 124; Cass., 21 February 1907, *Pasicrisie belge*, 1907, I, 135.

[229] R. DRION, "Aperçu sur quelques problèmes soulevés par les clauses d'irresponsabilité", *Annales de Droit et de Sciences Politiques*, 1948-1949, 357-372, p. 364-366; L. CORNELIS (*supra* footnote 120), par. 8, p. 201-202; *see e.g.* Cass., 15 February 1993, *Pasicrisie belge*, 1993, I, 171; Cass., 4 January 1993, *Pasicrisie belge*, 1993, I, 1; Cass., 21 February 1907, *Pasicrisie belge*, 1907, I, 135.

[230] *See supra* footnotes 120-125 and accompanying text.

[231] *See* H. VANDENBERGHE a.o. 2000 (*supra* footnote 135), par. 45, p. 1702-1704; H. VANDENBERGHE a.o. 1995 (*supra* footnote 135), par. 34-36, p. 1225-1242. For an example of a statutory provisions forbidding exoneration, *see* Article 17 of the Belgian Public Offering of Securities Act of 2003 (*supra* footnote 49).

Barrack Mines case held an exoneration clause included in promotional materials distributed by a bank that acted as an intermediary in the acquisition of certain financial instruments by investors not to be valid. The Court reasoned that such an exoneration clause would render the role of the bank for the introduction and further support for the financial instrument after its listing totally meaningless. The Court stressed that the bank had in its efforts taken the floor to speak to the public and therefore cannot invoke any exoneration clause that would take all the meaning from its words and would in effect warn the public that whenever the bank spoke in relation to a project, this word should not be taken seriously.[232]

Such broad language would in principle render a general exoneration included in a credit report issued by a rating agency invalid. However, we are not aware of any other court decisions containing such broad critical language on the validity of Aquilian exonerations in relation to extra-contractual liability for losses caused by faulty information provided to the investing public. Moreover, an appeal has been lodged against this decision, and at the time of finishing this report, the Court of Appeal Brussels had not decided yet whether it will confirm or reverse the decision. One shouldn't therefore necessarily assume that this decision represents established law in Belgium.

The issue that causes most disputes relating to such exonerations is the question whether the person that tries to recover damages based on extra-contractual liability has actually consented to the exoneration clause.[233] Here, the exonerations credit rating agencies include in their credit reports might risk not being completely safe. Under Belgian law, no explicit consent to the exoneration clause is required: as is the case for contracts in general, implicit consent to an Aquilian exoneration clause, inferred from a person's behavior, is sufficient.[234] However, this does not mean that when a person publishing information notes in this publication that he exonerates himself for any liability if the information would turn out to be wrong, every recipient of this published information has accepted this exoneration merely because he has read that clause.[235] In practice, Belgian courts enjoy a significant margin of discretion within which they appear to judge such exoneration clauses case by case, based on their opinions of reasonableness and fairness.[236]

The case for such Aquilian exoneration becomes even harder if one realizes that in reality the investing public does not learn about the credit ratings directly from the credit reports issued by the credit rating agencies, but from general reporting in the news me-

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[232] Commercial Court of Brussels, 17 October 2003, *Droit des Affaires – Ondernemingsrecht*, 2004/69, 83-87, p. 84.

[233] See H. VANDENBERGHE a.o. 2000 (*supra* footnote 135), par. 45(b), p. 1704; H. VANDENBERGHE a.o., 1995 (*supra* footnote 135), par. 36.A, p. 1236-1238.

[234] Cass., 11 December 1970, *Pasicrisie belge*, 1971, I, p. 347; *see also* Cass., 20 May 1988, *Pasicrisie belge*, 1988, I, p. 1149.

[235] The textbook example usually invoked here is the usual warning line accompanying the reporting of winning lottery numbers on television.

[236] *See* R. KRUITHOF 1984 (*supra* footnote 120), par. 17, p. 255; H. VANDENBERGHE a.o. 1995 (*supra* footnote 135), par. 36.A, p. 1237-38.

dia and the mentioning of the ratings in documentation relating to investments or by investment advisors or more generally, personnel of financial institutions helping the individual investor making his decisions. One can therefore doubt whether most investors could have – even implicitly – consented to an exoneration clause they have never seen or heard of. Also, the argument that a person relying on information of which the publisher warns that he cannot guarantee its correctness behaves carelessly and that this negligence should be considered as a fault under Article 1382 of the Belgian Civil Code so the investor himself would at least partially bear the responsibility of his losses, a method that could be used to avoid the problem that consent cannot be inferred,[237] cannot be invoked in cases where the investor did not in fact receive the warning that originally accompanied the credit rating when it was issued.

F. Injunctions based on Fair Trade Practices Regulation

Belgian law forbids all acts violating the honest trading practices through which a professional supplier of goods or provider of commercial services hurts or can hurt the professional interests of other suppliers or service providers.[238] While the standard of fault used in this rule is in reality the same as the one used under the extra-contractual liability based on Article 1382 of the Belgian Civil Code applied to trade practices – the behavior of the supplier or service behavior is compared with what a normally prudent and diligent supplier or service providor would do in similar circumstances – the crucial difference between these provisions is that Article 1382 of the Civil Code only provides for a remedy if and when damages actually resulted from the behavior, while the fair trade practices rule imposes a behavioral obligation, irrespective of whether damages are actually caused or not; only the possibility that damages might result is required for this provision to apply.[239]

The remedy against a breach of this behavioral standard is an injunction, which is specifically provided by the Belgian Trade Practices and Consumer Protection and Information Act.[240] This Act explicitly allows such an injunction, ordering a supplier or providor of services to immediately cease a forbidden practice, to be used against publicity forbidden under the Belgian Trade Practices and Consumer Protection and Information Act,[241] not only when it has been published already, but also before it has been published.[242]

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[237] *See* R. KRUITHOF 1984 (*supra* footnote 120), par. 11, p. 248-250.

[238] Article 93 of the Belgian Trade Practices and Consumer Protection and Information Act (*supra* footnote 126).

[239] *See* J. STUYCK (*supra* footnote 129), par. 161, p. 129-130 and par. 180, p. 144; *see e.g.* President of the Commercial Court of Kortrijk, 30 June 1986, *Pratiques du Commerce – Handelspraktijken*, 1986, II, 283.

[240] Article 95, 1st paragraph, of the Belgian Trade Practices and Consumer Protection and Information Act (*supra* footnote 126).

[241] Articles 23-23*bis* of the Belgian Trade Practices and Consumer Protection and Information Act (*supra* footnote 126) contain a list of prohibited forms of publicity.

[242] Article 95, 2nd paragraph, of the Belgian Trade Practices and Consumer Protection and Information Act (*supra* footnote 126); *see e.g.* President of the Commercial Court of Kortrijk, 17 August 2001, *Jaarboek Handelsprak-*

Some Belgian courts, however, even go further and are prepared to issue injunctions against the publication of information or an opinion which is not considered to be publicity under the meaning attached to that term in the Belgian Trade Practices and Consumer Protection and Information Act,[243] when they consider the publication as behavior inconsistent with the general fair trade practices standard. Thus, injunctions have for instance been imposed on a newspaper, periodical or culinary guide to prohibit the publication of a negative opinion about a company or restaurant.[244]

This is relevant for the subject matter of this report, as the injunctive remedy under the Trade Practices and Consumer Protection and Information Act is not limited to unfair behavior emanating from a competitor but is available against unfair practices from any other person this statute is applicable to if that practice risks causing damage to a professional, even if that person is active in a completely different sector.[245] Therefore, it seems conceivable that a company that has received an unsolicited credit rating could attempt to use this remedy to force the rating agency to withdraw the rating or, if the rating has not been issued yet but is about to be published, to try to obtain an injunction against such a publication based on this statute.

Several cases have involved the critical review of the business of a service providor in the press, in particular culinary reviews. In general, Belgian courts do accept that critics enjoy a wide margin of opinion freedom and are allowed to publish both positive and even extremely negative opinions.[246] In the cases where the courts did impose an injunction, however, it usually was the fact that the particular wordings chosen by the critic were so denigrating and unnecessarily rude that rendered the practice a violation of the fair trade practices standard.[247] While this does not seem to be likely a problem

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tijken, 2001, 233; Court of Appeal of Brussels, 22 September 1998, *Jaarboek Handelspraktijken*, 1998, 615; Court of Appeal of Brussels, 19 May 1998, *Jaarboek Handelspraktijken*, 1998, 118; President of the Commercial Court of Turnhout, 18 November 1994, *Handelspraktijken*, 1995/1, 41; President of the Commercial Court of Brussels, 28 April 1994, *Jaarboek Handelspraktijken*, 1994, 93.

[243] Publicity is in this Act understood to be every communication that directly or indirectly is intended to promote the sale of products or services. *See* Article 22 of the Belgian Trade Practices and Consumer Protection and Information Act (*supra* footnote 126).

[244] *See e.g.* President of the Commercial Court of Brussels, 31 December 1969, *Jurisprudence commerciale de Belgique*, 1970, 253; President of the Commercial Court of Oudenaarde, 2 February 1988, *Revue de Droit Commercial Belge*, 1988, 964, confirmed on appeal by the Court of Appeal of Ghent, 9 December 1988, *Rechtskundig Weekblad*, 1989-1990, 91, *Tijdschrift voor Gentse Rechtspraak*, 1989, 112, and an appeal against this decision was rejected by the Cour de Cassation, but without this Court actually dealing with the question whether an injunction violates Article 25 of the Constitution or not (Cass., 15 December 1989, *Tijdschrift voor Gentse Rechtspraak*, 1990, 137-138).

[245] *See* P. DE VROEDE, "Overzicht Rechtspraak Wet op de Handelspraktijken (1983-1988)", *Tijdschrift voor Privaatrecht*, 1989, 189-383, par. 209, p. 297; J. STUYCK (*supra* footnote 129), par. 52, p. 51-52; *see e.g.* Court of First Instance of Brussels, 13 February 1973, *Pasicrisie belge*, 1973, III, 36.

[246] *See e.g.* President of the Commercial Court of Antwerp, 6 December 1990, *Jaarboek Handelspraktijken*, 1990, 511; President of the Commercial Court of Leuven, 28 November 1989, *Jaarboek Handelspraktijken*, 1989, 425; *see also* L. NEELS (*supra* footnote 146), p. 200-201.

[247] *See* President of the Commercial Court of Oudenaarde, 2 February 1988 and in the same case Court of Appeal of Ghent, 9 December 1988 (*supra* footnote 244); *see also* G.L. BALLON (*supra* footnote 156), p. 1002; G.L. BALLON, "De veroordeling krachtens de Wet Handelspraktijken wegens slechtmaking: een middel om perskritiek op een onderneming te beteugelen?", *Revue de Droit Commercial Belge*, 1988, 968-971, p. 970; 1545; E. GULDIX (*supra* footnote 146), p. 523-524; D. VOORHOOF, "De vordering tot staking van denigrerende of slechtmakende

in the case of credit ratings, it is not unthinkable that for some other reason the publication of an unsollicited rating would be considered to be an unfair trade practice. As was already discussed above, the fact that the rating would be lower than the rated entity would have hoped for, is in and by itself not enough of a reason to render the publication a fault in the sense of Article 1382 of the Belgian Civil Code,[248] so such publication will by itself also not violate the fair trade practices standard. But if a rating is incorrect because of a fault commited by the rating agency – behavior inconsistent with the *bonus pater familias* standard – so this behavior can be the basis for a claim for damages based on Article 1382 of the Civil Code, by the same token this fault could form the basis for injunctory relief based on the Trade Practices and Consumer Protection and Information Act.[249]

Several scholars have raised serious objections against these line of cases. First, these decisions are inconsistent with the Constitutionally imposed cascade liability for law suits based on published opinions.[250] But secondly, it is argued that allowing a judge to issue an injunction against the publication of an opinion boils down to a form of government censorship,[251] forbidden by Article 25 of the Belgian Constitution.[252] In

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kritiek in persartikelen", in *Liber Amicorum Paul De Vroede*, Diegem: Kluwer Rechtswetenschappen België, 1994, 1540-1559, p. 1553.

[248] *See supra* footnotes 156-157 and 198 and accompanying text.

[249] *See* J. STUYCK (*supra* footnote 129), par. 182 *et seq*., p. 145 *et seq*.

[250] *See supra* section E.2.a)(ii). *See e.g.* Court of Appeal of Brussels, 21 June 1996, *Jaarboek Handelspraktijken*, 1996, 447; *cf.* President of the Commercial Court of Brussels, 8 March 1996, *Jaarboek Handelspraktijken*, 1996, 518; President of the Commercial Court of Liège, 27 September 1994, *Jaarboek Handelspraktijken*, 1994, 39; *see* D. VOORHOOF, "Pers en 'Gerecht'. Hoe door de beteugeling van culinaire kritiek de bescherming van de expressie- en informatievrijheid op een laag pitje wordt gezet", *Tijdschrift voor Gentse Rechtspraak*, 1989, 115-122, p. 116-117; D. VOORHOOF, "Culinaire kritiek en het Hof van Cassatie. Over kleuren en smaken valt te twisten", *Tijdschrift voor Gentse Rechtspraak*, 1990, 138-140; D. VOORHOOF (*supra* footnote 247), p. 1556-1558; E. BREWAEYS, "Persvrijheid en economische kritiek", *Rechtskundig Weekblad*, 1990-1991, 91-93, p. 92; M. HANOTIAU (*supra* footnote 160), p. 384. This is remarkable, as the injunction against prohibited publicity that is specifically foreseen by statute, is conditioned by a cascade system copied from the constitutional cascade liability system for the press. *See* Article 27 of the Belgian Trade Practices and Consumer Protection and Information Act (*supra* footnote 126). One can therefore assume that the legislator did not intend for injunctions under this Act to be available against other persons than the author if this author is known and present in the country. The reason some courts have ignored this, is probably the fact that authors of opinions or informative pieces in the media – as opposed to advertisers – most of the time do not themselves qualify as "professional sellers" under this Act, so that the injunction cannot be used against them. *Cf.* E. GULDIX, (*supra* footnote 146), p. 515; D. VOORHOOF (*supra* footnote 247), p. 1558. *See* however President of the Commercial Court of Brussels, 1 March 1991, *Droit des Affaires – Ondernemingsrecht*, 1991/21, 89. not allowing a claim for an injunction against the publisher because the authors were identifiable and thus applying the constitutional cascade liability system.

[251] *See* for example E. BREWAEYS (*supra* footnote 250), p. 92; J. VELAERS, "Het gerechtelijk publikatie- en verspreidingsverbod en de persvrijheid", *Limburgs Rechtsleven*, 1984, 144; D. VOORHOOF & J. BAERT, "Rechter en Persvrijheid", *Tegenspraak*, 1984, nr. 2, p. 14; L. NEELS, "De media in het geding", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 1980, 387.

[252] In its first paragraph, Article 25 of the Belgian Coordinated Constitution of 1994 specifically prohibits censure; in its French version, the relevant part states: "la censure ne pourra jamais être établie". This provision is generally understood to outlaw preventive measures in general. *See* D. DE PRINS, "De burgerlijke rechter en de persvrijheid", *Rechtskundig Weekblad*, 2000-2001, 1445-1456; A. SCHANS, "Inédits de droit de la presse: commentaries de jurisprudence relative à la liberté d'expression", *Revue de Jurisprudence de Liège, Mons et Bruxelles*, 1996, 1152 *et seq*. With this norm, the Belgian Constitution provides more protection than Article 10 of the European Convention on Human Rights, which does not contain a *per se* prohibition of censorship. *See* Judgment of the E.C.H.R. of 20 November 1988 in the case of Markt Intern Verlag GmbH and Klaus Beermann, Case nr. 3/1988/147/201, Publ. Court, Series A, Vol. 165. However, as Article 53 of the European Convention of Human Rights states, this Treaty does not limit the constitutional rights and fundamental freedoms protected by

proclaiming this principle, as one court stated, the framers of the Constitution weighed the interest of press freedom against other perfectly legitimate private interests that might be hurt by the press, and clearly chose to let the press freedom prevail; thus, the freedom of the press can surely not be rated lower than the mere commercial insterests of a private person or company.[253]

However, there is a long lasting dispute among Belgian courts and commentators whether injunctions against a publication or broadcasting are in fact a form of censure forbidden by Article 25 of the Belgian Constitution. While some courts have categorically excluded the possibility of a judicial injunction against publication or broadcasting,[254] there are also plenty of court decisions that consider a prohibition to publish or broadcast as a necessary temporary measure acceptable when an obvious and manifest violation of a threatened right is likely and such prohibition can in an efficient way avoid irreparable harm to appear.[255]

G. The Relevance of Credit Ratings for Bank Liability

Although the legal status of credit ratings and the liability of credit rating agencies thus far have not been litigated in Belgium, there has been an important series of court decisions in one particular high profile case about the liability of a bank as a lead manager of an underwriting and placement syndicate or as a distributor of securities, in which the role and relevance of credit ratings was explicitly discussed.

The case concerned subordinated Eurobonds issued by the Canadian insurance company Confederation Life and underwritten by Luxembourg and Belgian banks.[256] The bonds were privately placed with retail investors located in Luxembourg and Belgium,[257] and

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the internal law of a contracting state. *See* J. VELAERS (*supra* footnote 251), p. 146; E. BREWAEYS (*supra* footnote 250), p. 92-93.

253 *See* the judgment of the Court of Appeal of Brussels of 21 February 1990, *Rechtskundig Weekblad*, 1990-1991, 89-91, p. 90.

254 *See* D. VOORHOOF (*supra* footnote 158), p. 69-74.

255 *See* H. VANDENBERGHE (*supra* voetnoot 149), p. 120 and cases cited there in footnote 56.

256 For comments on this case, *see* J. TYTECA, "Confederation Life – Adviesverstrekking aan de belegger", *Tijdschrift voor Rechtspersoon en Vennootschap*, 2000, 118-122; F. DE BAUW & M. DUPLAT, "Emission d'euro-obligations et devoir de due diligence du banquier chef de file. Observations à propos de l'arrêt Confederation Life", *Forum Financier / Droit Bancaire et Financier*, 2003/II-III, 136-144.

257 Under the regime for Eurobonds applicable at the time, this placement, which did not involve a generalized campaign of advertising or canvassing, was considered private and therefore did not trigger the requirement to publish a prospectus (*see* the definition of "Euro-securities" in Article 3(f) and the exemption granted by Article 2.2.(l) of Council Directive 89/298/EEC of 17 April 1989 Coordinating the Requirements for the Drawing-Up, Scrutiny and Distribution of the Prospectus to be Published when Transferable Securities are Offered to the Public, *Official Journal* L124/8 of 5 May 1989; this exemption – at least in this formulation – is not included in Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the Prospectus to be Published when Securities are Offered to the Public or Admitted to Trading and amending Directive 2001/34/EC, *Official Journal* L345/64 of 31 December 2003, which in the meantime has replaced Directive 89/298). As a consequence, the Confederation Life Eurobonds were issued without a regular public offering prospectus, approved by the securities regulator.

were subsequently listed on the Luxembourg stock exchange.[258] When the issuer one year after issuing the bonds collapsed and entered into bankruptcy proceedings, a large number of investors protested and several of them filed law suits, leading to a series of court decisions.[259] The investors brought claims against the intervening banks that sold them the securities based on contractual and pre-contractual liability and against the bank that acted as the lead manager of the underwriting and placement syndicate based on extra-contractual liability. Although these decisions contain valuable information on the liability of banks acting as lead manager or as a member of the placement syndicate under Belgian law, the present discussion of these cases will be limited to those aspects that directly touch upon the role of the credit rating agencies.[260]

A first such element discussed in the Confederation Life decisions is the question whether the lead managing bank should undertake its own full due diligence on the issuer and the issue, and the related question to what extent a lead manager is allowed to rely on the credit rating agencies and their published analyses to assess the issuer's creditworthiness. In this context, the decisions discuss the role of the credit ratings in a placement of securities in general.

This due diligence question was at the center of the debate in a suit an investor brought against the lead managing bank. As this investor had bought the bonds from another distributing bank, it could not bring a contractual claim against the lead managing bank and based its claim instead on the general tort of negligence. The investor argued that the lead bank had not fulfilled its professional duties as it had not undertaken its own complete due diligence of the issuer. The Commercial Court of Brussels, hearing the case at first instance, dismissed this argument, stating that the lead managing bank was allowed to rely on the favorable information it had obtained in the market, including the information distributed by the rating agencies.[261]

Confirming this decision, the Court of Appeal of Brussels acknowledged that a lead managing bank should verify the issuer's apparent solvency and would be liable if it would underwrite and place securities when it could not reasonably have been unaware

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[258] Because of this listing, a listing prospectus, approved by the listing authority in Luxemburg, was subsequently published, but this was not discussed in the court decisions.

[259] *See* Commercial Court of Brussels, 26 March 1997, *Tijdschrift voor Rechtspersoon en Vennootschap*, 2000, 109-118, *Revue de la Banque*, 1997/5, 334-340; Commercial Court of Brussels, 10 February 2000, *Tijdschrift voor Rechtspersoon en Vennootschap*, 2000, 100-105; Brussels Court of Appeal, 8 March 2002, *Forum Financier / Droit Bancaire et Financier*, 2002/IV, 234-237; *see also* the judgments of the Commercial Court of Ghent of 13 February 2001 and the Commercial Court of Charleroi of 1 March 2001, not published as such but summarized by M. DELMEE in "Bank – Financieel Recht. Euro-obligaties, foutieve informatie – gebrek aan informatie", *Revue de Droit Commercial Belge*, 2001, 631-633. Apart from these litigated claims, an undisclosed number of disputes were settled.

[260] It is interesting to note that none of the credit rating agencies that had rated Confederation Life or the Eurobonds were involved in the law suits; not only did no investor bring a claim against these rating agencies, but the respondent banks that had relied on the credit ratings did not call them into the dispute. One can suspect that the banks did not consider it worthwhile to jeopardize their relationship with the credit rating agencies for the sake of what overall was a relatively minor liability suit.

[261] Commercial Court of Brussels, 10 February 2000 (*supra* footnote 259), p. 102-104; *see also* Commercial Court of Brussels, 26 March 1997 (*supra* footnote 259), p. 111-113.

of the fact that the issuer would most likely not be able to meet its obligations. But the Court of Appeal did not see any basis for requiring the lead managing bank to undertake its own full due diligence when analysis by independent, undoubtedly more specialized analysts is available, provided the bank does not merely rely on the statements and declarations of the issuer and formulates its own opinion on the issuer's financial position. With "independent analysis", the Court clearly refers to the activity of the credit rating agencies that, according to the decision, proceed to a thorough analysis of the financial and commercial situation of the issuer.[262] The opinion follows the existing practice in the markets whereby the lead managers do not investigate in full the business of the issuer, the more so as the time span between the announcement of the issue and the decision to take up the securities as lead manager is very short.

The second element discussed in these cases concerns the liability of the distributing banks for not disclosing a credit rating to investors or for giving investors an erroneous rating. At the time of the placement, Confederation Life as an issuer had received an AA rating from Standards & Poor's and an AA+ rating from Duff and Phelps, one of the predecessors of Fitch. However, the Eurobonds at issue themselves were rated less favorably at A+, indicating Standard & Poor's reservations about the weakening position of the issuer. The Belgian bank BBL, not a member of the syndicate, had published its own A2 rating for the bonds.[263] Some of the distributing banks had either not told the investors about the rating or had told some investors that the Eurobonds had received a AA- rating – one investor was even told the bonds were rated at AAA – obviously mixing up the credit rating of the issuer and the rating of the issue.[264]

In one of the cases tried, the Brussels Commercial Court held the bank liable on two counts. On the one hand it declared the purchase of the Eurobonds by certain investor null and void on the basis of an error in their consent. The court found that these investors – most plaintiffs were pensioners or people having invested their pension money – had purchased the securities specifically as a very safe investment, an investment for the "*bonus pater familias*". The fact that the selling bank had told them the credit rating was higher than it actually had been was considered a critical element, especially in light of the refusal other banks to take part in the placement because they considered the securities too risky.[265] In addition, the bank was held liable *vis-à-vis* other investors

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[262] Court of Appeal of Brussels, 8 March 2002, (*supra* footnote 259), p. 235-236, quoting the Luxembourg Monetary Institute (Institut Monétaire Luxembourgeois, the Luxembourg securities regulator at the time) as having written that "la pratique sur place consiste en ce que le lead-manager, qui doit fournir aux investisseurs potentiels une information aussi complète que possible sur l'émetteur, n'ajoute pas sa propre analyse à celle réalisée par les agences de notation quant à la solvabilité de l'émetteur".

[263] About these BBL ratings, *see* already *supra* footnotes 28-32 and accompanying text.

[264] See for the facts the decision of the Commercial Court of Brussels of 26 March 1997(*supra* footnote 259), p. 113.

[265] Commercial Court of Brussels, 26 March 1997 (*supra* footnote 259), p. 114-115; *see* however the decision of the Court of Appeal of Brussels of 10 February 2000, not published but referred to by M. DELMEE in "Bank – Financieel Recht. Euro-obligaties, foutieve informatie – gebrek aan informatie", *Revue de Droit Commercial Belge*, 2001, 631-633, par. 7, p. 632, which did not allow a similar claim based on error in consent by an investor against a stock exchange broker that had not advised the purchase of the Eurobonds but had merely bought them for the investor at his own request. The District Court of Luxemburg (Great Duchy of Luxemburg) in its decision of 12 December 1997 in a similar Confederation Life dispute was also of the opinion that the wrong rating given by the

whom it had specifically advised to buy the Eurobonds, as the fact that it had not communicated the true rating was considered a breach of its information duties, a pre-contractual fault ("*culpa in contrahendo*").[266] Although the point was merely mentioned and not developed any further, the Court also alluded to the fact that the bank was confronted with a conflict of interest in advising the purchase of the bonds it had underwritten.[267]

The lessons to be drawn from this series of decisions can be summarized as follows. Credit ratings do matter and when a bank refers to such ratings, this reference should be true and precise. Lead managers are allowed to rely on credit ratings issued by independent credit rating agencies and limit their own creditworthiness analysis, but a reference to a credit rating will not be a sufficient defense if the bank knew or as a reasonable professional should have known the issuer was unlikely to meet its obligations.

H. Some Concluding Remarks

Recent attention for the regulation and liability of credit rating agencies has been ignited by the Enron scandal: until just four days before the company declared bankruptcy, it had been rated as a good credit risk.[268] Investigations in the United States revealed that the coverage and assessment of Enron by the rating agencies was characterized by a disappointing lack of diligence and care.[269] This was perceived to be a potential systemic problem, as a combination of regulatory provisions functioning as entry barriers limit the number of active rating agencies and as a result restrict competition,[270] the credit rating agencies are subject to little or no formal regulation or oversight, and their liability traditionally has been limited by regulatory exemptions and constitutional free

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bank was not a decisive factor in the investor's decision to invest; *see Tijdschrift voor Rechtspersoon en Vennootschap*, 2000, 105-109, p. 108; *see also* J.-P. BUYLE, "Bankrecht: Kredietinstelling – Bemiddelaar bij financiële transacties – Aansprakelijkheid", *Revue de Droit Commercial Belge*, 1998, 126-127, p. 127.

266 *See* however the decision of the Commercial Court of Ghent of 13 February 2001 (*supra* footnote 259), par. 12, p. 632, stating that a "minimal" difference between the actual rating and the rating mentioned was not sufficient to conclude that the banks had committed a fault.

267 Commercial Court of Brussels, 26 March 1997 (*supra* footnote 259), p. 115-117.

268 *See* the hearing before the U.S. Senate Committee on Governmental Affairs "Rating the Raters" (*supra* footnote 21); *see also* C.A. HILL, "Rating Agencies Behaving Badly: The Case of Enron", *Connecticut Law Review*, Vol. 35, 2003, 1145-1155.

269 *See* "Financial Oversight of Enron: The SEC and Private-Sector Watchdogs", Report of the Staff of the Senate Committee on Governmental Affairs, 107th Congress, 2d Session, Committee Print, S. Prt. 107-75, Washington: U.S. Government Printing Office, 7 October 2002, p. 76-99, in particular p. 89, available at the GPO's web site at <www.gpoaccess.gov/congress> (hereinafter "Financial Oversight of Enron"): "While the credit rating agencies did not completely ignore problems at Enron when those problems became very apparent, their monitoring and review of the company's finances fell far below the careful efforts one would have expected from organizations whose ratings hold so much importance."

270 See "SEC Report" (*supra* footnote 2), p. 36-40; *See already* U.S. Department of Justice, Antitrust Division, "Comments of the United States Department of Justice before the Securities and Exchange Commission", 6 March 1998, cited by L.J. WHITE (*supra* footnote 3), p. 28; *see also* the letter of 19 January 2001 from the American Antitrust Institute (AAI), authored by L.J. White, member of the AAI Advisory Board, to Arthur Levitt, Chairman of the SEC, available on the AAI's web site under the title "AAI Urges SEC to Ease Entry for Smaller Credit Ratings Companies" at <www.antitrustinstitute.org/recent/98.cfm>.

speech protections.[271] Combined, these factors create an environment in which there is little to hold credit rating agencies accountable for future poor performance.[272]

A review of the situation under Belgian law paints a slightly different picture. On the one hand, there are significantly less regulations relying on credit ratings. Together with the relatively smaller size of Belgian companies and the institution-based financing system, this has resulted in very few Belgian companies acquiring credit ratings. However, there is a clear tendency in more recent financial regulations to increase the use of and reliance on external credit ratings, the Basel II Accord of course being the most notable example. Although no direct regulation of the activity of credit rating or the credit rating agencies as such exists or is considered, the new Capital Requirement Directive foresees a coordinated consultation process between the different national authorities in the different EU Member Countries on the recognition of credit rating agencies. Here, the explicitation of a procedure and substantive criteria for recognition of rating agencies are a clear progress compared to the existing Belgian practice of having regulations depending on ratings issued by recognized rating agencies without a specified or published procedure and criteria for such recognition.

With regard to liability as a means of holding credit rating agencies accountable, Belgian law offers more realistic chances of declaring a rating agency effectively liable for damages caused by its lack of diligence or care than U.S. law. As such, constitutional free speech guarantees are not considered to change the applicable liability standard, and the freedom of the press guarantee in the form of a cascade liability system is most likely not applicable to credit ratings.

In general, the Belgian standard of liability and its application by the courts is relatively claimant friendly. Although no Belgian decision about the liability of a credit rating agency is known to us, we consider it to be a very realistic possibility that a Belgian court would declare a credit rating company liable for damages caused to the rated entity and/or the investing public when because of its lack of diligence or care a rating incorrectly reflects the creditworthiness of the rated entity.

At the same time, however, Belgian law is lenient with exoneration clauses. This means that a credit rating agency has a good chance that its disclaimers will be held valid and binding, except in cases of intentional wrongs or criminal offences.

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[271] *See* G. HUSISIAN (*supra* footnote 44).

[272] *See* "Financial Oversight of Enron" (*supra* footnote 269), p. 98 ("The problem is that the credit rating agencies have no incentive to catch the few wrongdoers, no matter how huge the consequences to the market. […] Assuming that most companies are honest, […] credit rating agencies will be correct in most cases without having to go much beyond the face of financial statements. Their limited liability and their entrenched position of power means that they do not have to go to additional lengths in order to expose the outlier corporations that are not being truthful"); *see also* "SEC Report" (*supra* footnote 2), p. 3-4 and p. 31-32.

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