FACULTY OF
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THIRD-PARTY CERTIFIERS

An Inquiry into their Obligations and Liability in Search of Legal Mechanisms to Increase the Accuracy and Reliability of Certification

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Doctoral dissertation submitted to
the Faculty of Law and Criminology of Ghent University
in fulfilment of the requirements for the Degree of Doctor in Law

June 2018

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SUMMARY

Third-party certifiers such as credit rating agencies or classification societies issue certificates attesting that a certified item complies with certain standards or meets (legal) requirements. Although the issuance of this certificate constitutes the performance under the agreement with the entity requesting the certification services, the information included in this attestation can and will also be used by persons with whom certifiers do not have any contractual relationship or even by the public at large. One can think of investors relying on ratings, cargo-owners requiring a class certificate before contracting with a shipowner or consumers buying a particular product covered by a certificate. As such, third parties using certificates need to be sure that they are accurate and reliable. A certifier has to be trustworthy and apply the appropriate level of care in performing its functions for the certification mechanism to work. Several recent scandals, however, show that certificates do not always correspond with the 'true' or 'real' value of the certified item. Some famous examples are inaccurate credit ratings that contributed to the 2008 financial crisis, the sinking of the Erika and the Prestige and the position of classification societies or the involvement of a notified body in the certification of the defective PIP breast implants. Third parties might thus incur losses or suffer injuries, despite the issuance of a certificate attesting that an item complied with the applicable norms. Based on an analysis of a third-party certifier's obligations and liability, the dissertation will evaluate a number of legal mechanisms aiming to increase the accuracy and reliability of certification.

SAMENVATTING

Certificeringsdiensten zijn onafhankelijke partijen die een certificaat verstrekken. Dit certificaat geeft aan dat een product, dienst, persoon of informatie (het 'gecertificeerde *item*') aan bepaalde normen voldoet. Hoewel het verlenen van een certificaat meestal het voorwerp is van een overeenkomt met de partij die het aanvraagt, zal het ook door derden die vreemd zijn aan het certificeringscontract worden gebruikt. Zij baseren zich op het certificaat bij het nemen van beslissingen. Zo beschouwen ladingeigenaars een certificaat dat verstrekt werd door een classificatiemaatschappij als een indicatie dat het schip aan bepaalde technische en veiligheidsnormen voldoet. Op grond hiervan gaan zij met de scheepseigenaar een contract aan om de lading te vervoeren. Een ander voorbeeld zijn *credit rating agencies* die aan de hand van *ratings* de kredietwaardigheid van bepaalde vormen van schuldbewijzen of emittenten beoordelen. Investeerders gebruiken deze *ratings* vaak bij het nemen van een beslissing. Derden moeten er met andere woorden op kunnen vertrouwen dat deze certificaten een accurate en betrouwbare weergave zijn van het gecertificeerde *item*. Een certificeringsdienst moet voldoende betrouwbaar zijn en de nodige zorg besteden bij het bepalen en verstrekken van het certificaat. Verschillende schandalen tonen echter aan dat dit niet steeds het geval is en dat certificaten soms geen accurate en betrouwbare weergave van het gecertificeerde *item* geven. Een aantal voorbeelden hiervan zijn inaccurate ratings die aan de totstandkoming van de financiële

crisis in 2008 hebben bijgedragen, de rol van classificatiemaatschappijen bij het zinken van de Erika en de Prestige of, recenter nog, het schandaal van de lekkende PIP borstimplantaten en de omstreden rol van de betrokken productcertificeringsdienst. Derden lijden dus soms schade hoewel een positief certificaat door de certificeringsdienst werd verstrekt. Op basis van een analyse van de verbintenissen en de aansprakelijkheid van certificeringsdiensten, beoordeelt dit proefschrift een aantal juridische mechanismen bedoeld om de accuraatheid en betrouwbaarheid van certificaten te verhogen.

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PART I – GENERAL INTRODUCTION

1. The aim of this part is to provide the framework that will be used to conduct research on certifiers. After some preliminary considerations on their function (chapter I), attention is given to the types of certifiers that will be examined more thoroughly (chapter II). It will become clear that it is essential that certificates are accurate and reliable for the certification mechanism to work (chapter III). This preliminary part also identifies the research questions and discusses the research methodology (chapter IV). A brief outline of the remaining parts will provide an overview of the content of this dissertation (chapter V).

Chapter I – Third-Party Certifiers and the Certification Process

2. Certifiers are entities that provide services of certification. They attest that a certified product, service, information or person (further referred to as 'item') possesses certain qualifications or meets safety, quality or technical standards.[1] The certification process can take different forms. A distinction can be made between first-party, second-party and third-party certification.

First-party certification means that the certification is done by the manufacturers of the products or providers of services/information themselves. Thus, it is the party marketing those products or offering the services and information that takes the necessary steps to determine whether they comply with the applicable requirements.[2] Examples include the manufacturer of medical devices, the issuer of financial instruments or a shipowner. Second-party certification occurs when a person or organisation that has an interest in the product, service or information establishes whether these items comply with the applicable technical and safety standards.[3] The certification is performed by the party purchasing the products or relying on the services or information to ensure their compliance with the agreed contractual requirements and technical specifications.[4] Third-party certification is performed by organisations that are independent vis-à-vis the entity manufacturing the products, offering the services or providing information (further referred to as the 'requesting entity' or 'client'). Such certification occurs at the end of the design or production process when an independent body determines whether the item complies with the applicable technical or safety standards and requirements.[5]

3. In this dissertation, I will focus on third-party certifiers.[6] Such certifiers provide their services at the request of clients. To that end, third-party certifiers enter into a certification agreement with the requesting entities. This contract contains the obligations of both parties during the certification process.[7] The certificate they issue is the performance under the certification contract. Most certified items bear the certifier's mark to help consumers or other buyers making decisions.[8] Third-party certification is appropriate if

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[1] B. GARNER, *Black's Law Dictionary*, St. Paul, West, 2009, 220-221; D. GREENBERG, *Jowitt's dictionary of English Law*, London, Sweet & Maxwell, 2010, 304-305. See also the definition of certification in the Business Dictionary (<www.businessdictionary.com/definition/certification.html>).

[2] American National Standards Institute, "U.S. Conformity Assessment System: 1st Party Conformity Assessment" (<www.standardsportal.org/usa_en/conformity_assessment/suppliers_declaration.aspx>).

[3] American National Standards Institute, "U.S. Conformity Assessment System: 1st Party Conformity Assessment".

[4] European Federation of National Associations of Measurement, Testing and Analytical Laboratories, "First-, second- and third-party testing – how and when", Position Paper No. 1/2000, 3.

[5] American National Standard Institute, "U.S. Conformity Assessment System: 3rd Party Conformity Assessment" (<www.standardsportal.org/usa_en/conformity_assessment/3party_conformity_assessment.aspx#Accreditation>).

[6] When referring to certifiers, it only relates to third-party certifiers unless indicated otherwise.

[7] P. VERBRUGGEN, "Aansprakelijkheid van certificatie-instellingen als private toezichthouder", (30) *Nederlands Tijdschrift voor Burgerlijk Recht* 2013, 329-330.

[8] American National Standards Institute, "U.S. Conformity Assessment System: 3rd Party Conformity Assessment".

the results of the process have a considerable influence or effect on the general public or societal issues, especially when they are related to health, the environment, safety or economic values.[9]

4. Even when the issuance of a certificate constitutes the performance under the certification agreement, the information included in this attestation can and will also be used by persons with whom certifiers do not have any contractual relationship (further referred to as 'third parties'). In this regard, AKERLOF's 'market for lemons' arising in the context of information asymmetry is important. Due to information asymmetry, third parties do not always have all the necessary information on the quality of a particular item. Third parties and requesting entities do not possess equal amounts of information required to make an informed decision regarding a transaction. The requesting entity knows the true value of the item or at least knows whether it is above or below average in quality. A third party, by contrast, does not always have this knowledge as it is not involved in the production of an item. As a consequence, requesting entities might have an incentive to market items of less than average market quality. According to AKERLOF, a third party is not always able to effectively identify 'good' items from those that are below average in quality (cf. the adverse selection problem).[10]

5. A certifier can remedy this asymmetric relationship between the third party and the requesting entity by issuing a certificate to items that comply with the applicable requirements. They moderate informational asymmetries that distort or prevent efficient transactions by providing the public with information it would otherwise not have. This function is so important that one could say that without certifiers "efficient trade would often be distorted, curtailed or blocked".[11] It is, therefore, not surprising that certification services are used in different sectors. Reference can be made to the CE mark, the SGS product safety mark, the Underwriters Laboratories mark, food safety certificates, credit ratings, class certificates or energy performance certificates. These and many other examples illustrate that the efficient and effective functioning of third-party certifiers is extremely important in today's world.

[9] See in this regard: European Federation of National Associations of Measurement, Testing and Analytical Laboratories, "First-, second- and third-party testing – how and when", Position Paper No. 1/2000.

[10] G.A. AKERLOF, "The Market for "Lemons": Quality Uncertainty and the Market Mechanism", (84) *The Quarterly Journal of Economics* 1970, 488; K-.G. LOFGREN, T. PERSSON & J.W. WEIBULL, "Markets with Asymmetric Information: The Contributions of George Akerlof, Michael Spence and Joseph Stiglitz", (104) *Scandinavian Journal of Economics* 2002, 195.

[11] J. BARNETT, "Intermediaries Revisited: Is Efficient Certification consistent with profit maximization?", (37) *Journal of Corporation Law* 2012, 476.

Chapter II – Selected Certification Services

6. Considering that an analysis of all types of certifiers might be too ambitious and not feasible, a selection needs to be made. I will shed light on the functioning of certifiers in three sectors, namely capital markets (part 1), transportation (part 2) and products with a special attention for medical devices (part 3).

1. Credit Rating Agencies and Auditors

7. Credit rating agencies (CRAs) operate as certifiers in capital markets. CRAs evaluate the creditworthiness of financial instruments or issuers of such instruments.[12] They examine the risk that the payment of interests and capital will not or not completely take place at the promised time.[13] CRAs thus predict the ability of an entity to meet its financial obligations with regard to the financial instruments it issues.[14]

CRAs such as Standard & Poor's (S&P),[15] Moody's[16] or Fitch[17] issue ratings in the form of letters or alphabetic symbols. The higher the given rating, the lower the credit risk for investors. The highest rating on long-term debt securities is AAA ('triple A') followed by ratings descending to BBB or below.[18] A triple A rating means that the risk of default for investors is low and that the entity will be able to pay back its debt. Ratings below BBB are considered non-investment grade or 'junk rating'. They indicate that the full and timely repayment of financial products may be speculative and uncertain.[19] The use of those symbols thus makes "ratings easily comprehensible to even the dullest user and enables markets to respond quickly and, more or less, uniformly to changes in ratings".[20]

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[12] J.C. COFFEE, *Gatekeepers: The Role of the Professions in Corporate Governance*, Oxford, Oxford University Press, 2006, 283-284; A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 29-30.

[13] M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 351; S.L. SCHWARCZ, "The Universal Language of Cross-Border Finance", (8) *Duke Journal of Comparative and International Law* 1998, 252.

[14] T.J. DILLON & C.T. EBENROTH, "The prospect for rating agency duty of care liability in England and the United States", (15) *Company Lawyer* 1994, 259. See for an overview: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 29-42.

[15] See for more information: <www.standardandpoors.com>.

[16] See for more information: <www.moodys.com>.

[17] See for more information: <www.fitchratings.com>.

[18] It should, however, be noted that each CRA of course has its own specific rating symbols. Whereas Fitch, for instance, uses BBB+, Moody's uses bbb1.

[19] S.L. SCHWARCZ, "Private Ordering of Public Markets: The Rating Agency Paradox", (2) *University of Illinois Law Review* 2002, 7; F. PARTNOY, "Rethinking Regulation of Credit Rating Agencies: An Institutional Investor Perspective", (25) *Journal of International Banking Law and Regulation* 2010, 189.

[20] J.C. COFFEE, *Gatekeepers: The Role of the Professions in Corporate Governance*, Oxford, Oxford University Press, 2006, 284.

8. The rating process has been extensively regulated because CRAs are seen as "reputational intermediaries"[21] playing a key role in capital markets.[22] Several parties rely on ratings for commercial decisions and other regulatory purposes. CRAs reduce informational asymmetries between lenders and investors on the one hand and borrowers or issuers on the other hand.[23] This allows investors, who do not always have the (professional) capacity, nor the time to evaluate the quality of financial products or the creditworthiness of the issuer, to use ratings to make investment decisions.[24] Ratings are also useful for other participants in capital markets. For instance, issuers of financial instruments benefit from services provided by CRAs because higher ratings result in competitive advantages.[25] The issuer can use a high rating for marketing and advertising purposes. More importantly, a higher rating gives the issuer access to cheaper credit.[26] It reflects a lower risk and allows the issuer to offer a lower interest rate or demand a higher price at which the instrument is issued. This results in a lower cost of capital.[27] Finally, regulators promulgated legislation that depends on ratings. As such, regulators have to a certain extent "outsourced their safety judgments to third-party CRAs".[28]

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[21] See in this regard: R.J. GILSON & R.H. KRAAKMAN, "The Mechanisms of Market Efficiency", (70) *Virginia Law Review* 1984, 605 & 619-621.

[22] See for an analysis of the role of CRAs as "information" or "reputational" intermediaries in capital markets: A. MIGLIONICO, "Market failure or regulatory failure? The paradoxical position of credit rating agencies", (9) *Capital Markets Law Journal* 2014, 195-198.

[23] H. MCVEA, "Credit Rating Agencies, The Subprime Mortgage Debacle and Global Governance: The EU Strikes Back", (59) *International & Comparative Law Quarterly* 2010, 706-707; F. PARTNOY, "The Siskel and Ebert of Financial Markets: Two Thumbs Down for the Credit Rating Agencies", (77) *Washington University Law Quarterly* 1999, 628-638; H. LANGOHR & P. LANGOHR, *The Rating Agencies and Their Credit Ratings: What They Are, How They Work, and Why They are Relevant,* Chichester, John Wiley, 2010, 9-13 & 111-126.

[24] M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (ed.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law,* Brussels, Bruylant, 2006, 353; A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 38; L.J. WHITE, "The Credit Rating Industry: An Industrial Organization Analysis", in: R.M. LEVICH, G. MAJONI & C. REINHART (eds.), *Ratings, Rating Agencies and the Global Financial System*, Dordrecht, Kluwer Academic Publishers, 2002, 43-44.

[25] H. MCVEA, "Credit Rating Agencies, The Subprime Mortgage Debacle and Global Governance: The EU Strikes Back", (59) *International & Comparative Law Quarterly* 2010, 706-707.

[26] A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 38; T.J. SINCLAIR, *The New Masters Of Capital: American Bond Rating Agencies And The Politics Of Creditworthiness*, Cornell, Cornell University Press, 2005, 40.

[27] M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 353; S.L. SCHWARCZ, "Private Ordering of Public Markets: The Rating Agency Paradox", (2002) 2 *University of Illinois Law Review* 2002, 8; A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 38.

[28] A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 40. In this regard, the Nationally Recognized Statistical Rating Organizations (NRSRO) have been recognised by the US Securities and Exchange Commission (SEC). NRSROs issue ratings that financial firms or the US Government can use for regulatory purposes. The ratings provided by NRSROs are used by investors to make business decisions and by federal and state agencies as benchmarks. See for more information: <www.sec.gov/about/offices/ocr.shtml>. See in this regard also: Basel Committee on Banking Supervision, "Basel III: The Liquidity Coverage Ratio and liquidity risk monitoring tools", 2013, 13-14, available at <www.bis.org/publ/bcbs238.pdf> stating at paragraph 52 that level 2A assets are limited to corporate debt securities (including commercial papers) and covered bonds that have a long-term credit rating from a

9. The major credit rating agencies provide their services on an international level. Moody's, for instance, employs approximately 11.700 people worldwide and maintains a presence in 41 countries.[29] In 2016, the company had a revenue of $3.6 billion (€2.93 billion). S&P Global Ratings and its predecessor organisations have been in the rating business for more than 150 years. It operates in 31 countries around the world where 20.000 employees from whom 1500 credit analysists perform their services.[30] In 2016, its revenue was $5.66 billion (€4.61 billion).[31]

10. Besides credit rating agencies, there are several other financial certifiers. Auditors such as Deloitte,[32] PwC[33] or Ernst & Young[34] review the accuracy of a company's financial statements to enhance users' confidence in such statements. The purpose of the audit opinion is to express an opinion as to whether the financial statements fairly reflect, in all material aspects, the economic position of the company. This is pursued by examining whether the statements have been prepared in accordance with Generally Accepted Accounting Principles (GAAP)[35].[36] Auditors moderate informational asymmetries that distort or prevent efficient transactions between parties by verifying a company's financial statements.[37] Third parties such as creditors or investors subsequently use the audit opinion to make business decisions. The audit opinion thus acts as "a filter of cynicism, ensuring that the investor has complete information upon

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recognised external credit assessment institution (ECAI) of at least AA or in the absence of a long term rating, a short-term rating equivalent in quality to the long-term rating. Also see: Basel Committee on Banking Supervision, "Basel III: a global regulatory framework for more resilient banks and banking systems", December 2010, revised June 2011, 52-53, available at <www.bis.org/publ/bcbs189.pdf>. See for more information on the "regulatory licenses" of ratings as "keys that unlock the financial markets" the discussion *infra* in nos. 425-428 (F. PARTNOY, "Rethinking Regulation of Credit Rating Agencies: An Institutional Investor Perspective", (25) *Journal of International Banking Law and Regulation* 2010, 189; F. PARTNOY, "The Siskel and Ebert of Financial Markets: Two Thumbs Down for the Credit Rating Agencies", (77) *Washington University Law Quarterly* 1999, 681-704). See for more information and examples on the regulatory use of reliance upon ratings: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 45-51 & 169-178.

[29] See for more information: <www.moodys.com/Pages/atc.aspx>.

[30] See for more information: <www.spratings.com/en_US/what-we-do>.

[31] See for more information: <www.spglobal.com/annual-report-2016>. See for an historical overview of CRAs: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 13-29.

[32] See for more information: <www2.deloitte.com>.

[33] See for more information: <www.pwc.com>.

[34] See for more information: <www.ey.com>.

[35] Generally Accepted Accounting Principles encompass the conventions, rules and procedures necessary to define accepted accounting practice at a particular time (C. SCHOLZ & J. ZENTES, *Strategic Management - New Rules for Old Europe*, Wiesbader, Springer Science & Business Media, 2007, 55). They are a common set of accounting principles, standards and procedures that companies must follow when they compile their financial statements (see for more information: S.M. BRAGG, *Wiley GAAP: Interpretation and Application of Generally Accepted Accounting Principles 2011*, New Jersey, 2010, 1392p.).

[36] J.M. FEINMAN, "Liability of accountants for negligent auditing: doctrine, policy, and ideology" (31) *Florida State University Law Review* 2003, 21; A.J. BRILOFF, *The Truth about Corporate Accounting*, New York, Harper and Row, 1981, 7-8.

[37] J. BARNETT, "Intermediaries Revisited: Is Efficient Certification consistent with profit maximization?", (37) *The Journal of Corporation Law* 2012, 481; J. BURKE, "Auditor Liability to External Users for Misleading Financial Statements of Publicly Listed Companies: Two Normative Propositions", (39) *Syracuse Journal of International Law & Commerce* 2011, 138-146.

which to base an investment decision".[38] The audit opinion enhances the credibility of the management's representations in financial statements[39] and gives third parties a certain assurance that they are not materially misleading.[40]

11. It should, however, be noted that auditors are only examined to the extent that it is relevant to understand the role and liability of CRAs. The analysis of the liability of the auditor serves as a theoretical framework to address the more contested liability of CRAs. The role and liability of auditors has also already been extensively analysed in academia, especially after accounting scandals such as Enron and Worldcom, making it less interesting for new research.[41]

2. Classification Societies

12. Classification societies operate as certifiers in the maritime sector. They are paid for by the owner of the vessel that is to be classified and certified.[42] Examples are Lloyd's Register of Shipping,[43] Bureau Veritas (BV),[44] Registro Italiano Navale (RINA),[45]

[38] J. ZISA, "Guarding the guardians: expanding auditor negligence liability to third-party users of financial information", (11) *Campbell Law Review* 1989, 125.

[39] R.S. PANTTAJA, "Accountants' Duty to Third Parties: A Search for a Fair Doctrine", (13) *Stetson Law Review* 1994, 932.

[40] K.E. SHORE, "Watching the Watchdog: An Argument for Auditor Liability to Third Parties", (53) *SMU Law Review* 2000, 391.

[41] See for example the following publications with regard to the liability of auditors: K. AERTS, *Taken en aansprakelijkheden van commissarissen en bedrijfsrevisoren,* Brussels, Larcier, 2002, 199p.; I. DE POORTER, *Controle van financiële verslaggeving: revisoraal en overheidstoezicht*, Antwerp, Intersentia, 2007, 572p.; J. FEINMAN, "Liability of Accountants for Negligent Auditing: Doctrine, Policy, and Ideology", (31) *Florida State University Law Review* 2003, 17; C.N. KATSORIS, "Accountants' Third Party Liability-How Far Do We Go?", (36) *Fordham Law Review* 1967, 191; W.J. CASAZZA, "Rosenblum Inc. v. Adler CPAs Liable at Common Law to Certain Reasonably Foreseeable Third Parties Who Detrimentally Rely on Negligently Audited Financial Statements", (70) *Cornell Law Review* 1985, 335; H. KOZIOL & W. DORALT, *Abschlussprüfer: Haftung und Versicherung*, Vienna, Springer, 2004, 180p.; D.J. MIRTSCHINK, *Die Haftung des Wirtschaftsprüfers gegenüber Dritten*, Berlin, Walter de Gruyter, 2006, 267p.; H.B. SCHÄFER, "Efficient Third Party Liability of Auditors in Tort Law and in Contract Law", (12) *Supreme Court Economic Review* 2004, 181; E.J.A.M. VAN DEN AKKER, *Beroepsaansprakelijkheid ten opzichte van derden: een rechtsvergelijkend onderzoek naar de zorgplichten van accountants, advocaten en notarissen ten opzichte van anderen dan hun opdrachtgever*, The Hague, Boom Juridische Uitgevers, 2001, 223p.; G.S. MORRIS, "The liability of professional advisers: Caparo and after", *Journal of Business Law* 1991, 36-48; V. GOLDBERG, "Accountable Accountants: Is Third-Party Liability Necessary?", (17) *Journal of Legal Studies* 1988, 295; P. GIUDICI, "Auditors' multi-layered liability regime", (13) *European Business Organization Law Review* 2012, 501.

[42] M.A. MILLER, "Liability of Classification Societies from the perspective of United States Law", (22) *Tulane Maritime Law Journal* 1997, 77.

[43] See for more information: <www.lr.org>.

[44] See for more information: <www.bureauveritas.com>.

[45] See for more information: <www.rina.org>.

American Bureau of Shipping (ABS),[46] Germanischer Lloyd[47] and Nippon Kaiji Kyokai (NKK)[48].[49]

13. Vessels used to be assessed according to their state for a single voyage.[50] Based on the condition of the hull and the equipment, an attempt was later made to classify each ship on an annual basis. The condition of the hull was classified by the letters A, E, I, O or U taking into account the quality of its construction and its adjudged continuing soundness. Equipment was classified as good (G), middling (M) or bad (B). These three letters were gradually replaced by the numbers 1, 2 and 3. Thus, a vessel classed as A1 was in the first or highest class.[51] Some societies used numbers or letters to indicate which percentage of their safety regulations was met. This was often complemented by a number indicating the duration of the assigned class. LAGONI refers to the example of Germanischer Lloyd awarding vessels the class sign 100 (being the percentage of the requirements complied with) A5 (stating that the vessel would be in class for 5 years).[52]

Nowadays, however, classification symbols no longer indicate which percentages of the rules are met.[53] Although most classification societies use their own symbols to indicate compliance with class rules, the practice of assigning different classification figures to vessels has been mostly abandoned.[54] Instead, a vessel has to comply with minimum standards laid down in the society's class rules if it wants to be classified.[55] In other words, a vessel either meets the relevant requirements in class rules or it does not, and is respectively either in or out of class. A vessel continues to be in class as long as it is maintained in a condition that corresponds with the respective standards in class rules.[56]

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[46] See for more information: <ww2.eagle.org>.

[47] In 2013, Det Norske Veritas (Norway) and Germanischer Lloyd (Germany) merged and became Det Norske Veritas Germanischer Lloyd (DNV-GL). See for more information: <www.dnvgl.com>.

[48] See for more information: <www.classnk.or.jp>.

[49] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 5; A. ANTAPASSIS, "Liability of classification societies", (11) *Electronic Journal of Comparative Law* 2007, 3-5.

[50] J.J. SMITH, "On a flood tide: Classification societies and Canada's marine industry in 2020", *Canadian Institute of Marine Engineers* 2011, 3.

[51] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 4; T.J. PAGONIS, *Chartering Practice Handbook*, Piraeus, Dimelis Publications, 2009, 82. See in this regard also: D.J. EYRES, *Ship Construction*, Oxford, Butterworth-Heinemann, 2007, 36-37.

[52] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 5-6.

[53] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 5-6.

[54] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 6.

[55] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 6; J. BASEDOW & W. WURMNEST, "Classification Societies as General Insurers of Shipping Activities", in: J.H. WANSINK, N. VAN TIGGELE-VAN DER VELDE, J.G.C. KAMPHUISEN & B.K.M. LAUWERIE (eds.), *De Wansink- bundel: van draden en daden: liber amicorium prof.mr. J.H. Wansink*, Deventer, Kluwer, 2006, 18.

[56] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 6; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 7-8.

14. Classification societies thus issue a certificate of class attesting that a vessel is built in accordance with class rules. This is referred to as the 'private function' of classification societies. To that end, a classification contract is agreed with the shipowner or the shipyard.[57] Important sectors of and actors in the maritime industry subsequently rely on these certificates as an assurance that the classed vessel is likely to be reasonably suited for its intended use.[58] As well as the shipowner and purchasers of vessels, maritime insurers,[59] cargo-owners[60] and charterers[61] use certificates of class prior to providing financial coverage or hiring the vessel. A certificate allows them to make a reasonable assumption as to the condition of a ship and the risks it represents without having to check the vessel themselves.[62]

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[57] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 43-46.

[58] M.A. MILLER, "Liability of Classification Societies from the perspective of United States Law", (22) *Tulane Maritime Law Journal* 1997, 77, 82-88.

[59] Hull and machinery as well as protection and indemnity (P&I) insurers use the class certificate to provide insurance coverage (M.A. MILLER, "Liability of Classification Societies from the perspective of United States Law", (22) *Tulane Maritime Law Journal* 1997, 82). The provisions of the French Hull Insurance Package, for instance, stipulate that "the vessel must be properly classed with a classification society agreed by the insurers and must be class maintained with an agreed Classification Society throughout the entire duration of the policy" (French Federation of Insurance Companies, "Commentaries on the Marine Hull and Machinery Insurance Package", 2010, 8). Protection and indemnity insurers also depend on the classification societies' activities. Rule 8 of the London P&I Club Rules states that, unless otherwise agreed by the club, every entered ship needs to be fully classed during that period with a society that is approved by the International Association of Classification Societies, regardless of any separate inspections which it may have required (Rule 8.1 London P&I Rules 2017/2018).

[60] Cargo-owners rely on classification societies as "independent appraisers of a vessel's seaworthiness" (M.A. MILLER, "Liability of Classification Societies from the perspective of United States Law", (22) *Tulane Maritime Law Journal* 1997, 85) to contract with the shipowner for the transport of goods. As a consequence, "cargo owners do not need to check each individual vessel's classification status because the vessel, in all likelihood, will not be in service if it is not classified" (M.A. MILLER, "Liability of Classification Societies from the perspective of United States Law", (22) *Tulane Maritime Law Journal* 1997, 86).

[61] Charters also rely on the services performed by classification societies. A charterer is a person or a company that rents, hires or leases a vessel from its owner. Both parties establish a charter party, which is a written contract for the carriage of goods. It includes the terms of the agreement such as the duration, the freight rate and the ports involved in the voyage (Marine Insurance Glossary, "Glossary of Marine Insurance and Shipping Terms", (14) *University of San Francisco Maritime Law Journal* 2002, 331). Before deciding to use the vessel, charter parties often require that the shipowner or the classification society in which the vessel is registered confirms that it is maintained in class (M.A. MILLER, "Liability of Classification Societies from the perspective of United States Law", (22) *Tulane Maritime Law Journal* 1997, 85; S.J. DOEHRING, "Chartering of Vessels for Tidelands Operations", (32) *Tulane Law Review* 1958, 246). It should, however, be noted that the major oil companies also have their own surveyors who examine whether a chartered vessel is fit for the transport of oil. These are so-called 'vetting inspections' and illustrate that a class certificate is often not sufficient for those companies as a proof that the vessel is in a safe condition to transport oil (N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 23).

[62] See in general: D.L. O'BRIEN, "The potential liability of classification societies to marine insurers under United States law", (7) *University of San Francisco Maritime Law Journal* 1995, 404-405; H. HONKA, "The classification system and its problems with special reference to the liability of classification societies", (19) *Tulane Maritime Law Journal* 1994, 3-5; M.A. MILLER, "Liability of Classification Societies from the perspective of United States Law", (22) *Tulane Maritime Law Journal* 1997, 82-88; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 11-26.

15. Classification societies in their private function thus perform a vital role with regard to the insurability and marketability of vessels.[63] At the same time, however, the function of classification societies gradually expanded to cover public tasks as well. This is referred to as statutory certification and implies that societies have a 'public function' as well.[64] Although the distinction between both functions is not always clear, private commercial classification activities are often voluntary and public statutory certification is compulsory.[65] Flag States have a duty under international law to take appropriate measures for vessels flying their flag to ensure safety at sea.[66] However, flag States often delegate executive powers to classification societies as they have more technical knowledge in inspecting and certifying vessels. Acting as Recognised Organisations (ROs), classification societies then become responsible for the implementation and enforcement of international maritime safety standards.[67] The activities of Recognised Organisations have been regulated by the IMO[68] as well as the EU.[69] Consequently, a classification society acting on behalf of a flag State as RO is bound by two contracts. The first one with the flag State itself (agreement on the delegation of power) and the

[63] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce* 2005, 487-488.

[64] A. KHEE-JIN TAN, *Vessel-Source Marine Pollution: the Law and Politics of International Regulation*, Cambridge, Cambridge University Press, 2006, 44.

[65] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 488.

[66] Article 94.3. United Nations Convention on the Law of the Sea 1982 (UNCLOS), 1833 UNTS 3. The International Convention of Safety of Life at Sea of 1974 (SOLAS), for example, requires flag States to ensure that their vessels comply with the minimum safety standards in construction, equipment and operation (IMO, International Convention for the Safety of Life at Sea 1974, 1184 UNTS 278). The inspection and survey of ships has to be carried out by officers of the national administration. However, the administration may entrust the inspections and surveys either to surveyors nominated for that purpose or to organisations recognised by public authorities (Regulation 6 SOLAS Convention 1974). Most governments delegate these powers to classification societies which are authorised to establish surveys in accordance with the conventions and issue certificates accordingly (H. HONKA, "The classification system and its problems with special reference to the liability of classification societies", (19) *Tulane Maritime Law Journal* 1994, 4).

[67] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 488-490; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 50-53; A. ANTAPASSIS, "Liability of classification societies", (11) *Electronic Journal of Comparative Law* 2007, 13-14.

[68] The IMO adopted several resolutions establishing minimum requirements for ROs (e.g. IMO Resolution A.739(18) Guidelines for the authorization of organizations acting on behalf of the administration adopted on November 4, 1993 and IMO Resolution A. 789(19) on the specifications on the survey and certification functions of recognized organizations acting on behalf of the administration adopted on 23 November 1995). The IMO recently adopted the Code for Recognised Organisations, which recalled IMO Resolutions A. 739(18) and A. 789(19). The Code serves as the international standard that contains minimum criteria to assess whether flag States can recognise and authorise organisations to act on their behalf (IMO Code for Recognized Organizations, Resolution MSC.349(92) adopted on 21 June 2013 MEPC.237(65)).

[69] See in this regard: Directive 2009/15/EC of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, *OJ* L 131/47 and Regulation 391/2009 of 23 April 2009 on common rules and standards for ship inspection and survey organisations, *OJ* L 131/11.

second one with the shipowner for the performance of the statutory surveys (statutory survey contract).[70]

16. Similar to credit rating agencies, the major classification societies offer their services on an international level. For instance, Bureau Veritas has 69.000 employees working in 1.400 offices in 140 countries.[71] With 400.000 clients worldwide, its revenue was €4.55 billion in 2016, while its operating profit was estimated at €609.7 million.[72] Founded in 1760 as a marine classification society, Lloyd's Register also works across many industry sectors with over 9.000 employees based in 78 countries. Despite its charitable non-profit making status, LR's total turn-over in 2016 was £881 million (€1 billion), while its normalised operating profit was £79 million (€90.64 million).[73] DNV GL is a global quality assurance and risk management company providing classification services. It was created in 2013 as a result of a merger between two leading classification societies: Det Norske Veritas and Germanischer Lloyd. Both classification societies have their origins stretching back to 1864. DNV GL operates in more than 100 countries and had a revenue of 20.834 million NOK (€2.16 billion) and an operating profit of 154 million NOK (€15.98 million) in 2016.[74]

3. Products Certifiers and Notified Bodies

17. This study will also focus on certifiers of products in general and of medical devices in particular. There is a wide range of certifiers providing these services. Examples include TüV Rheinland,[75] SGS,[76] Dekra[77] and Underwriters Laboratories.[78] These certifiers determine whether the product, medical device or manufacturer complies with specific safety, quality or technical requirements. The certificate serves as a "quality signal" for parties purchasing those items.[79] For instance, while the toy given to my

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[70] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 53-55.

[71] See for more information: <www.bureauveritas.com>.

[72] See for more information: <finance.bureauveritas.com/phoenix.zhtml?c=216209&p=irol-fundamentals>.

[73] Lloyd's Register, "Group Review 2016: Shaping the future, delivering solutions today", Group Review 2016, 28. See in this regard also the dissenting opinion of Lord BERWICK in the *Marc Rich* case: "It is not as if N.K.K. are unable to afford the cost of insurance. It is the third largest classification society. A.B.S., another non-profit making classification society, had a net income of $11m. in 1990 on operating revenues of $122m […] In paragraph 21(c) of his statement, Mr. Mitsuo Abe, Executive Vice-President of N.K.K., doubts whether N.K.K. would be able to survive if they were held liable for claims such as the present. I have to say that I view this assertion with a good deal of scepticism" (*Marc Rich & Co AG v. Bishop Rock Marine Co Ltd*, [1996] ECC 120, 133).

[74] See for more information: <www.dnvgl.com/about/in-brief/key-figures.html>.

[75] See for example: <www.tuv.com>.

[76] See for example: <www.sgsintl.com>.

[77] See for example: <www.dekra-certification.com>.

[78] See for example: <ul.com>.

[79] G. JAHN, M. SCHRAMM & A. SPILLER, "The Reliability of Organic Certification: An Approach to Investigate the Audit Quality", Paper at presented at Researching Sustainable Systems - International Scientific Conference on Organic Agriculture, Adelaide, September 21-23, 2005, 1.

godchild bears a "CE" marking, the hoverboard my father sends me from the US will probably be accompanied by the "UL" label.

18. These actors provide certification services to requesting entities on a global scale. TüV Rheinland Group, for instance, evolved from a regional testing organisation into an international provider of technical services and certification. The company with its headquarters in Cologne can trace its origins back to 1872 when a group of entrepreneurs founded the *Dampfkessel-Überwachungs-Vereine* (DÜV) as their own independent organisation dedicated to ensure technical safety. In 2016, TüV Rheinland's revenues were €1.92 billion.[80] SGS was established in 1878 and is a world's leading inspection, verification, testing and certification company. With more than 90.000 employees, SGS operates a network of more than 2.000 offices and laboratories around the world. Its total revenues in 2016 reached CHF 6 billion (€5 billion). Its profit for the same period was CHF 586 million (€493 million).[81] Dekra (*Deutscher Kraftfahrzeug-Überwachungs-Verein*) was established in Berlin in 1925. It achieved revenues of around €2.9 billion in 2016. The company currently employs around 39.000 people in over 50 countries.[82] Underwriters Laboratories is a US safety consulting and certification company headquartered in Northbrook, Illinois. It was established in 1894 as the Underwriters' Electrical Bureau. In 2016, approximately 22 billion UL marks appeared on products. UL has about 11.615 employees working in 40 countries with 170 testing and certification facilities.[83]

19. Besides the certifier providing an "attestation related to products, processes, systems or persons",[84] there are several other actors involved as well to ensure the safety of products. Standard-setting bodies, for instance, develop technical and safety standards products or their manufactures have to comply with.[85] Accreditation bodies are also of particular importance in the field of product safety. Accreditation is the "third-party attestation related to a conformity assessment body conveying formal demonstration of its competence to carry out specific conformity assessment tasks".[86] It is thus one step higher than the actual certification of the products.[87] One could, therefore, say that accreditation bodies are actually guarding the guards in the sense that they guarantee that certifiers are competent to perform their certification functions. Accreditation bodies rely

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[80] See for more information: <www.tuv.com/en/corporate/about_us_1/facts_figures_1/facts_figures.html>.

[81] See for more information: SGS, "SGS 2016 Full Year Results", January 23, 2017, 3, available at <www.sgs.com/en/news/2017/01/sgs-2016-full-year-results>.

[82] See for more information: <www.dekra.com/en-us/about-dekra>.

[83] See for more information: <www.ul.com/aboutul>.

[84] Clauses 5.2 and 5.5 ISO/IEC 17000:2004 Conformity assessment - Vocabulary and general principles.

[85] International Organization for Standardization, "About ISO", available at <www.iso.org>.

[86] Clause 3.1. ISO/IEC 17011 Conformity Assessment-General Requirements for Accreditation Bodies Accrediting Conformity Assessment Bodies.

[87] R. MUSE, "What's in a Name: Accreditation vs. Certification?", *Quality Magazine*, June 2, 2008, available at <www.qualitymag.com/articles/85483-what-s-in-a-name-accreditation-vs-certification>.

on different criteria to determine whether third-party certifiers are competent.[88] Accreditation is not always compulsory and non-accreditation does not necessarily mean that a certifier is not reputable. However, the accreditation of a certifier provides an independent confirmation of its competence, which is likely to be relied upon by purchasers of the products.[89]

20. Special attention is given to certifiers in the medical sector. This is interesting considering recent scandals with defective medical devices that were, nonetheless, certified as being safe (e.g. the PIP breast implant case[90]). Manufacturers can only place medical devices on the European market when they comply with the 'essential requirements' or 'general safety and performance requirement'.[91] To that end, the manufacturer has to perform a conformity assessment procedure. This assessment is conducted according to the procedures included in sectorial legislation dealing with a particular product.[92] EU legislation often prescribes the conformity assessment procedure that has to be followed by the manufacturer. In some cases, the assessment needs to be carried out by the manufacturer itself. The applicable legislation can also require that an independent third-party certifier is involved in the conformity assessment procedure of the product.[93] In this regard, Regulation 2017/745 on Medical Devices ('Medical Device Regulation' – 'MDR') taking effect mid-2020 and Directive 93/42/EEC ('Medical Device Directive' – 'MDD') refer to notified bodies that participate in the conformity assessment procedure of medical devices.

21. A notified body is an independent entity notified by a Member State's competent authority to assess the conformity of medical devices before being placed on the market.[94] The body determines whether devices meet all the applicable legislative requirements to get the CE marking. This marking is the manufacturer's declaration that a device meets

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[88] International Accreditation Forum, "About us", available at <www.iaf.nu>.

[89] ISO, "Certification", available at <www.iso.org/iso/home/standards/certification.htm>. See in this regard also: American National Standard Institute, "U.S. Conformity Assessment System: 3rd Party Conformity Assessment".

[90] See for more information the discussion *infra* in Part II, Chapter I.

[91] See in this regard: Article 3 Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, *OJ* L 169. Annex I of the Medical Device Directive contains the essential requirements. These requirements deal with the design and manufacture of medical devices to ensure the protection of the health and safety of patients, users and third parties. See also: Article 5 Regulation 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation 178/2002 and Regulation 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC, *OJ* L 117. The article stipulates that a medical device has to meet the general safety and performance requirements set out in Annex I.

[92] See for more information: European Commission, "Commission Notice. The 'Blue Guide' on the implementation of EU product rules 2016", 2016/C 272/01, 65-75. Also see: European Commission, "Conformity assessment", available at <ec.europa.eu/growth/single-market/goods/building-blocks/conformity-assessment/index_en.htm>.

[93] European Commission, "Commission Notice. The 'Blue Guide' on the implementation of EU product rules 2016", 2016/C 272/01, 66-67.

[94] European Commission, "Commission Notice. The 'Blue Guide' on the implementation of EU product rules 2016", 2016/C 272/01, 78.

the applicable safety and technical requirements.[95] Member States can choose notified bodies from the entities under their jurisdiction that comply with requirements set out in the MDR or the MDD and the principles laid down in Decision 2008/768.[96] Notified bodies must operate in a competent, non-discriminatory, transparent, neutral, independent and impartial manner.[97] Manufacturers are free to choose any notified body that has been designated by Member States to carry out the conformity assessment procedure.[98]

22. Article 11 and Annexes II-VII of the MDD deal with the involvement of notified bodies in the conformity assessment procedure of medical devices.[99] The procedure involves an audit of the manufacturer's quality system and, depending on the classification of the medical device,[100] a review of technical documentation provided by the manufacturer. Once the notified body has determined that a manufacturer or the latter's devices comply with the applicable criteria, it issues a CE certificate.[101]

The MDR contains similar provisions as the MDD. The classification of devices will determine the conformity assessment procedure a manufacturer has to follow. The conformity assessment procedures for medical devices are further laid down in the Articles 52-60 and Annexes IX-XI of Regulation 2017/745. For medical devices of classes IIa, IIb and III, a notified body needs to be involved in the conformity assessment procedure depending on the risks and class of the device. Following the PIP breast implant scandal, the European Commission issued Recommendation 2013/473/EU on audits and assessments performed by notified bodies in the field of medical devices.[102] The Recommendation contains requirements for conducting unannounced audits and stipulates the obligations for the notified body. Notified bodies already had the possibility

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[95] BSI Notified Body, "Want to know more about the Notified Body?", available at <medicaldevices.bsigroup.com/LocalFiles/en-GB/Services/BSI-md-notifed-body-guide-brochure-UK-EN.pdf>; European Commission, "Commission Notice. The 'Blue Guide' on the implementation of EU product rules 2016", 2016/C 272/01, 58-59.

[96] Decision 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, *OJ* L 218/82; European Commission, "Conformity assessment and Notified bodies".

[97] Article R17 in Decision 2008/768.

[98] European Commission, "Commission Notice. The 'Blue Guide' on the implementation of EU product rules 2016", 2016/C 272/01, 78.

[99] S.M. SINGH, "Symposium on the EU's New Medical Device Regulatory Framework What Is the Best Way to Supervise the Quality of Medical Devices? Searching for a Balance between Ex- Ante and Ex-Post Regulation", *European Journal of Risk Regulation* 2013, 465.

[100] The classification of medical devices in the EU is a risk-based system grounded on the vulnerability of the human body taking account of the potential risks associated with the devices (see in this regard Annex IX of the MDD and Annex VIII of the MDR). This approach allows the use of a set of criteria that can be combined in various ways to determine the classification of a device (e.g. duration of contact with the body, degree of invasiveness and local or systemic effect). There are four classes of medical devices, ranging from low risk to high risk: medical devices of class I, IIa, IIb, III. See for more information: European Commission, "Medical Devices Guidance document. Classification of medical devices", MEDDEV 2. 4/1 Rev. 9, June 2010.

[101] BSI Notified Body, "Want to know more about the Notified Body?".

[102] Commission Recommendation 2013/473/EU of 24 September 2013 on the audits and assessments performed by notified bodies in the field of medical devices, *OJ* L 253/27.

to do unannounced audits under the MDD. Recommendation 2013/473 now obliges notified bodies to perform such audits at least once every year.[103]

[103] Annex III, Recommendation 2013/473/EU on the audits and assessments performed by notified bodies in the field of medical devices.

Chapter III – The Need for Reliable and Accurate Certificates

23. It has already been mentioned that certifiers remedy the asymmetric relationship between third parties and the requesting entity by issuing a certificate to items that comply with the applicable requirements. Third parties can use these certificates when making decisions.[104] One can think of investors relying on ratings, cargo-owners requiring a class certificate before contracting with a shipowner or consumers buying a particular product covered by a certificate. Third parties using certificates need to be sure that they are accurate[105] and reliable.[106] Certificates have to correspond with the 'true' or 'actual' value of the certified item, thereby moderating informational asymmetries that distort or prevent efficient transactions.[107] In other words, a certifier has to be trustworthy and apply the appropriate level of care in performing its functions for the certification mechanism to work.

24. However, third-party certifiers have been involved in several scandals. Some famous examples are auditors in the Enron auditing debacle, CRAs in the 2008 global financial crisis, notified bodies in the PIP breast implant case and classification societies in the *Erika* and *Prestige* maritime disasters. Those events illustrate that certifiers do not always provide accurate and reliable certificates. As such, certificates sometimes do not correspond with the 'true' or 'actual' value of the certified item. Third parties might thus incur losses or suffer injuries, despite the issuance of a certificate attesting that an item complied with the applicable requirements. Investors, for instance, incurred losses following the financial crisis even though positive credit ratings were issued. Similarly, TüV Rheinland certified breast implants that later turned out to be defective because of potential ruptures.

25. Considering that certificates do not always correspond with the 'true' or 'actual' value of a certified item, it becomes interesting to examine which legal mechanisms can be adopted to ensure that certificates are an accurate and reliable representation of the certified item. Prior to that analysis, however, two preliminary remarks need to be made.[108]

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[104] See in this regard also: C-171/11, *Fra.bo SpA v. Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW)*, ECLI:EU:C:2012:453, July 12, 2012, paragraph 30 concluding that "[a]lthough the ABVWasserV [Verordnung über Allgemeine Bedingungen für die Versorgung mit Wasser] merely lays down the general sales conditions as between water supply undertakings and their customers, from which the parties are free to depart, it is apparent from the case-file that, in practice, almost all German consumers purchase copper fittings certified by the DVGW".

[105] Accuracy is the quality or state of being correct or precise or the degree to which the result of a measurement, calculation or specification conforms to the correct value or standard. See the definition of 'accuracy' in the online Oxford Dictionary.

[106] Reliable is something that can be trusted or believed because it works or behaves well in the way one expects. See the definition of 'reliable' in the online Cambridge Dictionary.

[107] J. BARNETT, "Intermediaries Revisited: Is Efficient Certification consistent with profit maximization?", (37) *Journal of Corporation Law* 2012, 476.

[108] In addition to legal mechanisms, policymakers can rely on other mechanisms as well to direct and influence a certifier's behavior. One can think of accreditation schemes, 'naming and shaming' provisions, private self-monitoring elements, restricting a certifier's activities or simply withdrawing its registration.

On the one hand, requesting entities need to be given sufficient incentives to ensure that their items comply with the applicable requirements. While the aim of this dissertation is to identify and propose legal mechanisms to increase the accuracy and reliability of certificates, requesting entities should of course not be able to seek shelter behind certifiers to refute liability whenever a certified item defaults. A requesting entity will remain the party that is primarily responsible to carry the potential consequences of a defective item. They are responsible for producing or marketing the item.

On the other hand, defaults with certified items do not occur on a daily basis. Claims against certifiers are not filed that frequently either. This is an indication that the currently existing mechanisms probably work quite well. Nevertheless, the 2008 financial crisis, the leaking breast implants or maritime disasters illustrate that the issuance of inaccurate and unreliable certificates can affect third parties and even society in general. The consequences of the certified item's default can be enormous and have an impact on parties that were not involved in the certification process. Adopting legal mechanisms inducing certifiers to issue certificates that are more accurate and reliable to prevent even only some scandals involving certifiers are, therefore, necessary.

Even though such mechanisms might have some advantages, the analysis will also show their shortcomings. Moreover, the doctoral dissertation is restricted to legal mechanisms due to my legal background and familiarity with doing research from a legal point of view.

Chapter IV – Research Questions and Methodology

26. The aim of this dissertation is to identify legal mechanisms that might ensure that certifiers issue more accurate and reliable certificates to prevent scandals with certified items in the future. One needs to find those legal measures that will induce certifiers to issue certificates that are 'even' more accurate and reliable. However, finding ways to improve the accuracy and reliability of certificates is not always straightforward. To come to a satisfying answer, five specific research questions need to be addressed:

1. *What are the obligations of certifiers during the certification process?*

The first research question focusses on the obligations of third-party certifiers during the certification process. One obviously needs to know to what certifiers commit themselves before it can be established which mechanisms improve the accuracy and reliability of their certificates.

2. *Do all certifiers function similarly or does each type of certifier have its own characteristics that can influence which legal mechanisms are capable of stimulating or improving the accuracy and reliability of their certificates?*

The second research question deals with the characteristics of certifiers. It is assessed whether all certifiers have similar and common characteristics or, instead, have their own features. The answer to this question might be of importance when framing proposals increasing the reliability and accuracy of certificates.

3. *To which extent have certifiers already been held liable vis-à-vis third parties and how does this influence legal mechanisms available or feasible to stimulate or improve the accuracy and reliability of their certificates?*

The third research question focusses on some aspects related to a certifier's third-party liability. The conditions under which certifiers might incur liability towards third parties in different jurisdictions are examined. The extent to which freedom of speech can serve as a defence in liability claim against certifiers is also analysed. Finding answers to those issues is relevant to understand proposals that aim to increase the reliability and accuracy of certificates.

4. *Which mechanisms have already been proposed or implemented so far to safeguard the accuracy and reliability of certificates?*

The fourth research question examines whether proposals have already been made in academia to increase the accuracy and reliability of certificates. If this turns out to be the case, some of these proposals are discussed. Especially their benefits and shortcomings are analysed.

5. *What feasible measures can be taken that could make a difference when it comes to ensuring that certifiers issue more reliable and accurate certificates?*

This section analyses a question *de lege ferenda.* Taking into account the answers to the previous research questions, some criteria might be identified that can be used to develop proposals aiming to safeguard the accuracy and reliability of certificates. These proposals can subsequently be implemented by legislatures or be relied upon by courts when having to decide on issues with regard to certifiers.

27. Each specific research question will require its own methodology. Yet, the overall research methodology used in this dissertation is based on an analysis of legislation and codes of conduct, case law, contracts, and doctrine. These sources may be found online through legal databases or by references in doctrinal books, law journals and court reports. Whereas the first, second and third question will especially require an analysis of case law, certification contracts and legislation, the last two research questions are addressed from a more doctrinal and theoretical point of view. Although empirical studies will be relied upon when necessary and relevant, I will not conduct empirical research on third-party certifiers myself.

28. Problems in certification markets are universal and occur in many countries. Consequently, both the dogmatic and functional method of comparative law can be used. With the first method, formal legal sources of jurisdictions are examined and the doctrine stating and explaining the (local) law is compared. The starting point of the functional method is to examine how the law in various jurisdictions deals with the same practical issue, namely the question how the accuracy and reliability of certificates can be improved.[109] Leaving out of consideration theoretical discussions,[110] the functional method helps us to better understand the dynamics of certifiers and especially in coming to feasible proposals ensuring that they issue more accurate and reliable certificates. Most of the existing research on gatekeepers[111] and certifiers is still based on United States (US) law.[112] This is partly because important certifiers are still vested in the US. Examples are Standard & Poor's, Moody's, Underwriters Laboratories or the American Bureau of Shipping. Nevertheless, as MAVROMMATI underlines, "the gatekeeping problem is not confined to the US market and it certainly is an issue that concerns all countries around

[109] See in this regard: F. GORLÉ *et al* (eds.), *Rechtsvergelijking*, Mechelen, Kluwer, 2007, 32; W. DEVROE, *Rechtsvergelijking in een context van europeanisering en globalisering*, Leuven, Acco, 2010, 38-39.

[110] See in this regard: K. ZWEIGERT & H. KÖTZ, *An Introduction to Comparative Law*, Oxford, Clarendon Press, 1998, 714p.; R. MICHAELS, "The Functional Method of Comparative Law", in: M. REIMANN & R. ZIMMERMANN (eds.), *The Oxford handbook of comparative law*, Oxford, Oxford University Press 2008, 340-380.

[111] See on the notion of gatekeepers and the difference with certifiers the discussion *infra* in nos. 108-109 & 437-464.

[112] The extensive references to American academic scholarship in this dissertation will make this clear.

the world, including Europe".[113] Therefore, a study on certifiers from not only a US legal perspective but also including other jurisdictions is relevant.

29. The choice of jurisdictions included in this dissertation is determined by several elements. One of these elements relates to the fact that third parties have already filed claims against certifiers in different jurisdictions alleging that the certificates were flawed and inaccurate. The question thus arises whether certifiers can be held liable towards third parties when their certificates do not correspond with the 'true' or 'actual' value of the certified item. The answer to that question might be different depending upon the jurisdiction where the claim against the certifier has been filed. The choice is also determined by compelling pragmatic constraints, such as language issues as well as access to the relevant (national) sources.

Against this background, the dissertation examines legal aspects of certifiers in Belgium, France, the Netherlands, England, Germany and at the European Union (EU) level. The dissertation takes the legal situation in Belgium as a starting point. In order to place the functioning of certifiers in a broader perspective, the Belgian situation is compared with the legal context in France. Besides language considerations, there are many similarities between (legal) developments in France and Belgium. It is interesting to evaluate if similarities and/or differences occur in both jurisdictions with regard to the liability of certifiers. The Netherlands and Germany are analysed because of the specific tort provisions in these jurisdictions. Especially the relativity of liability, referred to as *relativiteit* in the Netherlands and *Normzwecklehre* in Germany might be relevant. England is also involved because of the specific requirements to impose a duty of care upon certifiers such as foreseeability, proximity or fairness. These requirements might have consequences on a certifier's liability. Furthermore, the EU increasingly addresses the liability of certifiers and tries to regulate their functioning (e.g. provisions on CRA's,[114] classification societies[115] or medical devices[116]). Supranational legislation on certifiers might have a different impact on national systems, which makes its inclusion interesting. Particularly important decisions that have been taken in other jurisdictions will also be referred to when necessary (e.g. the Australian *Bathurst* case for CRAs).

However, a country-by-country overview on the regulation, working or liability of certifiers is not given. Instead, and surely not wanting to be accused of *legal tourism*,[117]

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[113] S. MAVROMMATI, "The Dynamics of Gatekeepers, Corporate Culture and Whistle Blowers", (1) *Corporate Governance Law Review* 2005, 396.

[114] Regulation 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, *OJ* L 302; Regulation 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation 1060/2009 on credit rating agencies, *OJ* L 146.

[115] Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations; Regulation 391/2009 on common rules and standards for ship inspection and survey organisations,.

[116] Regulation 2017/745 on medical devices; Directive 93/42 concerning medical devices.

[117] See in this regard: W.F. MENSKI, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge, Cambridge University Press, 2006, 609; C. VAN DAM, *European Tort Law*, Oxford, Oxford University Press, 2013, 11.

the legal context of the different jurisdictions is relied upon to shape this dissertation on certifiers. In other words, an eclectic research methodology is used. The research is based on theoretical arguments and ideas coming from all the above-mentioned jurisdictions without always examining every jurisdiction. The analysis of each single jurisdiction is not only time-consuming but also loses importance within a broader conceptual framework dealing with third-party certifiers.[118]

[118] See for a justification of the number of jurisdictions: D. KOKKINI-IATRIDOU, *Een inleiding tot het rechtsvergelijkende onderzoek*, Deventer, Kluwer, 1988, 139 (restricting the research to four jurisdictions for young researchers) and K. ZWEIGERT & H. KÖTZ, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, Tübingen, Mohr, 1996, 40-41 (deciding that the US and England can be used as Anglo-American jurisdictions and France and Germany for European continental countries when doing legal research).

Chapter V – Outline of the Dissertation

30. This dissertation consists of different parts, each of them necessary to find an answer to the previously mentioned research questions. Instead of focussing on one specific issue related to certifiers, a more general and overall approach is taken. This implies that several aspects related to third-party certifiers will be examined.

Part II especially deals with the first, second and third research question. More specifically, the obligations of certifiers during the certification process are analysed. In order to have a clear view on legal issues related to certifiers, it is also necessary to have an understanding of their characteristics, (third-party) liability and the freedom of speech defence.

Part III addresses the fourth and the fifth research question. Third parties use certificates to take decisions. Certificates have to be accurate and reliable, which is not always the case. It is examined whether academic proposals have already been suggested to ensure that certifiers issue accurate and reliable certificates. Based on this analysis, a framework is developed that can be used to induce certifiers to issue certificates that are more accurate and reliable.

Part IV summarises the main findings and gives a clear answer to each individual research question. Taking into account the general and overall approach used in this dissertation, some issues for future research are identified as well.

PART II – THIRD-PARTY CERTIFIERS AND THE CERTIFICATION PROCESS

31. Whereas the specific types of certifiers included in this study have already been briefly touched upon above, the obligations of certifiers during the certification process are examined more thoroughly in this part (chapter I). With a few exceptions,[119] scholars generally start from the assumption that all certifiers are alike. However, it needs to be examined if this is the case or whether certifiers each have different legal characteristics (chapter II). This framework will subsequently be used as a basis to assess a certifier's third-party liability (chapter III). It will also be relied upon to examine to which extent certificates qualify as protected speech (chapter IV). Finding an answer to all these questions is important as it will determine which legal mechanisms are appropriate to ensure that certifiers issue more accurate and reliable certificates. The main findings are summarised in a conclusion (chapter V).

[119] See for example: A. LABY, "Differentiating Gatekeepers" (1) *Brooklyn Journal of Corporate, Financial & Commercial Law* 2006, 120; J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 331.

Chapter I – Obligations of Certifiers and the Certification Process

32. Based on the generally recognised fundamental freedom to contract, certifiers and requesting entities can in principle freely determine the content of and obligations under the certification agreement.[120] This freedom of contract, however, finds its limits in mandatory law, public policy and good morals. A contract can thus be void or unenforceable if its conclusion or performance violates a provisions of mandatory law or fundamental principles of society.[121] Certifiers and requesting entities will thus have to take into account these restrictions when drafting the certification agreement. If statutory provisions dealing with the obligations of certifiers are considered to be mandatory, the freedom of a certifier and requesting entity to contract is limited. Therefore, inter-, supra- or national law is also included in the analysis as it can contain mandatory requirements

[120] The freedom to contract has been recognised in different jurisdictions. In Belgium, for instance, the principle is understood to be included in the more general principle enunciated in Article II.3 of the Code of Economic Law, which specifies that everyone is free to exercise any economic activity to his choice (Court of Cassation, September 13, 1991, *Pasicrisie belge* 1992, 33 & *Arresten van het Hof van Cassatie* 1992, 38; W. VAN GERVEN with cooperation of A. VAN OEVELEN, *Verbintenissenrecht*, Leuven, Acco, 2015, 71-72; P. WÉRY, *Droit des obligations. 1: Théorie générale du contrat*, Brussels, Larcier, 2011, 124-128). This freedom is also expressed in the Article 16 of the European Charter on Fundamental Rights. The freedom to contract has also been acknowledged as a fundamental principle in France (see in this regard: P. DELEBECQUE & F.J. PANSIER, *Droit des obligations: contrat et quasi-contrat*, Paris, Litec, 2010, 33 & 181). In her comparative analysis, professor of civil law at Amsterdam University MAK concludes that the freedom to contract to a greater or lesser extent, is considered as a leading principle of contract law in Germany, the Netherlands and England (C. MAK, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn, Kluwer Law International, 2008, 44). Liberty of contract is also a fundamental legal principle in the United States (D.A. SCHULTZ, *The Encyclopedia of American Law*, New York, Infobase Publishing, 2014, 284).

[121]121 J.M. SMITS, *Contract Law: A Comparative Introduction*, Cheltenham, Edward Elgar, 2014, 177-190 with further references. The situation in four countries can be used as an illustration in this regard. In Belgium, Article II.4 of the Code of Economic Law specifies that the freedom of enterprise is exercised taking into account the international treaties, the general normative framework of the economic union and the monetary unity as determined by or on the basis of the international treaties and the law, as well as the laws concerning public policy and good morals and the provisions of mandatory law. Article 6 of the Belgian Civil Code (BCC) further stipulates that specific contracts may not harm the laws that concern public order and good morals (I used the translation given by I. CLAEYS, "Contract Law", in: M. KRUITHOF & W. DE BONDT (eds.), *Introduction to Belgian Law*, Alphen aan den Rijn, Kluwer Law International, 2017, 230; W. VAN GERVEN with cooperation of A. VAN OEVELEN, *Verbintenissenrecht*, Leuven, Acco, 2015, 75-94 with further references). In the Netherlands, Article 3:40 of the Dutch Civil Code provides that a juridical act that by its contents or implications violates good morals or public policy, is null and void. A juridical act that violates a statutory provision of mandatory law is null and void as well. If, however, this statutory provision is only intended to protect one of the parties to a multilateral juridical act, the juridical act is only avoidable; in both cases this applies in so far as the provision does not imply otherwise (I used the translation given by J.M. SMITS, *Contract aw: A Comparative Introduction*, Cheltenham, Edward Elgar, 2014, 178; J. HIJMA, C.C. VAN DAM, W.A.M. VAN SCHENDEL & W.L. VALK, *Rechtshandeling en overeenkomst*, Deventer, Kluwer, 2007, 15 & 160-170). In England, contracts will be illegal when they involve the commission of a legal wrong or when they are contrary to public policy (G.H. TREITEL & E. PEEL, *The Law of Contract*, London, Sweet & Maxwell, 2010, 472). The freedom of contract is not an absolute one. Some level of protection will always be required for those less able to look after themselves (P.H. RICHARDS, *Law of Contract*, London, Pitman, 2010, 10). The 'weaker' position of parties is also a reason to restrict the freedom to contract in France (see in this regard: P. DELEBECQUE & F.J. PANSIER, *Droit des obligations: contrat et quasi-contrat*, Paris, Litec, 2010, 33-34 & 196-213).

for certifiers, for instance regarding their independence or the performance of surveillance tasks.

The interaction between contracts and mandatory law becomes clear as contracts often contain clauses (e.g. on a certifier's independence) that are further specified under the applicable legislation or regulation (e.g. on the avoidance of conflicts of interest). Moreover, the applicable legislation can include provisions that refer to the contractual relationship with the requesting entity to ensure that certifiers issue accurate and reliable certificates.[122] Certification agreements need to be seen in the light of these legal requirements. Therefore, and for reasons of clarity as well, contractual obligations and legal requirements are combined to shed light on the certification process as a whole. A certifier's conduct during the certification process is governed by contractual provisions as well as legal requirements. When I refer to a certifier's obligations during the certification process, this includes the latter's contractual commitments as well as the applicable legal requirements. Such an approach might also be relevant when certification agreements are incomplete, which then calls for "gap filling".[123] Gap filling can take place on an ad hoc basis or by using default rules. The former method implies that a lacuna in the specific contract is supplemented with terms that follow from the hypothetical will of the parties in the circumstances of the case.[124] The latter method of gap filling provides standard solutions for problems typical to a certain type of contract (e.g. a contract of sale).[125]

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[122] For instance, EU legislation stipulates that CRAs should in their "professional activity" focus on the issuing of ratings to avoid potential conflicts of interest (Recital (22) Regulation 1060/2009 on credit rating agencies). CRAs have an important responsibility towards investors and issuers in ensuring that they comply with Regulation 1060/2009 so that their ratings are independent, objective and of adequate quality (Recital (32) Regulation 462/2013 on credit rating agencies). The Regulation on Medical Devices stipulates that the position of notified bodies vis-à-vis manufacturers "should be strengthened" to ensure continuous compliance by manufacturers after receipt of the original certification (Recital (52) Regulation 2017/745 on medical devices).

[123] J.M. SMITS, *Contract Law: A Comparative Introduction*, Cheltenham, Edward Elgar, 2014, 121.

[124] J.M. SMITS, *Contract Law: A Comparative Introduction*, Cheltenham, Edward Elgar, 2014, 122, 130-132. In Belgium and France, the Civil Code states that agreements do not only obligate to what is expressed therein but also for the consequences that equity, usage or the law gives to an obligation according to its nature (Article 1135 Belgian Civil Code and article 1194 of the new French Civil Code). Article 5.74. of Book 5 «Les obligations» that will be included in the new Civil Code contains a similar wording (*Avant-projet de loi approuvé*, le 30 mars 2018, par le Conseil des ministres, tel que préparé par la Commission de réforme du droit des obligations instituée par l'arrêté ministériel du 30 septembre 2017 et adapté, eu égard aux observations reçues depuis le début de la consultation publique lancée le 7 décembre 2017). In England, a contract may in addition to express terms also contain terms that are not expressly stated but which are implied, either because that is found to be the intention of the parties, or by operation of laws, or by custom or usage (G.H. TREITEL & E. PEEL, *The Law of Contract*, London, Sweet & Maxwell, 2010, 205). In the Netherlands, Article 6:248(1) of the Civil Code states that a contract not only has the effects parties have agreed upon, but also those which, according to the nature of the agreement, arise from statute, usage or the requirement of good faith (reasonableness and fairness) (I used the translation given by J.M. SMITS, *Contract law: A Comparative Introduction*, Cheltenham, Edward Elgar, 2014, 131-132). In the United States, a distinction is also made between express and implied terms of a contract (G. KLASS, *Contract Law in the USA*, Alphen aan den Rijn, Kluwer Law International, 2010, 131).

[125] J.M. SMITS, *Contract Law: A Comparative Introduction*, Cheltenham, Edward Elgar, 2014, 132-133.

33. The certification process generally starts with a requesting entity purchasing a certificate for a particular item.[126] To that end, requesting entities are required to provide the item that needs to be certified and/or any related information to the certifier.[127] Based on this information, the certifier subsequently initiates the actual certification process. From a conceptual point of view, the certifier's obligations during this certification process can be framed around two axes. The combination of both axes will provide a better understanding of a certifier's obligations during the process, which will be useful for the remaining parts of this dissertation.

34. The first axis deals with the stages during the certification process and a certifier's corresponding obligations. It relates to the process by which certifiers come to the certificate given to a particular item. The linear certification process is divided into three stages, namely the stage before the certificate is issued ('pre-issuance stage'), the actual issuance of certificate, and the stage once the certificate has been issued ('post-issuance stage').

35. The second axis relates to the nature and qualification of the certifier's obligations in each of these stages, namely 'pre-issuance' obligations (first stage), the issuance of the certificate (second stage) and 'post-issuance' obligations that arise once the certificate is issued (third stage). Whether there will be a basis for liability towards a requesting entity ultimately depends of the nature of the certifier's obligations. Several legal systems (explicitly or implicitly) make a distinction between the obligation of certifiers to produce or achieve a specific anticipated and contractual agreed result on the one hand (*obligation de résultat*) and the duty to apply the normally required diligence, reasonable care and skill on the other hand (*obligation de moyen*).

Certifiers will breach an *obligation de résultat* whenever the promised result has not been reached, except when the certifier proves that this failure is due to impossibility or *force majeure*.[128] The requesting entity will thus only have to establish that the certifier did not

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[126] In some case, credit rating agencies can issue so-called unsolicited ratings. This means that the CRA provides a rating without prior request of the issuer. The issuance and presentation of such ratings has been regulated in Article 10 Regulation 1060/2009 on credit rating agencies.

[127] A rating agreement with S&P included in the Annexes, for instance, stipulates that the issuer has to give the CRA all information necessary to calculate the initial rating. The requirement to provide information also exists under the agreement with classification societies. Shipbuilders initiate the certification process by submitting a request for classification to the society. They provide the plans, related technical descriptions and data concerning the vessel for approval to the classification society (N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 43-46). The duty to give information is also included in certification contracts with product certifiers. The conditions for certification services of product certifier SGS stipulate that the requesting entity has to make available or accessible product samples, information, records, documentation and facilities (Article 4, "SGS Terms and Conditions - General Conditions for Certification Services", available at <www.sgs.com/en/Terms-and-Conditions/General-Conditions-for-Certification-Services-English.aspx>). A requesting entity might also be required to communicate all changes that significantly affect the certified product throughout the term of the contract such as changes associated with the design of the certified product (Article 4, "TUV Terms and Conditions of Certification", available at <www.tuv.com/media/usa/termsandconditions/ TandC_of_Certification_for_DAkks-VDA_Rev8.pdf>.

[128] In Belgium, *force majeure* occurs when it is impossible for the certifier to perform a contractual obligation because of a circumstance that is not attributable to it (see in this regard: Articles 1147-1148

achieve the contractually promised result(s). A violation of an *obligation de moyen* presupposes that the certifier did not apply the required care and skill. If the certification contract is qualified as *obligation de moyen*, the certifier will only be held liable if the requesting entity shows that the former has been negligent and did not act as a reasonable certifier placed in the same circumstances.[129]

BCC; Articles 5.75 and 5.300 of Book 5 «Les obligations» that will be included on the new Belgian Civil Code (*Avant-projet de loi approuvé*, le 30 mars 2018, par le Conseil des ministres, tel que préparé par la Commission de réforme du droit des obligations instituée par l'arrêté ministériel du 30 septembre 2017 et adapté, eu égard aux observations reçues depuis le début de la consultation publique lancée le 7 décembre 2017); Court of Cassation, October 18, 2001, *Arresten van het Hof van Cassatie* 2001, 1718 & *Pasicrisie belge* 2001, 1656; I. CLAEYS, "Contract Law", in: M. KRUITHOF & W. DE BONDT (eds.), *Introduction to Belgian Law*, Alphen aan den Rijn, Kluwer Law International, 2017, 236; M. DE POTTER DE TEN BROECK, *Gewijzigde omstandigheden in het contractenrecht*, Antwerp, Intersentia, 2017, 438p.). The situation is quite similar in France where *force majeure* is relevant for the non-performance of an *obligation de résultat* (see in this regard: Article 1218 of the new French Civil Code; P. DELEBECQUE & F.J. PANSIER, *Droit des obligations: contrat et quasi-contrat*, Paris, Litec, 2010, 295; J. BELL, S. BOYRON & S. WHITTAKER, *Principles of French Law*, Oxford, Oxford University Press, 2008, 343). In England, the only possibility to escape liability is to invoke the doctrine of frustration. A contract is deemed frustrated when a supervening event renders its performance impossible or at least so different from that contemplated that it would not be reasonable to hold the parties bound by the contract (M. KATSIVELA,"Contracts: Force Majeure Concept or Force Majeure Clauses?", (12) *Uniform Law Review* 2007, 108-109; H. RÖSLER, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law", (3) *European Review of Private Law* 2007, 497-500 with further references). The supervening event has to destroy a fundamental assumption on which the contract is based (P.H. RICHARDS, *Law of Contract*, London, Pitman, 2010, 272). Considering these strict requirements, parties often allocate the risk themselves by incuding a *force majeure* clause in the the contract (J.M. SMITS, *Contract law: a comparative introduction*, Cheltenham, Edward Elgar, 2014, 215 with further references; P.H. RICHARDS, *Law of Contract*, London, Pitman, 2010, 281). In the Netherlands, provisions on *force majeure* are explicitly included in Article 6:75 of the Dutch Civil Code according to which a non-performance cannot be attributed to the debtor if he is not to blame for it, nor accountable for it by virtue of law, a juridical act or generally accepted societal norms (I used the translation provided in J.M. SMITS, *Contract Law: A Comparative Introduction*, Cheltenham, Edward Elgar, 2014, 212. Also see: G.T. DE JONG, C.J.H. BRUNNER, H.B. KRANS, M.H. WISSINK, *Verbintenissenrecht algemeen*, Deventer, Kluwer, 2011, 42-43).

[129] See on the difference between an obligation de résultat and an obligation de moyen in France and Belgium: W. VAN GERVEN with cooperation of A. VAN OEVELEN, *Verbintenissenrecht*, Leuven, Acco, 2015, 34; L. VAN VALCKENBORGH, "De kwalificatie van een verbintenis als resultaats- of middelenverbintenis", (5) *Tijdschrift voor Belgisch Burgerlijk Recht-Revue Générale de Droit Civil* 2011, 222-229; P. WÉRY, *Droit des obligations*. 1: *Théorie générale du contrat*, Brussels, Larcier, 2011, 30-31; P. VAN OMMESLAGHE, *Droit des obligations*, I, *Sources des obligations* (première partie), Brussels, Bruylant, 2010, 39-48; M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 374-376; A. BÉNABENT, *Droit des obligations*, Paris, Montchrestien, 2012, 295-296). Article 5.75. of Book 5 «Les obligations» that will be included in the new Civil Code explicitly mentions the difference between both types of obligations (Avant-projet de loi approuvé, le 30 mars 2018, par le Conseil des ministres, tel que préparé par la Commission de réforme du droit des obligations instituée par l'arrêté ministériel du 30 septembre 2017 et adapté, eu égard aux observations reçues depuis le début de la consultation publique lancée le 7 décembre 2017). In England, strict contractual duties imply that, except in cases of a force majeure clause in the contract, liability is independent of fault. However, in a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill (Section 13 of the Supply of Goods and Services Act 1982, c. 29, July, 13, 1982). The Act stipulates that any rule of law might impose on the supplier a duty stricter than the one imposed under Section 13. The type of contract determines whether the liability of the party breaching the contract will be strict or based on fault. For instance, when the contract is one for the supply of components or goods, liability is generally strict. The contractor's duty under a contract of services, on the other hand, is often one of care only (see in this regard *BHP Petroleum Ltd v. British Steel plc*, [2000] 2

36. The focus of this chapter will be on the certification process and the nature of the obligations of certifiers in the pre-issuance stage (part 1.), the issuance stage (part 2.) and the post-issuance stage (part 3.). By using both axes, a graphical illustration of the obligations of certifiers during the certification process is given (part 4.).

1. First Stage of the Certification Process

37. Certifiers have several 'pre-issuance' obligations during the first stage of the certification process. For instance, they are required to perform the analysis of the item or any related information that needs certification. The obligation to perform the analysis cannot be equated with the way in which the analysis is actually conducted. The obligation to perform the analysis within the agreed time framework qualifies as *obligation de résultat*.[130]

Lloyd's Rep. 277). The general rule is that contracts under which services are rendered by professionals (e.g. accountants or lawyers) only impose a duty of care. The professional party does not guarantee to produce a specific result but only undertakes to perform the services with reasonable care and skill (G. TREITEL & E. PEEL, *The Law of Contract*, London, Sweet & Maxwell, 2010, 834-838 with extensive references to case law). In Germany, the distinction is made between the contract of services or employment (Dienstvertrag regulated in §§ 611-630 BGB) and the contract of work (*Werkvertrag* regulated in § 632 BGB). A contract for service does not contain an obligation to achieve a specific result. Rather, under contracts to provide services, the party providing the services is only required to perform the service lege artis but does not promise a particular result. The party that performs the service is only bound to perform this service using reasonable care and skill without achieving the specific result. To the contrary, the contract of work contains the duty for a party to achieve a specific result (B. MARKESINIS & H. UNBERATH, *The German Law of Contract: A Comparative Ttreatise*, Oxford, Hart, 2006, 153-157 & 520-533; B. MARKESINIS, W. LORENZ & G. DANNEMANN, *The Law of Contracts and Restitution: A Comparative Introduction*, Oxford, Clarendon press, 1997, 40). In the Netherlands, a distinction is made between an *inspanningsverplichting* and a *resultaatsverplichting*. Under the former one, a contractor has to apply its best efforts to reach a particular result. The party has to make sure that it acts according to its duty of care, without having to achieve the particular result. Under the latter one, the party has to achieve the particular result that has been agreed in the contract (G.T. DE JONG, C.J.H. BRUNNER, H.B. KRANS, M.H. WISSINK, *Verbintenissenrecht algemeen*, Deventer, Kluwer, 2011, 42-43; A.S. HARTKAMP & C.H. SIEBURGH, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands Burgerlijk Recht*. 6. *Verbintenissenrecht*. Deel 1. *De verbintenis in het algemeen*, eerste gedeelte, Deventer, Kluwer, 2012, 150-151). In the United States, "every first-year law student learns [that] contract liability is absolute liability-that is to say, liability not based on fault. In the law of contracts, trying is not enough" (E.A. FARNSWORTH, "On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law", (46) *University of Pittsburgh Law Review* 1985, 3). In this regard, HILLMAN relies on different judicial opinions, the Restatement (Second) of Contracts and doctrinal contributions to conclude that reasons for failing to perform a contract, whether willful, negligent or unavoidable "have little or no bearing in determining contract liability". Contract liability is strict, which means that the reasons for nonperformance are irrelevant in determining the injured party's rights (R.A. HILLMAN, "The Future of Fault in Contract Law", (52) *Duquesne Law Review* 2014, 275 referring to E.A. POSNER, "Fault in Contract Law", (107) *Michigan Law Review* 2009, 1438; R. POSNER, "Let Us Never Blame a Contract Breaker", (107) *Michigan Law Review* 2009, 1349). However, a duty of best efforts for the certifier can arise when the contractual terms explicitly limit the certifier's undertaking to a duty of best efforts. The language used in contracts that require the promisor to achieve a specific result can be interpreted as only imposing a duty of best efforts. This can be the case for contracts of service (E.A. FARNSWORTH, "On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law", (46) *University of Pittsburgh Law Review* 1985, 3-5). As such, strict liability "is a very narrow view of the nature of a contract promise. At minimum, this view ignores the many contracts that explicitly or implicitly import standards of care, such as best efforts, due care, and good faith" (R.A. HILLMAN, "The Future of Fault in Contract Law", (52) *Duquesne Law Review* 2014, 283).

[130] Reference can, for example, be made to the case of the *Elodie II* dealing with the liability of classification societies (Court of Appeal Versailles, March, 21, 1996, "Navire Elodie II", *Droit Maritime Français* 1996,

38. More importantly, certifiers also have to examine the item or related information provided by the requesting entity. Based on this analysis, they issue the certificate. It has already been mentioned that the obligation *to perform* this analysis has to be distinguished from the obligations relating to *how* this is done. The way certifiers have to perform this analysis can be determined by the certification contracts (e.g. for CRAs), codes of practice or terms and conditions (e.g. for product certifiers and classification societies) or EU and national law (e.g. for CRAs and notified bodies). A closer look at all these sources shows that certifiers are bound by an *obligation de moyen* when doing the analysis to determine the certificate. Besides general reasons pointing to that conclusion (part 1.1.), attention is given to each certifier, namely credit rating agencies (part 1.2.), classification societies (part 1.3.), product certifiers and notified bodies (part 1.4.).

1.1. General Considerations on a Certifier's Obligations

39. The issuance of the certificate is the result of tests and inspections performed by a third-party certifier of the item that has to be certified. Class surveyors, financial analysts or inspectors are involved in the certification process and determine whether and which certificate can be issued. The certification process remains the result of human appreciations and calculations. Certifiers should, therefore, not be liable merely because the certificate does not correspond with the 'actual' or 'true' value of the certified item (cf. *errare humanum est*). This corresponds with decisions in different legal systems and provisions in legislation according to which other professional providers of information or services such as attorneys,[131] parties issuing the electronic identification means[132] or medical practitioners[133] are only bound to carefully perform their services, without having to achieve or guarantee a particular result.

721). Based on the decision, classification societies can be held liable when they do not conduct the surveys at the agreed time or do not issue the certificate of class accordingly. See in this regard also: P. LE TOURNEAU, "Faute lourde d'un organisme de contrôle (à propos du classement d'un navire)", *Recueil Dalloz* 1996, 547.

[131] See for Belgium: Court of Appeal Mons, May 14, 2009, *Revue de jurisprudence de Liège, Mons et Bruxelles* 2010, 1423; Court of Appeal Liège, October 14, 2009, *Revue de jurisprudence de Liège, Mons et Bruxelles* 2010, 1434. See for England: *Clark v. Kirby-Smith*, [1964] Ch. 506 as discussed in G. TREITEL & E. PEEL, *The Law of Contract*, 2011, London, Sweet & Maxwell, 2010, 834-838. See for the Netherlands: Court of First Instance Utrecht, January 28, 2009, ECLI:NL:RBUTR:2009:BH2374, *Nederlandse Jurisprudentie Feitenrechtspraak* 2009, 198.

[132] 'Electronic identification means' refers to a material and/or immaterial unit containing person identification data and which is used for authentication for an online service (Article 3(2) Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257). In this regard, Article 11, 2. of Regulation 910/2014 stipulates that the "party issuing the electronic identification means is liable for damage caused intentionally or negligently to any natural or legal person due to a failure to comply with the obligation referred to in point (e) of Article 7 in a cross-border transaction".

[133] See for Belgium: Court of Appeal Liège, October 18, 2012, *Consilio Manuque: Belgisch tijdschrift voor lichamelijke schade en gerechtelijke geneeskunde* 2013, 85; Court of Appeal Liège, November 15, 2012, *Consilio Manuque: Belgisch tijdschrift voor lichamelijke schade en gerechtelijke geneeskunde* 2013, 88 & *Revue de Jurisprudence de Liège, Mons et Bruxelles* 2013, 788; T. VANSWEEVELT, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis*, 1997, Antwerp, Maklu, 1997, 960p.; T. VANSWEEVELT, "Rechtsvergelijkende aantekeningen bij de medische aansprakelijkheid: evolutie en

The wording used in Article 1:107 of the Principles of European Law on Service Contracts[134] points towards a similar conclusion. It stipulates that the provider of services such as a certifier has to perform the service "with the care and skill that a reasonable service provider would exercise under the circumstances". If the service provider professes a higher standard of care and skill, he must exercise that care and skill (*spondet peritiam artis, et imperitia culpae adnumeratur*). If the service provider is or purports to be a member of a group of professional service providers for which standards exist that have been set by a relevant authority or by that group itself, the service provider must exercise the care and skill expressed in these standards.[135]

40. There are several other elements illustrating that third-party certifiers are bound by an *obligation de moyen* when conducting the analysis to determine the certificate.

A certifier will be more likely bound by an *obligation de moyen* to the extent that the requesting entities accept the risk inherent to the performance of the certification agreement.[136] This seems to be the case as it is the requesting entity that ultimately remains responsible for the quality or safety of the certified item. Another element to qualify an obligation as an *obligation de moyen* is related to uncertainty as to whether the exercise of reasonable care will actually lead to a specific anticipated result. If a particular result remains unlikely despite applying reasonable efforts to achieve it, the obligation more likely qualifies as an *obligation de moyen*.[137] This applies for certifiers as there is no guarantee that the certified item will never default, even when the certifiers carefully performed the analysis.[138]

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hervorming", *Tijdschrift voor gezondheidsrecht-Revue de Droit de la Santé* 2000, 116-123. See for France: Court of Appeal Versailles, March 28, 1996, *Recueil Dalloz* 1996, 138. See for England: *Eyre v. Measday*, [1986] 1 All. E.R. 488; *Thake v. Maurice*, [1986] QB 644. In Germany, things seem less clear. Spranger concludes that it has to be assessed on a case-by-case basis whether a violation of an agreement occurred. However, he concludes that it seems clear that the physician does not owe the success of convalescence in normal medical treatments and, therefore, cannot be held responsible if the treatment is carried out according to the current state of medical arts without success (T.M. SPRANGER, *Medical Law in Germany*, Alphen aan den Rijn, Kluwer Law International, 2011, 79-80). In his study, STAUCH also concludes that a violation of the medical contract does not arise merely because the result is not achieved. Instead, German courts have qualified the medical contract as a *Dienstvertrag*, which obliges the doctor to exercise due skill and care without warranting a particular result (M. STAUCH, *The Law of Medical Negligence in England and Germany: A Comparative Analysis*, Portland, Bloomsbury Publishing/Hart, 2008, 29 with further references).

[134] The Principles of European Law on Service Contracts advance a set of systematically presented rules similar to national civil codes as a set of common European principles for the functioning of the Common Market.

[135] J.M. BARENDRECHT, *Service Contracts (PEL SC)*, München, Sellier, 2006, 1033; P. LE TOURNEAU & L. CADIET, *Droit de la responsabilité et des contrats*, Paris, Dalloz, 2002, 740-742.

[136] J. FROSSARD & R. NERSON, *La distinction des obligations de moyens et des obligations de résultat*, Paris, Librairie générale de droit et de jurisprudence, 1965, 137-157. See for more information also the discussion *infra* in nos. 61-65.

[137] J. GHESTIN, G. VINEY & P. JOURDAIN (eds.), *Traité de droit civil. Les conditions générales de la responabilité*, Paris, L.G.D.J., 1998, 460-461; J. FROSSARD & R. NERSON, *La distinction des obligations de moyens et des obligations de résultat*, Paris, Librairie générale de droit et de jurisprudence, 1965, 128.

[138] A comparison can to a certain extent be made with physicans who are bound by an *obligation de moyen*. For instance, they will not face liability in Belgium merely because the patient did not heal. Liability will

An active role and involvement of the requesting entities in the certification process can also be an indication that a certifier is only bound by an *obligation de moyen*. It remains difficult to impose an *obligation de résultat* on the certifier if the latter is not completely in control of the outcome of the first stage in the certification process.[139] The requesting entity has to provide the necessary information to the certifier. As a consequence, a certifier is only able to issue a reliable and accurate certificate to the extent that the information given by the requesting entity is correct. Moreover, the requesting entity has to cooperate with the certifier during the first stage of the certification process. The PIP case illustrates the importance of giving accurate information as well as the consequences of not doing so. Poly Implant Prothèse (PIP) was a French company that produced breast implants. As from 2001, French law obliged manufacturers of breast implants to use one specific type of medical silicone gel for their products. However, PIP did not comply with this explicit requirement. It developed an elaborate scheme of deceit and continued to use sub-standard industrial silicone gel implants to cut costs. The impact of PIP's fraud on the manufacturing process was quite disparate. Whereas some implants contained the required medical silicone gel, others held a mixture of medical and industrial silicone gel or only industrial silicone gel. Therefore, the verification of the quality and certification of the breast implants by the certifier was made extremely difficult. Such events show that it might take things too far to impose an *obligation de résultat* on certifiers as they do not always have control over the item that needs certification or the behavior of requesting entities.[140]

1.2. Obligations of Credit Rating Agencies

41. Apart from general reasons pointing towards an *obligation de moyen*, the specific situation for each certifier underpins a similar conclusion. A credit rating agency, for instance, bases its decision to issue a rating on financial information provided by the issuer or on publicly available information. CRAs have two major obligations in the first stage of the certification process. On the one hand, they have to analyse the information with regard to the issuer's financial position (part 1.2.1.). On the other hand, they need to use rigorous, systematic and continuous methodologies to determine the rating (part 1.2.2.).

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be imposed to the extent that the physician did not act as a prudent and careful physician placed in similar circumstances (e.g. Court of Appeal Liège, October 18, 2012, *Consilio Manuque: Belgisch tijdschrift voor lichamelijke schade en gerechtelijke geneeskunde* 2013, 85).

[139] G. VINEY & P. JOURDAIN, "Les conditions générales de la responabilité", in: J. GHESTIN (ed.), *Traité de droit civil*, Paris, L.G.D.J., 1998, 460-461.

[140] See for extensive description and discussion of the facts: B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 339-340; B.M. FRY, "A Reasoned Proposition to a Perilous Problem: Creating a Government Agency to Remedy the Emphatic Failure of Notified Bodies in the Medical Device Industry", (22) *Willamette Journal of International Law & Dispute Resolution* 2014, 169-170; P. VERBRUGGEN & B. VAN LEEUWEN, "The Liability of Notified Bodies under the EU's New Approach: The Implications of the PIP Breast Implants Case", (43) *European Law Review* 2018, 392.

1.2.1. Analysis of Information Made Available to the CRA

42. The process of coming to the actual rating can be quite complex and challenging. The EU Regulation on Credit Rating Agencies stipulates that a CRA has to adopt, implement and enforce adequate measures to ensure that the ratings it issues are based on a thorough analysis of all information that is available to it and that is relevant to its analysis according to its rating methodologies.[141] The 2008 Code of Conduct Fundamental for CRAs adopted by the International Organization of Securities Commission (IOSCO)[142] as well as the individual codes of conduct adopted by the CRAs[143] use similar wording. The codes of conduct further specify that the rating analysis and any rating action has to be based upon the criteria, processes and methodologies established by CRAs.[144]

43. Arguably, the requirement that a CRA has to adopt, implement and enforce adequate measures to ensure that the ratings are based on a thorough analysis of all available and relevant information according to its methodologies is an *obligation de moyen*. CRAs will have to determine whether the adopted measures are adequate and the analysis conducted sufficiently thorough. That is because it would be difficult to establish when exactly the adopted measures would be adequate or if the analysis is thorough. As such, CRAs will have to apply reasonable care and skill when adopting adequate measures and conducting a thorough analysis.

The purpose of Article 8.2. of the EU Regulation is (merely) to guarantee that ratings are issued after an analysis of relevant and available information, which the CRA has to assess according to its own methodologies. Therefore, CRAs only have to analyse information that is considered relevant. Basically, CRAs will have to decide which information is relevant and only have to mention the information they will use in their methodologies. The analysis needs to be based on the available information. CRAs can base their decision to issue a rating on the (financial) information provided by the issuer. Thus, CRAs are not expected to actively look for all existing information and, in case the issuer does not provide sufficient information, they are only required to examine public information on the issuer.[145] Such wording is difficult to reconcile with an *obligation de résultat*.

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[141] Article 8.2. Regulation 1060/2009 on credit rating agencies.

[142] Article 1 Technical Committee of the International Organization of Securities Commission, "Code of Conduct Fundamental for Credit Rating Agencies", August 2008, available at <www.iosco.org/library/pubdocs/pdf/IOSCOPD271.pdf>.

[143] Article 1.4. Standard & Poor's Rating Services, "S&P Global Ratings Code of Conduct", December 15, 2017, available at <www.standardandpoors.com/ru_RU/delegate/getPDF?articleId=1978501&type=COMMENTS&subType=REGULATORY>.

[144] See for example: Article 2.1.3. Fitch Ratings, "Code of Conduct", August 2014, available at <www.fitchratings.com/web_content/credit_policy/code_of_conduct.pdf>; Article 1.2., Section III Moody's, "Moody's Code of Professional Conduct", June 2017, available at <www.moodys.com/uploadpage/Mco%20Documents/Documents_professional_conduct.pdf>.

[145] R.G. ALCUBILLA & J. RUIZ DEL POZO, Cred*it Rating Agencies on the Watch List: Analysis of European Regulation*, Oxford, Oxford University Press, 2012, 190.

44. Article 8.2. of the EU Regulation on CRAs further stipulates that CRAs have to adopt all necessary measures so that the information used when assigning a rating is of sufficient quality and from reliable sources.[146] At first sight, this seems to be an *obligation de résultat* as CRAs are required to use 'all necessary' measures. The CRA needs to refrain from issuing a rating if there is a lack of reliable and sufficient data or when the complexity of a structure of a new type of financial instrument or the quality of information available is not satisfactory or raises serious questions as to whether a CRA can provide a credible rating.[147] Such an interpretation also follows from the decision by the United States District Court for Northern District of California in *Anschutz v. Merrill Lynch*. Fitch and Standard & Poor's acknowledged the importance to use information of sufficient quality and from accurate and reliable sources. Both CRAs claimed they would exercise their editorial discretion and either refrain from publishing the rating or withdraw it if they would only possess inadequate information.[148]

The IOSCO Code of Conduct Fundamentals, however, is less clear when stipulating that a CRA should only adopt 'reasonable measures' so that the information is of sufficient quality to support a rating.[149] A similar wording is used in rating agreements and the CRAs' individual codes of conduct.[150] The wording used in the Regulation on CRAs (using 'all necessary measures') and rating agreements or the IOSCO Code of Conduct Fundamentals (using 'reasonable measures') is thus different. There are, nonetheless, two reasons why CRAs should only be bound by an *obligation de moyen*. This implies that CRAs only have to apply reasonable and not all measures to ensure that the information they use to determine a rating is of sufficient quality and from reliable sources. This also means that if CRAs are convinced that the information is not of sufficient quality and from unreliable sources after a reasonable analysis, the rating should not be issued.

45. First, contractual terms often stipulate that rating agencies do not guarantee that the information they receive from the issuer is accurate, complete, correct or comprehensive. Some ratings agreements also state that CRAs do not have a duty of due diligence or independent verification of the information given by the issuer. A contract with Standard & Poor's is clear in this regard when stipulating that the CRA relies on the issuer for the accuracy of information and documents to determine the latter's creditworthiness. The CRA does not audit or verify such information and does not take the responsibility for the appropriateness of the information provided.[151] The codes of conduct of the individual CRAs contain a similar wording. Moody's, for instance, is not an auditor and cannot independently verify or validate information received in the rating process.[152] Standard

[146] Article 8, paragraph 2 Regulation 1060/2009 on credit rating agencies.

[147] Recital (34) and Annex I, Section D.I.4 Regulation 1060/2009 on credit rating agencies.

[148] *Anschutz Corp. v. Merrill Lynch & Co. Inc*., 785 F. Supp. 2d 799, 809 (N.D. Cal. 2011).

[149] Article 1.7. Technical Committee of the International Organization of Securities Commission, "Code of Conduct Fundamental for Credit Rating Agencies", August 2008, 5.

[150] See for example Article 2.1.7. Fitch Ratings, "Code of Conduct", August 2014, 4.

[151] The contracts included in the Annexes are made anonymous due to reasons of confidentiality.

[152] Moody's, "Code of Professional Conduct", December 2017, 7.

& Poor's relies on the issuer, its accountants, counsel, advisors, and other experts for the accuracy and completeness of the information submitted in connection with the rating.[153] Such provisions seem difficult to align with the obligation of CRAs to adopt 'all necessary' measures to safeguard that the information is of sufficient quality and from reliable sources. Therefore, it is more realistic that CRAs, within the confines of the provisions in contracts or code of conducts, only have to adopt 'reasonable measures'.[154]

46. Second, case law in different jurisdictions can be relied upon to show that CRAs only have to apply reasonable measures to safeguard that the information used when assigning a rating is of sufficient quality and from reliable sources. The Australian *Bathurst* case is of particular importance in this regard. The judge held that S&P violated its duty of care towards investors. The rating was not based on reasonable grounds and issued without reasonable care and skill.[155] One reason why the CRA did not act with reasonable care and skill was because it did not apply reasonable measures to ensure that information was of sufficient quality and from reliable sources. The CRA did not develop its own model for rating the securities but instead relied on the model created by the issuer. S&P also did not consider the model risk when assigning the rating.[156] In addition, S&P adopted a 15% volatility figure which had been provided to it by ABN Amro. However, S&P could have easily calculated the volatility and would then have realised that the correct figure was around 28%. In essence, S&P used a number of inputs that were incorrect to calculate the rating. This could have been prevented if the CRA had relied on information of sufficient quality and from accurate and reliable sources, and thus not only on information given by the issuer ABN Amro.[157]

For a similar conclusion, reference can also be made to a Belgian case dealing with the liability of information providers. The Court of Appeal in Brussels upheld a lower court decision according to which the issuance of incorrect commercial information does not *ipso facto* lead to the liability of the information provider. Rather, there must be "un manque de prudence ou de diligence dans la recherche ou dans la communication de l'information" (own translation: there needs to be a lack of prudence or diligence in the research or communication of the information).[158] Such wording corresponds with the

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[153] Article 7.1. Standard & Poor's Rating Services, "S&P Global Ratings Code of Conduct", December 15, 2017, 8.

[154] R.G. ALCUBILLA & J. RUIZ DEL POZO, *Credit Rating Agencies on the Watch List: Analysis of European Regulation*, Oxford, Oxford University Press, 2012, 190.

[155] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2437, 2820-2836, 2979 & 3105. See for a discussion and further references: J. DE BRUYNE, "Liability of Credit Rating Agencies Regulatory Changes & Tendencies in Case Law Following the Financial Crisis", (3) *International Company and Commercial Law Review* 2016, 87-94.

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

[157] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2611-2669.

[158] Court of Appeal Brussels, December 8, 2004, *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2006, 135.

duty to apply reasonable measures rather than displaying all necessary measures to safeguard that the information is of sufficient quality and from reliable sources.

1.2.2. Using Rigorous, Systematic and Continuous Methodologies

47. Once all the information is gathered, CRAs proceed with the calculation of the rating based on this information. Article 8.3. of the Regulation on CRAs, the IOSCO Code of Conduct Fundamentals[159] and the individual codes of conduct adopted by the CRAs[160] stipulate that CRAs have to use rigorous, systematic and continuous rating methodologies. This at first sight looks similar to an *obligation de résultat*.[161] The European Commission, for instance, adopted legislation which clearly defines when methodologies are considered rigorous,[162] systematic,[163] continuous[164] and based on historical experience.[165] The enactment of such legislation might indeed be an indication that CRAs are bound by an *obligation de résultat* as there are clear standards and requirements CRAs have to follow. Consequently, there can be a basis for liability once CRAs do not meet these standards, regardless of the efforts they made to achieve them.

48. At the same time, however, there are two more important reasons why CRAs should actually be bound by an *obligation de moyen*. There will only be a basis for liability when CRAs negligently use rigorous, systematic and continuous methodologies. The question

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[159] Article 1.2., Section A ('Quality of the Rating Process'), Part 1 ('Quality and Integrity of the Rating Process') Technical Committee of the International Organization of Securities Commission, "Code of Conduct Fundamental for Credit Rating Agencies", August 2008, 4.

[160] Article 1.2., Section A ("Quality of the Rating Process"), Part 1 ("Quality and Integrity of the Rating Process) Moody's, "Code of Professional Conduct", June 2017, 8.

[161] See in this regard also E. WEEMAELS, "La responsabilité des agences de notation. Des sociétés responsables comme les autres?", (2) *Revue Pratique des Sociétés-Tijdschrift voor Rechtspersoon en Vennootschap* 2012, 154-155.

[162] Article 4 Commission Delegated Regulation (EU) No 447/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies by laying down regulatory technical standards for the assessment of compliance of credit rating methodologies, OJ L 140/14. A rigorous methodology (1) contains clear and robust controls and process for their developments and related approval that allow suitable challenge, (2) incorporates all driving factors deemed relevant in determining the creditworthiness of a rated entity or financial instrument and is supported by statistical, historical experience or evidence; (3) considers the modelled relationship between rated entities or financial instruments of the same risk factor and risk factors to which the credit rating methodologies are sensitive; and (4) incorporates reliable, relevant and quality related analytical models, key credit rating assumptions and criteria where these are in place.

[163] Article 5 Delegated Regulation 447/2012. The methodology is considered systematic if (1) it can be applied systematically in the formulation of all ratings in a given asset class or market segment unless there is an objective reason for diverging from it; and (2) if it is capable of promptly incorporating the findings from any review of its appropriateness.

[164] Article 6 Delegated Regulation 447/2012. The methodology is continuous if it is designed and implemented in such a way that enables it to (1) be used unless there is an objective reason for the rating methodology to change or be discontinued; (2) be capable of promptly incorporating any finding from ongoing monitoring or a review, in particular where changes in structural macroeconomic or financial market conditions would be capable of affecting credit ratings produced by that methodology; and (3) compare ratings across different asset classes.

[165] Article 7 Delegated Regulation 447/2012. The rating methodology will be subject to validation based on historical experience including back testing if it is, for example, supported by quantitative evidence of the discriminatory power of the credit rating methodology.

whether or not methodologies were rigorous, systematic and continuous is determined by the behaviour of CRAs. Put differently, the conduct of CRAs eventually makes rating methodologies unacceptable.

First, the judge in the *Bathurst* case held that the CRA did not use rigorous, systematic and continuous methodologies because of the lack of reasonable grounds to assign the rating. The rating was not the result of the CRA's reasonable care and skill.[166] It has already been mentioned that S&P did not develop its own model for rating CPDOs. Instead, it relied on the model created by ABN Amro. The CRA did also not give any consideration to the model risk when assigning the rating.[167] S&P adopted a 15% volatility figure which had been given to it by ABN Amro. There was no evidence that S&P checked the 15% volatility figure itself. S&P could have calculated the volatility and would then have realised that the correct figure was around 28%. A reasonable and prudent CRA would have done its own calculations and surely not have adopted a volatility figure of 15%.[168] The notes were a newly created product issued in a new market. Consequently, there was no reliable historical data concerning the intended performance of the notes. S&P therefore had to conduct a particularly rigorous and conservative assessment of the available data. The court agreed with the plaintiffs that S&P did not undertake such an analysis. Rather, the CRA adopted inputs for its model advocated by ABN for which there was no reasonable historical or statistical basis.[169]

The second reason relates to the actual process of calculating the rating, which ultimately remains the result of "une appréciation humaine".[170] This also corresponds to the wording used in the Regulation 462/2013 on CRAs, which stipulates that the business of rating involves a degree of assessment of complex economic factors. CRAs have a degree of discretion to determine whether their methodologies are rigorous, systematic and continuous. The use of different methodologies can lead to different ratings, none of which might actually be considered incorrect.[171] CRAs will not violate the obligation to use rigorous, systematic and continuous methodologies merely because it would later turn out that the rating does not truly reflect the issuer's creditworthiness. This is only the case when the incorrect rating is the result of a CRA's wrongful behaviour, for example

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[166] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2814-2836; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 12, 503 & 722.

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

[168] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2611-2669.

[169] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2423 & 2836; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 12, 566-722.

[170] E. WEEMAELS, "La responsabilité des agences de notation. Des sociétés responsables comme les autres?", (2) *Revue Pratique des Sociétés-Tijdschrift voor Rechtspersoon en Vennootschap* 2012, 154.

[171] Recital (33) Regulation 462/2013 on credit rating agencies.

because it used a methodology that no reasonable and competent CRA would use.[172] One might also refer to case law dealing with the liability of issuers under Section 11 & 12 of the US Securities Act.[173] Issuers will not face prospectus liability when reporting honest ratings that later turn out to be inaccurate or merely because the CRA could have formed "better opinions" (internal quotation marks omitted).[174] The mere fact that ratings would have been different by using another methodology is insufficient to state a claim against the issuer. Ratings cannot be inaccurate merely because CRAs should have used better or other rating methods or data.[175]

1.3. Obligations of Classification Societies

49. Similar to CRAs, classification societies have to perform surveys before issuing the certificate. In their private role, they conduct surveys to examine whether the vessel's condition complies with the approved plans and class rules. In their public role, they act on behalf of flag States and attest whether a vessel conforms to (inter)national safety standards. Class surveys have to be carried out according to the technical requirements laid down in the class rules or under applicable legislation.[176] Classification societies perform periodical and non-periodical surveys of the vessel's hull and machinery. Periodical surveys include the class renewal/special survey,[177] the intermediate survey,[178]

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[172] E. WEEMAELS, "La responsabilité des agences de notation. Des sociétés responsables comme les autres?", (2) *Revue Pratique des Sociétés-Tijdschrift voor Rechtspersoon en Vennootschap* 2012, 151-152; M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 376.

[173] United States Securities Act of 1933, Pub. L. 73-22, 48 Stat. 74. See for more information on prospectus liability the discussion *infra* in nos. 286-287.

[174] *Plumbers' Union v. Nomura Asset Acceptance Corp*., 632 F.3d 762, 775 (1st Cir 2011); *Plumbers' Union v. Nomura Asset Acceptance Corp.*, 658 F.Supp.2d 299, 301-303, 309-310 (D. Mass. 2009).

[175] *Plumbers' Union v. Nomura Asset Acceptance Corp*., 632 F.3d 762, 774-776 (1st Cir 2011); *Boilermakers Nat. Annuity Trust v. Wamu Mortg*., 748 F. Supp. 2d 1246, 1256 (W.D. Wash. 2010).

[176] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 5-6.

[177] The class renewal/special survey is held every five years. It includes extensive in and out-of-water examinations to verify that the vessel's structure, the main and essential auxiliary machinery or systems and the equipment remain in a condition that comply with the class rules (International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 6). The special survey involves a thorough analysis of all parts of the ship covered by the class rules. Instead of a time-consuming special survey once in five years, the shipowner may opt for a continuous survey in which not all the check-ups are conducted simultaneously. Each and every part of the vessels is then surveyed at times favourable to the schedule of the ship. Nonetheless, all parts covered by the classification must be checked at least once in five years (N. LAGONI, *The Liability of Classification Societies, Berlin*, Springer, 2007, 47).

[178] The intermediate survey is held approximately half way between two special surveys. The survey aims to determine whether the vessel remains in a general condition which satisfies class rules (International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 6).

the annual survey[179] and (specific) bottom/docking surveys of the hull or boiler and machinery surveys.[180]

50. Class certificates, however, do not imply and cannot be construed as a warranty of safety and fitness of the vessel. In other words, the certificate does not guarantee the ship's seaworthiness. It is merely an attestation that the vessel complies with the class rules.[181] Class rules do not cover every piece of structure or item. Instead, they contain a certain standard of safety which has to be state-of-the-art. Classification societies, therefore, do not guarantee that a vessel is absolutely safe or suitable for its intended services. The aim of classification and certification services is to ascertain that a certain vessel or particular item is state-of-the-art at the time of the survey.[182] Against this background, scholars concluded that classification societies have to perform the surveys with care, without guaranteeing a particular result or completion of specific work (e.g. safeguarding the vessel's the seaworthiness).[183] This conclusion also corresponds with the wording used in class rules or agreements. Classification societies have to perform their 'pre-issuance' obligations carefully by using the normally applied testing standards, procedures and techniques for the purpose of assigning and maintaining class.[184]

51. In sum, class surveys leading to the certificate qualify as *obligations de moyen*. There will not be a basis for liability merely because a classed vessel sinks but only when the classification society did not carefully perform the surveys. This has also been affirmed by decisions dealing with the nature of the contractual obligations of classification societies in different jurisdictions. For instance, courts in Belgium have accepted that a classification society is only obliged to apply the normally required diligence during the

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[179] The ship is also examined during an annual survey. Such a survey includes an external and general inspection of the hull, equipment and machinery to establish whether the vessel's general condition still satisfies the requirements contained in the class rules (N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 47; International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011,6).

[180] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 9; M.A. MILLER, "Liability of Classification Societies from the perspective of United States Law", (18) *Tulane Maritime Law Journal* 1997, 80-81.

[181] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 3. See also the discussion *infra* in no. 63.

[182] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 48.

[183] A. ANTAPASSIS, "Liability of Classification Societies", (11) *Electronic Journal of Comparative Law* 2007, 16; M. FERRER, "Responsabilité des sociétés de classification - Obligations et inexécutions contractuelles des sociétés de classification. – Responsabilité extra-contractuelle à l'égard des tiers et des contractants. – Responsabilité administrative et immunité du droit du pavillon. – Responsabilité pénale", *JurisClasseur Transport* 2009 (available online at JurisClasseur).

[184] Article 1.3. of the Bureau Veritas Marine & Offshore General Conditions stipulates that the classification society "acts as a services provider. This cannot be construed as an obligation bearing on the Society to obtain a result or as a warranty" (Bureau Veritas, "Bureau Veritas Marine & Offshore General Conditions", available at <mybwmp.bureauveritas.com/terms-and-conditions>. According to the terms and conditions of ABS, the society only represents to the shipowner that when assigning class, it uses "normally applied testing standards, procedures, and techniques" as called for by the rules, standards or other criteria of ABS for the purpose of assigning and maintaining class (Rule 5, Section 1, Chapter 1, Part 1 American Bureau of Shipping, "Rules for Conditions of Classification", 2016, 4).

surveys, without necessarily being required to achieve a specific anticipated result.[185] Several courts in France have also ruled that classification societies commit themselves to an *obligation de diligence* when performing surveys.[186] Finally, the US District Court for the Southern District of New York held in *Continental Ins. Co. v. Daewoo Shipbuilding* that classification societies are only required to exercise due care in reviewing the design and surveying the vessel's construction before issuing the certificate.[187] The same court concluded in the *Great American* case that a society has to perform two duties with "due care" towards "its clientele".[188] The first duty is to survey and classify vessels in accordance with class rules and standards. However, the court immediately stressed that a breach of this duty cannot lead to recovery for the plaintiff. This bar stems from the long-standing policy that the shipowner has a non-delegable duty to maintain a seaworthy vessel.[189] The second duty is one of due care in the detection of defects in ships and the notification thereof to the owner. A society is required to notify the shipowners of any defect if these are not yet known or apparent.[190]

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[185] Court of First Instance Dendermonde, January 11, 1973, *Jurisprudence Anvers* 1973, 127; Commercial Court Antwerp, September 20, 2006, A/02/04109 (unpublished); Court of Appeal Antwerp, February 18, 2013, *Nieuw Juridisch Weekblad* 2013, 659-660 with annotation by J. DE BRUYNE. When looking at case law dealing with the liability of classification societies in tort towards third parties in Belgium, a similar conclusion can be reached. In the *Spero* case, for instance, the Antwerp Court of Appeal held that surveyors of the classification society applied insufficient attention and time to the examination of the vessel's (heavily corroded) water pipe. The inability to identify this defect in the construction of the vessel was a professional fault, which also constituted a breach of the classification society's general duty of care. Such a wording corresponds with an *obligation de moyen* (obligation to perform to the best of one's ability): a classification society will only be held liable if it negligently surveys and certifies the vessel and not merely because it later turns out that the vessel was defective (Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 321-329). In the *Paula* case, however, the Antwerp Court of Appeal held that a classification society acts negligently when issuing a certificate to a vessel with (major) shortcomings in its construction. This comes close to an *obligation de résultat* and implies that a society will act negligently when it certifies a vessel with (major) defects. As a consequence, a classification society that carefully surveys the vessels and subsequently issues the certificate still faces the risk of liability when it later turns out that the ship had (major) shortcomings (Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 313-317). For reasons discussed elsewhere, Belgian courts should adhere to the former approach (see J. DE BRUYNE, "De aansprakelijkheid van classificatiemaatschappijen in België en enkele (recente) ontwikkelingen en pijnpunten vanuit een rechtsvergelijkend perspectief", (4) *Tijdschrift Vervoer en Recht* 2014, 85).

[186] Court of Appeal Paris, December 12, 1972, *Droit Maritime Francais* 1972, 292; Commercial Court Le Havre, August 25, 1978 *Droit Maritime Francais* 1979, 103; M. FERRER, "Responsabilité des sociétés de classification - Obligations et inexécutions contractuelles des sociétés de classification. – Responsabilité extra-contractuelle à l'égard des tiers et des contractants. – Responsabilité administrative et immunité du droit du pavillon. – Responsabilité pénale", *JurisClasseur Transport* 2009 (available online at JurisClasseur).

[187] *Continental Ins. Co. v. Daewoo Shipbuilding,* 707 F. Supp. 123, 123-124 (S.D.N.Y. 1988).

[188] *Great American Insurance Co. v Bureau Veritas,* 338 F. Supp. 999, 1011 (S.D.N.Y. 1972).

[189] See for more information on this shipowner's non-delegable duty the discussion *infra* in nos. 63 and 533-534.

[190] *Great American Insurance Co. v Bureau Veritas,* 338 F. Supp. 999, 1012 (S.D.N.Y. 1972). See for discussion: M.A. MILLER, "Liability of Classification Societies from the perspective of United States Law", (18) *Tulane Maritime Law Journal* 1997, 90-91.

1.4. Obligations of Product Certifiers and Notified Bodies

52. Certifiers of products often stipulate in the contracts or terms and conditions that they only perform their services carefully or diligently. The SGS conditions for certification services, for instance, specify that the certifier provides certification services using "reasonable care and skill".[191] The general conditions of certification of Bureau Veritas also stipulate that the certifier has to deliver the certificate with reasonable care, skill and diligence as expected of a competent body experienced in the certification industry.[192] The certifier does not owe any specific success but only the performance of certification services.[193]

53. Product certifiers themselves are very clear in their (contractual) terms and conditions on this point. Judges in both common and civil law jurisdictions have come to similar conclusions as well.

In the United States, the Court for the Southern District of New York concluded in *Vital Trading v. SGS* that inspectors are not insurers of their work. Therefore, they cannot be held liable solely on the basis of an undesirable or incorrect outcome. The certifier has to inspect the product with the due care and skill a reasonably prudent tester would have used under the same circumstances.[194]

In Belgium, the Antwerp Court of Appeal, vacated a first instance decision,[195] when deciding that "[o]p het keurings-organisme rust geen resultaatsverbintenis, doch enkel een middelenverbintenis" (own translation: an inspection body is not bound by an *obligation de résultat* but only by an *obligation de moyen*).[196] Inspections have to be performed in a skilful and workmanlike way and aim to detect shortcomings in the product. The certifier has to safeguard that it correctly performs its inspection and control duties (*obligation de moyen*) but cannot guarantee that it will discover any concealed damage in the product (*obligation de résultat*).[197] The French *Cour de Cassation* reached a similar conclusion when a consumer purchased a television that had been certified by the *Association Française de Normalisation* (AFNOR). The television broke shortly after and the plaintiff claimed recovery from the certifier. The plaintiff argued that the AFNOR

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[191] Article 2(a) SGS, "SGS General Conditions of Service", available at <www.sgs.com/en/terms-and-conditions>.

[192] Article 6.1. Bureau Veritas, "General Terms and Conditions for Certification Services", January 2, 2017, available at <www.us.bureauveritas.com/home/our-services/certification/about-us/terms-and-conditions>.

[193] Article 7.2. Bureau Veritas, "General Terms and Conditions for Certification Services", January 2, 2017.

[194] *Vitol Trading S.A., Inc. v. SGS Control Services*, 680 F.Supp. 559, 567 (S.D.N.Y. 1987) affirmed in *Vitol Trading S.A., Inc. v. SGS Control Services*, 874 F.2d 76 (2nd Cir. 1989). In the *Interore* case, the Court of Appeals for the Second Circuit held that SGS only had to carry out the inspection of a vessel with reasonable care (*International Ore & Fertilizer Corp. v SGS Control Services, Inc.*, 38 F.3d 1279 (2nd Cir. 1994)).

[195] See in this regard Court of First Instance Antwerp, February 24, 2010 (unpublished).

[196] Court of Appeal Antwerp, September 17, 2012, *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2013, 550-551.

[197] Court of Appeal Antwerp, September 17, 2012, *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2013, 551.

certification was a guarantee of the quality and safety of the product. The judges in the first instance court and on appeal followed this line of reasoning. The *Cour de Cassation*, however, vacated the decision. AFNOR did not guarantee that the product would be free of defects merely by attaching its certificate.[198]

54. Things are similar for notified bodies during the conformity assessment procedure of medical devices. Recommendation 2013/473 on audits and assessments performed by notified bodies stipulates that they should apply "special care" when examining the design, manufacture and packaging of devices. Although the notion of special care remains unclear, it might point towards an *obligation de moyen*.[199] Such a conclusion certainly corresponds with the decisions in the PIP breast implants case,[200] both by the European Court of Justice (ECJ) as well as by the French and German domestic courts. TüV Rheinland was involved as notified body in the conformity assessment procedure of the breast implants. Considering that claims against PIP were fruitless as the company went bankrupt in 2010, the plaintiffs had to find other targets against whom to claim compensation for their physical harm or the financial losses.[201] Therefore, a group of distributors and women brought a case against TüV before courts in Germany and France. Because of the public importance of this case and the fact that a number of German courts were dealing with the same issues, the *Oberlandesgericht* (OLG) in Zweibrücken gave permission to appeal to the German *Bundesgerichtshof* (BGH). On the 9th of April 2015, the BGH referred three questions on the interpretation of the MDD to the European Court of Justice.[202]

55. Advocate General SHARPSTON of the ECJ concluded that Annex II to the MDD dealing with the EC Declaration of Conformity[203] should be interpreted as meaning that,

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[198] Court of Cassation, October 2, 2007, no. 06-19.521, JurisData no. 2007-040618, *Revue de droit immobilier* 2008, 106 with annotation by P. MALINVAUD. The court held that AFNOR attested "la conformité aux normes par l'apposition d'une marque nationale, ce qui ne constitue nullement une assurance l'engageant en cas de panne du produit". The decision can found on the online database JurisClasseur.

[199] See in this regard Annex I, paragraph 3, Recommendation of 24 September 2013 on the audits and assessments performed by notified bodies in the field of medical devices.

[200] The example of the PIP breast implant case is often used in this chapter for two reasons. On the one hand, it is a recent case dealing with product certifier TüV Rheinland that was involved as notified body in the conformity assessment of medical devices. Claims were filed in different EU Member States and the case was eventually referred to the European Court of Justice. On the other hand, claims against notified bodies for their role in the conformity assessment of medical devices or other products have to my knowledge not been filed so far. Moreover, the European Court of Justice in *Schmitt* "seems to put more effort into pointing out the conclusions that cannot be drawn, than those that can. As such, it is fair to say that the judgment gives rise to more questions than it answers" (A. WALLERMAN, "Pie in the sky when you die? Civil liability of notified bodies under the Medical Devices Directive: Schmitt" (55) *Common Market Law Review* 2018, 270). Against this background, it is particularly interesting to analyse the decision.

[201] B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 345-346.

[202] BGH, April, 9, 2015, VII ZR 36/14.

[203] The EC declaration of conformity is the written statement and the declaration drawn up by the manufacturer to demonstrate the fulfilment of the EU requirements relating to a product bearing the CE marking he has manufactured. See for more information: <www.ce-marking.com/required-content-for-CE-marking-EC-declaration-of-conformity.html>.

in the case of class III medical devices, the body responsible for auditing the quality system, examining the design of the product and surveillance is under a "duty to act with all due care and diligence". That duty will require it to exercise the powers available to it under the Annex to determine whether its certification of the device in question may stand.[204] The judgement by the ECJ comes to a similar conclusion. Notified bodies must be given an appropriate degree of discretion in view of the stringent requirements they must satisfy under the applicable legislation regarding their independence and scientific expertise.[205] A notified body is not under a general obligation to carry out unannounced inspections, to examine devices and/or to examine the manufacturer's business records.[206] However, they have to act with all due diligence when determining whether the certification may be maintained.[207]

56. The French *Tribunal de Commerce* in Toulon held that TüV negligently performed its obligations of control/inspection, care and vigilance.[208] The certifier, for instance, did not carry out a sufficiently rigorous review of PIP's financial accounts. Such a review would have revealed the abnormalities with regard to the amount of gel bought and the volume of PIP's production.[209]

TüV Rheinland appealed against the decision. The notified body claimed that it complied with the applicable requirements. TüV maintained it was only responsible for controlling the design and the quality system and not the actual implants. The certifier also argued that it had been systematically deceived by PIP that had presented false documents. TüV did not have sufficient powers under the MDD to take further actions to unmask the fraud. The *Cour d'Appel* d'Aix-en-Provence followed this reasoning and reversed the first

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[204] Opinion of Advocate General SHARPSTON, C 219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2016:694, September 15, 2015, paragraph 61(2).

[205] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 45.

[206] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 48.

[207] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraphs 38-48. One could argue that the use of "all due diligence" comes close to an *obligation de résultat* ('statement of the rule'). Yet, when looking at the actual rationale and context of the ECJ in coming to that conclusion (e.g. degree of discretion given to notified bodies), it seems that the ECJ actually means that a notified body is bound by an *obligation de moyen* ('holding of the case'). See for a discussion of the case: A. WALLERMAN, "Pie in the sky when you die? Civil liability of notified bodies under the Medical Devices Directive: Schmitt" (55) *Common Market Law Review* 2018, 267-270; P. VERBRUGGEN, "Het PIP-schandaal voor het HvJ EU en de constitutionalisering van private regulering", (18) *Nederlands Juristenblad* 2017, 1245-1246.

[208] Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, no. 2013F00567, 144 (available at the online legal database Dalloz).

[209] Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, no. 2013F00567, 142-143 (available at the online legal database Dalloz). The commercial court ordered TüV Rheinland to pay a provisional compensation of 3,000 euro per person to approximately 1,700 patients. The immediate and provisional character of the compensation was upheld and confirmed by the *Cour d'Appel* of Aix-En-Provence on 21 January 2014 (Court of Appeal Aix-en-Provence, January, 21, 2014, no. 13/00690. This decision can found on the online database Dalloz). See for a discussion : B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 345-346.

instance decision, which it held to be unfounded. The court concluded that TüV Rheinland complied with its obligations under supranational law. TüV only had an obligation to examine the technical file and not the device itself. There were no elements in the file that should have warned the body that approved silicone products were replaced by other non-approved products. Consequently, it was not at fault and, therefore, not liable.[210]

57. Claims against TüV were also initiated before German courts.[211] A brief analysis of some of the arguments used in the decisions shows that notified bodies have to apply reasonable care in this stage of the certification process. Imposing an *obligation de résultat* would, for instance, be challenging considering that the *Oberlandesgericht* in Zweibrücken held that certificates issued by notified bodies only constitute a building block (*Baustein*) for manufacturers to show they complied with the requirements in the MDD.[212] The objective of the MDD is to protect patients who come into contact with medical devices. The MDD stipulates that devices should provide patients and users with a high level of protection and should attain the performance attributed to them by the manufacturer.[213] The OLG Zweibrücken, however, concluded that the MDD did not impose any statutory obligation on the notified body to intervene in order to protect all patients that might come into contact with medical devices. The purpose and aim (*Sinn und Zweck*) of the certification is not to protect third parties. It is only a prerequisite for the manufacturer to distribute the implants on the EU market. The certificate is an indication for the national authorities that the standards of care have been observed by the responsible parties without, however, relieving them of their responsibility.[214]

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[210] Court of Appeal Aix-en-Provence, July 2, 2015, no. 13/22482, 109, 113 & 119 and part II, A), 1/ in "Motifs de la décision" ("Contrairement à ce que prétendent les appelantes personnes physiques, les intimés et intervenantes, il résulte de la directive que lors de l'examen de la demande, l'organisme notifié n'avait pour obligation que d'examiner le dossier technique qui lui était soumis. Aucun élément ne pouvait laisser suspecter que le gel Nusil avait été remplacé par un gel non approuvé […] La société AM a donc respecté les dispositions de la directive dans le cadre de la certification"). This decision can be found on the online legal database Dalloz and is also available at <www.doctrine.fr/d/CA/Aix-en-Provence/2015/R544A062AC137538AB085>.The case has been reported in several (online) journals and other sources (e.g. T. KLEIN, "French Court Repeals Conviction against TÜV Rheinland in PIP Case", *European Medical Device Technology, Regulatory and Compliance*, July 2, 2015).

[211] See for an extensive discussion: P. ROTT & C. GLINSKI, "Le scandale PIP devant les jurisdictions allemandes", *Revue Internationale de Droit Economique* 2015, 87; P. ROTT & C. GLINSKI, "Die Haftung der Zertifizierungsstelle im Produktsicherheitsrecht", *Zeitschrift für Europäisches Privatrecht* 2015, 192.

[212] B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 343-345.

[213] Recital (5) Directive 93/42 concerning medical devices. In this regard, the recently adopted MDR aims to establish a robust, transparent, predictable and sustainable regulatory framework for medical devices ensuring a high degree of safety and health (Recital (1) Regulation 2017/745 on medical devices).

[214] Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13, *JurionRS* 2014, 10232, Part II, 1. b); W. REHMANN & D. HEIMHALT, "Medical devices: liability of notified bodies?", TaylorWessing, May 2015, available at <www.taylorwessing.com/synapse/may15.html>. The ECJ, however, held that the aim of the MDD is not only the protection of health stricto sensu but also the safety of persons. The Directive does not only affect patients and users of devices but also 'third parties' and 'other persons'. The actual purpose of the MDD is to protect end users of medical devices. To that end, the MDD does not only impose obligations on the manufacturer of the device but also on Member States and notified bodies. With regard to the involvement of the notified body in the procedure relating to the EC Declaration of Conformity, it is apparent from the wording and overall scheme of the MDD that the purpose of that procedure is to ensure

2. Second Stage of the Certification Process

58. The certifier will subsequently issue the certificate based on the assessment of the item or related information. This is the second stage of the certification process. Two important aspects related to the certifier's issuance of the certificate need more elaboration, namely the 'limited value' of a certificate and a certifier's required independence.[215]

59. Certifiers generally stress that the certificate is nothing more than an opinion. It should and cannot be used for any transaction with the requesting entity. The certificate merely attests that the item complies with the applicable requirements, nothing more and nothing less. This illustrates the 'limited value' of certificates in the sense that there will not automatically be a basis for liability merely because the certificate does not correspond with the 'real value' of the certified item (part 2.1.).

60. Despite the 'limited value' of certificates, there are different moments in this second stage where certifiers might face liability. Certifiers are required to issue the certificate for which they are paid. They will violate their contractual obligations during the second stage when they do not issue the certificate or do so with a delay. This is an *obligation de résultat*.[216] More importantly, certifiers have to remain independent vis-à-vis the requesting entity. Clear and strict requirements exist on a certifier's independence. This obligation qualifies as an *obligation de résultat* as well. As a consequence, there might be a potential basis for liability when the certifier did not issue an independent certificate,

protection for the health and safety of persons (C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraphs 50-53). At the same time, it does not necessarily follow from the fact that the MDD imposes surveillance obligations on notified bodies or the fact that one of its objectives is to protect injured parties that the Directive also seeks to confer rights on such parties in the event that those bodies fail to fulfil their obligations. The ECJ eventually concluded that the conditions under which a notified body's culpable failure to fulfil its obligations under the procedure relating to the EC Declaration of Conformity may give rise to its liability vis-à-vis the end users of medical devices are governed by national law, subject to the principles of equivalence and effectiveness (C-219/15, Eli*sabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraphs 55 & 59). The BGH recently decided that, based on the facts that had been put forward in the lower instance courts, TüV Rheinland had no reason to pay PIP unannounced visits. Therefore, it has not violated its duties under the MDD (BGH, June 22, 2017, VII ZR 36/14, *Neue Juristische Wochenschrift* 2017, 2617. See for a discussion: G. BRÜGGEMEIER, "Luxemburg locuta, causa finita? – Eine Nachbetrachtung der juristischen Behandlung der sogenannten PIP-Affäre in Deutschland", (73) *JuristenZeitung* 2018, 191).

[215] A certifier's requirement to remain independent is of importance in each of the three stages. As such, it can overlap the different stages. In a first stage, the certifier has to independently analyse and investigate the information. In the third stage, a third-party certifier might also have to update the certificate when necessary. Nevertheless, I have decided to categorise it in a second and separate stage for several reasons. The certifier has to cooperate with the requesting entity in the first and third stage of the certification process when gathering the required or updated information. Based on this information, the certifier then 'retrieves' to analyse the information and determine the certificate in an independent way. The reader might get a better understanding on the different obligations of certifiers when dividing the certification process into three separate categories, one of which is the issuance of a certificate in an independent way.

[216] See in this regard also: M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law,* Brussels, Bruylant, 2006, 376-377.

regardless of the question whether it acted carefully or not when issuing the certificate (part 2.2.).

2.1. 'Limited Value' of Certificates

61. Certifiers emphasise the 'limited value' of their certificates in different ways. At the same time, they also stress that requesting entities remain responsible for the quality and safety of the certified item.[217] This will be illustrated with examples stemming from CRAs, classification societies and product certifiers or notified bodies.

62. Rating contracts may stress that ratings are mere opinions and no verifiable statements of facts. Ratings are no recommendations to buy, hold or sell any securities.[218] They do not comment on the adequacy of the market price or the suitability of an investment. CRAs do not act as investment, financial or other advisor of the issuer or any other recipient of the rating. Each investor might even be required to make its own evaluation of the security that is under consideration for purchase or sale.[219] A cautionary wording is used in the IOSCO Code of Conduct Fundamentals[220] as well as in the individual codes of conduct of each CRA.[221]

In addition to contractual terms and codes of conduct, the provisions included in Directive 2014/65 on markets in financial instruments ('MiFID II') may also be used to conclude that a CRA's assessment of creditworthiness cannot be considered as an investment advice.[222] The MiFID framework strengthens the EU rules for investment services and regulated markets with a view of achieving two major objectives, namely (1) protecting investors and safeguarding market integrity by establishing harmonised requirements

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[217] This is the situation as portrayed by certifiers. To my opinion, however, it makes little sense that certifiers would invoke the 'limited value' of their certificates and point towards the requesting entity when the certified items fails. As will be shown throughout the remaining parts of this study, certificates are widely used in different sectors and there is no reason why certifiers should not be held liable when they do not comply with their obligations during the certification process.

[218] As opposed to for instance negative opinions, incorrect information and unwarranted recommendations critical of a company (LVMH) spread by analysts of investment bank Morgan Stanley in emails to clients, its specialised journal and reports (Commercial Court Paris, January 12, 2004, *Revue Trimestrielle de Droit Commercial (RTD com.)* 2004, 337 reversed by Court of Appeal Paris, June 30, 2006, no. 04/06308, *Banque & Droit* 2006, 3 & *Revue Trimestrielle de Droit Commercial (RTD com.)* 2006, 875). See for an analysis of the case: M. KRUITHOF, "LVMH v. Morgan Stanley: de aansprakelijkheid van financiële analisten met belangenconflicten", *Financieel Forum: Bank- en Financieel recht-Forum Financier: Droit Bancaire et Financier* 2004, 215).

[219] See in this regard the documents included in the Annex.

[220] Technical Committee of the International Organization of Securities Commission, "Code of Conduct Fundamental for Credit Rating Agencies", August 2008, 3.

[221] For instance, Moody's Code of Professional Conduct stipulates that "MIS is in no way providing a guarantee with regard to the accuracy, timeliness, or completeness of factual information reflected, or contained, in the Credit Rating or any related MIS publication" (Moody's, "Code of Professional Conduct", June 2017, 7). Paragraph 7.2. in the S&P's Code of Conduct indicates that "Ratings do not constitute investment, financial, or other advice […] Credit Ratings do not comment on the suitability of an investment for a particular investor and should not be relied on when making any investment decision" (Standard & Poor's, "S&P Global Ratings Code of Conduct", December 15, 2017, 8).

[222] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, *OJ* L 173.

governing the activities of authorised intermediaries and (2) promoting fair, transparent, efficient and integrated financial markets. MiFID II applies to investment firms and market operators, data reporting services providers and third-country firms providing investment services or performing investment activities.[223] An investment firm is a legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis.[224] Section A of Annex I to the Directive provides an overview of different investment services and activities, one of which is investment advice. Such advice relates to the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of transactions relating to financial instruments.[225]

CRAs do normally not provide investment advice when issuing a rating. They do not give personal recommendations to an issuer (i.e. client) by giving the rating. Personal recommendations can, however, be given when a CRA provides other consulting services to the issuer. CRAs will in such circumstances fall under the MiFID II rules.[226] The European Commission came to a similar conclusion in its Communication on Credit Rating Agencies. The former MiFID I was applicable only to CRAs undertaking investment services and activities over and above their regular rating activity.[227]

63. Things are similar in the context of classification societies. Once all surveys have been done and the society decides a vessel's construction complies with the applicable class rules, it assigns a class to the vessel and issues a certificate accordingly.[228] The certificate attests that the vessel has been assigned a certain class and class notation.[229] In

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[223] Article 1.1. MiFID II.

[224] Article 4.1.(1) MiFID II.

[225] Article 4.1.(4) MiFID II.

[226] See in this regard also: A. CHIRICO, "Credit Rating Agencies: The Main Lacuna in EU Regulation Governing Conflicts of Interest", ECMI Commentary, Working Paper No. 17, January 31, 2008, 3; H. LANGOHR & P. LANGOHR, *The Rating Agencies and Their Credit Ratings: What They Are, How They Work, and Why They are Relevant*, Chichester, John Wiley, 2010, 458.

[227] European Commission, Communication 2006/C59/02 from the Commission on Credit Rating Agencies, *OJ* C 59/2 (summary). The question can also arise whether a rating would be considered as investment advice to an investor or other party that contracts with the CRA. This remains uncertain as it is required that the recommendation to the client is personal, which is not the case with a rating. See in this regard also: M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 370-371.

[228] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 3.

[229] Classification notations indicate the specific rule requirements that have been met. Additional voluntary notations are offered by individual classification societies to demonstrate that the vessel conforms to a particular standard (International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 10-11; T.J. PAGONIS, *Chartering Practice Handbook*, Piraeus, Dimelis Publications, 2009, 82; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 5-8). Each society developed notations or symbols that may be given to a ship to indicate that it complies with voluntary criteria (International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 11).

other words, it indicates what has been, or according to the rules should have been, analysed and surveyed. It does not give any further information.[230]

Class certificates, however, have their limitations as the shipowner remains responsible for the seaworthiness of his vessel. The issuance of a certificate does not relieve the shipowner of his non-delegable duty to maintain the ship in a seaworthy condition.[231] Even though class certificates might constitute evidence of seaworthiness,[232] they do not warrant the seaworthiness of a vessel. It merely is a representation that the vessel complied with class rules at the time of the construction or the latest survey.[233] Class certificates do not imply and should not be construed as a warranty of safety, fitness for purpose or seaworthiness of the ship. Classification societies are not guarantors of safety of life or property at sea or the seaworthiness of a vessel. They have no control on the way in which a vessel is manned, operated and maintained between the periodical class surveys.[234] Several court decisions also established that the shipowner has the duty to ensure that the vessel is seaworthy. This is an obligation that cannot be delegated to classification societies.[235]

64. Several examples show that certificates issued by product certifiers are no exception to the rule. For instance, the Intertek terms and conditions stipulate that the certifier merely tests and evaluates the submitted product samples and service without guaranteeing their quality.[236] Similarly, the terms and conditions of business of TüV Rheinland specify there is no assumption of any guarantee of correctness, quality or

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[230] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 49-50.

[231] See in this regard also the discussion *infra* in nos. 533-534. The ABS Rules for Conditions of Classification stipulate that nothing contained in the certificate relieves the designer, shipowner, manufacturer, insurer or other person of any duty to inspect the vessel or any other (contractual) duty. The certificate only attests that at the time of survey, the vessel covered by a certificate complied with the applicable requirements and standards in class rules. The classification society is not an insurer or guarantor of the integrity or safety of a vessel or of any of its equipment or machinery. The rules of ABS are not meant as a substitute for the independent judgment of professional designers or shipowner (Part 1, Chapter 1, Section 1, ABS, "ABS Rules for Conditions of Classification Societies", August 2016, 5).

[232] H. HONKA, "The Classification System and Its Problems with Special Reference to the Liability of Classification Societies", (19) *Tulane Maritime Law Journal* 1995, 3.

[233] B.D. DANIEL, "Potential Liability of Marine Classification Societies to Non-Contracting Parties", (19) *University of San Francisco Maritime Law Journal* 2007, 196.

[234] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 3.

[235] See for example: *Great American Insurance Co. v Bureau Veritas*, 338 F. Supp. 999 (S.D.N.Y. 1972); *Sundance Cruises v. American Bureau of Shipping*, 799 F. Supp. 363 (S.D.N.Y 1992) affirmed in *Sundance Cruises Corp. v American Bureau of Shipping*, 7 F.3d 1077 (2nd Circ. 1994); Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 325-327; Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 314; Commercial Court Antwerp, September 20, 2006, A/02/04109 (unpublished); Court of Appeal Antwerp, February 18, 2013, *Nieuw Juridisch Weekblad* 2013, 659 with annotation by J. DE BRUYNE.

[236] Article 2.1. Intertek, "Certification Agreement for U.S. Federal Communication Commission ("FCC") Telecommunications Certification Body ("TCB") Program with Intertek", available at <www.intertek.com/uploadedFiles/Intertek/Divisions/Commercial_and_Electrical/Media/PDF/Telecom_Equipment/Intertek-TCB-FCC-Certification-Agreement-1-18-2013.pdf>.

working of the certified product.[237] The certification agreement with Steelwork Compliance Australia stipulates that the certifier does not assume or undertake to discharge any responsibility to any other party or parties when performing its contractual duties. The requesting entity acknowledges that the certifier does not warrant or guarantee the correctness of its opinions or certificates.[238] Finally, the SGS general conditions for certification services mention that the certifier does not take the place of the client by entering into the contract or providing the certification services. The requesting entity remains responsible to ensure the safety and quality of products.[239] The 'limited value' of the certificate and the manufacturer's obligation concerning the quality and safety of products has also been acknowledged by courts.[240]

65. The value of the certificates issued by notified bodies during the conformity assessment of medical devices has restrictions as well. Notified bodies perform an assessment of the medical device and the manufacturer's quality system. However, the manufacturer has to ensure that the requirements in the relevant conformity assessment procedure are met. Whether or not a notified body has been involved in the conformity assessment procedure, the manufacturer remains responsible to affix the CE marking, to issue the Declaration of Conformity and to guarantee compliance with the applicable supranational legislation.[241]

The decisions by German courts in the PIP implant case came to similar conclusions. The OLG in Zweibrücken affirmed a first instance decision.[242] Certificates provided by notified bodies constitute a "Baustein" for manufacturers to show they complied with the requirements in the MDD. Thus, the "Sinn und Zweck" of the certification was not to protect third parties. Instead, it was only a requisite for the manufacturer to sell the implants on the European market. The purpose of the CE label given to a device is not to provide buyers with a right to claim compensation from a body involved in the conformity

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[237] Article 4.4. TüV Rheinland, "TüV General Terms and Conditions of Business of TÜV Rheinland Industrie Service GmbH", November 2012, available at <www.tuv.com/media/germany/10_industrialservices/agbs/TIS-AGB_Stand_November_2012-Englisch_TUV-Rheinland.pdf>.

[238] Article 12 Steelwork Compliance Australia, "National Structural Steelwork Compliance Scheme Licensing Agreement for the Use of the Certificate of Conformity and Certification Mark", available at <www.scacompliance.com.au/wp-content/uploads/2014/06/SCA-F-012-Rev-0-Certification-Agreement.pdf>.

[239] Article 3.3. SGS, "SGS General Conditions for Certification Services", June 2, 2005, available at <www.sgs.com/en/Terms-and-Conditions/General-Conditions-for-Certification-Services-English.aspx>.

[240] See for example: *Hanberry v. Hearst Corp*., 276 Cal.App.2d 680, 687-688 (1969). See for a discussion of the case: J. BECK, "Hanberry v. Hearst Corp.: Liability of Product Certifiers", (5) *University of San Fransisco Law Review* 1971, 137. One reason why the court denied the application of strict liability in the case of certifiers was that it would not be justified to apply strict liability since the latter could not protect itself against possible defects in manufacture. More specifically, the court held that "the application of either warranty or strict liability in tort would subject respondent to liability even if the general design and material used in making this brand of shoe were good, but the particular pair became defective through some mishap in the manufacturing process". See also: J. BELSON, *Certification Marks*, London, Sweet & Maxwell, 2002, 50.

[241] European Commission, "Commission Notice. The 'Blue Guide' on the implementation of EU product rules 2016", 2016/C 272/01, 57 & 60.

[242] District Court Frankenthal, March 14, 2013, 6 O 304/12, *JurionRS* 2013, 37376.

assessment procedure.[243] The conformity assessment procedure undertaken by TüV did not create a guarantee that the implants complied with essential requirements in the MDD. The manufacturer of medical devices remains responsible for the quality and safety of his products. Consequently, the manufacturer assumes the risks when the device turns out to be defective and causes injuries to patients.[244]

2.2. The Certifier's Independence

66. Certifiers stress the 'limited value' of the certificates in the sense that they should not be relied upon by third parties to make decisions. The rating is only an opinion and no recommendation; the CE marking only a requirement to place medical devices on the European market and a class certificate merely a representation that the vessel complied with the class rules. At the same time, certifiers also emphasise that the requesting entity remains responsible for the safety and quality of the certified item. In other words, the requesting entity is responsible in case the certified item would default once a certificate has been issued. Based on these findings, one might conclude that holding certifiers liable seems not evident. This conclusion is further strengthened by the inclusion of clauses in agreements and codes of practice that exclude or limit the certifier's liability.[245]

67. However, reality shows the situation to be quite different. Certifiers have already been held liable in the past, both towards the requesting entity and third parties.[246] For example, there can be a basis for liability when the certifier did not carefully perform the analysis during the first stage of the certification process.[247] There is another potential basis leading to liability if the certifier did not remain independent towards the requesting entity. The role and position of certifiers as market intermediaries requires them to respect the necessary independence *vis-a-vis* the requesting entities.

An independent assessment of an item is not only what the requesting entity pays for but also necessary for intermediaries to remain in business. Certifiers attest the credibility of requesting entities by pledging their 'reputational capital'. This allows third parties to trust a requesting entity's own statements regarding its items where the former otherwise might not have. Certifiers acquire this reputational capital over many years by certifying many items. The argument goes that they can easily lose this capital if their certificates are not reliable or inaccurate. The loss of reputational capital can eventually lead to a certifier's collapse as parties might no longer trust its certificates. If certifiers are paid to give favourable but inaccurate and unreliable certificates or do not display the required

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[243] Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13, *JurionRS* 2014, 10232. See for a translation and discussion of the case: W. REHMANN & D. HEIMHALT, "Medical devices: liability of notified bodies?", TaylorWessing, May 2015.

[244] Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13, *JurionRS* 2014, 10232, Part II, 2. d); B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 344-345; W. REHMANN & D. HEIMHALT, "Medical devices: liability of notified bodies?", TaylorWessing, May 2015.

[245] See for more information the discussion *infra* in nos. 552-576.

[246] See for more information the discussion *infra* in part II, Chapter III.

[247] See for more information the discussion *supra* in nos. 37-57.

independence in other ways, third parties being aware of this behaviour might no longer rely on the certificates to purchase the certified item.[248]

68. Certification contracts, a certifier's general terms and conditions, case law and supranational legislation all emphasise that certifiers have to be independent vis-à-vis the requesting entity. A certifier's independence actually relates to its intention to remain independent, which can for example vary between the binary numbers 1 – total independence – and 0 – no independence. In order to achieve total independence, the above-mentioned sources contain clear, strict and specific requirements certifiers have to comply with. A certifier's compliance with these requirements to guarantee that certificates are issued in an independent way can be qualified as *obligation de résultat*. A certifier does not have any discretion when deciding on actions to ensure its independence.[249] The result that a certifier needs to achieve, namely compliance with the applicable requirements to ensure independence, does not depend upon the level of care it applies, nor upon the requesting entity's cooperation. Arguably, a requesting entity should not even be involved when a certifier issues the certificate in an independent way. None of the previously discussed elements pointing towards an *obligation de moyen* apply when certifiers have to remain independent when issuing certificates.[250] A closer look at the situation for each individual certifier also underpins this conclusion. The following parts focus on the obligation to remain independent in the context of CRAs (part 2.2.1.), classification societies (part 2.2.2.) and product certifiers/notified bodies (part 2.2.3.).

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[248] J.C. COFFEE, *Gatekeepers: The Role of the Professions in Corporate Governance*, Oxford, Oxford University Press, 2006, 1-5, 287-288, 325; F. PARTNOY, "Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime", (79) *Washington University Law Quarterly* 2001, 494-495; D.W. DIAMOND, "Reputational Acquisition in Debt Markets", (97) *Journal of Political Economy* 1989, 828; V.P. GOLDBERG, "Accountable Accountants: Is Third-Party Liability Necessary?", (17) *Journal of Legal Studies* 1988, 295; D.M. COVITZ & P. HARRISON, "Testing Conflicts of Interest at Bond Ratings Agencies with Market Anticipation: Evidence that Reputation Incentives Dominate", December 2003, available at <www.federalreserve.gov/pubs/feds/2003/200368/200368pap.pdf>.

[249] See in this regard also: M. KRUITHOF, "Wanneer vormen tegenstrijdige belangen een belangenconflict?", in: C. VAN DER ELST, H. DE WULF, R. STEENNOT & M. TISON (eds.), *Van alle markten: liber amicorum Eddy Wymeersch*, Antwerp, Intersentia, 2008, 591-592, no. 21-22. This is not really surprising from a comparative approach. A look over the fence into practices of other providers of information such as architects reveals that the obligation to remain independent is often essential as well. In Belgium, for instance, the architect is required to be independent vis-à-vis the principal (client), building contractors and other parties involved in the construction process. Such independence is necessary to properly perform his profession (Article 4 Reglement de Deontologie du 18 avril 1985. Ordre des architects, May 8, 1985). The public interest benefits from buildings that are safe. Therefore, the quality control of such buildings has to be performed by an expert who is independent from the persons responsible for building the construction. The architect who does not remain independent violates the Act concerning the protection of the title of architect (Loi sur la protection du titre et de la profession d'architecte du 20 février 1939, no. 1939022050, published in the *Moniteur belge* on March 25, 1939). See in this regard also: P. COLLE & K. TROCH, "Algemeen overzicht van de beginselen inzake aansprakelijkheid van de bouwheer, architect, aannemer, ingenieur en/of studiebureau", (3) *Tijdschrift Verzekeringsrecht* 2000, 28. Several decisions also accepted that an architect's independence is the cornerstone of his profession: Court of Cassation, December 1, 1994, D.94.22.F, *Arresten van het Hof van Cassatie* 1994, 1038 & *Pasicrisie belge* 1994, I, 1031; Court of Appeal Ghent, June 29, 2007, *Rechtskundig Weekblad* 2010-2011, 1136-1338.

[250] See for more information the discussion *supra* in nos. 39-40.

2.2.1. Credit Rating Agencies

69. Several sources require CRAs to remain independent vis-à-vis the issuer while analysing the provided information and when issuing a rating. The IOSCO Code of Conduct Fundamentals, the individual codes of conducts of CRAs as well as the examined rating contract with S&P emphasise that ratings are independent opinions based on the information provided by the issuer.[251] There is also case law which stresses the independence of CRAs and proper management of conflicts of interest.[252] The court for the Southern District of New York held in the *Abu Dhabi* case that "the market at large […] have come to rely on the accuracy of credit ratings and the independence of rating agencies".[253] The CRA's "role as an unbiased reporter of information typically requires the rating agency to remain independent of the issuers for which it rates notes".[254] The importance to remain independent has also been acknowledged by decisions that refused to qualify statements in a CRA's codes of conduct on their independence as non-actionable puffery. Such statements are not "couched in aspirational terms" but are a promise that policies and procedures are implemented to manage and avoid conflicts of interest.[255]

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[251] See for example Part 2 of the IOSCO Code of Conduct Fundamentals ("CRA Independence and Avoidance of Conflicts of Interest"). It contains several general obligations for CRAs to ensure their independence (e.g. CRAs should operationally and legally separate their rating business from any other business that may present conflicts of interest). The IOSCO Code also includes several requirements with regard to procedures and policies (e.g. CRAs are under certain circumstances required to disclose the general nature of their compensation arrangements with the issuers) and the independence of analysts and employees (e.g. any analyst who becomes involved in a personal relationship that creates the potential for any real or apparent conflict of interest should be required to disclose such relationship). See in this regard: Technical Committee of the International Organization of Securities Commission, "Code of Conduct Fundamental for Credit Rating Agencies", August 2008, 7. Individual Codes of Conduct also contain provisions on the independence of CRAs. Moody's professional Code of Conduct, for instance, includes a section on the "Independence and Avoidance and/or Management of Conflicts of Interest". Moody's has to use professional judgment to maintain both the substance and appearance of independence and objectivity. The section also includes provisions regarding the independence of rating analysists. Their compensation arrangements, for instance, need to be organised in such a way to eliminate or manage conflicts of interest. See in this regard: Moody's, "Code of Professional Conduct", June 2017, 7, 10-11.

[252] These conflicts of interest follow from the issuer-pays business model and lead to the situation where the issuer whose creditworthiness is being controlled and rated pays for these services. See in this regard: L.J. WHITE, "Credit-rating agencies and the financial crisis: less regulation of CRAs is a better response", (25) *Journal of International Banking Law and Regulation* 2010, 170 & 173; L. BAI, "On Regulating Conflict of Interests in the Credit Rating Industry", (13) *New York University Journal of Legislation and Public Policy* 2010, 253. See for a discussion on conflicts of interest *infra* nos. 383-412.

[253] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 181 (S.D.N.Y. 2009); *King County, Washington, et al v. IKB Deutsche Industriebank AG et al*, 09 Civ. 8387, 8 (SAS) (S.D.N.Y. 2012) holding that ratings "convey to investors that the product has been evaluated by an objective and independent third-party".

[254] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 166 (S.D.N.Y. 2009).

[255] *U.S. v. McGraw-Hill Companies*, CV 13-0779 DOC(JCGx), Order Denying Defendant's Motion to Dismiss, 7-11 (C.D. Cal. 2013); *In re Moody's Corporation Securities Litigation*, 599 F. Supp. 2d 493, 509 (S.D.N.Y. 2009) holding that "Moody's statements regarding its own independence do not constitute inactionable puffery. They were neither vague nor non-specific pronouncements that were incapable of objective verification […] Moody's not only proclaimed its independence; it also listed verifiable actions it was taking to ensure its independence […]. Rather than being general statements, these were specific steps

70. Article 6 of EU Regulation 1060/2009 contains several requirements to ensure that CRAs remain independent from the rated entity. CRAs have to take "all necessary steps" to ensure that the issuance of a rating is not affected by a potential conflict of interest or by a business relationship involving the CRA, its managers, rating analysts, employees, any person whose services are placed at the disposal or under the control of the CRA or any person (in)directly linked to it by control.[256]

71. This is strengthened considering that this general obligation is given more content in the Annex of the Regulation.

For instance, section A of Annex I of the Regulation contains several organisational requirements that have to be respected by CRAs to enhance their independence and avoid conflicts of interest. The CRA's senior management has to ensure that the agency's activities are independent from all political and economic influences or constraints and that conflicts of interest are properly identified, managed and disclosed.[257] CRAs must be organised in a way that safeguards that their business interest does not impair the independence or accuracy of the rating activities.[258] In addition, a CRA must establish appropriate and effective organisational and administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest.[259]

More relevant are the operational requirements listed in section B of Annex I. CRAs have to identify, eliminate or manage and disclose clearly and prominently any actual or potential conflict of interest that may influence the assessment and judgments of its rating analysts.[260] This objective is also pursued by several provisions in the Regulation itself. Rating analysts and other persons directly involved in rating activities are not allowed to initiate or participate in negotiations regarding fees or payments with any rated entity or any person that is directly or indirectly linked to the rated entity by control.[261] Furthermore, the compensation and performance evaluation of such persons may not be contingent on the amount of revenue that the CRA derives from the rated entities or any related third parties.[262] Since long-lasting relationships with the same rated entities could compromise the independence of rating analysts and any other person approving ratings, a CRA also has to establish an appropriate gradual rotation mechanism.[263] Recital (12) in Regulation 462/2013 sets out a maximum duration of the contractual relationship between the issuer that is rated or which issued the rated debt instruments and the CRA. This

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that Moody's was taking to ensure its independence and ratings integrity" (internal quotation marks omitted).

[256] Article 6 Regulation (EC) No 1060/2009 on credit rating agencies.

[257] Annex I Section A1(a), (b) Regulation 1060/2009 on credit rating agencies.

[258] Annex I Section A2 Regulation 1060/2009 on credit rating agencies.

[259] Annex I Section A7 Regulation 1060/2009 on credit rating agencies.

[260] Annex I Section B1 Regulation 1060/2009 on credit rating agencies.

[261] Article 7(2) Regulation 1060/2009 on credit rating agencies.

[262] Article 7(5) Regulation 1060/2009 on credit rating agencies.

[263] Recital (33) juncto Article 7(4) Regulation 1060/2009 on credit rating agencies.

removes the incentive for issuing favourable credit ratings.[264] Section B contains additional requirements to ensure that a CRA is independent and helps to avoid conflicts of interest. A CRA must publicly disclose the names of the rated entities or related third parties from which it receives more than five per cent of its annual revenue.[265] Under certain circumstances, most of them related to the direct or indirect involvement of a CRA in the operation or management of the issuer of the financial instruments, a CRA is not authorised to issue a rating.[266]

A CRA is also not allowed to provide consultancy or advisory services to the rated entity or any related third party regarding the corporate or legal structure, assets, liabilities or activities of that entity or related third party. Although a CRA may provide certain ancillary services other than issuing ratings (e.g. market forecasts, estimates of economic trends or pricing analysis), it must ensure that this does not create conflicts of interest with its rating activities.[267] In addition, rating analysts or persons who approve ratings are not allowed to make proposals or recommendations, either formally or informally, regarding the design of structured finance instruments on which the CRA is expected to issue a credit rating.[268] CRAs also have to keep adequate records and, where appropriate, audit trails of its rating activities. Such records include among other items information related to fees received from any rated entity and the procedures and methodologies they employ to determine the ratings.[269]

2.2.2. Classification Societies

72. In the exercise of their private role, classification societies are also confronted with the situation wherein the entity being examined and certified (the shipowner and more specifically the latter's vessels) pays for the certification. A classification society gives an independent assessment of a vessel, while it is at the same time economically dependent upon the shipowner's fleet. It is not unthinkable that a shipowner who is dissatisfied with a classification society will class hop to another one offering less rigorous terms and/or cheaper services. This could result in a less strict application of (technical standards in) class rules.[270]

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[264] Recitals (12)-(13) and (21) Regulation 462/2013 on credit rating agencies.

[265] Annex I Section B2 Regulation 1060/2009 on credit rating agencies.

[266] Annex I Section B3 Regulation 1060/2009 on credit rating agencies.

[267] Annex I Section B4 Regulation 1060/2009 on credit rating agencies.

[268] Annex I Section B5 Regulation 1060/2009 on credit rating agencies. See on the importance of this requirement and more information: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 32-33.

[269] Annex I Section B7 Regulation 1060/2009 on credit rating agencies.

[270] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36*) Journal of Maritime Law & Commerce* 2005, 493; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 26-27; P. BOISSON, "Classification Societies and Safety at Sea: Back to Basics to Prepare For the Future", (18) *Maritime Policy* 1994, 373. See also the discussion *infra* in nos. 389 & 407-409.

73. Several sources require classification societies to remain independent vis-à-vis the shipowner. Some of the Membership Criteria of IACS included in the Charter[271] are designed to demonstrate a classification society's independence and impartiality.[272]

This requirement is further specified in the "Membership Criteria: Guidance and Application Procedure", included in the "Procedures concerning requirements for Membership of IACS".[273] In order to demonstrate independence from ship-owning, ship-building and other commercial interests that could undermine a classification society's impartiality, its governing bodies must have less than fifty percent representation from combined shipowners, shipbuilders and other actors commercially engaged in the manufacture, equipping, repair or operation of ships, and may not have shares of fifty percent or more in any of such entities.[274] Furthermore, surveyors are not allowed to carry out classification or statutory work or participate in the decision-making related thereto if that surveyor has business, personal or family links to the requesting entity.[275]

The IACS Charter also obliges classification societies to comply with the IACS Quality System Certification Scheme (QSCS),[276] which in turn stipulates that the quality management system of an individual society has to adhere to the IACS Quality Management System Requirements to obtain a QSCS certification.[277] These Requirements, which are incorporated in Annex 2 of the QSCS, contain several conditions with regard to independence, impartiality and integrity of the society and its surveyors.[278]

For instance, the society's personnel has to be free from commercial, financial and other pressures that might affect their judgment. Procedures must be implemented to ensure that persons or organisations external to the society cannot influence the results of its services. Moreover, the remuneration of personnel engaged in the society's activities may not directly depend on the activities carried out and in no case on their results. Furthermore, the classification society (or its staff) may not be the designer, manufacturer, supplier, installer, purchaser, owner, user or maintainer of the item subject

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[271] International Association of Classification Societies, "IACS Charter", October 27, 2009, revised January 2018, available at <www.iacs.org.uk/about/>.

[272] International Association of Classification Societies, "Procedures Concerning Requirements for Membership of IACS", Volume 2, October 2017, 5.

[273] International Association of Classification Societies, "Procedures Concerning Requirements for Membership of IACS", Volume 2, October 2017, 7.

[274] International Association of Classification Societies, "Procedures Concerning Requirements for Membership of IACS", Volume 2, October 2017, 12, E1.5.

[275] International Association of Classification Societies, "Procedures Concerning Requirements for Membership of IACS", Volume 2, October 2017, 11, D1.8.

[276] Article 2.2. (a), International Association of Classification Societies, "IACS Charter", October 27, 2009, revised January 2018.

[277] Annex 1, Part 4.1. International Association of Classification Societies, "IACS Quality System Certification Scheme", Volume 3, June, 2011, 35-36, available at <www.iacs.org.uk/media/1768/procedures_vol3_rev4_pdf2340.pdf>.

[278] See especially Part. 4.3.2 (Impartiality and Integrity) and Part 4.3.3 (Independence Criteria) of Annex 2 of the QSCS, 48-49.

to the service. The society or its staff may not engage in activities that conflict with their independence of judgment and their integrity. In particular, classification societies are not allowed to become involved in the design, manufacture, supply, installation, use or maintenance of the items covered by the service. Moreover, the society may not be controlled by shipowners or others commercially involved in the manufacture, equipping, repair or operation of ships. It can also not substantially depend on a single commercial enterprise for its revenue. Finally, a surveyor is not allowed to carry out class or statutory work if it has business, personal or family links to the shipowner or operator.[279]

74. As opposed to the situation for CRAs and by extension other capital-market certifiers such as auditors,[280] EU legislation does not contain measures to reduce potential conflicts of interest between the shipowner and classification societies (private role). There are only provisions dealing with the independence of societies when acting as ROs (public role). Recital (9) of Directive 2009/15 stipulates that ROs need to be strictly independent and have specialised technical competence and rigorous quality management to carry out their duties in a satisfactory manner.[281] Moreover, the RO may not be controlled by shipowners or shipbuilders or by other parties (commercially) engaged in the manufacture, equipping, repair or operation of ships. ROs may also not be substantially dependent on a single commercial enterprise for its revenue. The RO is not allowed to carry out class or statutory work if it is identical to or has business, personal or family links to the shipowner or operator. This incompatibility also applies to surveyors employed by an RO.[282] Besides supranational legislation, contracts between the classification society acting as an RO and the flag State can also emphasise that societies have to remain independent and impartial or contain provisions to prevent/minimise conflicts of interest.[283]

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[279] See in this regard: Part. 4.3.2 (Impartiality and Integrity) and Part 4.3.3 (Independence Criteria) of Annex 2 of the QSCS, 48-49.

[280] See for a comparative overview: J. DE BRUYNE & C. VANLEENHOVE, "An EU perspective on the liability of classification societies: selected current issues and private international law aspects", (20) *Journal of International Maritime Law* 2014, 110-111.

[281] Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administration.

[282] Annex I, A, 6 Regulation 391/2009 on common rules and standards for ship inspection and survey organisations.

[283] The IMO Model Agreement, for instance, specifies that the RO endeavours to avoid undertaking activities which may result in a conflict of interest (Article 2.5. IMO Model Agreement for the Authorization of Recognized Organizations Acting on Behalf of the Administration, MSC/Circ.710 - MEPC/Circ.307, October 9, 1995, available at <www.sjofartsverket.se/pages/7148/307.pdf>). The agreement with the Swedish Transport Agency (STA) states that the RO has to act in an objective and impartial way when performing its duties on behalf of the STA. Employees of the RO may not give or receive gifts, rewards or other benefits when performing duties in accordance with the agreement. Employees may not be involved in any conflict of interest when performing duties. A conflict of interest arises inter alia when the person performing the statutory certification or services, his or her next of kin or another person close to him or her (a) is a party concerned, (b) may expect extraordinary benefit or detriment from the result of the statutory certification or services, or (c) is a representative either of the person, company or organisation concerned or of someone else who may expect extraordinary benefit or detriment from the result of the statutory certification or service. A conflict of interest will also arise when there are other special circumstances that may influence the impartiality of the person performing the statutory

2.2.3. Product Certifiers and Notified Bodies

75. The examined contractual terms and general conditions do not explicitly mention that a product certifier has to remain independent vis-à-vis the requesting entity. However, the norms issued by the International Organisation for Standardisation (ISO)[284] address a certifier's independence and impartiality.

Article 4.2. in ISO 17065, for instance, stipulates that inspectors have to remain independent in the review and certification decision-making process. The decision has to be carried out by someone who was not involved in the process for evaluating the product or service.[285] Certifiers are responsible to ensure their impartiality, which cannot be compromised by financial commercial or other pressures. To that end, the certifier has to identify potential risks to its impartiality on an ongoing basis and, where such a risk is identified, demonstrate how it eliminates or minimises it. The certifier may not be involved in the design, manufacture, installation, distribution or maintenance of the certified item. Therefore, it is not allowed to offer consultancy or internal auditing services or may not be linked with an organisation providing such services to the requesting entity.[286] Article 5.2. further contains structural and organisational requirements to safeguard the certifiers' impartiality. For instance, they need to have a mechanism to guarantee their impartiality. This mechanism has to provide input on policies and procedures relating to their independence.[287]

76. The EU did not adopt legislation covering the independence of product certifiers in general. However, sectoral legislation contains several provisions dealing with their independence.[288] For instance, Decision 768/2008 sets out requirements to ensure that notified bodies remain independent vis-à-vis the manufacturer of medical devices. More specifically, they are not allowed to engage in any activity that may conflict with their independence of judgment or integrity (e.g. consultancy services).[289]

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certification or services. A person involved in such a conflict of interest may not perform duties on behalf of the STA (Article 3.5. Agreement Governing the Delegation of Statutory Certification & Services for Ships Registered in Sweden between the Swedish Transport Agency and XX, available at <www.transportstyrelsen.se/globalassets/global/sjofart/fartyg/delegationsavtal-160101.pdf>).

[284] The ISO is an independent non-governmental organisation and the world's largest developer of standards. See for more information the discussion *infra* in no. 192.

[285] Article 7.6.2. ISO/CASCO, ISO/IEC 17065:2012, Conformity assessment - Requirements for bodies certifying products, processes and services, ICS 03.120.20.

[286] Article 4.2 ISO/CASCO, ISO/IEC 17065:2012, Conformity assessment - Requirements for bodies certifying products, processes and services, ICS 03.120.20.

[287] Article 5.2. ISO/CASCO, ISO/IEC 17065:2012, Conformity assessment - Requirements for bodies certifying products, processes and services, ICS 03.120.20.

[288] See for requirements on the independence for inspection and certification bodies of construction products: Annex IV Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, *OJ* L 40. See for provisions on the independence of conformity assessment bodies involved in the certification of toys: Article 26 Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys, *OJ* L 170.

[289] Article R17 ("Requirements relating to notified bodies") in Decision 768/2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC.

Annex VII of the MDR contains additional criteria for the designation of notified bodies. Such a body has to be organised and operated to safeguard the independence, objectivity and impartiality of its activities. It needs to have procedures that guarantee the identification, investigation and resolution of any case in which conflicts of interest can arise. Notified bodies are not allowed to engage in activities that may conflict with their independence of judgement or integrity in relation to conformity assessment activities for which they are designated. A notified body, its top-level management and personnel responsible for carrying out the conformity assessment tasks are also not allowed to offer or provide services which might jeopardise the confidence in their independence, impartiality or objectivity. For instance, notified bodies are not allowed to provide consultancy services to the manufacturer, a supplier or a commercial competitor on the design, construction, marketing or maintenance of devices. Notified bodies cannot be involved in the design, manufacture or construction, marketing, installation and use or maintenance of devices they assess. Moreover, the level of the remuneration of the top-level management and assessment personnel of notified bodies may not depend on the results of the assessments.[290]

3. Third Stage of the Certification Process

77. Besides the analysis (*obligation de moyen*) and the issuance of a certificate in an independent way (*obligation de résultat*), certifiers also have several 'post-issuance' obligations during the last stage of the certification process. Some of these obligations qualify as *obligations de résultat*. An example are confidentiality requirements in certification agreements. There might thus be a basis for liability once a certifier violates this obligation by disclosing confidential information.[291]

78. In addition to confidentiality requirements, a certifier also has monitoring and surveillance obligations during the last stage of the process. These obligations can be included in the certification contract or be imposed by legislation. The obligation to *perform* these surveillance obligations can be labelled as an *obligation de résultat*. There will thus be a basis for liability if a certifier fails to periodically perform them or does not do so within the agreed period. Based on the monitoring and surveillance activities, there can be reasons to suspend or withdraw the certificate. The SGS code of practice, for

[290] Annex VII, Article 1.2. Regulation 2017/745 on medical devices.

[291] Rating agreements, for instance, can require CRAs to keep confidential the information they receive from the issuer. In the rating agreement with S&P, the CRA is not allowed to publish or disclose the rating to any party without the issuer's consent. The CRA may use confidential information in connection with the assignment and monitoring of the rating but is not allowed to directly disclose it to any other party. The information can only be used for research and modelling purposes if it is not presented in a way that makes it possible to identify the issuer (see in this regard the documents in the Annex). Part 3.B of the 2008 IOSCO Code of Conduct as well as the individual codes of CRAs also contain several confidentiality duties (e.g. Article 3.15 Moody's, "Moody's Code of Professional Conduct", June 2017, 15). Classification societies are also bound by confidentiality requirements. The terms and conditions of the marine service contract of Lloyds stipulate that the society has to keep confidential any data, plans or other technical information received from the shipowner except when disclosure is required by law or authorised by the shipowner. Confidentiality requirements are also included in the delegation agreement between the RO and the flag State (e.g. Article 7.5. in the Agreement Governing the Delegation of Statutory Certification & Services for Ships Registered in Sweden between the Swedish Transport Agency and XX).

instance, stipulates that a certificate can be withdrawn if the products no longer conform to the applicable standards, norms or regulations.[292] Article 56 of the MDR also stipulates that a notified body is allowed to suspend or withdraw the certificate when a manufacturer no longer meets the applicable requirements, unless compliance with the requirements is ensured by appropriate corrective action taken by the manufacturer within an appropriate deadline set by the notified body.[293] This requirement qualifies as an *obligation de résultat*. In other words, if the monitoring and surveillance tasks identify reasons to withdraw or modify the certificate, there might be a basis for liability if the certifier does not do so regardless of the efforts that are made.[294]

79. The *way* in which certifiers have to conduct these monitoring and surveillance obligations, however, is an *obligation de moyen*. Certifiers have to carefully perform these tasks, without being able to guarantee that monitoring and surveillance is always successful. There might thus be a basis for liability if certifiers negligently performed their monitoring tasks, even when it turns out that the certificate has not been downgraded or withdrawn. Alternatively, if the certificate has not been downgraded or withdrawn, there will not be a basis for liability if certifiers carefully performed the surveillance and monitoring tasks. Surveillance and monitoring duties find their basis in different sources including certification contracts, codes of conduct or supranational legislation (part 3.1.). More importantly, there are several reasons why a certifier's monitoring and surveillance tasks qualify as *obligations de moyen* (part 3.2.).

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[292] Article 16 SGS, "Code of Practice", available at <www.sgs.com/Terms-and-Conditions/Codes-of-Practice-SSC-English-NL.aspx>. Also see: Articles 3.17-3.18 TüV Rheinland, "Terms and Conditions of Certification TUV Rheinland of North America", available at <www.tuv.com/media/usa/termsandconditions/TandC_of_Certification_for_DAkks-VDA_Rev8.pdf>.

[293] There are also several other circumstances when certifiers need to withdraw or suspend a certificate. For instance, rating contracts can mention that CRAs may raise, lower, suspend, place on CreditWatch or withdraw a rating at any time and at its sole discretion, especially when the information provided by the issuer or lack thereof requires the CRA to do so (see in this regard the documents in the Annex). Classification societies can also withdraw the certificates under several circumstances. The certificate will either be automatically suspended or the classification society may withdraw it at any time and expel the ship from its register if the ship is not made accessible to a survey, if necessary repairs are not carried out in time or if the vessel is used for other purposes than it is designed and approved for (N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 47-48; International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 5-6 & 11-12). Whether ROs are allowed to withdraw statutory is less clear. The Model Agreement states the circumstances under which a surveyor is allowed to withdraw the certificate (see paragraphs 7-8 in attachment "additional and/or alternative provisions for consideration when developing the agreement and appendixes thereto" to the IMO Model Agreement for the Authorization of Recognized Organizations Acting on Behalf of the Administration, MSC/Circ.710-MEPC/Circ.307, October 9, 1995). The agreement with the Swedish Transport Administration, however, specifies that the RO is not entitled to withdraw statutory certificates (Paragraph II.4., Appendix 2. Agreement Governing the Delegation of Statutory Certification & Services for Ships Registered in Sweden between the Swedish Transport Agency and XX).

[294] Moody's, for instance, will on a timely basis update the issued rating, based on the results of a review (Article 1.9 Moody's Investors Service, "Code of Professional Conduct", June 2017, 9).

3.1. Sources of Monitoring and Surveillance Obligations

80. Monitoring and surveillance obligations can find their basis in different sources. This becomes clear when examining the situation for CRAs, classification societies and product certifiers/notified bodies.

81. The IOSCO Code of Conduct Fundamentals stipulates that, except for ratings that clearly indicate they do not entail any on-going surveillance, the CRA should monitor on an on-going basis the published rating by regularly reviewing the issuer's creditworthiness. Ratings should be updated on a timely basis taking into account the results of the review.[295] The EU Regulation on CRAs contains similar provisions when requiring CRAs to monitor and review ratings on an on-going basis and at least annually, especially where material changes occurred that could have an impact on a rating.[296] A same conclusion follows from different cases where the monitoring and surveillance duties of CRAs were examined.[297] In *CalPERS*, it was held that the CRAs had to continuously monitor the financial structured products to ensure that the given ratings remained accurate. They had to withdraw any rating that was no longer representative of the rated products' financial condition. In publishing a rating, the CRAs did not simply offer investors their best prediction as to whether they would eventually be paid in full on their investment at the time the product was first marketed. Instead, CRAs continuously examined the products' market performance to ensure that the rating was currently valid.[298]

Moody's Code of Professional Conduct stipulates that when a rating is published, unless it is withdrawn, the CRA will at least once in any twelve month period review the creditworthiness of the issuer or his products. To that end, surveillance teams continuously monitor and review the ratings. The CRA will also initiate a review of the status of the rating when it receives any information that might reasonably be expected to result in an action such as lowering or withdrawing the rating.[299] CRAs can put the issuer on a Credit Watch (list)[300] when the CRA plans to review the rating. Such a review is of

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[295] Article B.1.9, Technical Committee of the International Organization of Securities Commission, "Code of Conduct Fundamental for Credit Rating Agencies", August 2008, 5-6.

[296] Article 8.5. Regulation 1060/2009 on credit rating agencies.

[297] See for example: *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155 (S.D.N.Y. 2009); *In re Moody's Corporation Securities Litigation*, 599 F. Supp. 2d 493 (S.D.N.Y. 2009); *King County, Washington et al v. IKB Deutsche Industriebank AG et al*, no. 09-08387, 31-50 (S.D.N.Y. 2012); *LaSalle Nat. Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071 (S.D.N.Y. 1996); *Ohio Police & Fire Pension Fund v. Standard & Poor's Financial Services LLC*, 813 F.Supp.2d 871 (S.D. Ohio 2011).

[298] *California Public Employees' Retirement System v. Moody's Corp*., Docket No. A134912, No. CGC-09-490241, footnote 15 (Cal. Ct. App. 2014).

[299] Article 1.9 Moody's Investors Service, "Code of Professional Conduct", June 2017, 9.

[300] CreditWatch highlights a CRA's view regarding the potential direction of a short-term or long-term rating. It focusses on identifiable events and short-term trends that cause ratings to be placed under special surveillance by a CRA. Ratings may be placed on CreditWatch under several circumstances (e.g. a material change in performance of an issuer or the occurrence of an event that makes it necessary to evaluate the rating). See in this regard: S&P Global Ratings, "S&P Global Ratings Definitions", June 26, 2017, 6-7,

particular importance for market participants. Whereas an upgrade might increase future investments, a downgrade indicates that the issuer is less able or willing to meet its financial obligations.[301] CRAs will, therefore, inform issuers and investors of the intention to change the rating prior to publishing the downgrade or upgrade. This gives issuers an opportunity to adjust the design of financial instruments to avoid a downgrade.[302]

82. Classification societies have surveillance and monitoring obligations in the form of surveys. Vessels are subject to a life survey regime if they want to be retained in class. There are different kind of class surveys.[303] The Rules for Classification and Construction of former society Germanischer Lloyd stipulated that it has to perform regular periodical and non-periodical surveys of the vessel's hull and machinery.[304] Although the shipowner remains responsible to properly maintain the ship in between the surveys,[305] a classification society has discretion to determine whether or not it will initiate a survey. ABS, for instance, reserves the right to perform unscheduled surveys of a vessel when it has reasonable grounds to believe the shipowner does not comply with the applicable class rules.[306]

83. Product certifiers can also be bound by monitoring and surveillance activities. The SGS code of practice, for example, stipulates that the certifier has to do periodic surveillances of the management system and products. To that end, the certifier has the right to visit the manufacturer unannounced.[307] A surveillance agreement with TüV Rheinland specifies that the surveillance of the manufacturing plants are used to check whether the manufacturer of construction products complies with the applicable requirements. Once the certificate is issued for construction products, the certifier has to

available at <www.standardandpoors.com/en_US/delegate/getPDF?articleId=2017758&type=COMMENTS&subType=REGULATORY>.

[301] S. ROUSSEAU, "Enhancing the Accountability of Credit Rating Agencies: The Case for a Disclosure-Based Approach", (51) *McGill Law Journal* 2006, 625; U. BLAUROCK, "Control and Responsibility of Credit Rating Agencies", (11) *Electronic Journal of Comparative Law* 2007, 4.

[302] A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 37.

[303] See for more information the discussion *supra* in no. 49.

[304] Section 3, A.1. Germanischer Lloyd, "Rules for Classification and Construction", November 2011, 3-1, available at <rules.dnvgl.com/docs/pdf/gl/maritimerules2016Jan/gl_i-2-1_e.pdf>.

[305] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 11.

[306] Article 1.1. Section 2, Chapter I, Part 1, ABS, "Rules for Conditions of Classification", August 2016, 7.

[307] Article 9 SGS, "Code of Practice". Also see the Articles 4.15-4.16 TüV Rheinland, "Terms and Conditions of Certification TUV Rheinland of North America".

regularly assess whether the factory production control[308] conforms to the relevant technical specifications.[309]

84. Notified bodies have different monitoring and surveillance obligations as well. The MDR, for instance, contains several obligations. Regarding class IIa, class IIb and class III medical devices, notified bodies must periodically, at least once every twelve months, carry out audits and assessments to ensure that the manufacturer applies the approved quality management system and post-market surveillance plan. These audits and assessments include inspections on the manufacturer's premises as well as tests to check whether the quality management system is working properly.[310] The notified body needs to randomly perform, at least once every five years, unannounced audits on the site of the manufacturer. Within the context of such unannounced on-site audits, the body has to test an adequate sample of the produced devices or an adequate sample from the manufacturing process to verify that the manufactured medical device is in conformity with the technical documentation.[311]

Reference can also be made to Recommendation 2013/473 on audits and assessments performed by notified bodies.[312] The Recommendation obliges notified bodies to perform unannounced audits of manufacturers of medical devices at least once every three year. The timing of the audits should be unpredictable. Notified bodies need to increase the frequency of unannounced audits if the devices bear a high risk, if the devices of the type in question are frequently non-compliant or if specific information gives rise to suspicions that the devices or their manufacturer do not comply with the applicable requirements. Notified bodies have to check a recently produced sample, preferably one taken from the ongoing manufacturing process, for its conformity with technical documentation and (applicable) legal requirements.[313]

85. Before the implementation of the MDR and Recommendation 2013/473, post-issuance obligations were also included in Annex II of the MDD.[314] The PIP breast

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[308] Article 13 3(a) of Council Directive 89/106/EC of 21 December 1988 on the Approximation of Laws, Regulations and Administrative Provisions of the Member States relating to Construction Products, *OJ* L 40 stipulates that manufacturers may only affix the EC conformity marking on their construction products if they have "a factory production control system to ensure that production conforms with the relevant technical specifications". Factory production control is defined by Annex III of the Directive as the permanent internal control of production exercised by the manufacturer.

[309] TüV Rheinland Industrie Service GmbH, "Surveillance and Certification Agreement", available at <www.tuv.com/media/poland/o_nas/zalaczniki_do_ofert/dp/Umowa_w_sprawie_inspekcji_i_certyfikacji.pdf>.

[310] Annex IX, Chapter I, Article 3.3. Regulation 2017/745 on medical devices.

[311] Annex IX, Chapter I, Article 3.4. Regulation 2017/745 on medical devices.

[312] Annex III Recommendation 2013/473 on the audits and assessments performed by notified bodies in the field of medical devices. The Recommendation is divided into four parts including general provisions and three Annexes focusing on product assessment (Annex I), quality management system assessments (Annex II) and the unannounced audits themselves (Annex III).

[313] Annex III, Recommendation 2013/473/EU on the audits and assessments performed by notified bodies in the field of medical devices.

[314] See in this regard Annex II, Articles 5.3. and 5.4. Directive 93/42 concerning medical devices.

implant case, however, showed that the scope and content of these obligations has not always been that clear under the MDD.[315]

86. In France, a large group of distributors and women brought a case before the *Tribunal de Commerce* in Toulon. The court held that TüV Rheinland negligently performed its obligations of control/inspection, care and vigilance.[316] In its capacity of notified body, TüV had substantial power in its inspection role to ensure that the implants only contained the authorized gel. The court assumed that the body was required to make unannounced visits at the factory or on sites of the manufacturer.[317] The Court of Appeal d'Aix-en-Provence, however, reversed the first instance decision and concluded that TüV complied with its obligations under EU law. The MDD provided solely for the possibility to make unannounced visits. There was no obligation to do so.[318]

87. In a case before the German District Court in Nuremberg-Fürth, the victim's claim was rejected as well. The court held that EU law did not require a notified body to investigate the specific implants or carry out unannounced inspections on the manufacturing site.[319] The District Court in Frankenthal concluded that TüV Rheinland had not breached its obligations included in Annex II of the MDD.[320] The certifier has to check the conformity of the quality management system with the provisions of the MDD. Although the notified body undertook an audit of the quality management system, it did not have to examine whether the quality management as presented by PIP was also brought into practice.[321] The audit of PIP's quality system was merely a "document-based

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[315] I am aware that the legal framework in the context of notified bodies is quite confusing. The MDD was applicable when the PIP scandal occurred. Proceedings with regard to the application of the MDD were initiated in different EU Member States. The PIP case eventually made it to the European Court Justice by way of a preliminary ruling. Shortly after the scandal, the Recommendation on the audits and assessments performed by notified bodies was adopted (thus before the decision by the ECJ in February 2017). While the PIP scandal occurred, supranational policymakers were already amending the Medical Device Directive. This resulted in the adoption of the Medical Device Regulation that entered into force on 25 May 2017. The MDR will only apply after a transitional period of three years after entry into force.

[316] Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, no. 2013F00567, 144 (available at the online legal database Dalloz).

[317] Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, 2013F00567, 142-143 (available at the online legal database Dalloz).

[318] Court of Appeal Aix-en-Provence, July 2, 2015, no. 13/22482, part II, B), 1) in "Motifs de la décision" ("Il ne peut donc être reproché à l'organisme certifié de ne pas avoir procédé périodiquement aux inspections prévues à l'article 5.3. de l'annexe II de la directive 93/42/CEE"). This decision can be found on the online legal database Dalloz and is also available at <www.doctrine.fr/d/CA/Aix-en-Provence/2015/R544A062AC137538AB085>.

[319] District Court Nürnberg-Fürth, September 25, 2013, 11 O 3900/13. The decision can be found on the online databases Dejure and Juris. See TüV Rheinland, "PIP Breast Implants: TÜV Rheinland Wins Another Case", April, 10, 2013, available at <www.tuv.com/en/malaysia/about_us_my/news_my/news-content_208551.html>.

[320] District Court Frankenthal, March 14, 2013, 6 O 304/12, *JurionRS* 2013, 37376, *Medizin Produkte Recht* 2013, 134-138; B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 343-344.

[321] District Court Frankenthal, March 14, 2013, 6 O 304/12, *JurionRS* 2013, 37376, *Medizin Produkte Recht* 2013, 134-137.

exercise".[322] The notified body was also required to examine the design dossier containing information on the content and design of the implants. Once again, TüV was not obliged to inspect the actual implants.[323] The District Court also held that the certifier had no obligation to do unannounced visits. The MDD stipulates that the notified body *may* carry out such visits.[324] An obligation would only arise if there were specific circumstances demanding for an unannounced visit. However, the plaintiff failed to show the existence of such circumstances.[325]

88. The decision has been affirmed by the *Oberlandesgericht* in Zweibrücken, albeit on different grounds.[326] More importantly, the OLG gave permission to appeal to the BGH. On the 9th of April 2015, the *Bundesgerichtshof* referred three questions on the interpretation of the MDD to the European Court of Justice.[327] By its second and third question, the BGH sought to ascertain whether the provisions of Annex II to the MDD are to be interpreted as meaning that a notified body is required in general, or at least where there is due cause, to do unannounced inspections/audits, to examine devices and/or to examine the manufacturer's business records.[328]

The ECJ held that a notified body had no general obligation to carry out unannounced inspections, to examine medical devices and/or to examine the manufacturer's business records.[329] That being so, however, the notified body may pay unannounced visits to the manufacturer during which it may carry out or ask for tests to check if the quality system is working and applied properly.[330] The notified body may also require, where duly justified, any information or data necessary for establishing and maintaining the attestation of conformity in view of the chosen procedure.[331] The manufacturer must

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[322] B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 343-344.

[323] District Court Frankenthal, March 14, 2013, 6 O 304/12, *JurionRS* 2013, 37376, *Medizin Produkte Recht* 2013, 134-137; B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 344.

[324] Annex II, Article 5.4. Directive 93/42 concerning medical devices.

[325] District Court Frankenthal, March 14, 2013, 6 O 304/12, *JurionRS* 2013, 37376, *Medizin Produkte Recht* 2013, 134-137; B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 344.

[326] Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13, *JurionRS* 2014, 10232. See for a discussion and translation of the case: W. REHMANN & D. HEIMHALT, "Medical devices: liability of notified bodies?", TaylorWessing, May 2015; B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 344-345. See for more information also the discussion *infra* in nos 97-99.

[327] BGH, April, 9, 2015, VII *ZR* 36/14.

[328] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, request for a preliminary ruling from the *Bundesgerichtshof* lodged on 13 May 2015.

[329] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraphs 38 & 40.

[330] Annex II, Articles 5.3. and 5.4. Directive 93/42 concerning medical devices.

[331] Article 11, 10. of Directive 93/42 concerning medical devices.

allow the notified body to carry out all the inspections necessary and provide it with all relevant information.[332]

3.2. Content of the Monitoring and Surveillance Obligations

89. Regardless of the sources imposing surveillance and monitoring obligations on certifiers, the way in which they have to be performed qualifies as *obligation de moyen*. This can be illustrated by two reasons coming from different certification sectors. First, a certifier is often not the only party involved in the surveillance and monitoring process. Several other parties also play a role in the last stage of the certification process (part 3.2.1.). Second, there is case law showing that certifiers are bound by an *obligation de moyen* when it comes to their monitoring and surveillance obligations (part 3.2.2.).

3.2.1. Other Actors Involved in the Third Stage

90. One reason why certifiers are bound by an *obligation de moyen* relates to the interplay with other entities once the certificate is issued. Those parties can also have obligations to ensure that the certified item does not default. Imposing an *obligation de résultat* upon third-party certifiers might in these circumstances be too far-reaching. Whether a certifier's monitoring and surveillance obligations will be successfully accomplished is, for instance, determined by the cooperation of national authorities (part A.) or requesting entities (part B.).

A. National Authorities

91. In the medical sector, for instance, national competent authorities play an important role after the device has been marketed. Those authorities have several obligations once a device has been placed on the market. They need to do appropriate checks on the conformity characteristics and performance of devices including, where appropriate, a review of documentation and physical or laboratory checks on the basis of adequate samples.[333] The competent authorities have to carry out both announced and if necessary unannounced inspections of the premises of economic operators such as the manufacturer and, where necessary, at the facilities of professional users.[334] If the competent authority believes that the medical device presenting a health or safety risk does not comply with the applicable requirements, it can take several post-market actions (e.g. withdrawing the device from the market or recalling it within a reasonable period).[335]

92. The decisions by the German and French courts in the PIP breast implant case illustrate the ambiguity regarding the obligations of notified bodies and the interplay with national authorities during the third stage of the certification process.

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[332] Annex II, Article 5.2. Directive 93/42 concerning medical devices.

[333] Article 93.1 Regulation 2017/745 on medical devices.

[334] Article 93.3 Regulation 2017/745 on medical devices.

[335] Articles 94 & 95 Regulation 2017/745 on medical devices.

The District Court in Frankenthal emphasised that there was a distinction between duties of notified bodies on the one hand and the obligations of national public market surveillance agencies on the other hand. Notified bodies cannot be qualified as market surveillance agencies and do not have the same powers. Instead, notified bodies only play a role in the conformity assessment procedure of devices.[336] On appeal, the OLG in Zweibrücken also stressed the separation of duties between notified bodies and competent authorities. Certification cannot be placed at the same level as post-market surveillance activities. Competent authorities remain responsible to monitor and control products that have been marketed.[337]

In France, the Commercial Court in Toulon held that notified bodies effectively assume a public role. As a consequence, they guarantee that the product has reached a certain standard of safety whenever it is certified. The functions performed by TüV Rheinland constituted a real delegation of public services by national authorities. In its capacity of notified body, TüV Rheinland had substantial power in its inspection role to ensure that the implants only contained the authorised gel.[338] The first instance decisions was, however, reversed by the *Cour d'Appel* d'Aix-en-Provence. This might be an indication that French courts adhere to the same stance as their German counterparts.[339]

B. Requesting Entities

93. Whether a certifier's obligations are successfully performed can also depend upon the cooperation of the requesting entity itself. Take the situation of classification societies. Vessels are subject to a lifelong survey regime if they want to be retained in class. However, it is the shipowner who remains responsible to properly maintain the vessel in the period between the surveys. He has to inform the society of events or circumstances that affect the conformity of the ship with class rules. Although classification societies have monitoring and surveillance duties, the shipowner might thus have to trigger societies to actually perform them. The effectiveness of the classification depends upon the shipbuilder or shipowner cooperating with the society in an open and transparent manner on all issues affecting its status. To that end, the shipowner has to act in good faith by disclosing to the society any damage or deterioration that may influence the

[336] District Court Frankenthal, March 14, 2013, 6 O 304/12, JurionRS 2013, 37376, *Medizin Produkte Recht* 2013, 135-136; B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 344.

[337] Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13, *JurionRS* 2014, 10232. See for translation and discussion of the case: W. REHMANN & D. HEIMHALT, "Medical devices: liability of notified bodies?", TaylorWessing, May 2015; B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 343-348.

[338] Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, 2013F00567, 142-143 (available at the online legal database Dalloz). See in this regard also: B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 345-346.

[339] Court of Appeal Aix-en-Provence, July 2, 2015, no. 13/22482. This decision can be found on the online legal database Dalloz and is also available at <www.doctrine.fr/d/CA/Aix-en-Provence/2015/R544A062AC137538AB085>.

vessel's classification status. If there is any doubt, the owner should notify the society and schedule a survey to decide if the vessel still complies with the relevant class rules.[340]

94. The importance of a requesting entity's cooperation and its influence on the certifier's services became clear as well in the PIP case. The impact of the manufacturer's fraud in the production process was disparate. Whereas some breast implants contained the required medical silicone gel, others had a mixture of medical and industrial silicone gel or only industrial gel. The manufacturer's fraud and lack of cooperation made an accurate inspection of the implants extremely difficult. Thus, the requesting entity might commit fraud the certifier will not always discover.[341]

95. A last example relates to the certifier's remuneration by the requesting entity. The way certifiers are paid the certification fee by the requesting entity does not always induce them to carefully perform the post-issuance activities. The model where the certifier is paid by the requesting entity can lead to a disincentive to adequately monitor the certified item when a downgrade or withdrawal of the certificate is appropriate.[342] CRAs can serve as illustration in this regard as investors already brought several claims[343] alleging that they failed to duly monitor the underlying assets for significant decreases in the quality of the securities that investors purchased.[344]

CRAs charge surveillance fees for monitoring services, either upfront or annually. Performing adequate and surveys on time is important considering that issuers of structured products do not always make the underlying loan performance or other information publicly available.[345] Based on the issuer-pays business model,[346] CRAs are encouraged to give issuers favourable ratings to generate revenues. However, they have little incentives to provide monitoring services or downgrade securities when necessary[347]

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[340] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 5.

[341] See for more information and references the discussion *supra* in no. 40.

[342] N. HORNER, "If You Rate It, He Will Come: Why Uncle Sam's Recent Intervention with the Credit Rating Agencies Was Inevitable and Suggestions for Future Reform", (41) *Florida State University Law Review* 2014, 499; T.J. PATE, "Triple-A Ratings Stench: May the Credit Rating Agencies be Held Accountable?," (2) *Barry Law Review* 2010, 36.

[343] See for example: *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742 (S.D. Tex. 2005); *California Public Employees' Retirement System v. Moody's Corp*., No. CGC-09-490241 (Cal. Super. 2010); *California Public Employees' Retirement System v. Moody's Corp*., Docket No. A134912, No. CGC-09-490241, paragraphs 30-34 (Cal. Ct. App. 2014); *In Re Moody's Corp. Securities Litigation*, 599 F. Supp. 2d 493 (S.D.N.Y. 2009); *Lasalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071 (S.D.N.Y. 1996).

[344] T.J. PATE, "Triple-A Ratings Stench: May the Credit Rating Agencies be Held Accountable?", (2) *Barry Law Review* 2010, 36-38.

[345] United States Securities and Exchange Commission, "Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies", July 2008, available at <www.sec.gov/news/studies/2008/craexamination070808.pdf>.

[346] See for more information on this model the discussion *infra* in nos. 389-412.

[347] N.S. ELLIS, L.M. FAIRCHILD & F. D'SOUZA, "Is Imposing Liability on Credit Rating Agencies a Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis", (17) *Stanford Journal of Law, Business & Finance* 2012, 191, footnote 66.

as the issuer pays for the continuing surveillance of securities in advance.[348] Few issuers are eager to let CRAs monitor their securities considering that it could result in downgrades.[349] During the initial rating process, the issuer tries to assure CRAs that they are getting the "the complete picture by providing both bad information and good [on the creditworthiness]" (internal quotations marks omitted).[350] Thereafter, the company is no longer induced to voluntarily bring any negative information to the CRA's attention.[351] Consequently, credit ratings are mostly downgraded long after public information has signalled a deterioration in the issuer's probability of default.[352] Moreover, CRAs can obtain information from other actors involved in overlapping commercial activities during the initial rating process (e.g. investment banks or law firms). However, as time goes by and the CRA needs to monitor the initial rating, it becomes more difficult to acquire information from other sources or actors as they are no longer involved in the surveillance of issuers.[353]

3.2.2. Monitoring and Surveillance Obligations in Case Law

96. The post-issuance obligations of certifiers have also been addressed in different court decisions. An illustration of these decisions shows that certifiers are bound by an *obligation de moyen* when it comes to monitoring and surveillance obligations. There is no basis for liability if certifiers carefully performed the surveillance and monitoring tasks when the certified item defaults despite the existence of a favourable certificate. The PIP breast implant case (part A.) as well as decisions in the context of CRAs (part B.) can be used as subject of the analysis in this regard.

A. The PIP Breast Implant Case

97. The French Commercial Court in Toulon held that TüV Rheinland negligently performed its obligations of control, inspection, care and vigilance. The certifier was held liable because it did not apply the normally required diligence and care during its post-issuance obligations. A reasonable and prudent certifier placed in the situation of TüV would have conducted an announced inspection even if this was not mandatory under EU law.[354] The certifier was not prudent or vigilant enough as it never performed unannounced inspections at the factory or on sites of the manufacturer to examine the implants despite having the right to so under the MDD. One small-scale unannounced

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[348] See in this regard also: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 122.

[349] J.D. KREBS, "The Rating Agencies: Where We Have Been and Where Do We Go From Here?", (3) *The Journal of Business, Entrepreneurship & the Law* 2009, 141.

[350] C. HILL, "Regulating the Rating Agencies", (82) *Washington University Law Quarterly* 2004, 70.

[351] C. HILL, "Regulating the Rating Agencies", (82) *Washington University Law Quarterly* 2004, 70.

[352] J.D. KREBS, "The Rating Agencies: Where We Have Been and Where Do We Go From Here?", (3) *The Journal of Business, Entrepreneurship & the Law* 2009, 141.

[353] C. HILL, "Regulating the Rating Agencies", (82) *Washington University Law Quarterly* 2004, 70.

[354] Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, no. 2013F00567, 84-89 & 144 (available at the online legal database Dalloz).

visit would have made it possible to detect that the products did not fall under the remit of the certified manufacturing process.[355]

TüV Rheinland appealed against the first instance decision. The body claimed it complied with the applicable requirements. TüV argued that it was only responsible for controlling the design and the quality system and not the implants themselves. The certifier also argued it had been systematically deceived by PIP which presented false documents. TüV did not have sufficient powers under the MDD to take further actions to unmask the fraud. The *Cour d'Appel* d'Aix-en-Provence followed this reasoning and reversed the first instance decision. The court of appeal concluded that TüV Rheinland complied with its obligations under supranational law.[356]

98. In Germany, the OLG Zweibrücken concluded that the MDD did not impose any statutory obligation on the notified body to intervene to protect all patients that might come into contact with devices. The certification of a device is only a prerequisite for placing it on the market.[357] Even if a duty of care would exist, the OLG held that the notified body conducted inspections on a regular basis without being required to establish when inspections would exactly take place. The certifier was not obliged to perform unannounced audits of the manufactures, which would not even have brought to light PIP's fraud with the implants.[358]

99. It has already been mentioned that the case made it to the ECJ in a preliminary ruling. Advocate General SHARPSTON also acknowledged that notified bodies have surveillance obligations. Annex II to the MDD should be interpreted as meaning that, in the case of class III devices, the notified body responsible for auditing the quality system, examining the design of the product and "surveillance" is under a "duty to act with all due care and diligence".[359] Several elements of the Advocate General's reasoning point towards a qualification of an *obligation de moyen*. For instance, if a notified body considers it necessary to examine medical devices and/or the manufacturer's business records, the manufacturer is bound to allow it to do so. The ECJ, however, cannot lay down precise guidelines as to whether such a body is under a duty to carry out an examination, nor

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[355] Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, 2013F00567, 142-143 (available at the online legal database Dalloz). B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 245-246.

[356] Court of Appeal Aix-en-Provence, July 2, 2015, no. 13/22482 concluding that "Les appelantes personnes physiques, les intimés et intervenantes ne rapportent nullement l'existence d'une faute de la société AK, et/ou de la société AM". This decision can be found on the online legal database Dalloz and is also available at <www.doctrine.fr/d/CA/Aix-en-Provence/2015/R544A062AC137538AB085>.

[357] Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13, *JurionRS* 2014, 10232, Part II, 2. d); B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 344-345; W. REHMANN & D. HEIMHALT, "Medical devices: liability of notified bodies?", *TaylorWessing*, May 2015.

[358] Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13, *JurionRS* 2014, 10232. See for a translation: W. REHMANN & D. HEIMHALT, "Medical devices: liability of notified bodies?", TaylorWessing, May 2015.

[359] Opinion of Advocate General SHARPSTON, C 219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2016:694, paragraph 61.

when it has to perform unannounced inspections. That will be a matter to be assessed by the national court on a case-by-case basis. The main question thereby will be what a notified body acting with all due care and diligence would have done in the same circumstances.[360]

The judgement by the ECJ specifies that a notified body does not have a general obligation to carry out unannounced inspections, to examine devices and/or a manufacturer's business records. When there is evidence indicating that a medical device may not comply with the applicable requirements, the notified body has to take all necessary steps to ensure that it fulfils its obligations.[361] The ECJ proceeds and writes that notified bodies are under a "general obligation to act with all due diligence"[362] when engaged in a procedure relating to the Declaration of Conformity. Whereas such wording might point towards an *obligation de résultat*, the underlying reasons of coming to that conclusion illustrate that a body's monitoring and surveillance tasks during the third stage more likely qualify as *obligation de moyen*.

Notified bodies must be allowed an "appropriate degree of discretion"[363] to determine whether a device does or does not comply with the applicable requirements. A notified body's obligations would be a "dead letter" [364] if the degree of discretion is unlimited. The notified body is under a "duty to be alert" during the last stage of the process.[365] Arguably, a notified body will violate this duty when a reasonable notified body placed in the same circumstances would have been alerted by a medical device not complying with the applicable requirements. When performing this duty and finding evidence indicating that a device may not comply with the applicable requirements, the notified body must then take all steps necessary to ensure it fulfils its obligations under the MDD.[366]

B. Case Law on Credit Rating Agencies

100. The monitoring and surveillance obligations of CRAs have also been addressed in different cases. These cases illustrate that a CRA's post-issuance monitoring duties will more likely qualify as *obligations de moyen*.

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[360] Opinion of Advocate General SHARPSTON, C 219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2016:694, September 15, 2015, paragraph 57.

[361] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 48.

[362] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 46.

[363] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 45.

[364] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 45.

[365] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 47.

[366] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 47.

101. In *Ohio Police v. Standard & Poor's*, the complaint asserted a claim for negligent misrepresentation. The plaintiffs claimed that the CRAs owed them "a duty to act with reasonable care"[367] when preparing, assigning, maintaining and disseminating the ratings. The CRAs allegedly breached this duty inter alia by failing to adequately monitor the structured finance securities they rated. The complaint alleged that the CRAs failed to conduct surveillance due to a lack of personnel and inadequate models to track required developments.[368] A claim of negligent misrepresentation in Ohio requires that a person failed to exercise reasonable care or competence in obtaining or communicating the information.[369] Thus, a CRA will not be held liable merely because the given ratings are not updated. Instead, there will be a basis for liability when a CRA did not exercise reasonable care or competence during its monitoring duties (e.g. by using inadequate models to track required developments).[370]

102. Reference can also be made to the *Lasalle* case. The plaintiffs argued that their financial losses would have been prevented if Duff & Phelps had properly done the initial investigation and the post-issuance monitoring it claimed to perform. To monitor the continued accuracy of its ratings, the CRA required the issuers to submit detailed reports containing information.[371] The plaintiffs filed a claim against the CRA on the ground of Section 10(b) of the Exchange Act and SEC Rule 10b-5. These provisions prohibit fraudulent activities in connection with the purchase or sale of securities. One element a plaintiff must show to state a *prima facie* case of a violation of Section 10(b) and Rule 10b-5 is that a CRA acted with scienter.[372]

The US Supreme Court defined scienter as a "mental state embracing intent to deceive, manipulate or defraud".[373] To underpin a claim brought under Section 10(b), the plaintiff is required to show "fraudulent intent or recklessness rising to the level of conscious behavior".[374] The District Court for the Southern District of New York eventually held that plaintiffs adequately alleged sufficient facts to create the strong inference that Duff & Phelps acted with fraudulent intent or recklessness. The Court held that the CRA's self-described due diligence process would have alerted it of the issuer's violation of the bond program as designed or approved by Duff & Phelps. The fact that this did not happen constitutes strong circumstantial evidence that the CRA either had knowledge of these

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[367] *Ohio Police & Fire Pension Fund v. Standard & Poor's Financial Services LLC*, 813 F.Supp.2d 871, 875 (S.D. Ohio 2011).

[368] *Ohio Police & Fire Pension Fund v. Standard & Poor's Financial Services LLC*, 813 F.Supp.2d 871, 875 (S.D. Ohio 2011).

[369] *Ohio Police & Fire Pension Fund v. Standard & Poor's Financial Services LLC*, 813 F.Supp.2d 871, 880 (S.D. Ohio 2011). See on claims of negligent misrepresentation also the discussion *infra* in nos. 271-283.

[370] *Ohio Police & Fire Pension Fund v. Standard & Poor's Financial Services LLC*, 813 F.Supp.2d 871, 879-885 (S.D. Ohio 2011).

[371] *Lasalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071, 1082 (S.D.N.Y. 1996).

[372] *Lasalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071, 1082 (S.D.N.Y. 1996). See on claims of securities fraud also the discussion *infra* in no. 285.

[373] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

[374] *O'Brien v. Price Waterhouse*, 740 F.Supp. 276, 280 (S.D.N.Y.1990).

violations or wilfully disregarded the violations. In other words, Duff & Phelps' Bond ratings were made with knowledge of falsity or at least extreme recklessness.[375]

4. Conclusions: Obligations of Certifiers During the Certification Process

103. This chapter shed light on the obligations of certifiers during the certification process. There are three stages, each of them giving rise to different obligations for certifiers.

First, a certifier has several 'pre-issuance' obligations before issuing the certificate. The most important one is to analyse the item or related information that needs to be certified. This analysis subsequently makes it possible to determine the certificate. This obligation qualifies as an *obligation de moyen*. There should only be a basis for liability when the certifier did not carefully perform the assessment of the item or related information that needs to be certified. Based on the assessment, certifiers subsequently issue a certificate in an independent way during the second stage of the process. This is an *obligation de résultat*. The certifier will violate this obligation if it did not remain independent vis-à-vis the requesting entity, irrespective of the level of care it applied. Certifiers also have 'post-issuance' obligations during a last stage. The most important one relates to monitoring and surveying the certified item. This is an *obligation de moyen*. There will be a basis for liability when certifiers did not carefully perform the surveillance and monitoring services, regardless of the question whether the certificate has been suspended, withdrawn or updated. When there are reasons to withdraw or change the certificate and the certifier fails to do so, there will be a basis for liability. This has been qualified as an *obligation de résultat*.

104. The combination of both axes that were referred to in the introduction shows that certifiers will not be held liable merely because the certificate does not correspond with the 'true' or 'actual' value of the certified item. Instead, there is a basis for liability if the certifier did not act as a reasonable and prudent certifier in the first (cf. analysis of the information) or third stage (cf. surveillance and monitoring duties). There might also be a basis for liability when the certifier did not remain independent vis-à-vis the requesting entity during the second stage, regardless of the degree of care it applied to ensure independence. Policymakers can take this framework into account when suggesting mechanisms to increase the accuracy and reliability of certificates. At the same time, it provides a better understanding and overview of a certifier's obligations in general.

105. An example can illustrate the relevance of the three stages in the certification process. Suppose that a certifier issues a certificate that does not correspond with the 'true' or 'actual' value of the certified item: a triple A rating for financial instruments that default, a certificate for a vessel that sinks or a certificate for a medical device that subsequently causes injuries. It is then required to examine in which stage of the certification process things could have gone wrong.

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[375] *Lasalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071, 1087 (S.D.N.Y. 1996).

There will be a basis for liability if the certifier performed an analysis of the item or used a methodology that no reasonable and prudent certifier placed in the same circumstances would have done or used (first stage). There is also a risk of liability if the certifier did not remain independent vis-à-vis the requesting entity, for example, because it offered consultancy services or did not comply with the applicable criteria on independence and impartiality (second stage). A basis for liability might also exist if certifiers do not conduct their surveillance and monitoring duties with the required care and skill. In other words, when a certifier does not take the necessary steps to ensure that the certificate still corresponds with the 'actual' value of the certified item. However, the mere fact that a certificate no longer corresponds with the 'true' value of the certified item cannot be a reason why liability should be imposed upon certifiers (third stage).

Chapter II – The Characteristics of Third-Party Certifiers

106. Although the obligations of the types of certifiers are quite similar during the certification process, the question addressed in this chapter is whether there is such a thing as 'one' or 'the' certifier in the eyes of the law in general. The answer to that question is of importance when developing legal mechanisms that induce certifiers to issue more accurate and reliable certificates. Several characteristics can be used to assess the differences and similarities between certifiers. A selection is made of those elements that are relevant from a legal point of view. Against this background, the following parts focus on the extent to which certification is mandatory or voluntary (part 1.), the supervision on certifiers (part 2.), the relationship between certifiers and national governments (part 3.), standard-setting in certification sectors (part 4.) and the way in which a certifier's independence is organised (part 5.), In conclusion, an overview of a certifier's characteristics is given (part 6.).

1. Mandatory and Voluntary Certification Schemes

107. Certification can be voluntary or mandatory. If certification is mandatory, it is required by the law. The requesting entity will thus have to obtain a certificate before it can market its items. Mandatory certification can be required for certain medical devices, vessels and financial products (part 1.1.). In other cases, certification is voluntary. It is then especially sought by a requesting entity in order to increase a third party's confidence in the certified item (part 1.2.).

1.1. Mandatory Certification

108. Prior to giving some examples, the concept of 'gatekeeper' needs some elaboration as it relates to mandatory certification. A gatekeeper can be defined in two ways.[376]

Some scholars focus on the certification functions performed by gatekeepers. The latter are "reputational intermediaries who provide verification and certification services".[377] A gatekeeper acquires reputational capital over many years and many clients, which it pledges to assure the accuracy of statements or representations it either makes or verifies.[378]

Others define gatekeepers as parties able to disrupt misconduct by withholding their cooperation from wrongdoers.[379] They are private entities selling a product or service that is necessary for clients wishing to enter a specific market or engage in particular

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[376] E.F. GERDING, "The Next Epidemic: Bubbles and the Growth and Decay of Securities Regulation", (38) *Connecticut Law Review* 2007, 426, footnote 219. See on the concept of gatekeepers and gatekeeping liability the discussion *infra* in nos. 437-464.

[377] J.C. COFFEE, "Understanding Enron: It's about the Gatekeepers, Stupid", (57) *Business Lawyer* 2002, 1405.

[378] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 308.

[379] R.H. KRAAKMAN, "Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy", (2) *Journal of Law, Economics and Organization* 1986, 53.

services.[380] Gatekeepers can block admission through the gate.[381] Certifiers are not always able to block a requesting entity's access to the market but when they can, they serve as gatekeepers. By being able to withhold the necessary cooperation or consent allowing market access, they can prevent a requesting entity's misconduct.[382]

109. If certification is required by law, certifiers can thus function as gatekeepers. The requesting entity will need to obtain a certificate before an item can pass the gate and be used or commercialised.

A notified body, for instance, needs to be involved in the conformity assessment procedure of medical devices of classes IIa, IIb and III. The body examines whether those devices meet the applicable requirements. When they comply with the safety and technical criteria, it will issue a certificate.[383] The manufacturer will only be able to market devices once the notified body has issued the required certificate.[384] This has been affirmed in the PIP case by the *Oberlandesgericht* in Zweibrücken when holding that the certificate issued by a notified body is a prerequisite for the manufacturer to distribute the implants on the EU market.[385]

Several international conventions require that vessels comply with safety standards before they can be used for maritime transport. Flag states have a duty under international law to take appropriate measures for vessels flying their flag to ensure safety at sea.[386] A flag State is not allowed to let its vessels sail if they do not meet the applicable standards. Flag states often delegate powers to classification societies as they have more technical knowledge in inspecting and certifying vessels. Acting as ROs, societies become responsible for the implementation and enforcement of international maritime safety standards.[387] Whether vessels comply with these standards is determined by ROs that issue the relevant certificates accordingly. As such, vessels cannot be used in maritime transport as long as the ROs did not issue the required statutory certificates.

The involvement of financial certifiers such as CRAs or auditors can under certain circumstances be mandatory as well. As the role of gatekeepers in the financial sector has

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[380] A. HAMDANI, "Gatekeeper Liability", (77) *Southern California Law Review* 2003, 58.

[381] L.A. CUNNINGHAM, "Beyond Liability: Rewarding Effective Gatekeepers", (92) *Minnesota Law Review* 2007, 328.

[382] R.H. KRAAKMAN, "Gatekeepers: The Anatomy of a Third- Party Enforcement Strategy", (2) *Journal of Law, Economics & Policy* 1986, 54. By doing so, however, gatekeepers might also restrict competition between requesting entities.

[383] Articles 52-60 and Annexes IX-XI of Regulation 2017/745 on medical devices.

[384] See in this regard the discussion *supra* in nos. 20-22.

[385] Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13, *JurionRS* 2014, 10232, Part II, 1. b) and 2. d).

[386] Article 94.3. UNCLOS.

[387] J. L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 488-490; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 50-53; A. ANTAPASSIS, "Liability of classification societies", (11) *Electronic Journal of Comparative Law* 2007, 13-14. See in this regard also the discussion *supra* in no. 15.

already been extensively discussed, it is not elaborated upon.[388] Instead, it suffices to stress that companies can be legally required to let their annual accounts certify by an auditor.[389] Requesting entities might also have to obtain a rating before certain financial products can be marketed or held.[390]

1.2. Some Examples of Voluntary Certification

110. Certification is not always required by law and often occurs voluntarily. This form of certification is widespread in different sectors. The involvement of a notified body, for instance, is not necessary for class I medical devices unless they have a measuring function, are reusable surgical instruments or are placed on the market in a sterile condition.[391] Another example is the Forest Management Certification. It involves a voluntary inspection of an organisation's forest management to check whether it complies with internationally agreed principles of good forest management.[392] The Fairtrade program also illustrates voluntary certification. FLO-CERT is the inspection and certification body for labelled Fairtrade products.[393]

111. Voluntary certification has several benefits, both for purchasers of the certified item as well as for requesting entities. Such certification increases the confidence of the purchaser in the certified item. Moreover, a certificate implies that an item's characteristics are highlighted. It confirms a requesting entity's commitment towards higher safety and quality standards. In sum, voluntary certification can be a useful business card to introduce an item in a new market niche or to retailers.[394]

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[388] See in this regard: Y. FUCHITA & R.E. LITAN, *Financial Gatekeepers: Can They Protect Investors?*, Tokyo, Nomura Institute of Capital Markets Research, 2006, 201p.; J.C. COFFEE, *Gatekeepers: The Role of the Professions in Corporate Governance*, Oxford, Oxford University Press, 2006, 389p.

[389] See in this regard, Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts, *OJ* L 158. According to Article 1, a statutory audit means an audit of annual financial statements or consolidated financial statements in so far as: (a) required by Union law; (b) required by national law as regards small undertakings; (c) voluntarily carried out at the request of small undertakings which meets national legal requirements that are equivalent to those for an audit under point (b).

[390] See for an analysis in Belgium: M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 359-369. See in general: F. PARTNOY, "The Paradox of Credit Ratings" in: R.M. LEVICH, G. MAJONI & C. REINHART, *Ratings, Rating Agencies and the Global Financial System*, New York, Springer, 2002, 65-84; E.E. EKINS, M.A. CALABRIA & C.O. BROWN, "Regulation, Market Structure and the Role of Credit rating agencies", APSA 2011 Annual Meeting Paper. Also see the discussion *supra* in no. 8 and *infra* in nos. 425-428.

[391] Article 52.7 Regulation 2017/745 on medical devices. See also: <www.ec.europa.eu/growth/single-market/ce-marking/manufacturers_en>.

[392] See for more information: <www.fsc-uk.org/en-uk/business-area/fsc-certificate-types/forest-management-fm-certification>.

[393] See for more information: <www.flocert.net/about-us>.

[394] See for more information: <www.dnvgl.com/services/voluntary-product-certification--5127>.

2. Supervision of Certifiers

112. The next characteristic deals with the question how activities of certifiers are supervised by public or private authorities. To that end, I will examine the supervision of classification societies (part 2.1.), CRAs (part 2.2.) and product certifiers/notified bodies (part 2.3.). The analysis is restricted to the situation in the EU as this already provides a sufficiently comprehensive and elaborated overview on the different ways in which supervision on certifiers can be organised.[395] A comparative overview is provided as a summary (part 2.4.).

2.1. Supervision of Classification Societies

113. The growth of classification societies by the end of the nineteenth century led to severe competition in the sector. This resulted in a decline of the quality of classification and certification services. Each society had its own standards, included in class rules, allowing shipowners to class hop.[396] Shipowners tended to register their vessels with a competitor when they did not like the requirements and recommendations of a particular classification society,[397] thereby looking for "a society that [would] class a ship that might otherwise not be accepted".[398] Against this background and in order to enhance confidence in classification societies, the International Association of Classification Societies (IACS) was created.

114. IACS consists of twelve major classification societies.[399] It aims to harmonise regulations and standards of its members, facilitate the exchange of knowledge between societies and offer training for surveyors.[400] IACS establishes, promotes and develops minimum technical requirements on the design, construction, maintenance and survey of ships or other marine related facilities.[401] These minimum requirements create a level-playing field for classification societies. This prevents shipowners from gaining any

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[395] This does not mean that public oversight on certifiers has not been discussed in the United States. See in the context of credit rating agencies for instance: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 68-72; A. DARBELLAY & F. PARTNOY, "Credit Rating Agencies and Regulatory Reform", University of San Diego, Legal Studies Research Paper Series, Research Paper No. 12-083, April 2012, 7-16, available at <https://ssrn.com/abstract=2042111> (appeared as: A. DARBELLAY & F. PARTNOY, "Credit Rating Agencies and Regulatory Reform", in: C. HILL *et al* (eds.), *Research Handbook on the Economics of Corporate Law*, Cheltenham, Edward Elgar, 2012, 273-298).

[396] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 493 with further references.

[397] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 493.

[398] E.R. DESOMBRE, *Flagging Standards: Globalization and Environmental, Safety, And Labor Regulations at Sea*, Massachusetts, MIT Press, 2006, 183.

[399] The classification societies include: American Bureau of Shipping, Bureau Veritas, China Classification Society, Croatia Registry of Shipping, DNV-GL, Indian Register of Shipping, Korean Register of Shipping, Lloyd's Register of Shipping, Nippon Kaiji Kyokai, Registro Italiano Navale, Russian Maritime Register of Shipping and Polish Register of Shipping.

[400] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 24.

[401] Article 2.1. International Association of Classification Societies, "IACS Charter", October 27, 2009, revised January 2018.

economic or other advantage by choosing a particular society.[402] The Transfer of Class Agreement (TOCA) adopted by IACS is of importance in this regard.[403] Under the TOCA framework, the 'gaining' society has the right of access to the full classification history of the vessel while the society 'losing' the ship has an obligation to ensure that all the existing class history is made available. Thus, TOCA provides for a reliable exchange of information between the two classification societies that are involved in the transfer of a vessel.[404]

115. Classification societies that want to become a member of IACS have to comply with membership criteria set out in Article 3 of the IACS Charter (e.g. on their independence and expertise). The Charter also requires them to comply with the IACS Quality System Certification Scheme (QSCS).[405] The IACS Council has the power to suspend and withdraw membership of any classification society when it does not comply with the applicable criteria.[406] By having this possibility, the Council (indirectly) supervises the working of classification societies.

116. The EU also adopted supervision mechanisms on classification societies when acting as ROs. Member States that want to grant an authorisation to any organisation that is not yet recognised have to submit a request for recognition to the European Commission. This request needs to be accompanied with information on and evidence of the organisation's compliance with the minimum criteria set out in Annex I and several other articles in Regulation 391/2009 on common rules and standards for ship inspection and survey organisations.[407]

ROs are also assessed by the Commission together with the Member State that submitted the request for recognition. The assessment has to take place on a regular basis and at least every two years. Its aim is to examine if ROs (still) meet the obligations under the Regulation and comply with the applicable minimum criteria.[408] In this regard, the European Maritime Safety Agency (EMSA) has been entrusted by the Commission with the task of carrying out the inspections. EMSA conducts a number of inspections of

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[402] M.A. MILLER, "Liability of Classification Societies from the perspective of United States Law", (22) *Tulane Maritime Law Journal* 1997, 77.

[403] International Association of Classification Societies, "Procedure for Transfer of Class", 2009 last adapted in January 2016, available at <www.iacs.org.uk/publications/procedural-requirements>.

[404] F. KENNEDY, "Sea views: IACS enforces revision of transfer of class agreement", Gulf News, July 30, 2001; P. BOISSON, "Classification Societies and Safety at Sea: Back to Basics to Prepare for the Future", (5) *Marine Policy* 1994, 375; M.A. MILLER, "Liability of Classification Societies from the perspective of United States Law", (22) *Tulane Maritime Law Journal* 1997, 77.

[405] Article 3 Charter International Association of Classification Societies, October 27, 2009.

[406] Article 3.7. and Annex I Charter International Association of Classification Societies, October 27, 2009.

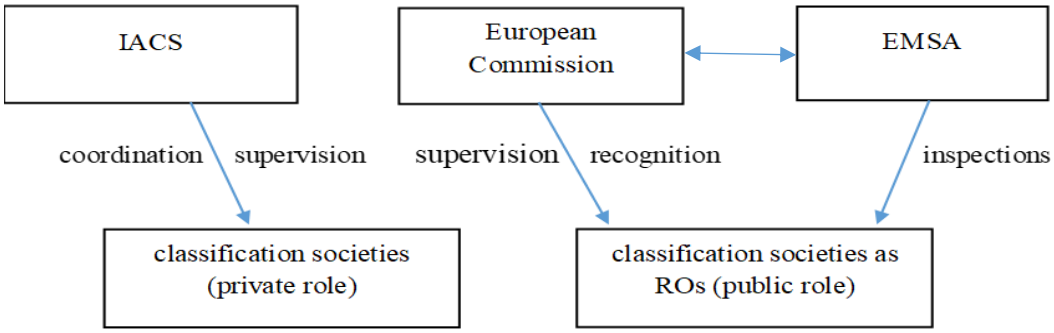
[407] Article 3 Regulation 391/2009 on common rules and standards for ship inspection and survey organisations.

[408] Article 8 Regulation 391/2009 on common rules and standards for ship inspection and survey organisations.

recognised organisations each year (e.g. of head offices and ships) for the purpose of verifying the performance of ROs.[409]

117. The European Commission can take several actions with regard to ROs. For instance, it can refuse to recognise organisations which do not meet the applicable requirements or whose performance is considered an unacceptable threat to safety or the environment.[410] The Commission can require the RO to undertake the necessary preventive and remedial action if it does not meet the applicable criteria or obligations under Regulation 391/2009 or when the safety and pollution prevention performance of the RO worsened significantly without, however, constituting an unacceptable threat to safety or the environment.[411] The Commission can also impose fines on ROs for their serious or repeated failure to comply with the applicable criteria or in case they deliberately provided incorrect, incomplete or misleading information.[412] As a last resort, the Commission can withdraw the recognition of an organisation whose repeated and serious failure to fulfil the minimum criteria, the obligations under the Regulation or its safety and pollution prevention performance constitutes an unacceptable threat to safety or the environment.[413]

118. The supervising of classification societies in both their private and public role can be illustrated with the following graphic:



[409] See for more information: European Maritime Safety Agency, "Inspections of Recognised Organisations", available at <www.emsa.europa.eu/visits-a-inspections/assessment-of-classification-societies.html>.

[410] Article 3 Regulation 391/2009 on common rules and standards for ship inspection and survey organisations.

[411] Article 5 Regulation 391/2009 on common rules and standards for ship inspection and survey organisations.

[412] Article 6 Regulation 391/2009 on common rules and standards for ship inspection and survey organisations.

[413] Article 7 Regulation 391/2009 on common rules and standards for ship inspection and survey organisations.

2.2. Supervision of Credit Rating Agencies

119. As opposed to classification societies, CRAs have not gathered their forces into an organisation similar to IACS. Nevertheless, different international governmental organisations operate in the field of CRAs.[414]

120. The International Organization of Securities Commissions, for instance, adopted instruments that aim to harmonise the conduct of CRAs and improve the quality of their ratings and the rating process. Reference can in this regard be made to the IOSCO Principles Regarding the Activities of Credit Rating Agencies[415] and the Code of Conduct Fundamentals for Credit Rating Agencies.[416] CRAs are expected to give full effect to the Code of Conduct Fundamentals as compliance with it is a sign of good governance. CRAs have to disclose how each Fundamental is addressed in their own codes of conduct. They should explain whether their codes deviate from the Fundamentals. If this is the case, CRAs must show how the objectives laid down in the IOSCO Code are achieved by the deviations (the so-called comply or explain principle).[417]

121. More importantly, the IOSCO debated the merits of several proposals dealing with oversight on CRAs (e.g. creating an international monitoring body, increasing the enforcement capacities of national regulators or establishing a self-regulatory organisation). The IOSCO Technical Committee eventually agreed that the most effective approach would be to enhance cross-border cooperation between national regulators. They already have regulatory powers to inspect and oversee CRAs. Such an enhanced cooperation could take the form of a college of regulators and/or a series of bilateral regulatory arrangements.[418]

122. There are also several provisions in EU legislation dealing with the supervision of CRAs.[419] Credit rating agencies have to apply for registration before they can provide

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[414] See for an overview: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 64-76.

[415] Technical Committee of the International Organization of Securities Commission, "IOSCO Statement of Principles Regarding the Activities of Credit Rating Agencies", September 25, 2003, available at <www.iosco.org/library/pubdocs/pdf/IOSCOPD151.pdf>.

[416] Technical Committee of the International Organization of Securities Commission, "Code of Conduct Fundamental for Credit Rating Agencies", August 2008.

[417] A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 64-65; U. BLAUROCK, "Control and Responsibility of Credit Rating Agencies", (11) *Electronic Journal of Comparative Law* 2007, 26-27. See in this regard also paragraph 4.1. and the discussion at page 2 in the introduction of the Technical Committee of the International Organization of Securities Commission, "Code of Conduct Fundamental for Credit Rating Agencies", August 2008. See for a discussion and further references: J. DE BRUYNE & C. VANLEENHOVE, "Rating the EU regulatory framework on the liability of credit rating agencies: triple a or junk?", (2) *Edinburgh Student Law Review* 2015, 117-120.

[418] Technical Committee of the International Organization of Securities Commission, "International Cooperation in Oversight of Credit Rating Agencies", March 2009, available at <www.iosco.org/library/pubdocs/pdf/IOSCOPD287.pdf>.

[419] See for a discussion: G. DEIPENBROCK & M. ANDENAS, "Credit Rating Agencies and European Financial Market Supervision", (8) *International and Comparative Corporate Law Journal* 2011, 1; A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 72-76 & 151.

their services in the EU.[420] They have to submit an application for registration to the European Securities and Markets Authority (ESMA). Credit rating agencies are only granted registration if they demonstrate their ability to meet the applicable legal requirements. More specifically, the application for registration needs to contain information on matters in Annex II of Regulation 1060/2009 on CRAs (e.g. on policies and procedures to identify, manage and disclose conflicts of interest).[421] ESMA has to ensure that the Regulation on CRAs is applied. It can conduct all necessary investigations of CRAs to that end.[422]

123. After registration, ESMA supervises the registered CRAs through a combination of desk-based supervisory activities and on-site investigations.[423] As part of its desk-based supervisory activities, it analyses periodic information submitted by CRAs, reviews notifications of material changes to the initial registration conditions and monitors ratings data submitted to it by CRAs.[424] It can withdraw the registration if the CRA no longer meets the conditions under which it was registered.[425] The competent authority of the Member State where the rating has been issued and which considers that the CRA no longer meets the conditions under which it was registered may request ESMA to analyse whether this indeed is the case.[426]

Moreover, if ESMA's Board of Supervisors[427] finds that a CRA has committed one of the infringements listed in Annex III of Regulation 513/2011, it can take several actions. These, for instance, include a withdrawal of the CRA's registration, a temporary prohibition for the CRA to issue ratings until the infringement has been brought to an end or the suspension of the rating's use for regulatory purposes until the infringement has been brought to an end.[428]

124. In order to carry out its duties under the Regulation, ESMA may also conduct all the necessary investigations of requesting entities (e.g. examining any records, data, procedures and other relevant material). It has to cooperate with the national competent

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[420] Articles 14-19 Regulation 1060/2009 on credit rating agencies.

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

[422] Article 21 & 23c Regulation 1060/2009 on credit rating agencies as replaced and inserted by Article 1(9) & (10) Regulation 513/2011.

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

[424] ESMA, "Credit Rating Agencies", available at <www.esma.europa.eu/supervision/credit-rating-agencies/supervision>.

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

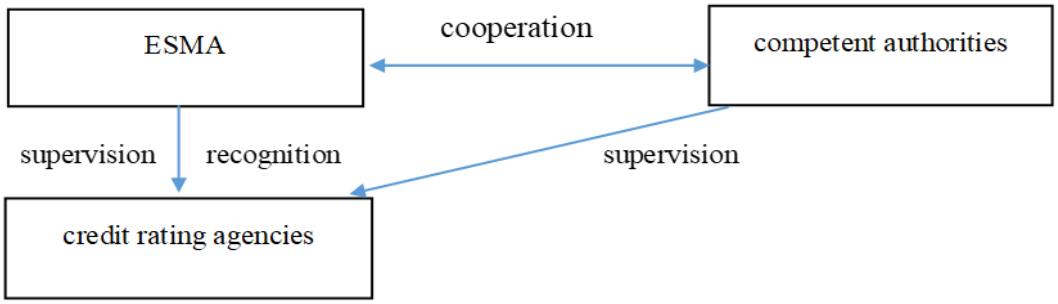
[426] Article 20 Regulation 1060/2009 on credit rating agencies as replaced by Article 1(9) Regulation 513/2011.

[427] The Board guides the work of the Authority and has the ultimate decision-making responsibility regarding a broad range of matters.

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

authority where the investigation takes place, for instance by giving the necessary information.[429] ESMA or national competent authorities when instructed may even conduct (unannounced) on-site inspections at the business premises of requesting entities.[430]

125. The supervision on CRAs in Europe can be illustrated by the following graphic:



2.3. Supervision of Product Certifiers and Notified Bodies

126. Certifiers provide services in different sectors covering many products ranging from children's products[431] over shoes[432] to medical devices.[433] There are several supervision mechanisms on the activities of product certifiers and the quality of the certification process. These include sectoral organisations providing a quality label to certifiers, accreditation mechanisms and provisions in EU law for notified bodies involved in the conformity assessment procedure of medical devices.

127. First, private sectoral organisations can establish supervision mechanisms to increase the quality of a certifier's services. The International Association for Child Safety, for example, developed the childproofing industry's professional certification program. According to that program, certifiers themselves get an additional label (e.g. the Certified Professional Childproofer designation or the Certified Professional Babyproofer designation). Such a designation indicates that certifiers meet specific criteria and possess the required knowledge to provide certification services.[434]

128. Second, product certifiers often need to be accredited before they can provide their services. It has already been mentioned that accreditation is one step higher than the actual

[429] Article 23c Regulation 1060/2009 on credit rating agencies as replaced by Article 1(11) Regulation 513/2011.

[430] Article 23d Regulation 1060/2009 on credit rating agencies as replaced by Article 1(11) Regulation 513/2011.

[431] Manufacturers and importers of children's products in the US must certify, in a written Children's Product Certificate, that their products comply with applicable children's product safety rules (see in this regard: <www.cpsc.gov/en/Business--Manufacturing/Testing-Certification/Childrens-Product-Certificate-CPC>).

[432] See in this regard: <www.sgs.com/en/consumer-goods-retail/softlines-and-accessories/footwear-and-leather-products>.

[433] See for more information the discussion *supra* in nos. 20-22.

[434] See for more information: <www.iafcs.org/page.asp?pg=Certification>.

certification of products.[435] Accreditation bodies guarantee that certifiers are competent to perform their certification functions. The accreditation provides an independent confirmation of a certifier's competence, which is likely to be relied upon by purchasers of products.[436] Accreditation bodies use different criteria to determine whether certifiers are able to perform certification services.[437] Those criteria, for instance, include ISO 17021 (certification of management systems),[438] ISO 17065 (requirements for bodies certifying products, processes and services)[439] and ISO 17024 (requirements for bodies certifying persons).[440] Accreditation bodies themselves demonstrate their competence by showing compliance with the standards lied down in ISO 17011 (e.g. on impartiality and management).[441]

129. Third, EU legislation can also contain supervision mechanisms with regard to product certifiers. One example can found in the medical sector, where the Regulation on Medical Devices deals with the recognition and organisation of notified bodies. The MDR leaves the responsibility for designating and monitoring notified bodies with individual Member States. Member States have to appoint an 'authority responsible for notified bodies', which has to set up and carry out the necessary procedures for the assessment, designation and notification of conformity assessment bodies.[442]

130. A certifier has to submit an application for designation to the authority responsible for notified bodies.[443] The responsible authority examines whether the application is complete and draws up a preliminary assessment report. This report subsequently needs to be submitted to the Commission, which transmits it to the Medical Device Coordination Group ('MDCG')[444] and to members of the joint assessment team.[445]

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[435] R. MUSE, "What's in a Name: Accreditation vs. Certification?", *Quality Magazine*, June 2, 2008.

[436] International Organization for Standardization, "Certification", available at <www.iso.org/iso/home/standards/certification.htm>. See also the discussion *supra* in no. 19.

[437] International Accreditation Forum, "About us", available at <www.iaf.nu//articles/About/2>.

[438] ISO/IEC 17021-1:2015. Conformity assessment -- Requirements for bodies providing audit and certification of management systems -- Part 1: Requirements.

[439] ISO/IEC 17065:2012. Conformity assessment -- Requirements for bodies certifying products, processes and services.

[440] ISO/IEC 17024:2012. Conformity assessment -- General requirements for bodies operating certification of persons.

[441] ISO/IEC 17011:2004. Conformity assessment -- General requirements for accreditation bodies accrediting conformity assessment bodies. See in this regard also: EEFC Energy, "Product Verification & Certification Division", available at <eefcenergy.com/product-verification-certification-division>.

[442] Article 35.1. Regulation 2017/745 on medical devices.

[443] Article 38 Regulation 2017/745 on medical devices.

[444] The Medical Device Coordination Group is an expert committee composed of persons designated by the Member States based on their role and expertise in the field of medical devices. It has to fulfil the tasks conferred on it by the applicable Regulations dealing with medical devices, to provide advice to the Commission and to assist the Commission and the Member States in ensuring a harmonised implementation of Regulation 2017/745 (Recital (82) Regulation 2017/745 on medical devices).

[445] The European Commission has to designate a joint assessment team made up of at least three experts chosen from a list of experts who are qualified in the assessment of conformity assessment bodies (Article 39 Regulation 2017/745 on medical devices).

The national authority responsible for notified bodies and the joint assessment team have to review the documentation submitted with the application. They have to conduct an on-site assessment of the applicant conformity assessment body. The national authority responsible for notified bodies subsequently has to submit its final assessment report and, if applicable, the draft designation to the Commission, the MDCG and the joint assessment team. The joint assessment team then needs to provide its final opinion regarding the assessment report and the draft designation. The European Commission has to immediately submit this opinion to the MDCG. The MDCG needs to issue a recommendation regarding the draft designation, which the authority responsible for notified bodies duly takes into consideration for its final decision on the designation of the notified body.[446] Member States need to notify the Commission and the other Member States of the conformity assessment bodies they have designated. After that, the Commission will publish the notification in the electronic notification tool within the database of notified bodies developed and managed by the Commission (NANDO).[447]

131. The Regulation on Medical Devices also contains several requirements on the monitoring of notified bodies and the withdrawal of certificates. The authority needs to continuously monitor notified bodies to ensure their ongoing compliance with the applicable requirements.[448] The authority shall at least once a year re-assess whether the notified bodies still satisfy the applicable requirements and fulfil their obligations set out in Annex VII. That review has to include an on-site audit of each notified body and, where necessary, of its subsidiaries and subcontractors.[449]

In addition to regular monitoring or on-site assessments, the responsible authority may conduct short-notice unannounced reviews if needed to address a particular issue or to verify compliance.[450] Three years after the notification of a body, and again every fourth year thereafter, the national authority and the joint assessment team have to perform a complete re-assessment to determine whether it still complies with the requirements in Annex VII.[451] Where a responsible authority finds that a notified body no longer meets the requirements set out in Annex VII or that it is failing to fulfil its obligations or has not implemented the necessary corrective measures, it can suspend, restrict or (fully or partially) withdraw the designation.[452]

132. The European Commission has to investigate all cases where concerns have been brought regarding a notified body's continued compliance with the applicable requirements and its obligations. Where the Commission believes that a notified body no longer meets the requirements for its designation, it needs to inform the notifying Member

[446] Article 39 Regulation 2017/745 on medical devices.

[447] Article 42 Regulation 2017/745 on medical devices.

[448] Article 44.2. Regulation 2017/745 on medical devices.

[449] Article 44.4. Regulation 2017/745 on medical devices.

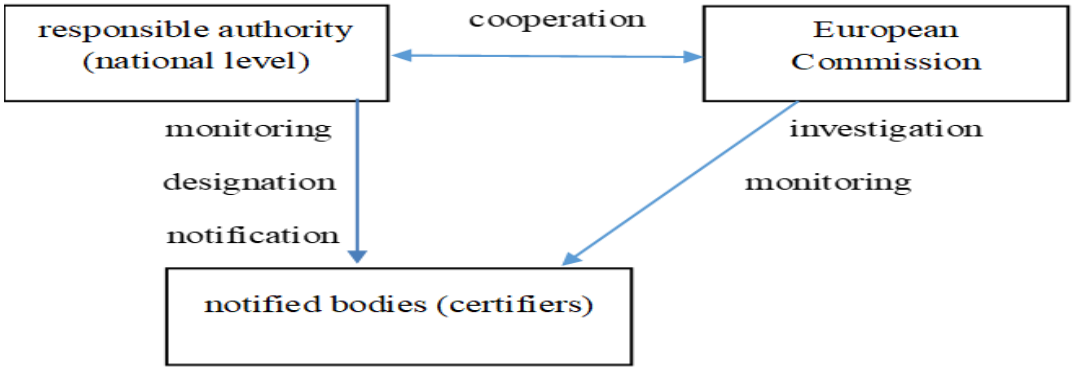
[450] Article 44.7. Regulation 2017/745 on medical devices.

[451] Article 44.10. Regulation 2017/745 on medical devices.

[452] Article 46.4. Regulation 2017/745 on medical devices.

State accordingly. The Commission will request that Member State to take the necessary corrective measures. These measures include the suspension, restriction or withdrawal of the notification. If the Member State fails to take the necessary corrective measures, the Commission may at its own initiative suspend, restrict or withdraw the notification.[453]

133. The regulatory supervision on notified bodies under the Regulation on Medical Devices can be illustrated as follows:



2.4. Summary

134. All certifiers are subject to some form of regulatory supervision by public authorities. However, the way in which it is organised can be different in each certification sector. Whereas some third-party certifiers need to be 'recognised' by public authorities, others merely have to be 'designated' and 'notified'. National and supranational authorities can be involved in supervising certifiers. Their respective obligations as well as relationship with individual certifiers are not always the same either.

135. There are also several other differences with regard to supervision of certifiers. Classification societies, for instance, have established an international organisation that can suspend and withdraw a society's membership when it does not meet certain criteria. By having this possibility, IACS supervises the working of classification societies. Other certifiers have not (yet) gathered their forces into creating such a self-regulating organisation. Nevertheless, they can be subject to alternative supervision mechanisms. Some certifiers need to be accredited before there are able and allowed to provide their services. An accreditation guarantees that certifiers are competent to perform certification functions. It can thus be regarded as a way to supervise certifiers.

3. The Relationship Between Certifiers and the National Government

136. Most certifiers such as CRAs and auditors do not act on behalf of governments when providing credit ratings or audit opinions. If they issue allegedly inaccurate and unreliable certificates, the government's liability will probably not be an issue, unless it relates to

[453] Article 47 Regulation 2017/745 on medical devices.

the recognition of certifiers or the supervision on their activities.[454] More interesting are those situations in which third-party certifiers have a relationship with the government when providing their certification services.[455] Two scenarios will be addressed. When States have a legal obligation to certify a particular item, national governments can delegate this duty to certifiers. By doing so, States actually give public certification powers to private certifiers (part 3.1.). There are also less drastic ways to involve certifiers in the certification process for which the government remains responsible. One example is a certifier's appointment or designation (part 3.2.). After having discussed these two scenarios, a conclusion is provided on the relationship between a certifier and the government (part 3.3.).

3.1. Certifiers and the 'Delegation' of Authority

137. National governments can rely on services provided by certifiers to comply with their own legal obligations. The most notable example in this regard are classification societies when providing statutory certificates as Recognised Organisations on behalf of a flag State. To that end, a delegation agreement is concluded between the society and the flag State (part 3.1.1.).[456] Third parties suffering losses because of a maritime disaster could target the flag State as well as the RO.[457] The outcome of a claim against the RO can be determined by the extent to which the classification society can enjoy immunity because of acting on behalf of the flag State (part 3.1.2.). More interesting is that ROs, and by extension other certifiers as well, provide their businesses on an international scale. ROs might thus be sued in other jurisdictions than the one where they are vested, registered or where the agreement with the flag State was concluded. Claims have, for instance, already been initiated against classification societies in jurisdictions other than

[454] See for more information the discussion *supra* in part 112-134.

[455] The relationship between private certifiers and public authorities became clear in the *Fra.bo* case. The European Court of Justice held that a certifier – i.e. *Deutsche Verein des Gas- und Wasserfaches* (DVGW) – had the power to regulate the entry into the German market of products, such as copper fittings, by virtue of its authority to certify products. The Court concluded that the DVGW offered the only possibility for obtaining a certificate for those products. The lack of certification by the DVGW placed a considerable restriction on the marketing of the products on the German market. As a consequence, former Article 28 EC – Article 34 Treaty of the Functioning of the European Union – had to be interpreted as meaning that it applies to standardisation and certification activities of a private-law body when national legislation considers products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body (C-171/11, *Fra.bo SpA v. Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW)*, ECLI:EU:C:2012:453, July 12, 2012, paragraphs 27-32).

[456] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 488-490; A. ANTAPASSIS, "Liability of classification societies", (11) *European Journal of Comparative Law* 2007, 13-14; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 50-55.

[457] The liability of the delegating State towards third parties as well as towards the certifier is not addressed in this dissertation considering that it primarily focusses on the liability of certifiers. It is only examined when necessary to understand the liability of certifiers themselves. State liability has already been extensively analysed elsewhere (e.g. D. FAIRGRIEVE, *State Liability in Tort: A Comparative Law Study*, Oxford, Oxford University Press, 2003, 354p.; C. HARLOW, *State Liability: Tort Law and Beyond*, Oxford, Oxford University Press, 2004, 149p.; C. VAN DAM, *European Tort Law*, Oxford, Oxford University Press, 2006, 472-517).

the one on whose behalf they act as RO. As a defence, classification societies often invoke immunity from jurisdiction. The application of this immunity in the context of ROs is examined (part 3.1.3.).

3.1.1. Relationship Between the Flag State and the RO

138. Some international instruments contain provisions allowing flag States to delegate authority to ROs to perform statutory certification services on their behalf.[458] The EU enacted legislation covering the relationship between the RO and the flag State as well. Article 5 of Directive 2009/15 requires that cooperation agreements between administrations and classification societies are established. Member States delegating functions to ROs have to establish a working relationship between their competent administration and the society acting on their behalf. This relationship has to be regulated by a formalised written and non-discriminatory agreement or another equivalent legal arrangement. The agreement needs to contain duties and functions assumed by ROs as well as provisions on their financial liability.[459]

139. Delegation agreements are thus concluded between classification societies and the flag State. Acting as Recognised Organisations, they become responsible for the implementation of international safety standards.[460] Such agreements, however, vary in extent and content.[461] Broadly speaking, two situations are identified. On the one hand, classification societies can almost entirely substitute for the flag State regarding the certification of vessels. The State will only interpret international conventions or statutory requirements and supervise the society's activities. On the other hand, flag States may decide to not grant wide statutory powers to classification societies. As a consequence, the society is not authorised to issue certificates but only surveys the vessel. The classification society will only provide a report or attestation as to whether the vessel conforms to the applicable statutory regulations. Based on this report, the administration issues the certificate.[462]

140. The situation in Belgium can serve as example to illustrate the relationship between a flag Sate and a classification society. The *Service Public Fédéral Mobilité et Transports* (Federal Public Service Mobility and Transport or 'FPSMT') is the competent body for

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[458] See for example: Article 4.1. of the IMO Code for ROs, Resolution MSC.349(92), June 21, 2013; Appendix I of the Model Agreement for the Authorization of Recognized Organizations Acting on Behalf of the Administration, MSC/Circ.710 -MEPC/Circ.307.

[459] Article 5 Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations; J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 514-515.

[460] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 488-490; A. ANTAPASSIS, "Liability of classification societies", (11) *European Journal of Comparative Law* 2007, 13–14.

[461] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 54.

[462] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 235.

maritime transport issues in Belgium.[463] Within the FPSMT, the *Direction Générale Navigation* is responsible for navigation management, safety and control matters. It is in charge of the survey and certification of seagoing and inland navigation and vessels.[464] Several classification societies have been recognised by the maritime administration so far: American Bureau of Shipping, Bureau Veritas, DNV-GL, Lloyd's, Nippon Kaiji Kyokai and the Russian Maritime Register of Shipping. The level of delegation varies upon the type of survey and certificate.[465]

3.1.2. Liability of Recognised Organisations

141. More interesting is the question whether the delegation of statutory powers by flag States has an influence on the liability of ROs. The following paragraphs focus on the extent to which ROs can benefit from immunity because of acting on behalf of flag States. Different situations can be identified in this regard, depending upon the examined jurisdiction. First, there might not be a difference as to whether classification societies act in their public or private role. This means that the public role of a classification society does by itself not entail any immunity protection (part A.). Second, the specific nature of the relationship with a flag State will determine whether ROs can face liability or, instead, be immune (part B.). Third, classification societies acting as ROs will incur liability only when strict requirements are met. The question of immunity might, therefore, not be significant as the conditions to impose liability upon ROs will often not be met (part C.).[466]

A. Liability of ROs in Belgium

142. The situation in Belgium illustrates that ROs will be held liable under the same conditions as classification societies acting in their private role. Since the *Flandria* decision,[467] the Belgian Government cannot any longer rely on state immunity from jurisdiction to bar liability.[468] The fact that a classification society acts on behalf of the national government does not affect its potential liability towards third parties. Therefore, Recognised Organisations that commit a wrongful act in surveying and certifying the

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[463] Arrêté royal of 20 November 2001 portant création du Service public fédéral Mobilité et Transports, published in the *Moniteur belge* on November 24, 2001.

[464] See for more information: <mobilit.belgium.be/nl/overfod/organisatie/martitiem> and European Maritime Safety Agency, "An overview of the 29 European maritime administrations", 2009, 11-13, available at <www.emsa.europa.eu/overview-maritime-administrations.html>.

[465] European Maritime Safety Agency, "An overview of the 29 European maritime administrations", 2009, 11-13 with an overview of the powers delegated to ROs by the Belgian Government.

[466] This part on the liability of ROs should be read together with the analysis in chapter III on the third-party liability of certifiers to prevent misunderstandings regarding their liability. The aim of this part is especially to illustrate that differences exist regarding the liability and/or immunity of the same certifier, namely classification societies acting as ROs.

[467] Court of Cassation, November 5, 1920, *Pasicrisie Belge* 1920, I, 193 with conclusion by P. LECLERCQ.

[468] T. VANSWEEVELT & B. WEYTS, *Handboek Buitencontractueel Aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 200. See more extensively: H. VANDENBERGHE, "Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad. 2000-2008 [Overheidsaansprakelijkheid]", (4) *Tijdschrift voor Privaatrecht* 2010, 2013-2097.

vessel that caused the third party's loss can be held liable in tort on the basis of Articles 1382-1383 of the Belgian Civil Code (BCC).[469]

143. In Belgium, classification societies have on several occasions already been held liable in their private role.[470] The underlying reasons of those decisions will also apply when classification societies act as ROs. Third parties are not always aware whether classification societies issue (public) statutory or (private) class certificates. It would not be logical if parties were able to recover if it concerns a class certificate (private role), but not when it is statutory certificate (public role).

144. Moreover, a comparison can to a certain extent be made with the situation for other private institutions performing tasks of a public nature. For instance, hospitals are private entities whose activities contribute to public health.[471] However, hospitals have already been held liable towards third parties under Belgian law.[472] There is no reason why this should be any different for classification societies acting as ROs in their public role.[473]

145. This conclusion is strengthened by the fact that existing immunity or limitation of liability provisions in Belgium law do not apply to classification societies regardless of

[469] H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 46-105. See on the liability of classification societies from a Belgian perspective: J. DE BRUYNE, "Liability of Classification Societies: Cases, Challenges and Future Perspectives", (45) *Journal of Maritime Law & Commerce* 2014, 190-202. See in this regard also: Articles 5.146-5.148 of the *Avant-projet de loi portant insertion des dispositions relatives à la responsabilité extracontractuelle dans le nouveau Code civil*, Rédigé par la Commission de réforme du droit de la responsabilité instituée par l'arrêté ministériel du 30 septembre 2017, March 28, 2018.

[470] See for example: Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 321-331; Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 301-331.

[471] I. GIESEN, "Aansprakelijkheid voor inadequate publieke beveiliging door private actoren", in: I. GIESEN, J.M. EMAUS & L.F.H. ENNEKING (eds.), *Verantwoordelijkheid, aansprakelijkheid en privatisering van publieke taken*, The Hague, Boom Juridische Uitgevers, 2014, 81.

[472] See for example: Court of Appeal Mons, October 15, 2013, *Tijdschrift voor Verzekeringen* 2015, 229; Court of Appeal Liège, October 8, 1991, *Vlaams Tijdschrift voor Gezondheidsrecht.* 1993, 35 with annotation by R. HEYLEN; Court of First Instance Bruges, June 10, 1998, *Tijdschrift voor Gezondheidsrecht-Revue de Droit de la Santé* 2000, 41. See for more information: T. VANSWEEVELT, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis*, Antwerp, Maklu, 1997, 960p.; T. VANSWEEVELT, "La responsabilité au sein de l'hôpital. La responsabilité du fait d'autrui et du fait des choses", in: T. VANSWEEVELT, *La responsabilité des professionnels de la santé*, Waterloo, Wolters Kluwer Belgium, 2015, 89-124 (online).

[473] By way of comparative note, reference can also be made to the *Marc Rich* decision by the House of Lords. In his dissenting opinion, Lord BERWICK compared classification societies with hospitals. Similar to classification societies, hospitals are charitable non-profit making organisations, but they are subject to a same duty of care as "betting shops or brothels". In other words, remedies in tort law cannot be applied discretionary (*Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 133).

the role in which they operate.[474] One example is the personal immunity of a contracting party's performing agent or subcontractor (*agent d'exécution*).[475]

This doctrine developed by the *Cour de Cassation* implies that an agent performing the contractual duties of a principal will only be liable in tort vis-à-vis the contracting party of a principal for whom he is performing these duties if the principal himself can be held liable in tort towards his contracting party.[476] Considering the strict requirements for the concurrence of liability in contract and liability in tort between contracting parties,[477] a performing agent/subcontractor will most likely not incur such liability. Taking into account that a performance agent cannot be held liable based on the contract between his principal and the latter's co-contractor, Belgian case law and doctrine consider performing agents/subcontractors generally to be quasi-immune from liability towards the contracting parties of the principals.[478]

Courts repeatedly held that classification societies in their private role do not perform the shipowner's contractual obligations towards cargo-owners by classifying and certifying vessels. A classification society is not a performing agent acting on behalf of the shipowner. Instead, it is considered to be a 'normal' third party. Consequently, a society cannot rely on the personal immunity principles.[479] There is no legal or procedural barrier preventing co-contractors of the shipowner from proceeding in tort against classification societies under Belgian law.[480]

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[474] See for an overview of immunity or limitation of liability provisions: H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 105-118.

[475] See in general: I. CLAEYS, *Samenhangende overeenkomsten en aansprakelijkheid: de quasi-immuniteit van de uitvoeringsagent herbekeken*, Antwerp, Intersentia, 2003, 143-239.

[476] Court of Cassation, December 7, 1973, *Arresten van het Hof van Cassatie* 1974, 395 & *Pasicrisie belge* 1974, I, 376; Court of Cassation, December 3, 1976, *Rechtskundig Weekblad* 1977-1978, 1303; Court of Cassation, April 8, 1983, AR 3734, *Arresten van het Hof van Cassatie* 1983, 934 & *Pasicrisie belge* 1983, I, 834. The agent is the person to whom a contracting party confides the actual performance of his own contractual duty (H. COUSY & D. DROSHOUT, "Liability for Damage Caused by Others under Belgian Law", in: J. SPIER & F.D. BUSNELLI (eds.), *Unification of Tort Law: Liability for Damage Caused by Others*, The Hague, Kluwer Law International, 2003, 50).

[477] See in this regard: H. BOCKEN, "Samenloop contractuele en buitencontractuele aansprakelijkheid. Verfijners, verdwijners en het arrest van het Hof van Cassatie van 29 september 2006", (169) *Nieuw Juridisch Weekblad* 2007, 722-731; I. CLAEYS, *Samenhangende overeenkomsten en aansprakelijkheid: de quasi-immuniteit van de uitvoeringsagent herbekeken*, Antwerp, Intersentia, 2003, 50-75; I. BOONE, "Samenloop contractuele en buitencontractuele aansprakelijkheid verfijnd", (153) *Nieuw Juridisch Weekblad* 2006, 947; E. DIRIX, "Rechterlijk overgangsrecht", (42) *Rechtskundig Weekblad* 2008-2009, 1756; M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 39-41, nos. 48-52.

[478] H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 42-44; M. KRUITHOF, *Tort Law in Belgium* in *International Encyclopaedia of Laws*: *Tort Law,* Alphen aan den Rijn, Wolters Kluwer, 2018, 82, no. 128.

[479] Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 328-329.

[480] E. VAN HOOYDONK, *Eerste blauwdruk over de herziening van het Belgisch scheepvaartrecht*: *proeve van Belgisch scheepvaartwetboek (privaatrecht): algemene toelichting*, Antwerp, Maklu, 2011, 195-196.

Classification societies will not benefit from the immunity for a contracting party's performing agent when acting as ROs either. This immunity only applies to performing agents who assist or replace a party in the performance of his contractual obligations. A classification society acting as RO, however, cannot be qualified as a performance agent of the flag State as the latter is required to ensure the safety of vessels flying its flag under inter- and supranational law. This obligation is a legal one, not a contractual one.[481]

B. Liability of ROs in the US

146. In the United States, things are more complex with regard to the liability and immunity of ROs.[482] A distinction needs to be made between classification societies acting as agents of the Federal Government or as independent contractors.

147. On the one hand, each department, agency and instrumentality of the United States Government has to recognise American Bureau of Shipping (ABS) as its agent in matters related to classifying and certifying vessels owned by the Government.[483] According to Section 1.01 Restatement (Third) of Agency, an agency is the fiduciary relationship that arises when one person (principal) manifests assent to another person (agent) that the agent will act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act. An agent is bound to exercise his authority according to the instructions and control of the principal.[484] When ABS acts as an agent in an official capacity and within conformity with its contract with the US, sovereign immunity principally bars suits against the classification society.[485]

148. This means that a third party's claim against ABS has to be based on a statute waiving the sovereign immunity of the Government for the type of claim made.[486]

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[481] H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 43-44.

[482] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 240-248. See on the immunity of the US Government in general: E. CHEMERINSKY, "Against Sovereign Immunity", (53) *Stanford Law Review* 2001, 1201; V.C. JACKSON, "Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence", (35) *George Washington International Law Review* 2003, 521.

[483] This has been codified in 46 U.S.C. § 3316.

[484] See in this regard also: A. SCHNEEMAN, *Law of Corporations and Other Business Organization*, New York, Cengage Learning, 2009, 3; R.E. MEINERS, A.H. RINGLEB & F. EDWARDS, *The Legal Environment of Business*, Mason, Cengage Learning, 2014, 385-387.

[485] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 242 referring to *United States v. Shaw*, 309 U.S. 495, 60 S. Ct. 659, 84 L. Ed. 888 (1940) and *Shaw v. Grumman Aerospace Corp*., 778 F.2d 736, paragraph 10 (11th Cir.1985) ("Since "[t]he action of the agent is 'the act of the government,' […], the contractor could be deemed to share in federal sovereign immunity"). See in this regard also: *United States v. Mitchell*, 445 U.S. 535, 538 (1980). See in general: V.S. CHU & K.M. MANUEL, "Tort Suits Against Federal Contractors: An Overview of the Legal Issues", Congressional Research Service, CRS Report for Congress, April 7, 2011.

[486] R. PORTER, "Contract Claims Against the Federal Government: Sovereign Immunity and Contractual Remedies", Harvard Law School Federal Budget Policy Seminar, Briefing Paper No. 22, February 2, 2006, 4, available at <www.law.harvard.edu/faculty/hjackson/ContractClaims_22.pdf>; V.C. JACKSON, "Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence", (35) *George Washington International Law Review* 2003, 523. See in this regard for example: *United States v. Mitchell*, 445 U.S. 535, 538 (1980*); United States v. Shaw*, 309 U.S. 495, 500-501 (1940).

Phrased differently, a waiver of immunity is necessary for a successful third-party liability claim against classification societies acting as agents of the US Government.[487] In this regard, both the Federal Tort Claims Act (FTCA)[488] and the Suits in Admiralty Act (SIAA)[489] contain a waiver of immunity for tort claims against US agencies, officers and employees.[490]

The FTCA removed immunity of the Federal Government from most tort actions brought against it.[491] The SIAA applies to claims arising from the use of Government-owned merchant vessels.[492] This also includes the survey and statutory certification of a vessel, which is an activity related to the traditional activity of operating a vessel. As a consequence, the claim against ROs lies in admiralty and the SIAA will provide a waiver for the sovereign immunity.[493]

149. While the FTCA waives federal sovereign immunity for tort claims in general, some exceptions remain. The US Government can rely on the discretionary function exception included in 28 U.S.C. § 2680(a).[494] The waiver of immunity in the FTCA does not apply to claims based upon an act or omission of an employee of the Government exercising due care in the execution of a statute or regulation, or upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government. To determine whether the 'discretionary function' exception applies, courts generally use a two-part test.[495] First, it needs to be assessed whether the conduct involved an element of judgment or choice, instead of being

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[487] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 243; D.S. INGRAHAM, "The Suits in Admiralty Act and the Implied Discretionary Function", (1982) *Duke Law Journal* 1982, 148.

[488] Federal Tort Claims Act of 1946, 60 Stat. 842 codified in 28 U.S.C. § 1346(b).

[489] Suits in Admiralty Act of 1920, Pub. L. 109-304, 120 Stat. 1517 codified in 46 U.S.C. § 309.

[490] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 244. See for a discussion: K.C. NIELSEN, "The Discretionary Function Exception and the Suits in Admiralty Act: A Safe Harbor for Negligence?", (4) *University of Puget Sound Law Review* 1981, 385.

[491] J. WILSON, *American Law Yearbook*, Michigan, Gale Research, 2007, 81; A.M. HACKMAN, "The Discretionary Function Exception to the Federal Tort Claims Act: How Much Is Enough", (19) *Campbell Law Review* 1997, 413.

[492] D.S. INGRAHAM, "The Suits in Admiralty Act and the Implied Discretionary Function", (1982) *Duke Law Journal* 1982, 146; US Legal, "Suits in Admiralty Act", available at <admiralty.uslegal.com/suits-by-or-against-the-united-states/suits-in-admiralty-act>.

[493] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 244-245 with further references.

[494] G.C. SISK, "Official Wrongdoing and the Civil Liability of the Federal Government and Officers", (8) *University of St. Thomas Law Journal* 2011, 300. See for more information on the discretionary function exception: A.M. HACKMAN, "The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?", (19) *Campbell Law Review* 1997, 411; R.C. VAUGHAN, "The "Discretionary-Function" Exception of the Federal Tort Claims Act: Some Reflections on Sovereign Immunity", (1) *William & Mary Law Review* 1957, 5.

[495] *Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Kennewick Irrigation District v. United States*, 880 F.2d 1018, 1025 (9th Cir. 1989). See for a discussion: R.C. LONGSTRETH, "Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?", (8) *University of St. Thomas Law Journal* 2011, 398.

prescribed by a federal statute, regulation or policy.[496] Second, if the agent or employee exercises a judgment or choice, the challenged decision must be based on considerations of public policy.[497] Unlike the FTCA, the SIAA does not contain an explicit discretionary function exemption. Several decisions have, however, accepted that the SIAA includes an implied discretionary function exemption. This exception bars the waiving of immunity for classification societies if they exercise a discretionary function as agent on behalf of the US during statutory surveys.[498]

150. The essential question is thus whether the certification of vessels by ROs acting as agent of the US Government can be qualified as discretionary. The decision in *Varig Airlines* can be used as a basis and source of inspiration to find an answer to that question.

The *Varig Airlines* case arose out of two separate accidents in which commercial aircrafts certified by the Federal Aviation Administration (FAA) caught fire. This resulted in the death of most of the persons on board of one plane and all of them on board of the other aircraft. Each accident was caused by parts that did not comply with FAA regulations. Under the rules adopted by the FAA, the manufacturers were required to develop the plans and perform the necessary inspections and tests to establish whether an aircraft's design complies with the applicable regulations. To that end, engineers of the FAA conduct on-spot inspections of the manufacturer's work. The plaintiffs sued the US Government under the FTCA on the ground that the FAA negligently issued certificates for both aircrafts. In the two cases, the Ninth Circuit held that the US Government was liable for the negligent inspection of the aircrafts. Liability was thus not barred by the discretionary function.[499]

The Supreme Court, however, reversed both decisions by the Ninth Circuit court. It ruled that FAA inspections could not give rise to liability under the FTCA because of the discretionary nature of the certification process. The Court emphasised that the nature of the conduct, rather than the status of the actor, determines whether the discretionary function exception will apply. The exception was also intended to include the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals. Congress wished to prevent second-guessing of legislative and

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[496] *United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

[497] *United States v. Gaubert*, 499 U.S. 315, 322-325 (1991). Also see: R.C. LONGSTRETH, "Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?", (8) *University of St. Thomas Law Journal* 2011, 401.

[498] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 247 with further references to several cases in footnote 953. See in this regard also: D.S. INGRAHAM, "The Suits in Admiralty Act and the Implied Discretionary Function", (1982) *Duke Law Journal* 1982, 147 relying on several elements to conclude that the SIAA contains an implied discretionary-function exemption.

[499] *S.a. Empresa De Viacao Aerea Rio Grandense (varig Airlines) v. United States of America*, 692 F. 2d 1205, 1208-1209 (9th Cir. 1984); *United Scottish Insurance v. United States*, 692 F. 2d 1209, 1212 (9th Cir. 1984). See for a discussion: T.H.S. RICE, "United States v. Varig: Can King Only Do Little Wrongs?, (22) *California Western Law Review* 1985, 175.

administrative decisions grounded in social, economic and political policy through the medium of an action in tort.[500]

The Supreme Court eventually held that when an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind. The FAA employees who conducted compliance reviews of the aircraft were allowed to make policy judgments on the degree of confidence that might reasonably be placed in a manufacturer, the need to maximise compliance with FAA regulations and the efficient allocation of agency resources. The FAA's decision to institute the spot-check program to monitor compliance with its minimum safety standards was discretionary and thus protected by Section 2680(a). The certification was a calculated decision that took into account the objectives of the certification process in light of practical considerations such as funding and staffing. The Court concluded that the FAA has a statutory duty to promote safety in air transportation but not to insure it.[501]

151. The certification process of aircrafts is quite similar to the certification of vessels. Class surveyors make policy judgments as to whether a vessel complies with the international safety standards. Likewise, ROs promote safety in maritime transportation without, however, insuring it. Consequently, the statutory certification of vessels by ABS as an agent could also be covered by the discretionary function exemption. ABS will, therefore, be immune from liability.[502]

152. On the other hand, the situation is more complex when classification societies are independent contractors of the US Government and not agents.[503] An independent contractor is a person who contracts with another party to do something for him but who is not controlled by the latter, nor subject to the other person's right to control with respect to his physical conduct in the performance of the undertaking.[504] An independent contractor only undertakes to carry our certain specified work, without being subject to the employer's control or interference. A contractor is hired by another party to perform some specific tasks or functions, but not in a representative function.[505] Most

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[500] *United States v. Varig Airlines*, 467 U.S. 797, 807-814 (1984). This is different in Belgium, where courts might second-guess whether an RO committed a wrongful act when issuing accurate and reliable certificates. The *Court of Cassation* decided in the earlier mentioned *Flandria* case that the principle of the separation of powers does not preclude the judiciary from determining whether the executive has committed a fault, even when performing its political function (M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 73, no. 112).

[501] *United States v. Varig Airlines*, 467 U.S. 797, 814-820 (1984).

[502] *United States v. Varig Airlines*, 467 U.S. 797, 813-814 (1984) as discussed in N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 246-248.

[503] See for a general overview of the defenses: R.G. VIADA, "Immunities for Independent Contractors and Agents", State Bar of Texas, 25th Annual Suing & Defending Governmental Entities Course, July 18-19, 2013, 1-22.

[504] See the definition in Restatement (Third) of Agency § 2.

[505] A. SCHNEEMAN, *Law of Corporations and Other Business Organization*, New York, Cengage Learning, 2009, 3; R.E. MEINERS, A.H. RINGLEB, F. EDWARDS, *The Legal Environment of Business*, Mason, Cengage Learning, 2014, 385-387.

classification societies, including ABS when not acting as an agent, are independent contractors of the US Government.[506] An independent contractor does not enjoy immunity from liability merely because of the existence of a contract with the Government.[507]

153. Yet, under certain circumstances, they can rely on immunity defences as well.[508] Courts have introduced mechanisms that shield a Government's contractor from liability.[509] One example is the Government 'contractor defence'. It is a doctrine that bars courts from hearing cases because the state tort law claims raised in the case are pre-empted.[510] According to that doctrine, a contractor will benefit from immunity when doing work for the Government (1) in an area of uniquely federal interests and (2) when state law significantly conflicts with an identifiable federal policy/interest or impedes the objectives of federal legislation.[511]

Even if the execution of statutory surveys is delegated to classification societies, the US Government has to guarantee the safety of the vessel under international law. As such, ROs acting as independent contractors work for the Government in an area of uniquely federal interests.[512] One could also argue that the application of state law might frustrate specific objectives of federal legislation. The Government has to take all the necessary measures with regard to vessels flying its flag to ensure safety at sea.[513] In other words, the flag State should remain responsible for the status of its vessels, not the RO acting as a contractor. State actions against ROs to hold them liable might, therefore, conflict with an identifiable federal policy, namely the Government's duty to ensure safety at sea.[514]

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[506] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 242.

[507] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 242 with further references; H.H. PERRITT, *Law and the Information Superhighway*, New York, Aspen Publishers Online, 2001, 255.

[508] R.G. VIADA, "Immunities for Independent Contractors and Agents", State Bar of Texas, 25th Annual Suing & Defending Governmental Entities Course, July 18-19, 2013, 1.

[509] See in this regard: V.S. CHU & K.M. MANUEL, "Tort Suits Against Federal Contractors: An Overview of the Legal Issues", Congressional Research Service, CRS Report for Congress, April 7, 2011, 12-22; G.C. SISK, "Official Wrongdoing and the Civil Liability of the Federal Government and Officers", (8) *University of St. Thomas Law Journal* 2011, 295-323 with further references to case law.

[510] V.S. CHU & K.M. MANUEL, "Tort Suits Against Federal Contractors: An Overview of the Legal Issues", Congressional Research Service, CRS Report for Congress, April 7, 2011, 11-12.

[511] *Boyle v. United Technologies Corporation*, 487 U.S. 500, 504-507 (1988). See for a discussion of the case: S. WATTS, "Boyle v. United Technologies Corp. and the Government Contractor Defense: An Analysis Based on the Current Circuit Split Regarding the Scope of the Defense", (40) *William & Mary Law Review* 1999, 687. There have been several cases that expanded the government contractor defense to service contracts, which might be of particular importance in the case of classification societies when performing statutory certification services (e.g. *Katrina Canal Breaches v. Washington Group Internationa*, 620 F.3d 455 (5th Cir. 2010); *Hudgens v. Bell Helicopters/ Textron*, 328 F.3d 1329 (11th Cir. 2003)).

[512] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 243 referring to *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (U.S.1940); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510 (1988).

[513] Article 94.3. UNCLOS.

[514] *Boyle v. United Technologies Corporation*, 487 U.S. 500, 512-512 (1988) as discussed in: R.M. PERRY, "Tort Suits Against Federal Contractors: Selected Legal Issues", Congressional Research Service, March 31, 2014, 4-5.

Therefore, classification societies acting as independent contractors of the US Government principally benefit from immunity protection.[515]

154. ROs should, however, not be too optimistic either. Several situations remain in which independent contractors are not immune and could face third-party liability. This might be the case when the society exceeds its authority or when its authority was not validly conferred. Classification societies are also not immune when they negligently exercised the authority granted by the Government. As a consequence, the immunity defence for classification societies as independent contractors remains largely illusory.[516] A distinction will thus need to be made between two situations depending on whether the injury was caused by the classification society conforming to the requirements set by the US Government (immunity protection) or whether it was caused by the negligent performance of the society's tasks (no immunity protection).[517] If an allegedly flawed certificate follows from a violation of the classification society's obligations during the certification process, the RO acting as independent contractor will not enjoy from immunity.[518]

C. Liability of ROs in England and the Netherlands

155. In some other legal systems, ROs will only be held liable when strict requirements are met. The question of their immunity is, therefore, less relevant. The situation in England and in the Netherlands is discussed.

156. In England, ROs will not always be held liable even though employees of the Crown (e.g. agents or public officers) or independent contractors acting on behalf of the Government can be sued in personal capacity.[519] Public servants are personally accountable for their public duties in civil actions before the courts. In other words, a servant who commits a tort can be sued by the injured party.[520] However, an action for

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[515] See in this regard also: N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 242 referring to *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (U.S.1940); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510 (1988).

[516] *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 20-21 (1940); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988). See in this regard: R.G. VIADA, "Immunities for Independent Contractors and Agents", State Bar of Texas, 25th Annual Suing & Defending Governmental Entities Course, July 18-19, 2013, 12 concluding there are "three substantial limitations on the applicability of derivative immunity: (1) lack of government approval, (2) deviation from the government's specifications, and (3) contractor negligence in the performance of the contract".

[517] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 242 with further reference to case law and scholarship in footnotes 926-927.

[518] V.S. CHU & K.M. MANUEL, "Tort Suits Against Federal Contractors: An Overview of the Legal Issues", Congressional Research Service, CRS Report for Congress, April 7, 2011, 21-22.

[519] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 236 referring to A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, London, Macmillan and Company, 1959, 193-194.

[520] D. FAIRGRIEVE, *State Liability in Tort: A Comparative Law Study*, Oxford, Oxford University Press, 2003, 23-24.

damages against a public authority or servant for administrative wrongdoing has to fall within one of the categories of existing torts.[521]

157. The tort of negligence is of particular importance in this regard. One of the requirements to be held liable under the tort of negligence is that the defendant has a duty of care towards the injured party. The modern approach in deciding whether a party owes a duty of care implies three elements. First, it needs to be reasonable foreseeable for the defendant that its failure to take care could cause losses to the plaintiff. Second, the relationship between both parties needs to be close enough, one of proximity, to create a duty of care. Third, it needs to be fair, just and reasonable to impose a duty of care upon the defendant.[522]

158. The application of these requirements in the context of classification societies is challenging. Courts in England are traditionally reluctant to accept that classification societies have a duty of care towards third parties when acting in their private role. Many of the reasons to reject the existence of a duty of care when classification societies perform their private role might also apply to deny such a duty when they act on behalf of the national administration as ROs.[523]

For instance, third parties will face great obstacles to prove sufficient proximity between their economic loss and the RO's conduct/role.[524] Besides the lack of any contractual relationship between both parties, "the primary purpose of the classification system is […] to enhance the safety of life and property at sea, rather than to protect the economic interests of those involved, in one role or another, in shipping".[525] There is no duty of care to prevent economic loss as the prevention of such losses is not the aim of legislation dealing with ROs.[526] The existence of a duty of care might be even less likely as classification societies fulfil a role, which in their absence would have to be borne by flag

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[521] D. FAIRGRIEVE, *State Liability in Tort: A Comparative Law Study*, Oxford, Oxford University Press, 2003, 16 & 23-24.

[522] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 236-237; V.H. HARPWOOD, *Modern Tort Law*, London, Routledge, 2009, 27-30. Also see the discussion *infra* in nos. 240-252 on the existence of a duty of care and the tort of negligence in the context of certifiers.

[523] V. BERMINGHAM & C. BRENNAN, *Tort Law*, Oxford, Oxford University Press, 2012, 43-107; C.E. FEEHAN, "Liability of Classification Societies from the British Perspective: The Nicolas H", (22) *Tulane Maritime Law Journal* 1997, 163-190; J. BASEDOW & W. WURMNEST, *Third-Party Liability of Classification Societies: A Comparative Perspective*, Berlin, Springer, 2005, 15-21; P. CANE, "Classification Societies, Cargo Owners and the Basis of Tort Liability", *Lloyd's Maritime and Commercial Law Quarterly* 1995, 433-435; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 236-238; J. DE BRUYNE, "Liability of Classification Societies: Cases, Challenges and Future Perspectives", (45) *Journal of Maritime Law & Commerce* 2014, 203.

[524] See in this regard for example: *Mariola Marine Corp. v. Lloyd's Register of Shipping*, [1991] E.C.C. 103; *Mariola Marine Corp. v. Lloyd's Register of Shipping*, [1990] 1 Lloyd's Rep. 547; *Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd*., [1993] E.C.C. 121; *Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd*., [1994] 1 W.L.R. 1071; *Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd.*, [1996] E.E.C. 120; *Reeman v. Department of Transport*, [1994] P.N.L.R. 618.

[525] *Mariola Marine Corp. v. Lloyd's Register of Shipping*, [1991] E.C.C. 103, 114; *Reeman v. Department of Transport and Others*, [1997] 2 Lloyd's Rep. 648, 680-681.

[526] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 237.

States.[527] Following *Perret v. Collins* – a case that concerned the liability of a private body (Popular Flying Association) performing delegated statutory functions on behalf of a public authority (Civil Aviation Authority)[528] – classification societies might more likely have a duty of care when it relates to personal injury.[529]

However, even when assuming that there is sufficient proximity between the parties, a duty of care will only be accepted to the extent it is fair, just and reasonable. Lord STEYN, writing for the majority, relied on several policy considerations in the *Nicolas H* case to conclude that it would not be fair, just and reasonable to impose a duty of care upon classification societies towards third parties.[530] The fact that a society acts for the collective welfare is a matter that needs to be taken into account when deciding whether it would be fair to impose such a duty. Classification societies are non-profit organisations operating to promote the collective welfare, namely the safety of lives and ships at sea.[531]

159. Another legal system where ROs might relatively easily escape liability is the Netherlands. The *Duwbak Linda* case is important in this regard.[532] The vessel *Linda* was approved and certified by an RO acting on behalf of the Dutch Shipping Inspectorate. A safety certificate was issued under the *Reglement Onderzoek Schepen op de Rijn* (ROSR). The ROSR contains technical and (public) safety requirements for vessels.[533] By issuing the certificate, the society affirmed that the *Linda* complied with these technical and safety norms. The vessel capsized during its loading because of a corroded bottom planking a year after the certificate was issued. A dredging construction was damaged as consequence thereof. The owner of the construction filed a claim against the classification society as well as the Dutch Government alleging that the certificate would not have been issued if a careful inspection was conducted according to the norms in the ROSR.[534]

160. The Dutch Supreme Court (*Hoge Raad*) affirmed the decision on appeal and rejected the claims against the classification society and the Dutch Government. The highest court held that there was no relation between the alleged violation of a statutory duty under the

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[527] *Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd.*, [1996] E.E.C. 120, 146-147; *Reeman v. Department of Transport*, [1994] P.N.L.R. 618, 635.

[528] *Perrett v. Collins*, [1998] EWCA Civ 884, [1998] 2 Lloyd's LR 255.

[529] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 237-238.

[530] Lord BERWICK concluded in his dissenting opinion that if the facts of the case "cry out for the imposition of a duty of care between the parties, as they do here, it would require an exceptional case to refuse to impose a duty on the ground that it would not be fair just and reasonable" (*Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 135).

[531] *Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 120 & 146-147.

[532] Hoge Raad, May 7, 2004, no. C02/310HR, ECLI:NL:HR:2004:AO6012, *Nederlandse Jurisprudentie* 2006, 281 with annotation by J. HIJMA. See for a discussion and analysis of the case: L. DI BELLA, *De toepassing van de vereisten van causaliteit, relativiteit en toerekening bij de onrechtmatige overheidsdaad*, E.M. Meijers Institute, Faculty of Law, Leiden University, Doctoral Thesis, 2014, 134-137; P.W. DEN HOLLANDER, *De relativiteit van wettelijke normen*, Leiden, Boomjuridisch, Doctoral Thesis, 2016, 4-6 & 173-186.

[533] Reglement onderzoek schepen op de Rijn 1995, BWBR0025973, CEND/HDJZ-2009/105sectorSCH.

[534] See for a discussion: A. VAN ROSSUM, L. VERHEY & N. VERHEIJ, *Toezicht - Handelingen Nederlandse Juristen-Vereniging*, Deventer, Kluwer, 2005, 80-81; A.J. VERHEIJ, *Onrechtmatige daad*, Deventer, Kluwer, 2005, 36-37.

ROSR and the plaintiff's economic loss. Therefore, the requirement of relativity (*relativiteit*) as included in article 6:163 of the Dutch Civil Code was not met.[535]

Relativity needs to be assessed on three levels. The act has to be wrongful against the person protected by the legal norm (*persoonlijke relativiteit*). The plaintiff's loss must be of the type envisaged/protected by the legal norm as well (*zakelijke relativiteit*). The way in which the loss occurred also needs to fall within the range of the protective purpose of the violated legal norm (*ontstaansrelativiteit*).[536] In sum, the requirement of relativity implies that a third party who suffered economic loss has to prove that the legal norm which has been violated by the certifier grants protection against the suffered loss. Recovery will only be possible if a third party's interest are protected by the violated norm and if the type of the loss and the way it occurred fall within the protective scope of the norm.[537]

Against this background, the *Hoge Raad* held that a classification society needs to carefully perform the surveys and certification of the vessel. This obligation extends towards both the shipowner as well the flag State.[538] The inspection of vessels by the RO and subsequent issuance of the certificate pursuant to the ROSR contributes to the public welfare. It enhances safety of life at sea by preventing accidents. The provisions included in the ROSR and the inspection of vessels do not cover the protection of the plaintiff's individual economic losses resulting from a negligent survey and certification. The *Hoge Raad* ruled that the RO could not be held liable for the loss caused by the sinking of a vessel.[539]

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[535] Hoge Raad, May 7, 2004, no. C02/310HR, ECLI:NL:HR:2004:AO6012, *Nederlandse Jurisprudentie* 2006, 281, paragraphs 3.3.2.-3.4.5. See for a discussion of the first instance and appeal decision: W.A.M. RUPERT, "Het relativiteitsbeginsel en zorgvuldig toezicht", (39) *Aansprakelijkheid, Verzekering & Schade* 2004, 211-213.

[536] R. MEIJER, "Het relativiteitsvereiste: terug van nooit weggeweest Over relativiteit in het algemeen en bij vernietigde overheidsbesluiten in het bijzonder", (2) *Maandblad voor Vermogensrecht* 2008, 22-23; S. LINDENBERGH, "Alles is betrekkelijk. Over de relatie tussen normschending en sanctie in het aansprakelijkheidsrecht", uitgesproken bij de aanvaarding van het ambt van hoogleraar privaatrecht aan de Faculteit der Rechtsgeleerdheid van de Erasmus Universiteit Rotterdam op 15 december 2006, Erasmus Universiteit Rotterdam, Rotterdam Institute of Private Law; G.E. VAN MAANEN, "De relativiteit als onlosmakelijk bestanddeel van de onrechtmatigheidsvraag", in: J. TEN KATE, *Miscellanea, Jurisconsulto vero Dedicata, Bundel opstellen aangeboden aan prof. mr J.M. van Dunné*, Deventer, Kluwer, 1997, 258-259.

[537] A. HARTKAMP & C. SIEBURGH, *Verbintenissenrecht. De verbintenis uit de wet*, Deventer, Kluwer, 2011, 128-130; C. VAN DAM, "Aansprakelijkheid van Toezichthouders. Een analyse van de aansprakelijkheidsrisico's voor toezichthouders wegens inadequaat handhavingstoezicht en enige aanbevelingen voor toekomstig beleid", British Institute of International and Comparative Law, 2006, 124-125. See for more information on the requirement of relativity: G.H. LANKHORST, *De relativiteit van de onrechtmatige daad*, Deventer, Kluwer, 1992, 291p.; A. HARTKAMP & C. SIEBURGH, *Verbintenissenrecht. De verbintenis uit de wet*, Deventer, Kluwer, 2011, 115-125.

[538] Hoge Raad, May 7, 2004, no. C02/310HR, ECLI:NL:HR:2004:AO6012, *Nederlandse Jurisprudentie* 2006, 281, paragraph 3.3.2.

[539] Hoge Raad, May 7, 2004, no. C02/310HR, ECLI:NL:HR:2004:AO6012, *Nederlandse Jurisprudentie* 2006, 281, paragraphs 3.3.2.-3.4.5.

3.1.3. Liability of Certifiers and Immunity From Jurisdiction

161. The previous paragraphs illustrated that ROs can be immune and escape liability depending upon the jurisdiction where the claim is filed. Certifiers can also rely on so-called immunity from jurisdiction under international law, also known as sovereign or State immunity. After a discussion on this immunity (part A.), it is examined to what extent ROs, and by extension other certifiers acting on behalf of a national government, have successfully relied on it in legal proceedings (part B.).

A. General Considerations on Immunity From Jurisdiction

162. Sovereign immunity is a principle of customary international law whereby a State is immune from the adjudicative jurisdiction of another State.[540] This immunity exempts States from a prosecution or a suit for the violation of the domestic laws of another State in that State.[541] Thus, a successful plea of immunity prevents a State from being made a party to proceedings in the courts of a foreign State. Immunity from jurisdiction includes proceedings against the State, its organs or enterprises and its agents.[542]

163. Sovereign immunity has a national as well as an international dimension. The European Convention on State Immunity (ECSI)[543] and the UN Convention on Jurisdictional Immunities of States (UNCJIS)[544] are adopted at the international level. Whereas only eight countries have ratified the ECSI since 1972, the UNCJIS has not been ratified by enough States to become effective.[545]

164. As these instruments are not yet fully enforceable or effective,[546] countries enacted additional legislation dealing with State immunity (e.g. the US Foreign Sovereign Immunity Act[547] and the UK State Immunity Act[548]). In other countries such as Belgium, immunity from jurisdiction has been developed by courts,[549] thereby taking into account

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[540] B.A. BOCZEK, *International Law: A Dictionary*, Oxford, Scarecrow Press, 2005, 125.

[541] See in this regard: X. YANG, *State Immunity in International Law*, Cambridge, Cambridge University Press, 2015, 915p.; J. FINKE, "Sovereign Immunity: Rule, Comity or Something Else?", (21) *European Journal of International Law* 2010, 853-881.

[542] D. GAUKRODGER, "Foreign State Immunity and Foreign Government Controlled Investors", OECD Working Papers on International Investment 2010/02, OECD Publishing, 2010, 10; J. FINKE, "Sovereign Immunity: Rule, Comity or Something Else?", (21) *European Journal of International Law* 2010, 853-881.

[543] European Convention on State Immunity of May 16, 1972, ETS No.074. See for more information: <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074>.

[544] United Nations, United Nations Convention on Jurisdictional Immunities of States and Their Property, December 2, 2004, A/RES/59/38.

[545] J. FINKE, "Sovereign Immunity: Rule, Comity or Something Else?", (21) *European Journal of International Law* 2010, 857.

[546] See in this regard also: F. SICCARDI, "Immunity from jurisdiction are CS entitled to it (a) as Recognized Organizations acting for flag states (b) when performing class services", in: London Shipping Law Center, *Classification Societies Regulatory Regime and Current issues on Liability*, 41, February 21, 2013, 44.

[547] US Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891 codified at 28 U.S.C. §§ 1602-1611.

[548] UK State Immunity Act (1978), I.L.M. 1978, 1123-1129.

[549] See for an overview with further references to case law: J. WOUTERS & M. VIDAL, "De rechter als hoeder van het internationaal recht: recente toepassingen van internationaal recht voor Belgische hoven en

Article 6 of the European Convention on Human Rights (ECHR). Article 6 ECHR protects the right to a fair trial.[550]

The application of sovereign immunity will be compatible with Article 6 ECHR to the extent it pursues a legitimate aim and when it is proportionate to the legitimate aim pursued.[551] In *Cudak v. Lithuania*, the European Court on Human Rights (ECtHR) considered that "the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty".[552] Therefore, domestic courts will have to determine whether granting sovereign immunity will be seen as imposing a disproportionate restriction on the right of access to a court as guaranteed by Article 6 ECHR.[553]

165. Many jurisdictions (e.g. Belgium,[554] the US and the United Kingdom[555]) have evolved from a rule of absolute immunity towards one of restrictive immunity.[556] Under the restrictive theory of immunity, a State is only immune from the jurisdiction of foreign

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rechtbanken", in: VRG Alumni, *Recht in beweging. 13de VRG-Alumnidag 2006 (Reeks VRG Alumni Leuven)*, Antwerp, Maklu, 2006, 232-233; J. WOUTERS & F. NAERT, "Internationale immuniteiten in de Belgische rechtspraktijk", Instituut voor Internationaal Recht, Working Paper No. 34, October 2002, 7.

[550] See for more information: M. KLOTH, *Immunities and the Right of Access to Court Under Article 6 of the European Convention on Human Rights*, Leiden, BRILL, 2010, 220p. In this regard, the Dutch *Hoge Raad* already had to assess the relationship between immunity from jurisdiction and access to its domestic courts as guaranteed by Article 6 ECHR. See for example: Hoge Raad, September 11, 2009, no. 07/13385, ECLI:NL:HR:2009:BI6317, *Nederlandse Jurisprudentie* 2010, 523. See for more information: A.A.H. VAN HOEK, "Staatsimmuniteit in het privaatrecht", in: A.A.H. VAN HOEK (ed.), *Making choices in public and private international immunity law: preadviezen*, The Hague, T.M.C. Asser Press, 2011, 10 with further references; I. GIESEN, *Asser Procesrecht 1 Beginselen van burgerlijk procesrecht*, Deventer, Kluwer, 2015, 178-194; I.F. DEKKER & C.M.J. RYNGAERT, "Immunity of International Organisations - Balancing the Organisation's Functional Autonomy and the Fundamental Rights of Individuals", in: A.A.H. VAN HOEK (ed.), *Making choices in public and private international immunity law: preadviezen*, The Hague, T.M.C. Asser Press, 2011, 83-109.

[551] See in this regard: O. DE SCHUTTER, *International Human Rights Law: Cases, Materials, Commentary*, Cambridge, Cambridge University Press, 2014, 103.

[552] Case 15869/02, *Cudak v. Lithuania*, [2010] ECHR 370, paragraph 60.

[553] Case 15869/02, *Cudak v. Lithuania*, [2010] ECHR 370, paragraph 57; A.A.H. VAN HOEK, "Staatsimmuniteit in het privaatrecht", in: A.A.H. VAN HOEK (ed.), *Making choices in public and private international immunity law: preadviezen*, The Hague, T.M.C. Asser Press, 2011, 11. See for other cases: case 34869/05, *Sabeh El Leil v. France*, [2011] ECHR 1055; case 36703/04, *Oleynikov v. Russia*, March 14, 2013.

[554] Court of Cassation, June 11, 1903, *Pasicrisie belge* 1903, I, 301; Court of Appeal Brussels, March 16, 1989, *Journal des Tribunaux* 1989, 550; Court of First Instance Brussels, June 6, 2000 (unpublished) as reported in J. WOUTERS, *Bronnenboek Internationaal Recht*, Antwerp, Intersentia, 2000, 136 and in M.J. BOSSUYT & J. WOUTERS, *Grondlijnen van internationaal recht*, Antwerp, Intersentia, 2005, 394; J. WOUTERS & F. NAERT, "Internationale immuniteiten in de Belgische rechtspraktijk", Instituut voor Internationaal Recht, Working Paper No. 34, October 2002, 7-8.

[555] A. ORAKHELASHVILI, *Research Handbook on Jurisdiction and Immunities in International Law*, Cheltenham, Edward Elgar, 2015, 159-160.

[556] See for an overview of the evolution from absolute to restrictive immunity in the UK and from a comparative perspective with further references: J. O'BRIEN, *International Law*, London, Routledge, 2001, 265-269.

courts with regard to its sovereign or public acts (*jure imperii*). Immunity does not apply for acts that have a private or commercial character (*jure gestionis*).[557]

The distinction between public acts and commercial/private acts is thus of importance to determine whether States can enjoy immunity from jurisdiction. One can take into account the nature of the act or its purpose to establish the qualification of the act.[558] It is the prevailing practice to qualify state activities by looking at their nature rather than their purpose.[559] This is the case in both civil law countries such as Belgium[560] and common law jurisdictions such as the United States.[561] A foreign State engages in commercial activities for purposes of the restrictive theory only where it acts in a manner of a private player within the market. States enjoy immunity as long as they act in their official capacity but must submit to the jurisdiction of another State if they act as a private person.[562]

166. There are also two criteria to determine the actors that can enjoy immunity. On the one hand, immunity *ratione personae* implies that immunity is granted depending on the status of the actor.[563] It is an immunity from which an individual benefits by mere virtue of his position (e.g. head of states, ministers and the diplomatic corps).[564] Immunity can,

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[557] E. TASLIM, *The International Court of Justice and some contemporary problems: Essays on International Law*, The Hague, Springer, 2013, 132; R. VAN ALEBEEK, *The Immunity of States and Their Officials in International Criminal and International Human Rights Law*, Leiden, E. M. Meijers Instituut, 2008, 12-64. The first paragraph of Article 10 UNCJIS, for instance, stipulates that if a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

[558] J. BRÖHMER, *State Immunity and the Violation of Human Rights*, The Hague, Martinus Nijhoff Publishers, 1997, 1; J. WOUTERS & F. NAERT, "Internationale immuniteiten in de Belgische rechtspraktijk", Instituut voor Internationaal Recht, Working Paper No. 34, October 2002, 7.

[559] J. BRÖHMER, *State Immunity and the Violation of Human Rights*, The Hague, Martinus Nijhoff Publishers, 1997, 1; F. SICCARDI, "Immunity from jurisdiction are CS entitled to it (a) as Recognized Organizations acting for flag states (b) when performing class services", in: London Shipping Law Center, *Classification Societies Regulatory Regime and Current issues on Liability*, February 21, 2013, 44.

[560] Court of Cassation, June 11, 1903, *Pasicrisie belge* 1903, I, 302; Court of Appeal Brussels, December 4, 1963, *Journal des Tribunaux* 1964, 44 as reported in J. WOUTERS & F. NAERT, "Internationale immuniteiten in de Belgische rechtspraktijk", Instituut voor Internationaal Recht, Working Paper No. 34, October 2002, 8.

[561] *Saudi Arabia v. Nelson*, 507 US 349, 359-360 (1993); X. YANG, *State Immunity in International Law*, Cambridge, Cambridge University Press, 2012, 95-96.

[562] *Saudi Arabia v. Nelson*, 507 US 349, 359-360 (1993); X. YANG, *State Immunity in International Law*, Cambridge, Cambridge University Press, 2012, 95-96. See in this regard also Article 2.2 UN Convention on Jurisdictional Immunities of States.

[563] F. SICCARDI, "Immunity from jurisdiction are CS entitled to it (a) as Recognized Organizations acting for flag states (b) when performing class services", in: London Shipping Law Center, *Classification Societies Regulatory Regime and Current issues on Liability*, February 21, 2013, 45.

[564] R. O'KEEFE & C.J. TAMS, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford, Oxford University Press, 2013, 85.

on the other hand, apply because of the nature of the act, irrespective of the status of its author.[565] Immunity is thus granted to individuals by virtue and in respect of their acts.[566]

167. It should, however, be stressed that a State will of course remain subject to the jurisdiction of its own courts.[567] Moreover, there are different situations in which a State will not benefit from sovereign immunity. First, several countries such as the US[568] and the UK[569] as well as the international community by virtue of Article 11 ECSI[570] and Article 12 UNCJIS[571] adopted a (non-commercial) tort law exception. This exception basically implies that a foreign State may be held liable for certain torts committed in another country or for torts having an effect in that country (e.g. death or personal injury).[572] Second, national legislation[573] and international conventions[574] sometimes stipulate that immunity might be waived (e.g. because the State consented to the exercise

[565] F. SICCARDI, "Immunity from jurisdiction are CS entitled to it (a) as Recognized Organizations acting for flag states (b) when performing class services", in: London Shipping Law Center, *Classification Societies Regulatory Regime and Current issues on Liability*, February 21, 2013, 45.

[566] R. O'KEEFE & C.J. TAMS, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford, Oxford University Press, 2013, 85

[567] F. SICCARDI, "Immunity from jurisdiction are CS entitled to it (a) as Recognized Organizations acting for flag states (b) when performing class services", in: London Shipping Law Center, *Classification Societies Regulatory Regime and Current issues on Liability*, February 21, 2013, 48-49.

[568] Section 1605(a)(5) of the Foreign Sovereign Immunities Act. See for more information: C. BRADLEY, *International Law in the U.S. Legal System*, New York, Oxford University Press, 2013, 243-244.

[569] See for example Section 5 of the State Immunity Act 1978 stipulating that a state is not immune in proceedings in respect of (a) death or personal injury; or (b) damage to or loss of tangible property caused by an act or omission in the United Kingdom.

[570] The Article stipulates that "[a] Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred".

[571] The Article stipulates that "[u]nless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission".

[572] S. HAVKIN, "The Foreign Sovereign Immunities Act: The Relationship between the Commercial Activity Exception and the Noncommercial Tort Exception in Light of De Sanchez v. Banco Central de Nicaragua", (10) *Hastings International and Comparative Law Review* 1987, 456.

[573] See for example: Section 1605(a)(1) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605; Section 2 (1) of the State Immunity Act 1978.

[574] See for example Article 7 UNCJIS according to which "a State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case: (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court or by a written communication in a specific proceeding" and Article 2 ECSI stipulating that a contracting State cannot claim immunity from the jurisdiction of a court of another State if it has undertaken to submit to the jurisdiction of that court either: (a) by international agreement; (b) by an express term contained in a contract in writing; or (c) by an express consent given after a dispute between the parties has arisen.

of jurisdiction).[575] Finally, a State may lose its right on immunity by participating in or initiating the proceedings before a foreign court.[576]

B. The Case of Recognised Organisations

168. Taking this theoretical framework into account, it is now examined to which extent certifiers acting on behalf of national States are able to rely on sovereign immunity. Classification societies acting as ROs can be used as an example in this regard.

169. Even if national administrations delegate certification duties to ROs, flag States remain responsible to guarantee the completeness and efficiency of the inspection and survey of their vessels.[577] Flag States have to take all steps to ensure that, from the point of view of safety, a vessel is fit for the service for which it is intended.[578] They have to take the necessary measures with regard to the construction, equipment and seaworthiness of ships flying their flag to ensure safety at sea.[579] The International Convention for the Safety of Life at Sea ('SOLAS Convention') stipulates that certificates issued under the authority of national governments need to be accepted by other States for all purposes covered by the Convention. They have to be regarded by other States as having the same force as their own certificates.[580] The Model Agreement for the Authorisation of ROs specifies that an RO, its officers, employees or any other person acting on its behalf are entitled to all the protection of law and the same defences and/or counterclaims as would be available to the delegating State if the latter had done the statutory certification.[581]

170. It is against this background no surprise that ROs have already invoked sovereign immunity on several occasions when claims have been filed against them in other jurisdictions. One of the oldest cases accepting immunity from jurisdiction was *Sundancer v. ABS*. Classification society ABS issued a class certificate (private role) and a number of statutory certificates on behalf of the Bahamian Government (public role).

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[575] F. SICCARDI, "Immunity from jurisdiction are CS entitled to it (a) as Recognized Organizations acting for flag states (b) when performing class services", in: London Shipping Law Center, *Classification Societies Regulatory Regime and Current issues on Liability*, February 21, 2013, 49.

[576] See for example Article 3 of the ECSI according to which "[a] Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if, before claiming immunity, it takes any step in the proceedings relating to the merits […] However, if the State satisfies the Court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it has taken such a step, it can claim immunity based on these facts if it does so at the earliest possible moment […] A Contracting State is not deemed to have waived immunity if it appears before a court of another Contracting State in order to assert immunity". Article 8 of the UNCJIS uses a similar wording.

[577] Part B, Regulation 6 (Inspection and Survey) International Convention for the Safety of Life at Sea (SOLAS), November 1, 1974.

[578] Article I (b) International Convention for the Safety of Life at Sea (SOLAS), November 1, 1974.

[579] Article 94(3)(a) United Nations Convention on the Law of the Sea 1982, December 10, 1982, 1833 UNTS 3.

[580] Part B, Regulation 17 (Inspection and Survey) International Convention for the Safety of Life at Sea (SOLAS), November 1, 1974; Article 2.3. Model Agreement for the Authorisation of Recognised Organisations Acting on Behalf of the Administration, MSC/Circ.710 -MEPC/Circ.307.

[581] Article 7.5. Model Agreement for the Authorisation of Recognised Organisations Acting on Behalf of the Administration, MSC/Circ.710 -MEPC/Circ.307.

The shipowner argued that the vessel would not have sunk but for the classification society's negligence, negligent misrepresentation and breach of contract. However, the District Court for the Southern District of New York held that Bahamian law – the flag the *Sundancer* flew – shielded ABS with immunity for its actions in issuing the statutory certificates.[582] The Court of Appeals for the Second Circuit upheld the decision and granted ABS immunity from jurisdiction. A distinction was thereby made between private classification for which immunity does not apply and public certification allowing a society to enjoy immunity.[583]

171. More recent cases, however, show that the distinction between private and public functions and its influence of immunity is not always straightforward. Although judges sometimes still deny immunity protection to commercially operated vessels,[584] two important decisions illustrate that immunity might apply to private classification services as well, namely the case of the *Erika* and the case of the *Al-Salam Boccaccio 98*.

172. The sinking of the *Erika* caused a huge oil pollution of the French shoreline. Proceedings were instituted by the *Conseil Général de la Vendée* against the shipowners, the owners of the cargo (Total) and *Registro Italiano Navale* (RINA). The *Erika* was classed by RINA, which renewed the class certificate in November 1999 (private function). RINA also acted as RO for Malta and issued an International Safety Certificate. As a consequence, RINA claimed that it could not be held liable by a French court as it benefited from sovereign immunity (public function).[585] The decisions by the *Tribunal Correctionnel* in first instance[586] and by the *Cour d'Appel* on appeal[587] have already been discussed by scholars.[588] The following paragraphs, therefore, especially focus on the

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[582] *Sundance Cruises v. American Bureau of Shipping*, 799 F. Supp. 363, 386-393 (S.D.N.Y. 1992).

[583] *Sundance Cruises v. American Bureau of Shipping*, 7 F.3d 1077, paragraphs 34-48 (2nd Cir.1993).

[584] See for example: Court of Appeal Bordeaux, March 6, 2017, no. 14/02185, 8. This decision can found on the online database Lextenso and is also available at <www.iopcfunds.org/uploads/tx_iopcincidents/Arret_de_la_cour_d_appel_de_Bordeaux_-_mars_2017.pdf>.

[585] V.J. FOLEY & C.R. NOLAN, "The Erika Judgment-Environmental Liability and Places of Refuge: a Sea Change in Civil and Criminal Responsibility that the Maritime Community must Heed", (33) *Tulane Maritime Law Journal* 2008, 44; O.Z. ÖZCAYIR, "The Erika and its Aftermath", (7) *International Maritime Law* 2000, 230-235.

[586] High Court of Paris, January 16, 2008, no. 9934895010, JurisData no. 2008-351025, *Revue de droit des transports* 2008, 36; A. VAN LANG, "Affaire de l'Erika: la consécration du préjudice écologique par le juge judiciaire" *Actualité juridique Droit Administratif* 2008, 934, J.H. ROBERT, "Naufrage de l'Erika: responsabilité de l'affréteur et reconnaissance du dommage écologique", *Revue de Science Criminelle* 2008, 344. The decision can be found on the legal database Dalloz and is available at <www.fortunes-de-mer.com/documents%20pdf/jurisprudence/Arrets/7%20TGI%20Paris%2016012008%20Erika.pdf>.

[587] Court of Appeal Paris, March 30, 2010, no. 08/02278. The decision can be found on the online legal database Dalloz and is also available at <actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/MARS_2014/Erika_CA_Paris_30_mars_2010.pdf>. See for more information: P. DELEBECQUE, "Opérateurs économiques. Immunité. Société de classification. Navire «Erika»", *Revue trimestrielle de droit commercial* 2010, 622; S. LAVRIC, "Procès en appel de l'Erika: confirmation des responsabilités et reconnaissance du préjudice écologique", *Dalloz actualité*, April, 6, 2010.

[588] V.J. FOLEY, C.R. NOLAN, "The Erika Judgment-Environmental Liability and Places of Refuge: a Sea Change in Civil and Criminal Responsibility that the Maritime Community must Heed", (33) *Tulane Maritime Law Journal* 2008, 42-77; M.G. VAN DEN DOOL & J.F. VAN DER VLIES, "Liability of classification societies before and after the Erika-verdict", (3) *Tijdschrift Vervoer en Recht* 2008, 91-100; J. DE BRUYNE,

decision by the Criminal Section of the *Cour de Cassation*, which largely upheld the judgement by the Court of Appeal.[589]

173. The French Court of Cassation did not address whether a RO could benefit from flag State immunity because RINA renounced immunity by participating in the proceedings.[590] In first instance, however, the *Tribunal Correctionnel* rejected sovereign immunity because the inspections and certification of the vessel were performed in the interest of the shipowner.[591] The court held that the existence of a link between public certification and private classification services, the relation of Flag State Malta with various classification companies or even the objective of public service that would be pursued with the classification activities had neither the purpose, nor the effect of linking these activities to the exercise of sovereignty by the flag State. Although the court did not explicitly decide whether a classification society acting as RO could enjoy immunity (public function), it held that a society is not immune when acting on behalf of a shipowner to classify the latter's vessel (private function).[592]

The *Cour d'Appel* decided that the certificates issued by a classification society acting as RO were "actes de puissances publiques" (*acta iure imperii*) and not simple "actes de gestion" (*acta iure gestionis*). Statutory certificates are issued to enhance the safety at sea and serve the public interest. The *Erika* could not have sailed under Maltese Flag without RINA's certification services. Consequently, a classification society acting as RO should be able to rely on sovereign immunity. The court even seems to accept that a society can enjoy immunity from jurisdiction when providing private certification services to the shipowner. The (technical) standards that have to be fulfilled before a society can issue a certificate are part of a set of class rules "qui conditionnent la certification statutaire" by virtue of the reference made to them in several international maritime safety conventions. Class rules aim to improve the safety at sea and serve the public interest.[593] However, the Court of Appeal, relying on Article 8 of the UNCJSI, [594] decided that RINA had

"Liability of Classification Societies: Cases, Challenges and Future Perspectives", *Journal of Maritime Law and Commerc*e 2015, 209-213.

[589] Court of Cassation, September 25, 2012, no. 10-82.938, JurisData no. 2012-021445. This decision can be found online on Legifrance as well as on the legal database Dalloz. See in this regard also M. NDENDE, "Pollution marine par hydrocarbures (Affaire de l'Erika)", (4) *Revue de droit des Transports* 2012, 52.

[590] Court of Cassation, September 25, 2012, no. 10-82.938, JurisData no. 2012-021445.

[591] High Court of Paris, January 16, 2008, no. 9934895010, JurisData no. 2008-351025, 276.

[592] High Court of Paris, January 16, 2008, no. 9934895010, JurisData no. 2008-351025, 276.

[593] Court of Appeal Paris, March 30, 2010, no. 08/02278, 322-323.

[594] According to the first paragraph of that Article, a State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has: (a) itself instituted the proceeding; or (b) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment. The second paragraph further stipulates that a State is not considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of: (a) invoking immunity; or (b) asserting a right or interest in property at issue in the proceeding. Article 3 of the European Convention on State Immunity contains similar provisions.

renounced the privilege of flag State immunity by participating in the criminal proceedings.[595]

174. A second decision that sheds light on the immunity of societies when acting as ROs is the case of *Al-Salam Boccaccio 98*. The vessel sank in the Red Sea after a fire broke out on the car deck. Classification society RINA was acting as RO on behalf of the Panama Maritime Administration (public role) and provided classification services for the shipowners as well (private role).[596]

The Association of Victim's Families filed a suit against RINA before the *Tribunale* of Genoa. The Association claimed compensation of $132,000,000 from RINA. The plaintiffs argued that the classification society had been negligent during the ship inspections because several technical safety class rules were not respected. As a consequence, RINA was not allowed to issue the certificate of class. RINA would have withdrawn the vessel's class if it had respected the International Safety Management Code and several other compliance documents.[597] RINA contested these allegations and argued that it should be granted immunity as it acted as an RO on behalf of a flag State.[598]

The *Tribunale* accepted RINA's immunity from Italian adjudicative jurisdiction. The court relied on several precedents (among which the *Erika* judgment) to conclude that private companies do enjoy immunity from jurisdiction insofar as they perform public activities and duties delegated by flag States. The court also held that the distinction between (private) classification and (public) statutory services was arbitrary and irrelevant for the purpose of granting immunity because class certificates are required for each vessel to sail.[599] RINA's activities were not merely technical. The issuance of certificates is a distinguished public feature of the flag States as certificates – also when issued by ROs – are valid *erga omnes*. Such certificates are recognised and accepted by all States by virtue of Regulation 17 in the SOLAS Convention.[600]

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[595] Court of Appeal Paris, March 30, 2010, no. 08/02278-A, 323-324.

[596] See for a discussion of the facts: X, "Class on trial", *Fairplay* 2012, no. 375, 26.

[597] The purpose of this Code is to provide an international standard for the safe management and operation of ships and for pollution prevention. The Code establishes safety-management objectives and requires a safety management system to be established by the shipowner and others who has assumed responsibility for operating the ship. They are then required to establish and implement a policy for achieving these objectives (International Maritime Organisation, "ISM Code and Guidelines on Implementation of the ISM Code", available at <www.imo.org/en/OurWork/HumanElement/SafetyManagement/Pages/ISMCode.aspx>).

[598] M. FERRERO, "Press Conference on Al Salam Boccaccio 98 shipwreck", *Ufficio Stampa & Communicazione*, July 20, 2010.

[599] *Abdel Naby Hussein Maboruk Aly c. RINA s.p.a.*, Court of First Instance Genova, March 8, 2012, no. 9477/2010, *Il Diritto Marittimo*, 2013, 145 as discussed in F. SICCARDI, "Immunity from jurisdiction are CS entitled to it (a) as Recognized Organizations acting for flag states (b) when performing class services", in: London Shipping Law Center, *Classification Societies Regulatory Regime and Current issues on Liability*, February 21, 2013, 64-66; A. MOIZO, "RINA will be tried in Panama for the Boccaccio", *Ship2shore* 2012, 27.

[600] Regulation 17 stipulates that "Certificates issued under the authority of a Contracting Government shall be accepted by the other Contracting Governments for all purposes covered by the present Convention. They shall be regarded by the other Contracting Governments as having the same force as certificates issued

3.2. Certifiers and 'Designation' by Governments

175. Besides the explicit delegation of certification duties by States to certifiers, there can be other less drastic ways for a government to rely on the services provided by certifiers. An example is the involvement of notified bodies in the conformity assessment procedure of medical devices in the EU.[601]

176. Once notified bodies are 'designated' by the authority responsible for notified bodies, they can provide their services to the manufacturer during the conformity assessment of medical devices.[602] Manufacturers are free to choose the services of any notified body that has been designated to carry out the assessment procedure.[603] The relationship between the notified body and the manufacturer is based on a contract, even though certain of a notified body's actions might have regulatory authority.[604] This regulatory authority stems from the specific relationship between notified bodies and the national authority responsible for notified bodies. The national authority remains responsible for setting up and carrying out the necessary procedures for the assessment, designation and notification of conformity assessment bodies.[605] It needs to continuously monitor notified bodies to ensure their ongoing compliance with the applicable requirements.[606] The national authority can withdraw the notification if it finds that a notified body no longer meets the applicable criteria.[607] Because of this relationship, some argue that a notified body performs delegated regulatory functions.[608] However, they cannot be compared with ROs acting on behalf of flag States for two reasons.[609]

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by them" (International Convention for the Safety of Life at Sea, 1974). *Abdel Naby Hussein Maboruk Aly c. RINA s.p.a.*, Court of First Instance Genova, March 8, 2012, no. 9477/2010, *Il Diritto Marittimo*, 2013, 145 as discussed in F. SICCARDI, "Immunity from jurisdiction are CS entitled to it (a) as Recognized Organizations acting for flag states (b) when performing class services", in: London Shipping Law Center, *Classification Societies Regulatory Regime and Current issues on Liability*, February 21, 2013, 65.

[601] J.P. GALLAND, "The Difficulties of Regulating Markets and Risks in Europe through Notified Bodies", (4) *European Journal of Risk Regulation* 2013, 365.

[602] J. O'GRADY, I. DOBBS-SMITH, N. WALSH & M. SPENCER, *Medicines, Medical Devices and the Law*, Cambridge, Cambridge University Press, 2011, 7.

[603] S.M. SINGH, "Symposium on the EU's New Medical Device Regulatory Framework What Is the Best Way to Supervise the Quality of Medical Devices? Searching for a Balance between Ex- Ante and Ex-Post Regulation", *European Journal of Risk Regulation* 2013, 465.

[604] J. O'GRADY, I. DOBBS-SMITH, N. WALSH & M. SPENCER, *Medicines, Medical Devices and the Law*, Cambridge, Cambridge University Press, 2011, 7.

[605] Article 35, 1. Regulation 2017/745 on medical devices.

[606] Article 44, 2. Regulation 2017/745 on medical devices.

[607] Article 16 Directive 93/42 concerning medical devices; Article 46, 4 Regulation 2017/745 on medical devices.

[608] J. O'GRADY, I. DOBBS-SMITH, N. WALSH & M. SPENCER, *Medicines, Medical Devices and the Law*, Cambridge, Cambridge University Press, 2011, 7

[609] See in this regard also B. VAN LEEUWEN, "La responsabilité des organismes notifiés du fait d'implants mammaires défectueux: TÜV Rheinland devant les tribunaux français et allemands", (24) *Revue Internationale de Droit Économique* 2015, 81.

177. On the one hand, there is no actual 'delegation' of power but a 'designation' of a notified body.[610] Notified bodies do not become part of the public administration.[611] As opposed to ROs, Member States are not required to establish a working relationship with the notified body. It is a private body that is merely involved in the conformity assessment procedure of medical devices. Notified bodies only need to suspend or withdraw certificates upon finding that a manufacturer or medical device no longer complies with the essential requirements.[612]

178. On the other hand, the various actors involved in the regulatory framework of medical devices have different functions. As opposed to ROs in the certification process of vessels, the role of notified bodies within the framework of medical devices is rather restricted when making the comparison with the other actors involved, such as the manufacturer of the device and the competent national authority.

179. For instance, it is the manufacturer of the devices who, by affixing the CE mark, declares that they are in conformity with all the requirements and not the notified body. The manufacturer takes full responsibility for that.[613] This has not only been confirmed by national courts in the PIP case[614] but also by the ECJ. More specifically, it held that, even though other actors might be involved as well, it is in the first place the manufacturer who has to ensure that the medical device complies with the applicable requirements.[615]

180. A distinction can also be made between notified bodies and the competent national authority. This authority should not be confused with the authority responsible for notified bodies.[616] Member States have to designate a competent authority. This authority is responsible for the implementation of EU legislation on medical devices.[617] National competent authorities are in charge of different post-market surveillance activities.[618]

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[610] Articles 42 Regulation 2017/745 on medical devices.

[611] S.M. SINGH, "Symposium on the EU's New Medical Device Regulatory Framework What Is the Best Way to Supervise the Quality of Medical Devices? Searching for a Balance between Ex- Ante and Ex-Post Regulation", *European Journal of Risk Regulation* 2013, 465; S. FRANK, "An Assessment of the Regulations on Medical Devices in the European Union", (56) *Food & Drug Law Journal* 2001, 112.

[612] L. HANCHER & M.A. FÖLDES, "Revision of the Regulatory Framework for Medical Devices in the European Union: The Legal Challenges. Symposium on the EU's New Medical Device Regulatory Framework", (4) *European Journal Risk Regulation* 2013, 429. Also see Article 56 Regulation 2017/745 on medical devices.

[613] Recital (31) in Decision 768/2008 of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC.

[614] See for example the French *Cour d'Appèl* in Aix-en-Provence stipulating "C'est donc sous la seule responsabilité du fabricant que celui-ci doit commercialiser les produits qu'il a fait certifier suite au dépôt d'un dossier technique auprès de l'organisme habilité" (Court of Appeal Aix-en-Provence, July 2, 2015, no. 13/22482. This decision can be found on the online legal database Dalloz and is also available at <www.doctrine.fr/d/CA/Aix-en-Provence/2015/R544A062AC137538AB085>).

[615] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 51.

[616] See in this regard Article 35 Regulation 2017/745 on medical devices.

[617] Article 101 Regulation 2017/745 on medical devices.

[618] See in this regard for example Articles 93-97 Regulation 2017/745 on medical devices. There are not many reported cases in which claims have been initiated against a competent authority. The German

Competent national authorities, however, are not involved in the assessment and authorisation of placing devices on the market. This responsibility remains with the manufacturer of the device.[619] The decisions in the PIP case also emphasised the differences between notified bodies and competent national authorities. The German District Court in Frankenthal, for example, held that notified bodies cannot be considered as market surveillance agencies. Notified bodies do not have similar powers. Their role is restricted to the conformity assessment procedure of devices.[620] The decision on appeal by the OLG in Zweibrücken reaffirmed the separation of duties between notified bodies and the competent authority. Product certification cannot be placed at the same level as post-market surveillance activities. National competent authorities are responsible to monitor and control the marketed devices.[621]

It was different in the first instance decision by the *Tribunal de Commerce* in Toulon. The court considered that notified bodies effectively have a public role and guarantee that the product has reached a certain safety standard whenever they certify it. The functions performed by the notified body constitute a real delegation of public services – "véritable délegation de service publique" – by national competent authorities.[622] The first instance court thus adopted an expansive interpretation of the duties of notified bodies.[623] However, the decision has been overturned by the court of appeal in Aix-en-Provence. Not only did the court conclude that TüV complied with its obligations under supranational law, it also stressed the restricted role of notified bodies during the conformity assessment procedure.[624]

3.3. Summary

181. The analysis showed that different types of relationship can exist between certifiers and a national government. In most cases, national authorities are involved in the registration and supervision of certifiers. They are also required to withdraw or suspend

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Bundesinstitut für Arzneimittel und Medizinprodukte (BfArM) faced claims by women who bought defective implants. The plaintiffs argued that the BfArM made the information concerning the risks of the PIP breast implants only publicly available in 2011. This timing was way too late. However, the court decided that the BfArM did not possess information before 2011 to inform patients on the risks of the implants (the case has been reported in P. ROTT & C. GLINSKI, "Le scandale PIP devant les juridictions allemandes", (1) *Revue Internationale de Droit Economique* 2015, 92; LTO-Redaktion, "Kein Schadensersatz für Brustimplantate", *Legal Tribune Online*, November 26, 2014).

[619] J. O'GRADY, I. DOBBS-SMITH, N. WALSH & M. SPENCER, *Medicines, Medical Devices and the Law*, Cambridge, Cambridge University Press, 2011, 7.

[620] Court of First Instance Frankenthal, March 14, 2013, 6 O 304/12, *JurionRS* 2013, 37376.

[621] Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13, *JurionRS* 2014, 10232, Part II, 2. d); B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 344-345; W. REHMANN & D. HEIMHALT, "Medical devices: liability of notified bodies?", *TaylorWessing*, May 2015.

[622] Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, no. 2013F00567, 141 (available at the online legal database Dalloz).

[623] B. VAN LEEUWEN, "PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies", (5) *European Journal of Risk Regulation* 2014, 345-346.

[624] Court of Appeal Aix-en-Provence, July 2, 2015, no. 13/22482. This decision can be found on the online legal database Dalloz and is also available at <www.doctrine.fr/d/CA/Aix-en-Provence/2015/R544A062AC137538AB085>.

the certificate when necessary. In some cases, however, the relationship can be more elaborate. In addition to the 'designation' of certifiers by national governments, certifiers might also act on their behalf. The example of ROs was used as an illustration in this regard. ROs are bound by a delegation agreement with the flag State. Governments rely on the services provided by classification societies to comply with their own obligations. The question, therefore, was to what extent ROs are able to benefit from immunity. Two elements were discussed, namely immunity of liability for ROs in the country where they operate and immunity from jurisdiction under international law.

182. The jurisdiction where claims against ROs are initiated will determine whether they can benefit from state immunity. The analysis revealed that there is no uniform approach. In Belgium, classification societies will not be immune merely because they fulfil a public role. In the United States, the qualification of agent or independent contractor determines whether ROs will be immune. Whereas an agent recognised by the government in that capacity will benefit from immunity, most classification societies operating as independent contractor will not enjoy this protection. In other countries, ROs will only be held liable under strict conditions inter alia related to requirements of relativity, proximity or fairness and justice. Due to their public role or legislation aimed at ensuring safety at sea, third parties will not always be able to recover their economic losses from ROs.

183. Certifiers acting on behalf of a national government can also invoke immunity from jurisdiction in proceedings in courts of other States. ROs were used as an example once again. The examined cases show that classification societies can benefit from sovereign immunity when acting on behalf of flag States, especially when they do not participate in legal proceedings. Even more striking is that some decisions illustrate that the distinction between private and public duties of classification societies and its influence on their immunity loses importance. Both functions are part of the same classification/ certification process. Societies might thus benefit from sovereign immunity even when acting in their private role and performing contractual services under the classification agreement. After all, class certificates (private function) are necessary to increase the safety of vessels at sea (public role).[625]

184. This far-reaching conclusion can be extrapolated to other certifiers. They will benefit from sovereign immunity if three requirements are met. So far, however, no other certifier than ROs seems to simultaneously comply with all of them.

First, there must be a delegation of authority by the State to a certifier. This implies that the government has an obligation under inter-, supra- or national law to ensure the quality or safety of certain items. In other words, the government needs to remain responsible for the quality and safety of the certified item. At the same time, the State also needs to have the possibility under the applicable legislation to delegate the obligation to certify to

[625] J. DE BRUYNE, "Liability of classification societies: developments in case law and legislation", in: M. MUSI (ed.), *New Challenges in Maritime Law: de Lege Lata et de Lege Ferenda*, Bologna, Bonomo, 223-232.

private entities acting on its behalf. Second, private certification needs to have a link with public certification. This implies that besides public certification, a certifier has to provide private certification with regard to the same item. The certifier has to fulfil a dual role. One for the benefit of private market participants and one on behalf of the government. This dual role should be visible in the technical and safety regulations an item has to comply with. Ideally, the 'public' regulations that have to be met when certifiers provide public certification should be part of 'private' regulations that certifiers need to examine when providing private services to market participants. Third, the certifier acting on behalf of the government will not be able to invoke immunity when it participated in a proceeding before a court of another country.[626]

4. Standard-Setting and Certifiers

185. Whereas third-party certifiers examine whether an item complies with the applicable standards, standard-setters develop and promulgate those standards.[627] It is briefly examined below how and which entities establish standards used in the context of classification societies (part 4.1.), products certifiers/notified bodies (part 4.2.) and CRAs (part 4.3.). The main findings are summarised (part 4.4.).

4.1. Standard-Setting and Classification Societies

186. In their private role, classification societies certify whether a vessel complies with technical standards. These standards are developed and issued by societies themselves in the form of class rules.[628] Class rules contain requirements on the way the hull and the vessel's structures and equipment have to be constructed and maintained. However, they cannot be used as a blueprint for building a ship. They only imply that a vessel fulfils the requirements to avoid common deficiencies at the time of its inspection and certification.[629] Thus, a classification society does not guarantee or confirm that a vessel is built in a perfect way.[630]

187. Besides their own class rules, classification societies that are member of the International Association of Classification Societies (IACS) also adopted Unified Requirements (URs).[631] URs need to be transposed into the individual society's class

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[626] See in this regard Article 8 UN Convention on Jurisdictional Immunities of States and Article 3 European Convention on State Immunity discussed *supra* in no. 167.

[627] Definition of "standard setting organization", USLegal Definitions, available at <definitions.uslegal.com/s/standard-setting-organization-sso>.

[628] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications 2011, 3.

[629] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 20.

[630] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 20-21.

[631] Unified Requirements are adopted resolutions on matters directly connected to or covered by specific class rule requirements and practices of classification societies and the general philosophy on which the rules and practices of classification societies are established. Unified Requirements need to be incorporated in class rules and practices of member societies. Unified Requirements are minimum requirements. As such, each classification society remains free to set more stringent requirements (see in this regard: International Association of Classification Societies, "Unified Requirements", available at <www.iacs.org.uk/publications>).

rules.[632] Ultimately, the international community determines the acceptable level of risk associated with the conduct of marine transport and develops the standards accordingly. This can be done by governmental representation in the International Maritime Organisation (IMO).[633]

The IMO is the international standard-setting authority for the safety, security and environmental performance of international shipping. Its main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented.[634] The standards developed by the IMO can be prescriptive or goal-based.[635] Prescriptive standards imply that classification societies, under the aegis of IACS, develop Unified Interpretations (UIs) that clarify the intent and application of the international standards.[636] The IMO currently uses goal-based standards. It establishes clear, demonstrable and verifiable goals to the effect that a properly built, operated and maintained ship should create a minimal risk to its cargo, the crew and the environment.[637] The IMO, however, does not take over the work of societies by developing detailed class rules. Rather, it determines what has to be achieved in a general way. It is subsequently the task of classification societies and other actors in the maritime industry to ensure that IMO goals are met. Members of IACS are under an obligation to develop their rules in conformity with the standards laid down in the goal-based regulatory framework.[638]

188. Classification societies also issue certificates on behalf of flag States in their public role. The safety requirements that have to be met before a statutory certificate can be issued are laid down in international conventions, most of which are adopted by the IMO.[639] Some or all of these requirements may also be covered by particular class rules issued by the society.[640]

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[632] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications 2011, 7.

[633] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications 2011, 7.

[634] See for more information: <www.imo.org/en/About/Pages/Default.aspx>.

[635] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications 2011, 7.

[636] Unified Interpretations are resolutions on matters arising from implementing requirements of IMO Conventions or Recommendations. Such resolutions can involve uniform interpretations of provisions and matters in IMO Conventions that are left to the satisfaction of the national Administration or that are vaguely worded (see: International Association of Classification Societies, "Unified Interpretation", available at <www.iacs.org.uk/publications>).

[637] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications 2011, 7.

[638] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 38; International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications 2011, 7.

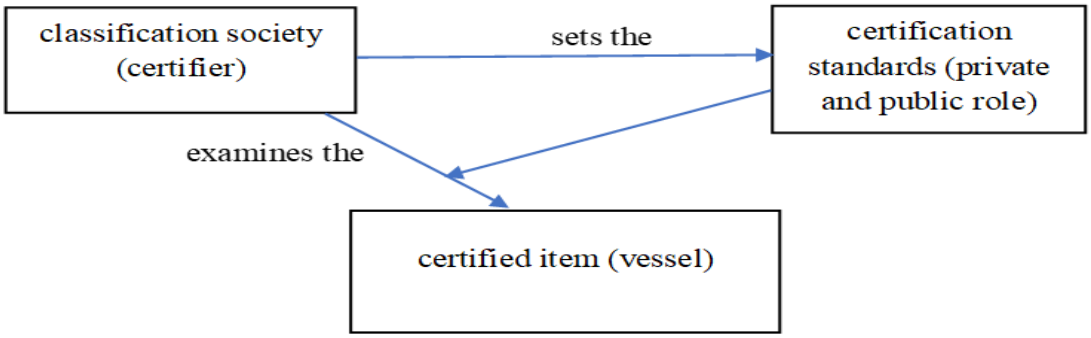
[639] See for example: International Convention for the Safety of Life at Sea and the International Convention on Load Lines.

[640] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications 2011, 8.

In addition to the actual certification, classification societies assist flag States as well. Flag States rely on their technical expertise for the implementation of new legal instruments and/or obligations adopted at the international level. Flag states often discuss technical matters with classification societies. The latter are generally also represented in technical committees of the administration for consultation, the exchange of information and the provision of advice.[641] IACS assists international regulatory bodies and organisations in the development and implementation of (statutory) regulations and standards in ship design and maintenance.[642] It was even given consultative status in the IMO in 1969. It remains the only non-governmental organisation granted observer status and able to develop and apply IMO Rules.[643]

189. In sum, classification societies develop and set their own standards, which they then apply to the certification of vessels. Standards can also by adopted by IACS, an organisation consisting of the very same certifiers that have to examine whether vessels comply with these standards (private role). Classification societies assist flag States or the IMO in developing statutory requirements. These requirements can subsequently be integrated in class rules (public role).

190. The following graphic visualises the standard-setting framework in the field of classification societies:



4.2. Standard-Setting and Product Certifiers or Notified Bodies

191. A quite different picture emerges when looking at product certification. Besides the actual certifier providing a "third-party attestation related to products, processes, systems or persons",[644] there are other actors involved in the certification process of products. Standard-setting bodies, for instance, establish the technical and safety standards items or

[641] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 38.

[642] See in this regard: Article 2(b) Charter International Association of Classification Societies, October 27, 2009 revised January 2018.

[643] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications 2011, 4.

[644] Clauses 5.2 and 5.5 ISO/IEC 17000:2004 Conformity assessment - Vocabulary and general principles, available at <www.iso.org/iso/catalogue_detail.htm?csnumber=29316>.

requesting entities have to comply with. These bodies provide their services at the inter-, supra- or national level.[645]

192. The International Organisation for Standardisation (ISO) is the most prominent example in this regard. The ISO is an independent non-governmental organisation and the world's largest developer of voluntary international standards. The ISO adopted more than 20,500 standards covering many industries ranging from technology to food safety and medical devices. ISO-standards provide guidelines for products, services and systems to ensure their quality, safety and efficiency.[646]

Besides the ISO 9000 family addressing aspects of quality management[647] and ISO 17065 containing requirements for bodies certifying products, services and processes,[648] specific ISOs have been adopted in the field of medical devices. For example, ISO 13485 contains requirements regarding the quality management system of manufacturers of medical devices.[649] Under this ISO, manufactures have to demonstrate their ability to design and produce devices that meet the applicable (safety and technical) requirements.[650]

Sectoral standard-setters operate at the international level as well. Reference can be made to the Forest Stewardship Council (FSC). The Council has developed principles and criteria that apply to FSC-certified forests around the world. The FSC sets standards for responsible forest management. Certifiers such as Bureau Veritas subsequently assess forest management by using the standards established by the FSC.[651] Another example is Fairtrade, which sets standards to tackle poverty and empower producers in the poorest countries in the world. Certifier FLO-CERT subsequently certifies whether products comply with the Fairtrade-standards.[652]

193. There are also three European Standardisation Organisations, namely the European Committee for Standardisation (CEN),[653] the European Committee for Electrotechnical Standardisation (CENELEC)[654] and the European Tele-communications Standards

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[645] J. DE BRUYNE & C. VANLEENHOVE, "Liability in the Medical Sector – The "Breast-taking" Consequences of the PIP Case", (5) *European Review of Private Law* 2016, 826-827.

[646] International Organization for Standardization, "About ISO", available at <www.iso.org/iso/home/about.htm>.

[647] See for more information: International Organization for Standardization, "ISO 9000 - Quality management", available at <www.iso.org/iso/home/standards/management-standards/iso_9000.htm>.

[648] International Organization for Standardization, "ISO/IEC 17065:2012", available at <www.iso.org/iso/catalogue_detail?csnumber=46568>.

[649] EMERGO Group, "What is ISO 13485 certification?", available at <www.emergogroup.com/resources/articles/what-is-iso-13485-certification>; BSI, "Quality Management System (QMS) ISO 13485 Certification", available at <www.bsigroup.com/en-GB/medical-devices/our-services/iso-13485>.

[650] International Organization for Standardization, "ISO 13485:2003", available at <www.iso.org/iso/catalogue_detail?csnumber=36786>.

[651] See for more information: <us.fsc.org/en-us/certification>.

[652] See for more information: <www.fairtrade.net/standards/our-standards.html> and <www.flocert.net/about-us>.

[653] See for more information: <www.cen.eu>.

[654] See for more information: <www.cenelec.eu>.

Institute (ETSI).[655] They develop and define general harmonised standards regarding products, materials, services and processes (CEN), electrotechnical engineering (CENELEC) and information and communication technologies (ETSI).[656]

Compliance with harmonised standards provides a presumption of conformity with the corresponding legal requirements for a specific product.[657] The MDD[658] as well as the Regulation on Medical Devices refer to harmonised standards. Medical devices must meet the essential requirements set out in Annex I of the applicable legislation. Medical devices that comply with the relevant (parts of) harmonised standards are presumed to be in conformity with the requirements in the Regulation covered by those standards or parts thereof.[659]

194. Standard-setting bodies also operate at a national level. A difference can be made between national standard bodies (NSBs) on the one hand and standard-developing organisations (SDOs) on the other hand.[660] Whereas NSBs coordinate the standard-setting process, SDOs develop the content of standards.[661] In Belgium, for instance, the *Bureau de Normalisation* develops and publishes standards.[662] In the US, the American National Standards Institute oversees the creation and use of norms and guidelines in nearly every sector.[663] In Germany, the *Deutsches Institut für Normung* (DIN) is the organisation responsible for developing standards in different sectors.[664]

195. Certifiers thus examine whether an item complies with the applicable standards. These standards, however, are developed by another body and not by the certifier.

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[655] See for more information: <www.etsi.org>.

[656] See in this regard also: Regulation 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, *OJ* L 316/12. It sets the framework for the European standardisation system. The Regulation contains rules with regard to the cooperation between the European Standardisation Organisations, national standardisation bodies, Member States and the Commission.

[657] European Commission, "Harmonised Standards", available at <ec.europa.eu/growth/single-market/european-standards/harmonised-standards/index_en.htm>.

[658] Articles 3 & 5 of Directive 93/42 concerning medical devices.

[659] Article 8 Regulation 2017/745 on medical devices.

[660] The ISO gathers national standard bodies within an international framework, namely one for each country. See in this regard: International Organization for Standardization, "ISO members", available at <www.iso.org/iso/about/iso_members.htm>.

[661] Durham College, "Standards: Standards Bodies", available at <guides.library.durhamcollege.ca/c.php ?g=316842&p=2116950>.

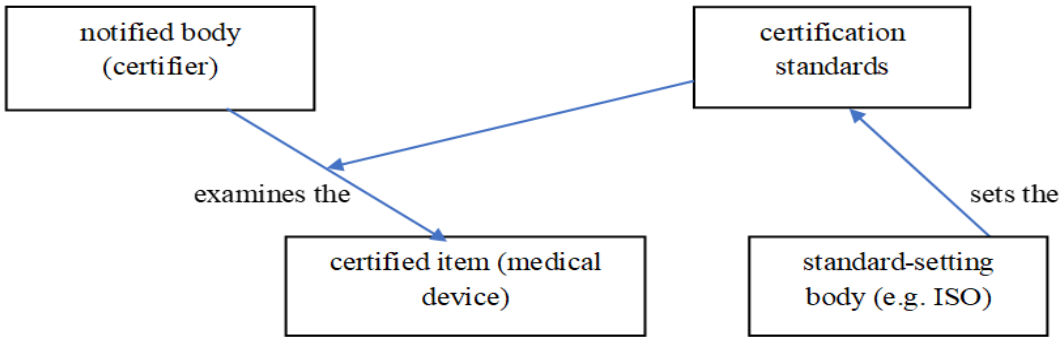
[662] Loi du 3 avril 2003 relative à la normalization, May 27, 2003; Arrêté royal relatif à l'agrément des opérateurs sectoriels de normalization published in the *Moniteur belge* on November 9, 2004. See for more information on the functioning of the Bureau voor Normalisatie/Bureau de Normalisation: <www.nbn.be>.

[663] American National Standards Institute, "Introduction to ANSI", available at <www.ansi.org/ about_ansi/introduction/introduction.aspx?menuid=1>. See for an overview of standards developing organisations in the US:<www.standardsportal.org/usa_en/resources/sdo.aspx>.

[664] See for more information: <www.din.de>.

The example of notified bodies can be used as an illustration. Medical devices have to comply with the essential requirements contained under the applicable legislation (e.g. on design and construction). A notified body needs to be involved in the conformity assessment procedure of certain devices. The body determines whether the medical device meets all the applicable essential requirements to get the CE marking.[665] Once the notified body established that a manufacturer or the latter's device complies with the assessment criteria, the manufacturer can issue a CE certificate. This certificate thus shows that a medical device meets the safety and technical standards.[666]

196. The following graphic illustrates the standard-setting framework for product certifiers in general and notified bodies in particular:



4.3. Standard-Setting and Credit Rating Agencies

197. There is a lack of real independent standards against which CRAs have to evaluate an issuer's creditworthiness or the latter's financial instruments. As opposed to product certifiers, notified bodies or classification societies, there is a lack of an accepted 'check list' an item needs to comply with. Instead, the focus especially lies on the methodology CRAs use to determine the rating. A standard is defined as a required or agreed level of quality or attainment.[667] A method refers to an established or prescribed practice or systematic process of achieving or approaching certain ends with accuracy and efficiency, usually in an ordered sequence of fixed steps.[668]

198. The IOSCO is recognised as a global standard-setter for the securities sector. It develops, implements and promotes compliance with internationally recognised standards for securities regulation. However, it did not adopt standards CRAs can use to determine the creditworthiness.[669] This is quite obvious as there is not a real product in the traditional meaning of the word that credit rating agencies need to certify. CRAs

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[665] BSI Notified Body, "Want to know more about the Notified Body?".

[666] BSI Notified Body, "Want to know more about the Notified Body?".

[667] See the definition of 'standard' in the Online Oxford Dictionary available at <en.oxforddictionaries.com/definition/standard>.

[668] See the definition of 'method' available at <www.businessdictionary.com/definition/method.html> and in the Oxford Living Dictionaries.

[669] See for more information: <www.iosco.org/about/?subsection=about_iosco>.

establish the creditworthiness of an issuer or the latter's financial instruments by using their own analytical models, assumptions and expectations.[670]

199. Standard-setting as such is not of primary importance in the context of CRAs. Rather, the focus lies on the use of appropriate rating methodologies. Both the IOSCO Code of Conduct Fundamentals for CRAs as well as applicable EU Regulations on CRAs contain obligations on the use of rating methodologies and disclosure of the rating process. More specifically, CRAs have to use rigorous, systematic, continuous rating methodologies that are subject to validation based on historical experience, including back-testing.[671] The EU adopted legislation explicitly and clearly defining when methodologies are considered rigorous,[672] systematic,[673] continuous[674] and based on historical experience.[675] Several additional requirements apply when CRAs rate structured products. For instance, they have to assess whether the existing methodologies and models to determine ratings of structured products are appropriate when the risk characteristics of assets underlying the product changed materially.[676]

200. The importance of using appropriate methodologies has also been addressed in cases dealing with the liability of CRAs. The *Bathurst* case illustrates the importance of rating methodologies. S&P violated its duty of care because the CRA did not have reasonable grounds to assign the rating. The rating was not the result of reasonable care and skill.[677] S&P did not develop its own model for rating CPDOs but instead relied on the model created by ABN Amro. The CRA did not give any consideration to the model risk when assigning the credit rating.[678] S&P adopted a 15% volatility figure which had been provided to it by ABN Amro. There was no evidence that S&P checked the 15% volatility

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[670] SEC Office of Investor Education and Advocacy, "The ABCs of Credit ratings", Investor Assistance (800) 732-0330, SEC Pub. No. 161 (10/13). Nonetheless, there can be a link between rating methodologies and standards. In the *Abu Dhabi* case, for instance, the court held that the plaintiffs sufficiently pleaded facts showing that defendants knew the ratings were false. In the summer of 2004, both CRAs independently unveiled new rating models that eased the CRAs' standards for evaluating the creditworthiness of nonprime securities (*Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 178 (S.D.N.Y. 2009).

[671] Article 8.3 Regulation 1060/2009 on credit rating agencies. See for more information: I.H.Y. CHIU, "Regulating Credit Rating Agencies in the EU: In Search of a Coherent Regulatory Regime", (271) *European Business Law Review* 2014, 285. See for more information also the discussion *supra* in nos. 47-48.

[672] Article 4 Commission Delegated Regulation 447/2012.

[673] Article 5 Commission Delegated Regulation 447/2012.

[674] Article 6 Commission Delegated Regulation 447/2012.

[675] Article 7 Commission Delegated Regulation 447/2012.

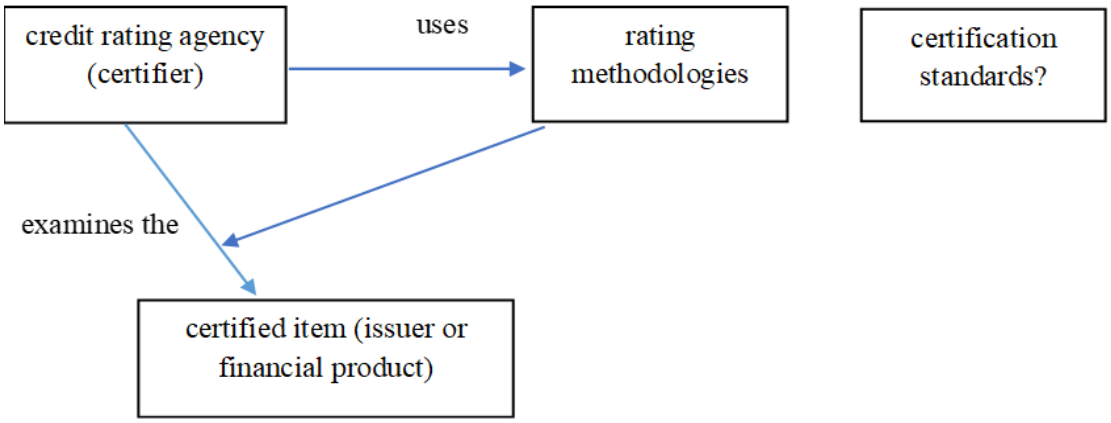
[676] See in this regard Article 1.7-4 of the IOSCO, "Code of Conduct Fundamental for Credit Rating Agencies", August 2008.

[677] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd* (No 5) [2012] FCA 1200, paragraphs 2814-2836; *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, paragraphs 12, 503 & 722.

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

figure itself. However, S&P could have easily calculated the volatility and would then have realised that the correct figure was around 28%.

201. The following graphic illustrates the standard-setting framework for CRAs:



4.4. Summary

202. Standards are established differently in each certification sector. In their private role, classification societies establish standards themselves in the form of class rules. They also advise and assist international organisations in the development of safety standards. The standards for products and medical devices are not established and adopted by certifiers. Instead, independent organisations determine the standards that certifiers subsequently use when assessing the items. The development of standards in the field of CRAs is less clear. There is no entity establishing standards for CRAs. Instead, they use their own methodologies and assumptions to determine the rating.

5. The Required Independence of Certifiers

203. Another characteristic is a certifier's independence towards a requesting entity. The analysis in the previous chapter already showed that certifiers have to remain independent when issuing the certificate.[679] However, when taking a closer look at all the sources – contracts, general terms and conditions, case law and supranational legislation – it becomes clear that there are different ways to ensure their independence.

204. Supranational policymakers, for instance, extensively intervened to regulate the independence of capital-market certifiers such as CRAs and auditors. The EU has not addressed the position of classification societies in their private role. It only adopted a directive dealing with ROs. The latter does not contain 'hard-core' provisions on their independence similar to the ones included in legislation dealing with financial gatekeepers. The EU did also not adopt legislation on the independence of product certifiers in general. There is, nonetheless, sectorial legislation dealing with the independence of conformity assessment bodies such as notified bodies. One question that arises is why the EU adopted 'hard-core' provisions in the field of capital-market

[679] See in this regard also the discussion *supra* in part nos. 66-76.

certifiers but refrained to do so for other certifiers. Three reasons can be put forth in this regard.

205. First, the market itself might not sufficiently discipline capital-market certifiers to truly remain independent vis-à-vis requesting entities. CRAs, for instance, turned out to have extensive knowledge on the design and structure of complex securities in the past. They became vital players for the marketability of structured financial products.[680] IOSCO published a report on the role of CRAs in structured finance markets. It concluded that "many investors and market participants effectively outsourced their own valuations and risk analyses of [structured financial products] to the CRAs".[681] Structured finance ratings were one of the fastest growing income streams for the major CRAs. As such, they might have been less inclined to use the appropriate, conservative and safe assumptions in their methodologies to maintain (sufficient) transaction flows.[682] Reference can also be made to the *Abu Dhabi* case. CRAs closely worked together with the issuer to structure the products in such a way they could obtain the highest ratings. In exchange for these allegedly unreasonably high ratings, the CRAs received fees in excess of three times their normal fees for rating the products as well as fees that were linked to the successful sale of the rated products.[683] Such practices are less evident for notified bodies or classification societies. They often do not have the resources or capacity to produce medical devices or build entire vessels.

206. Second, CRAs do not perform duties on behalf of the government in the same way as classification societies do when acting as ROs. Classification societies might be more vigilant in their private role considering that this could influence national authorities in the future when deciding which RO will perform the functions on its behalf (public role). Furthermore, classification societies will be declined IACS-membership if they do not remain independent from the shipowner. There are 'external' triggers ensuring that classification societies remain independent from the shipowners.

Such triggers also exist for product certifiers as well as notified bodies. Product certifiers often need to be accredited before they can provide certification services. In this regard, ISO 17065 contains several provisions on the independence and impartiality of certifiers.[684] The lack of independence and impartiality might imply that certifiers will not get the required accreditation. This could result in a loss of business and financial

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[680] T.J SINCLAIR, "From Judge To Advocate: The Credit Rating Enigma", New Left News, December, 18, 2012, available at <newleftproject.org/index.php/site/article_comments/from_judge_to_advocate_the_credit_rating_enigma>

[681] Technical Committee of the International Organization of Securities Commission, "The Role of Credit Rating Agencies in Structured Finance Markets. Final Report", May 2008, 2.

[682] Technical Committee of the International Organization of Securities Commission, "The Role of Credit Rating Agencies in Structured Finance Markets. Final Report", May 2008, 12. See for more information on the role of CRAs in structured finance ratings: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 93-120.

[683] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 166-167 & 179-180 (S.D.N.Y. 2009*).*

[684] See the discussion and references *supra* in nos. 75-76.

incomes. Thus, product certifiers might have more incentives to remain independent to get and maintain their accreditation.[685]

Notified bodies are the only entities that can carry out the conformity assessment of medical devices when third-party intervention is required by EU law.[686] Member States have to notify those conformity assessment bodies within their jurisdiction that are technically competent to assess compliance of medical devices with the applicable requirements.[687] More specifically, notified bodies have to fulfil the requirements set out in the MDD or the MDR and the principles laid down in Decision 2008/768.[688] In essence, they have to operate in a competent, non-discriminatory, transparent, neutral and independent way.[689] The notifying authority can restrict, suspend or withdraw the notification if the notified body no longer fulfils the requirements or its obligations under Decision 2008/768 (e.g. on independence and impartiality). As a consequence, notified bodies are induced to offer their services in an independent way to safeguard their recognition by Member States in the future.[690]

207. Finally, the financial crisis showed that the lack of a CRA's independence can have far-reaching consequences on a global scale. Incorrect ratings of structured products contributed to the collapse of the subprime-mortgage market in the US, which eventually led to the 2008 financial crisis affecting the global economy (cf. systemic risk).[691] The lack of independence of other certifiers does not always have the same worldwide consequences. For instance, the PIP case mainly affected distributors and purchasers of the defective breast implants. The use of defective breast implants, however, did not affect the global stability in the world.[692]

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[685] ISO, "Certification", available at <www.iso.org/iso/home/standards/certification.htm>.

[686] European Commission, "Conformity assessment and Notified bodies", available at <ec.europa.eu/enterprise/policies/single-market-goods/internal-market-for-products/conformity-assessment-notified-bodies/index_en.htm>.

[687] See in this regard especially Article 16 Directive 93/42 concerning medical devices; Article 36 and Annex VII Regulation 2017/745 on medical devices.

[688] Decision 768/2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC.

[689] Article R17 Decision 768/2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC; Annex VII Regulation 2017/745 on medical devices.

[690] Also see the discussion *supra* in nos. 175-180.

[691] See for a discussion on the role of CRAs in the financial crisis: N.S. ELLIS, L.M. FAIRCHILD & F. D'SOUZA, "Is Imposing Liability on Credit Rating Agencies a Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis", (17) *Stanford Journal of Law, Business & Finance* 2012, 192-203.

[692] The stability of the financial system can be jeopardised by a system risk (A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 160). If refers to the risk or the probability of breakdowns in an entire system, as opposed to breakdowns in individual parts or components, and is evidenced by comovements (correlation) among most or all part (G.G. KAUFMAN & K. SCOTT, "What Is Systemic Risk, and Do Bank Regulators Retard or Contribute to It?", (7) *Independent Review* 2003, 371). Misconduct by CRAs can contribute to the collapse of the financial system as a whole (A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 160). This can affect society in general, which is less likely for misconduct by other certifiers such as classification societies or notified bodies.

6. Conclusions: Characteristics of Certifiers

208. This chapter shed light on some characteristics of certifiers that can be important from a legal point of view. The analysis revealed that differences occur in several ways. These, for example, related to a certifier's independence, its relationship with the government or supervision on its (certification) activities. Certifiers are thus not all alike and they can have many 'faces'.

209. The findings of this chapter might be relied upon by policymakers when drafting rules or taking other actions dealing with certifiers. The conclusions can especially be used to examine which initiatives should be taken and whether they will have the intended effects. This can be illustrated with some examples. Suppose that certifiers decide to offer their services in a new sector. Policymakers might in those circumstances have to adopt additional legislation, for instance with regard to a certifier's independence towards a requesting entity. Different options are possible in this regard. They could draft legislation including specific requirements on a certifier's independence or, by contrast, decide to accredit or designate third-party certifiers complying with certain requirements. Likewise, policymakers might need to adopt legislation dealing with the supervision on certifiers. When certifiers have already established self-regulatory mechanisms, public oversight becomes less necessary. This in turn will save costs that are associated with adopting legislation that imposes public oversight on certifiers. On a more general level, the outcome of this chapter can provide a clear overview of those elements that might be of importance when regulating certifiers. It can be used by policymakers to identify potential shortcomings in the existing legal framework of certifiers, and allow them to pursue a more targeted and effective approach.

Chapter III - The Third-Party Liability of Certifiers

210. Individuals or organisations have already filed law suits against certifiers on different grounds and in several jurisdictions alleging that the certificates they relied upon were inaccurate. In this chapter, some important aspects of such third-party liability claims against certifiers are examined. After a brief overview of supranational legislation (part 1.), the situation at the national level is examined more thoroughly (part 2.). Based on this analysis, some concluding remarks are provided (part 3.).

1. The Liability of Certifiers at the Inter- and Supranational Level

211. The previous chapter showed that different elements related to certifiers are covered by EU legislation. These deal with the supervision on the working of certifiers, their registration and independence or the relationship with national governments. Another element that could be interesting to examine is to which extent supranational policymakers addressed the third-party liability of certifiers. I will shed light on the liability of CRAs (part 1.1.), auditors (part 1.2.),[693] classification societies (part 1.3.) and notified bodies (part 1.4.). The main findings are summarised in a conclusion (part 1.5.).

1.1. The Liability of Credit Rating Agencies

212. At the international level, the IOSCO took several initiatives regarding the activities and conduct of CRAs. Examples are the Statement of Principles Regarding the Activities of Credit Rating Agencies[694] or the Code of Conduct Fundamentals for CRAs.[695]

None of these initiatives, however, deal with the liability of CRAs. The Code of Conduct only contains provisions that can be used by courts to determine the (appropriate) level and standard of care for a reasonable and prudent CRA.[696] More importantly, shortcomings remain with regard to the Code itself. Besides the fact that some CRAs fail(ed) to fully implement the Code,[697] it uses undefined terms (e.g. sufficient or

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[693] Auditors are specifically included in this chapter for two reasons. On the one hand, the context in which supranational policymakers adopted legislation on certifiers operating in the financial sector can be different. This might have an influence on the regulation of their liability. On the other hand, the reliance on auditors might be of importance to explain why the liability of certifiers has been regulated differently at the supranational level.

[694] The Principles were designed to improve the operation of CRAs. The Principles contain high-level objectives and guidelines that address the quality and integrity of the rating process, improve the independence of CRAs, prevent potential conflicts of interests and enhance the transparency and timelines of ratings disclosure (Technical Committee of the International Organization of Securities Commission, "IOSCO Statement of Principles Regarding the Activities of Credit Rating Agencies", September 25, 2003).

[695] Technical Committee of the International Organization of Securities Commission, "Code of Conduct Fundamentals for Credit Rating Agencies", May 2008.

[696] U.S. *v. McGraw-Hill Companies*, CV 13-0779 DOC(JCGx), Order Denying Defendant's Motion to Dismiss, 7-11 (C.D. Cal. 2013).

[697] While the Code of Conduct Fundamentals had been implemented by the major CRAs (Fitch, Moody's and S&P), many small or mid-sized CRAs did not or partly implement the Code. See in this regard: Technical Committee of the International Organization of Securities Commission, "A Review of Implementation of the IOSCO Code of Conduct Fundamentals for Credit Rating Agencies", March 2009, 8-9, available at <www.iosco.org/library/pubdocs/pdf/IOSCOPD286.pdf>. Also see: A. DARBELLAY,

reasonable)[698] and "suffers from critical limitations".[699] The Code is also based on voluntary compliance by CRAs and cannot be enforced by the IOSCO.[700] The Code does not contain sanctions or a specific liability regime that regulators can use if CRAs breach one of the Fundamentals.[701] Furthermore, national legislation in the jurisdictions where the CRA operates prevails over the Code of Conduct Fundamentals.[702]

213. The extent to which CRAs can be held liable in tort or contract is thus primarily determined by supra- and national law.[703] In this regard, Article 35a of Regulation 1060/2009 as introduced by Article 1(22) of Regulation 462/2013 contains the core provision on the liability of CRAs vis-à-vis both issuers and investors. This is remarkable because the EU often remains silent on the private law effects of financial market legislation.[704]

214. CRAs are only liable when they intentionally or with gross negligence commit any of the in Annex III listed infringements.[705] CRAs cannot face liability under the Regulation for simple negligence or only because they issued a 'wrong' rating. The

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Regulating Credit Rating Agencies, Cheltenham, Edward Elgar, 2013, 66 with further references; K.S. CHARLES, "Regulatory Imperialism: The Worldwide Export of European Regulatory Principles on Credit Rating Agencies", (19) *Minnesota Journal of International Law* 2010, 409-410; M.B. HEMRAJ, "Soft law regulation of the credit rating agencies", (35) *Company Law* 2014, 10-16.

698 H. MCVEA, "Credit Rating Agencies, The Subprime Mortgage Debacle and Global Governance: The EU Strikes Back", (59) *International & Comparative Law Quarterly* 2010, 718.

699 H. MCVEA, "Credit Rating Agencies, The Subprime Mortgage Debacle and Global Governance: The EU Strikes Back", (59) *International & Comparative Law Quarterly* 2010, 719; K.S. CHARLES, "Regulatory Imperialism: The Worldwide Export of European Regulatory Principles on Credit Rating Agencies", (19) *Minnesota Journal of International Law* 2010, 409-410.

700 J. DE HAAN & F. AMTENBRINK, "Credit Rating Agencies", *DNB Working Paper No. 278*, January 2011, 17-18, available at <https://ssrn.com/abstract=1760951>; K.S. CHARLES, "Regulatory Imperialism: The Worldwide Export of European Regulatory Principles on Credit Rating Agencies", (19) *Minnesota Journal of International Law* 2010, 409-410.

701 M.B. HEMRAJ, "Soft law regulation of the credit rating agencies", (35) *Company Law* 2014, 15-16.

702 Technical Committee of the International Organization of Securities Commission, "Code of Conduct Fundamentals for Credit Rating Agencies", May 2008, 2.

703 See in this regard also: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 76-84.

704 W. DEN HOLLANDER, "European tort law through the front door: civil liability for credit rating agencies", *Leiden Law Blog*, July 8, 2013, available at <leidenlawblog.nl/articles/european-tort-law-through-the-front-door-civil-liability-of-credit-rating-a>. See for example the discussion of the Markets in Financial Instruments Directive (MiFID) on private law: M. KRUITHOF, "De privaatrechtelijke werking van de MiFID-2004 gedragsregels: een analyse van de mate waarin zij de wederzijdse rechten en plichten van dienstverlener en cliënt kunnen aanvullen en beperken", in: Instituut Financieel Recht, *Financiële regulering in de kering*, Antwerp, Intersentia, Reeks Instituut Financieel Recht, 2012, 273-356; M. TISON, "The Civil Law Effects of MiFID in a Comparative Law Perspective", Financial Law Institute Working Paper No. WP 2010-05, 2010; O. ELOOT & H. TILLEY, "Beleggersbescherming in MiFID II en MiFIR: een overzicht en toetsing van enkele recente nationale beleggersbeschermende maatregelen", (78) *Bank- en Financieel Recht-Droit Bancaire et Financier* 2014, 179-201; D. BUSCH, "The Private Law Effect of MiFID: the Genil Case and Beyond", (13) *European Review of Contract Law* 2017, 70; D. BUSCH, "Why MiFID matters to private law - the example of MiFID's impact on an asset manager's civil liability", (7) Capital Markets Law Journal 2012, 386; O.O. CHEREDNYCHENKO, "Financial Consumer Protection in the EU: Towards a Self-Sufficient European Contract Law for Consumer Financial Services?", (10) *European Review of Contract Law* 2014, 476.

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

Regulation does not impose liability for CRAs when they commit the infringement by mistake or because they did not display reasonable care when issuing the rating. This standard of fault is "appropriate" as rating activities involve a degree of assessment of complex economic factors. Using different methodologies may lead to contrasting rating results, none of which can be considered as incorrect.[706]

215. The infringement of the Regulation must also have (had) an impact on the rating. It is the investor who has to present accurate and detailed evidence indicating that the CRA has committed an infringement of the Regulation and that this infringement has an impact on the rating. This implies that the rating issued by the CRA has to be different from the rating that would have been issued if the CRA had not committed that infringement.[707] The competent court has to assess whether the presented information is accurate and detailed, taking into account that the investor or issuer may not have access to information which is purely within the sphere of the CRA.[708]

216. The Regulation also requires a link between the infringement and the loss suffered by the investor in two ways. First, the investor has to establish that he reasonably relied on the rating in accordance with Article 5a(1) of the Regulation[709] or otherwise with due care.[710] What is to be understood under the notion 'reasonable reliance' is unclear and not defined in the Regulation. It could imply that a CRA will not incur liability if the investors mentioned in the Regulation (e.g. investment firms, insurance undertakings, reinsurance undertakings or institutions for occupational retirement provision) did not make their own credit risk assessment but relied solely on ratings to assess the creditworthiness of an entity or financial instrument.[711] Second, the investor must have reasonably relied on the rating for a decision to invest into, hold onto or divest from a financial instrument covered by that credit rating.[712]

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[706] Recital (33) Regulation 462/2013 amending Regulation 1060/2009 on credit rating agencies. Based on this reasoning, other certifiers having similar obligations during the certification process might be subject to a same standard of fault, namely intention or gross negligence. However, the analysis will show that this is not the case. A possible explanation for this difference in treatment relates to the goal pursued by supranational legislation. The wording used in Recital (33) of the Regulation on CRAs shows that such a standard of fault aims to prevent a rating agency's unlimited liability. Supranational legislation dealing with the other certifiers includes other mechanisms preventing unlimited liability. Examples are financial caps or proportionate liability. Therefore, a standard of gross negligence or intention is not necessary for the other certifiers.

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

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

[709] This article tries to overcome over-reliance by financial institutions on credit ratings. See for more information on 'transaction causation', which requires the third party plaintiff to prove that he would have taken another decision in the absence of the wrongful act on the part of the defendant certifier: E. VANDENDRIESSCHE, *Investor Losses: A Comparative Legal Analysis of Causation and Assessment of Damages in Investor Litigation*, Cambridge, Intersentia, 2015, 189-233. Also see the discussion *infra* in nos. 615-621.

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

[711] Article 5a, 1 Regulation 462/2013 amending Regulation 1060/2009 on credit rating agencies.

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

217. Any exclusion of liability for a CRA's gross negligence or intention in rating contracts is deprived of legal effect.[713] As opposed to the situation under the Proposal of a Regulation, CRAs are able to limit their liability in advance where that limitation is reasonable and proportionate and allowed by the applicable national law.[714] Any limitation that does not comply with these requirements or any contractual exclusion of the liability is deprived of legal effect.[715] Whether a limitation is reasonable and proportionate has to be interpreted in the light of national legislation. The English Credit Rating Agencies (Civil Liability) Regulations 2013, for example, contain elements to determine whether the limitation of liability is reasonable and proportionate.[716] This depends on whether the claimant is an investor or an issuer (regulation 12) and the extent to which the rating was solicited (regulation 10) or unsolicited (regulation 11).[717]

218. If all of the requirements are met – namely (1) an intentional or gross negligent infringement, (2) impact of the infringement on the rating, (3) reasonable reliance on the rating (4) for an investment decision regarding a financial instrument – the investor may claim compensation from the CRA for its financial losses.[718]

Several problems, however, remain with regard to the application of the Regulation. There is a high threshold of proof for third parties (e.g. reasonable reliance on the rating and the impact on decision-making processes regarding a financial instrument). In a recent decision, the *Oberlandesgericht* in Düsseldorf rejected an investor's claim on the basis of Article 35a as the issued ratings did not cover the purchased financial instrument (the bond) but solely the company.[719] The requirement of reasonable reliance on the rating

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[713] Remarkable is that the draft regulation contained more far-reaching proposals. The liability of CRAs for gross negligence or intention could, for example, *not be excluded* or *limited* in advance by agreement. Any clause excluding or limiting the liability in advance was deemed null and void. See: Article 1(20) Proposal for a Regulation amending Regulation 1060/2009 on credit rating agencies, COM/2011/0747 final - 2011/0361 (COD).

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

[715] Article 35a, 3 Regulation 1060/2009 as introduced by Article 1 (22) of Regulation 462/2013. The Regulation on CRAs does, however, not contain rules on the limitation or exclusion of the liability of CRAs for ordinary negligence. The opposability and validity of such clauses is governed by national law (see for more information the discussion *infra* in nos. 552-576).

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

[717] The Credit Rating Agencies (Civil Liability) Regulations 2013, No. 1637.

[718] Article 35a, 1 Regulation 1060/2009 as introduced by Article 1(22) of Regulation 462/2013. See for a discussion: F. DE PASCALIS, "Civil Liability of Credit Rating Agencies from a European Perspective: Development and Contents of Art 35(a) of Regulation (EU) No 462/2013", (2) *International and Comparative Corporate Law Journal* 2015, 41-70.

[719] Court of Appeal Düsseldorf, February 8, 2018, I-6 U 50/17, *Neuen Juristischen Wochenschrift* 2018, 1615, paragraphs 16-26 as reported by: H.C. SALGER & A. BARASIŃSKI, "Credit Rating Agencies Not Liable to Investors for Corporate Ratings", Schalast News, February 13, 2018, available at

is problematic from another point of view as well. Institutional investors are the group of third parties most likely to file a claim against CRAs. As Article 5a(1) of the Regulation requires them to make their own assessment and not solely rely on ratings, it is virtually impossible for institutional investors to argue they still relied on the rating to justify the claim against a CRA. If the rating and the own assessment are identical, the investor does not rely solely on the credit rating. An institutional investor exercising due care cannot rely on a rating when he has reason to believe that this rating is inaccurate. Such a reason exists if his own assessment is different than the given credit rating. Private investors, by contrast, are not required to conduct their own risk assessment. Such investors have to prove that they reasonably relied on the rating alone, which will be difficult. The requirement for investors to show that they exercised due care when using the rating "in practice restricts liability claims to private investors, which was not initially intended by the legislature. A liability claim by those most likely to sue [institutional investors] is thus practically prevented".[720] In sum, the regime in Article 35a remains a "theoretical claim".[721] In addition, the Regulation refers to national law for the interpretation and application of notions such as damage, gross negligence, due care, reasonably relied and impact. Finally, matters concerning the liability of CRAs that are not covered by the Regulation such as causation and liability for ordinary negligence are governed by national law.[722]

1.2. The Liability of Auditors

219. A quite similar picture emerges for auditors when looking at the international level. Taking into account the lack of international legislation dealing with their liability, the EU intervened and addressed the auditor's liability on several occasions. It mainly did so to strengthen the working of the internal market.[723] The EU adopted Directive 2006/43/EC on Statutory Audits (SAD). Article 31 SAD urged the Commission to present

<www.schalast.com/en/aktuelles/news/2018/03/05/Credit_Rating_Agencies_Not_Liable_Investors_Corporate_Ratings.php>.

[720] M.J. MÖLLERS & C. NIEDORF, "Regulation and Liability of Credit Rating Agencies – A More Efficient European Law?", (11) *European Company and Financial Law Review* 2014, 347.

[721] T.M.J. MÖLLERS & C. NIEDORF, "Regulation and Liability of Credit Rating Agencies – A More Efficient European Law?", (11) *European Company and Financial Law Review* 2014, 348. Other studies have shown the shortcomings of the liability regime included in the Article from a law and economics point of view (e.g. J. KLEINOW, "Civil Liability of Credit Rating Companies: Quantitative Aspects of Damage Assessment from an Economic Viewpoint", (11) *International and Comparative Corporate Law Journal* 2015, 134-151; A. HORSCH, "Civil Liability of Credit Rating Companies – Qualitative Aspects of Damage Assessment from an Economic Viewpoint", January 9, 2015, University of Oslo Faculty of Law Research Paper No. 2015-08). RISSO concludes that a higher degree of harmonisation of EU legislation on CRAs is necessary to increase its effectiveness (G. RISSO, "Investor Protection in Credit Rating Agencies' Non-Contractual Liability: The Need for a Fully Harmonised Regime", (5) *European Law Review* 2015, 706-721).

[722] Article 35a, 4 Regulation 1060/2009 as introduced by Article 1(22) of Regulation 462/2013.

[723] European Commission, "Green Paper on the role, the position and the liability of the statutory auditor within the European Union", COM(96), October 28, 1996, 7. See also: A. SAMSONOVA & C. HUMPHREY, "Transnational governance in action: The pursuit of auditor liability reform in the EU", Cardiff, IPA Conference, 2012, 18-19.

a report on the impact of national liability rules with regard to statutory audits on European capital markets and on the insurance conditions for statutory auditor.[724]

220. Based on Article 31, London Economics[725] issued the *Study on the Economic Impact of Auditor's Liability Regimes*.[726] The study concluded that the costs of an unlimited liability regime for auditors would exceed its benefits. The combination of unlimited liability claims against auditors and a restricted availability of liability insurance coverage would lead to catastrophic consequences for the profession. It would not only increase claims against auditors and the likelihood of audit companies to fail, but threaten the functioning of the economy in general. The study also found that a limited liability regime would reduce concentration in the market segment of statutory audits for large – but not very large – companies. Such a regime might also help audit firms to retain experienced staff, especially partners. The study, therefore, suggested limiting the auditor's liability.[727]

221. Against this background, the European Commission adopted Recommendation 2008/473 on the limitation of the civil liability of statutory auditors and audit firms.[728] Except in cases of intention, a notion that is not defined in the Recommendation and the interpretation of which is thus left to the discretion of national courts, auditors should be able to limit their liability in case they breach their professional duties.[729]

The Recommendation lists three methods that Member States can use to limit the auditor's liability: (1) a maximum financial amount or a formula allowing for the calculation of such an amount; (2) a set of principles by virtue of which a statutory auditor/audit firm is not liable beyond its actual contribution to the loss suffered by a claimant and is accordingly not jointly and severally liable with other wrongdoers (proportionate liability); and (3) a provision allowing any company to be audited and the auditor or audit firm to determine a limitation of liability in an agreement. Where liability is limited by such an agreement, Member States should ensure that the agreement is subject to judicial review. The limitation is decided collectively by the members of the administrative, management and supervisory bodies of the company to be audited. Such decision needs to be approved by the shareholders of the company to be audited. The

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[724] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, *OJ* L 157.

[725] London Economics is one of Europe's leading specialist policy and economics consultancies.

[726] London Economics in association with Professor R. EWERT, "Study on the Economic Impact of Auditors' Liability Regimes", (MARKT/2005/24/F), Final Report to EC-DG Internal Market and Services, September 2006, available at <ec.europa.eu/internal_market/auditing/docs/liability/auditors-final-report_en.pdf>.

[727] London Economics in association with Professor R. EWERT, "Study on the Economic Impact of Auditors' Liability Regimes", (MARKT/2005/24/F), Final Report to EC-DG Internal Market and Services, September 2006, xl-xlvi, 153-207.

[728] Commission Recommendation 2008/473/EC of 5 June 2008 concerning the limitation of the civil liability of statutory auditors and audit firms, *OJ* L162/39.

[729] Recital (4) Commission Recommendation 2008/473 concerning the limitation of the civil liability of statutory auditors and audit firms.

limitation and any modification thereof should be published in the notes to the accounts of the audited company.[730]

222. Taking into account the differences between the national liability systems,[731] Member States have to choose a method of limitation which is most suitable for their liability system[732] whilst ensuring, however, that the limitation does not prejudice the right of any injured party to be fairly compensated.[733] The limitation of liability applies in the relationship with the company that is being audited, as well as against any third party entitled under national law to bring a claim for compensation.[734] That means that Member States are given much discretion to determine whether and which third parties can claim recovery from the auditor in the first place.[735]

1.3. The Liability of Classification Societies

223. Similar to CRAs and auditors, there is no international legislation dealing with the liability of classification societies. The *Comité Maritime International* (CMI)[736] established a Joint Working Group on the Study of Issues of Classification Societies in June 1992. The Group was required to study the duties and the scope of the liability of classification societies. During the first Session, however, it was decided that issues of statutory limitation and the regulation of civil liability of classification societies would not be examined.[737]

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[730] Recommendation 5 Commission Recommendation 2008/473 concerning the limitation of the civil liability of statutory auditors and audit firms.

[731] See for a discussion of the liability of auditors in Belgium and a comparative overview: I. DE POORTER, *Controle van financiële verslaggeving: revisoraal en overheidstoezicht*, Antwerp, Intersentia, 2007, 183-305.

[732] Recital (5) of Recommendation 2008/473 concerning the limitation of the civil liability of statutory auditors and audit firms.

[733] Recital (4) of Recommendation 2008/473 concerning the limitation of the civil liability of statutory auditors and audit firms.

[734] Recommendation 3 in Recommendation 2008/473 concerning the limitation of the civil liability of statutory auditors and audit firms.

[735] See for a discussion of the (shortcomings in the) Recommendation and liability of auditors in the EU: C. FLORES, "New trends in auditor liability", (12) *European Business Organization Law Review* 2011, 420; M. OJO, "Limiting audit firms' liability: A step in the right direction? (Proposals for a new audit liability regime in Europe revisited, Bremen", MPRA Paper No. 14878, 2009, 8; A. SAMSONOVA & C. HUMPHREY, "Transnational governance in action: The pursuit of auditor liability reform in the EU", Cardiff, IPA Conference, 2012, 37; P. GIUDICI, "Auditors' multi-layered liability regime", (13) *European Business Organization Law Review* 2012, 522; W. DORALT, A. HELLGARDT, K.J. HOPT & P.C. LEYENS, "Auditor's Liability and its impact on the European Financial Market", (67) *Cambridge Law Journal* 2008, 63; I. DE POORTER, "Auditor's liability towards third parties within the EU: A comparative study between the United Kingdom, the Netherlands, Germany and Belgium", (3) *Journal of International Commercial Law and Technology* 2008, 68.

[736] The CMI is a non-governmental not-for-profit international organisation established in Antwerp in 1897. It aims to contribute by all appropriate means and activities to the unification of maritime law.

[737] CMI, *CMI Yearbook 1994*, Antwerp, CMI Headquarters, 1994, 229.

The Group's activities were, nevertheless, useful as the Principles of Conduct for Classification Societies were established.[738] These Principles are considered as recognised and widely accepted standards to evaluate the activities of classification societies.[739] They apply to all classification societies whether they are member of IACS or not and cover private and public services.[740] Compliance with the Principles of Conduct is seen as *prima facie* evidence that a classification society has not been negligent.[741]

224. The Joint Working Group also drafted Model Contractual Clauses for use in agreements with the shipowner (private role) and Flag states (public role).[742] The idea behind these Clauses was to provide a uniform system of contractual liability for classification societies and an appropriate limitation of that liability. However, the draft Clauses have not been adopted by the CMI because of diverging opinions between shipowners and classification societies on the maximum limitation of liability. They did not address a society's liability towards third parties either.[743] Nevertheless, the Clauses are relevant because they serve as guidelines for classification societies when drafting their General Conditions.[744]

225. The EU enacted Directive 2009/15 and Regulation 391/2009 that deal with the role, recognition and liability of classification societies when acting on behalf of the Flag state. Pursuant to the Article 5 of the Directive, Member States delegating certifying functions to ROs have to set out a working relationship between their competent administration and the society that acts on their behalf. This agreement should include provisions on an RO's financial liability when their activities cause harm for which the government has been held liable.[745]

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[738] As reported in CMI, *CMI Yearbook 1995*, Antwerp, CMI Headquarters, 1995, 100-103 and reprinted in F.L. WISWALL, "Classification Societies: Issues Considered by the Joint Working Group", (2) *International Journal of Shipping Law* 1997, 183-185; A. ANTAPASSIS, "Liability of classification societies", (11) *Electronic Journal of Comparative Law* 2007, 49.

[739] A. ANTAPASSIS, "Liability of classification societies", (11) *Electronic Journal of Comparative Law* 2007, 49.

[740] F.L. WISWALL, *Report and Panel Discussion concerning the Joint Working Group on a Study of Issues re Classification Societie*s, CMI Yearbook 1994, 233.

[741] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 498.

[742] CMI, *CMI Yearbook 1995*, Antwerp, CMI Headquarters, 1995, 103-106; CMI, *CMI Yearbook 1996*, Antwerp, CMI Headquarters, 1996, 334–342; J.M. ALCANTARA, "Shipbuilding and Classification of Ships. Liability towards Third Parties", (58) *Zbornik PFZ* 2008, 142.

[743] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 298-299; F.L. WISWALL, *Report and Panel Discussion concerning the Joint Working Group on a Study of Issues re Classification Societie*s, CMI Yearbook 1994, 229-233; J.M. ALCANTARA, "Shipbuilding and classification of ships: liability towards third parties", (58) *Zbornik PFZ* 2008, 142; J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 499.

[744] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 298-299.

[745] Article 5 Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations.

Under the circumstances set out in Article 5.2(b), the administration is entitled to financial compensation from the RO to the extent that the loss, injury or death was caused by it. There are three grounds upon which ROs can be held liable towards the flag State: unlimited liability for a wilful act or omission or gross negligence, limited liability for a negligent or reckless act or omission causing personal injury or death and limited liability for any negligent or reckless act or omission causing loss of or damage to property.[746]

226. Several problems remain with regard to the application of the liability provisions included in the Directive.

One of the main problems is the unclear phrasing and use of undefined terms such as 'reckless' and 'gross negligence'. As there seems no difference in treatment between a reckless act and (gross) negligence, the liability of classification societies might be confined to only major offences. Therefore, it might be argued that they cannot be held liable for minor offences or ordinary negligence.[747] It is, however, rightly claimed that excluding minor faults from the scope of the Directive would not fit in the post-*Erika* and *Prestige* era. As such, classification societies should be held liable in cases of ordinary negligence as well.[748]

In addition, the Directive lacks the necessary standards against which reckless or gross negligent acts of ROs must be evaluated.[749] It also remains unclear on which ground the limitation figures of 'at least equal to' €4 million and €2 million specified in the Directive,[750] respectively, for personal injury or death and other losses, are based. Those amounts do not reflect the maximum financial liability classification societies can incur.[751] More importantly, the Directive remains silent on the liability of classification societies towards shipowners or third parties (private role). Courts have to rely on domestic principles of contract and tort law to determine a classification society's liability.

1.4. The Liability of Product Certifiers

227. There is currently no inter- nor supranational legislation covering the liability of product certifiers. The same is true for notified bodies involved in the conformity

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[746] Article 5, 2, (b) (i)-(iii) Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations.

[747] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 524–527.

[748] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 526 referring to J. ARROYO, "Problemas juridicos relativos a la seguridad de la navigacion maritime (Referencia especial al 'Prestige')", (20) *Annuario De Derecho Maritimo* 2003, 39-40. Also see Article 3 Treaty of the European Union: "The Union's aim is to promote […] well-being of its peoples".

[749] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 529.

[750] Article 5, 2, (b) (ii)-(iii) Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations.

[751] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 324-25.

assessment procedure of medical devices.[752] Decision 768/2008 only contains general requirements for notified bodies. Furthermore, notified bodies have to employ the necessary personnel with sufficient knowledge and experience to carry out the conformity assessment. They must be adequately insured to cover their professional activities unless liability is assured under the national legislation of the notifying EU Member State.[753]

228. The Medical Device Directive[754] and Regulation on Medical Devices[755] contain similar provisions. A notified body has to take out appropriate liability insurance for its conformity assessment activities unless liability is assumed by the notifying Member State in accordance with national law or when that Member State is directly responsible for the conformity assessment. The scope and overall financial value of the liability insurance has to correspond to the level and geographic scope of a notified body's activities and be commensurate with the risk profile of the devices it certifies. The liability insurance needs to cover cases where the notified body may be obliged to withdraw, restrict or suspend certificates.[756]

1.5. Summary

229. Policymakers at the supranational level have addressed the liability of certifiers in different ways. In some cases, their (extra-)contractual liability has been explicitly addressed by legislation. This turned out to be the case for CRAs. Such a regime is quite surprising considering that supranational policymakers were not able to regulate the liability of other certifiers in the same way. With regard to auditors, for example, provisions on the limitation of their liability have been adopted. Whereas the liability of notified bodies has not been addressed, EU legislation only covers the liability of ROs towards flag States.

230. The analysis also revealed that supranational legislation dealing with the third-party liability of certifiers entails some problems. As a consequence, its application will often remain uncertain. More importantly, different provisions have been adopted for certifiers that essentially perform similar services. The question, for instance, arises why limitation of liability mechanisms were adopted for auditors but not for the other certifiers. One possible explanation relates to the aim and goal served by EU legislation covering a particular certifier. Such legislation can either protect the certifier or the party relying on the certificate. The example of auditors and CRAs will clarify this.

Supranational policymakers primarily intervened in the audit profession to strengthen and protect the position of the auditor. Besides the concentration in the audit market, auditors were subject to increased litigation. Therefore, they were not always able to obtain

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[752] See in this regard the discussion *supra* in nos. 20-22.

[753] Article R17 Decision No 768/2008/EC on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC.

[754] Annex XI.6 Directive 93/42 concerning medical devices.

[755] Article 1.4 Annex VII Regulation 2017/745 on medical devices.

[756] Article 1.4 Annex VII Regulation 2017/745 on medical devices.

sufficient insurance to cover audit activities and associated risks. It was held that a limitation of the auditor's liability would overcome these concerns.[757] The aim of the limitation of liability was to come to a regime that was more "equitable to the auditor".[758] The Commission eventually adopted Recommendation 2008/473, which contained four limitation regimes. Such a limitation of the auditor's liability was deemed necessary to enhance the smooth functioning of capital markets.[759]

EU action in the field of CRAs has been more oriented towards the protection of investors. Policymakers were not primarily concerned with the role and position of CRAs, even when the enacted provisions impose a high burden of proof upon third parties.[760] Recital (32) of Regulation 462/2013 is clear when stipulating that credit ratings have a significant impact on investment decisions and on the issuer's image and financial attractiveness. Hence, CRAs have an important responsibility towards investors and issuers in ensuring that they comply with Regulation 1060/2009 so that their ratings are independent, objective and of adequate quality. At the same time, investors are not always in a position to impose liability upon CRAs. It can be difficult to establish the liability of a CRA when there is no contract. Therefore, it is important to provide an adequate right of redress for investors who have reasonably relied on a rating issued in breach of Regulation 1060/2009. An investor should be able to hold the CRA liable for losses caused by an infringement of the Regulation that had an impact on the rating outcome. Member States should also be able to maintain national civil liability regimes that are more favourable to investors or issuers.[761]

231. Two other less important reasons can be relied upon as well to explain why different supranational liability regimes are established for certifiers.

One element relates to claims filed against certifiers in EU Member States. Capping mechanisms might be more easily adopted for those certifiers that have already been held liable within Member States. For instance, third parties have targeted auditors or classification societies on several occasions in different Member States. Those certifiers have in some cases even incurred liability towards third parties.[762] The situation is different for CRAs as they have to my knowledge not been held liable so far in an EU Member State. In other words, the 'need' to limit the liability was more urgent for auditors and classification societies than it is for CRAs.

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[757] London Economics in association with Professor R. EWERT, "Study on the Economic Impact of Auditors' Liability Regimes", (MARKT/2005/24/F), Final Report to EC-DG Internal Market and Services, September 2006, 77-177.

[758] European Commission, "Green Paper on the role, the position and the liability of the statutory auditor within the European Union", COM(96), October 28, 1996, 28.

[759] Recitals (2) and (3) in Recommendation 2008/473/EC concerning the limitation of the civil liability of statutory auditors and audit firms.

[760] See for more information the discussion *supra* in nos. 213-216.

[761] Recital (35) of Regulation 462/2013 amending Regulation 1060/2009 on credit rating agencies.

[762] See in this regard the discussion and references to case law *infra* in nos. 232-292.

Another element deals with the supranational policymakers' view on national law. The European Commission held in its 1996 Green Paper on the role and liability of the statutory auditor that action at the EU level was likely to be difficult as "the legal traditions in Member States in the area of civil liability are quite different".[763] The Recommendation further stresses that Member States should be able to choose the method of limitation they consider the most suitable in the "view of the considerable variations between civil liability systems".[764] One could say that the existence of different national rules 'impeded' the enactment of supranational legislation. Things are different when looking at the Regulation on CRAs. Potential differences between national jurisdictions seemed less decisive when setting up a framework on their civil liability. Recital (35) of Regulation 462/2013 stresses that matters concerning the civil liability of a CRA that are not covered by or defined in the Regulation should be governed by national law. Thus, supranational legislation was adopted 'despite' the existence of different national rules.

2. The Liability of Certifiers at the National Level

232. More importantly, third parties have already filed claims against certifiers on different grounds and in several jurisdictions. I will not provide a general overview of liability law in different jurisdictions, nor extensively discuss all decisions dealing with a certifier's third-party liability. Instead, a comparative analysis is conducted to identify some elements that play a crucial role in deciding whether there will be a basis to impose liability upon certifiers for a violation of the obligations during the certification process. To that end, attention is given to civil law countries such as Belgium or France (part 2.1.) and common law jurisdictions including England (part 2.2.), the United States and Australia (part 2.3.). Some important findings are summarised (part 2.4.).

2.1. Civil Law Countries

233. Certifiers have already been held liable towards third parties in Belgium on the basis of Articles 1382-1383 of the Belgian Civil Code and in France on the basis of Articles 1240-1241 of the New French Civil Code (FCC).[765] Plaintiffs have to establish a certifier's *faute*, the incurred loss (*dommage*) and a causal link (*lien de causalité*) between both elements. In the following paragraphs, I will especially focus on a certifier's *faute*.[766] A wrongful act can either be a breach of a specific legal rule of conduct or a an act that is judged to be negligent.[767] Quite similar elements seem to be of importance in both jurisdictions when establishing a certifier's *faute*.

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[763] European Commission, "Green Paper on the role, the position and the liability of the statutory auditor within the European Union", COM(96), October 28, 1996, 29.

[764] Recital (5) Recommendation 2008/473/EC.

[765] See in this regard the references to cases *infra* in nos. 236-238.

[766] See on the requirement of causation between a certifier's wrongful act and the incurred loss the discussion *infra* in nos. 615-621.

[767] See for Belgium: H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht*, Bruges, die Keure, 2014, 89-90; T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 126; Court of Cassation, March

234. First, the question arises whether the certifier's breach of the certification agreement (contractual setting) can also lead to liability towards third parties (extra-contractual setting). Third parties often suffer losses following a certifier's violation of contractual obligations during the certification process. For instance, investors incurred economic losses because CRAs were involved in the design of structured finance and did not remain independent vis-à-vis issuers during the certification process.[768] Similarly, women that purchased PIP implants did not have any contract with notified body TüV Rheinland. Nonetheless, those women were victims of TüV's violation of its contractual obligations during the certification process. In other words, one needs to know to what extent a violation of the certification agreement (breach of contract) also constitutes a *faute* for which certifiers can face third-party liability.

235. Pursuant to the doctrine of the *coexistence passive* under Belgian law,[769] the certifier's improper performance of the contract will only lead to its liability towards third parties on the ground of Articles 1382-1383 BCC if the certifier's behaviour on which the claim is based apart from a non-compliance with its contractual duties *also* constitutes a shortcoming to the general standard of care.[770] Negligence is not taking the amount of care that a normally prudent person would have taken to protect the interests of others.[771]

25, 2010, C.09.0403.N, *Arresten van het Hof van Cassatie* 2010, 920 & *Pasicrisie belge* 2010, 1007. See for France: P. BRUN, "Responsabilité du fait personnel", *Répertoire de droit civil* (Dalloz online) 2015, no. 88; M. BACACHE-GIBEILI, *Traité de droit civil. 5: les obligations, la responsabilité civile extracontractuelle*, Paris, Economica, 2012, 146.

[768] The analysis departs from the assumption that such behaviour does by itself not constitute a violation of a specific legal rule of conduct. According to the Belgian *Cour de Cassation*, the violation of a statutory or regulatory legal rule of conduct committed without a ground of justification is per se wrongful. Any form of negligence is thus not required (see in this regard: Court of Cassation, April 10, 2014, C.11.0796.N, *Arresten van het Hof van Cassatie* 2014, 962 & *Pasicrisie belge* 2014, 949; Court of Cassation, November 8, 2002, C.00.0124.N, *Arresten van het Hof van Cassatie* 2002, 2417 & *Pasicrisie belge* 2002, 2136; M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 50, no. 68 with further references).

[769] See for more information on the doctrine of *coexistence passive*: M. VAN QUICKENBORNE & H. VANDENBERGHE, "Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad. 2000-2008. [Contractuele en delictuele aansprakelijkheid] Co-existentie", (2) *Tijdschrift Privaatrecht* 2011, 639-656; A. DE BOECK, "De schade bij samenloop en co-existentie. Een verkenning van de grens tussen contractuele en buitencontractuele schade", in: A. DE BOECK, I. SAMOY, S. STIJNS & R. VAN RANSBEECK (eds.), *Knelpunten in het buitencontractueel aansprakelijkheidsrecht*, Bruges, die Keure, 2013, 21-54; I. CLAEYS, *Samenhangende overeenkomsten en aansprakelijkheid: de quasi-immuniteit van de uitvoeringsagent herbekeken*, Antwerp, Intersentia, 2003, 46-50 with further references; M. DEBAENE & P. DEBAENE, "Samenloop en co-existentie contractuele en buitencontractuele aansprakelijkheid. Afdeling 3. De co-existentie", in: X, *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, IV. Commentaar Verbintenissenrecht, Titel II, Hfdst. 11, Afd. 3 with an overview of case law (available online on the legal database Jura).

[770] Court of Cassation, June 22, 2009, C.08.0546.N, *Rechtskundig Weekblad* 2011-2012, 1003; Court of Cassation, October 25, 2012, C.12.0079.F, *Arresten van het Hof van Cassatie* 2012, 2332 & *Pasicrisie belge* 2012, 2039; Court of Cassation, June 11, 1981, 3168, *Arresten van het Hof van Cassatie* 1980-81, 1168 & *Pasicrisie belge* 1981, 1159; H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 41-42; M. VAN QUICKENBORNE & H. VANDENBERGHE, "Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad. 2000-2008. [Contractuele en delictuele aansprakelijkheid] Co-existentie", (2) *Tijdschrift Privaatrecht* 2011, 650-651.

[771] M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 46-49, nos. 62-67.

Not every breach of a contractual obligation automatically constitutes a wrong leading to extra-contractual liability.[772] Some types of contracts, however, are intended to benefit and protect third parties as well. Where a contracting party is aware that his performance directly affects the interests of third parties, the breach of a contractual duty can be considered negligent and, therefore, wrongful.[773] This is especially the case when a professional party's breach of contract might endanger the safety of the wider public.[774] Third parties can claim compensation for the harm they suffered resulting from a service provider's "sloppy performance" of contractual duties.[775]

236. Court rulings dealing with the liability of classification societies are of particular interest in this regard. Their third-party liability will be at stake when they did not act as a reasonable and careful society placed in the same circumstances. A decision by the Antwerp Court of Appeal held that classification societies might be held liable when they do not comply with the general standard of care at the moment of issuing the certificate. This can occur when a certificate has been given to a vessel with major shortcomings in its construction.[776] In another decision, the same court held that the issuance of a certificate to a vessel whose water pipe is heavily corroded is a professional fault (contractual setting) that also constitutes a shortcoming of the classification society's standard of care (extra-contractual setting).[777]

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[772] H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 42; H. VANDENBERGHE, "Contractuele en delictuele aansprakelijkheid. Co-existentie", (2) *Tijdschrift voor Privaatrecht* 2011, 650 with further references; J. LIMPENS, "*Responsabilité du contractant* envers les tiers du chef de la violation du contrat", *Revue de droit international et de droit comparé* 1954, 101-102.

[773] M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 52, no. 72 with references to case law; Court of Cassation, June 22, 2009, *Nieuw Juridisch Weekblad* 2009, 725 with annotation by I. BOONE ("Het Hof vereist niet meer, zoals in vroegere rechtspraak […] dat de tekortkoming 'los van het contract' een schending uitmaakt van de algemene zorgvuldigheidsplicht. Het contract en de verplichtingen die daaruit voortvloeien kunnen als een feitelijk element ingeroepen worden om de zorgvuldigheidsnorm te concretiseren).

[774] A textbook example are an elevator maintenance contracts: Court of Appeal Ghent, May 15, 1995, *Tijdschrift voor aannemingsrecht* 1996, 369; Court of First Instance Brussels, March 13, 2001, *Tijdschrift voor verzekeringen* 2001, 820; Court of Appeal Liège, January 19, 1988, *Revue Générale des Assurances et des Responsabilités* 1989, no. 11.565; H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 42; B. DEBAENE & P. DEBAENE, "Samenloop en co-existentie contractuele en buitencontractuele aansprakelijkheid. Afdeling 3. De co-existentie", in: X, *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, IV. Commentaar Verbintenissenrecht, Titel II, Hfdst. 11, Afd. 3 (available online on the legal database Jura); T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 115.

[775] M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 52, no. 72; I. CLAEYS, *Samenhangende overeenkomsten en aansprakelijkheid: de quasi-immuniteit van de uitvoeringsagent herbekeken*, Antwerp, Intersentia, 2003, 48.

[776] Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 314.

[777] Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 328-329.

237. Certifiers, such as classification societies[778] and product certifiers[779], have also been held liable towards third parties on the ground of the former Articles 1382-1383 (now Articles 1240-1241) of the French Civil Code. However, there seems to be a difference with the situation in Belgium. The violation of a certification contract can be the basis for a claim in tort by third parties.[780] This has been affirmed in decisions by lower courts in the context of classification societies[781] as well as by the French Court of Cassation in the *Wellborn* case.[782]

It has also been acknowledged in the PIP case dealing with the liability of the notified body TüV Rheinland. The Court of First Instance in Toulon held that third parties can claim recovery in tort from the certifier when the latter violated its contractual obligations with the manufacturer that caused the losses or physical damage. This is especially ("tout particulièrement") the case when a breach of the contract relates to a general obligation of care and diligence transcending the pure contractual sphere ("qui transcende les seuls rapports contractuels").[783]

238. Second, courts in both jurisdictions took into account the public role or position of certifiers when examining their potential liability. In the *Elodie II* case, the Court of Appeal of Versailles held that the obligations of Bureau Veritas have to be strictly

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[778] See for example: Court of Cassation, March 27, 2007, no. 05-10.480, (8) *Revue Droit Transport* 2007; Court of Appeal Versailles, March 21, 1996, *Droit Maritime Francais* 1996, 731.

[779] See for example: Tribunal de Commerce Toulon, November 14, 2013, no. RG 2011F00517, no. 2013F00567 (available at the online legal database Dalloz).

[780] M. ESPAGNON, "Droit à reparation – Rapports entre responsabilité délictuelle et contractuelle. – Domaine. – Nature de la responsabilité entre contractants et tiers", *JurisClasseur Civil Code* 2015, number 24 listing several cases which show that "[l]e tiers à un contrat peut invoquer, sur le fondement de la responsabilité délictuelle, un manquement contractuel dès lors que ce manquement lui a causé un dommage" (online JurisClasseur). Also see: Court of Cassation, October 6, 2006, no. 00-13.255, JurisData no. 2006-035298, *Dalloz* 2006, 282; Court of Cassation, June 22, 2010, no. 09-14.862, JurisData no. 2010-010240, *Responsabilité Civile et Assurance* 2010, 243; S. BECQUÉ-ICKOWICZ, "Contrats et obligations. – Effets des conventions à l'égard des tiers. – Opposabilité du contrat", *JurisClasseur Civil Code* 2014, nos. 52-67 (online JurisClasseur); G. VINEY, "La responsabilité du débiteur à l'égard du tiers auquel il a causé un dommage en manquant à son obligation contractuelle", *Recueil Dalloz* 2006, 2825.

[781] See for example: Court of Appeal Versailles, March 21, 1996, *Droit Maritime Francais* 1996, 731.

[782] Court of Cassation, March 27, 2007, no. 05-10.480, JurisData no. 2007-038216, *Responsabilité Civile et Assurances* 2007, 177. See for an annotation: P. DELEBECQUE, "Responsabilité pour faute. Naufrage d'un navire. Intérêts cargaison. Responsabilité de la société de classification (oui). Loi applicable. Loi du fait générateur du dommage", *Revue trimestrielle de droit commercial* 2007, 633; M. FERRER, "Détermination du lieu du fait dommageable et responsabilité des sociétés de classification à l'égard des assureurs facultés. - À propos de l'arrêt Wellborn", (6) *Revue de droit des Transports* 2007, no. 2 concluding that "[l]a première chambre civile ne se réfère plus à la violation d'un devoir général de prudence et de diligence. Elle retient la responsabilité délictuelle des organismes classificateurs lorsqu'un manquement à l'obligation contractuelle cause directement un dommage aux marchandises transportées par le navire" (available online at JurisClasseur); M. FERRER, "Responsabilité des sociétés de classification. – Obligations et inexécutions contractuelles des sociétés de classification. – Responsabilité extra-contractuelle à l'égard des tiers et des contractants. – Responsabilité administrative et immunité du droit du pavillon. – Responsabilité pénale", *JurisClasseur Transport* 2009, no. 166.

[783] Tribunal de Commerce Toulon, November 14, 2013, no. RG 2011F00517, no. 2013F00567, 25 (available at the online legal database Dalloz).

interpreted considering that "cet organisme jouit de la réputation internationale de professionnel performant et compétent et d'un quasi monopole en la matière".[784]

A similar picture emerges when looking at case law dealing with the third-party liability of auditors in Belgium.[785] A decision of the Brussels Court of First Instance focussed on the public role of the auditor[786] to make conclusions regarding the latter's third-party liability. The auditor performs a legal duty – the certification of the annual account – for which it has a monopoly. This influences the liability towards third parties. The auditor does not solely act in the interest of the audited company but also in the general interest ("algemeen belang"). If the auditor issues an unqualified opinion, a third party may assume the certified accounts comply with the applicable legal provisions and fairly reflect, in all material aspects, the economic position of the company. If it later turns out that the auditor, for whatever reason ("om welke reden ook"), failed to make a reservation regarding the annual accounts and, by doing so, does not draw the attention to bookkeeping irregularities or illegal acts, he commits a *faute*.[787]

239. The previously discussed elements illustrate the importance of a certifier's services for third parties. Most certifiers do not only act in the interest of their clients during the certification process but also have to take into account that third parties will rely on certificates to make certain decisions. This has also been acknowledged in supranational legislation dealing with certifiers. In other words, certification is not purely a private matter between the certifier and the requesting entity but, instead, has a wider effect. [788]

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[784] Court of Appeal Versailles, March 21, 1996, *Droit Maritime Français* 1996, 731.

[785] As opposed to the situation of classification societies, the third-party liability of auditors has been regulated by Article 140 of the Belgian Company Code. The application of this regime, however, is subject of fierce academic debate. See in this regard: K. AERTS, *Taken en aansprakelijkheden van commissarissen en bedrijfsrevisoren*, Ghent, Larcier, 2002, 62-70; N. THIRION & C. BALESTRA, "De burgerrechtelijke aansprakelijkheid van de commissaris", in: C. BALESTRA, L. DUPONT, N. THIRION, B. TILLEMAN, S. VAN DYCK (eds.), *De aansprakelijkheid van de bedrijfsrevisor*, Studies I.B.R., Recht, 2003, 14-17; A. BENOIT-MOURY, "Les pouvoirs et les responsabilités des commissaires", *Revue pratique des sociétés* 1986, 43; P.A. FORIERS & M. VON KEUGELGEN, "La responsabilité civile des reviseurs et experts comptables", (26) *Revue de Droit ULB* 1992, 43-44; A. VAN OEVELEN, "De rol en de civielrechtelijke aansprakelijkheid van de commissaris-revisor", in: M. STORME, E. WYMEERSCH & H. BRAECKMANS (eds.), *Handels- economisch en financieel recht*, Ghent, Mys & Breesch, 1995, 273; I. DE POORTER, *Controle van financiële verslaggeving: revisoraal en overheidstoezicht*, Antwerp, Intersentia, 2007, 207-243.

[786] The auditor's public role has also been accepted by several scholars: P.A. FORIERS & M. VON KEUGELGEN, "La responsabilité civile des reviseurs et experts comptables", (26) *Revue de Droit ULB* 1992, 21-23; K. AERTS, *Taken en aansprakelijkheden van commissarissen en bedrijfsrevisoren*, Ghent, Larcier, 2002, 9-10.

[787] Court of First Instance Brussels, December 12, 1996, *Tijdschrift voor Rechtspersoon en Vennootschap-Revue Pratique des Sociétés* 1997, 41-42.

[788] See for example: Recital (8) Regulation 462/2013 on Credit Rating Agencies ("their services have considerable impact on the public interest"); Recital (1) Regulation 2017/745 on medical devices ("ensures a high level of safety and health"); Recital (1) Recommendation 2013/473 on Unannounced Audits ("proper functioning of notified bodies is crucial for ensuring a high level of health and safety protection, the free movement of medical devices in the internal market, and citizens' confidence in the regulatory system").

2.2. England

240. The situation in England illustrates that imposing third-party liability upon certifiers is by no means straightforward. As opposed to the situation in France and Belgium, courts are more reluctant to hold certifiers liable in England. A major pitfall, for instance, is that third parties need to prove that the certifier violated its duty of care under the tort of negligence.[789] The establishment of such a duty of care is often problematic, especially when it concerns pure economic loss[790] following negligent statements.[791] There are different ways to establish whether a certifier has a duty of care towards third parties when issuing certificates.[792] A plaintiff could, on the one hand, show that the requirements under the *Hedley Byrne* case are met (part 2.2.1.). On the other hand, the three stage-test as established in *Caparo* is often used in cases dealing with certifiers (part 2.2.2.).

2.2.1. The *Hedley Byrne* Test and a Certifier's Duty of Care

241. Certifiers can have a duty of care towards third parties under the conditions set out in the *Hedley Byrne* case.[793] A duty of care can arise if the following requirements are met: a special relationship between the certifier and a third party, the certifier's voluntary assumption of the risk of liability and a third party's reasonable reliance on the certificate.

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[789] See in general: K. HORSEY & E. RACKLEY, *Tort Law*, Oxford, Oxford University Press, 2011, 56-71.

[790] Pure economic loss is defined as a pecuniary or commercial loss that does not arise from actionable physical, emotional or reputational injury to person or physical injury to property (F. GOMEZ & H.-B. SCHÄFER, "The law and economics of pure economic loss: Introduction to the special issue of the International Review of Law and Economics", (27) *International Review of Law and Economics* 2007, 1). See for more information: M. BUSSANI & V.V. PALMER, *Pure economic loss in Europe*, Cambridge, Cambridge University Press, 2003, 589p.

[791] V. BERMINGHAM & C. BRENNAN, *Tort Law Directions*, Oxford, Oxford University Press, 2008, 49. See for an extensive discussion C. WITTING, *Liability for Negligent Misstatements*, Oxford, Oxford University Press, 2004, 428p.; J. HODGSON & J. LEWTHWAITE, *Tort Law Textbook*, Oxford, Oxford University Press, 2007, 81-127.

[792] *Her Majesty's Commissioners of Customs and Excise v. Barclays Bank Plc*, [2006] UKHL 28, paragraphs 4-8 (giving an overview of three tests that can be used). In addition to the *Hedley Byrne* and *Caparo* test, a duty of care can be established by using an incremental approach. It implies that the law develops novel categories of negligence, and thus the existence of a duty of care, incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care. This test has been approved by Lord BRIDGE OF HARWICH in the *Caparo* case (*Caparo Industries pIc v. Dickman*, [1990] 2 AC 605, 618). However, the utility of the approach was rejected in the *Nicolas H* case when the House of Lords decided that a classification society was not liability towards third parties (*Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120). Against this background and taking into account the many problems arising with regard to the application of the test, it is not further discussed (K. HORSEY & E. RACKLEY, *Tort Law*, Oxford, Oxford University Press, 2011, 66-68). The three tests are generally assessed in the following order of analysis: (1) *Hedley Byrne*, (2) *Caparo* and (3) the incremental approach (R. MULHERON, *Principles of Tort Law*, Cambridge, Cambridge University Press, 2016, 175). With regard to the relation between the *Hedley Byrne* and *Caparo* test, the House of Lords held that the *Hedley Byrne* test can be used in many cases as means of satisfying the *Caparo* requirements. If the former test fails, a duty of care might still be adopted by applying the three stage *Caparo* test. The two tests will, therefore, be applied next to each other (*Her Majesty's Commissioners of Customs and Excise v. Barclays Bank Plc*, [2006] UKHL 28 as referred to in C. VAN DAM, *European Tort Law*, Oxford, Oxford University Press, 2013, 109). In their analysis, BERMINGHAM & BRENNAN conclude that courts often apply both tests either alternatively or so that they supplement one another (V. BERMINGHAM & C. BRENNAN, *Tort Law Directions*, Oxford, Oxford University Press, 2016, 157).

[793] *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465.

Although these requirements are to a large extent interlinked,[794] they are briefly discussed separately.

242. First, a *special relationship* of confidence and trust has to exist between the certifier and the third party.[795] A special relationship exists where it is plain that the party seeking information was trusting the other party to exercise such a degree of care as required by the circumstances, where it was reasonable for the party seeking information to do so, and where the other party gave the information when he knew or ought to have known that the enquirer would rely on it.[796] Such a relationship will generally arise in a business or professional relationship between the parties.[797]

243. Second, the certifier has *voluntary assumed* the risk of liability when issuing the certificate.[798] A defendant is believed to assume responsibility to the claimant by their jointly entering into a special relationship in which the claimant relies upon the defendant's careful exercise of special skill, knowledge or authority.[799] One could argue that it remains uncertain whether a certifier voluntary assumes a risk of liability considering their reliance on exoneration clauses.[800] This was a reason to reject the voluntary assumption of liability in the *Hedley Byrne* case.[801] Certifiers give "an answer with a clear qualification [they] accepted no responsibility".[802] In most cases, there is also a lack of personal contacts and dealings with third parties using the certificate. Certifiers might, therefore, not have voluntary assumed the risk of liability.[803]

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[794] C. ELLIOTT & F. QUINN, *Tort Law*, Harlow, Pearson Education, 2007, 28.

[795] *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, 502-503.

[796] *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, 486. The requirement of a special relationship has also been an issue in several other cases: *Mutual life and citizen's Assurance Co Ltd v. Evatt*, [1971] AC 793; *Argy Trading and Development Co. Ltd v. Lapid Developments Ltd*, [1977] 1 WLR 444. See for a discussion of both cases: J. HODGSON & J. LEWTHWAITE, *Tort Law Textbook*, Oxford, Oxford University Press, 2007, 92.

[797] V.H. HARPWOOD, *Modern Tort Law*, London, Routledge, 2009, 72; C. ELLIOTT & F. QUINN, *Tort Law*, Harlow, Pearson Education, 2007, 28 discussing Lord Reid's opinion in the *Hedley Byrne* case; K. HORSEY & E. RACKLEY, *Tort Law*, Oxford, Oxford University Press, 2015, 197.

[798] *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465; K. HORSEY & E. RACKLEY, *Tort Law*, Oxford, Oxford University Press, 2015, 188.

[799] A. MULLIS & K. OLIPHANT, *Torts*, Basingstoke, Palgrave, 2011, 61; K. HORSEY & E. RACKLEY, *Tort Law*, Oxford, Oxford University Press, 2011, 185-186. The assumption of responsibility was also at stake in *Her Majesty's Commissioners of Customs and Excise v. Barclays Bank Plc* case. The House of Lords held that the assumption of responsibility has to be applied objectively. It is not answered by the consideration of what the defendant thought or intended. In the case at hand, the bank did not voluntarily assume responsibility towards Customs and Excise on receipt of the freezing order because it was bound by law to accept it (*Her Majesty's Commissioners of Customs and Excise v. Barclays Bank Plc*, [2006] UKHL 28).

[800] See for more information the discussion *infra* in nos. 563-576.

[801] *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, 511-514.

[802] *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, 486.

[803] See in third regard: *Williams v. Natural Life Health Foods Ltd*, [1998] UKHL 17 as discussed in V. BERMINGHAM & C. BRENNAN, *Tort Law Directions*, Oxford, Oxford University Press, 2008, 133.

244. Third, a party's reliance on the certificate needs to be *reasonable* as well.[804] The concept of reasonable reliance allows judicial discretion in cases of pure economic loss.[805] Reasonable reliance can be established when the certifier knows or should have known that the third party relying on the certificate would make a decision without an additional survey. The certifier needs to know that the certificate will determine whether or not a party proceeds with a particular commercial decision.[806] The parties' position towards each other can be significant to determine whether reliance was reasonable. If the third party has more skill and knowledge in the matter than the certifier, it is less likely that the latter will owe a duty of care.[807] Reasonable reliance is also less likely if both parties are professionals or experts, as opposed to the situation in which one party is a professional and the other a private individual.[808]

2.2.2. The *Caparo* Test and a Certifier's Duty of Care

245. A more frequently used test to establish the existence of a duty of care has been developed by the House of Lords in the *Caparo* decision.[809] A certifier has a duty of care when three requirements are met. First, it needs to be reasonable foreseeable for the certifier that its failure to take care might cause a loss to a third party (part A.). Second, the relationship between the certifier and the third party needs to be close enough to create a duty of care (part B.). There can sometimes be an overlap between these two categories. Finally, it needs to be fair, just and reasonable to impose a duty of care upon the certifier (part C.).[810]

A. Reasonable Foreseeability

246. The certifier should have been able to reasonably foresee that a specific third party would rely on the certificate. The certifier does not owe a duty of care to the world at large but only to those parties falling within a class of individuals put at a foreseeable risk by the certifier.[811] A certifier will thus not owe a duty of care when the certificate is put into more or less general circulation and may foreseeably be relied upon by strangers for a variety of different purposes that the certifier did not anticipate. The duty of care should

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[804] *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465; K. HORSEY & E. RACKLEY, *Tort Law*, Oxford, Oxford University Press, 2015, 188.

[805] V.H. HARPWOOD, *Modern Tort Law*, London, Routledge, 2009, 72.

[806] *Smith v Eric Bush* & *Harris v. Wyre Forest DC* [1990] 1 AC 831. See for a discussion: S. DEAKIN, A. JOHNSTON & B. MARKESINIS, *Markesinis and Deakin's Tort Law*, Oxford, Oxford University Press, 2003, 121-122.

[807] J. HODGSON & J. LEWTHWAITE, *Tort Law Textbook*, Oxford, Oxford University Press, 2007, 93.

[808] V.H. HARPWOOD, *Modern Tort Law*, London, Routledge, 2009, 75-76 with references to case law.

[809] *Caparo Industries pIc v Dickman* [1990], E.C.C. 313.

[810] V. BERMINGHAM & C. BRENNAN, *Tort Law*, Oxford, Oxford University Press, 2012, 43-107; K. HORSEY & E. RACKLEY, *Tort Law*, Oxford, Oxford University Press, 2011, 62; S. DEAKIN, A. JOHNSTON & B. MARKESINIS, *Markesinis and Deakin's Tort Law*, Oxford, Oxford University Press, 2003, 88-91.

[811] K. HORSEY & E. RACKLEY, *Tort Law*, Oxford, Oxford University Press, 2011, 62.

be limited to situations where the certificate was made to a known recipient for a specific purpose of which the certifier was aware.[812]

247. The existence of a certifier's duty of care has been denied in several cases because the requirement of reasonable foreseeability was not met. In the *Caparo* case, for instance, the House of Lords held that the auditor did not owe a duty towards investors. The purpose of the audit was not to guide investors in making business decisions. Instead, it was prepared to inform shareholders as to whether the company was properly managed by its directors.[813]

In *Reeman v. Department of Transport* (DoT), the Court of Appeal rejected the first instance decision. The aim of a statutory certificate given to a fishing vessel was to promote safety at sea, and not to safeguard the economic interests of purchasers of the vessel. Those who relied on the certificate issued by the DoT to purchase the vessel were not part of a class that is capable of definition and delimitation by identifiable characteristics. Anyone in the world may rely on the class certificate to buy the vessel. As such, mere foreseeability that the certificate may, or probably will, be relied upon by others than those for whom it is provided does not make such persons part of a class in proximate relationship with the DoT.[814]

B. Relationship of Proximity

248. Another element that has to be proven is a relationship of proximity between a certifier and the third party.[815] Such a relationship comes into existence when (1) the certificate is required for a particularly specified or generally described purpose that is either actually or inferentially made known to the certifier at the time of issuing the certificate; (2) the certifier either actually or inferentially knows that the certificate will be communicated to the third party, either specifically or as member of an ascertainable class, so that the latter can use it for that purpose; (3) the certifier either actually or inferentially knows that the certificate is likely to be acted upon by the third party for that purpose without any independent inquiry; and (4) it is so acted upon by the third party to his detriment.[816]

249. Several decisions show that it can be quite a hurdle to establish a relationship of proximity between the certifier and a third party. In *Caparo*, for instance, the required proximity was not proven as the audit was put into general circulation. It was held that

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[812] *Caparo Industries pIc v. Dickman*, [1990] E.C.C. 313, paragraph 16.

[813] *Caparo Industries pIc v. Dickman*, [1990] E.C.C. 313, paragraphs 25-29.

[814] *Reeman v. DOT and Others*, [1997] P.N.L.R. 618, 627-631. There are of course also cases where the requirement of reasonable foreseeability was proven. In *Law Society v. KPMG*, for instance, the accountant had a duty of care towards the plaintiff because the accountants knew the purpose for which the accounts were prepared and knew that the plaintiffs would rely upon the report (*Law Society v. KPMG Peat Marwick*, [2000] 4 All ER 540). Similarly, in *Morgan Crucible Co. plc v. Hill Samuel*, it was held that the statements were made with the purpose of influencing the conduct of an identified bidder (*Morgan Crucible Co plc v. Hill Samuel & Co Ltd*, [1991] 2 WLR 655).

[815] K. HORSEY & E. RACKLEY, *Tort Law*, Oxford, Oxford University Press, 2011, 65.

[816] *Caparo Industries pIc v. Dickman*, [1990] E.C.C. 313, 342, paragraph 50.

"strangers" would rely on it for a variety of reasons, none of which the accountant could anticipate.[817] The court in *James McNaughton v. Hicks Anderson* also ruled there was insufficient proximity for a special relationship to exist. The accountant did not know that the reports would be sent to the bidder for a particular transaction.[818] In *Reeman*, the class of potential purchasers of the vessel that could rely on the certificate was not ascertainable. The certificate was not plaintiff-specific. It was not given to the actual plaintiff or to a member of a group, identifiable at the time the statement was made, to which the actual plaintiff belonged. The certificate was also not transaction-specific. It was not made with reference to the transaction into which the plaintiff entered by relying on it.[819]

C. Fair, Just and Reasonable to Impose a Duty of Care

250. A last element requires that it is fair, just and reasonable to impose a duty of care.[820] This requirement opens the door to include policy considerations to accept or reject a certifier's duty of care.[821] The aspect of fairness has been at stake in several cases dealing with the third-party liability of certifiers.[822]

251. In *Law Society v. KPMG*, the Court of Appeal concluded that it was fair and reasonable to impose a duty as the auditors were not exposed to a risk of unlimited liability. Appropriate control mechanisms were in place limiting the recoverable economic loss. The compensation that was payable, for instance, was limited to the amount of the client's money that had been lost due to the fraud. Moreover, the time for claiming recovery was limited. Annual reports were published so that negligence in one year could be revealed by a proper report in the next year.[823]

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[817] *Caparo Industries pIc v. Dickman*, [1990] E.C.C. 313, paragraph 16.

[818] *James McNaughton Paper Group Ltd. v. Hicks Anderson & Company*, [1991] 1 All ER 134. The Court of Appeal held that in deciding whether or not a duty of care exists, it is necessary to take all circumstances into account. Certain elements can be of importance to determine whether or not a duty of care exists. Lord NEILL set out six headings to establish the existence of a duty of care: (1) the purpose for which the statement was made, (2) the purpose for which the statement was communicated, (3) the relationship between the advisor, the advisee and any relevant third party, (4) the size of any class to which the advisee belongs, (5) the state of knowledge of the advisor and (6) reliance by the advisee.

[819] *Reeman v. DOT and Others*, [1997] P.N.L.R. 618, 639-640. See for a similar conclusion dealing with the liability of classification societies: *Mariola Marine Corp v. Lloyd's Register of Shipping*, [1991] E.C.C. 103, 118-119, where it was held that the requirement of proximity was not met because the survey was not carried out for one specific purchaser. The cargo-owner belonged to an indeterminate class of persons.

[820] S. DEAKIN, A. JOHNSTON & B. MARKESINIS, *Markesinis and Deakin's Tort Law*, Oxford, Oxford University Press, 2003, 89-90.

[821] S. DEAKIN, A. JOHNSTON & B. MARKESINIS, *Markesinis and Deakin's Tort Law*, Oxford, Oxford University Press, 2003, 89; K. HORSEY & E. RACKLEY, *Tort Law*, Oxford, Oxford University Press, 2011, 64.

[822] J. DE BRUYNE, "Policy considerations and third-party liability of certifiers", in: J. DE BRUYNE, M. DE POTTER DE TEN BROECK & I. VAN HIEL (eds.), *Policy within and through law*, Antwerp, Maklu, 2015, 347-370.

[823] *The Law Society of England and Wales v. Kpmg Peat Marwick & Ors* [2000], P.N.L.R. 831 as discussed in J. HODGSON & J. LEWTHWAITE, *Tort Law Textbook*, Oxford, Oxford University Press, 2007, 102.

252. The question also arose whether it would be fair, just and reasonable to impose a duty of care in the *Nicolas H*. The case dealt with the liability of classification societies. After judgments by the Queen's Bench Division[824] and by the Court of Appeal,[825] the House of Lords held that a classification society did not owe a duty of care towards the cargo owners. Lord STEYN, writing for the majority, relied on several policy considerations to conclude that it would not be fair to impose a duty of care.[826]

For instance, the fact that a classification society acts for the collective welfare is a matter that has to be taken into account.[827] Moreover, if classification societies were to have a duty of care, they would become potential defendants in many more cases. This would not only result in more expensive and complex procedures but also undermine the relatively simple system of settling cargo claims. Furthermore, the House of Lords concluded that the existence of a duty would inevitably extend to every type of survey classification societies (have to) perform. This would increase their exposure to claims in tort, thereby not only creating an "extra layer of insurance", but also opening the door for more claims by third parties (the so-called floodgate argument).[828] The most important argument against imposing a duty of care was related to the (application of the) Hague (-Visby) Rules. The acceptance of a duty of care for classification societies would disturb the contractual allocation of risks between cargo holders and shipowners and undermine the terms on which international trade was conventionally conducted.[829]

2.3. The United States and Australia

253. Judges already held that third parties cannot be qualified as beneficiaries to the certification agreement (part 2.3.1). Therefore, claims against certifiers need to be filed on other grounds in the United States and Australia. These include negligence (part 2.3.2.)

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[824] *Marc Rich & Co AG v. Bishop Rock Marine Co. Limited,* [1993] E.C.C. 121.

[825] *Marc Rich & Co AG v. Bishop Rock Marine Co Limited*, [1994] 1 W.L.R. 1071.

[826] Lord BERWICK concluded in his dissenting opinion that if the facts of the case "cry out for the imposition of a duty of care between the parties, as they do here, it would require an exceptional case to refuse to impose a duty on the ground that it would not be fair just and reasonable" (*Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 135).

[827] *Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 120 & 146-147. Lord BERWICK rejected this assumption and compared classification societies with hospitals in his dissenting opinion. Similar to classification societies, hospitals are charitable non-profit making organisations. Nonetheless, they are subject to a same duty of care as "betting shops or brothels". Remedies in tort law cannot be applied discretionary (*Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 133).

[828] *Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 147-148. In his dissenting opinion, Lord BERWICK argued that English courts have considered the availability of insurance irrelevant to the question whether a duty of care should be imposed (*Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 133-134).

[829] *Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 144-146 as reported in K. HORSEY & E. RACKLEY, *Tort Law*, Oxford, Oxford University Press, 2011, 64. Lord BERWICK held in his opinion that the Hague-Visby Rules did not apply to the parties in this case. Moreover, he contended that the question whether a classification society should be able to limits its liability could not be decided by judges but has to be imposed by the legislature (*Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 132-133).

and negligent misrepresentation (part 2.3.3.).[830] There are 'certifier-specific' grounds and elements as well. They play a role with regard to the liability of one particular certifier but not for the others (part 2.3.4.).

2.3.1. Common Basis: Beneficiaries to the Agreement

254. The concept of beneficiary to a contract implies that a third party has the right to sue on a certification agreement, despite not being an active party to it. It provides third parties with a way to recover their losses incurred by relying on an allegedly inaccurate certificate.[831]

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[830] Whereas the tort of negligence relates to the improper performance of services, the tort of negligent misrepresentation deals with negligently communicating false information (J.M. FEINMAN, "Liability of Lawyers and Accountants to Non-Clients: Negligence and Negligent Misrepresentation", (67) *Rutgers University Law Review* 2015, 131). The former tort implies that a certifier's negligence injures the third party but the act of negligence does not involve a communication relied upon by the third party. Under the latter tort, there is either an act of negligence resulting in a false statement to the third party on which he relies to his detriment or an act of negligence in communicating the information itself. In those cases, the third party is injured by its reliance on the communication (J.M. FEINMAN, "Liability of Lawyers and Accountants to Non-Clients: Negligence and Negligent Misrepresentation", (67) *Rutgers University Law Review* 2015, 148-149). Some court decisions emphasise the difference between the tort of negligence and the tort of negligent misrepresentation (see for example: *Raritan River Steel v. Cherry, Bekaert & Holland*, 367 S.E.2d 609 (N.C. 1988) as reported and discussed in J.M. FEINMAN, "Liability of Lawyers and Accountants to Non-Clients: Negligence and Negligent Misrepresentation", (67) *Rutgers University Law Review* 2015, 150-151). Other court rulings conclude that there is no meaningful distinction between them (see for example: *Greycas Inc v. S Proud*, 826 F. 2d 1560 (7th Cir. 1987) as reported and discussed in J.M. FEINMAN, "Liability of Lawyers and Accountants to Non-Clients: Negligence and Negligent Misrepresentation", (67) *Rutgers University Law Review* 2015, 151-152). As such, the two causes of action are not always distinguished in the context of certifiers and the choice of either one of them depends on the law of the jurisdiction or other factors (J.M. FEINMAN, "Liability of Lawyers and Accountants to Non-Clients: Negligence and Negligent Misrepresentation", (67) *Rutgers University Law Review* 2015, 131; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 188). Claims for negligence and negligent misrepresentation can also be dealt with together under a same heading. In *in Re National Century*, the plaintiffs filed claims against CRAs for negligent misrepresentation, negligence and gross negligence. The Southern District Court of Ohio held that the negligence-based claims were indistinguishable. The only negligent act alleged against Moody's was a representation, namely the credit rating itself. The complaint alleged that Moody's was negligent because it gave favourable credit ratings to notes when they were not in fact deserving those ratings. The Court, therefore, treated these claims together as a claim for negligent misrepresentation (*In Re National Century Financial Enterprise*, 580 F. Supp. 2d 630, 646-648 (S.D. Ohio 2008)).

[831] See for more information: M.A. EISENBERG, "Third-Party Beneficiaries", (92) *Columbia Law Review* 1992, 1358; A. CORBIN, "Contracts for Benefit of Third Persons", 27 *Yale Law Journal* 1918, 1009; A. CORBIN, "Contracts for the Benefit of Third Persons in the Federal Courts", (5) *Yale Law Journal* 1930, 601-615. The possibility for contracting parties to agree to a third-party beneficiary contract may also exist in civil law countries such as Belgium (cf. Article 1121 BCC). If all the requirements for such a contract are satisfied, the third-party beneficiary has a contractual right against the promisor, even though he is not a contracting party (I. CLAEYS, "Contract Law", in: M. KRUITHOF & W. DE BONDT (eds.), *Introduction to Belgian Law*, Alphen aan den Rijn, Kluwer Law International, 2017, 241. See for more information: N. CARETTE, *Derdenbeding*, Antwerp, Intersentia, 2011, 892p.). However, I will not examine this theoretical possibility as it is more interesting to look at actual decisions against certifiers where third parties claimed such protection. To my knowledge, this has not occurred in Belgium so far. The reasons accepting or rejecting beneficiary protection in the United States could be used as a source of inspiration for other jurisdictions whenever third parties would claim that they are beneficiary to the certification agreement. Likewise, arguments invoked in German cases against certifiers could be relied upon as well (see the discussion *infra* in no. 624).

255. Third parties will not easily be seen as beneficiaries to certification agreements. An investor, for instance, could be qualified as third-party beneficiary in some US states if the issuer and the CRA intended to give him a right to enforce the contractual promises (the 'intent to benefit-test').[832] The intent to give parties enforcement rights often remains a matter of interpretation.[833] Proving such an intent, however, can be difficult as there is a presumption that contractors will generally intend that the contractual provisions only apply to them and not towards third parties.[834] Whether the CRA and the issuer had the intent to benefit the investor under the rating agreement, for instance, was at stake in both *Quinn v. McGraw-Hill*[835] and *Abu Dhabi Commercial Bank v. Morgan Stanley*.[836]

256. The plaintiffs in *Quinn* asserted that S&P and the issuer must have known that investors were beneficiaries to the rating contract. S&P existed as an independent CRA because investors relied on its ratings. Without potential purchasers, ratings would exist in a "vacuum […] benefitting no one".[837] The Court of Appeals for the Seventh Circuit held that investors might indeed derive valuable information from ratings. However, the contract between the issuer and S&P did not contain express language identifying purchasers such as *Quinn* by name. There were no explicit or implicit indications in the rating contract showing the necessary intent to benefit the investor.[838] The District Court in the *Abu Dhabi* case also concluded that plaintiffs failed to allege "contract language or other facts sufficient to give rise to a plausible inference that any of these contracts clearly evidence […] an intent to permit enforcement by plaintiffs" (internal quotations omitted).[839]

257. Besides the use of express language in the rating agreement identifying certain purchasers, there are other ways as well to establish whether investors can be seen as third-party beneficiaries. The court in *Quinn* held that investors may be indirect

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[832] Under the intent to benefit-test, courts seek whether the promisee or parties to a contract intended to benefit the non-contracting party seeking the enforcement of the contract. Pursuant to Section 302 Restatement (Second) of Contracts, a non-party to the contract (e.g. third party relying on a certificate) is an intended third-party beneficiary with enforceable rights if the recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties (e.g. requesting entity and certifier) and the circumstances indicate that the promisee (e.g. the requesting entity) intended to give the beneficiary the benefit of the promised performance. An incidental beneficiary is a beneficiary who is not an intended beneficiary and who has no right to recovery thereon (see in general: A.J. WATERS, "The Property in the Promise: A Study of the Third Party Beneficiary Rule", (98) *Harvard Law Review* 1985, 1148-1173; E.A. FARNSWORTH, W.F. YOUNG & C. SANGER, *Contracts: Cases and Materials*, New York, Foundation press, 2001, 857-892).

[833] B.A. BLUM, *Contracts: Examples and Explanations*, New York, Aspen, 2004, 692.

[834] See for example *155 Harbor Drive Condominium Association v. Harbor Point*, Inc., 209 Ill.App.3d 631, 154 Ill. Dec. 365, 568 N.E.2d 365, 375 (1991). Also see for discussion: M.A. EISENBERG, "Third-Party Beneficiaries", (92) *Columbia Law Review* 1992, 1378-1382.

[835] *Quinn v. The McGraw-Hill Companies*, 168 F.3d 331, 334-335 (7th Cir. 1999).

[836] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 173, 184-186 (S.D.N.Y. 2009).

[837] *Quinn v. The McGraw-Hill Companies*, 168 F.3d 331, 334 (7th Cir. 1999).

[838] *Quinn v. The McGraw-Hill Companies*, 168 F.3d 331, 334-335 (7th Cir. 1999).

[839] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 173, 185 (S.D.N.Y. 2009).

beneficiaries of ratings to the extent they would not only have been issued to the benefit of the issuer. Although ratings are relevant to investors, they are also important for the issuer himself. The issuer enters into a rating agreement for its own purposes. Once he knows which rating will be given to his financial products, he "has a better idea of which customers are likely to be interested, what interest rate (or other element of price) to attach to the placement, and where it stands relative to others in its line of business".[840] The Court of Appeals referred to the certification market in general to deny third-party protection for investors. Contracts between parties often generate information that is valuable to third parties. Manufacturers of electrical appliances, for instance, contract with UL to have their devices certified to ensure consumers will purchase them. However, consumers who benefit from such contracts are not third-party beneficiaries to those contracts. They are not entitled to sue when the manufacturer violates the agreement.[841]

In the *Abu Dhabi* case, the District Court held that the investor could be the intended third-party beneficiary if no other party is able to recover its losses when the CRA breaches the agreement.[842] The judge, however, held that the CRAs and the issuer retained the right to enforce the agreement if it had been violated and thus recover their losses.[843] The plaintiffs' allegation that they were third-party beneficiaries because the CRAs only contracted to generate revenues for themselves by providing service to the issuer and the latter's investors was rejected as well. Similarly to the decision in *Quinn*, the importance of the rating agreement for the issuer was underlined. Allowing investors to bring a claim for a breach of the rating contract as third-party beneficiaries would undervalue the benefits that those contracts directly provide to the issuer.[844]

2.3.2. Common Basis: Tort of Negligence

258. Third parties have already claimed on several occasions that certifiers such as classification societies,[845] CRAs[846] or product certifiers[847] negligently performed their services. Establishing that a third-party certifier acted negligently is not always

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[840] *Quinn v. The McGraw-Hill Companies*, 168 F.3d 331, 334-335 (7th Cir. 1999).

[841] *Quinn v. The McGraw-Hill Companies*, 168 F.3d 331, 334-335 (7th Cir. 1999).

[842] See in this regard for example *Debary v. Harrah's Operating Co. Inc*, 465 F.Supp.2d 250, 263-264 (S.D.N.Y. 2006), *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co. Inc*., 66 N.Y.2d 38, 45 (1985).

[843] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 173, 184-186 (S.D.N.Y. 2009).

[844] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 173, 186 (S.D.N.Y. 2009).

[845] See for example: *Steamship Mutual Underwriting Association v. Bureau Veritas*, 380 F. Supp. 482 (E.D. La. 1973); *Continental Ins. Co. v. Daewoo Shipbuilding*, 707 F. Supp. 123 (S.D.N.Y. 1988).

[846] See for example: *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742 (S.D. Tex. 2005); *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200 affirmed in *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65.

[847] See for example: *Hempstead v. General Fire Extinguisher Corporation*, 269 F. Supp. 109 (D. Del. 1967); *Bollin v. Elevator Construction and Repair Co., Inc.*, 361 Pa. 7, 63 A.2d 19 (1949); *US Lighting Service, Inc. v. Llerrad Corp*., 800 F. Supp. 1513 (N.D. Ohio 1992); *Yassin v. Certified Grocers of Illinois*, 150 Ill. App.3d 1052 (1986); *Benco Plastics, Inc. v. Westinghouse Electric Corp.*, 387 F. Supp. 772 (E.D. Tenn. 1974); *Midwest Plastic Fabricators, Inc. v. Underwriters Laboratories, Inc.*, 906 F.2d 1568 (Fed.Cir.1990); *Dekens v. Underwriters Laboratories*, 107 Cal App 4th 1177 (2003).

straightforward. Similar to the situation in England, there can be obstacles on the way of holding them liable under the tort of negligence in the US and Australia. Certifiers often refer to the lack of privity with a third party (part A.), their role and position (part B.) or other legal requirements (part C.) to deny the existence of a duty of care towards a third party.

A. Requirement of Privity

259. Certifiers can argue that there is no relationship of privity between them and the third party relying on the certificate. As a consequence, a duty of care towards third parties might not arise.[848] Several decisions, however, illustrate that this privity bar is not always decisive regarding the existence of a certifier's duty of care.

In *Hempstead v. General Fire Extinguisher*, the Court for the District of Delaware concluded that there is a trend towards broadening the scope of those to whom responsibility attaches when injury results from an "imminently dangerous product" such as a fire extinguisher. When it concerns such a product, the once existing barrier of privity appears to be "largely a thing of the past".[849] In *Westerhold v. Carroll*, the Supreme Court of Missouri even held that "so many exceptions have been engrafted upon the rule that it has been said, perhaps too broadly, that the exceptions have swallowed the rule" (internal quotation marks omitted).[850] The rule requiring privity has thus been further eroded and the exceptions have been extended into new fields and areas.[851]

260. A brief comparative look at the Australian *Bathurst* decision also shows that a duty of care can be imposed despite the lack of a relationship of privity between investors and a CRA. Thirteen New South Wales Regional Councils suffered financial losses after the purchase of CPDO (Constant Proportion Debt Obligations) notes. The structured products were marketed by Local Government Financial Services (LGFS), created by ABN Amro Bank and given a triple A rating by S&P. The investors claimed recovery from the CRA for their losses. S&P alleged that it could not owe a duty of care because there were no direct dealings or any contractual relationship with the investors. The investors did not contract with S&P to rate the CPDO notes and did not pay S&P accordingly.[852]

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[848] See for example: *Hempstead v. General Fire Extinguisher Corporation*, 269 F. Supp. 109, 111-112 (D. Del. 1967); *US Lighting Service, Inc. v. Llerrad Corp*., 800 F. Supp. 1515, 1515-1517 (N.D. Ohio 1992). See in this regard also: D. PELLECCHIA, "Torts--Negligent Misrepresentation--Products Liability--Liability of Certifiers of Quality to Ultimate Consumers", (1) *Stetson Intramural Law Review* 1970, 48-50.

[849] *Hempstead v. General Fire Extinguisher Corporation*, 269 F. Supp. 109, 117-118 (D. Del. 1967); *Bollin v. Elevator Construction and Repair Co., Inc.*, 361 Pa. 7, 63 A.2d 19 (1949).

[850] *Westerhold v. Carroll*, 419 S.W. 2d 73, 77 (Mo. 1967). See for (additional) references to case law and scholarship: R.A. BAUERLY, "Products Liability – Liability of Certifiers of Quality to Consumers", (14) *South Dakota Law Review* 1969, 104-108; D. PELLECCHIA, "Torts--Negligent Misrepresentation--Products Liability--Liability of Certifiers of Quality to Ultimate Consumers", (1) *Stetson Intramural Law Review* 1970, 49-50.

[851] *Westerhold v. Carroll*, 419 S.W. 2d 73, 77 (Mo. 1967).

[852] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraph 2779.

However, the Court held that such a submission fails to recognise the real nature of the transaction between ABN Amro and S&P. The issuer engaged S&P for rating services because ABN Amro wanted the credit rating for the very purpose of communicating it to investors.[853] The decision on appeal also ruled that S&P knew that the issuer obtained and paid for the rating to communicate it to the "interested parties" so that they could use it in deciding whether or not to invest. A contractual nexus between the CRA and the investors was in such circumstances not required.[854] The *Bathurst* court eventually held that S&P had a duty to exercise reasonable care and skill in forming its opinion. The CRA violated its duty of care because it did not have reasonable grounds to assign the rating. The credit rating was not the result of reasonable care and skill.[855]

B. Certifier's Role and Position

261. Certifiers can also rely on their role or position to deny the existence of a duty of care towards third parties. In the *Great American Insurance* case, for instance, it was held that classification societies have several duties. One of their duties is to inspect and classify vessels in accordance with their class rules. However, a breach of this duty cannot be a ground for recovery for third parties. The shipowner has a non-delegable duty to maintain his vessel in a seaworthy condition. A right to claim recovery from a classification society would place the responsibility to assure the seaworthiness of a vessel on an organisation that merely supervises the vessel's operation. Liability would turn the society into an absolute insurer of every vessel it certifies. This is not in proportion to the amount of control that a classification society exercises over a ship. It would also not be in accordance with the intention of the parties considering the low fees charged for classification services.[856]

262. The *Enron* case also illustrates that the position of CRAs in financial markets can be used to reject a duty of care. The Southern District Court of Texas ruled that the CRA did as a matter of law and policy not owe a duty of care towards investors. The Court concluded that one critical issue was whether the relationship between the alleged negligent misrepresentation of the CRAs and the investors' losses was "too removed as a matter of public policy to impose a duty".[857] There was no special relationship between the CRA and the investors because the ratings were distributed to the world at large and not specifically to the investors.[858] The Court also relied on several other reasons to deny the recognition of a duty of care. For instance, CRAs play a significant role in the efficient operation of capital markets. This would be chilled if anyone who claims to have relied

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[853] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraph 2780.

[854] *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 1270-1271.

[855] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd* (No 5), [2012] FCA 1200, paragraphs 2814-2836; *ABN AMRO Bank NV v. Bathurst Regional Council* , [2014] FCAFC 65, paragraphs 12, 503 & 722.

[856] *Great American Insurance Company v. Bureau Veritas*, 338 F. Supp. 999, 1008 (S.D.N.Y. 1972).

[857] *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742, 827 (S.D. Tex. 2005).

[858] *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742, 827 (S.D. Tex. 2005).

upon the rating would be able to sue the CRA as it can lead to unlimited potential liability for CRAs.[859]

263. However, a certifier's role or position can be used to more easily accept a duty of care as well. In *US Lighting Service v. Llerrad,* the Court for the Northern District of Ohio held that Underwriters Laboratories owed a duty of care to purchasers of lighting equipment products bearing the certifier's mark.[860]

The Court relied on the decision in *Hanberry* where it was held that the very purpose of certification was to induce consumers to purchase products so endorsed. The Court of Appeal of California concluded in *Hanberry* that consumers sometimes rely even more on certificates than on the statements made by the retailer, manufacturer or distributor to purchase products. The certifier was voluntarily involved into the marketing of products and loaned its reputation to induce their sale. In voluntarily assuming this business relationship, the certifier placed itself in the position where public policy imposes upon it a duty to use ordinary care when issuing its certificate of quality so that members of the consuming public are not unreasonably exposed to the risk of harm.[861]

Against this background, the Court in the *Lighting* case concluded that the *raison d'être* of the UL mark was to show a product has met safety standards. The certifier places itself into the stream of commerce by offering its mark to manufacturers who then use it for promotional purposes. Although UL certification does not guarantee that a manufacturer has acted with ordinary care, sound public policy requires that UL acts with ordinary care when certifying products.[862]

264. Similarly, in *Hempstead v. General Fire Extinguisher*, the Court for the District of Delaware upheld a cause of action against UL for a negligent inspection of a fire extinguisher. UL sets the standards of construction and performance with which a product must comply to be listed in its publication. This publication is made available to interested parties and to the public. Before listing a product, UL tests the product to determine whether it complies with the applicable requirements. UL argued that it did not approve the design of the fire extinguisher by listing it in its publication. The Court held that UL tacitly provides its approval of the design when listing the product in its publicly available publication, even when the manufacturer is responsible for the design.[863] The status of UL as recognised testing company and certifier under the state Fire Safety Regulations and the county Fire Prevention Code virtually precluded the sale of fire extinguishers that were not approved by UL.[864]

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[859] *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742, 827 (S.D. Tex. 2005).

[860] *US Lighting Service, Inc. v. Llerrad Corp*., 800 F. Supp. 1513 (N.D. Ohio 1992).

[861] *Hanberry v. Hearst Corp.*, 1 Cal. App. 2d 149, 81 Cal. Rptr. 519 (Dist. Ct. App. 1969).

[862] *US Lighting Service, Inc. v. Llerrad Corp.*, 800 F. Supp. 1513, 1517 (N.D. Ohio 1992).

[863] *Hempstead v. General Fire Extinguisher Corporation*, 269 F. Supp. 109, 116-118 (D. Del. 1967).

[864] J.T. BECK, "Hanberry v. Hearst Corp.: Liability of Product Certifiers", (5) *University of San Francisco Law Review* 1970, 143. *Hempstead v. General Fire Extinguisher Corporation*, 269 F. Supp. 109, 117 (D. Del. 1967) ("The Fire Prevention Code authorized the Fire Prevention Supervisor to rely upon the services

C. Other Requirements to Impose a Duty of Care

265. The requirements to impose a duty of care upon certifiers are not always proven either. Third parties might, for instance, fail to show the foreseeability of the loss, their reasonable reliance on the certificate or a lack of a sufficient proximity with the certifier.[865] Yet, the proof of these elements is not insurmountable. Although the *Enron* court eventually did not accept that a CRA had a duty of care because of public policy considerations, it held that the specific nature of the harm suffered by the plaintiffs was a foreseeable result of the CRA's alleged negligent conduct.[866]

266. A more prominent example where the legal requirements for a negligence claim were at stake is the Australian *Bathurst* case.[867] That case illustrates that third parties are sometimes able to establish the necessary elements for a duty of care. These include a CRA's foreseeability of the loss and a relationship of proximity with the CRA, each of them briefly discussed in the following paragraphs.

267. On the one hand, the risk of loss by the potential investors in the CPDO notes was foreseeable for the CRA as it was the immediate consequence of S&P's careless rating of the notes. S&P knew or ought to have known that investors would suffer losses by relying on the rating. A reasonable person in S&P's position would have taken precautions against the risk for investors to suffer financial losses. The risk of the financial loss was not insignificant, either in possibility or in quantum.[868] S&P had results of its own modelling that provided no rational basis upon which to decide to assign the securities the highest rating.[869] Therefore, S&P's conduct created a high probability of harm. Given the minimum investment tranches of $500,000, S&P knew that the potential losses for any investor would be serious.[870] On appeal, it was affirmed that S&P knew the foreseeable type of loss. It is the nature of the loss – losing "the money [investors] had invested in the notes" – and not the precise amount that is important.[871] S&P knew that if its opinion was given carelessly, investors were likely to lose the money they had invested in the notes.[872]

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of any recognized testing authority, including Underwriters, to determine the suitability of a particular type of fire extinguisher, and a listing by any such authority permitted the Fire Prevention Supervisor to find such extinguisher suitable for installation.").

[865] *Benco Plastics, Inc. v. Westinghouse Electric Corp.*, 387 F. Supp. 772, 786 (E.D. Tenn. 1974).

[866] *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742, 827 (S.D. Tex. 2005).

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

[868] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraph 2816; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraph 582.

[869] See for more information the discussion *supra* in no. 46.

[870] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2786-2787 & 2817.

[871] *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 585-595, 1257-1262.

[872] *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraph 593.

268. On the other hand, there needs to be a special relationship of proximity between the CRA and the investors before a duty of care can arise. The speaker must realise or the circumstances must be such that the speaker ought to have realised that the recipient of the information or advice intends to act on it for commercial decisions.[873] This requirement was established in the *Bathurst* case. ABN Amro obtained the rating to disseminate it to potential investors. This allowed investors to rely on the rating as an expert opinion regarding the creditworthiness of the notes and/or to take it into account when deciding whether or not to invest. The issuer was aware that many institutional investors could only invest in notes that had a certain rating (investment grade or above). More importantly, S&P knew that its ratings were intended to be used for these purposes. The judge even stressed that it was difficult to think of any other purpose for which the ratings were given. S&P was paid for the very purpose to allow potential investors to rely on the ratings.[874]

269. In its defence, S&P argued that imposing a duty would result in liability vis-à-vis an indeterminate number of purchasers. Justice JAGOT, however, found this argument unpersuasive and held that the class of persons to whom S&P owed a duty of care was ascertainable.[875] The class of persons comprised of potential purchasers of the minimum $500,000 subscription in the $40 million issue of the notes. Moreover, S&P controlled several factors confining the scope of potential liability such as the amount of issued products to which the rating relates. It also had the ability to control its liability by downgrading or withdrawing the rating.[876]

On appeal it was also decided that the liability was not indeterminate. S&P knew that the investors were members of a class, the essential characteristic of which was that each investor wanted to purchase the notes (an "identifiable class"[877]). CRAs are not required to know the precise identity of the recipient of the rating, nor the exact number of members in the class or the exact loss. It is sufficient to identify the class of persons to whom the duty of care was owed.[878] Expert information and advice is part of modern

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[873] *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraph 573.

[874] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2759, 2780 & 2816. The *Esanda Finance* case illustrates that it is different for audit opinions. The auditor's potential liability was disproportionate because the auditor did not intend investors to rely on the audit and was not paid for that purpose. The reliance by the investor on the audit opinion was "self-induced" (*Esanda Finance Corporation Ltd v. Peat Marwick Hungerfords*, [1997] 188 CLR 241, 289). The rating is assigned to a financial instrument to be communicated to potential investors to take it into account and rely upon in deciding whether or not to invest. The same cannot be said of an audit, which is undertaken for the company's own purposes to comply with the company's statutory obligations (*Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 222, 233, 235, 253-254, 2480 and 2754-2760; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraph 580).

[875] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2499, 2743, 2793.

[876] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraph 2745-2766.

[877] *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraph 577.

[878] *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 577, 589 & 593

commercial life. Such information, as was the case in *Bathurst*, is often issued by reference to or in respect of an instrument and not with regard to a particular person's individual position.[879] Both the class of investors and foreseeable loss were identifiable and determined by the function that S&P undertook, which was "delineated by the purpose of the rating […] and the known reasonable reliance".[880]

270. A duty of care also requires that it is reasonable in all circumstances for the recipient to seek, accept and rely on the utterance of the speaker. Special attention is thereby given to the nature of the subject matter, the occasion of the interchange, the identity and relative position of the parties towards each other taking into account their knowledge and capacity to exercise a judgement.[881] Against this background, the first instance court held that it was reasonable for the investors to rely on the rating. A rating is an opinion given by an expert in the field of structured finance and the result of reasonable care and skill.[882] The reliance of investors on the credit ratings was reasonable considering that they were "vulnerable" and "unsophisticated".[883] Investors are vulnerable when they are unable to assess the creditworthiness of the financial products or to "second-guess" the rating. This occurs if the only available information on the creditworthiness is the rating.[884]

2.3.3. Common Basis: Tort of Negligent Misrepresentation

271. Classification societies,[885] CRAs[886] and product certifiers[887] have already been targeted for negligent misrepresentation in the US. After a more general discussion of this tort (part A.), two issues that are often decisive in claims against certifiers are

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[879] *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraph 593.

[880] *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 1261.

[881] *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 573-574 with references to case law.

[882] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2481 & 2517; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraph 581.

[883] *Federal Court of Australia, Bathurst Regional Council v. Local Government Financial Services Pty Ltd*, (No 5) [2012] FCA 120, paragraphs 2767-2778; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 580, 599, 890-891, 1211 & 1263-1269.

[884] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 120, paragraphs 2767-2778; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 580, 599, 890-891, 1211 & 1263-1269. Also see: H. EDWARDS, "Liability for the rating and sale of structured credit products: Australian cases and their (much) wider implications", (7) *Law and Financial Markets Review* 2013, 90-91.

[885] See for example: *Otto Candies LLC v. Nippon Kaija Kyokai Corp*., 346 F.3d 530 (5th Cir. 2003); *Somarelf v. American Bureau of Shipping*, 704 F. Supp. 59 (D.N.J. 1989); *In Re Eternity Shipping*, 444 F.Supp.2d 347 (D. Md. 2006); *Cargill v. Bureau Veritas*, 902 F. Supp. 49 (S.D.N.Y. 1995).

[886] See for example: *Quinn v. The McGraw-Hill Companies*, 168 F.3d 331, paragraphs 9-18 (7th Cir. 1999); *LaSalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071, 1091-1096 (S.D.N.Y. 1996); *In re National Century Financial Enterprise*, 580 F. Supp. 2d 630, 646-649 (S.D. Ohio 2008); *California Public Employees' Retirement System v. Moody's Corporation*, no. A134912, 14-30 (Cal. Ct. App. 2014); *King County, Washington et al v. IKB Deutsche Industriebank AG et al*, no. 09-08387, 31-50 (S.D.N.Y. 2012); *Anschutz Corp. v. Merrill Lynch & Co*., 690 F.3d 98, 114 (2nd Cir. 2012); *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Services. LLC*, no. 11-4203, 2012 WL 5990337 (6th Cir. 2012); *In Re Enron Corp. Securities Derivative,* 511 F.Supp.2d 742, 809-827 (S.D. Tex. 2005).

[887] See for example: *Hanberry v. Hearst Corp*, 1 Cal. App. 2d 149, 81 Cal. Rptr. 519 (Dist. Ct. App. 1969).

examined more thoroughly. These include the requirement of a special relationship between the certifier and the third party (part B.) and the latter's actual and reasonable reliance on the certificate (part C.).[888]

A. General Considerations

272. Different sections of the Restatement (Second) of Torts deal with the liability for negligent misrepresentation for physical injury and financial/pure economic losses respectively.

273. Sections 310-311 of the Restatement (Second) of Torts allow parties to recover from a person who made a misrepresentation inducing some action involving a risk of physical harm. The question to which extent a certificate induces a third party to purchase a certified item was at stake in *Hanberry v. Hearst*. The plaintiff relied on the Good Housekeeping Seal of Approval to buy a pair of shoes. After buying the shoes, she fell and sustained physical injuries. The plaintiff claimed that the shoes were slippery and unsafe. She brought a suit against the product certifier that provided the consumer guarantee. The Californian Court of Appeal reversed the first instance trial court's dismissal regarding the claim of negligent misrepresentation. The Court of Appeal concluded that the certifier's representation was actionable as it made the representation solely to induce the sale of the shoes. The certifier represented to the public that it had superior knowledge and special information on the certified product.[889]

274. Section 552 Restatement (Second) of Torts is more important in the context of certifiers. It differs from Sections 310-311 as it requires a closer and far more direct relationship between the parties. It also remedies pecuniary loss rather than physical harm.[890] Someone who in the course of his business, profession or employment or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability if he fails to exercise reasonable care or competence in obtaining or communicating the information. The plaintiff claiming negligent misrepresentation must be a person or a member of a limited group of persons for whose benefit and guidance the defendant intends to supply

[888] See for more information: M.P. GERGEN, "Negligent Misrepresentation as Contract", (101) *California Law Review* 2013, 953-1012; A.J. STRONG, "But He Told Me It Was Safe: The Expanding Tort of Negligent Misrepresentation", (40) *University of Memphis Law Review* 2009, 105-164.

[889] *Hanberry v. Hearst Corp*, 1 Cal. App. 2d 149, 81 Cal. Rptr. 519, 523 (Dist. Ct. App. 1969). See for a discussion of the case: J.T. BECK, "Hanberry v. Hearst Corp.: Liability of Product Certifiers", (5) *University of San Francisco Law Review* 1970, 137-152; J.J. LEON, "Negligence - Torts - Negligent Misrepresentation - Downfall of Privity - Hanberry v. Hearst Corp.", (81) *DePaul Law Review* 1970, 803; J.A. ULSCH, "Testing Laboratories - Liability to Consumers for Negligent Misrepresentation - Hanberry v. Hearst Corp", (74) *Dickinson Law Review* 1970, 796.

[890] *Passmore v. Lee Alan Bryant Health Care Facilities,* Inc., 765 N.E.2d 625, 628-630 (Ind. Ct. App. 2002).

the information. The liability is also limited to losses suffered by relying upon the information in a transaction that the speaker intends to influence with the information.[891]

B. Special Relationship

275. One element that is required under the tort of negligent misrepresentation is a special relationship between the certifier and a third party relying on the certificate. This relationship can be established in several ways, depending upon the jurisdiction in which the claim is filed.

276. Some jurisdictions require a relationship of actual privity of contract or a relationship so close as to approach that of privity between the certifier and a third party.[892] This relationship can exist if there is direct contact between the certifier and a third party[893] or if the requirements set forth in the *Credit Alliance* decision are fulfilled.

277. Following the *Credit Alliance* decision, the certifier must have been aware that the certificate was used for a particular purpose in the furtherance of which a known party was intended to rely.[894] Investors, for instance, can be known parties if they are members of a "select [and settled and particularised] group of qualified investors" towards whom the CRAs targeted their ratings.[895] Certifiers do not need to know the identity or name of each particular plaintiff as long as the certificate is designed to target a select group of qualified third parties rather than the public at large.[896] Another requirement under the *Credit Alliance* test is some linking conduct between the certifier and the third party, which shows the certifier's understanding that the third party will rely on the certificate.[897] The certifier needs to be placed in a relationship with the third party that is significantly different from anyone else in the public at large.[898]

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[891] See for discussion and extensive overview of case law: L.A. CATALANO & S. LIPNER, "The Tort of Giving Negligent Investment Advice", (39) *University of Memphis Law Review* 2009, 680.

[892] See in this regard: *Ultramares Corporation v. Touche*, 174 N.E. 441 (1932); *Glanzer v. Shepard*, 233 N.Y. 236 (N.Y. 1922). Several decisions dealing with the liability of CRAs affirm this near-privity requirement under New York law: *LaSalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071, 1093-1094 (S.D.N.Y. 1996); *Anschutz Corp. v. Merrill Lynch & Co*., 690 F.3d 98, 114 (2nd Cir. 2012); *King County, Washington et al v. IKB Deutsche Industriebank AG et al*, no. 09-08387, 40-43 (S.D.N.Y. 2012). Such approach has also been adhered to in cases dealing with the liability of other certifiers such as classification societies: *Cargill v. Bureau Veritas*, 901 F. Supp. 737 (S.D.N.Y. 1995).

[893] Several cases dealing with the liability of CRAs have used this approach. As a result of such contact, a CRA might become aware that its ratings are being circulated in a private placement memoranda to a select group of potential investors (e.g. *LaSalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071, 1093-1094 (S.D.N.Y. 1996); *Anschutz Corp. v. Merrill Lynch & Co*., 690 F.3d 98, 114 (2nd Cir. 2012); *Federal Home Loan Bank of Boston v. Ally Financial Inc*., no. 11-10952-GAO, 3 (D. Mass. 2010)).

[894] *Credit Alliance Corp. v. Arthur Andersen & Co*., 65 N.Y.2d 536, 551 (N.Y. 1985).

[895] *King County, Washington et al v. IKB Deutsche Industriebank AG et al*, no. 09-08387, 40-43 (S.D.N.Y. 2012).

[896] *LaSalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071, 1093-1094 (S.D.N.Y. 1996).

[897] *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 551 (N.Y. 1985).

[898] *King County, Washington et al v. IKB Deutsche Industriebank AG et al*, no. 09-08387, 40-43 (S.D.N.Y. 2012).

278. The linking conduct has been addressed in different cases dealing with certifiers. In *LaSalle,* for instance, the claimants convincingly alleged that the primary if not the exclusive "end and aim" of the rating was to enable the issuer to market and sell the bonds to the plaintiffs. The CRA shaped the bond rating program to meet the plaintiffs' needs. It was a prerequisite for issuing the bonds that Duff & Phelps rated them as "AA".[899] In *Carbotrade*, there was no conduct linking classification society Bureau Veritas to the cargo-owner. There were no communications between both parties. Although the classification society may have been aware that its certificates were at one point going to be shown to third parties, this was merely one of the possibilities. It was surely not their end and aim. The purpose of the certificate is not to guarantee safety, but merely to allow the shipowner to take advantage of the insurance rates available to a classed vessel. The survey and the issuance of the certificate were thus not primarily to the benefit of the cargo-owners.[900]

279. Other jurisdictions rely on the requirements in Section 522 of the Restatement (Second) of Torts. The certifier needs to know the third parties to whom and for whose guidance the information is supplied. Parties that customarily rely on the information are not entitled to bring a claim under Section 552, unless the certifier knew at the time when the certificate was issued that it was for their benefit and guidance.[901]

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[899] *LaSalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071, 1076, 1093-1094 (S.D.N.Y. 1996); *King County, Washington et al v. IKB Deutsche Industriebank AG et al*, no. 09-08387, 40-43 (S.D.N.Y. 2012).

[900] *Carbotrade v. Bureau Veritas*, 901 F. Supp. 737, 746-749 (S.D.N.Y. 1995); *Sundance Cruises v. American Bureau of Shipping*, 7 F.3d 1077, 1084 (2nd Cir. 1993).

[901] *Federated Mgmt. Co. v. Coopers & Lybrand,* 137 Ohio App.3d 366, 384-385 (2000), 738 N.E.2d 842, 855-856 (2000); *Haddon View Inv. Co. v. Coopers & Lybrand*, 70 Ohio St.2d 154, 157, 436 N.E.2d 212, 214-215 (Ohio 1982); *Otto Candies LLC v. Nippon Kaija Kyokai Corp.*, 346 F.3d 530 (5th Cir. 2003); *Somarelf, Elf Union and Fairfield Maxwell Services Ltd. v the American Bureau of Shipping*, 704 F. Supp. 59 (D.N.J. 1989). Similar requirements can also exist in other jurisdictions. In Illinois, for instance, claims for negligent misrepresentation will be successful if the certifier intended to induce the plaintiff to act and rely on the certificate. The tort of negligent misrepresentation can extend to third parties who lack privity with the certifier if the latter knew that the certificate would be used and relied upon by third parties and that potential liability is restricted to a comparatively small group (*Rosenstein v. Standard & Poor's Corporation*, 636 N.E.2d 665, 667-668 (1993); *Quinn v. The McGraw-Hill Companies*, 168 F.3d 331, paragraphs 9-12 (7th Cir. 1999)). In California, plaintiffs have to show that the certificate was supplied with the intent to influence the plaintiff or a particular class of persons to which he belongs to act in reliance upon in a specific transaction, without explicitly requiring a special or privity-like relationship (*Bily v. Arthur Young & Co*., 3 Cal.4th 370, 414 (1992)). See for an application in the context of CRAs: *California Public Employees' Retirement System v. Moody's Corporation*, no. A134912, 24-25 (Cal. Ct. App. 2014) concluding there was a reasonable inference that the CRAs supplied their ratings with knowledge of the existence of a well-defined type of transaction which the ratings were intended to influence; *Grassi v. Moody's Investor's, Service*, no. CIV S-09-0543 JAM DAD PS (E.D. Cal. 2011) concluding that the ratings were available to the general public. Any person could have invested in the bonds purchased by plaintiffs; *Anschutz Corp. v. Merrill Lunch Co. Inc*.,785 F. Supp. 2d 799 (N.D. Cal. 2011) in which the Northern District Court in California held that plaintiff adequately pled that the CRAs intended to undertake the responsibility of influencing particular transactions involving the circumscribed group of qualified institutional buyers (QIBs). Although the class consisted of more than thousands QIBs, it was still a circumscribed and identifiable group that the CRAs not only knew would have access to the ratings but necessarily rely on it to purchase investment grade securities.

280. This requirement was fulfilled in *National Century*. The plaintiff convincingly alleged he was part of a limited class whose reliance on the ratings was foreseeable for the CRA. Moody's knew that its ratings would be seen on the offering materials given to only a select class of qualified investors of whom the plaintiff was one.[902] Things were different in *Ohio Police & Fire Pension Fund v. Standard & Poor's.* The Court of Appeals for the Sixth Circuit affirmed a first instance judgement, which held there were no allegations that the parties had any direct communication, nor that the CRAs knew or foresaw that the plaintiffs would be relying on its ratings.[903] The complaint did not support the plaintiff's allegation that they were part of a limited class of qualified investors to whom the CRAs intended to supply their ratings. Of the 308 mortgage-backed securities purchased by the plaintiff, 254 of them were publicly available securities any investor could have acquired. Such claims were the "sort of claim for representations made to the "faceless" investing public that Ohio courts reject".[904]

C. Actual and Reasonable or Justifiable Reliance

281. A third party also needs to actually and reasonably or justifiably rely on the certificate to make a decision. The facts of the case will often determine whether a third party *actually* relied on a certificate. Proving that third parties *reasonably* or *justifiably* relied on the certificate can be trickier.

282. In the *Otto Candies* case, classification society NKK challenged the District Court's finding that Otto Candies actually relied on the certificate. On appeal, it was decided that the District Court did not err in coming to that conclusion. If it was not for NKK's certification of the vessel as a coastal passenger vessel free of recommendations, the third party would not have purchased it. The purchaser actually relied on the class certificate to buy the vessel.[905] In *Carbotrade*, the plaintiff also failed to show actual reliance on the certificate issued by Bureau Veritas. Reliance was not possible as the cargo-owners already began loading cargo several days before the society had completed the intermediate survey and extended the vessel's certification.[906] Actual reliance was also rejected in the *Cargill* case. There was no evidence that the plaintiffs consulted Bureau Veritas' Register that classified the vessel. Additionally, the plaintiffs hired their own independent surveyor to inspect the vessel one week after Bureau Veritas surveyed the ship.[907]

283. Reasonable or justifiable reliance will often be accepted if the certificate is the only information available on a particular item. The court in the *Abu Dhabi* case, for example,

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[902] *In re National Century Financial Enterprise*, 580 F. Supp. 2d 630, 646-648 (S.D. Ohio 2008).

[903] *Ohio Police & Fire Pension Fund v. Standard & Poor's Financial Services LLC*, 813 F.Supp.2d 871 (S.D. Ohio 2011).

[904] *Ohio Police & Fire Pension Fund v. Standard & Poor's Financial Services LLC*, 2012 WL 5990337, no. 11-4203, 14 (6th Cir. 2012).

[905] *Otto Candies LLC v. Nippon Kaija Kyokai Corp*., 346 F.3d 530 (5th Cir. 2003).

[906] *Carbotrade v. Bureau Veritas*, 901 F. Supp. 737, 746-749 (S.D.N.Y. 1995).

[907] *Cargill v. Bureau Veritas*, 902 F. Supp. 49 (S.D.N.Y. 1995).

concluded that investors reasonably relied on the credit ratings. The market at large including sophisticated investors has come to rely on ratings issued by CRAs considering "their NRSRO [Nationally Registered Statistical Rating Organisation] status and access to non-public information that even sophisticated investors cannot obtain".[908] The *CalPERS* court also held that, contrary to the corporate market, investors in the structured finance market cannot reasonably develop their own informed opinions as there is insufficient public information to do so. Reliance on ratings is justified if investors are unable to do their own analysis or develop their views about potential investments.[909]

Besides the availability of information on a particular item, the position of a certifier is also important to establish reasonable or justifiable reliance. The *Abu Dhabi* decision, for instance, clearly considered a CRA's NRSRO status of importance when establishing reasonable reliance.[910] Similarly, in the *Otto Candies* case, the District Court held that the buyer's reliance on the certificate was reasonable. Reference was made to the position of NKK as one of the largest classification societies in the world as well as to its IACS membership.[911] In the *Great American Insurance* case, the Southern District Court in New York rejected a negligent misrepresentation claim against a classification society as its owner and charterer had "knowledge and opportunity to remedy the defects" but "elected to do nothing".[912]

2.3.4. Certifier-Specific Elements Related to Liability

284. In addition to the common bases of liability discussed above, certifier-specific elements exist as well. These can relate to grounds of liability that are not common to all certifiers or concepts that play a role regarding a particular certifier's liability. Certifier-specific elements can be illustrated with some examples stemming from CRAs (part A.) and classification societies (part B.).

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[908] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651. F. Supp. 2d 155, 180-181 (S.D.N.Y. 2009); *Federal Home Loan Bank of Boston v. Ally Financial Inc*., no. 11-10952-GAO, 3 (D. Mass. 2010). CRAs may apply to be recognised by and registered with the SEC as NRSRO. Ratings provided by NRSROs are often used by financial institutions or investors for regulatory purposes. In order to be considered a NRSRO, a CRA has to be nationally recognised in the US and provide credible ratings. See in this regard: Section 3 (62) of the Credit Rating Agency Reform Act of 2006, September 29, 2006, Pub. L. 109–291, 120 Stat. 1328, codified in scattered sections of 15 U.S.C. (C. HILL, "Limits of Dodd-Frank's Rating Agency Reform", (15) *Chapman Law Review* 2011, 133).

[909] *California Public Employees' Retirement System v. Moody's Corp.*, no. A134912, 28-30 (Cal. Ct. App. 2014); *King County, Washington et al v. IKB Deutsche Industriebank AG et al*, no. 09-08387, 49 (S.D.N.Y. 2012). See however: *Quinn v. McGraw-Hill Cos.*, 168 F.3d 331, 336, paragraph 17 (7th Cir.1999) affirming that Quinn could not show that he reasonably relied on the rating because he was an "experienced" banker who should have done "his own homework". It seems, nonetheless, that Quinn had access to inside information and "chose to take no action at that time; indeed, he let matters ride for a long time, until after S & P had downgraded its own rating".

[910] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651. F. Supp. 2d 155, 180-181 (S.D.N.Y. 2009); *Federal Home Loan Bank of Boston v. Ally Financial Inc*., no. 11-10952-GAO, 3 (D. Mass. 2010).

[911] *Otto Candies LLC v. Nippon Kaija Kyokai Corp*., 346 F.3d 530 (5th Cir. 2003).

[912] *Great American Ins. Co. et al. v. Bureau Veritas*, 338 F. Supp. 999, 1011 (S.D.N.Y. 1972).

A. The Situation for Credit Rating Agencies

285. Rating agencies can be held liable for securities fraud. Deceived investors have already targeted CRAs alleging violations of Section 10(b) of the Securities and Exchange Act of 1934[913] and the thereunder promulgated SEC Rule 10b-5.[914] Claims under Rule 10b-5 require a plaintiff to establish that the defendant CRA made a material misrepresentation or omitted to disclose material information[915] with scienter in connection with the purchase or sale of securities justifiably relied on by plaintiffs and proximately causing them injury.[916]

An important element in the context of CRAs is the proof that they acted with scienter. The Supreme Court defined scienter as a "mental state embracing intent to deceive, manipulate or defraud".[917] Prior to the enactment of the Dodd-Frank Act,[918] a plaintiff had to plead with particularity facts giving rise to a strong inference that the CRA acted with scienter. Rating agencies had to act with the *intention* to deceive, manipulate or defraud.[919] An inference of scienter needs to be more than merely plausible, permissible

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[913] US Securities Exchange Act of 1934, Public Law 73–291, 48 Stat. 881, codified in 15 U.S.C. §§ 78a-pp.

[914] SEC Rule 10b-5, codified at 17 C.F.R. 240, 10b-5. Also see: R. MILLER & G. JENTZ, *Business Law Today: Comprehensive*, South-Western, Cengage Learning, 2009, 843-844.

[915] Case law shows that ratings are actionable if they are factually not well-grounded (e.g. *In Re National Century Financial Enterprise*, 580 F. Supp. 2d 630, 639 (S.D. Ohio 2008)), if the CRA does not genuinely and reasonably believe the rating (e.g. *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 167 & 178-179 (S.D.N.Y. 2009)) or when there is no special relationship between the parties (e.g. *LaSalle National Bank v. Duff & Phelps Credit Rating Co.,* 951 F. Supp. 1071, 1085-1086 (S.D.N.Y. 1996)).

[916] *Superintendent of Insurance v. Bankers Life & Casualty Co*., 404 U.S. 6, 13-14 (1971); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983); *Helwig v. Vencor Inc*., 251 F.3d 540, 554 (6th Cir. 2001); *In re IBM Securities Litigation*, 163 F.3d 102, 106 (2nd Cir. 1998); *In re National Century Financial Enterprise*, 580 F. Supp. 2d, 634 (S.D. Ohio 2008); *Lasalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071, 1082 (S.D.N.Y. 1996). In certain US States, the elements of a common law fraud claim are substantially identical to those governing Section 10(b). For example, investors who file a lawsuit for common law fraud under New York law have to demonstrate a misrepresentation or omission of material fact, which the defendant knew to be false and made with the intention of inducing reliance (*Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 171 (S.D.N.Y. 2009)*; Federal Home Loan Bank of Boston v. Ally Financial*, no. 11-10952-GAO, at "Title B Count V: Fraud" (D. Mass. 2013); *Tolin v. Standard & Poor's Financial Services*, 950 F.Supp.2d 714, 722-723 (S.D.N.Y. 2013); *LaSalle National Bank v. Duff & Phelps Credit Rating Co.*, 951 F. Supp. 1071, 1085-1086 (S.D.N.Y. 1996)).

[917] *Tellabs Inc. v. Makor Issues & Rights*, 551 U.S. 308, 319 (2007); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-194 (1976). See for more information: A. HORWICH, "An Inquiry into the Perception of Materiality as an Element of Scienter Under SEC Rule 10b-5", (67) *Business Lawyer* 2011, 5-9.

[918] US Congress, Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376-2223 codified at 12 U.S.C. chapter 53. Following Section 933(b) of the Act, plaintiffs must now only establish particular facts giving rise to a strong inference that a CRA either (1) knowingly or recklessly failed to conduct a reasonable investigation of the rated security with respect to the factual elements relied upon by its own methodology for evaluating credit risk; or (2) knowingly or recklessly failed to obtain reasonable verification that such an investigation was done by a source independent of the issuer or underwriter (15 U.S.C. § 78u–4(b)(2)(B)). On June 9, 2017, however, the House of Representatives passed H.R. 10, the Financial Choice Act of 2017. The Act repealed Section 933(b) of the Dodd-Frank Act. It remains unclear whether the bill will also pass the Senate.

[919] 15 U.S.C. § 78u–4, (b)(2)(A).

or reasonable to qualify as strong. The requirement of scienter has to be cogent and at least as compelling as any opposing inference of non-fraudulent intent.[920] Although investors do not always succeed to prove a strong inference that the CRA acted with scienter,[921] it can sometimes be possible.[922]

286. Capital-markets certifiers can also face prospectus liability in the US.[923] Section 11 of the Securities Act makes issuers of securities liable for registration statements[924] that contain an untrue statement of a material fact or omit to state a material fact. The plaintiff has to prove that the registration statement filed with the Securities and Exchange Commission (SEC) contained untrue statements of a material fact or materially misleading omissions in connection with a public offering.[925] If a registration statement contains such statements, any person acquiring securities may sue those who signed the statement, the experts who prepared or certified portions of the registration statement and every security underwriter.[926] Experts such as accountants or other parties giving authority to a statement made by them, who have with their consent been named as having prepared or certified any part of the registration statement or as having prepared or certified any report or valuation supporting the registration statement, can be held liable under Section 11 of the Act for the parts they prepared.[927] Section 12 of the Securities Act imposes similar liability for sellers who make those statements in a prospectus and (oral) communications.[928]

Liability under Section 11 is not absolute. All defendants except for the issuer have a so-called 'due diligence' defence if they had no reason to believe that the statement contained

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[920] *In re National Century Financial Enterprise*, 580 F. Supp. 2d 630, 641 (S.D. Ohio 2008) referring to *Tellabs Inc. v. Makor Issues & Rights*, 551 U.S. 308 (2007).

[921] *In re National Century Financial Enterprise*, 580 F. Supp. 2d 630, 634 (S.D. Ohio 2008).

[922] See for example: *In re Moody's Corporation Securities Litigation*, 599 F. Supp. 2d 493, 514-516 (S.D.N.Y. 2009); *LaSalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071, 1086-1088 (S.D.N.Y. 1996).

[923] A prospectus is published by companies that offer securities for purchase to the public. It has to comply with legal requirements and is filed for approval with a country's securities inspectorate such as the SEC. A prospectus discloses essential information including the issuer's objectives and primary business activities, the company's current financial position, the projected financial statements and assumptions underlying the projections, the offering price on the stock (shares) and (in case of bonds and notes) how the interests will be paid.

[924] A registration statement is a set of documents including a prospectus, which a company must file with the Securities and Exchange Commission before it can proceed with a public offering.

[925] *New Jersey Carpenters Health Fund v. Residential Capital LLC*, 08 CV 8781 (HB), 10-11 (S.D.N.Y. 2010).

[926] United States Securities Act of 1933, Title I of Pub. L. 73-22, 48 Stat. 74, May 27, 1933, codified at 15 U.S.C. § 77k (a) 2006.

[927] See for an analysis of the liability of auditors under Section 11 and references to case law: J.P. CANDIDA, "Section 11 of the Securities Act of 1933: The Disproportionate Liability Imputed to Accountants", (27) *Delaware Journal of Corporate Law* 2002, 570-571; J.W. ZISA, "Guarding the Guardians: Expanding Auditor Negligence Liability to Third-Party Users of Financial Information", (11) *Campbell Law Review* 1989, 123-174; J.A. BURKE, "Auditor Liability to External Users for Misleading Financial Statements of Publicly Listed Companies: Two Normative Propositions", (39) *Syracuse Journal of International Law and Commerce* 2011, 137-188.

[928] 15 U.S.C. § 77l.

a misstatement or an omission.[929] To sustain a due diligence defence, the auditor will need to prove that he had reasonable ground to believe and did believe after a reasonable investigation that the audited financial statements were materially accurate.[930]

287. Things are more complex regarding CRAs. Prior to the changes introduced by the Dodd-Frank Act,[931] SEC Rule 436(g) stipulated that ratings from a NRSRO assigned to public offerings were not considered as an expert-certified part of the registration statement. As opposed to auditors, CRAs could not be held liable if the registration statement contained an incorrect rating.[932] However, Section 939G of the Dodd-Frank Act repealed Rule 436(g). As a consequence, the issuer had to seek the written consent of a NRSRO before he could include a rating in the registration statement. By giving its consent, the NRSRO could incur liability as expert for the material misstatements or omissions regarding the rating included in the registration statement.[933] However, NRSROs refused to give their consent due to this threat of potential liability. This eventually led to the freezing and the collapse of the asset-backed securitisation market as issuers were no longer able to offer securities.[934] The US House Financial Services Committee, therefore, approved the removal of expert liability for CRAs ("no-action

[929] 15 U.S.C. § 77k (b) (3). See in this regard: W.K. SJOSTROM, "The Due Diligence Defense Under Section 11 of the Securities Act of 1933", (44) *Brandeis Law Journal* 2006, 549. SEC Rule 176 sets out a number of general factors courts can use when determining the 'reasonableness' of an investigation for purposes of Section 11 such as the type of issuer or security (Section 17 C.F.R. 230.176 (Circumstances affecting the determination of what constitutes reasonable investigation and reasonable grounds for belief under section 11 of the Securities Act)).

[930] M.C. KNAPP, *Contemporary Auditing*, Boston, Cengage Learning, 2016, 458.

[931] US Congress, Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376-2223 codified at 12 U.S.C. chapter 53. The Act contains several requirements on the regulation and liability of CRAs in Title XI, Subtitle C ("Improvements to the Regulation on Credit Rating Agencies"). The Act, for instance, imposes greater transparency of rating procedures and methodologies, provides the Securities and Exchange Commission with more efficient enforcement mechanisms, aims to reduce reliance on ratings and minimises conflicts of interest.

[932] Dodd-Frank Act, § 939G. See in this regard also the discussion in A.M. GRINSHTEYN, "Horseshoes and Hand Grenades: The Dodd-Frank Act's (Almost) Attack on Credit Rating Agencies", (39) *Hofstra Law Review* 2011, 956, 967-975; O. SCHMIDT, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies", (3) *Columbia Business Law Review* 2012, 1010-1014. Case law affirmed that CRAs do not fall within the definition of underwriter under Section 11 of the Securities Act 1933: *In Re Lehman Brothers Securities & ERISA Litigation*, 681 F. Supp. 2d 495, 498-499 (S.D.N.Y. 2010); *New Jersey Carpenters Vacation Fund v. Royal Bank*, 720 F. Supp. 2d 254, 262-264 (S.D.N.Y. 2010).

[933] Dodd-Frank Act, §939G. See for a discussion: N.S. ELLIS, L.M. FAIRCHILD & F. D'SOUZA, "Is Imposing Liability on Credit Rating Agencies a Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis", (17) *Stanford Journal of Law, Business & Finance* 2012, 209-210; A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 79.

[934] B. BROWNLOW, "Rating Agency Reform: Presenting the Registered Market for Asset-Backed Securities", (15) *North Carolina Banking Institute Journal* 2011, 131-133.

relief") in July 2011.[935] The Asset-Backed Market Stabilization Act of 2011 repealed section 939G of the Dodd-Frank Act and restored Rule 436(g).[936]

B. The Situation for Classification Societies

288. Some certifier-specific concepts can also play an important role in the context of classification societies. One example is the presumption of unseaworthiness, which is often invoked by plaintiffs in trying to recover from classification societies. According to that presumption, a vessel is considered unseaworthy when it is lost under normal conditions with no additional or other explanation.[937] Although the presumption mainly operates against the shipowner, it can also be used against other parties who are responsible for the condition of the vessel.[938]

289. Judge Tyler concluded in the *Great American* case that the presumption of unseaworthiness did not apply for classification societies as it is the shipowner who remained responsible for the vessel's seaworthiness. A classification society does not design, build or repair the vessel. Consequently, it could not be responsible for the seaworthiness of the ship under an implied warranty of fitness and suitability for use. The plaintiffs, nonetheless, maintained that Bureau Veritas had control over the condition of the vessel in that the owner and charterer could not have sailed under their insurance policies without the certificate. While this might constitute control in some practical or

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[935] Committee on Financial Services, "Committee Acts To Eliminate Provision In Dodd-Frank That Shut Down Segment Of Economy", July 20, 2011, available at <financialservices.house.gov/news/documentsingle.aspx?DocumentID=252949>.

[936] Asset-Backed Market Stabilization Act of 2011, H.R.1539, Report No. 112–196, April 14, 2011. In the EU, Article 6 of the Prospectus Directive stipulates that Member States have to ensure that the responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor. Member States have to safeguard that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus (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, *OJ* 345). National legislation will thus determine whether auditors or CRAs can be held liable when their opinions are included in the prospectus. In Belgium, Article 61 of the Prospectus Act deals with the liability for incomplete, misleading or erroneous information contained in the prospectus (Loi du 16 juin 2006 relative aux offres publiques d'instruments de placement et aux admissions d'instruments de placement à la négociation sur des marchés réglementés, no. 2006009492, published in the *Moniteur belge* on June 21, 2006). The Article lists different parties that will be held jointly and severally liable for the damage in respect of any incomplete, misleading or erroneous information contained in the prospectus. The auditor and CRA are not mentioned as one of those parties. However, the auditor can held liable on the basis of Article 140 of the Belgian Company Code as well as on the basis of the Articles 1382-1383 BCC (I. DE POORTER, *Controle van financiële verslaggeving: revisoraal en overheidstoezicht*, Antwerp, Intersentia, 2007,183-242). This is a different basis than liability for statements contained in a prospectus (see for more information: V. DE SCHRYVER, "Prospectusaansprakelijkheid", in E. WYMEERSCH, *Financieel recht tussen oud en nieuw*, Antwerpen, Maklu, 1996, 345-346 & 360; A. DE BOECK, "De prospectusaansprakelijkheid na de Wet van 22 april 2003: een nieuw kleedje of alleen maar wat make-up?", *Tijdschrift voor Financieel Recht* 2005, 1223).

[937] *Federazione Italiana Dei Corsorzi Agrari et al. v. Mandask Compania De Vapores, S. A.*, 388 F.2d 434 (2nd Cir. 1968); *South, Inc. v. Moran Towing & Transportation Co*., 360 F.2d 1002, 1005 (2nd Cir. 1966); N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 74.

[938] *In Re Marine Sulphur Transport Corp.*, 312 F. Supp. 1081, 1098 (S.D.N.Y. 1970); *Great American Insurance Company v. Bureau Veritas*, 338 F. Supp. 999, 1008 (S.D.N.Y. 1972).

economic sense, the judge held that it was not sufficient to bring the presumption into play. The shipowner and charterer could have either sailed without insurance or paid a higher premium. The presumption of unseaworthiness cannot be used against a classification society that did nothing more than classify a ship that proved to be unseaworthy.[939]

2.4. Summary

290. The analysis shed light on the liability of certifiers towards third parties in different jurisdictions. Two conclusions are worth mentioning, one on a more global scale, the other one on a legal technical level.

291. Whether a certifier can be held liable will, on the one hand, largely depend upon the jurisdiction in which the claim was filed. Certifiers will more easily incur liability in civil law traditions than in common law jurisdictions. For instance, classification societies have already been held liable on several occasions in Belgium and France. In England, third parties will not always succeed in proving that a certifier owed a duty of care. The requirement that it has to be fair, just and reasonable gives judges some margin to reject a duty when the other elements for a claim – proximity and foreseeability – are established. As opposed to England, certifiers have already been held liable under different torts in the US and Australia. In most cases, quite similar requirements are necessary. The third party needs to be a member of an ascertainable class and the certifier has to know that a third party will rely on the certificate for a specific transaction. A third party's reliance on the certificate should be reasonable or justified as well.

292. On the other hand, the existing risk of third-party liability might not always be sufficient to deter certifiers from issuing inaccurate and unreliable certificates. In Belgium and France, certifiers have already been held liable on several occasions in the past. Yet, recent scandals have occurred with certified items and certifiers are still being subject to litigation. The recent PIP case is the most prominent example in this regard. In other jurisdictions such as England, the risk that certifiers will be held liable might be even lower due to several strict requirements.

3. Conclusions: Third-Party Liability of Certifiers

293. The chapter discussed the third-party liability of certifiers both at the EU and at the national level. The analysis showed that policymakers at the supranational level addressed the liability of certifiers quite differently. Several reasons for the diverging approaches were given. More importantly, EU legislation dealing with the third-party liability of each certifier entails many problems. As a consequence, its application will remain uncertain and reliance on national law becomes necessary.

294. Some important aspects related to a certifier's (third-party) liability were subsequently examined in civil law and common law jurisdictions. It was shown that the

[939] *Great American Insurance Company v. Bureau Veritas*, 338 F. Supp. 999, 1008-1009 (S.D.N.Y. 1972).

jurisdiction in which the claim is filed will largely determine whether there is a basis to impose liability upon certifiers. A basis for liability might be more easily established in civil law countries such as France and Belgium as opposed to England or the United States. In any case, the existing risk of third-party liability is not always high enough to deter certifiers from issuing inaccurate and unreliable certificates. This is an important starting point for the analysis in the following chapters.

Chapter IV – Certificates as Opinions and the Freedom of Speech Defence

295. Based on the stages in the certification process, certificates are issued attesting that a particular item meets certain standards. Certifiers have already argued that their certificates should be protected under the constitutional or fundamental freedom of speech defence. Rating agreements or reports, for instance, stipulate that ratings are no absolute assurances of credit quality or exact measures of the probability that an issuer or financial product will default. They are opinions on the credit quality and do not recommend purchasing, holding or selling securities.[940] CRAs gather complex information from different sources and transform this into future predictions by using simple symbols.[941] CRAs argue that they are financial journalists and their ratings opinions that do not contain provably false facts.[942] Credit ratings are the "world's shortest editorials"[943] written on an item or company's creditworthiness. CRAs, therefore, consider themselves as members of the financial press. As a consequence, ratings should be fully protected as journalistic speech.[944] There is no reason why other certifiers could not invoke the same argument when confronted with claims following an allegedly inaccurate and unreliable certificate: it merely is an opinion on the certified item, nothing more or less.

296. The question arises whether certificates can indeed be considered as equivalent to an opinion protected by the freedom of speech defence. This is important as the "Free Speech Clause […] can serve as a defense in state tort suits".[945] A background on the freedom of speech defence is, therefore, necessary to better understand the mechanisms aiming to increase the accuracy and reliability of certificates. To find an answer to the previously mentioned question, a brief comparative analysis is made between several legal systems. CRAs have already invoked the protection of speech defence under the First Amendment to the US Constitution. This is the reason why that legal system is used as a starting point (part 1.). However, the certifier's freedom of speech can be invoked in other jurisdictions as well. This is not surprising considering that certifiers offer their services on a global scale. Against this background, the analysis will also include Belgium. It is a civil law jurisdiction, which makes the comparison with the US even

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[940] Moody's, Ratings Definitions, available at <www.moodys.com/Pages/amr002002.aspx>. See in this regars also the wording used in the different codes of conduct.

[941] R. JONES, "The Need for a Negligence Standard of Care for Credit Rating Agencies", (1) *William & Mary Business Law Review* 2010, 210.

[942] See in this regard also the discussion *supra* in no. 62.

[943] G. HUSISIAN, "What Standard of Care Should Govern the World's Shortest Editorials? An Analysis of Bond Rating Agency Liability", (75) *Cornell Law Review* 1990, 446.

[944] See for example: *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 175-176 (S.D.N.Y. 2009*); Federal Home Loan Bank of Pittsburgh v. J.P Morgan Securities LLC*, GD09-016892, 16-17 (Court of Common Pleas of Allegheny County, November 29, 2010); *In Re Enron Corp. Securities Derivative,* 511 F.Supp.2d 742, 809-815 (S.D. Tex. 2005); *Genesee County Employee Retirement System v. Thornburg Mortgage Securities Trust 2006-3*, No. CIV 09-0300, 2011 WL 5840482, 227-228 (D.N.M. 2011).

[945] *Snyder v. Phelps*, 562 U.S. 443, 131 S.Ct. 1207, 1215 (2011).

more interesting. As the situation in Belgium cannot be disconnected from case law dealing with the freedom of expression under Article 10 of the ECHR, decisions issued by the ECtHR are included as well (part 2.). A brief overview of the most important findings is given in a conclusion (part 3.).

1. Freedom of Speech under the First Amendment

297. The First Amendment to the US Constitution gives members of the press the right to publish information, news and opinions without interference by the Government. The freedom of press guaranteed by the First Amendment is not very different from the right to freedom of speech. It allows individuals to express themselves through publication and dissemination of opinions or statements and is part of the constitutional protection of freedom of expression.[946] The First Amendment restricts the ability of the Government to constrain the speech of its citizens or commercial entities. However, the prohibition on abridgment of the freedom of speech is not absolute. Different levels of protection apply according to the type of speech.[947] Whereas certain types of speech can be – and are – prohibited outright (e.g. child pornography), the regulation of other types is more complex.[948] False speech, for instance, is afforded less protection than true speech, and commercial speech less than non-commercial political speech.[949]

298. The First Amendment defence is often related to defamation claims. Defamation refers to intentional false statements of fact that harm a person's reputation. It encompasses both libel, which generally concerns written defamation, and slander, mostly related to oral defamation.[950] However, First Amendment protection has been expanded "to reach beyond [its] traditional application to the law of defamation, slander and libel to reach other causes of action [such as] breach of contract, misrepresentation, and tortious interference with contract or business".[951]

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[946] See for an overview and further references: O. FISS, *The Irony of Free Speech*, Harvard, Harvard University Press, 2009, 112 p.; F. ABRAMS, *The Soul of the First Amendment: Why Freedom of Speech Matters*, Yale, Yale University Press, 2017, 160 p.; R.L. WEAVER & D.E. LIVELY, *Understanding The First Amendment*, LexisNexis, 2012, 418p.; E. CHEMERINSKY, *Constitutional law: principles and policies*, New York, Wolters Kluwer, 2015, 965-1247.

[947] Legal Information Institute, "First Amendment: An Overview", Cornell *University Law School*, available at <www.law.cornell.edu/wex/first_amendment>.

[948] K.A. RUANE, "Freedom of Speech and Press: Exceptions to the First Amendment", CRS Report for Congress, September 8, 2014, available at <www.fas.org/sgp/crs/misc/95-815.pdf>.

[949] J. KESSLER, "First Amendment Protection for False Commercial Speech by A Publisher Regarding The Truthfulness of Its Publication: A Response to Litigation Arising Over James Frey's A Million Little Pieces", (24) *Cardozo Arts & Entertainment* 2007, 1220 with further references.

[950] See for more information: BEAU III BAEZ, *Tort Law in the USA*, Alphen aan den Rijn, Kluwer Law International, 2010, 68-71 with further references.

[951] *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742, 811 (S.D. Tex. 2005). This is illustrated in several cases where investors brought claims against CRAs. In the *Abu Dhabi* case, the protection under the First Amendment arose in a common law fraud claim (*Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155, 175-176 (S.D.N.Y. 2009). In *re Enron*, the scope of the First Amendment protection was at stake in the context of claims for negligent misrepresentation (*In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742, 809-810 (S.D. Tex. 2005). See in this regard also: D.J. SOLOVE & N.M. RICHARDS, "Rethinking Free Speech and Civil Liability", (109) *Columbia Law Review* 2009, 1659.

299. The Supreme Court held that "[t]he liberty of the press […] comprehends every sort of publication which affords a vehicle of information and opinion".[952] Against this background, any claim brought against CRAs with regard to the substance of ratings potentially raises First Amendment concerns.[953] A similar conclusion could apply to other certificates potentially falling within the scope of the First Amendment.[954] Others argue that certificates, even when couched as opinions,[955] should not protect certifiers from liability under the freedom of speech argument.[956] However, things are more nuanced. Several categories of speech are protected under the First Amendment, such as non-factual opinions (part 1.1.), factual statements (part 1.2.) and commercial speech (part 1.3.). This qualification of types of speech is important as it will determine the level of protection given to the certificates (part 1.4.). I will conclude by giving an overview of the main findings (part 1.5.).[957]

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[952] *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

[953] R. JONES, "The Need for a Negligence Standard of Care for Credit Rating Agencies", (1) *William & Mary Business Law Review* 2010, 210. WELLSTOOD also concludes that the "above is a sampling of cases that have been brought against movie producers, magazine and book publishers, newspapers, radio, and television broadcasters for physical harm allegedly resulting from the speech they disseminate. These causes of action are grounded in various theories of tort, including negligence, negligent misrepresentation, strict products liability and attractive nuisance. Most of these claims have been unsuccessful due to the rights guaranteed by the First Amendment" (J. WELLSTOOD, "Tort Liability of the Media", (15) *Journal of Civil Rights and Economic Development* 2000, 187).

[954] The application of the First Amendment can be broad (see for example for newspaper: *Gutter v. Dow Jones*, 22 Ohio St. 3d 286, 289, 490 N.E.2d, 901 (1986) as discussed in D.A. BALLAM, "The Expanding Scope of the Tort of Negligent Misrepresentation: Are Publishers Next", (22) *Loyola of Los Angeles Law Review* 1989, 780). Courts have, for instance, concluded that the contents of books, songs, movies, and even video games are forms of expression which deserve protection under the First Amendment (R.C. AUSNESS, "Products Liability in the Twenty-First Century: A Review of Owen's Products Liability Law", (58) *South Carolina Law Review* 2006, 453 with further references). As such, the question to which extent certificates could fall within the protective scope of the First Amendment becomes relevant.

[955] R.H. HEIDT, "Damned for Their Judgment: The Tort Liability of Standard Development Organizations", (45) *Wake Forest Law Review* 2010, 1274, footnote 178.

[956] S.E. GRANT HAMILTON, "The First Amendment as a Trade Association Shield from Negligent Liability and Strategies for Plaintiffs Seeking to Penetrate that Shield", (22) *Journal of Constitutional Law* 2000, 466. The author especially targets trade associations but a same conclusion can apply to certifiers. Similarly, HEIDT writes that certifiers "offer opinions" but doing so has not prevented courts from deeming them negligent and imposing liability (R.H. HEIDT, "Damned for Their Judgment: The Tort Liability of Standard Development Organizations", (45) *Wake Forest Law Review* 2010, 1274, footnote 178. Also see: K.D. STUCKEY, *Internet and Online Law*, New York, Law Journal Press, 1996, 3-40).

[957] An extensive analysis of the First Amendment does not fall within the scope of this doctoral dissertation. I do not have the necessary background when it comes to constitutional law in the United States. This is one reason why the protection of professional speech under the First Amendment is not addressed. Besides the complexity of the topic, the protection of professional speech has so far not been at stake in cases dealing with the liability of certifiers. Moreover, the Supreme Court has not yet provided a definition of professional speech or identified the applicable review standard (see for more information: P. BANNON, "Intermediate Scrutiny vs. The "Labeling Game" Approach: King v. Governor of New Jersey and the Benefits of Applying Heightened Scrutiny To Professional Speech", (23) *Journal of Law & Policy* 2015, 652 with extensive references to case law; D. HALBERSTAM, "Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions", (147) *University of Pennsylvania Law Review* 1999, 834-835 with further references; D. MOLDENHAUER, "Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers", (29) *Seattle University Law Review* 2006, 843). Furthermore, the analysis is restricted to protection for non-factual opinions, the

1.1. Certificates as Non-Factual Opinions

300. CRAs have already argued that their ratings are non-factual opinions that should be fully protected by the First Amendment.[958] Several courts have considered this line of reasoning and qualified misleading credit ratings as predictive opinions not containing provably false factual connotations.[959] Not all judges, however, agree with this conclusion. The Court for the Eastern District of North Carolina held in *First Financial Savings Bank* that the First Amendment protection was without merit and that any further discussion on this matter was "a waste of paper".[960] Moreover, protection is not absolute or unconditional only because a rating is labelled as opinion. Ratings can imply an assertion of an objective fact that may be false or that can be coupled with false factual assertions.[961] If ratings contain false components, the issuer should "not be shielded from liability by raising the word 'opinion' as a shibboleth".[962]

301. The fact that credit ratings *an sich* are not fully protected speech is strengthened when taking into account that members of the press are not granted limitless protection under the First Amendment.[963] In *Re Fitch*, for instance, the Court of Appeals for the

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actual malice standard for factual statements and commercial speech, as these categories also correspond with the protection given to speech under Article 10 ECHR.

[958] See for example: *Ohio Police & Fire v. Standard & Poor's Financial*, 813 F.Supp.2d 871, 877 (2011) stipulating that "the Rating Agencies offer numerous other grounds for why [the claims] should be dismissed, including that their ratings enjoy absolute immunity under the First Amendment".

[959] See for example: *Compuware Corp. v. Moody's Investors Services Inc*., No. 05-1851, August 23, 2007, 7 (6th Cir. 2007); *In Re Credit Suisse First Boston Corp*., 431 F.3d 36, 47 at paragraph 32 (1st Cir. 2005). The court in the *Pan Am* case concluded that S&P was a publisher of publicly distributed financial ratings, analysis and commentary "deserving of the full breadth of First Amendment safeguards" (*In Re Pan Am Corp*., 161 B.R. 577, 586 (S.D.N.Y. 1993)).

[960] *First Financial Saving Bank Inc. v. American Bankers Ins. Co. of Florida Inc*., 1989 WL 168015, 5 (E.D.N.C. 1989). Also see: *In Re Fitch Inc., American Savings Bank FSB v. UBS PaineWebber Inc.*, 330 F.3d 104, paragraph 29 (2nd Cir. 2003).

[961] A.R. PINTO, "Control and Responsibility of Credit Rating Agencies in the United States", (54) *American Journal of Comparative Law* 2006, 352-353; L. FREEMAN, "Who's Guarding the Gate? Credit-Rating Agency Liability as "Control Person" in the Subprime Credit Crisis", *Vermont Law Review* 2009, no. 33, 307. See in this regard for example: *Jefferson County School District No.R-1 v. Moody's Investor's Services Inc*., 175 F.3d 848, paragraph 26 & 34 (10th Cir. 1999); *Commercial Financial Services Inc. v. Arthur Andersen LLP*, 94 P.3d 106, 109, paragraph 14 (Okla. Civ. App. 2004); *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742, 819 (S.D. Tex. 2005). In *California Public Employees' Retirement System (CalPERS) v. Moody's*, Judge JENKINS agreed with the investors that the ratings were actionable because they were not mere predictions of the future value of structured investment vehicles (SIVs). Rather, they were affirmative representations regarding the present state of the SIVs' financial health and their capacity to provide payments to investors as promised (*California Public Employees' Retirement System v. Moody's Corp.*, No. A134912, 18-19 (Cal. Ct. App. 2014)).

[962] *Jefferson County School District No.R-1 v. Moody's Investor's Services Inc*., 175 F.3d 848, paragraph 26 & 34 (10th Cir. 1999). Thus, a CRA's "status as a financial publisher does not necessarily entitle it to heightened protection under the First Amendment" (*County of Orange v. McGraw Hill Companies Inc.*, 245 B.R. 151, 154 (C.D. Cal. 1999)).

[963] *Cohen v. Cowles Media Co*., 501 U.S. 663, 671 (1991); K. BAILEY, "The New York Times and Credit Rating Agencies: Indistinguishable under First Amendment Jurisprudence", (93) *Denver Law Review* 2016, 282. In this regard, courts seem to rely on four elements to determine the First Amendment protection with regard to ratings, namely whether CRAs "(1) rate debt which they are not paid to rate; (2) distribute the ratings through their publications; (3) have independence in gathering and evaluating information used for the rating; and (4) fulfill the general public function of providing information to the financial market". See

Second Circuit upheld a lower court decision,[964] in which the court did not accept that Fitch was a member of the financial press. The dissemination of financial information by Fitch was not based on a judgment about newsworthiness but rather on its client's needs.[965] The Second Circuit Court of Appeals considered that it was the issuer (UBS) and not the subscribers/investors (American Savings Bank) who paid for the rating. Fitch was also actively involved in structuring the securities and planning the transaction to reach the desired ratings. This reveals a level of involvement with the client's transactions, which is not typical for the relationship between a journalist and the activities upon which he reports.[966]

302. Certificates issued by other certifiers than CRAs will not be given full protection as non-factual opinions under the First Amendment either. In this regard, the *CalPERS* decision can be used to identify elements why First Amendment protection was rejected for the CRAs. The plaintiff in *CalPERS* made a *prima facie* case that the ratings were actionable as professional opinions or deliberate affirmations of fact regarding the nature and quality of the securities. The CRAs published the ratings from a position of superior knowledge using information on the structured investment vehicles (SIVs) not generally available to other market participants. The information embodied in ratings did not only reflect professional opinions regarding an event in the future such as the likelihood of default. The ratings also related to a past or existing fact (e.g. the then-current composition and quality of the SIV products).

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for discussion: R. JONES, "The Need for a Negligence Standard of Care for Credit Rating Agencies", (1) *William & Mary Business Law Review* 2010, 213 and further.

[964] *American Savings Banks FSB v. UBS PaineWebber Inc*., No. M8-85, at part II. Journalist privilege (S.D.N.Y. 2002), available at <casetext.com/case/american-savings-bank-fsb-v-ubs-painewebber-inc-sdny-2002> ("in contrast to SP, Fitch does not operate publications with complete circulation to the general public. Fitch performs its ratings based on a private contractual agreement […] Fitch rates transactions at the request of issuers").

[965] *In Re Fitch Inc., American Savings Bank FSB v. UBS PaineWebber Inc*., 330 F.3d 104, 109 (2nd Cir. 2003).

[966] *In Re Fitch Inc., American Savings Bank FSB v. UBS PaineWebber Inc*., 330 F.3d 104, 109-111 (2nd Cir. 2003). A similar conclusion was reached in *Commercial Financial Services Inc. v. Arthur Andersen LLP*. The Oklahoma Court of Civil Appeals concluded that the relationship between the CRA and the issuer goes "beyond a relationship between a journalist and subject". Thus, ratings that result from such a relationship of privity are barred from First Amendment protection. The court justified that if "a journalist wrote an article for a newspaper about the bonds, the First Amendment would presumably apply. But if [the issuer] hired that journalist to write a company report about the bonds, a different standard would apply" (*Commercial Financial Services Inc. v. Arthur Andersen LLP*, 94 P.3d 106, 108, 110-112, paragraphs 13-19 (Okla. Civ. App. 2004)). As such, "[t]his judicial pushback against the rating agencies' free speech assertions is strongly rooted in the economics of ratings […] Given the high profile nature of the problems with rating agencies and the continuing profitability of the rating business, rating agencies hardly act like publishers" (A. DARBELLAY & F. PARTNOY, "Credit Rating Agencies and Regulatory Reform", University of San Diego, Legal Studies Research Paper Series, Research Paper No. 12-083, April 2012, 17-18). The more prominent the role that unsolicited ratings perform in a company's business model, the more likely courts will view a CRA as a member of the financial press (R. JONES, "The Need for a Negligence Standard of Care for Credit Rating Agencies", (1) *William & Mary Business Law Review* 2010, 213, footnote 9; T. NAGY, "Credit Rating Agencies and the First Amendment: Applying Constitutional Journalistic Protections to Subprime Mortgage Litigation", (94) *Minnesota Law Review* 2009, 157).

Arguably, other certifiers issue certificates from a position of superior knowledge and expertise after receiving the necessary information from the requesting entity during the certification process. These certificates often deal with existing facts such as the company's financial statements when the audit is done, the vessel's state at the moment a class certificate is provided or the condition of a device when the product certifier issues the certificate.[967] Moreover, the market, whether it relates to investors, maritime insurers or purchasers of medical devices, values certificates as benchmark and not as a mere opinion or information. Certificates are often required by law or by the market, which indicates that they are not the equivalent of editorials in *The New York Times*.[968] Purchasers, for instance, rely on certificates (e.g. the UL mark) as an assurance that products comply with safety standards.[969]

1.2. Certificates as Factual Statements

303. Even when full protection remains unlikely, certifiers could try to bring their certificates under the First Amendment protection in other ways. CRAs, for instance, assert that even if the falsity of their ratings can be demonstrated, they are protected by the so-called 'actual malice' standard under the First Amendment (part 1.2.1.).[970] Protection might more easily be given to CRAs when ratings are a matter of public concern (part 1.2.2.). Whereas things remain blurry for CRAs, other certifiers will probably not be successful in showing that they are protected by the actual malice standard for several reasons (part 1.2.3.).

1.2.1. The Actual Malice Standard and Credit Ratings

304. The actual malice standard implies that CRAs will only be liable if the rated entity or product is a public figure[971] and the rating a matter of public concern/interest issued

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[967] *CalPERS v. Moody's*, A134912, paragraphs 13-19 (Cal. Ct. App. 2014). In this regard, reference can also be made to the case of the *Ruki* in Belgium where it was held that a certificate of class only attests the seaworthiness of the vessel at the moment it is issued just prior to the intended voyage. Since the certificate dated from August 1969 and the incident occurred ten months later, it would be difficult for the plaintiffs to invoke it as proof of a seaworthy vessel (Court of First Instance Dendermonde, January 11, 1973, *Rechtspraak Haven van Antwerpen* 1973, 129).

[968] Committee on Governmental Affairs United States Senate, "Financial Oversight of Enron: The SEC and Private-Sector Watchdogs", Washington, U.S. Government Printing Office, October 7, 2006, 97.

[969] M.R. BARRON, "Creating Consumer Confidence or Confusion? The Role of Product Certification in the Market Today", (11) *Intellectual Property Law Review* 2007, 416.

[970] See for example *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742, 810 (S.D. Tex. 2005) holding that even "if their ratings were not entitled to protection as statements of opinion, to impose liability on a publisher for statements about matters of public concern, a plaintiff must show that a statement is made with "actual malice"". For discussion with further references: C. DEATS, "Talk that Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies from Regulation?", (10) *Columbia Law Review* 2010, 1833; D.K. BAILEY, "The New York Times and Credit Rating Agencies: Indistinguishable under First Amendment Jurisprudence", (93) *Denver Law Review* 2016, 302.

[971] Whether the issuer is a public figure is often not the main concern in cases dealing with the actual malice standard. See however: *Compuware Corp. v. Moody's Investors Services Inc*., 499 F.3d 520 (6th Cir. 2007) where Compuware was considered to be a public figure because it was a publicly held corporation; *Anschutz Corp. v. Merrill Lynch & Co. Inc*., 785 F. Supp. 2d 799 (N.D. Cal. 2011) where the rated trusts were no public figures.

"with knowledge that it was false or with reckless disregard of whether it was false or not".[972] In other words, if ratings are a matter of public concern,[973] plaintiffs have to prove that CRAs made the statements/issued ratings with actual malice.[974] Courts frequently apply this standard when deciding on the liability of CRAs. The court in the *Abu Dhabi* case is very clear in this regard when stating that it is well-established that under "typical circumstances", CRAs are protected by the First Amendment subject "to an actual malice exception […] because their ratings are considered matters of public concern".[975]

305. Reckless disregard for the truth under the actual malice standard requires more than a departure from reasonably prudent conduct. It is not measured by whether a reasonable CRA would have published or would have investigated the issuer's information before issuing the rating. Instead, the plaintiff has to demonstrate recklessness with sufficient evidence showing that the CRA entertained serious doubts as to the truth of its rating.[976] Under the actual malice standard, CRAs will thus not be liable because they did not act as reasonable and competent CRAs placed in the same circumstances or failed to investigate the accuracy of the information used to underpin the actual rating.[977]

Plaintiffs will often experience difficulties proving that CRAs issued a rating with knowledge that it was false or with reckless disregard of whether it was false or not.[978] Rating opinions, for example, can be "too indefinite" to be proven true or false.[979] Courts

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[972] *New York Times Co. v. Sullivan*, 376 U.S. 254, 297-280 (1964); *Dun & Bradstreet Inc. v. Greenmoss Builders*, 472 U.S. 749, 755-763 (1985). Also see discussion in: L. FREEMAN, "Who's Guarding the Gate? Credit-Rating Agency Liability as "Control Person" in the Subprime Credit Crisis", (33) *Vermont Law Review* 2009, 606-608.

[973] Whether or not a rating is a matter of public concern is determined "by [its] content, form, and context…as revealed by the whole record" (*Connick v. Myers*, 461 U.S. 138, 147-148 (1983) as referred to in *Dun & Bradstreet Inc. v. Greenmoss Builders*, 472 U.S. 749, 761 (1985)).

[974] See for example *Genesee County Employee Retirement System v. Thornburg Mortgage Securities Trust 2006-3*, No. CIV 09-0300, 2011 WL 5840482, 227-228 (D.N.M. 2011). For discussion of the application of the actual malice standard: K.C. KETTERING, "Securitization and Its Discontents: The Dynamics of Financial Product Development", (29) *Cardozo Law Review* 2008, 1689-1693; C. DEATS, "Talk that Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies from Regulation?", (110) *Columbia Law Review* 2010, 1831-1832.

[975] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155, 175-176 (S.D.N.Y. 2009). This has also been acknowledged in other decisions: *County of Orange v. McGraw Hill Companies Inc*., 245 B.R. 151, 156 (C.D. Cal. 1999); *First Equity Corp. v. Standard & Poor's Corp*., 690 F. Supp. 256, 258-259 (S.D.N.Y. 1988) stipulating that "First Amendment requires a demonstration of actual malice […]. To prevail here, plaintiffs must show either that Standard & Poor's published the description with actual knowledge of its falsity or with reckless disregard of its truth or falsity"; *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742, 829-830 (S.D. Tex. 2005).

[976] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *In Re Enron Corp. Securities Derivative*, 511 F. Supp.2d 742, 811 (S.D. Tex. 2005); *First Equity Corp. v. Standard & Poor's Corp*., 690 F. Supp. 256, 258-259 (S.D.N.Y. 1988); *Scalamandre & Sons v. Kaufman*, 113 F.3d 556, 560-561 (5th Cir.1997). See for discussion also: G. HUSISIAN, "What Standard of Care Should Govern the World's Shortest Editorials? An Analysis of Bond Rating Agency Liability", (75) *Cornell Law Review* 1990, 449-455.

[977] R. JONES, "The Need for a Negligence Standard of Care for Credit Rating Agencies", (1) *William & Mary Business Law Review* 2010, 211-212 referring to *in re Enron corp. Securities Derivate*, 511 F.Supp.2d 742, 810 (2005).

[978] *In Re Enron Corp. Securities Derivatives*, 511 F.Supp.2d 742, 808-812, 825-826 (S.D. Tex. 2005).

[979] *Biospherics Inc. v. Forbes Inc*., 151 F.3d 180, 184-185 (4th Cir.1998) as discussed in *Jefferson County School District No.R-1 v. Moody's Investor's Services Inc*., 175 F.3d 848, 850-856 (10th Cir. 1999).

have also concluded that there is often no or not enough (objective) evidence supporting that an allegedly defamatory statement (such as a rating) was false.[980] Showing that CRAs knew that the rating was false is, however, not insurmountable. This can be illustrated with claims against CRAs for fraud under New York law. To state a claim for fraud, investors have to demonstrate a misrepresentation or omission of a material fact that the CRA knew to be false. This wording corresponds to the requirement of 'knowledge that the information was false' under the actual malice standard. In the *Abu Dhabi* decision, CRAs knew "that the ratings process was flawed, […] that the portfolio was not a safe, stable investment, and […] that [they] could not issue an objective rating because of the effect it would have on their compensation".[981]

1.2.2. Ratings as a Matter of Private or Public Concern

306. Whether a rating is a matter of public or private concern also determines if CRAs will benefit from the actual malice standard. An investor who alleges that he incurred losses because he relied on inaccurate ratings will have to prove that the CRA acted with actual malice if the rating is a matter of public concern. If the rating is a purely private matter between the CRA and the investor, the former will not receive "special protection when the speech is wholly false and clearly damaging to the victim's business reputation".[982] If the rating is a matter of private concern, it suffices for the plaintiff to prove that the rating agency acted with ordinary negligence or negligently misrepresented the issuer's creditworthiness.[983]

307. CRAs will obviously try to argue that ratings are a matter of public concern to make sure they are covered by the actual malice standard. In this regard, the element of

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[980] *NBC Subsidiary v. Living Will Center*, 879 P.2d 6, 13-14 (Colo. 1994) as discussed in *Jefferson County School District No.R-1 v. Moody's Investor's Services Inc*., 175 F.3d 848, 850-856 (10th Cir. 1999). In *First Equity*, the plaintiff did, for instance, not submit sufficient proof that the CRA in fact entertained serious doubts concerning the truth of its publications (*First Equity Corp. v. Standard & Poor's Corp.*, 690 F. Supp. 256, 258-259 (S.D.N.Y.1988)).

[981] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 178-179 (S.D.N.Y. 2009); *Federal Home Loan Bank of Boston v. Ally Financial*, No. 11-10952-GAO, at "Title B Count V: Fraud" (D. Mass. 2013) concluding that plaintiffs have "pled with sufficient particularity that the Rating Agency Defendants issued ratings that they did not genuinely or reasonably believe. For example, the Amended Complaint alleges that the Rating Agency Defendants diluted their own standards and carried out their ratings procedures in an intentionally lax manner as to PLMBS while maintaining higher standards in other contexts. The Bank has also sufficiently pled scienter, alleging that the Rating Agency Defendants competed for business by artificially inflating ratings, as they were only paid if they provided high ratings".

[982] See for example *Genesee County Employee Retirement System v. Thornburg Mortgage Securities Trust 2006-3*, No. CIV 09-0300, 2011 WL 5840482, 234 (D.N.M. 2011).

[983] J. CRAWFORD, "Hitting the Sweet Spot by Accident: How Recent Lower Court Cases Help Realign Incentives in the Credit Rating Industry", (42) *Connecticut Law Review* 2009, 19; J.W. HEGGEN, "Not always the world's shortest editorial: why credit-rating-agency speech is sometimes professional speech", (96) *Iowa Law Review* 2011, 1756-1757; R. JONES, "The Need for a Negligence Standard of Care for Credit Rating Agencies", (1) *William & Mary Business Law Review* 2010, 211. See in this regard also *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742, 811 (S.D. Tex. 2005) holding that "the standard of "actual malice", i.e., "with knowledge that the statement was false or with reckless disregard for whether or not it was true," protects publishers from liability for "either innocent or negligent misstatement" so as not to chill the press' exercise of constitutional guarantees".

newsworthiness determines whether something is of public concern.[984] Chief Justice ROBERTS concluded in *Snyder v. Phelps* that "all the circumstances of the case" have to be taken into account to determine whether speech is a matter of public concern. A matter is of public concern if one of the following conditions is satisfied: (1) the speech can be "fairly considered as relating to any matter of political, social, or other concern to the community" (community concern) or (2) the speech centres on "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public" (news interest).[985] Arguably, unsolicited sovereign ratings disseminated to the benefit of the public might be connected to a political or social concern to the community (e.g. the consequences of a low rating for a country) or centred on a subject of legitimate news interest (e.g. media have reported on bad sovereign ratings on several occasions[986]).[987]

308. According to case law, a rating is considered as a matter of public concern when a CRA makes it available to the public at large, in other words, when the rating is widely disseminated. [988] The *Pan Am* court, for example, held that S&P published its credit ratings for the benefit of the general public and, acting as a journalist, widely disseminated this information. S&P did not only provide ratings to issuers who paid for them.[989] Similarly, the court in *Re Enron* concluded that ratings "were not private or confidential, but distributed "to the world" and were related to the creditworthiness of a powerful public corporation that operated internationally".[990]

CRAs will thus not be protected under the actual malice standard when a rating is a matter of private concern because the speech is "solely in the individual interest of the speaker and its specific business audience".[991] Such ratings are not disseminated in the interest of

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[984] R.T. KARCHER, "Tort Law and Journalism Ethics", (40) *Loyola University Chicago Law Journal* 2009, 824.

[985] *Snyder v. Phelps*, 562 U.S. 443, 5-7 (2011). Also see the discussion in C. CALVERT, "Defining Public Concern after Snyder v. Phelps: A Pliable Standard Mingles with News Media Complicity", (19) *Jeffrey S. Moorad Sports Law Journal* 2012, 52.

[986] See for example: The Associated Press, "Standard & Poor's Cuts Greece's Credit Rating", New York Times, February 6, 2015, available at <www.nytimes.com/2015/02/07/business/international/standard-poors-cuts-greeces-credit-rating.html?ref=topics>.

[987] When CRAs issue unsolicited ratings for which an issuer is not paying, they appear to be acting more like journalists (F. PARTNOY, "How and Why Credit Rating Agencies Are Not Like Other Gatekeepers", in: Y. FUCHITA & R.E. LITAN, *Financial Gatekeepers: Can They Protect Investors?*, Baltimore, Brookings Institution Press, 2007, 73). A higher protection might be warranted to these ratings (e.g. M. HEMRAJ, *Credit Rating Agencies: Self-regulation, Statutory Regulation and Case Law Regulation in the United States and European Union*, SpringerLink (Online service), 2015, 81).

[988] J.W. HEGGEN, "Not always the world's shortest editorial: why credit-rating-agency speech is sometimes professional speech", (96) *Iowa Law Review* 2011, 1754-1758.

[989] *Pan Am Corp. v. Delta Air Lines Inc. (In re Pan Am Corp.)*, 161 B.R. 577, 581-586 (S.D.N.Y. 1993).

[990] *In Re Enron Corp. Securities Derivative*, 511 F.Supp.2d 742, 820 (S.D. Tex. 2005). See for a similar conclusion: *Federal Home Loan Bank of Pittsburgh v. J.P Morgan Securities LLC*, GD09-016892, 16-17 (Court of Common Pleas of Allegheny County, November 29, 2010).

[991] *Dun & Bradstreet Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 & 792 (1985). Also see: F. PARTNOY, "How and Why Credit Rating Agencies Are Not Like Other Gatekeepers", in: Y. FUCHITA & R.E. LITAN, *Financial Gatekeepers: Can They Protect Investors?*, Baltimore, Brookings Institution Press, 2007, 85-86.

the general public but only issued for a limited class of institutional investors[992] or a select group of investors[993] to induce them to buy the rated products.[994]

1.2.3. Actual Malice Standard for Other Certifiers

309. The actual malice standard has especially been invoked by CRAs in the context of ratings.[995] It remains unlikely that other certifiers will be successful in showing that they are protected by the actual malice standard for several reasons.

310. In the first place, certificates have to be matters of public concern. A certificate can be a matter of public concern if it is distributed to the world. A difference can be made between (unsolicited) sovereign ratings and the other certificates. Audit opinions, class certificates or product certificates are issued in the interests of the company (e.g. to comply with legal obligations[996]), shipowner (e.g. to seek insurance coverage or charter the vessel[997]) or manufacturers of products (e.g. to comply with legislation and allow them to market products[998]). As opposed to (unsolicited) sovereign ratings disseminated to the general public through reports in the media, other certificates are mostly not distributed to the world. Such certificates are generally not a community concern or a legitimate news interest.[999]

311. Second, certifiers are not members of the press traditionally envisaged by the First Amendment protection.[1000] The decision by the Third Circuit in *In Re Madden* held that

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[992] *California Public Employees' Retirement System v. Moody's Corp*., Docket No. A134912, No. CGC-09-490241, paragraphs 30-34 (Cal. Ct. App. 2014); *Lasalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071, 1093-1094, 1096-1097 (S.D.N.Y. 1996).

[993] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651. F. Supp. 2d 155, 175-176 (S.D.N.Y. 2009).

[994] *Lasalle National Bank v. Duff & Phelps Credit Rating Co*., 951 F. Supp. 1071, 1093-1094, 1096-1097 (S.D.N.Y. 1996).

[995] See for an extensive overview: K. BAILEY, "The New York Times and Credit Rating Agencies: Indistinguishable under First Amendment Jurisprudence", (93) *Denver Law Review* 2016, 296-326.

[996] In *Security Pacific*, the court noted that there was no allegation that the defendant accounting firm was aware that the primary if not the exclusive end and aim of auditing the client was to provide the plaintiff third party with the financial information it required. Rather, the accounting firm performed the audit for the benefit of a client and only incidentally for the use of those to whom the client might exhibit it thereafter (*Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co*, 79 N.Y.2d 695, 597 N.E.2d 1080, 586 N.Y.S.2d 87 (1992)). Striking in this regard is also the Australian *Bathurst* case in which the Australian Federal Court held that the "purpose of an audit of a company is one thing. The purpose of the assignment of a rating to a financial instrument is another". A rating is assigned to a financial instrument for the very purpose of communication to the class of potential investors for them to take into account and rely upon in deciding whether or not to invest (it being common knowledge that many institutional investors could only invest in investment grade or above instruments). The same cannot be said of a financial audit of a company, which is undertaken by an auditor for the company's own purposes and to comply with the company's statutory obligations (*Bathurst Regional Council v. Local Government Financial Services Pty Ltd* (No 5) [2012] FCA 1200, paragraphs 2758-2759).

[997] See for more information the discussion *supra* in nos. 14-15.

[998] See for more information the discussion *supra* in nos 20-22.

[999] See in this regard: *Snyder v. Phelps*, 562 U.S. 443, 5-7 (2011). Also see the discussion in C. CALVERT, "Defining Public Concern after Snyder v. Phelps: A Pliable Standard Mingles with News Media Complicity", (19) *Jeffrey S. Moorad Sports Law Journal* 2012, 52.

[1000] See for more information also the discussion *supra* in no. 301 and *infra* in nos. 345-346.

individuals claiming protection of the journalist's privilege must demonstrate they are engaged in investigative reporting, gather news and possess the intent at the inception of the newsgathering process to disseminate this news to the public.[1001]

Whereas CRAs might fulfil that function when issuing unsolicited (sovereign) ratings leading to a public debate worth protecting, other certifiers do generally not fall within the definition. They do not widely disseminate certificates but, rather, provide them in a contractual relationship during the certification process. Certificates are generally unsolicited. Unlike a business newspaper or magazine that would cover any fact deemed newsworthy, certifiers also provide services upon request of their clients and not merely to inform the public.[1002] Certificates are often issued for other more important reasons than its dissemination to the public (e.g. seeking insurance coverages in the case of class certificates or a legal requirement in the case of audits or product certificates). The requesting entity also pays certifiers a fee for their services. Therefore, the previously mentioned concerns regarding the remuneration structure in the context of CRAs and its influence on First Amendment protection also apply to other certifiers.[1003]

312. Third, some scholars note that First Amendment protection for ratings has its roots in former times when CRAs were still paid by subscribers or investors and not by the issuers (the investor-pays business model[1004]). CRAs were not paid by issuers they had to rate but by other parties that needed an independent opinion. This made their relationship somehow more journalist and newspaper-like.[1005]

However, the role of CRAs changed in recent decades and they are now paid by issuers (the issuer-pays business model[1006]). Consequently, ratings should no longer need a broad protection under the First Amendment because of the changing remuneration structure.[1007] In this regard, ratings of mortgage-backed securities were often "motivated by the desire for profit"[1008] to the benefit of CRAs. Rating agencies will in these circumstances merit lesser protection under the First Amendment.[1009] Considering that

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[1001] *In Re Madden*, 151 F.3d 125, 130 (3d Cir. 1998).

[1002] *In Re Fitch Inc., American Savings Bank FSB v. UBS PaineWebber Inc*., 330 F.3d 104, 109-111 (2nd Cir. 2003).

[1003] See for more information the discussion *supra* in no. 301.

[1004] See for more information on this model the discussion *infra* in nos. 389-412.

[1005] See for further references: M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 353-354.

[1006] See for more information on this model the discussion *infra* in nos. 389-412.

[1007] L. FREEMAN, "Who's Guarding the Gate? Credit-Rating Agency. Liability as "Control Person" in the Subprime Credit Crisis", (33) *Vermont Law Review* 2009, 605.

[1008] *Dun & Bradstreet Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985). The *CalPERS* decision seems to follow this line of reasoning when holding that rating SIVs was an economic activity designed for the purpose of making money (*California Public Employees' Retirement System v. Moody's Corp*., No. CGC-09-490241, 8 (Cal. Super. 2010); *California Public Employees' Retirement System v. Moody's Corp*., Docket No. A134912, No. CGC-09-490241, 30-34 (Cal. Ct. App. 2014)).

[1009] L. FREEMAN, "Who's Guarding the Gate? Credit-Rating Agency Liability as "Control Person" in the Subprime Credit Crisis", (33) *Vermont Law Review* 2009, 607.

other certifiers are also paid for their services by requesting entities, the same argument can be used to deny them First Amendment protection under the actual malice standard.

1.3. Certificates as Commercial Speech

313. Certifiers could also invoke the protection given to commercial speech under the First Amendment. After examining whether certificates might indeed qualify as commercial speech (part 1.3.1.), the level of First Amendment protection given to such speech is analysed more thoroughly (part 1.3.2.).

1.3.1. Certificates as Commercial Speech

314. Different tests exist to determine whether speech is commercial. They have been established in three cases: *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,*[1010] *Bolger v. Youngs Drugs Products Corp.*[1011] and *Nike v. Kasky*.[1012]

315. Under a first test, commercial speech does "no more than propose a commercial transaction".[1013] Commercial speech is an expression related solely to the economic interests of the speaker and its audience.[1014] In this regard, ratings given to complex securities leading to the 2008 financial crisis were often "for-profit appraisals"[1015] and qualify as commercial speech.[1016] CRAs closely worked together with issuers to guarantee that securities purchased by investors would receive high ratings. By doing so, they ensured that "certain segments of the investment market"[1017] relied on them to first structure securities and subsequently issue a high rating to make those securities succeed. Moreover, CRAs were often paid the rating fee only when they would issue the desired ratings. The inclusion of credit ratings in investments' informational memoranda and selling documents informed investors and made transactions possible.[1018] CRAs were

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[1010] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc*., 425 U.S. 748 (1976).

[1011] *Bolger v. Youngs Drugs Prods. Corp*., 463 U.S. 60 (1983).

[1012] *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), cerr. denied, *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003).

[1013] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc*., 425 U.S. 748, 762 (1976).

[1014] *Central Hudson Gas & Electric Corp. v. Public Services Community*, 447 US 557, 561 (1980).

[1015] C. SCHMITT, "Holding the Enablers Responsible: Applying SEC Rule 10b-5 to the Credit Rating Institutions", (13) *University of Pennsylvania Journal of Business Law* 2013, 1037.

[1016] Judges have in several cases acknowledged that ratings qualify as commercial speech. In *In Re Taxable Municipal Bond Securities Litigation*, for instance, the Louisiana Eastern District Court held that S&P's publications may be afforded some protection under the First Amendment as commercial speech (*In Re Taxable Municipal Bond Securities Litigation*, Civ. MDL 863, 1993 WL 591418, 4 (E.D.La.1993)). Similarly, the court in *Genesee County Employee Retirement System v. Thornburg Mortgage Securities* concluded that ratings are commercial speech and receive "reduced protection" as they "occup[y] a 'subordinate position in the scale of First Amendment values'" (*Genesee County Employee Retirement System v. Thornburg Mortgage Securities Trust 2006-3*, No. CIV 09-0300, 2011 WL 5840482, 234-235 (D.N.M. 2011)).

[1017] C. DEATS, "Talk that Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies from Regulation?", (110) *Columbia Law Review* 2010, 1855.

[1018] C. DEATS, "Talk that Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies from Regulation?", (110) *Columbia Law Review* 2010, 1854-1856. See for a similar

paid to assign ratings to guarantee that an issuer could effectuate a securities sale. Such ratings were "purely financial expression[s]", which facilitated the sale of securities and spoke to the economic interests of CRAs and potential investors.[1019]

Other certificates will also qualify as commercial speech under this test to the extent that they do no more than propose a commercial transaction and relate solely to the economic interests of the certifier and its audience. Most certificates do indeed propose commercial transactions. Third parties such as investors use audit opinions as "admission tickets"[1020] to make decisions.[1021] Class certificates can also propose a commercial transaction (e.g. between the shipowner and cargo-owner or maritime insurers) and are related to the economic interest of the classification society and the shipowner.[1022]

However, most certificates do more than merely propose a commercial transaction solely to the economic interests of the certifier and its audience. Statutory certificates, for instance, are issued to increase safety at sea and show that a flag State complies with international legislation. Lord STEYN even held in *Marc Rich* that a classification society is a "non-governmental and non-profit-making entity […] related to […] public interests and […] not aimed at making a profit […] classification societies are charitable non-profit making organisations, promoting the collective welfare and fulfilling a public role".[1023] Similarly, product certificates also contribute to the health of citizens. Defective medical devices, for instance, cannot as a matter of principle be marketed without certificate issued by a notified body.

316. A second test was established by the Supreme Court in *Bolger* when it concluded that informational pamphlets sent with contraceptive ads in unsolicited mailings were commercial speech. The mailings (1) were concededly advertisements, (2) referred to specific products and (3) were economically motivated. Consequently, they qualified as commercial speech, notwithstanding that they contained discussions of important public issues.[1024]

Some of these conditions can be fulfilled in the context of certificates as well. Most certificates, for instance, will refer to a particular product such as a vessel or medical

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conclusion: P. HAGHSHENAS, "Obstacles to Credit Rating Agencies' First Amendment Defense in Light of *Abu Dhabi*", (8) *First Amendment Law Review* 2010, 452-499.

[1019] B.A. MURPHY, "Credit Rating Immunity? How the Hands-Off Approach Toward Credit Rating Agencies Led to the Subprime Credit Crisis and the Need for Greater Accountability", (62) *Oklahoma Law Review* 2010, 767-768.

[1020] S.VICK, "Note, Bily v. Arthur Young & Co.: Is Limiting Auditor Liability to Third Parties Favoritism or Fair Play?", (26) *Loyola of Los Angeles Law Review* 1993,1336.

[1021] J.B. SCHERL, "Evolution of Auditor Liability to Noncontractual Third Parties: Balancing the Equities and Weighing the Consequences", (44) *American University Law Review* 1994, 256.

[1022] Lloyd's Register, for example, stipulates on its website that it is "a successful, profit-making business" (Lloyd Register, "Working together for a safer world", available at <www.lr.org/en/who-we-are>).

[1023] *Marc Rich & Co AG v. Bishop Rock Marine Co Ltd*, [1996] E.C.C. 120, paragraph 71.

[1024] *Bolger v. Youngs Drugs Prods. Corp*., 463 U.S. 60, 67 (1983). See for a discussion of the case: M. MASON, "A Trojan Horse Goes to Court: Bolger v. Youngs Drug Products Corp.", (10) *American Journal of Law & Medicine* 1984, 203.

device. Certificates can also be issued with an economic motivation.[1025] Such an economic motivation, however, is not always the reason why a certificate is issued. Statutory certificates issued by ROs are not issued with economic interest but mainly to ensure safety at sea. Moreover, certificates need to be advertisement, in other words, messages persuading people to buy a product or service.[1026] This could be the case for most certificates as they induce parties such as investors, cargo-owners or consumers to purchase, hire or insure the certified item. Yet, advertisements are defined as non-personal or public communications disseminated through means such as direct mail and internet. This requirement can be more problematic for certificates. Most certificates are not considered as announcement related to the certified item made public or aimed to attract public attention.[1027] Instead, they are given in a personal relationship of confidentiality to the requesting entity.

317. The third test was adopted by the Californian Supreme Court in *Nike v. Kasky*. In typical commercial speech cases, the speaker is someone engaged in commerce (e.g. the production, distribution or sale of goods or services) and the intended audience includes the actual or potential buyers or customers of the speaker's goods or services, persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers. Speech is commercial in its content if it is likely to influence consumers in their commercial decision.[1028] In sum, a three-prong test is applied to determine whether speech is commercial taking into account the speaker, the intended audience and the content of the message.

Most certifiers are engaged in commerce as they provide services to the requesting entities. Thus, certifiers could qualify as commercial speakers (first requirement). Requesting entities are also a commercial audience to the extent they could repeat the message, namely the certificate, to parties that subsequently use it to make decisions. For instance, companies that seek a rating for their securities provide the rating as 'commercial message' to potential investors who rely on it for business transactions. Shipowners also repeat certificates in their commercial transactions with insurers or cargo-owners that can use it to make decisions on the vessel. With few exceptions for

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[1025] The California Court of Appeals affirmed a 2012 trial court decision according to which the issuance of SIV ratings was an economic activity designed for the purpose of making money (*California Public Employees' Retirement System v. Moody's Corp*., No. CGC-09-490241, 8 (Cal. Super. 2010) affirmed in *California Public Employees' Retirement System v. Moody's Corp*., Docket No. A134912, No. CGC-09-490241, paragraphs 30-34 (Cal. Ct. App. 2014)).

[1026] See for example the definition of advertisement in the Cambridge Dictionaries Online available at <dictionary.cambridge.org/dictionary/british/advertisement> and in the Business Dictionary available at <www.businessdictionary.com/definition/advertisement-ad.html>.

[1027] See the definition of advertisement in the Business Dictionary available at <www.businessdictionary.com/definition/advertisement-ad.html> and in the Free Dictionary available at <www.thefreedictionary.com/advertisement>.

[1028] *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), cerr. denied, *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003). See for a discussion of the case: C. FISK & E. CHEMERINSKY, "What Is Commercial Speech? - the Issue Not Decided in 'Nike v. Kasky'", (54) *Case Western Reserve Law Review* 2004, 1143; S. MARCANTONIO, "What is Commercial Speech? An Analysis in Light of Kasky v. Nike", (24) *Pace Law Review* 2003, 357.

certificates that have other goals (e.g. compliance with the applicable legislation), most certificates intend to reach third parties and influence them in taking actions with regard to the certified item (second requirement). Certificates are often factual representations of a commercial nature concerning the certified item. The extensive discussion in the previous parts, for example, showed that courts no longer blindly accept that certificates are mere opinions fully protected by the First Amendment. Instead, they can be a representation of fact of a commercial nature, namely the value of a certified item (third requirement).[1029]

1.3.2. Commercial Speech and First Amendment Protection

318. Based on the analysis above, it is conceivable that certificates might be qualified as commercial speech under one of the identified tests.[1030] Under the conditions set out in *Central Hudson*, commercial speech is protected by the First Amendment if it is not false, misleading or deceptive.[1031] Commercial speech deserves protection under the First Amendment because both individual consumers and society have strong interests in the free flow of accurate and reliable commercial information.[1032] It does not lose its protection merely because money is spent to project it in a paid advertisement.[1033] Commercial speech will be protected even if it is carried in a form that is sold for profit[1034] or involves an incentive to purchase a particular item.[1035] An advertiser's purely economic interest in the diffusion of commercial information does not disqualify him from protection under the First Amendment.[1036]

319. However, commercial speech is offered less protection under the First Amendment than non-commercial speech.[1037] It can be regulated in ways that might "be impermissible

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[1029] See for example *California Public Employees' Retirement System v. Moody's Corp*., No. CGC-09-490241, 8 (Cal. Super. 2010) affirmed in *California Public Employees' Retirement System v. Moody's Corp*., Docket No. A134912, No. CGC-09-490241, paragraphs 30-34 (Cal. Ct. App. 2014); T.C. GOLDSTEIN, "Nike v. Kasky and the Definition of ''Commercial Speech''", *Cato Supreme Court Review 2002-2003*, 2003, 67-68.

[1030] See in this regard also: N. GAILLARD & M. WAIBEL, "The Icarus Syndrome: How Credit Rating Agencies Lost Their Quasi-Immunity", University of Cambridge Faculty of Law Research Paper No. 12/2017, February 14, 2017 concluding that US courts increasingly consider ratings as commercial speech, especially those given to structured finance; A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 77-78.

[1031] *Central Hudson Gas & Electric Corp. v. Public Services Community*, 447 U.S. 557, 593 (1980).

[1032] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc*., 425 U.S. 748, 762-765 & 781 (1976); N.K. MCKENZIE, "Ambiguity, Commercial Speech and the First Amendment", 56 *University of Cincinnati Law Review* 1988, 1300-1301.

[1033] *Buckley v. Valeo*, 424 U.S. 1, 35-59 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-266 (1964).

[1034] See for example: *Smith v. California*, 361 U.S. 147, 150 (1959).

[1035] See for example: *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-266 (1964).

[1036] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc*., 425 U.S. 748, 762 (1976).

[1037] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc*., 425 U.S. 748, 762 (1976); *Central Hudson Gas & Electric Corp. v. Public Services Community*, 447 U.S. 557, 563 (1980).

in the realm of noncommercial expression".[1038] The Supreme Court relies on several reasons to restrict First Amendment protection for commercial speech, which might equally apply to certificates.[1039]

320. To start with, it is easier to verify the truth of commercial speech than of opinions included in political speech.[1040] As certifiers issue certificates after a thorough analysis of information provided by the requesting entity, it is conceivable that the 'truth' of certificates can be verified. Certifiers have already been held liable because of issuing certificates that turned out to be inaccurate, which is an indication that the truth can be verified.[1041] The objective and durable nature of the information provided to a certifier allows a certificate to attain a level of accuracy that most other forms of reports and communications cannot reach. Certifiers should, therefore, not be entitled to the same protection afforded to political speech under the First Amendment.[1042]

321. Commercial speech is also "more durable" [1043] than other types of speech taking into account that advertising is the *condition sine qua non* of commercial profits. Thus, it is unlikely that commercial speech will be chilled by proper regulation.[1044] Arguably, the profitability of issuing certificates is greater than the typical revenues generated by publishers and journalists. This hardiness of commercial speech may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.[1045] The profits

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[1038] *Ohralik v. Ohio State Bar Assn*. 436 U.S. 447, 456 (1978). See for more information on the protection of commercial speech under the First Amendment in general: J. KESSLER, "First Amendment Protection for False Commercial Speech by A Publisher Regarding The Truthfulness of Its Publication: A Response to Litigation Arising Over James Frey's A Million Little Pieces", (24) *Cardozo Arts & Entertainment* 2007, 1220; E. BAKER, "The First Amendment and Commercial Speech", (84) *Indiana Law Journal* 2009, 981; V. BRUDNEY, "The First Amendment and Commercial Speech", *Boston College Law Review* 2012, 1153; D.A. FARBER, "Commercial Speech and First Amendment Theory", (74) *Northwestern University Law Review* 1980, 372; D. MEIKLEJOHN, "Commercial Speech and the First Amendment", (13) *California Western Law Review* 1977, 430; R. POST, "The Constitutional Status of Commercial Speech", (48) *UCLA Law Review* 2000, 1.

[1039] J. KESSLER, "First Amendment Protection for False Commercial Speech by A Publisher Regarding The Truthfulness of Its Publication: A Response to Litigation Arising Over James Frey's A Million Little Pieces", (24) *Cardozo Arts & Entertainment* 2007, 1231-1232.

[1040] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc*., 425 U.S. 748, endnote 24 (1976).

[1041] See for more information the discussion *supra* in nos. 232-294.

[1042] B.A. MURPHY, "Credit Rating Immunity? How the Hands-Off Approach Toward Credit Rating Agencies Led to the Subprime Credit Crisis and the Need for Greater Accountability", (62) *Oklahoma Law Review* 2010, 769-770.

[1043] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc*., 425 U.S. 748, endnote 24 (1976).

[1044] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc*., 425 U.S. 748, endnote 24 (1976).

[1045] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc*., 425 U.S. 748, endnote 24 (1976); B.A. MURPHY, "Credit Rating Immunity? How the Hands-Off Approach Toward Credit Rating Agencies Led to the Subprime Credit Crisis and the Need for Greater Accountability", (62) *Oklahoma Law Review* 2010, 769; J. KESSLER, "First Amendment Protection for False Commercial Speech by A Publisher Regarding The Truthfulness of Its Publication: A Response to Litigation Arising Over James Frey's A Million Little Pieces", (24) *Cardozo Arts & Entertainment Law Journal* 2007, 1232-1233; C. DEATS, "Talk that Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies from Regulation?", (110) *Columbia Law Review* 2010, 1836-1837.

in the certification business might encourage certifiers to continue issuing certificates, regardless of the existence of First Amendment protection.[1046]

322. The interest in preventing commercial harm justifies more intensive regulation of commercial speech as well.[1047] The dramatic consequences of incorrect certificates on the worldwide economy (e.g. the role of CRAs in the 2008 financial crisis), on the international environment (e.g. the role of classification societies in the major oil spills caused by the sinking of the *Erika* and *Prestige*) or on consumer's health (e.g. the role of TüV Rheinland in the PIP implant case) might justify the qualification of certificates as commercial speech to prevent disasters on the market.

1.4. Certificates and Strict or Intermediate Scrutiny

323. The analysis of these different types of protected speech is important as it will determine the level of scrutiny given to courts to assess the constitutionality of laws and Governmental policies. This is relevant as legislation can be adopted to regulate the functioning, methodologies and liability of certifiers.[1048] The question arises whether such legislation, for instance imposing liability upon certifiers for inaccurate and unreliable certificates, might conflict with their freedom of expression as guaranteed by the First Amendment.[1049] In this regard, a distinction needs to be made between the Government's content-based and content-neutral regulation of expressions.

324. On the one hand, a content-based restriction limits the communications because of the content and the substance of the message conveyed. It regulates "on the basis of what is said".[1050] These restrictions are subject to strict scrutiny judicial review.[1051]

When applying this standard, a restriction on the content of speech is invalid unless it can be shown that it passes strict scrutiny. This means that the restriction is justified by a

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[1046] B.A. MURPHY, "Credit Rating Immunity? How the Hands-Off Approach Toward Credit Rating Agencies Led to the Subprime Credit Crisis and the Need for Greater Accountability", (62) *Oklahoma Law Review* 2010, 770-772.

[1047] *Cincinnati v. Discovery Network, Inc.* 507 U.S. 410, 426 (1993).

[1048] The Credit Rating Agency Reform Act (CRARA), for instance, enhances governance, protects against conflicts of interest and increases transparency to improve the quality of ratings (Credit Rating Agency Reform Act of 2006, P. Law 109–291, 120 Stat. 1327 codified in scattered sections of 15 U.S.C. (C. HILL, "Limits of Dodd-Frank's Rating Agency Reform", (15) *Chapman Law Review* 2011, 133)). Several provisions in the Dodd-Frank Act also deal with the liability and role of CRAs. The Act contains measures that requires greater transparency of rating procedures and methodologies and provides the Securities and Exchange Commission (SEC) more efficient enforcement mechanisms (Title XI, Subtitle C ("Improvements to the Regulation on Credit Rating Agencies") US Congress, Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376-2223). See also Section 933(b) of the Act and the discussion and references above in no. 285.

[1049] *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995); *SC State Ports Auth. v. BOOZ-ALLEN & HAMILTON*, 676 F. Supp. 346, 348-349 (D.D.C. 1987) ("the right to free speech is not absolute. The first amendment requires, however, that attempts by a state to regulate speech either through direct legislation or recognition of a particular cause of action must be scrutinized to insure that the proper constitutional balance is struck between free speech and the state's interest in restraining that speech").

[1050] P. FINKELMAN, *Encyclopedia of American Civil Liberties*, New York, Routledge, 2013, 363.

[1051] L.B. LIDSKY & R.G. WRIGHT, *Freedom of the Press: A Reference Guide to the United States Constitution*, Westport, Greenwood Publishing Group, 2004, 34.

compelling state interest and narrowly drawn to serve that interest. The State must specifically identify an actual problem in need of solving and the curtailment of free speech must be necessary to the solution.[1052] A compelling interest is an interest of the "highest order".[1053] The legislature must have passed the act (containing the restriction) to further a compelling Governmental interest, and must have narrowly tailored it to achieve that interest.[1054] Strict scrutiny is a demanding standard as it "is rare that a regulation restricting speech because of its content will ever be permissible".[1055] If legislation is subject to a strict scrutiny standard, it is nearly always shut down.[1056]

325. On the other hand, a content-neutral restriction is not related to the content of the message. Instead, it limits "where, when and how ideas are expressed".[1057] Such a restriction is measured against an intermediate scrutiny test. This test is now widely used to deal with many free-speech problems involving legislation that does not seek to regulate the content or viewpoint of speech but that may have an incidental impact on the freedom of expression.[1058] To survive intermediate scrutiny, the Government has to show that the restriction imposed by the law serves an important, substantial or significant public interest. The interest, however, does not need to be compelling as is required under strict scrutiny. The challenged act must further the interest by means that are substantially related to it. This condition is less rigorous than the strict scrutiny standard.[1059]

326. It has already been mentioned that certificates might be qualified as commercial speech. The regulation of commercial speech is subject to the test in the *Central Hudson* case. Commercial speech will fall within the First Amendment if it concerns a lawful activity and when it is not misleading. The asserted Governmental interest served by the restriction on commercial speech should be substantial as well. Moreover, the law needs to directly advance the Governmental interest asserted and should not be more extensive

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[1052] *Brown v. Entertainment Merchants Association*, 564 U.S. 786, part III (2011); *Republican Party of Minn. v. White*, 536 U.S. 765, 777 (2002); P. FINKELMAN, *Encyclopedia of American Civil Liberties*, New York, Routledge, 2013, 612; W. SINNOTT-ARMSTRONG & R.J. FOGELIN, *Cengage Advantage Books: Understanding Arguments: An Introduction to Informal Logic*, Wadsworth, Cengage Learning, 2009, 413.

[1053] *Employment Div. v. Smith*, 494 U.S. 872, 895 (1990) such as public health or national security (R. TRAGER & J. RUSSOMANNO, *The Law of Journalism and Mass Communication*, Washington, CQ Press, 2009, 70-71).

[1054] See in this regard the definition of strict scrutiny on the Legal Information Institute, available at <www.law.cornell.edu/wex/strict_scrutiny>.

[1055] *United States v. Playboy Entertainment Group*, 529 U.S. 803, 818 (2000); *Brown v. Entertainment Merchants Association*, 564 U.S. 786, part III (2011).

[1056] L.B. LIDSKY & R.G. WRIGHT, *Freedom of the Press: A Reference Guide to the United States Constitution*, Westport, Greenwood Publishing Group, 2004, 34; B. SCHWARTZ, *Decision: How the Supreme Court Decides Cases*, New York, Oxford University Press, 1997, 168.

[1057] R. TRAGER, J. RUSSOMANNO, S. DENTE ROSS & A. REYNOLDS, *The Law of Journalism and Mass Communication*, Washington, CQ Press, 2013, 71.

[1058] P. FINKELMAN, *Encyclopedia of American Civil Liberties*, New York, Routledge, 2013, 818.

[1059] J.M. SHAMAN, *Constitutional Interpretation: Illusion and Reality*, Connecticut, Greenwood Publishing Group, 2001, 128; K. WERHAN, *Freedom of Speech: A Reference Guide to the United States Constitution*, Westport, Greenwood Publishing Group, 2004, 76; *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

than is necessary to serve that interest.[1060] This test is thus similar to the intermediate scrutiny test applied to 'content-neutral' messages.[1061]

327. Commercial speech can be regulated when taking into account three conditions. First, the Government must assert a substantial interest in support of its regulation.[1062] This requirement can be met by showing an interest in preserving health, safety and morals, and aesthetic quality of the community.[1063] A substantial interest relates to a significant or important concern on a particular matter.[1064] Considering the potential wide and disastrous effects of inaccurate certificates (e.g. the financial crisis or oil disasters), the Government might have a substantial interest in regulating the role and liability of certifiers. Second, the Government must show that the restriction on commercial speech directly advances that specific interest.[1065] Arguably, imposing liability upon certifiers or adopting provisions on their role and functioning could advance the protection of parties and society in general. Third, these restrictions must be narrowly drawn.[1066] It cannot be more extensive than is necessary to serve the Governmental interest.[1067]

328. The Government may even freely regulate misleading commercial speech. It was held that "false and misleading commercial speech is not entitled to any First Amendment protection".[1068] Such speech does not provide the public with accurate information.[1069] The Government may ban those forms of communication more likely to deceive the public rather than to inform it.[1070] When courts consider certificates to be false and misleading, they will fall outside the scope of the First Amendment and will be denied protection.

[1060] *Central Hudson Gas & Elec. Corp. v. Public Service Community* 447 U.S. 557, 561-566 (1980).

[1061] E. CHEMERINSKY, *Constitutional Law: Principles and Policies*, New York, Wolters Kluwer, 2015, 1149; *Florida Bar v. Went For It, Inc*. 515 U.S. 618, 623 (1995) ("Mindful of these concerns, we engage in 'intermediate' scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in Central Hudson").

[1062] *Central Hudson Gas & Electric Corp. v. Public Services Community*, 447 U.S. 557, 566 (1980).

[1063] K.K. GOWER, *Legal and Ethical Considerations for Public Relations: Second Edition*, Illinois, Waveland Press, 2007, 37.

[1064] R.L. MILLER & F.B. CROSS, *The Legal Environment Today*, Stamford, Cengage Learning, 2015, 102.

[1065] *Central Hudson Gas & Electric Corp. v. Public Services Community*, 447 U.S. 557, 566 (1980).

[1066] *Central Hudson Gas & Electric Corp. v. Public Services Community*, 447 U.S. 557, 566 (1980).

[1067] M.A. BLANCHARD, *History of the Mass Media in the United States: An Encyclopedia*, New York, Routledge, 2013, 153.

[1068] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980); *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136 (1994) concluding that States may ban such speech only if it is false, deceptive, or misleading.

[1069] C. FISK & E. CHEMERINSKY, "What Is Commercial Speech? - The Issue Not Decided in 'Nike v. Kasky'", (54) *Case Western Reserve Law Review* 2004, 1158.

[1070] *Central Hudson Gas & Electric Corp. v. Public Services Community*, 447 U.S. 557, 561-562 (1980) with further references to case law as reported in A.B. MURPHY, "Credit Rating Immunity? How the Hands-Off Approach Toward Credit Rating Agencies Led to the Subprime Credit Crisis and the Need for Greater Accountability", (62) *Oklahoma Law Review* 2010, 768.

329. The critical element, therefore, is to determine when certificates are false and misleading. Regardless of my own thoughts as to when a certificate is inaccurate,[1071] Thomas Jefferson School of Law professor GUZELIAN writes that misleading speech means "that the perception the audience takes away—or to say it differently, the speech's *implication*—was false".[1072] The falsity within the meaning of false speech is determined by the perception of the audience and not by the correctness of the literal words. The First Amendment does not offer greater protection for what is called "literally-true-but-falsely-perceived speech" than it does for the category of "literally-false-and-falsely-perceived speech".[1073]

A certificate will thus be considered false to the extent that the public perceives it as misleading. Ratings that facilitated the financial crisis misrepresented the riskiness of structured finance. Such ratings fall outside the scope of protection for commercial speech. Credit ratings that contributed to the financial crisis did not convey correct information to the public.[1074] Similarly, inaccurate certificates that do not correspond with the 'true' or 'actual' value of the certified item are misleading as they caused the public to purchase certified items by misrepresenting them as meeting certain standards.

1.5. In Brief: Protected Speech in the United States

330. The analysis showed that speech on matters of public concern is at the heart of the First Amendment. With the exception of unsolicited sovereign credit ratings, most certificates do not relate to matters of public concern. The protection of the First Amendment has also been extended to speech of a purely commercial nature, though to a lesser degree.[1075] Certificates might be qualified as commercial speech and fall within the protective scope of the First Amendment. Misleading or false commercial speech, however, is not protected. Moreover, the Government is allowed to regulate commercial speech under an intermediate scrutiny test.

331. Restrictions can thus be imposed upon the working of certifiers and legislation can be adopted to regulate their liability. Such measures do not necessarily impede their freedom of speech. This conclusion corresponds with the fact that certificates convey information on the certified item. Certificates are not related to an argument or idea.[1076] A certificate deals with a private transaction and does not aim at social change. It is in

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[1071] See in this regard the conclusions *supra* in Part II, Chapter I.

[1072] C.P. GUZELIAN, "True and False Speech", (51) *Boston College Law Review* 2010, 683.

[1073] C.P. GUZELIAN, "True and False Speech", (51) *Boston College Law Review* 2010, 683-686.

[1074] A.B. MURPHY, "Credit Rating Immunity? How the Hands-Off Approach Toward Credit Rating Agencies Led to the Subprime Credit Crisis and the Need for Greater Accountability", (62) *Oklahoma Law Review* 2010, 767-769.

[1075] *SC State Ports Auth. v. BOOZ-ALLEN & HAMILTON*, 676 F. Supp. 346, 349 (D.D.C. 1987).

[1076] S.E. GRANT HAMILTON, "The First Amendment as a Trade Association Shield from Negligent Liability and Strategies for Plaintiffs Seeking to Penetrate that Shield", (22) *Journal of Constitutional Law* 2000, 466 for a similar conclusion in the context of trade associations.

most cases delivered in a confidential context rather than to the world at large.[1077] Certifiers should not be able to hold themselves out as experts and then rely on the First Amendment as a shield when their certificates are inaccurate.[1078]

2. Freedom of Speech under Article 10 ECHR

332. According to Article 10 ECHR, everyone has the right to freedom of expression. The European Court of Human Rights has interpreted the right to freedom of speech in Article 10 as "one of the basic conditions for [the] progress of a democratic society and for the development of every man".[1079] This right includes the freedom to hold opinions and to receive and impart information or ideas without interference by a public authority.[1080] Similar to the situation in the United States, different types of speech are covered by Article 10 ECHR. Expressions can be labelled as value judgments (part 2.1.), factual statements (part 2.2.) or commercial speech (part 2.3.). Assuming that certificates would fall in one of these categories, national governments are allowed to restrict the certifier's freedom of speech, for instance by imposing liability, under the conditions set out in the second paragraph of Article 10 (part 2.4.). The main findings are summarised in a conclusion (part 2.5.).

2.1. Certificates as Value Judgements

333. The ECtHR makes a distinction between facts on the one hand and value judgments on the other hand. This distinction is of importance when it comes to the application of the restrictions contained in the second paragraph of Article 10 ECHR.

334. Whereas the existence of facts can be demonstrated, the truth and accuracy of value judgments is not susceptible of proof.[1081] The requirement of proof for value judgments "is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 […] of the Convention".[1082] Value judgments receive more protection than factual statements.[1083] Value judgments,

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[1077] F. SCHAUER, "Mrs. Palsgraf And The First Amendment", (47) *Washington & Lee Law Review* 1990, 169.

[1078] S.E. GRANT HAMILTON, "The First Amendment as a Trade Association Shield from Negligent Liability and Strategies for Plaintiffs Seeking to Penetrate that Shield", (22) *Journal of Constitutional Law* 2000, 466 for a similar conclusion in the context of trade associations.

[1079] Case 5493/72, *Handyside v. the United Kingdom*, [1976] ECHR 5, paragraph 49.

[1080] See in general on Article 10 of the ECHR: A. MOWBRAY, *Cases, Materials, and Commentary on the European Convention on Human Rights*, Oxford, Oxford University Press, 2012, 671-731.

[1081] Case 9815/82, *Lingens v. Austria*, [1986] ECHR 7, paragraph 46; D. VOORHOOF, "Guaranteeing the freedom and independence of the media", in: Council of Europe, *Media and Democracy*, Council of Europe Publishing, 1998, 45. It should, however, be noted that there is no sharp distinction between the two categories (O. CASTENDYK, E.J. DOMMERING & A. SCHEUER, *European Media Law*, Alphen aan den Rijn, Kluwer Law International, 2008, 54). Whereas factual statements are objective, value judgments are subjective (J. GRIFFIN, *On human rights*, Oxford, Oxford University Press, 2008, 111).

[1082] Case 9815/82, *Lingens v. Austria*, [1986] ECHR 7, paragraph 46.

[1083] Case 9815/82, *Lingens v. Austria*, [1986] ECHR 7, paragraph 46; Case 11662/85, *Oberschlick v. Austria*, [1991] ECHR 30, paragraph 63. Also see: W. SAKULIN, *Trademark Protection and Freedom of Expression: An Inquiry Into the Conflict Between Trademark Rights and Freedom of Expression Under European Law*, Alphen aan den Rijn, Kluwer Law International, 2011, 112.

especially the "strong" ones,[1084] benefit from a wide almost absolute protection as long as the opinion put forward is not lacking any factual basis and is made in good faith.[1085] The communicator of the information has to act in good faith and ensure that the statement is based on sufficient facts to constitute a "fair comment".[1086] Value judgments without a sufficient factual basis may be excessive, which the government is allowed to regulate and restrict.[1087]

335. However, certificates will probably not qualify as value judgments for two reasons. While one reason is related to the way in which certifiers come to their conclusions, the other one deals with the context in which the certificate was issued.[1088]

336. The way certifiers come to their conclusions shows the certificate is not merely a subjective assessment of the certified item. For instance, CRAs are required to use rigorous, systematic and continuous methodologies.[1089] In addition, a CRA has to adopt, implement and enforce adequate measures to ensure its ratings are based on a thorough analysis of all the available and relevant information. CRAs have to adopt all necessary measures to ensure that the information they use in assigning a rating is of sufficient quality and comes from reliable sources.[1090]

The truth and accuracy of other certificates is even more susceptible of proof. Classification societies, for instance, conduct surveys and examine the vessel's condition before issuing the class certificate. Surveyors attend the shipyard and visit sea trials to verify whether the ship is constructed according to the approved design plans and class rules. Once the survey is done, the classification society issues a certificate of class. The

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[1084] O. CASTENDYK, E.J. DOMMERING & A. SCHEUER, *European Media Law*, Alphen aan den Rijn, Kluwer Law International, 2008, 55 referring to case law.

[1085] J.F. FLAUSS, "The European Court of Human Rights and the Freedom of Expression", (3) *Indiana Law Journal* 2009, 817 with further references to case law (e.g. Case 26958/95, *Jerusalem v. Austria* [2003] 37 EHRR 567; Case 19983/92, *De Haes and Gijsels v. Belgium* [1997] 25 EHRR 1). See for example: Case 29723/11, *Szima v. Hungary*, [2012] ECHR 1788, paragraph 30 and the discussion in M. MACOVEI, *A guide to the implementation of Article 10 of the European Convention on Human Rights*, Human rights handbooks no. 2, 2004, 10 & 50-52.

[1086] J. GARCÍA ROCA & P. SANTOLAYA, *Europe of Rights: A Compendium on the European Convention of Human Rights*, Leiden, Martinus Nijhoff Publishers, 2012, 379 with further references.

[1087] See for example: Case 26958/95, *Jerusalem v. Austria*, [2003] 37 EHRR 567, paragraph 43; Case 19983/92, *De Haes and Gijsels v. Belgium*, [1997] 25 EHRR 1, paragraph 47; Case 10807/04, *Veraart v. the Netherlands*, [2008] 46 EHRR 53, paragraph 55. Also see: P. LEACH, *Taking a Case to the European Court of Human Rights*, Oxford, Oxford University Press, 2011, 362 with references to several decisions; M. MACOVEI, *A guide to the implementation of Article 10 of the European Convention on Human Rights*, Human rights handbooks no. 2, 2004, 10.

[1088] D. VOORHOOF, "Guaranteeing the freedom and independence of the media", in: Council of Europe, *Media and Democracy*, Council of Europe Publishing, 1998, 45.

[1089] Article 8 Regulation 1060/2009 on credit rating agencies**.** See in this regard also: Article 4 (defining rigorous), Article 5 (defining systematic) and Article 6 (defining continuous) of Commission Delegated Regulation 447/2012 of 21 March 2012 supplementing Regulation 1060/2009 on credit rating agencies by laying down regulatory technical standards for the assessment of compliance of credit rating methodologies.

[1090] Article 8 Regulation 1060/2009 on credit rating agencies. Also see the discussion *supra* in nos. 41-49.

certificate attests that the vessel's construction complies with class rules.[1091] Therefore, one can argue that the inaccuracy of the certificate can be proven, namely if the ship did not comply with the technical and safety class rules at the moment the certificate was issued. This conclusion is strengthened considering that classification societies have to conduct periodical surveys of the vessel. This in turn gives them the opportunity to detect irregularities in the vessel's construction.[1092]

337. Judgments of the ECtHR take into account the context in which the statement is made to determine its protection.[1093] The contextual factors clearly do not speak to the benefit of certifiers when it comes to the protection of certificates as value judgements.

The Regulation on CRAs, for instance, is clear when stipulating that ratings are not opinions about a value or a price for a financial instrument or a financial obligation. CRAs are not financial analysts or investment advisors. Ratings have regulatory value for investors such as credit institutions or insurance companies. Credit ratings drive investment choices, especially because of information asymmetries and efficiency purposes.[1094] The same reasoning applies to certificates issued by other certifiers. Whereas audit opinions are "admission tickets" for creditors and investors to make decisions,[1095] class certificates are required before insurers will provide coverage for the vessel or before cargo-owners use the vessel to transport of their goods.[1096] Class certificates can also have regulatory value when they are issued by ROs to comply with a flag State's obligations under international law.[1097] Similarly, manufacturers are sometimes required to rely on notified bodies in the conformity assessment procedure of their medical devices.[1098]

[1091] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications, 2011, 3.

[1092] In this regard, the case of the *Dune* is particularly interesting. The Commercial Court of Antwerp affirmed in its decision that a class certificate is an indication of the state of the vessel at the moment the survey is undertaken. The survey has to be adapted to the particular nature of the ship and its construction materials. Although the shipowner is fully responsible to ensure that the vessel remains seaworthy between all the periodical surveys, the Court relied on the expert report to conclude that the *Dune* must already have been unseaworthy in 1998. As a consequence, the classification society was not entitled to issue a certificate of class on April 17, 1998. See in this regard: Commercial Court Antwerp, September 20, 2006, A/02/04109 (unpublished) affirmed by the Court of Appeal Antwerp, February 18, 2013, *Nieuw Juridisch Weekblad* 2013, 659-660 with annotation by J. DE BRUYNE.

[1093] J. GARCÍA ROCA & P. SANTOLAYA, *Europe of Rights: A Compendium on the European Convention of Human Rights*, Leiden, Martinus Nijhoff Publishers, 2012, 379 with further references to case law; W. BENEDEK & M.C. KETTEMANN, *Freedom of expression and the Internet*, Council of Europe, 2014, 89.

[1094] Recital (8) Regulation 462/2013 amending Regulation1060/2009 on credit rating agencies.

[1095] S.VICK, "Note, Bily v. Arthur Young & Co.: Is Limiting Auditor Liability to Third Parties Favoritism or Fair Play?", (26) *Loyola of Los Angeles Law Review* 1993, 1336. See in this regard also the discussion *supra* in nos. 10-11. See more general on gatekeepers the discussion *supra* in nos. 108-109 and *infra* in nos. 437-464.

[1096] See for more information the discussion *supra* in no. 14.

[1097] See for more information the discussion *supra* in no. 15.

[1098] See for more information the discussion *supra* in nos. 20-22.

2.2. Certificates as Statements of Facts

338. Factual statements can be proven false or true.[1099] Some certifiers, especially CRAs when issuing unsolicited ratings, argue that they are members of the press. This is important as the freedom of press has obtained the greatest protection by the ECtHR under Article 10.[1100] Not only does the press disseminate information and ideas on matters of public interest, the public also has a right to receive them.[1101] The press would be unable to play its vital role of "public watchdog" if this would be different.[1102]

339. On several occasions, the Court held that Article 10 ECHR protects a journalist's right to divulge information even when the respective facts prove to be untrue. It is only required that a journalist or a publication has a legitimate purpose, the publication covers a matter of public concern and reasonable efforts have been made to verify the facts.[1103] The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the provision they are acting in good faith on an accurate factual basis and provide reliable and precise information in accordance with the ethics of journalism.[1104]

The problem with the protection of certificates does not necessarily lie in the requirement that certifiers have to act in good faith. Certifiers will in most cases act in good faith when issuing their certificates, for instance, without knowing that they do not correspond with the 'true' and 'actual' value of the certified item. Moreover, the certificate will probably also be based on an accurate factual basis (e.g. information provided by the requesting entity). There are two bigger concerns that might restrict the protection of certificates as factual statements under Article 10 ECHR. Whereas the first one relates to the notion of

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[1099] Case 9815/82, *Lingens v. Austria*, [1986] ECHR 7, paragraph 46; Case 11662/85, *Oberschlick v. Austria*, [1991] ECHR 30 paragraph 63. Also see: W. SAKULIN, *Trademark Protection and Freedom of Expression: An Inquiry Into the Conflict Between Trademark Rights and Freedom of Expression Under European Law*, Alphen aan den Rijn, Kluwer Law International, 2011, 112.

[1100] J. GARCÍA ROCA & P. SANTOLAYA, *Europe of Rights: A Compendium on the European Convention of Human Rights*, Leiden, Martinus Nijhoff Publishers, 2012, 379.

[1101] See for example: Case 13585/88, *Observer and Guardian v. the United Kingdom*, [1991] 14 EHRR 153, paragraph 75; Case 15890/89, *Jersild v. Denmark*, [1994] ECHR 33, paragraph 31.

[1102] Case 51279/99, *Colombani and Others v. France*, [2002] ECHR 5, paragraph 55; Case 13778/88, *Thorgeir Thorgeirson v. Iceland*, [1992] 14 EHRR 843, paragraph 63; Case 28525/95, *Unabhängige Initiative Informationsvielfalt v. Austria*, [2003] 37 EHRR 33, paragraph 37; Case 15890/89, *Jersild v. Denmark*, [1994] ECHR 33, paragraph 30.

[1103] See for example: Case 29183/95, *Fressoz and Roire v. France*, [1999] ECHR 1, paragraph 54; Case 13704/88, *Schwabe v. Austria*, [1993] 14 HRLJ, paragraph 34. See for a discussion and further references: M. MACOVEI, *A guide to the implementation of Article 10 of the European Convention on Human Rights*, Strasbourg, Human rights handbooks no. 2, 2004, 10, 24 & 50-51; M. OETHEIMER, *Freedom of Expression in Europe: Case-law Concerning Article 10 of the European Convention of Human Rights*, Strasbourg, Council of Europe Publishing, 2007, 19-20.

[1104] Case 29183/95, *Fressoz and Roire v. France*, [1999] ECHR 1, paragraph 54; Case 21980/93, *Bladet Tromsø and Stensaas v. Norway*, [2000] 29 EHRR 125, paragraph 65; Case 51279/99, *Colombani and Others v. France*, [2002] ECHR 5, paragraph 65; Case 17488/90, *Goodwin v. United Kingdom*, [1996] 22 EHRR 12, paragraph 39.

the public interest (part 2.2.1.), the second one deals with the definition of members of the press traditionally protected by Article 10 (part 2.2.2.).

2.2.1. Public Debate and Matter of General Interest

340. Certificates have to contribute to a public debate on a matter of general interest if they want to enjoy protection under Article 10 ECHR.[1105] The duty of the press is to convey information and ideas on all matters or ongoing debates on questions of public interest in a way that is consistent with its obligations and responsibilities.[1106] I will first focus on the question whether certificates are a matter of general or public interest and then on the notion of public debate.

341. The ECtHR frequently held that, although the press should not overstep the boundaries set *inter alia* for the protection of the reputation of others,[1107] the need to prevent disclosure of confidential information[1108] or the safeguard of the interests of proper administration of justice,[1109] it has to impart information and ideas on political issues "just as on those in other areas of public interest".[1110] As a consequence, not only political expressions are protected. The general interest also relates to issues that arouse public concern among citizens in general.[1111] The public interest involves anything affecting the rights, health or finances of the public at large. The public interest is a common concern among citizens in the management and affairs of local, state and national governments.[1112] It is the benefit or advantage of the community as a whole[1113] and relates to the fact that the public has a right to know about something as it affects them.[1114]

This, for instance, includes a publication regarding the earnings and pay raises of the managing director of a company. The ECtHR held in *Fressoz and Roire* that the purpose of the published article was not to infringe the rights of the company chairman but to "contribute to the more general debate on a topic that interested the public [employment

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[1105] Case 29183/95, *Fressoz and Roire v. France*, [1999] ECHR 1, paragraph 50; Case 13704/88, *Schwabe v. Austria*, [1993] 14 HRLJ, paragraph 34; Case 21980/93, *Bladet Tromsø and Stensaas v. Norway*, [2000] 29 EHRR 125, paragraph 68.

[1106] Case 19983/92, *De Haes and Gijsels v. Belgium*, [1997] 25 EHRR 1, paragraph 37; Case 51279/99, *Colombani and Others v. France* [2002] ECHR 5, paragraph 55; Case 26131/95, *Bergens Tidende and Others v. Norway*, [2001] 31 EHRR 430, paragraph 49; Case 21980/93, *Bladet Tromsø and Stensaas v. Norway*, [2000] 29 EHRR 125, paragraph 59.

[1107] Case 9815/82, *Lingens v. Austria*, [1986] ECHR 7, paragraph 41.

[1108] Case 21980/93, *Bladet Tromsø and Stensaas v. Norway*, [2000] 29 EHRR 125, paragraph 59.

[1109] Case 22714/93, *Worm v. Austria* [1998] 25 EHRR 454, paragraph 50.

[1110] Case 9815/82, *Lingens v. Austria*, [1986] ECHR 7, paragraph 41.

[1111] J. GARCÍA ROCA & P. SANTOLAYA, *Europe of Rights: A Compendium on the European Convention of Human Rights*, Leiden, Martinus Nijhoff Publishers, 2012, 377.

[1112] See in this regard the definition of "public interest" on the Free (Legal) Dictionary, available at <legal-dictionary.thefreedictionary.com/Public+Interest>.

[1113] See in this regard the definition of "public interest" in the Oxford Dictionaries, available at <www.oxforddictionaries.com/definition/english/public-interest>.

[1114] See in this regard the definition of "public interest" in the MacMillan Dictionary, available at <www.macmillandictionary.com/dictionary/british/public-interest>.

and pay]".[1115] The publication can also relate to important aspects of human health (e.g. cosmetic surgery such as in the PIP case) and raise issues affecting the public interest, even if the article was not published as part of an ongoing general debate but focused on the standard of treatment provided in a single clinic.[1116]

342. There are some reasons why it is unlikely that certificates contribute to a public debate on a matter of general interest worth of protection. To start with, it remains unclear whether certificates relate to a matter of general or public concern. Reference can in this regard be made to case law in the US as a source of inspiration. Courts in the US already held that ratings of complex asset-backed securities leading to the financial crisis were not a matter of public concern but were issued to the benefit of only a few sophisticated investors.[1117] Similarly, certificates issued by classification societies in their private role also serve private interests of shipowners to receive insurance coverages or contract with cargo owners.[1118] When looking at the cases where the ECtHR did grant broader protection to statements or articles, one sees that such statements or articles are published within an entirely different context than certificates. Most statements that have been granted protection under Article 10 ECHR because of their link with the public debate or general interest deal with defamed politicians or other (prominent) public persons (e.g. police men, civil servants, politicians, judges and journalists).[1119]

343. Yet, there are some ways to link the issuance of a certificate with the general or public interest as well. Take the example of credit ratings. Recital (8) of Regulation 462/2013 stipulates that CRAs have to be registered and supervised as their services have considerable impact on the "public interest".[1120] Especially ratings given to a country or sovereign entity are important in this regard. Sovereign ratings could indeed affect debates of public interest because they pertain to an important political issue of

[1115] Case 29183/95, *Fressoz and Roire v. France*, [1999] ECHR 1, paragraph 50.

[1116] Case 26131/95, *Bergens Tidende and Others v. Norway*, [2001] 31 EHRR 430, paragraph 51; Case 25181/94, *Hertel v. Switzerland* [1998] 28 EHRR 534, paragraph 47; J. GARCÍA ROCA & P. SANTOLAYA, *Europe of Rights: A Compendium on the European Convention of Human Rights*, Leiden, Martinus Nijhoff Publishers, 2012, 377.

[1117] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651. F. Supp. 2d 155, 175-176 (S.D.N.Y. 2009); *In Re National Century Financial Enterprise Inc*., 580 F. Supp. 2d 630, 640-648 (S.D. Ohio 2008); *Anschutz Corp. v. Merill Lynch & Co*, 785 F. Supp. 2d 799, 831-832 (N.D. Cal. 2011). See for more information the discussion *supra* in nos. 306-308.

[1118] See for more information the discussion *supra* in no. 278 with references.

[1119] See for example: Case 9815/82, *Lingens v. Austria*, [1986] ECHR 7 (Austrian Chancellor); Case 28114/95, *Dalban v. Romania*, [2001] 31 EHRR 39 (prominent figures); Case 37698/97, *Lopes Gomes da Silva v. Portugal*, [2002] 34 EHRR 56 (candidate in municipal elections); Case 11508/85, *Barfod v. Denmark*, [1989] 13 EHRR 493 (lay judges); Case 41205/98, *Tammer v. Estonia*, [2001] ECHR 263 (politician's assistant); Case 53984/00, *Radio France and Others v. France*, [2005] 40 EHRR 706 (former deputy prefect); Case 15974/90, *Prager and Oberschlick v. Austria*, [1996] 21 EHRR 1 (judges); Case 11798/85, *Castells v. Spain*, [1992] 14 EHRR 445 (Basque militant and member of the Spanish Parliament).

[1120] Recital (8) of Regulation 462/2013 amending Regulation 1060/2009 on credit rating agencies.

outstanding political interest affecting both today's and the following generations, namely the ability of states to repay their loans.[1121]

Classification societies also act as ROs on behalf of national governments. Their activities have been regulated by the IMO and the EU.[1122] ANTAPASSIS concludes that ROs serve and protect the general public interest.[1123] The issuance of a statutory certificate and the role of classification societies acting as ROs might thus be a matter of general concern. Interest groups such as Greenpeace or WWF spread images or video footages of sinking vessels to increase awareness of the dramatic consequences of such disasters. Considering that the role of ROs is often at stake in such marine casualties, they can become the subject of a public debate on safety and environmental protection and become a matter of general concern.

Certificates issued by notified bodies might also serve the public interest. The ECJ, for instance, held that the aim of the MDD is not only the protection of health *stricto sensu* but also the safety of persons. The Directive does not only affect patients and users of devices but also 'third parties' and 'other persons'.[1124] With regard to the involvement of the notified body in the procedure relating to the EC Declaration of Conformity, it is apparent from the wording and overall scheme of the MDD that the purpose of that procedure is to ensure protection for the health and safety of persons.[1125]

344. Even when assuming *arguendo* that certificates do indeed relate to a matter of general concern, it remains uncertain whether they contribute to a public debate. In most cases, only one certifier will issue a specific certificate. An ongoing debate is, therefore, unlikely, regardless of the question whether it concerns a matter of general or public concern. An exception might occur with sovereign ratings or with ratings given to certain multinational companies headquartered in a country. A (potential) downgrade of the rating can lead to a discussion at the political level and in the financial press.[1126]

Different examples in the certification sector also show that not the actual certificate contributes to a debate but the underlying facts leading to the scandal and the role of the certifier. Moreover, the consequences of incorrect ratings leading to the financial crisis,

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[1121] J. OSTER, *Media Freedom as a Fundamental Right*, Cambridge, Cambridge University Press, 2015, 251.

[1122] See for example: IMO Code for Recognized Organizations, Resolution MSC.349(92) adopted on 21 June 2013 MEPC.237(65); Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations; Regulation 391/2009 on common rules and standards for ship inspection and survey organisations.

[1123] A. ANTAPASSIS, "Liability of classification societies", (11) *Electronic Journal of Comparative Law* 2007, 3 & 9.

[1124] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 50 referring to C-288/08, *Kemikalieinspektionen v. Nordiska Dental AB*, ECLI:EU:C:2009:718, November 19, 2009, paragraph 29.

[1125] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 53.

[1126] See for example: G. REILHAC & A. BREIDTHARDT, "EU slams ratings agencies after Portugal downgraded", Reuters, July 6, 2011, available at <www.reuters.com/article/us-eurozone/eu-slams-ratings-agencies-after-portugal-downgraded-idUSTRE7651EK20110706>.

a wrong product certificate resulting in the PIP breast implant scandal or the incorrect class certificates contributing to the massive oil pollution following the sinking of the Erika and Prestige illustrate that the general public only becomes aware of the role of third-party certifiers once such catastrophic events have occurred. This is long after the actual issuance of the certificate. Thus, a public debate only arises once the certificate has been issued and the certified item defaults. An exception can occur for some ratings, where there might be a public debate about the financial health of an institution/country preceding the issuance of the rating. In any case, the existence of a freedom of speech defence does by itself not enhance the public debate on certificates or certified items. Due to the lack of a debate, the need for liability when certifiers issue inaccurate and unreliable certificates becomes important.

2.2.2. Certifiers as Members of the Press

345. There is also another reason to deny certifiers protection under the freedom of expression for factual statements. Certifiers cannot be qualified as journalists to whom the ECtHR grants broad protection under Article 10 ECHR. Certifiers do not comment on facts that contribute to the public debate such as the behaviour of a Chancellor in an Austrian magazine[1127] or a complaint on the inactivity on the part of the authorities on numerous attacks and murders that took place in the Basque Country.[1128]

346. Labelling certifiers such as CRAs and classification societies as journalists is also not straightforward when looking over the fence to case law by the European Court of Justice. In *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy*, the ECJ established a test of what comprises "journalistic purposes". The Court defined journalistic purposes as referred to in Article 9 of Directive 95/46/EC[1129] as encompassing all activities with the "sole object of […] the disclosure to the public, irrespective of the medium which is used to transmit them, of information, opinions or ideas".[1130]

While some certifiers such as CRAs when issuing unsolicited sovereign ratings might indeed pursue the sole objective of disclosing information to the public, this will not be the case for most other certifiers such as classification societies. Besides the fact that class certificates are not always disclosed to the public, their purpose is not merely to provide the public with information. Certificates can be legally required (e.g. when classification societies act as ROs) or a necessity in certain maritime industries (e.g. certificates are often required before a shipowner is given insurance coverage). The same applies for certificates issued by notified bodies. Such certificates are not publicly disclosed and can

[1127] Case 9815/82, *Lingens v. Austria*, [1986] ECHR 7.

[1128] Case 11798/85, *Castells v. Spain*, [1992] 14 EHRR 445.

[1129] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ* L 281.

[1130] C-73/07, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, ECLI:EU:C:2008:727, December 16, 2008, paragraph 62.

be required under supranational law before a manufacturer can market medical devices in the EU.

2.3. Certificates as Commercial Speech

347. Certificates are thus not value judgements, nor factual statements contributing to a public debate on a matter of general interest. Certifiers could argue that their certificates qualify as commercial speech. The European Court of Human Rights does not distinguish between various forms of speech and expression.[1131] All expressions, whatever their content, fall within the scope of Article 10 ECHR. This also includes commercial speech.[1132] The legal status of a company or the fact that its activities are commercial and profit-making cannot deprive the statement of protection under Article 10.[1133] Speech does not necessarily fall outside the scope of Article 10 of the ECHR by reason of the content of the publication and the nature of the disseminator's activities.[1134] The fact that a person defends a given interest, whether it is an economic interest or any other interest, does not deprive him of the benefit of freedom of expression.[1135] However, commercial speech is given less protection than expressions of political ideas.[1136] This is also illustrated by a national authority's wider margin of appreciation for commercial speech. In *Demuth v. Switzerland*, for instance, the ECtHR concluded that the standard of scrutiny for a national authority's margin of appreciation may be less severe for commercial speech.[1137]

[1131] Case 10737/84, *Müller v. Switzerland*, [1991] 13 EHRR 212, paragraph 27.

[1132] In *Casado Coca v. Spain*, the ECtHR held that the freedom of speech does not apply solely to certain types of information, ideas or forms of expression in particular those of a political nature. It also encompasses artistic expression and information of a commercial nature (Case 15450/89, *Casado Coca v. Spain*, [1994] 18 EHRR 1, paragraph 35). In *Müller and others v. Switzerland*, the Court concluded that Article 10 ECHR did not specify that freedom of artistic expression comes within its ambit. However, it does also not distinguish between various forms of expression. It includes freedom to receive and impart information and ideas which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. As such, this also includes commercial speech (Case 10737/84, *Müller v. Switzerland*, [1991] 13 EHRR 212, paragraph 27). The Court in *Jakubowski* noted that freedom of expression exercised in another way than in discussions of matters of public interest (e.g. commercial speech) does not deprive it of the protection under Article 10 ECHR (Case 15088/89, *Jakubowski v. Germany* [1994] 19 EHRR 64, paragraph 25). Also see: Case 7805/77, *X. and Church of Scientology v. Sweden*, [1979] 16 DR 68, paragraph 5. See in this regard also: M. OETHEIMER, *Freedom of Expression in Europe: Case-law Concerning Article 10 of the European Convention of Human Rights*, Strasbourg, Council of Europe Publishing, 2007, 82.

[1133] Case 12726/87, *Autronic AG v. Switzerland*, [1990] ECHR 12, paragraphs 44-48.

[1134] Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, [1990] 12 EHRR 161, paragraphs 25-26.

[1135] Joint dissenting opinion in Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, [1990] 12 EHRR 161, part I.

[1136] Case 7805/77, *X. and Church of Scientology v. Sweden*, [1979] 16 DR 68, paragraph 5. See for a discussion: D. HARRIS, M. O'BOYLE & C. WARBRICK, *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 1995, 397; A.T. YUTAKA, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Oxford, Oxford University Press, 2002, 107.

[1137] Case 38743/97, *Demuth v. Switzerland*, [2002] 38 EHRR 423, paragraph 42.

348. Certificates will be considered as commercial speech when they intend to promote and further the sale of the certified item.[1138] CRAs are particularly interesting in this regard as they issue solicited and unsolicited ratings. It is the specific context in which the rating was issued that determines whether it is commercial speech or not. Solicited ratings could in one way or another qualify as commercial speech. Favourable ratings stimulate the interests of investors to purchase securities that are covered by such ratings.[1139] Ratings fall inside the "regular commercial context in the sense of inciting the public to purchase a particular product".[1140] Optimistic ratings of complex securities often promote and further the sale of the issuer's securities. Investors are more likely to invest in companies that have a high rating. Phrased differently, securities leading to the financial crisis would not have been sold successfully if they did not have an advantageous rating. Such ratings do often not have a wider effect on society but are merely issued in the interest of the CRA and its audience.[1141]

349. This requirement for statements to qualify as commercial speech, however, can be problematic for the other certificates. It is, for instance, uncertain whether class certificates intend to further the *sale* of the products. Class certificates are not always related to the actual sale of an item but rather provide parties with information on a vessel. Similarly, decisions by German courts in the PIP case showed that certificates issued by notified bodies do not necessarily intend to further the sale of the medical devices. The certification is a prerequisite for manufacturers to distribute devices on the EU market.[1142] Nevertheless, even those certificates might qualify as commercial speech as well.

The rationale of commercial speech might be to boost the attraction of a specific product. If courts follow this assumption, class certificates might be considered as commercial speech. Class certificates increase the attractiveness to contract with a particular shipowner whose vessels are classified by a major classification society. In other words, when classification societies issue certificates in their private role, they in some way intend to promote the certified vessel or maritime equipment. Cargo-owners as well as charters rely on services performed by classification societies.[1143] Similarly, certificates issued by notified bodies might also intend to further the sale of medical devices even

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[1138] See in this regard for example: Case 38743/97, *Demuth v. Switzerland*, [2002] 38 EHRR 423, paragraph 41; D VOORHOOF, "European Court of Human Rights. Case of Demuth v. Switzerland", *IRIS* 2003-1:2/2; M.H. RANDALL, "Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?", (6) *Human Rights Law Review* 2006, 60 with references to case law. See in this regard also: J. KRZEMINSKA-VAMVAKA, "Freedom of Commercial Speech in Europe", Research Training Network Fundamental Rights and Private Law in the European Union, 10-14 identifying three tendencies in decisions by the ECtHR concerning the qualification of commercial speech. First, speech can be labelled commercial by using balancing factors, which implies that one should look at the interest which is served by the speech. Second, the distinction between commercial and non-commercial speech can be determined by applying the public debate test. Finally, the commercial character of the speech can be determined by the enterprise's commercial objectives.

[1139] Case 7805/77, *X. and Church of Scientology v. Sweden*, [1979] 16 DR 68, paragraph 5.

[1140] Case 24699/94, *VgT Verein gegen Tierfabriken v. Switzerland*, [2002] 34 EHRR 159, paragraph 57.

[1141] See in this regard also the different cases in the United States discussed *supra* in nos. 306-308.

[1142] See for more information the discussion *supra* in nos. 57 and 98.

[1143] See for more information the discussion *supra* in no. 14.

when this is not their primary function. Those certificates boost the attractiveness of the certified medical devices for purchasers. Considering that the manufacturer is not able to market devices without certificate, it remains difficult to argue that certificates would not intend to further their sale. Without the required certificate, the sale of devices would simply not be possible.[1144]

Those certificates might to a certain extent also be seen as forms of mixed speech, containing commercial as well as non-commercial elements.[1145] The ECtHR held that if the statement contains factual data and assertions on the speaker or his business, these components can overlap to make up a whole, the gist of which is the expression of opinions and the imparting of information on a "topic of general interest" (e.g. public health). In such circumstances, it is not possible to dissociate from this whole those elements that go more to manner of presentation than to substance and which have a publicity-like effect.[1146] Mixed statements will be qualified as commercial speech if the advertising effect of the statement is not of a "secondary nature".[1147] Arguably, certificates convey the message that a certified items complies with the applicable standards and criteria. Therefore, the message of promoting and furthering the sale of the certified item seems not of a secondary nature.

2.4. Restrictions on the Freedom of Speech

350. Governments can restrict the certifier's freedom of speech, for instance by imposing liability for an allegedly inaccurate certificate. These restrictions must be construed strictly and established convincingly.[1148] An interference with a certifier's freedom of speech has to comply with the conditions in the second paragraph of Article 10 ECHR. More specifically, it has to be established whether the interference with and restriction of the freedom of expression is prescribed by law (part 2.4.1.), pursues a legitimate interest (part 2.4.2.) and is necessary in a democratic society to achieve that interest (part 2.4.3.).[1149]

2.4.1. The Restriction is Prescribed by Law

351. The requirement that the restriction needs to be prescribed by law will in most cases not be the major problem.[1150] The interference can be prescribed by law through

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[1144] See for more information the discussion *supra* in nos. 20-22.

[1145] M.H. RANDALL, "Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?", (6) *Human Rights Law Review* 2006, 64.

[1146] Case 8734/79, *Barthold v. Germany*, [1985] 7 EHRR 383, paragraphs 40-42.

[1147] Case 37928/97, *Stambuk v. Germany*, [2002] 37 EHRR 845, paragraph 38.

[1148] Case 25181/94, *Hertel v. Switzerland*, [1998] 28 EHRR 534, paragraph 46*;* Case 5493/72, *Handyside v the United Kingdom*, [1976] ECHR 5 paragraph 49; Case 15890/89, *Jersild v. Denmark*, [1994] ECHR 33, paragraph 37.

[1149] See for example: Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, [1990] 12 EHRR 161, paragraphs 25-38; Case 13778/88, *Thorgeir Thorgeirson v. Iceland*, [1992] 14 EHRR 843, paragraphs 55-70; Case 8734/79, *Barthold v. Germany*, [1985] 7 EHRR 383, paragraphs 44-59.

[1150] See for example in the context of commercial speech: Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, [1990] 12 EHRR 161 (interference was based on Section 1 of the 1909

legislation prohibiting the spreading of false and misleading information.[1151] Moreover, the basis for tort liability following from, for instance, Article 1382 BCC can be considered law.[1152] The law must be accessible, clear and sufficiently precise to enable citizens to adjust their conduct.[1153] This is the case for Article 1382 BCC considering that relevant court decisions on that provision are published, summarised and discussed in overviews of case law and academic journals.[1154] Against this background, Belgian courts already held that the freedom of expression does not provide immunity from liability in tort based on the Article 1382 BCC.[1155] Therefore, Article 10 ECHR allows holding certifiers liable for inaccurate certificates if the resulting limitation of the freedom of expression is necessary for one of the legitimate interests mentioned in the second paragraph of that Article.[1156]

Unfair Competition Act); Case 7805/77, *X. and Church of Scientology v. Sweden*, [1979] 16 DR 68 (interference was based on the Marketing Improper Practices Act); Case 15450/89, *Casado Coca v. Spain* 1994, 18 EHRR 1 (interference was based on the Statute of the Spanish Bar and by the Statute of the Barcelona Bar); Case 37928/97, *Stambuk v Germany*, [2002] 37 EHRR 845 (interference was based on sections 25 and 27 of the Baden-Württemberg Rules of Professional Conduct of the Medical Practitioners' Council and sections 55 and 58 of the Baden-Württemberg Act on the Councils for the Medical Professions).

[1151] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *OJ* L 149 and Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, *OJ* L 376.

[1152] Court of Appeal Ghent, June 6, 2005, *Nieuw Juridisch Weekblad* 2005, 1247.

[1153] Case 26229/95, *Gaweda v. Poland*, [2002] ECHR 301, paragraph 39; Case 8691/79, *Malone v. The United Kingdom*, [1984] ECHR 10, paragraph 67; Case 23224/94, *Kopp v. Switzerland*, [1998] ECHR 18, paragraph 55.

[1154] Court of Appeal Ghent, June 6, 2005, *Nieuw Juridisch Weekblad* 2005, 1247 ("Wat het vereiste van de kenbaarheid betreft [is] artikel 1382 B.W. een vorm van intern recht [...] die toegankelijk is, mede dankzij de veelvuldige rechtspraak, onder meer inzake de al dan niet rechtmatige meningsuiting, die wordt gepubliceerd en in overzichten van rechtspraak en andere rechtsleer wordt samengevat en toegelicht").

[1155] Court of Appeal Antwerp, October 11, 2005, *Auteur & Media* 2006, 207 with annotation by K. LEMMENS; Court of Appeal Brussels, September 20, 2001, *Auteur & Media* 2002, 524; Court of Appeal Brussels, February 16, 2001, *Auteur & Media* 2002, 282, Court of First Instance Antwerp, January 9, 2006, *Auteur & Media* 2006, 97; Court of First Instance, Antwerp, December 21, 2000, *Algemeen Juridisch Tijdschrift* 2001, 557; Court of Appeal Ghent, March 28, 2002, *Nieuw Juridisch Weekblad* 2003, 465; Court of Appeal Ghent, June 6, 2005, *Nieuw Juridisch Weekblad* 2005, 1243; Court of First Instance Tongeren, April 12, 2013, *Limburgs Rechtsleven* 2017, 132. See in this regard also the discussion and further references in M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 386; M. VAN QUICKENBORNE & H. VANDENBERGHE, "Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad. 2000-2008", (4) *Tijdschrift voor Privaatrecht* 2010, 1816; J. CORBET, *Censures: Actes du colloque du 16 mai 2003*, Brussels, Larcier, 2003, 85-89.

[1156] M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 386; M. VAN QUICKENBORNE & H. VANDENBERGHE, "Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad. 2000-2008", (4) *Tijdschrift voor Privaatrecht* 2010, 1816.

2.4.2. The Restriction Pursues a Legitimate Interest

352. The second requirement will not be a major challenge in the context of certifiers either.[1157] The restriction by imposing liability in the law or in case law can pursue a legitimate aim such as protecting the interest of the public in general, the rights of market participants or the reputation of the requesting entities. Take the example of CRAs. The creditworthiness of an entity that is to be rated is actually nothing more than its financial reputation. Imposing liability on CRAs for ratings that affect this reputation, therefore, can pursue a legitimate interest.[1158] One might apply a similar rationale to other requesting entities. Certificates issued by a classification society, for example, relate to the reputation of the shipowner. If the latter's vessel is not classified, cargo-owners or marine insurers perceive this as an indication that the vessel is not suitable for its intended use. This in turn influences the reputation of the shipowner. The classification society might thus have harmed the reputation of the shipowner by providing an incorrect certificate.

353. At the same time, however, persons or entities that have a public function or occupy a position in the public's interest because of their function have to tolerate more public comments and criticism than anonymous citizens. This also applies to critical reviews of activities in the markets affecting the interests of the public participating in these markets.[1159]

For instance, the fact that a rating incorrectly reflects the issuer's creditworthiness in itself is not enough to impose liability upon the CRA. Entities entering the capital markets for investment purposes should expect their financial reputations to become an issue that will be publicly discussed. For the same reasons, they should also accept that inaccuracies in these public discussions are inevitable and might sometimes even cause fluctuations in the public opinion about their creditworthiness. Entities such as CRAs contribute to the information production in the business and capital markets. Therefore, they should enjoy some leeway. A similar reasoning applies for other certifiers such as classification societies. They cannot be held liable only on the basis that the information they distribute harms the interests of others such as the shipowner or on the basis that the provided certificate turns out to be inaccurate. In order to permit sufficient voluntary production of

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[1157] This, for example, includes the protection of the reputation and the rights of others (Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, [1990] 12 EHRR 161), of the interests of the public while ensuring respect for members of the Bar (Case 15450/89, *Casado Coca v. Spain*, [1994] 18 EHRR 1), rights of consumers (Case 7805/77, X. *and Church of Scientology v. Sweden*, [1979] 16 DR 68) and health or the rights of others (Case 37928/97, *Stambuk v. Germany*, [2002] 37 EHRR 845).

[1158] M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 386.

[1159] M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 387. A comparison can in this regard also be made to critical reviews in restaurant guides. A restaurant owner cannot object that his restaurant is being reviewed in a guide because a person that runs a business in a democratic society should accept that this business will be subject to criticism (Commercial Court Antwerp, December 6, 1990, *Jaarboek Handelspraktijken* 1990, 511).

information that is beneficial for the maritime industry and the society in general, a strict standard of liability for any information that turns out to be incorrect should not be upheld.[1160]

2.4.3. The Restriction is Necessary in a Democratic Society

354. Even when a restriction of the certifier's speech is prescribed by law and pursues a legitimate interest, it needs to be necessary in a democratic society. When deciding if the restriction imposed by the government is necessary in a democratic society, the ECtHR weighs the opposing interests at stake in the particular case (e.g. public health, consumer protection, protection of identity, fair competition or the reputation and rights of others against the freedom of expression).[1161]

355. The adjective 'necessary' implies the existence of a "pressing social need".[1162] The ECtHR looks at the restriction in the light of the case and determines if it was proportionate to the legitimate aim pursued and whether the reasons invoked by the national authorities to justify the restriction are relevant and sufficient.[1163] In this regard, the margin of appreciation given to governments is essential to regulate, restrict or forbid speech. Two factors seem to have an influence on the margin of appreciation and the stance that courts will take regarding the protection of certificates.

356. First, the margin of appreciation is wide and essential for national governments when it concerns (purely) commercial matters[1164] or advertisements.[1165] Authorities have more discretion to regulate speech dealing with commercial matters or advertisements than value judgements or factual statements affecting a debate on a matter of general concern. The ECtHR, however, recalled that a strict and narrow margin of appreciation in cases of advertising and commercial matters for liberal professions would not be consonant with the freedom of expression. A strict application risks to discourage members of liberal professions from contributing to the public debate on topics affecting the life of the community if there is the slightest likelihood of their statements being treated as entailing

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[1160] M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 388.

[1161] Case 8734/79, *Barthold v. Germany*, [1985] 7 EHRR 383, paragraph 58; Case 15088/89, *Jakubowski v. Germany*, [1994] 19 EHRR 64, paragraph 27; Case 24699/94, *VgT Verein gegen Tierfabriken v. Switzerland*, [2002] 34 EHRR 159, paragraphs 67-79; Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, [1990] 12 EHRR 161, paragraphs 34; Case 37928/97, *Stambuk v. Germany*, [2002] 37 EHRR 845, paragraph 38.

[1162] Case 5493/72, *Handyside v. the United Kingdom*, [1976] ECHR 5, paragraph 48.

[1163] See for example: Case 25181/94, *Hertel v. Switzerland*, [1998] 28 EHRR 534, paragraph 46; Case 37928/97, *Stambuk v. Germany*, [2002] 37 EHRR 845, paragraph 38.

[1164] See for example: Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, [1990] 12 EHRR 161, paragraph 33-37; Case 15088/89, *Jakubowski v. Germany*, [1994] 19 EHRR 64, paragraph 26; Case 24699/94, *VgT Verein gegen Tierfabriken v. Switzerland*, [2002] 34 EHRR 159, paragraph 69.

[1165] See for example: Case 15450/89, *Casado Coca v. Spain*, [1994] 18 EHRR 1, paragraph 50; Case 31611/96, *Nikula v. Finland*, [2004] 38 EHRR 45, paragraph 45; Case 37928/97, *Stambuk v. Germany*, [2002] 37 EHRR 845, paragraphs 38-54. See in this regard also: S. FOSTER, *Human Rights and Civil Liberties*, Essex, Pearson Longman, 2008, 359.

an advertising effect.[1166] The government's margin of appreciation is reduced when the claim does not relate to an individual's purely commercial statements or advertisements but concerns a contribution to and participation in a debate affecting the public at large/general interest.[1167] This includes the protection of public health,[1168] the protection of the rights of others[1169] or maintaining the welfare of animals.[1170]

357. The ECtHR concluded in several cases that a particular restriction or injunction on the freedom of speech was not proportionate to the legitimate aim pursued and not necessary in a democratic society. This resulted in a violation of Article 10 ECHR. Those decisions were especially related to statements that were not purely within the commercial or advertising sphere but instead had a wider link to the society.[1171] In several other cases, the ECtHR found that the injunctions were proportionate and necessary. They did not constitute a violation of Article 10 ECHR. These cases were related to purely commercial statements or advertisements.[1172]

358. Certifiers will probably argue that imposing liability for an inaccurate certificate is not necessary in a democratic society. They might claim that their certificates are not purely commercial statements or advertisements but instead have a 'wider impact' on the society (e.g. the general welfare or public health). The issuance of certificates actually helps the wider public to receive information on the certified item. This gives national authorities a restricted margin of appreciation, which means that a violation of Article 10 ECHR might be more easily established.

However, certificates could fall within the definition of advertising as well, which is often relevant in cases dealing with commercial speech.[1173] Advertising refers to the making of a representation in any form in connection with a trade, business or profession in order to promote the supply of the goods or services.[1174] The *European Convention on Transfrontier Television* uses a quite similar wording when defining advertising as any

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[1166] Case 8734/79, *Barthold v. Germany*, [1985] 7 EHRR 383, paragraphs 52-59.

[1167] See for example: Case 8734/79, *Barthold v. Germany*, [1985] 7 EHRR 383, paragraph 58; Case 25181/94, *Hertel v. Switzerland*, [1998] 28 EHRR 534, paragraph 47; Case 24699/94, *VgT Verein gegen Tierfabriken v. Switzerland*, [2002] 34 EHRR 159, paragraph 71.

[1168] Case 25181/94, *Hertel v. Switzerland*, [1998] 28 EHRR 534, paragraph 47.

[1169] Case 37928/97, *Stambuk v. Germany*, [2002] 37 EHRR 845, paragraphs 46-49.

[1170] Case 24699/94, *VgT Verein gegen Tierfabriken v. Switzerland*, [2002] 34 EHRR 159, paragraphs 70-71.

[1171] Case 8734/79, *Barthold v. Germany*, [1985] 7 EHRR 383, paragraphs 52-59; Case 24699/94, *VgT Verein gegen Tierfabriken v. Switzerland*, [2002] 34 EHRR 159, paragraphs 70-71; Case 37928/97, *Stambuk v. Germany*, [2002] 37 EHRR 845, paragraphs 46-49; Case 25181/94, *Hertel v. Switzerland*, [1998] 28 EHRR 534, paragraph 47.

[1172] See for example: Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, [1990] 12 EHRR 161, paragraphs 32-38; Case 15088/89, *Jakubowski v. Germany*, [1994] 19 EHRR 64, paragraphs 23-30; Case 7805/77, *X. and Church of Scientology v.* Sweden, [1979] 16 DR 68, paragraph 5. See in this regard also: S. FOSTER, *Human Rights and Civil Liberties*, Essex, Pearson Longman, 2008, 359.

[1173] See the conclusion by M.H. RANDALL, "Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?", (6) *Human Rights Law Review* 2006, 59.

[1174] Article 2(a) Directive 2006/114 concerning misleading and comparative advertising, *OJ* L 376.

public announcement in return for payment or similar consideration or for self-promotional purposes, which is intended to promote the sale, purchase or rental of a product or service, to advance a cause or idea or to bring about some other effect desired by the advertiser or the broadcaster itself.[1175]

Some certificates could indeed qualify as advertisements. Ratings given to complex securities and leading to the financial crisis, for instance, have been issued to institutional investors to make commercial decisions. The financial products would not have been sold if they were not covered by favourable ratings. A similar conclusion applies for class certificates. They are often issued to the benefit of the shipowner and the class of persons planning to undertake transactions with that entity on the basis of that certificate such as insurance companies and cargo-owners. Certificates issued by classification societies in their private role are thus a kind of promotional messages and will often not have a wider link to society. Therefore, class certificates could be qualified as advertisements[1176] or at least a commercial matter.[1177] National authorities have more discretion to regulate, restrict or forbid speech related to classification societies in this private role.

359. Second, there is also another element that has an influence on the national authorities' margin of appreciation, namely whether a provider of information has a more public role. Lawyers, for instance, have a "central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar and also the monitoring and supervisory powers vested in Bar councils".[1178] Members of the bar cannot be compared with commercial undertakings such as insurance companies not subject to restrictions on advertising their legal consulting services.[1179] Lawyers play a key role in ensuring that courts enjoy confidence from the public. Therefore, it is legitimate to expect them to contribute to the proper administration of justice and thus to maintain public confidence therein. Lawyers are certainly entitled to publicly comment on the administration of justice. However, their criticism must not overstep certain bounds and restrictions on their freedom of expression may be justified. Account must be taken of the need to strike the

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[1175] European Convention on Transfrontier Television, CETS No. 132, May 5, 1989 as referred to in M.H. RANDALL, "Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?", (6) *Human Rights Law Review* 2006, 60. Such a broad conception is not surprising from a comparative legal perspective within the EU either. In the *Belgian Electronic Sorting Technology* case, the European Court of Justice, for instance, decided that it was desirable to provide a broad concept of comparative advertising to cover all modes of advertising. It is not limited to traditional forms of advertising but also includes very varied forms of promotional messages (C-657/11, *Belgian Electronic Sorting Technology NV v. Bert Peelaers Visys NV*, ECLI:EU:C:2013:516, July 11, 2013, paragraphs 21-26).

[1176] See for example: Case 15450/89, *Casado Coca v. Spain*, [1994] 18 EHRR 1, paragraph 50; Case 31611/96, *Nikula v. Finland*, [2004] 38 EHRR 45, paragraph 45; Case 37928/97, *Stambuk v. Germany*, [2002] 37 EHRR 845, paragraphs 38-54. See in this regard also: S. FOSTER, *Human Rights and Civil Liberties*, Essex, Pearson Longman, 2008, 359.

[1177] See for example: Case 10572/83, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, [1990] 12 EHRR 161, paragraphs 35-37; Case 15088/89, *Jakubowski v. Germany*, [1994] 19 EHRR 64, paragraph 26; Case 24699/94, *VgT Verein gegen Tierfabriken v. Switzerland*, [2002] 34 EHRR 159, paragraph 69.

[1178] Case 15450/89, *Casado Coca v. Spain*, [1994] 18 EHRR 1, paragraph 54; Case 25405/94, *Schöpfer v. Switzerland*, [2001] 33 EHRR 845, paragraph 29.

[1179] Case 15450/89, *Casado Coca v. Spain*, [1994] 18 EHRR 1, paragraph 53.

right balance between various interests involved. These include the public's right to receive information, the requirements of the proper administration of justice and the dignity of the legal profession.[1180]

Similarly, medical practitioners have a general professional obligation of care regarding the health of each individual and of the community as a whole. This position may explain restrictions on their conduct, such as rules on public communications or participation in public communications on professional issues. These rules of conduct in relation to the press have to be balanced against the legitimate interest of the public to receive information and are limited to preserve the well-functioning of the profession as a whole.[1181] National authorities might thus have a wider margin of appreciation when the speaker fulfils a more public role. A violation of Article 10 ECHR will be less easily established.[1182]

360. One can argue that certifiers to a certain extent also have such a public role. This has been acknowledged in Regulation 462/2013 on CRAs, which stipulates that credit ratings, whether issued for regulatory purposes or not, have a significant impact on investment decisions and on the image and financial attractiveness of issuers.[1183] CRAs are important for participants in financial markets such as credit institutions and insurance companies. Ratings still drive investment choices because of information asymmetries and for efficiency purposes.[1184] Classification societies could also argue that they fulfil a public role in society. The public role of classification societies has even explicitly been acknowledged by several court decisions in Belgium.[1185]

2.5. In Brief: Protected Speech Under Article 10 ECHR

361. Similar to the situation in the US, certificates will probably not be protected as value judgements, nor as factual statements contributing to a debate on a matter of public interest. However, certificates might fall within the scope of Article 10 ECHR as commercial speech. Governments can restrict a certifier's freedom of expression under the conditions set out in the second paragraph of the same Article. Imposing liability for an inaccurate certificate might, for instance, be prescribed by law and pursue a legitimate interest (e.g. protecting the reputation of the requesting entity or the public in general). The remaining point will thus be whether the government's interference by imposing

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[1180] Case 31611/96, *Nikula v. Finland*, [2004] 38 EHRR 45, paragraph 45; Case 25405/94, *Schöpfer v. Switzerland*, [2001] 33 EHRR 845, paragraph 29-30. Also see: P. LEACH, *Taking a Case to the European Court of Human Rights*, Oxford, Oxford University Press, 2011, 368.

[1181] Case 37928/97, *Stambuk v. Germany*, [2002] 37 EHRR 845, paragraph 41.

[1182] Case 15450/89, *Casado Coca v. Spain* [1994] 18 EHRR 1, paragraphs 54-55; Case 31611/96, *Nikula v. Finland*, [2004] 38 EHRR 45, paragraphs 45-46; Case 25405/94, *Schöpfer v. Switzerland*, [2001] 33 EHRR 845, paragraphs 29-30.

[1183] Recital (32) Regulation 462/2013amending Regulation 1060/2009 on credit rating agencies.

[1184] Recital (8) Regulation 462/2013amending Regulation 1060/2009 on credit rating agencies.

[1185] See for example the case of the *Spero*, Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 321-331 and the case of the *Paula*, Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 301-331.

liability is necessary in a democratic society to achieve the protected interest. Although it remains uncertain which stance courts will take on this issue, two possibilities have been identified.

362. In any case, national authorities will have a wider margin of appreciation when statements deal with (purely) commercial matters or when they are advertisements. Certificates fall within these categories to the extent that they intend to promote and further the sale of the certified item. Moreover, certifiers occupy a central position as intermediaries between third parties or the general public and the requesting entities. As such, they can have a public role. This implies that the margin of appreciation might be wider for national authorities. A violation of Article 10 ECHR will thus be less likely.

3. Summary

363. Even though certifiers can argue that certificates are mere opinions falling under the freedom of speech defence, things are more nuanced. The situation in the United States and under the ECHR illustrate that it is unlikely that certificates will qualify as value judgements/non-factual opinions or as factual statements related to a public interest or contributing to a debate on that interest. Instead, certificates might be seen as commercial speech in both jurisdictions. Such speech is given less protection in the sense that governments can impose liability or adopt legislation regulating a certifier's activities without interfering with the latter's freedom of expression. Certifiers out themselves as experts and provide information on items in exchange for certification fees. As such, imposing liability when a certifier violates its obligations during the certification process should not be made impossible by relying on the freedom of speech defence. Although it remains to be seen which stance (national) courts will take on this matter, there are sufficient possibilities to deny an extensive freedom of speech protection to certifiers.

364. This conclusion also corresponds with the findings in the *Bathurst* case. Judge JAGOT qualified a rating as an opinion on the creditworthiness of a financial product. It is issued by a professional entity that claims and represents itself as having expertise in assessing an item's creditworthiness. It is neither a guarantee, nor a statement of fact or advice to invest or not.[1186] However, CRAs should not be able to shield behind the 'mere opinion' argument. The *Bathurst* decision nuances the distinction that is traditionally made between statements of fact and opinions. The court underlined that the CRAs knew that the intended recipients of the rating would rely on it to make decisions. S&P knew and intended its rating to be perceived by investors as a representation of its opinion that the notes had an extremely strong capacity to meet their financial commitments.[1187] Moreover, the assignment of a triple A rating carried with it a "representation that S&P has a genuine and reasonable basis, formed following the application of its expertise, for

[1186] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd* (No 5) [2012] FCA 1200, paragraph 2808.

[1187] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd* (No 5) [2012] FCA 1200, paragraphs 2808 & 2846.

reaching the conclusions that it reached".[1188] Credit ratings and by extension other certificates, whether or not qualified as predictive opinions, can be actionable if they are not based on reasonable grounds and the result of a certifier's lack of reasonable care and skill.[1189]

[1188] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraph 2437.

[1189] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2437, 2820-2836, 2979, 3105.

Chapter V – Concluding Remarks

365. The aim of this part was to get an understanding of the functioning of certifiers. Their obligations during the certification process were examined. The certification process consists of three stages. The most important obligation of certifiers during the first stage is to analyse the item or related information that needs to be certified. This obligation qualifies as an *obligation de moyen*. During a second stage, certifiers have to issue a certificate in an independent way. This is an *obligation de résultat*. Certifiers also have a surveillance and monitoring obligation during a third stage, which was defined as an *obligation de moyen*. Although a certifier's obligations are quite similar during the certification process, the analysis showed that certifiers have different faces. They are not alike and have different characteristics, some of them even varying between jurisdictions. The same conclusion applies for their third-party liability in national law. Whether there will be a basis to impose liability will depend upon the jurisdiction where the legal claim is filed. The analysis also discussed the protection given to certificates under the freedom of speech defence.

366. Providing the reader with a theoretical background on a certifier's obligations, characteristics, liability and value of certificates is necessary to understand the remaining parts of this dissertation. Third parties need to be assured that certificates moderate informational asymmetries that distort or prevent efficient transactions.[1190] In other words, certificates have to be an accurate and reliable representation of the certified item. Scandals that occurred in the certification sector, however, illustrate that this is not always the case. Certificates sometimes do not correspond with the 'true' or 'actual' value of the certified item. Against this background, the question arises which legal mechanisms might ensure that certifiers issue more accurate and reliable certificates to prevent scandals with certified items in the future.

[1190] J. BARNETT, "Intermediaries Revisited: Is Efficient Certification consistent with profit maximization?", (37) *Journal of Corporation Law* 2012, 476.

PART III – INCREASING THE ACCURACY AND RELIABILITY OF CERTIFICATES

367. Several academic proposals have already been made to increase the reliability and accuracy of certificates. They will be thoroughly examined in this part (chapter I). Based on the analysis, evaluation criteria can be identified. Those criteria can then be used by policymakers to refine the existing proposals that aim to induce certifiers to issue more accurate and reliable certificates (chapter II). They can also be relied upon to design new mechanisms or regimes providing certifiers with the necessary incentives (chapter III). The most important findings are summarised (chapter IV).

Chapter I – An Overview of Existing Proposals

368. A wide variety of legal measures have already been suggested in academia to increase the reliability and accuracy of certificates. Some of them are examined more thoroughly in this chapter. The selection of proposals that will be discussed is based on different elements. One element is the extent to which they have been debated upon in academia. I will also focus on those proposals whose shortcomings and strengths might be used to identify evaluation criteria. According to some scholars, an entity established by the government might minimise financial pressures causing certifiers to issue unreliable certificates (part 1). In addition, alternatives have been advanced to avoid conflicts of interest that can arise between the requesting entity and the certifier (part 2). Financial or regulatory sticks and carrots can be used to encourage certifiers to provide more accurate and reliable certificates (part 3). A solution can also be found in eliminating references to or overreliance on certificates in legislation (part 4). Some seek the answer in more competition in the certification markets, which is often controlled by only a few major players (part 5). Inspiration can be sought in gatekeeping liability regimes as well (part 6). The most important findings are summarised in a conclusion (part 7).

1. Government-Created or Supervised Certifiers

369. Several scholars argue that certifiers might issue more accurate and reliable certificates if they are supervised by a public body at the inter-, supra- or national level. Some even go a step further and suggest to create governmental certifiers instead of their private counterparts. This approach views certificates as public goods issued to the benefit of the wider public and the economy in general.[1191] Such proposals have been advanced in the context of CRAs (part 1.1.), classification societies (part 1.2.) and notified bodies (part 1.3.). However, several concerns remain regarding the involvement or creation of a governmental body in private certification (part 1.4.).

1.1. Credit Rating Agencies in the Financial Sector

370. University of San Diego law professor PARTNOY favours the consolidation of credit rating regulation within one umbrella organisation. This organisation should be given additional responsibilities and new powers. One possibility in this regard could be to create a single independent Credit Rating Agency Oversight Board ('CRAOB'). This Board should have a similar structure and mission than the Public Company Accounting Oversight Board (PCAOB).[1192] The CRAOB could be a free-standing entity created by statute to oversee the registration, inspections, standards and enforcement actions related to NRSROs operating in the US. The Board could also encourage the development of alternatives to NRSRO ratings to facilitate the removal of regulatory licenses. Members of the CRAOB should be independent from US Congress or other CRAs and have the

[1191] Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 102-103.

[1192] The PCAOB oversees the audits of public companies to protect investors and the public interest by promoting informative, accurate and independent audit reports. See for more information: <pcaobus.org>.

necessary expertise. To that end, initial funding could be provided in the form of an endowment. Funding could also be established through required periodic NRSRO user fees or transaction fees. If the creation of the CRAOB would be too ambitious or unrealistic, PARTNOY suggests two other options, namely establishing an office within the SEC that is dedicated to the regulation of NRSROs or mandating the PCAOB to oversee the working of CRAs.[1193]

371. An even more ambitious global strategy to ensure that CRAs issue accurate ratings is advocated by University of Trieste law professor BUSSANI. He suggests placing activities of CRAs under a "public international law umbrella".[1194] International institutions such as the International Monetary Fund (IMF) could set up an International Public Rating Agency (IPRA). The IPRA should be surveyed by a board whose members represent the world economies and financial markets. More importantly, the IPRA would take over the activities of CRAs.[1195]

372. The proposal by former Senator FRANKEN provides for the creation of a Credit Rating Agency Board (the "Board"). This Board would be driven by investors and supervised by the US Securities and Exchange Commission. The Board would assign issuers who need an initial rating to a Nationally Recognized Statistical Rating Organization. The Board would not issue the rating but only assign an issuer to a rating agency to prevent the former from shopping for the highest rating.[1196] The issuer remains free to solicit additional ratings once he obtained the mandatory rating.[1197] The FRANKEN proposal has, however, not been adopted. Section 939F of the Dodd-Frank Act merely requires the SEC to conduct a study on the feasibility of the Proposal.[1198]

373. GUDZOWSKI, a trial attorney at the US Department of Justice, suggests two reasons why a federal Government entity – referred to as "Agency" in his proposal – should take over the responsibilities of CRAs to rate (mortgage) securities.

On the one hand, conflicts of interest with the issuer are eschewed as this Agency would operate with general revenues. Issuers would still have to pay for the ratings but the payments would go to a general revenue fund and not directly to the Agency. Consequently, there would be no contact between the Agency and the issuer. As such, the

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[1193] F. PARTNOY, "Rethinking Regulation of Credit Rating Agencies: An Institutional Investor Perspective", (25) *Journal of International Banking Law and Regulation* 2010, 191-193.

[1194] M. BUSSANI, "Credit Rating Agencies' Accountability: Short Notes on a Global Issue", (10) *Global Jurist Advances* 2010, 12.

[1195] M. BUSSANI, "Credit Rating Agencies' Accountability: Short Notes on a Global Issue", (10) *Global Jurist Advances* 2010, 12-13.

[1196] S.AMDT.3991 amending S.3217 and S.AMDT.3739, Bill Summary & Status 111th Congress (2009–2010).

[1197] J.C. COFFEE, "Ratings Reform: The Good, The Bad, and The Ugly", (1) *Harvard Business Law Review* 2010, 232; O. SCHMID, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies", (3) *Columbia Business Law Review* 2012, 1018-1019.

[1198] Section 939(F)(d)(1) Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376-2223.

former would no longer need to seek the business of the issuer ('incentive advantages').[1199]

On the other hand, the Agency could also increase transparency and uniformity. The Agency would not have any competitors and could, therefore, publicly disclose its rating methods and models. Such a transparency allows outsiders (e.g. experts, academics or investors) to "recreate step-by-step the Agency's credit rating process"[1200] and criticise the decision-making process ('informational advantages'). This in turn might improve rating models used by the Agency and increase the accuracy of its ratings.[1201]

374. Finally, professor LYNCH of Missouri-Kansas City University proposes ways to align the interests of CRAs to the interest of the general public. The government could, for instance, establish a taxpayer-funded agency that conducts and provides substantive risk analysis. The agency would use its resources to rate those securities and issuers that most adversely affect the general investing public. It should remain independent from political influence and publicly disclose its rating methodologies, financial models, procedures, assumptions and reports. This publicly available information can subsequently be subject to public comments to safeguard accurate ratings.

However, the creation of a public agency does not mean that private CRAs would disappear. Investors can still decide to use and rely on ratings issued by private CRAs. The public agency only provides additional information and it remains up to the investors to value the ratings, either those issued by the public agency or the private CRAs.[1202] Alternatively, the government could hire private CRAs with public funds.[1203] The public would thus pay the CRAs for the rating services. Ratings issued by government-hired CRAs might have additional informational value for investors. The hired CRAs will probably issue "overly conservative"[1204] ratings based on credit evaluations that are more oriented towards protecting the investing public. The government might favour such conservatism and more likely contract with CRAs that use investor-friendly and less risky

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[1199] M. GUDZOWSKI, "Mortgage Credit Ratings and the Financial Crisis: The Need for a State-Run Mortgage Security Credit Rating Agency", (1) *Columbia Business Law Review* 2010, 265-266.

[1200] M. GUDZOWSKI, "Mortgage Credit Ratings and the Financial Crisis: The Need for a State-Run Mortgage Security Credit Rating Agency", (1) *Columbia Business Law Review* 2010, 267.

[1201] M. GUDZOWSKI, "Mortgage Credit Ratings and the Financial Crisis: The Need for a State-Run Mortgage Security Credit Rating Agency", (1) *Columbia Business Law Review* 2010, 266-268. See in this regard also: R. BEETSMA, "Maak beoordeling van kredietwaardigheid een publieke taak", Tilburg: Me Judice, October 24, 2008 arguing that a Public Rating Agency ('PRA') should be created.

[1202] T.E. LYNCH, "Deeply and Persistently Conflicted: Credit Rating Agencies in the Current Regulatory Environment", (59) *Case Western Reserve Law Review* 2009, 291-299.

[1203] T.E. LYNCH, "Deeply and Persistently Conflicted: Credit Rating Agencies in the Current Regulatory Environment", (59) *Case Western Reserve Law Review* 2009, 300.

[1204] T.E. LYNCH, "Deeply and Persistently Conflicted: Credit Rating Agencies in the Current Regulatory Environment", (59) *Case Western Reserve Law Review* 2009, 300.

rating methodologies. Investors could thus also consider ratings provided by the hired CRAs when making decisions.[1205]

1.2. Classification Societies in the Maritime Sector

375. Potential benefits of public supervision on certifiers are not restricted to CRAs only. Suggestions have also been done in the maritime sector. Classification societies used to be controlled by underwriters and shipowners. This situation changed as classification societies now control each other through IACS membership. Due to the lack of external control mechanisms on classification societies, persons running them managed to place themselves in a "weightless condition".[1206]

376. An idea could, therefore, be to place classification societies under supervision of the IMO. Although shipowners would retain the right to choose a particular society, every vessel will be granted a unique IMO number. The IMO will have to assist shipowners with regard to the certification fees and additional costs for classification services. This would prevent potential conflicts of interest between the shipowner and the classification society. Classification societies would still remain privately operated organisations that should, however, take over all safety works for the maritime industry. This would require the (re)organisation from a classification society into a shipping company as no other underwriter or insurance club is able to cover all the safety works. In order to achieve the aforementioned goal, there should be only one encompassing yearly classification survey. This also implies that the distinction between their work as an RO (public role) and services for the shipowner (private role) should disappear.[1207]

1.3. Notified Bodies in the Medical Sector

377. Public oversight mechanisms have also been suggested in the field of notified bodies involved in the conformity assessment of medical devices. There is a risk that notified bodies might be self-interested and unable to improve the health of citizens in the EU. Manufacturers can forum shop under the current regulatory framework until they find a body willing to inspect and approve their devices. A notified body might thus approve a defective device to promote its private business interests and maintain a relationship with the manufacturer at the expense of the public interest.[1208]

378. Policymakers at the EU should, therefore, follow the example of the Food and Drug Administration (FDA) in the United States. More specifically, the EU could establish a unified and centralised governmental agency to regulate medical devices or assign the

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[1205] T.E. LYNCH, "Deeply and Persistently Conflicted: Credit Rating Agencies in the Current Regulatory Environment", (59) *Case Western Reserve Law Review* 2009, 300-301.

[1206] L. LINDFELT, "A future for classification societies", in: CMI, *CMI Yearbook 1994*, Antwerp, CMI Headquarters, 1994, 253-254.

[1207] L. LINDFELT, "A future for classification societies", in: CMI, *CMI Yearbook 1994*, Antwerp, CMI Headquarters, 1994, 253-255.

[1208] B.M. FRY, "A Reasoned Proposition to a Perilous Problem: Creating a Government Agency to Remedy the Emphatic Failure of Notified Bodies in the Medical Device Industry", (22) *Willamette Journal of International Law & Dispute Resolution* 2014, 187-196.

approval process of devices to an existing supranational agency. It might eliminate any business competition between notified bodies that occur in the approval process of devices. Moreover, all information regarding devices would be within one and the same agency. This in turn would improve the overall quality of medical devices and provide a higher level of safety for EU citizens.[1209]

1.4. Criticism on Government-Created or Supervised Certifiers

379. Arguably, creating a governmental certifier or placing private certifiers under public supervision has some benefits. For instance, conflicts of interest between certifiers and requesting entities or competition between certifiers driven by financial incentives might be eliminated. The creation of a governmental certifier could also reduce compliance costs[1210] for certifiers.[1211] However, the creation of a public body overseeing certifiers or establishing a governmental certifier *tout court* encounter three major problems.

380. First, it remains unclear whether the government would actually act to the benefit of the general and entire public when issuing certificates or supervising certifiers. In this regard, it has been argued that CRAs are allowed to contribute to "hazardous financial practices without the fear of serious reprisals" because of the idea that ratings are public goods.[1212] The reorganisation of the certification process might, therefore, require new legislation. Following private interest theories, regulation emerges from actions of individuals or groups motivated to maximise their self-interest. Thus, legislation dealing with the creation and establishment of a public certifier, or aiming to increase public oversight on private certification does not necessarily increase the public interest as well.[1213] Even with the necessary legislation, private networks may be so dense that they are difficult for public bodies to penetrate and effectively oversee.[1214]

381. Second, several practical concerns exist with regard to the creation of a public certifier. For instance, national agencies will have to be established in individual certification sectors. The feasibility of such measures remains unrealistic from a financial

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[1209] B.M. FRY, "A Reasoned Proposition to a Perilous Problem: Creating a Government Agency to Remedy the Emphatic Failure of Notified Bodies in the Medical Device Industry", (22) *Willamette Journal of International Law & Dispute Resolution* 2014, 187-196.

[1210] Compliance costs are those costs that parties incur in conforming to government requirements such as legislation, as well as costs for the government resulting from regulatory administration and enforcement (OECD, *Regulatory Compliance Cost Assessment Guidance*, OECD Publishing, 2014, 12).

[1211] J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1039.

[1212] D. CASH, "Credit Rating Agencies and the Protection of the 'Public Good' Designation: The Need to Readdress the Understanding of the Big Three's Output", (38) *Business Law Review* 2017, 228.

[1213] M. BRONWEN & K. YEUNG, *An Introduction to Law and Regulation: Text and Materials*, Cambridge, Cambridge University Press, 2007, 43; G.J. STIGLER, "The theory of economic regulation", (2) *The Bell Journal of Economics and Management Science* 1971, 3-21; S. PELTZMAN, "Toward a More General Theory of Regulation", (19) *Journal of Law and Economics* 1976, 211-240; R.A. POSNER, "Theories Of Economic Regulation", (5) *The Bell Journal of Economics and Management Science* 1974, 335-358.

[1214] J. MANNS, "Private Monitoring of Gatekeepers: The Case of Immigration Enforcement", (5) *University of Illinois Law Review* 2006, 894-895.

as well as practical point of view.[1215] Moreover, it is not clear which taxpayers would have to 'sponsor' the public agency. Certification services might especially be to the benefit of some parties (e.g. investors, cargo-owners or patients that purchase medical devices) and not to the benefit of the entire population. However, the consequences of an incorrect certificate might affect the whole society (e.g. the 2008 financial crisis or the massive oil pollution caused by the maritime disaster with the *Erika* or *Prestige*). It would, therefore, be unfair to let everyone pay taxes for these services, without fully enjoying the benefits of certification.[1216] A governmental certifier that receives public funding might be induced to continue obtaining such funding, perhaps at the expense of issuing accurate certificates.[1217] Doubts might also arise whether a governmental agency would perform its certification with the required care and independence when the requesting entities are important or politically-favoured players.[1218]

Additionally, it also remains unsure whether a governmental certifier has the required knowledge to provide certification services or oversee the certification process.[1219] Private certifiers have years of experience in the certification business and possess the necessary expertise when it comes to examining complex financial products or surveying highly technological vessels.[1220] Flag States even delegate their statutory certification duties to ROs because of this knowledge. It would, therefore, make little sense to expect the government to suddenly take over functions of private certifiers (again).[1221] This lack of expertise is even more problematic as governmental certifiers might not be able to pay the same wages for experts (e.g. class surveyors and rating analysts) as private certifiers do. Consequently, a public agency will need to employ personnel with less competence and skill. This could have an influence on the accuracy and reliability of certificates.[1222]

382. Third, even establishing extensive public oversight on certifiers instead of creating a governmental certifier encounters practical problems. A governmental body will have

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[1215] See in this regard also: F. PARTNOY, "Rethinking Regulation of Credit Rating Agencies: An Institutional Investor Perspective", (25) *Journal of International Banking Law and Regulation* 2010, 192.

[1216] Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 102; J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1039.

[1217] J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1039.

[1218] J.C. COFFEE, "Ratings Reform: The Good, The Bad, and The Ugly", (1) *Harvard Business Law Review* 2010, 256 & 260.

[1219] See in this regard also: F. PARTNOY, "What's (Still) Wrong with Credit Ratings", (92) *Washington Law Review* 2017, 1428 concluding that the "Dodd-Frank provisions […] also included several new oversight provisions. Unfortunately, their effect has been minimal and in some cases counterproductive. The lack of oversight leaves credit rating agencies largely unchecked".

[1220] Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 102-103; J. MANNS, "Private Monitoring of Gatekeepers: The Case of Immigration Enforcement", (5) *University of Illinois Law Review* 2006, 894-895.

[1221] See for more information the discussion *supra* nos. 15 and 137-140.

[1222] J.C. COFFEE, "Ratings Reform: The Good, The Bad, and The Ugly", (1) *Harvard Business Law Review* 2010, 260.

to randomly allocate contracts to a particular certifier. This approach is thus based on the assumption that all certificates are equivalent or interchangeable and grounded on comparable assessments. This could result in a certain minimum standard of competence that might be sufficient to receive the certification contracts. Consequently, all certifiers might converge to that standard. Certifiers meeting that minimum standard may have little incentives to compete with each other and attain a higher level of accuracy for their certificates as the government basically assures their market share. This could lead to a chilling of market competition and a decrease of the quality of certificates.[1223] Moreover, supranational public oversight measures already exist for most certifiers (e.g. registration requirements for CRAs or inspections of ROs by EMSA).[1224] Despite these measures, some of the previously discussed examples show that certificates issued by certifiers are (still) not always accurate or reliable.

2. Preventing and Eliminating a Certifier's Conflicts of Interest

383. Conflicts of interest are often portrayed as a cause for unreliable and inaccurate certificates. To understand the potential effects of such conflicts in the certification process, one needs to have an understanding of its meaning. In a broad and non-legal sense, a conflict of interest*s* arises whenever the protection or furtherance of different interests requires different actions. As such, it refers to those circumstances in which a choice of action necessarily implies preferring certain interests over others. In a legal context, the notion of a conflict of interest has a more specific meaning. A conflict of interest exists when a person in a certain situation has a duty to decide how to act solely based on the interests of another person while the choice he makes also has repercussions for his own interests (conflict of interest and duty) or for the interests of another, third person, that he is also legally bound to protect (conflict of duties). In some cases, a person is not only required to take into account the interests of certain parties when making its decision but also not allowed to consider the consequences of its choice towards the interests of other parties. This can occur when someone has an obligation to be impartial or make an independent judgement.[1225]

384. A certifier's duty to be independent and objective can conflict with its own interest on several moments during the entire certification process (conflict of interest and duty).[1226] In this regard, a distinction can be made between two situations. Conflicts of interest might, on the one hand, follow from the involvement of a certifier in a requesting entity's activities or from its own functioning. These conflicts of interest are thus not

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[1223] O. SCHMID, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies", (3) *Columbia Business Law Review* 2012, 1020.

[1224] See for more information the discussion *supra* in nos. 112-136.

[1225] M. KRUITHOF, "Wanneer vormen tegenstrijdige belangen een belangenconflict?", in: C. VAN DER ELST, H. DE WULF, R. STEENNOT & M. TISON (eds.), *Van alle markten: liber amicorum Eddy Wymeersch*, Antwerp, Intersentia, 2008, 590-591 & 595-596, nos. 20 & 25-26; M. KRUITHOF, "Conflicts of Interest in Institutional Asset Management: Is the EU Regulatory Approach Adequate?", in: L. THÉVENOZ & R. BAHAR, *Conflicts of interest: corporate governance and financial markets*, Alphen aan den Rijn, Kluwer Law International, 2007, 278-280.

[1226] M. DAVIS, "Conflict of Interest Revisited", (12) *Business and Professional Ethics Journal* 1993, 21-41.

related to the certifier's remuneration (part 2.1.). On the other hand, the way in which certifiers are paid for their services can cause conflicts of interest as well. This conflict is more important as it can potentially affect all certifiers. The existing proposals to resolve it are, therefore, examined more thoroughly (part 2.2.). However, these proposals all have flaws. It is even uncertain whether the mere existence of this conflict of interest *an sich* leads to unreliable certificates. The existing regulatory framework for certifiers might already adequately address this conflict of interest, which makes additional measures or drastic changes not necessary (part 2.3.).

2.1. Conflicts of Interest not Related to a Certifier's Remuneration

385. Potential conflicts of interest can arise when the certifier is involved in the 'working' of the requesting entity. The certifier might assist the requesting entity in the design of the item that has to be certified. As a consequence, certifiers could make sure that the item is structured or designed in such a way that it will get a favourable certificate. This conduct conflicts with the certifier's required independence during the certification process.

This conflict of interest has especially been at stake in cases dealing with the liability of CRAs after the 2008 financial crisis.[1227] However, the consequences of this conflict have also been recognised for classification societies. A conflict of interest would arise when societies become consultant naval architects and start marketing their own vessel designs. Smaller shipowners might be tempted to have their vessels built according to the designs developed by societies due to the lower cost. If a major accident happens with a ship constructed according to the classification society's design, far-reaching consequences might occur and even lead to the "end of class".[1228]

386. Closely related to this conflict of interest is the situation in which a certifier provides auxiliary and consulting services to the requesting entity. A certifier is not only involved in the certification process but can also offer other services to the entity. This could lead to the situation where the certifier might be inclined to provide a favourable certificate to safeguard that it can offer additional services.[1229] Those additional services might increase the certifier's revenues but also impair its objectivity and independence.[1230]

[1227] See for example: *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155,179 (S.D.N.Y. 2009).

[1228] K. REINIKAINEN, "Conflict of interest when class design ships", *Fairplay*, April 28, 2014 in an interview with K.E. HANSEN). However, legal restrictions have been adopted to remedy this conflict of interest (see for more information the discussion *supra* in nos. 66-68 & 72-74).

[1229] The additional services influence the certifier's remuneration as well and could thus be studied in the following part. However, it is not directly related to the certifier's fee given for the actual certification services. Therefore, I have decided to categorise it under the first type of conflict of interest.

[1230] A. CROCKETT, *Conflicts of Interest in the Financial Services Industry: What Should We Do about Them?*, Geneva, Centre for Economic Policy Research, 2003, 49; T.J. SINCLAIR, "From Judge to Advocate: The Credit Rating Enigma", *New Left Project*, December 18, 2012. A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 122-124.

The involvement of a certifier in the working of the requesting entity by offering additional non-certification services has already been prohibited or restricted by EU law or other instruments.[1231] The need for additional changes to overcome this conflict of interest is thus less necessary. The regulation of this conflict of interest does not require any fundamental changes of the structure of the certification market. Therefore, it is not given further attention in this dissertation.

387. There are also certifier-specific conflicts of interest that can affect its objectivity and independence. The dual of role of classification societies can be used as an example in this regard. The shipowner engages a society for the classification of vessels (private role). At the same time, classification societies can also act as ROs on behalf of flag States (public role). Although classification societies are operating on the basis of an official authorisation when they perform statutory surveys, they remain clients of shipowners and are paid by the latter. This dual role of classification societies carrying out public functions on the basis of a private contract may cause a conflict of interest. This conflict especially arises when the shipowner has a large fleet and/or the classification society is economically dependent upon the shipowner. A shipowner will in this situation incur additional costs if a society recommends improvements regarding the vessel's safety (public role). This might tempt the shipowner to employ another classification society that does not ask for such improvements or which lowers its safety standards. Such commercial pressure is not only to the detriment of safe shipping but undermines the classification society's public role as well.[1232]

Flag States also have a commercial interest in the work of ROs. Statutory certificates give flag States the economic benefits of maintaining the vessel in their national registry.[1233] In the process of "selling safety to someone else and competing for clients at the same time",[1234] a classification society ultimately needs "to find a reasonable balance between the benefits of safety standards and the costs which such safety incurs".[1235]

388. The lack of supervision over classification societies when they carry out public tasks has been criticised.[1236] Several options have been suggested to overcome this absence of supervision and reduce the potential conflict of interest. Flag States, for instance, could

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[1231] See for more information the discussion *supra* in nos. 66-76.

[1232] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 26-35; S. DURR, "An Analysis of the Potential Liability of Classification Societies: Developing Role, Current Disorder & Future Prospects", Shipping Law Unit University of Cape town, Research and Publications, paragraph 2.3.1; M. HAYASHI, "Toward the Elimination of Substandard Shipping: The Report of the International Commission on Shipping", (16) *International Journal of Marine & Coastal Law* 2003, 508.

[1233] S.A. LENTZ & F. FELLEMAN, "Oil Spill Prevention: A Proactive Approach", (1) *International Oil Spill Conference* 2003, 13.

[1234] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 29.

[1235] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 30.

[1236] M. HAYASHI, "Toward the Elimination of Substandard Shipping: The Report of the International Commission on Shipping", (16) *International Journal of Marine & Coastal Law* 2003, 508; S.A. LENTZ & F. FELLEMAN, "Oil Spill Prevention: A Proactive Approach", (1) *International Oil Spill Conference* 2003, 13; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 27 with further references in footnote 85.

pay classification societies to perform statutory certification services. Governments could also require the society to either perform classification (private) or statutory services (public) but not both at the same time.[1237] However, the implementation of these proposals remains unlikely.

States began relying on classification societies because of their expertise. It would, therefore, be unrealistic to suddenly require classification societies to only perform services in their private role. The maritime industry relies on both their private and public functions. Assuming that societies would have to decide between private or public certification, it is conceivable that they might choose to restrict their activities to the more profitable private certification. This would leave flag States with the duty to ensure the seaworthiness of vessels flying their flag for which they do not always have the required expertise. Ultimately, LAGONI concludes that the only way to effectively reduce the conflict of interest between public safety and private economic interest is to ensure that classification societies are neutral organisations working in the interest of the flag State and the shipowner. Therefore, it would be necessary to control whether classification societies exercise their services independently towards the shipowner. To that end, flag States should provide classification societies with sufficient funds so that they can act freely and independently from the shipowners.[1238]

There are already control mechanisms trying to ensure that classification societies act with the required independence. IACS membership, for instance, is based on a guarantee of independence and objectivity.[1239] EMSA also supervises classification societies when acting as ROs.[1240] Yet, maritime disasters involving ROs (e.g. the *Erika* or the *Al-Salam Boccaccio 98*) did not seize from happening despite all these initiatives. The existing proposals are thus not convincing to minimise the conflict of interest caused by a classification society's dual role.

2.2. Conflict of Interest Following a Certifier's Remuneration

389. A more important conflict of interest relates to a third-party certifier's remuneration structure. Certifiers are paid by the requesting entity to issue the certificate. The question arises whether certifiers can in such circumstances really issue certificates in an independent way.[1241] The undesired consequences resulting from this conflict of interest have already been identified for several certifiers.

Deceived investors, for instance, claim that the so-called issuer-pays business model caused CRAs to issue flawed ratings leading to the 2008 financial crisis.[1242] CRAs had to

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[1237] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 30.

[1238] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 28-29.

[1239] See for more information the discussion *supra* in nos. 72-73 & 113-115.

[1240] See for more information the discussion *supra* in nos. 116-117.

[1241] J. PAYNE, "The Role of Gatekeepers", in: E. FERRAN, N. MOLONEY & J. PAYNE (eds.), *The Oxford Handbook of Financial Regulation*, Oxford, Oxford University Press, 2015, 276-277.

[1242] See for example: *Anschutz Corporation v. Merill Lynch & Co. Inc*., 785 F. Supp. 2d 799, 809 (N.D. Cal. 2011) holding "an alleged conflict of interest developed such that the Rating Agencies abandoned their

issue an independent rating on the issuer's creditworthiness or the latter's financial products, while being paid by the very same issuer. Issuers might threaten to contract with another CRA if the agency they contracted with uses standards that are too strict. CRAs might also issue unsolicited credit ratings to safeguard that the issuer pays the necessary fees.[1243]

Classification societies are also expected to give an independent assessment of a vessel, while at the same time being economically dependent upon the shipowner's fleet. A shipowner who is dissatisfied with a classification society might class hop to another one offering less rigorous terms and/or cheaper services. This increases competition in the classification market but leads to a more lenient application of class rules and standards as well.[1244]

The conflict of interest can also occur during the conformity assessment procedure of medical devices. Manufacturers can contract with any of the notified bodies appointed by Member States for approval of their devices. They can even resubmit rejected applications to other bodies. At the same time, the scheme induces notified bodies to compete for business. There are at the moment more than seventy notified bodies providing their services within the EU. Manufacturers can forum shop for a notified body that is not too strict in the interpretation of supranational requirements or that offers the cheapest services. As a result, notified bodies might lower their standards to attract more manufacturers of medical devices.[1245]

390. There is thus – at least a theoretical possibility – that a certifier's independence risks to be affected by this conflict of interest. Therefore, several proposals have been made to eliminate or minimise the potentially adverse consequences resulting from it. One uniform proposal covering the conflict of interest for all certifiers has not been done so far. Instead, specific suggestions have been made for certifiers in the different sectors. Yet, the underlying mechanisms of each proposal can be extrapolated to the certification business in general. Proposals to resolve a conflict of interest for one certifier might thus

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independence and relaxed their rating criteria and procedures in order to secure the business of the investment banks in rating these types of securities"; *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155 (S.D.N.Y. 2009); *Tolin v. Standard & Poor's Financial Services*, 950 F.Supp.2d 714 (S.D.N.Y. 2013); *Ohio Police & Fire v. Standard & Poor's Financial*, 813 F.Supp.2d 871 (2011).

[1243] See for a discussion on conflicts of interest and CRAs: L. BAI, "On Regulating Conflict of Interests in the Credit Rating Industry", (13) *New York University Journal of Legislation and Public Policy* 2010, 263-265.

[1244] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36*) Journal of Maritime Law & Commerce* 2005, 493; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 26; P. BOISSON, "Classification Societies and Safety at Sea: Back to Basics to Prepare For the Future", (18) *Maritime Policy* 1994, 373.

[1245] B.M. FRY, "A Reasoned Proposition to a Perilous Problem: Creating a Government Agency to Remedy the Emphatic Failure of Notified Bodies in the Medical Device Industry", (22) *Willamette Journal of International Law & Dispute Resolution* 2014, 174-176; V.M. VIANA, *Certification of Forest Products: Issues and Perspectives*, Washington, Island Press, 1996, 216; B. CHESTNUT, ""Cherry" Trees or "Lemon" Trees: Conflicts of Interest in Forest Certification", (25) *Georgetown International Environmental Law Review* 2013, 341.

be used for others as well. In the field of CRAs, for instance, re-establishing the once existing investor-pays business model would no longer induce the certifier to issue inaccurate ratings (part 2.2.1). Taking into consideration the challenges that go along with the introduction of this business model, scholars have suggested several alternatives (part 2.2.2.). Another proposal in the financial sector has been advocated by RONEN, namely a financial statement insurance scheme (part 2.2.3.). With regard to classification societies, the solution against a potential conflict of interest caused by the remuneration structure came from the sector itself. Conflicts of interest between the shipowner and the society would be minimised by creating a trade association (part 2.2.4.).

2.2.1. Credit Rating Agencies: Investor-Pays Business Model

391. Under the currently existing issuer-pays business model, the issuer whose creditworthiness is being controlled and rated pays for the services.[1246] The argument goes that there is an inherent risk that CRAs will systematically assign a higher rating to an issuer to increase their revenues from the latter.[1247] CRAs have financial incentives to generate reports that please issuers.[1248] At the same time, issuers can shop around and choose the CRA that assigns the highest rating or that uses lenient standards to achieve the desired rating.[1249] This conflict of interest seems even more acute when CRAs rate structured financial products because of the volume of deals and the corresponding business attributable to those transactions. CRAs might thus be less inclined to use conservative and safe assumptions in their rating methodologies in order to maintain transaction flows.[1250] Against this background, it is no surprise that the issuer-pays business model has been criticised after the 2008 financial crisis.[1251]

392. CRAs counter these arguments by pointing out they face reputational pressures to issue accurate ratings. A credit rating agency would lose credibility in the eyes of investors if it only issued favourable ratings because of the alleged positive influence this might have on the certification fees. Such issuer-friendly conduct would harm the reputation of the CRA and might even lead to its collapse. Investors would no longer rely on ratings if the CRA does not give an independent opinion of the issuer's

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[1246] L.J. WHITE, "Credit-rating agencies and the financial crisis: less regulation of CRAs is a better response", (25) *Journal of International Banking Law and Regulation* 2010, 170 & 173.

[1247] L. BAI, "On Regulating Conflict of Interests in the Credit Rating Industry", (13) *New York University Journal of Legislation and Public Policy* 2010, 263-264.

[1248] S.J. BOYLAN, "Will credit rating agency reforms be effective?", (20) *Journal of Financial Regulation and Compliance* 2012, 362-363.

[1249] L.J. WHITE, "Credit-rating agencies and the financial crisis: less regulation of CRAs is a better response", (25) *Journal of International Banking Law and Regulation* 2010, 173; E. BENMELECH & J. DLUGOSZ, "The Credit Rating Crisis", National Bureau of Economic Research Working Paper 15045, June 2009, 16-21, available at <www.nber.org/papers/w15045.pdf>.

[1250] Technical Committee of the International Organization of Securities Organization, "The Role of Credit Rating Agencies in Structured Finance Markets", March 2008, 12.

[1251] See for example: B.J. KORMOS, "Quis custodiet ipsos custodes? Revisiting rating agency regulation", (4) *International Business Law Journal* 2008, 575-579; L. BAI, "On Regulating Conflict of Interests in the Credit Rating Industry", (13) *New York University Journal of Legislation and Public Policy* 2010, 263-265; A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 120-122.

creditworthiness. In essence, CRAs put their reputation at stake each time when they issue ratings. Reputation and integrity are the most valuable long-term assets of a CRA.[1252] They will, therefore, do everything within their power to make sure that the ratings are independent and objective opinions.[1253]

However, several studies show that this reputation argument is not as convincing as it seems to guarantee that CRAs issue accurate and reliable ratings.[1254] Against this background, some claim that re-establishing the once existing investor or subscriber-pays business model would induce CRAs to provide reliable ratings.[1255] Prior to 1970, CRAs generated their revenues by selling ratings to investors or subscribers.[1256] This business model implies that investors pay for the ratings and not issuers.[1257] As such, CRAs provide their ratings to issuers for free. This in turn would increase the CRA's independent judgement.[1258] There are indeed studies concluding that such a compensation

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[1252] V. TILLMAN, "Don't Blame the Rating Agencies", *The Wall Street Journal*, August 31, 2007.

[1253] S.L. SCHWARCZ, "Private Ordering of Public Markets: the Rating Agency Paradox", (2002) *University of Illinois Law Review* 2002, 1.

[1254] See for example: J. MATHIS, J.J. MCANDREWS & J.-C. ROCHET, "Rating the raters: Are reputation concerns powerful enough to discipline rating agencies?", (56) *Journal of Monetary Economics* 2009, 657-674 (the reputation argument only works when a sufficiency large fraction of the CRA's income comes from other sources than rating complex products); P.L. BONEWITZ, "Implications of Reputation Economics on Regulatory Reform of the Credit Rating Industry", (1) *William and Mary Business Law Review* 2010, 391 (reputation mechanisms theoretically operate in the rating industry to solve problems of information asymmetry. However, the actual industry differs from this theoretical model in several ways that have the potential to undermine reputational incentives); F. PARTNOY, "Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime", (79) *Washington University Law Quarterly* 2001, 493 & 495-505 (reputation alone might not be a sufficient incentive to create optimal gatekeepers behaviour); K.-H BAE, H. DRISS & G.S. ROBERT, "Does Competition Affect Ratings Quality? Evidence from Canadian Corporate Bonds", March 7, 2018, available at <https://ssrn.com/ abstract=3137107> (reputational concerns are not an effective disciplinary mechanism for small CRAs facing competitive pressure from larger ones); S.H. KIM, "Gatekeepers Inside Out" , (21) *Georgetown Journal of Legal Ethics* 2008, 424-426 (the reputation argument is overstated for several reasons such as the lack of empirical data or the fact that reputational information markets do not work as perfectly as imagined); A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 126 (concluding that "in the structured finance segment reputational incentives failed to work").

[1255] See for example: P. DEB & G. MURPHY, "Credit Rating Agencies: An Alternative Model", LSE Working Papers, November 2009.

[1256] N.S. ELLIS, L. M. FAIRCHILD & F. D'SOUZA, "Is Imposing Liability on Credit Rating Agencies a Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis", (17) *Stanford Journal of Law, Business & Finance* 2012, 190-191, footnote 66. See for references to more studies: M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 353-354.

[1257] C. HILL, "Regulating the Rating Agencies", (82) *Washington University Law Quarterly* 2004, 50; J.D. KREBS, "The Rating Agencies: Where We Have Been and Where Do We Go From Here", (3) *Journal of Business, Entrepreneurship & the Law* 2009, 140; F. COWELL, *Risk-Based Investment Management in Practice*, Hampshire, Palgrave Macmillan, 2013, 267.

[1258] Organisation for Economic Co-operation and Development, "Bank Competition and Financial Stability", OECD Publishing, 2011, 26; G. CAPRIO (ed.), *Handbook of Key Global Financial Markets, Institutions, and Infrastructure*, New York, Elsevier Academic Press, 2013, 383.

model might increase the accuracy of ratings.[1259] Nevertheless, these studies seem to operate in a vacuum. The move towards another remuneration model is unlikely as it encounters three fundamental problems.

393. First, although smaller CRAs still use the investors-pays business model, the major agencies such as S&P's and Moody's evolved to the issuer-pays business model. The practical relevance of the investor-pays model is thus rather limited.[1260] Moreover, ratings are only given to those investors and subscribers who pay for it under the subscriber-pays business model. As a consequence, a division would be created between the "haves and the have-nots of financial information".[1261] This would affect the CRA's market information function. In addition, ratings will be based only on information that is publicly available as there no longer is a contractual and confidential relationship between the issuer and the CRA. The issuer is not involved in the rating process and might be less willing to give confidential information regarding its financial position. The lack of such information might eventually affect the quality and informational value of ratings.[1262] Switching to an investor-based system might indeed alleviate a potential bias in ratings but could also lead to the collapse of the market for information.[1263] These practical concerns are further strengthened by empirical studies that shed a more critical light on the benefits of the investor-pays model. Some even conclude that the issuer-pays model still leads to more efficient outcomes than investor-pays alternatives.[1264]

394. Second, the issuer-pays business model became popular due to the increasing complexity of financial markets. The complexity of the financial markets required more specialisation and expertise when issuing ratings. The need for such expertise resulted in higher costs to calculate and issue ratings. These increased costs could no longer solely be funded by subscribers or investors. Investors were not willing to pay the substantial subscription fees necessary to generate the revenue stream allowing CRAs to continue rating as many entities and securities as they currently do. There was a need for a new business model through which the additional costs could be funded. Therefore, CRAs decided to offer ratings to issuers under a new business model. Consequently, moving

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[1259] J. CORNAGGIA & K.J. CORNAGGIA, "Estimating the Costs of Issuer-Paid Credit Ratings", (26) *Review of Financial Studies* 2013, 2229-2269; A.K. KASHYAP & N. KOVRIJNYKH, "Who Should Pay for Credit Ratings and How?", (1) *Review of Financial Studies* 2015, 1-36.

[1260] G. CAPRIO (ed.), *Handbook of Key Global Financial Markets, Institutions, and Infrastructure*, New York, Elsevier Academic Press, 2013, 383.

[1261] J. MANNS, "Rating Risk after the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability", (87) *North Carolina Law Review* 2009, 1061.

[1262] G. CAPRIO (ed.), *Handbook of Key Global Financial Markets, Institutions, and Infrastructure*, New York, Elsevier Academic Press, 2013, 383; R. GARCÍA ALCUBILLA & J. RUIZ DEL POZO, *Credit Rating Agencies on the Watch List: Analysis of European Regulation*, Oxford, Oxford University Press, 2012, 248-249.

[1263] V. SKRETA & L. VELDKAMP, "Ratings shopping and asset complexity: A theory of ratings inflation", (56) *Journal of Monetary Economics* 2009, 688-690.

[1264] J. AHMED, "Competition in Lending and Credit Ratings", FEDS Working Paper No. 2014-23, March 12, 2014, 7-8; V. SKRETA & L. VELDKAMP, "Ratings shopping and asset complexity: A theory of ratings inflation", (56) *Journal of Monetary Economics* 2009, 688-690.

back towards a system where only investors or subscribers pay for the ratings would undermine the revenues of CRAs.[1265]

395. Third, the photocopy machine producing relatively inexpensive photocopies became popular during the 70s. As a result thereof, the major CRAs made the switch to the issuer-pays business model. CRAs were worried that the sale of ratings to investors would decrease as the latter could free ride "by obtaining photocopies of the rating information from friends".[1266] Investors would not pay for ratings if they could get them for free. Nowadays, the technological possibilities for transmitting information multiplied. This makes the free-rider problem even more difficult to handle. The move towards another business model is, therefore, unrealistic.[1267]

2.2.2. Credit Rating Agencies: Some Alternatives

396. Taking into account these problems, scholars have suggested alternatives to the investor-pays business model. It would take me too far to extensively discuss all proposals. Instead, some innovative ideas are briefly touched upon. Especially their strengths and flaws are examined.

397. In his article, attorney at law HORNER suggests establishing an independent committee ("Board") composed either of SEC personnel, experts from NRSROs or institutional investors. The rating process would need substantial changes and start with the issuer selecting the CRA ("Hired CRA"). The issuer would have to send the Hired CRA's analysis to the Board together with a standard fee. The Board would subsequently have to submit the analysis to two other NRSROs ("Review NRSROs"). These Review NRSROs could not be solicited by the issuer for consulting/advisory or rating services. The Board will only approve the credit rating given by the Hired CRA if both Review NRSROs conclude that the analysis of the Hired CRA and the given rating are reasonable (e.g. based on the inputs and methodologies used in calculating the credit rating). The Board will downgrade the Hired CRA's rating one degree (e.g. from AAA to AA) if at least one Review NRSRO finds the analysis of the Hired CRA unreasonable. The two Review NRSROs cannot incur liability for reviewing the analysis. The liability remains

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[1265] R. GARCÍA ALCUBILLA & J. RUIZ DEL POZO, *Credit Rating Agencies on the Watch List: Analysis of European Regulation*, Oxford, Oxford University Press, 2012, 248-249; R. CANTOR & F. PACKER, "The Credit Rating Industry", *FRBNY Quarterly Review* 1994, 4; L.J. WHITE, "The Credit Rating Industry: An Industrial Organization Analysis", in: R.M. LEVICH, G. MAJNONI & C.M. REINHART (eds.), *Ratings, Rating Agencies and the Global Financial System*, Dordrecht, Kluwer, 2002, 47; C. HILL, "Regulating the Rating Agencies", (82) *Washington University Law Quarterly* 2004, 50; A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 120-121.

[1266] L.J. WHITE, "Credit-Rating Agencies and the Financial Crisis: Less Regulation of CRAs is a Better Response", (25) *Journal of International Banking Law* 2010, 173. See also: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 120-121.

[1267] R. GARCÍA ALCUBILLA & J. RUIZ DEL POZO, *Credit Rating Agencies on the Watch List: Analysis of European Regulation*, Oxford, Oxford University Press, 2012, 248; J.C. COFFEE, "Ratings Reform: The Good, The Bad, and The Ugly", (1) *Harvard Business Law Review* 2011, 255; C.M. MULLIGAN, "From AAA to F: How the Credit Rating Agencies Failed America and What Can Be Done to Protect Investors", (50) *Boston College Law Review* 2009, 1298.

solely with the Hired CRA, although the Review NRSROs can face a financial penalty if they act in bad faith when conducting their review.[1268]

Several (practical) problems remain under this approach. Foremost, the rating process will become more complex when three CRAs instead of only one agency are involved to determine the rating. In addition, it remains unclear how the Board should select the Review NRSROs. There might also be a risk that the Board will face (political) pressure to make a certain choice of Review NRSROs. The proposal is also US-based, making its implementation in EU Member States unlikely.

398. Stanford University law professors GRUNDFEST and HOCHENBERG urge the SEC to create a new category of credit rating agency, namely the Investor Owned and Controlled Rating Agencies (IOCRAs).[1269] The IOCRAs would operate under control of the sophisticated investor community. IOCRAs are thus oriented towards generating ratings that accurately reflect the credit risk. Every rating issued by a rating agency, which is not an IOCRA such as Moody's and S&P should be accompanied by at least one rating issued by an IOCRA. Although issuers will still pay for ratings, IOCRAs represent the investors' interest and if they would "fail to spot systematic rating inflation by the sell side, then the buy side will have only itself to blame".[1270]

Several concerns, however, exist under this approach. For instance, the idea of IOCRAs might not be feasible if sophisticated investor will resist paying any fees. In addition, the belief that institutional investors will form their own CRAs posits a stronger investor interest in rating reform than is realistic to assume exists.[1271]

399. George Washington University law professor MANNS notes that purchasers of debt currently do not play any role in the rating process.[1272] Purchasers should bear the burdens as well as the benefits of holding CRAs liable by financing a user's fee system administered by the SEC. In exchange for paying the fee, purchasers should be given enforceable rights against CRAs. The SEC would use the profits of such a user fee to finance the bidding process in which CRAs compete to rate the issuer's debt. The SEC user fee system would require CRAs both to bid for the right to rate securities and to

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[1268] N.D. HORNER, "If You Rate It, He Will Come: Why Uncle Sam's Recent Intervention with the Credit Rating Agencies Was Inevitable and Suggestions for Future Reform", (41) *Florida State University Law Review* 2014, 506-508.

[1269] J. GRUNDFEST & E.E. HOCHENBERG, "Investor Owned and Controlled Rating Agencies: A Summary Introduction", Stanford Law and Economics Online Working Paper No. 391, October 25, 2009, 6, available at <https://ssrn.com/abstract=1494527>.

[1270] J. GRUNDFEST & E.E. HOCHENBERG, "Investor Owned and Controlled Rating Agencies: A Summary Introduction", Stanford Law and Economics Online Working Paper No. 391, October 25, 2009, 6.

[1271] J.C. COFFEE, "Ratings Reform: The Good, The Bad, and The Ugly", (1) *Harvard Business Law Review* 2010, 256-257.

[1272] J. MANNS, "Rating Risk after the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability", (87) *North Carolina Law Review* 2009, 1059-1089.

assume certification and mandatory reporting duties to purchasers. The bidding CRAs would be required to detail the type and extent of diligence they will undertake.[1273]

CRAs would have certification and mandatory reporting duties toward purchasers. These requirements provide CRAs with more clear responsibilities in overseeing issuer disclosures. For example, CRAs could certify on a quarterly basis that they have exercised reasonable care in conducting a due diligence assessment of the issuer's financial and nonfinancial disclosures to make accurate assessments of risk exposure. This in turn gives purchasers the possibility to hold CRAs liable when the latter would violate those duties. However, the liability of CRAs towards purchasers should be limited to cases of gross negligence and capped to a percentage of their annual rating fees. In addition to the possibility for purchasers to file claims against CRAs, the SEC should be able to pursue actions when CRAs negligently breach their reporting duties.[1274]

One of the challenges under this proposal is that the SEC might not have the required knowledge to oversee the working of all CRAs, especially when it concerns complex financial products.[1275] Moreover, the SEC would have to administer the system, while at the same time being required to pursue actions when CRAs negligently breach their reporting duties. The question can be asked whether the SEC can in those circumstances be objective as informal contacts with CRAs arise due to their involvement in the user fee structure. In addition, the user-fee system with the involvement of the SEC is mainly US-oriented.

400. More radical proposals have been suggested as well to overcome conflicts of interest. For instance, a three-step reform has been advocated to overcome conflicts of interest. Issuers should obtain a vote from their largest bona-fide institutional investors. The outcome of this vote will determine the CRA that the issuer has to hire. The issuer would still have to pay the CRA but the model reduces potential conflicts of interest as the most significant institutional investors will select the CRA. The CRAs among which investors can choose should be limited to NRSROs that investors subsequently need to anonymously rank by preferences. Points should be allocated to each NRSRO of the investor's choice with their first choice receiving the greatest number of points. The CRA with the highest number of cumulative points from all the participating investors "will win the rating contract".[1276]

[1273] J. MANNS, "Rating Risk after the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability", (87) *North Carolina Law Review* 2009, 1059-1089.

[1274] J. MANNS, "Rating Risk after the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability", (87) *North Carolina Law Review* 2009, 1059-1089.

[1275] Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 102.

[1276] O. SCHMID, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies", (3) *Columbia Business Law Review* 2012, 1032.

A government-operated agency, or even better a self-regulatory organisation, can facilitate this decision-making process. Such "rater[s] of rating agencies"[1277] will have to evaluate and rank the performance of individual CRAs. This ranking should be based on different metrics including the CRAs' performance statistics or the frequency with which ratings are updated or reaffirmed. The idea is that the ranking of performance might induce CRAs to issue accurate ratings.[1278] CRAs that are not ranked in the top three by the governmental agency or self-regulatory organisation will be given a low performance designation. Issuers are required to obtain a second rating from a better performing CRA when they choose to hire a low performing agency. Consequently, CRAs with a performance that is below an acceptable level of accuracy remain out of business because issuers face two choices. They can either hire the less efficient CRA but with the additional cost of obtaining a second rating or immediately choose the more efficient CRA without any added cost.[1279]

401. Another more radical idea is to 'handicap' CRAs. A handicap in golf refers to the numerical advantage given or disadvantage imposed to account for past performance. The purpose of the handicap is to create a level playing field between golfers of different skill levels. It is accomplished by giving the less skilled golfers a scoring advantage over their competitors. The size of the advantage is determined by the difference between the two golfers' playing ability.[1280]

When applying this to CRAs, the SEC should create "CRA handicaps"[1281] that predict the likelihood of an issuer's credit rating. The information used to calculate the future performance would consist of information that is currently required to be disclosed (e.g. accuracy of past ratings issued or timeliness of downgrades). Once the handicap of a CRA is determined, the SEC needs to incorporate it into the regulatory structure by adjusting ratings according to the CRA's handicap. As such, the CRA's past performance needs to be tied with the regulatory benefits derived from its rating. Suppose that the issuer hires a particular CRA to rate a mortgage-backed security. The CRA issues an AA rating, which is considered the gross or unadjusted rating. The SEC subsequently applies the CRA's handicap to determine the net or adjusted rating. If the CRA has a bad track record in rating other mortgage-backed securities or failed to timely downgrade its ratings in the

[1277] O. SCHMID, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies", (3) *Columbia Business Law Review* 2012, 1034.

[1278] O. SCHMID, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies", (3) *Columbia Business Law Review* 2012, 1033-1039.

[1279] O. SCHMID, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies", (3) *Columbia Business Law Review* 2012, 1039-1043.

[1280] P. HOSP, "Problems and Reforms in Mortgage-Backed Securities: Handicapping the Credit Rating Agencies", (79) *Mississippi Law Journal* 2010, 570 with further references in footnote 178.

[1281] P. HOSP, "Problems and Reforms in Mortgage-Backed Securities: Handicapping the Credit Rating Agencies", (79) *Mississippi Law Journal* 2010, 571.

past, the handicap calculated by the SEC could reduce the gross rating from AA to the net rating A or even lower if appropriate.[1282]

402. The problem with these radical approaches is that their implementation will be unlikely. The rating sector would need some major reorganisation if they were to be accepted. This is not only a costly activity but at the same time difficult to put into practice.[1283] It might, for instance, be a complex exercise for the SEC to establish rating handicaps. Under the first radical proposal that was discussed, it remains difficult to determine when investors are considered to be bona fide, namely those who are "truly interested" in purchasing the debt.[1284] Moreover, only the significant institutional investors would be able to vote. Some investors would thus be left out of the decision process. This in turn could lead to problems of discrimination. In addition, CRAs will sometimes perform above and sometimes below the acceptable level of accuracy. They might be aware of this alternating scenario – 'sometimes they win, but sometimes they lose' – and thus not be too much focussed on the reliability of their ratings.

2.2.3. RONEN's Financial Statement Insurance Scheme (FSI)

403. Professor of accounting RONEN at NYU Stern School of Business proposed a financial statement insurance scheme (FSI). The scheme aims to reduce the conflict of interest between financial gatekeepers such as auditors and requesting entities.[1285] His scheme is based on the idea that auditors sometimes play an insuring role more than a policing role.[1286] There can be a close connection between auditing and insurance.[1287] FSI covers losses caused by financial misstatements that auditors did not discover, and replaces both auditor and issuer liability.[1288]

404. Instead of appointing and paying auditors, companies should purchase financial statement insurance. This insurance scheme provides coverage to investors against the losses suffered due to a misrepresentation in financial reports. The coverage that companies are able to obtain will be made public along with premiums paid for it. Insurance carriers subsequently appoint and pay the auditor who attests the accuracy of

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[1282] P. HOSP, "Problems and Reforms in Mortgage-Backed Securities: Handicapping the Credit Rating Agencies", (79) *Mississippi Law Journal* 2010, 569-572.

[1283] C.M. MULLIGAN, "From AAA to F: How the Credit Rating Agencies Failed America and What Can Be Done to Protect Investors", (50) *Boston College Law Review* 2009, 1298.

[1284] O. SCHMID, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies", (3) *Columbia Business Law Review* 2012, 1031.

[1285] J. RONEN, "Post-Enron Reform: Financial Statement Insurance, and GAAP Re-visited", (8) *Stanford Journal of Law, Business & Finance* 2002, 39-68.

[1286] F. PARTNOY, "Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime", (79) *Washington University Law Quarterly* 2001, 543.

[1287] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 349.

[1288] J. RONEN, "Post-Enron Reform: Financial Statement Insurance, and GAAP Re-visited", (8) *Stanford Journal of Law, Business & Finance* 2002, 48.

the financial statements of prospective insurance clients.[1289] While a company buys insurance covering financial statements and pays a premium to that end, the insurer engages an auditor to assess the risk. The insurer will then provide coverage accordingly. When losses occur, the insurer will pay the covered third parties up to the amount of the policy coverage. Therefore, auditors become employees of the insurer subject to termination as well as to legal claims by insurers for a breach of contract or negligence.[1290] Companies with higher limits of coverage and paying smaller premiums will distinguish themselves in the eyes of investors as companies with higher quality financial statements. Companies with smaller or no coverage, or companies that pay higher premiums will be seen as having lower quality financial statements. Requesting entities will, therefore, be eager to purchase higher coverage and pay smaller premiums. This will increase the quality of financial statements.[1291]

405. The FSI procedure starts with a review of the requesting entity that wants to be insured. This review is performed on behalf of the FSI carrier by an expert who investigates different elements of the potential insured (e.g. its reputation, integrity, financial state and prior operating results of its management). The potential insured then requests an insurance proposal from the FSI carrier. The proposal should at least contain the maximum amount of insurance being offered and the related premiums. The proposal request is made prior to the preparation of the company's shareholders' proxy.[1292] The proxy offers the following alternatives: (1) the maximum amount of insurance and related premiums as offered in the insurance proposal, (2) the amount of insurance and related premiums recommended by the management or (3) no insurance at all.

If the first or second option is approved, the reviewer and the auditor plan the scope and depth of the audit that needs to be conducted. When the auditor is in the position of issuing a clean opinion after the audit, the insurance policy will be provided. The originally proposed coverage and premium will be binding on the insurance carrier if the auditor's opinion is clean. However, if the auditor's opinion is qualified, the insurer will not provide any coverage unless the company can renegotiate different terms with the insurer. This will depend upon the auditor's findings and reasons for the qualified opinion. When the policy terms are renegotiated, the new terms agreed upon will be made public. The auditor's opinion will eventually contain a paragraph disclosing the amount of insurance that covers the accompanying financial statements and the associated premiums.[1293]

[1289] J. RONEN, "Post-Enron Reform: Financial Statement Insurance, and GAAP Re-visited", (8) *Stanford Journal of Law, Business & Finance* 2002, 48.

[1290] L.A. CUNNINGHAM, "Choosing Gatekeepers: The Financial Statement Insurance Alternative to Auditor Liability", (52) *UCLA Law Review* 2004, 427-428.

[1291] J. RONEN, "Post-Enron Reform: Financial Statement Insurance, and GAAP Re-visited", (8) *Stanford Journal of Law, Business & Finance* 2002, 48-49.

[1292] A proxy statement is a document containing the information that the SEC requires companies to provide to shareholders to allow them to make informed decisions about matters that will be brought up at an annual or special stockholder meeting.

[1293] J. RONEN, "Post-Enron Reform: Financial Statement Insurance, and GAAP Re-visited", (8) *Stanford Journal of Law, Business & Finance* 2002, 49-51.

406. It has already been mentioned that an important benefit of this financial statements insurance is the elimination of the auditor's conflict of interest with the issuer. The FSI improves the alignment of incentives between the auditor and the requesting entity, thereby increasing the accuracy and reliability of audits.[1294] Several challenges remain as well, some of which are briefly discussed below.[1295]

The insurer might prefer that the auditor would mask rather than reveal accounting irregularities discovered once the insurance policy is issued. The insurer will have to pay under the policy when irregularities are revealed.[1296] The integration of state insurance law with federal securities regulation objectives in the US can also pose challenges to the FSI's effectiveness.[1297] A difficulty also arises if shareholders have voted for FSI but when it is not possible to issue an unqualified audit opinion. In such a scenario, the insurer and the requesting entity will have to renegotiate new policy terms. This process can be quite complex in reality. Investors, for instance, might have voted for the maximum FSI coverage or for the management's lower recommendation. However, the management lacks their approval to agree on the renegotiated policy terms. The management could seek a new approval by using a special shareholder meeting or consent solicitation. Yet, this process can be "cumbersome and time-consuming"[1298], especially when there is only a limited period of time. The lack of an unqualified opinion also indicates that irregularities were discovered during the audit. This might alarm investors of problems with regard to managerial integrity and reliability. If the opinion is qualified in ways suggesting that accounting irregularities occurred, investors can have credible claims against the management but not against the auditor blowing the whistle. In that case, insurers will not be able to issue the policy.[1299]

2.2.4. Classification Societies: the Creation of a Trade Association

407. Classification societies do not only act as ROs but also have a private function, a "for-profit side of their business".[1300] They sell technical knowledge to shipowners in a

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[1294] J. RONEN, "Post-Enron Reform: Financial Statement Insurance, and GAAP Re-visited", (8) *Stanford Journal of Law, Business & Finance* 2002, 48.

[1295] J. RONEN, "Post-Enron Reform: Financial Statement Insurance, and GAAP Re-visited", (8) *Stanford Journal of Law, Business & Finance* 2002, 67-68.

[1296] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 349.

[1297] See for a discussion: L.A. CUNNINGHAM, "Choosing Gatekeepers: The Financial Statement Insurance Alternative to Auditor Liability", (52) *UCLA Law Review* 2004, 416 & 430-431.

[1298] L.A. CUNNINGHAM, "Choosing Gatekeepers: The Financial Statement Insurance Alternative to Auditor Liability", (52) *UCLA Law Review* 2004, 433.

[1299] L.A. CUNNINGHAM, "Choosing Gatekeepers: The Financial Statement Insurance Alternative to Auditor Liability", (52) *UCLA Law Review* 2004, 432-433. George Washington University law professor CUNNINGHAM also proposes a financial statements insurance scheme attempting to overcome some of these limitations. He develops a framework allowing companies to use financial statements insurance on an experimental basis and with investor approval as an alternative to financial statements auditing backed by auditor liability.

[1300] C.L. HAGERTY, *Deepwater Horizon Oil Spill: Selected Issues for Congress*, DIANE Publishing, Congressional Research Service, 2010, 17.

competitive environment.[1301] The current safety system imposes conflicting pressures on classification societies. On the one hand, they want to keep shipowners as their clients as the latter pay for the classification services. On the other hand, classification societies must comply with class and international safety rules.[1302] It is not unthinkable that a shipowner who is dissatisfied with a classification society might class hop to another society offering cheaper services or one applying the international safety rules less strictly.[1303]

408. This evolution resulted in a decline of the quality of classification services and activities. The reliability of certificates was affected by the end of the 19th century.[1304] As a response to this decrease of quality, insurers and banks began to establish alternative methods of inspecting vessels.[1305] Some even suggested to entirely reorganise the classification process of vessels.[1306] A more important reaction came from the classification societies themselves. More specifically, they established the International Association of Classification Societies.[1307]

Especially the Transfer of Class Agreement (TOCA) was an important step to minimise potential conflicts of interest arising from the remuneration structure. The system aims to prevent class hopping caused by commercial pressures and makes it virtually impossible for sub-standard ships to remain within the IACS-safety regime.[1308] In addition,

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[1301] C.L. HAGERTY, *Deepwater Horizon Oil Spill: Selected Issues for Congress*, DIANE Publishing, Congressional Research Service, 2010, 17-18.

[1302] H. HONKA, "Classification System and Its Problems with Special Reference to the Liability of Classification Societies", (19) *Tulane Maritime Law Journal* 1994, 6.

[1303] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36*) Journal of Maritime Law & Commerce* 2005, 493; N. LAGONI, *The Liability of Classification Societies*, Berlin, 2007, 26; H. HONKA, "Classification System and Its Problems with Special Reference to the Liability of Classification Societies", (19) *Tulane Maritime Law Journal* 1994, 6.

[1304] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36*) Journal of Maritime Law & Commerce* 2005, 490-493 with further references; E.R. DESOMBRE, *Flagging Standards: Globalization and Environmental, Safety, And Labor Regulations at Sea*, Massachusetts, MIT Press, 2006, 183.

[1305] C.L. HAGERTY, *Deepwater Horizon Oil Spill: Selected Issues for Congress*, DIANE Publishing, Congressional Research Service, 2010, 17-18. For instance, P&I Insurance Clubs started demanding a special survey before entering their clubs (D. SEMARK, *P&I Clubs: Law and Practice*, London, Taylor & Francis, 2013, 37). Charters began conducting their own surveys before contracting with the shipowner. They no longer solely relied on the work of classification societies (J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce* 2005, 494).

[1306] The CARVER Report drafted by the House of Lords in February 1992 recommended such an overall approach to safety. The different roles of institutions in the maritime sectors led to inconsistencies, gaps and duplications of effort in implementing safety standards. The overall approach to safety could be achieved by extending the concept of classification to statutory services. A vessel would thus only be classed if it complies with both (private) classification standards and (public) safety requirements (this has been reported in: P. BOISSON, "Classification Societies and Safety at Sea: Back to Basics to Prepare For the Future", (18) *Maritime Policy* 1994, 373).

[1307] See for more information the discussion *supra* in nos. 113-115.

[1308] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36*) Journal of Maritime Law & Commerce* 2005, 493; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 24-26; P. BOISSON, "Classification Societies and Safety at Sea: Back to Basics to

classification societies that want to become member of IACS have to comply with several IACS-membership criteria. These criteria also address the potential conflict of interest arising from the remuneration structure. For instance, a classification society may not be substantially dependent on a single commercial enterprise for its revenue.[1309]

409. Despite all these mechanisms, several shortcomings still remain within the IACS framework.[1310] These pitfalls could undermine the mitigation of conflicts of interest and thus potentially affect the reliability and accuracy of class certificates.

First, IACS was not regarded as a self-policing organisation for a long time by its members. This was due to weak relationships between classification societies at all hierarchical levels. Whereas technical information was exchanged between societies, "neither strong ties between top executives, nor a tradition of cooperation in policy matters have ever existed".[1311] Initiatives to prevent conflicts of interest are thus not necessarily successful if the trade association adopting them is not accepted as a self-policing entity by its members.

Second, although IACS implemented a Quality System Certification Scheme that is mandatory for its members,[1312] the Association only consists of twelve classification societies. Its activities as well as the IACS Quality System Certification Scheme "do […] not affect outsiders".[1313] As a consequence, outsiders are not bound by the provisions in the Scheme dealing with the prevention of this conflict of interest to guarantee a classification society's independence and objectivity.

Third, the creation of a trade association could lead to infringements of competition rules. This is illustrated with the example of IACS. More than ninety percent of the world's cargo carrying tonnage is covered by class rules and standards set by IACS members. IACS rules are the de facto minimum standards. They create a significant competitive advantage for classification societies complying with them.[1314] The European Commission already argued that IACS members have a strong position in the vessel classification market and that a restriction of the competition on this market might

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Prepare For the Future", (18) *Maritime Policy* 1994, 375; M.A. MILLER, "Liability of Classification Societies from the Perspective of United States Law", (22) *Tulane Maritime Law Journal* 1997, 77.

[1309] See for more information the discussion *supra* in no. 73.

[1310] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce* 2005, 499-500.

[1311] F. FURGER, "Accountability and Systems of Self-Governance: the Case of the Maritime Industry", (19) *Law & Policy* 1997, 466.

[1312] International Association of Classification Societies, "IACS Procedures. Volume 3: IACS Quality System Certification Scheme (QSCS)", June 2011.

[1313] H. HONKA, "Classification System and Its Problems with Special Reference to the Liability of Classification Societies", (19) *Tulane Maritime Law Journal* 1994, 7; R. HARLING, "The Liability of Classification Societies to Cargo Owners", (1) *Lloyd's Maritime and Commercial Law Quarterly* 1993, 7.

[1314] J. KALLAUGHER & A. WEITBRECHT, "Developments under the Treaty on the Functioning of the European Union, articles 101 and 102, in 2008/2009', (31) *European Competition Law Review* 2010, 309-310.

occur.[1315] This illustrates that the creation of a trade association to ensure the quality of a certifier's services and increase the reliability of certificates is not without problems either.

2.3. The Existing (Legal) Framework as Safeguard

410. The previous parts illustrated that each specific proposal to prevent or eliminate the conflicts of interest arising from the remuneration structure has several flaws. These shortcoming can relate to the fact that these suggestions are too drastic or unrealistic to implement because existing practices would have to undergo a fundamental change. Another concern is that many proposals are mainly US-based, making their adoption in the EU less likely. In addition to these flaw related to each proposal, there are also more general reasons why it is unlikely that the accuracy and reliability of certificates would increase by only preventing this conflict of interest.

411. On the one hand, the mere existence of this conflict of interest is not necessarily a threat for the reliability and accuracy of certificates. The court in *Abu Dhabi v. Morgan Stanley* is clear when concluding that there "is no question that companies can conduct business legally, even in the face of conflicts of interest, provided that proper safeguards are in place".[1316] Arguably such safeguards can exist as the EU adopted legislation preventing and minimising potential conflicts of interest for several certifiers.[1317]

412. On the other hand, the question also remains whether the mere existence of this conflict of interest actually leads to unreliable and inaccurate certificates. There are, for instance, studies showing that the conflict of interest caused by the issuer-pays business model does by itself not lead to flawed ratings.[1318] Additionally, even if a conflict of interest exists between the certifier and the requesting entity, the market structure might prevent that it has detrimental consequences on the accuracy and reliability of certificates. This especially seems to be the case for the major certifiers.

Take the example of the larger rating agencies such as Moody's and S&P. Both CRAs might not be as eager for the business of one particular client as smaller CRAs. The major CRAs have a revenue of several hundred million dollars a year coming from many clients. Even the largest issuer might thus be unable to manipulate CRAs through their yearly revenues.[1319] A similar reasoning extends to the other major certifiers. Their revenues can be enormous making it difficult for one client to have a considerable influence on the

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[1315] European Commission, Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case 39.416-Ship classification, 2009/C 131/13. Also see the discussion *infra* in nos. 433 & 436.

[1316] *Abu Dhabi Commercial Bank v. Morgan Stanley & Co*., 651 F. Supp. 2d 155, 178-179 (S.D.N.Y. 2009).

[1317] See in this regard also the discussion *supra* in nos. 66-76.

[1318] See for example: D.M. COVITZ & P. HARRISON, "Testing Conflicts of Interest at Bond Ratings Agencies with Market Anticipation: Evidence that Reputation Incentives Dominate", December 2003, available at <www.federalreserve.gov/pubs/feds/2003/200368/200368pap.pdf>.

[1319] T.J. SINCLAIR, "GLOBAL MONITOR. Bond Rating Agencies", (8) *New Political Economy* 2003, 149; T.J. SINCLAIR, "From Judge to Advocate: The Credit Rating Enigma", *New Left Project*, December 18, 2012.

certifier.[1320] Certifiers also derive part of their revenue from other activities than certification services.[1321] Moreover, activities of certifiers are often not restricted to only one sector but include several other industries.[1322] All of these elements prevent that one particular client would be able to have a major influence on the revenues of a certifier.

3. Conditioning 'Pavlovian' Certifiers With Using Rewards and Sanctions

413. Thus far, none of the examined proposals is convincing to increase and enhance the accuracy and reliability of certificates. Therefore, other scholars rely on the use of carrots and sticks. These mechanisms might be more effective to shape a certifier's behaviour.[1323] George Washington University law professor CUNNINGHAM stresses that reputational constraints and liability threats were insufficient to deter ineffective gatekeeping in the past. Therefore, a carrot-based merit system for certifiers should at least be considered and eventually promoted.[1324] Once again, many of these proposals have been done in the context of CRAs. However, they can also apply to other certifiers as they might react similarly to externally imposed rewards or sanctions. Some of these proposals are discussed in the following paragraphs. Special attention is given to disclose and disgorge mechanisms (part 3.1.), performance compensation schemes (part 3.2.), tax incentives (part 3.3.) and regulatory sanctions (part 3.4.).

3.1. Disclosing and Disgorging Profits

414. The first proposal applies the disclose or disgorge approach. UC Davis School of Law professor HUNT notes that reputational concerns do not necessarily make CRAs issue more accurate ratings for new products. CRAs have nothing to lose when they charge high fees, while at the same time issuing low quality ratings for new products. Even if such ratings might affect their reputation when it concerns other types of product, CRAs will keep issuing low ratings as long as new products are large enough in volume. Rational investors will rely on ratings for new products as long as the average rating quality is high enough, even if they know that some of the ratings are of lower quality. CRAs should, therefore, disgorge the profits they receive from inaccurate ratings given to new products falling under a predetermined quality level. The only exception to this disgorging mechanism is when CRAs themselves disclose that the ratings are of low quality. The underlying idea is that if a CRA is less confident about the accuracy of a

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[1320] See for more information the discussion *supra* in part I, Chapter II.

[1321] Classification society Lloyd's Register, for instance, also provides consulting services in the field of energy and engineering. Moody's does not only provide rating services but also assists companies in managing balance sheets, streamlining processes and ensuring compliance with regulations.

[1322] For example, Bureau Veritas does not only act as classification society but also provides certification services in other industries such as construction and real estate. Product certifiers such as TüV Rheinland acting as notified bodies during the conformity assessment procedure of medical devices also provide certification services outside the scope of medical devices.

[1323] See for an extensive discussion: L.A. CUNNINGHAM, "Beyond Liability: Rewarding Effective Gatekeepers", (92) *Minnesota Law Review* 2007, 323-386.

[1324] L.A. CUNNINGHAM, "Carrots for Vetogates: Incentive Systems to Promote Capital Market Gatekeeper Effectiveness", (92) *Minnesota Law Review* 2007, 1.

rating, it must disclose to the public that the rating is of low quality. This would 'warn' investors as to the reliability and accuracy of such ratings.[1325]

415. Several problems, however, remain regarding the application of this disclose or disgorge mechanism. For instance, it is uncertain whether investors will truly heed the warning of a low quality rating.[1326] Investors might still rely on the low quality simply because it is issued by a professional entity that claims to have expertise in assessing the creditworthiness of financial products.[1327] Moreover, CRAs have a certain degree of discretion to determine when exactly a rating is of lower quality. The financial instrument that has been given the low quality rating might also be treated as if it has an even lower quality rating than it actually does. This leads to a reduced demand of the rated product, which in turn results in a higher interest rate paid by issuers.[1328]

The proposal could also be ineffective from another point of view. A mere notice by CRAs that their ratings are of low quality does actually not protect investors. Reliance by investors on those ratings might be unreasonable or not justified and potentially resulting in their own negligence. Nevertheless, the method *an sich* to disclose to the public that ratings are of low quality does not encourage CRAs to issue more accurate and reliable ratings. It remains even doubtful to which extent CRAs themselves would be prepared to indicate that their ratings are of lower quality, despite the risk to disgorge profits.[1329]

3.2. Performance and Compensation Schemes

416. Performance and compensation schemes could also be used to induce certifiers to issue accurate and reliable certificates. CUNNINGHAM notes that positive incentives can promote a certifier's desired conduct. He refers to several examples including public recognition mechanisms (e.g. reporting on certifiers performing well instead of those that caused a crisis) or contractual cash compensation arrangements between certifiers and requesting entities.[1330] Several performance and compensation schemes have been put forth for individual certifiers such as CRAs. The following paragraphs briefly examine the proposal of University of Southern California professor of economics HARRIS to link the profits CRAs earn with the performance of the rated bonds. The suggestion by Yale

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[1325] J.P. HUNT, "Credit Rating Agencies and the "Worldwide Credit Crisis": The Limits of Reputation, the Insufficient of Reform, and a Proposal for Improvement", (1) *Columbia Business Law Review* 2009, 181-182.

[1326] J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1039-1040.

[1327] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraph 2808.

[1328] J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1039-1040.

[1329] J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1039-1040.

[1330] L.A. CUNNINGHAM, "Beyond Liability: Rewarding Effective Gatekeepers", (92) *Minnesota Law Review* 2007, 352-385.

law professor LISTOKIN and Assistant United States Attorney TAIBLESON to pay CRAs incrementally over time with the debt they rate is also analysed.

417. HARRIS argues that the profits for CRAs should rise if the bonds they rate as investment-grade perform well and decrease if those bonds default. CRAs could create this scheme by placing a meaningful portion of their fees into escrow. The custody of these funds would return to CRAs if their ratings performed well. A mandatory pay-for-performance compensation scheme could be established in which a fixed percentage of the accrued revenue earned by the CRAs would be ceded to fund a performance bonus. Regulators could award the bonus at periodic intervals on a winner-take-all basis to the best performing CRA for a given period.[1331]

418. Numerous practical concerns remain. CRAs, for instance, could reallocate the bonus between themselves once it has been given to one particular winning CRA. It is unlikely that the same CRA will always win the bonus. Therefore, rating agencies could establish some reallocation arrangements between themselves. Moreover, the notion of a meaningful portion of a CRA's revenue is unclear considering that not all CRAs have the same revenues. It will have to be determined for each individual CRA, which is time consuming and costly. Taking into account the enormous revenues of the major CRAs, the bonus will also need to be significant to have the desired effect of promoting the accuracy and reliability of ratings. At the same time, disgorging profits or requiring funds to be escrowed could also lead to significant liquidity constraints for smaller CRAs.[1332] The proposal stipulates that the SEC could create this system by requiring CRAs to opt in if they want to acquire or retain their NRSRO designation.[1333] However, smaller CRAs are not always able to meet the NRSRO requirements.[1334] Those CRAs would be required to participate in a project without even being sure that they meet the requirements to get the NRSRO designation. Smaller CRAs might thus lack incentives to opt-in anyway, making the model only accessible for those CRAs that actually benefit the less of a bonus-based proposal.[1335]

[1331] L. HARRIS, "Pay the Rating Agencies According to Results", Financial Times, June 3, 2010, available at <www.ft.com/intl/cms/s/0/a2d8d710-6f3d-11df-9f43-00144feabdc0.html#axzz3S5Llw6zr>.

[1332] O. SCHMID, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies", (3) *Columbia Business Law Review* 2012, 1028-1029; J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1040.

[1332] O. SCHMID, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies", (3) *Columbia Business Law Review* 2012, 1028-1029.

[1333] CRAs may apply to be recognised by and registered with the SEC as Nationally Recognized Statistical Ratings Organization (NRSRO). Ratings provided by NRSROs are often used by financial institutions or investors for regulatory purposes. In order to be considered an NRSRO, a CRA has to be nationally recognised in the US and provide credible ratings. See in this regard: Section 3 (62) of the Credit Rating Agency Reform Act of 2006, September 29, 2006, Pub. L. 109–291, 120 Stat. 1328. To be considered an NRSRO, the agency has to be nationally recognized in the US and provide reliable and credible ratings. The size of the CRA and its operational capability and rating process are also taken into account.

[1334] See for more information the discussion *supra* in no. 283 with further references.

[1335] J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1040.

419. An innovative compensation scheme has also been suggested by LISTOKIN and TAIBLESON. Under their scheme, CRAs would be paid incrementally over time with the debt they rate instead of immediately receiving a rating fee. This way, the cost of inflating the value of rated securities would fall on the CRA.

The authors use the example of a CRA that decides to rate the issuer's debt for a contractual agreed fee of $500. The value of the payments to the CRA depends on both the probability that the debt defaults as well as the general rate at which investors are willing to supply capital for repayment the next year. Assume, for instance, that each unit of issued debt pays $1 back in the next year. Consider now that the markets value $1 at $0.90 in the next year for debt given a AAA rating and at $0.80 for debt rated BBB because of higher probability of default. This implies that each unit of the issuer's debt (paying $1 in one year) is worth $0.90 if the CRA gives a AAA rating. The CRA, therefore, should receive 555.56 units of debt ($500/$0.90) as a rating fee if the CRA gives a AAA rating. If the CRA gives a BBB rating, each unit of debt is worth $0.80. As a consequence, the CRA is given 625 units of debt ($500/$0.80) as a rating fee when it provides a BBB rating.[1336]

Under the current issuer-pays business model, a CRA might give an AAA rating to debt that actually has a default probability of a BBB rating. The issuer might shop around and contract with the CRA that issues the most favourable AAA rating instead of the CRA that issues a lower but more accurate BBB rating. The debt compensation scheme advocated by LISTOKIN and TAIBLESON overcomes this problem. Going back to the example, the CRA receives 555.56 units of debt if it rates the debt as AAA. However, at market prices, the debt is only worth $444.40 (555.56 x $0.80). As a consequence, the CRA has a strong incentive to rate the debt as BBB (the actual default probability). With this accurate rating, the CRA receives 625 units of debt. This means that the true value of the fee will correspond to the contractual agreed fee of $500 (625 x $0.80). In essence, the CRA will suffer a financial penalty when it overrates debt because the debt the CRA receives as compensation is less valuable than the cash compensation the debt is replacing.[1337]

420. Not surprising, this proposal has several flaws. One could, for instance, argue that CRAs have an even greater incentive to manipulate ratings as their compensation is directly tied to the rated securities. CRAs could change the value of the debt they hold by simply re-rating the product at a later stage.[1338] The compensation scheme can also be undermined by immediately selling the securities before any misrating is discovered.[1339]

[1336] Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 104-106.

[1337] Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 104-106.

[1338] J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1040.

[1339] J.C. COFFEE, "Ratings Reform: The Good, The Bad, and The Ugly", (1) *Harvard Business Law Review* 2010, 254.

Additionally, CRAs must be paid over time for this scheme to be effective. This could lead to cash-flow and implementation concerns.[1340] The move towards this compensation mechanism implies that CRAs will have to take a large pay-cut for a few years until the first round of rated debt matures. The lack of transitional measures might diminish the incentive for CRAs to enter the NRSRO market, and reinforce the oligopoly in the rating sector.[1341] The compensation scheme might result in a private collusion between CRAs and issuers as well. The former could, for example, compensate the issuers for the loss they will incur following an unduly high rating.[1342] More importantly, the scheme tries to overcome the problem that issuers would pay for credit ratings that are higher than warranted. However, it remains unclear how large the proportion of the rated securities needs to be for CRAs to have the proper incentive to issue accurate credit ratings. Furthermore, whatever the proportion given to CRAs, the issuer could just increase the price that is paid for the rating that is too high to compensate the CRA's loss on the securities.[1343]

3.3. Tax Incentives

421. Some argue that a tax reduction would give CRAs a direct financial incentive to accurately rate products. LYNCH suggests to provide tax credits to those CRAs able to demonstrate that they conducted accurate risk analyses. Therefore, it is necessary to first create and set some measurement of ratings accuracy and then to establish accuracy benchmarks. CRAs that meet these benchmarks would receive tax credits. This would induce them to provide accurate ratings.[1344] Others argue that CRAs could be rewarded with a tax deduction when they accurately rate a security or entity that later defaults. Such a model needs to have three elements if it wants to be properly implemented. First, the amount of the tax deduction should equal the rating fee. Second, a threshold line needs to be drawn within the rating spectrum to determine which ratings qualify for the deduction. The line should be set at the investments grade. Only those securities rated below investment grade would be eligible for the deduction. Third, eligible securities that default would result in a deduction if the security was rated below the investment grade prior to

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[1340] J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1040; C. HILL, "Why Did Rating Agencies Do Such a Bad Job Rating Subprime Securities?", (71) *University of Pittsburgh Law Review* 2010, 606; O. SCHMID, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies", (3) *Columbia Business Law Review* 2012, 1018-1019.

[1341] J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1040-1041.

[1342] J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1040 referring to C. HILL, "Why Did Rating Agencies Do Such a Bad Job Rating Subprime Securities?", (71) *University of Pittsburgh Law Review* 2010, 606.

[1343] C. HILL, "Why Did Rating Agencies Do Such a Bad Job Rating Subprime Securities?", (71) *University of Pittsburgh Law Review* 2010, 606.

[1344] T.E. LYNCH, "Deeply and Persistently Conflicted: Credit Rating Agencies in the Current Regulatory Environment", (59) *Case Western Reserve Law Review* 2009, 301-302.

the default. In other words, the rating needs to be accurate for a certain time before the default occurs if it wants to be eligible for a tax deduction.[1345]

422. Several problems, however, exist with using tax incentives. Arbitrary decisions will have to be taken ranging from the reasons and the amount of tax deduction to the creation of accuracy measurements.[1346] It is, for instance, unclear why ratings above investment grade should not be eligible for a tax deduction if the goal of tax incentives is to increase the accuracy of all ratings. It might also be unfair to pay CRAs according to a tax scheme. Society in general would have to pay for the activities of CRAs, whereas only a few members of society benefit from their ratings.[1347]

Moreover, the measurement of rating accuracy under the idea of LYNCH would entail an evaluation of the accuracy of each CRA's historic ratings over some recent years. Therefore, tax credits would be earned only a certain number of years after the issuance of a rating. The problem is that a tax reward system does not necessarily signal which CRAs were providing accurate ratings at the moment when they were issued. In general, it may be impossible to reward only those CRAs that issue accurate ratings and completely avoid rewarding non-deserving agencies. There can be a discrepancy between the actual and retrospective performance of CRAs. A historical, retrospective analysis of actual performance of the rated product or entity does not necessarily differentiate those CRAs that have been conducting risk analysis with a high level of skill, competence and diligence from those that were merely the beneficiaries of good luck. As such, it can happen that ratings that prove to be accurate in retrospect are the results from good luck. Consequently, CRAs that in reality have conducted a "sloppy analysis" [1348] would benefit from a tax deduction. Ratings that prove to be inaccurate in retrospect and thus not enjoying tax benefits may have been determined with skill, diligence and competence but only be the result of bad luck.[1349]

3.4. The Regulatory Perspective

423. Some scholars address the carrots and sticks idea from a regulatory perspective. Columbia Law School professor COFFEE argues that CRAs should have their NRSRO designation revoked for a particular asset class if they issued inaccurate and unreliable

[1345] J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1042-1044.

[1346] T.E. LYNCH, "Deeply and Persistently Conflicted: Credit Rating Agencies in the Current Regulatory Environment", (59) *Case Western Reserve Law Review* 2009, 301-302.

[1347] See in general the critiques on a publicly funded CRA: Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 102.

[1348] T.E. LYNCH, "Deeply and Persistently Conflicted: Credit Rating Agencies in the Current Regulatory Environment", (59) *Case Western Reserve Law Review* 2009, 302.

[1349] T.E. LYNCH, "Deeply and Persistently Conflicted: Credit Rating Agencies in the Current Regulatory Environment", (59) *Case Western Reserve Law Review* 2009, 301-302.

ratings. To that end, the SEC would need to define a maximum default rate for each letter grade rating and subsequently measure compliance with this standard.[1350]

For example, the SEC might specify an 8% default rate for Moody's BAA rating and a tighter 3% default rate for its AA ratings. The SEC would revoke the NRSRO status given to a CRA whose default rate for a particular product exceeds these parameters over a defined period of time. Institutional investors might still consider the rating but would no longer be able rely on it when determining the legality of an investment decision, which requires a rating issued by an NRSRO. Thus, ratings would be useful only for their informative value and not because of their legal impact. The duration of the NRSRO suspension should continue until the CRA's five-year default is again within the acceptable SEC-parameters for that rating.[1351]

424. The implementation of this proposal is problematic for three reasons. First, there are several practical barriers. For instance, it is uncertain whether the SEC has the expertise and the time to define a maximum default rate for each letter grade rating. It also remains unclear how long the defined period would have to be to determine whether a default rate exceeds the established parameters. Furthermore, measuring compliance with this maximum default standard is by no means straightforward. The SEC might have a choice in this regard.

On the one hand, it can take into account procedural criteria such as the number of hours spent to determine a rating, the educational qualifications of the rating analysts or the number of institutions that claim to rely on the CRA or a particular rating. On the other hand, the SEC can examine the objective results of CRAs and examine whether the ratings accurately predicted the risk levels of the securities over an extended period. COFFEE favours the latter option as the first choice will produce voluminous "records of dubious value".[1352] However, even the second approach is problematic as it would impose an *obligation de résultat* upon CRAs during the first stage of the certification process. This does not correspond with the conclusions of the previous part that qualified the obligation of certifiers during the first stage as an *obligation de moyen*. Phrased differently, the SEC should not withdraw an agency's NRSRO designation only because it issued ratings that did not accurately predict the risk levels of the securities.

Second, the proposal can only be implemented in the US. The European Union does not have an equivalent to NRSROs. It is true that a CRA needs to register in the EU and loses its registration when it commits one of the infringements listed in Annex III of Regulation 513/2011.[1353] Yet, it is unlikely that CRAs will actually lose their registration considering

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[1350] J.C. COFFEE, "The Role and Impact of Credit Rating Agencies on the Subprime Credit Markets", Hearing Before the Senate Banking Committee, September 26, 2007, 13-14, available at <www.archive.org/stream/gov.gpo.fdsys.CHRG-110shrg50357/CHRG-110shrg50357_djvu.txt>.

[1351] J.C. COFFEE, "The Role and Impact of Credit Rating Agencies on the Subprime Credit Markets", Hearing Before the Senate Banking Committee, September 26, 2007, 13-14.

[1352] J.C. COFFEE, "The Role and Impact of Credit Rating Agencies on the Subprime Credit Markets", Hearing Before the Senate Banking Committee, September 26, 2007, 13-14.

[1353] See for more information the discussion *supra* in nos. 122-124.

the lack of alternatives within the EU to determine the creditworthiness of issuers or financial products.[1354]

Third, there might be a moment that all CRAs have lost their NRSRO status at the same time for at least some ratings or some products. As a consequence, investors would be required to fall back on their own analysis before making decisions.[1355] This can be problematic considering that such parties do no always have the necessary (confidential) information on the issuer or financial instrument, nor the expertise to perform an own analysis.[1356]

4. Certificates as Regulatory Licenses on the Market

425. Another reason why certifiers would not have the necessary incentives to issue accurate certificates is caused by their regulatory use. Legislation often requires a certificate before the certified item can be marketed (cf. the gatekeeping function of certifiers).[1357] Take the example of medical devices in the EU. A manufacturer can only place medical devices on the EU market that comply with the essential requirements. To that end, the manufacturer has to perform a conformity assessment procedure. The conformity assessment is completed in accordance with technical procedures included in legislation dealing with medical devices. The applicable legislation can require the involvement of notified bodies in the conformity assessment procedure.[1358] Similarly, flag States have to ensure that their vessels comply with international safety standards. To that end, classification societies acting as ROs provide the necessary certificates.[1359]

426. The problem of extensively using and referring to certificates in legislation has especially been an issue in the context of CRAs. Regulators have to a certain extent "outsourced their safety judgments to third-party CRAs".[1360] As a consequence, CRAs

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[1354] In 2013, German consulting firm Roland Berger proposed creating a European CRA to counter the dominance of the major CRAs, which are of American origin. However, this promising attempt failed because the initiators were not able to collect the 300 million Euros necessary for launching the project (X, "EU-based credit rating agency buried", EUOBSERVER, May 1, 2013, available at <EUobserver.com/foreign/120005>).

[1355] J.C. COFFEE, "The Role and Impact of Credit Rating Agencies on the Subprime Credit Markets", Hearing Before the Senate Banking Committee, September 26, 2007, 13-14.

[1356] In this regard, the court in the *Abu Dhabi* case concluded that the plaintiffs reasonably relied on the ratings because the market at large, including sophisticated investors, has come to rely on ratings issued by independent CRAs given "their NRSRO status and access to non-public information that even sophisticated investors cannot obtain" (*Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651. F. Supp. 2d 155, 180-181 (S.D.N.Y. 2009)). Similarly, the *CalPERS* court held that, as opposed to the corporate market, investors in the structured finance market cannot reasonably develop their own informed opinions because there is insufficient public information to do so. Reliance on ratings is thus justified if (sophisticated) investors are unable to conduct an own analysis or develop their independent views about potential investments (*California Public Employees' Retirement System v. Moody's Corp.*, no. A134912, 28-30 (Cal. Ct. App. 2014)).

[1357] See for more information the discussion *supra* in nos. 108-109 and *infra* in nos. 437-464.

[1358] See for more information the discussion *supra* in nos. 20-22

[1359] See for more information the discussion *supra* in nos. 15 & 138-140.

[1360] A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 40.

shifted from selling information to selling "regulatory licenses,"[1361] the "keys that unlock the financial markets."[1362] The use of and extensive references to ratings in legislation has been criticised. It has, for instance, been argued that CRAs remain in business because financial legislation often requires a rating as a pre-requisite for market access, for purchasing bonds by institutional investors or for other market activities, even if the rating turns out to be incorrect later.[1363] The fact that CRAs offer services that became necessary for regulatory compliance is one of the reasons which created and sustained the so-called "paradox of credit ratings."[1364] The paradox implies that although the informational value of ratings decreases (e.g. because investors increasingly allege that CRAs issued flawed ratings), CRAs remain profitable, and their ratings of major importance to regulate financial markets.[1365]

427. Both EU and US regulators have since 2008 tried to eliminate references to or using ratings in legislation or other documents. The Financial Stability Board[1366] and the EU implemented measures to reduce overreliance on ratings. The EU pursues this objective by adopting a multi-layer approach,[1367] which *inter alia* implies that financial institutions are required to make their own credit risk assessment[1368] and not rely solely on ratings when assessing the creditworthiness of an entity or financial instrument.[1369] The EU

[1361] F. PARTNOY, "The Siskel and Ebert of Financial Markets: Two Thumbs Down for the Credit Rating Agencies", (77) *Washington University Law Quarterly* 1999, 683.

[1362] F. PARTNOY, "Rethinking Regulation of Credit Rating Agencies: An Institutional Investor Perspective", (25) *Journal of International Banking Law and Regulation* 2010, 189.

[1363] F. PARTNOY, "Rethinking Regulation of Credit Rating Agencies: An Institutional Investor Perspective", (25) *Journal of International Banking Law and Regulation* 2010, 190; L.J. WHITE, "Financial Regulation and the Current Crisis: A Guide for the Antitrust Community", June 11, 2009, 30-31, available at <https://ssrn.com/abstract=1426188>; A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 51-59.

[1364] F. PARTNOY, "The Paradox of Credit Ratings", in: R.M. LEVICH, G. MAJNONI & C. REINHART (eds.), *Ratings, Rating Agencies and the Global Financial System*, New York, Springer, 2002, 65.

[1365] F. PARTNOY, "The Siskel and Ebert of Financial Markets: Two Thumbs Down for the Credit Rating Agencies", (77) *Washington University Law Quarterly* 1999, 621-622; F. PARTNOY, "The Paradox of Credit Ratings", in: R.M. LEVICH, G. MAJNONI & C. REINHART (eds.), *Ratings, Rating Agencies and the Global Financial System*, New York, Springer, 2002, 65-95.

[1366] Financial Stability Board, "Principles for Reducing Reliance on CRA Ratings", October 27, 2010, available at <www.financialstabilityboard.org/publications/r_101027.pdf>.

[1367] Directorate General Internal Market and Services, "Staff Working Paper, EU Response to the Financial Stability Board: EU Action Plan to reduce reliance on Credit Rating Agency (CRA) Ratings", May 12, 2014.

[1368] See in this regard also the Internal Ratings-Based Approach (IRB) used within the Basel II framework. Subject to certain minimum conditions and disclosure requirements, banks that have received supervisory approval to use the IRB approach may rely on their own internal estimates of risk components in determining the capital requirement for a given exposure (Basel Committee on Banking Supervision, "International Convergence of Capital Measurement and Capital Standards. A Revised Framework", 2005, 48, available at <www.bis.org/publ/bcbs118.pdf>.

[1369] Directorate General Internal Market and Services, "Staff Working Paper, EU Response to the Financial Stability Board: EU Action Plan to reduce reliance on Credit Rating Agency (CRA) Ratings", May 12, 2014, 4. The Basel Committee on Banking Supervision assessed a number of measures to reduce the reliance on external ratings in the Basel II framework (Basel Committee on Banking Supervision, "Basel III: a global regulatory framework for more resilient banks and banking systems", December 2010, revised June 2011, 4).

recommended that legislation and supranational institutions should refrain from referring to ratings in their guidelines, recommendations and draft technical standards if it would cause authorities or other financial participants to rely solely or mechanistically on ratings.[1370] In the US, the Dodd-Frank Act deals with the removal of references to ratings in a similar way. Section 939A directs each federal agency to review (1) any regulation it issued and which requires the use of an assessment of the creditworthiness of a security or money market instrument, and (2) any references to or requirement of reliance on ratings in such regulations. Each agency has to modify any such regulations to remove the reference to or requirement of reliance on ratings.[1371]

428. However, the many reforms to reduce reliance are not successful considering that legislation still includes references to credit ratings.[1372] In addition, eliminating references to CRAs or their ratings does not necessarily increase the accuracy and reliability of ratings. University of Minnesota Law School professor HILL argues that several factors show that the market influence of ratings is not only determined by their "favorable regulatory treatment".[1373] She uses the example of issuers who sometimes acquire two ratings, although the applicable legislation only requires one. In addition, issuers often use ratings from the major and more expensive CRAs (e.g. S&P, Fitch and Moody's) and not from smaller CRAs that might cost less. If companies were mainly "buying the regulatory treatment […] they would not pay much more than was necessary to obtain that treatment".[1374] Moreover, eliminating or limiting the regulatory role of ratings is "no panacea".[1375] CRAs are at the heart of the current banking and financial regulatory system. Drastically altering the system would impose considerable financial costs on regulators.[1376] Furthermore, Moody's and S&P already dominate the stage since the beginning of the 20th century. This was long before the creation of the NRSRO-designation and adoption of legislation relying on or referring to ratings. The claim that

[1370] Directorate General Internal Market and Services, "Staff Working Paper, EU Response to the Financial Stability Board: EU Action Plan to reduce reliance on Credit Rating Agency (CRA) Ratings", May 12, 2014, 5. See in this regard also Article 5a Regulation 1060/2009 on credit rating agencies as inserted by Article 1(6) Regulation 462/2013.

[1371] Section 939A (2010) Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376-2223. See for an overview: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 59-63, 197-199 & 225-235 (eventually concluding that the removal of regulatory references to ratings is necessary due to the incompatibility of competition and rating-based regulations).

[1372] See in this regard the analysis in: F. PARTNOY, "What's (Still) Wrong with Credit Ratings", (92) *Washington Law Review* 2017, 1421.

[1373] C. HILL, "Regulating Rating Agencies", (82) *Washington University Law Quarterly* 2004, 66, footnote 114.

[1374] C. HILL, "Regulating Rating Agencies", (82) *Washington University Law Quarterly* 2004, 67.

[1375] Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 104.

[1376] Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 104.

a CRA's licensing power is the reason for their dominance can, therefore, not explain their market power before they received any such regulatory role.[1377]

5. Increasing Competition in the Certification Sector

429. Most certification markets are characterised by a few big players. Therefore, some argue to lower the entry barriers allowing more certifiers to offer their services. More actors on the market will lead to more competition. Requesting entities will have more choice between the different certifiers. Consequently, certifiers will have to invest more in the accuracy of their certificates if they want to remain in business. In other words, competition increases the quality and reliability of certificates.[1378]

430. University of Florida law professor RHEE argues that the lack of competition in the rating sector is one cause for the poor performances of CRAs. The rating market is heavily concentrated with Moody's and S&P dominating the market as a duopoly plus Fitch as a major player. This "duopoly plus state" [1379] reduces competition in the sector. Legislation should create the conditions necessary to induce robust competition. CRAs need to compete for a pay-for-performance bonus on a periodic winner-take-all basis. Such a mechanism would increase competition and improve the accuracy and reliability of ratings.[1380] STEVENS, the President of the Investment Company Institute, is clear as well when saying that "robust competition for the credit rating industry is the best way to promote the continued integrity and reliability of their ratings".[1381] HILL concludes that ratings provide information, albeit probably of lesser quality than they might give if the industry was more competitive. Therefore, she proposes to gradually increase the number of NRSROs and eliminate NRSRO designation until new agencies are able to build their reputations. Such an elimination would allow smaller and more specialised CRAs to enter the market and establish themselves more easily.[1382] In other words, the SEC should allow small or new NRSROs "to get their feet under them by relaxing certain rules for these entities".[1383] Likewise, University of Geneva law professor DARBELLAY concludes that

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[1377] J.C. COFFEE, "Ratings Reform: The Good, The Bad, and The Ugly", (1) *Harvard Business Law Review* 2010, 262-263.

[1378] J. HINLOOPEN & H.T. NORMANN, *Experiments and Competition Policy*, Cambridge, Cambridge University Press, 2009, 235; D. ZIMMER, *The Goals of Competition Law*, Cheltenham, Edward Elgar, 2012, 223; Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 100; S. CHOI, "Market Lessons for Gatekeepers", (92) *Northwestern University Law Review* 1998, 959-960; A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 165-169 & 207 with further references.

[1379] R.J. RHEE, "On Duopoly and Compensation Games in the Credit Rating Industry", (108) *Northwestern University Law Review* 2013, 93, footnote 36.

[1380] R.J. RHEE, "On Duopoly and Compensation Games in the Credit Rating Industry", (108) *Northwestern University Law Review* 2013, 84-85.

[1381] Statement of P.S. STEVENS President Investment Company Institute on H.R. 2990, "The Credit Rating Agency Duopoly Relief Act of 2005" before the Committee on Financial Services United States House of Representatives, November 29, 2005.

[1382] C. HILL, "Regulating Rating Agencies", (82) *Washington University Law Quarterly* 2004, 85.

[1383] J.T. GANNON, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model", (31) *Review of Banking & Financial Law* 2012, 1041. See for an analysis of causes and

regulatory changes (e.g. removing regulatory references to credit ratings) should seek to encourage new entrants and also smaller CRAs to expand their market share.[1384]

431. However, there are several problems with regard to increasing competition in the certification sector. On a more general level, the mechanisms through which competition is supposed to improve the reliability and accuracy of certificates are not always clear and realistic.[1385] Increasing competition, for instance, is the "most interventionist approach",[1386] altering the market structure of certification intermediaries.[1387] There are three other reasons why enhancing competition might not be the way forward.

432. First, it is unsure whether increasing competition by itself leads to more accurate and reliable certificates. Professor of finance at the Stockholm School of Economics BECKER and professor of law at the Washington University Olin Business School MILBOURN even conclude that more competition leads to poor rating quality. Their study shows that ratings issued by S&P and Moody's inflated when competition in the market increased. That is because competition weakens reputational incentives to offer quality in the rating industry.[1388] The more CRAs offer their services, the greater the possibility for rating shopping by issuers. Although the existence of more CRAs does not imply that an issuer will use ratings of lesser quality, the latter might more easily have access to shadow ratings[1389] when more CRAs enter the market. Put differently, more CRAs increase the number of ratings and the possibility of shopping around for the 'best one'.[1390] University of Southern California law professor BARNETT also concludes that more competition will degrade a third-party certifier's performance. Any reduction in market concentration exerts competitive pressures on existing certifiers, which limits their ability to demand above-market premiums. Those above-market premiums ensure the quality of the

consequences of the lack of competition in the context of CRAs: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 165-169 & 207-235.

[1384] A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 225. Competitive incentives in the rating industry can be restored only after eliminating the regulatory use of ratings (A. DARBELLAY & F. PARTNOY, "Credit Rating Agencies and Regulatory Reform", University of San Diego, Legal Studies Research Paper Series, Research Paper No. 12-083, April 2012, 18-19 with further references).

[1385] Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 100-101.

[1386] S. CHOI, "Market Lessons for Gatekeepers", (92) *Northwestern University Law Review* 1998, 959.

[1387] In this regard, DARBELLAY favours sector-specific regulation as compared to antitrust intervention (A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 220-222).

[1388] B. BECKER & T. MILBOURN, "How did increased competition affect credit ratings?", (101) *Journal of Financial Economics* 2011, 496 & 499.

[1389] Shadow ratings are generally non-public ratings that can be used as input opinions to other rating work. It may be based on a lower level of information or it may be an indicative rating subject of further research. A shadow rating does not represent a full rating opinion (J.J. DE VRIES ROBBÉ, *Securitization Law and Practice: In the Face of the Credit Crunch*, Alphen aan den Rijn, Kluwer Law International, 2008, 393).

[1390] V. SKRETA & L. VELDKAMP, "Ratings shopping and asset complexity: A theory of ratings inflation", (56*) Journal of Monetary Economics* 2009, 690-691. See for a similar conclusion: Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 100-101.

certification process. As a consequence, the existing certifiers' might be less inclined to make the investments required to issue accurate and reliable certificates.[1391]

433. The example of classification societies can be used as illustration that more competition does not necessarily enhance the accuracy and reliability of certificates. The increase in classification societies by the end of the 19th century led to severe competition in the sector.[1392] This resulted in a decline of the quality of classification services and the reliability of class certificates.[1393] This was caused by the fact that classification societies faced conflicting pressures. On the one hand, they wanted to keep shipowners as clients as the latter paid for the classification services. On the other hand, they also had to comply with their own class rules and international safety regulations.[1394] The shipowner who was dissatisfied with a classification society could class hop to another one offering less rigorous terms and/or cheaper services. This in turn affected the accuracy and reliability of class certificates.[1395]

Things might be similar for notified bodies in the field of medical devices. There are currently more than seventy of these bodies providing services in the European Union. Manufacturers of medical devices can approach any appointed notified body for approval of their products. This gives them the possibility to resubmit rejected applications to other notified bodies. It also creates a propensity for bodies to compete for business. As a consequence, manufacturers can forum shop to find the 'most willing' notified body. This leads to competitiveness among notified bodies but also risks to affect the accuracy and reliability of their certificates. If a notified body does not approve the medical device or

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[1391] J. BARNETT, "Intermediaries Revisited: Is Efficient Certification consistent with profit maximization?", (37) *Journal of Corporation Law* 2012, 501-503. See also: K.-H BAE, H. DRISS & G.S. ROBERT, "Does Competition Affect Ratings Quality? Evidence from Canadian Corporate Bonds", March 7, 2018 concluding that ratings of a small agency in Canada become more favourable and less informative about the credit quality of bonds in response to increased competition from S&P; P. DUFFHUES & W. WETERINGS, "The quality of credit ratings and liability: the Dutch view", (8) *International Journal of Disclosure and Governance* 2011, 352 concluding that "increasing competition […] will not always offer sufficient incentive to the CRAs to make the interests of issuers and investors a central focus of their activities".

[1392] A. ANTAPASSIS, "Classification Societies' Liability: A Comparison with Emphasis to Greek Law", in: M. HUYBRECHTS, E. VAN HOOYDONK & C. DIERYCK (eds.), *Marine Insurance at the Turn of the Millennium*, Antwerp, Intersentia, 2000, 58.

[1393] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36*) Journal of Maritime Law & Commerce* 2005, 492; B. FARTHING, *International Shipping: An Introduction to the Policies, Politics, and Institutions of the Maritime World*, London, LLP Publishers, 1993, 156; E.R. DESOMBRE, *Flagging Standards: Globalization and Environmental, Safety, And Labor Regulations at Sea*, Massachusetts, MIT Press, 2006, 183.

[1394] H. HONKA, "Classification System and Its Problems with Special Reference to the Liability of Classification Societies", (19) *Tulane Maritime Law Journal* 1994, 6.

[1395] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36*) Journal of Maritime Law & Commerce* 2005, 493; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 26.

is not willing to review the product because of a deficiency, another one might still approve it.[1396]

434. Second, more competition might be to the detriment of the other goals served by certifiers. For instance, the objective of the MDD is to protect patients who come into contact with medical devices. The MDD stipulates that medical devices should provide patients and users with a high level of protection and should attain the performance attributed to them by the manufacturer.[1397] The MDR also aims to establish a robust, transparent, predictable and sustainable regulatory framework for medical devices, which ensures a high level of safety and health for patients and users..[1398] Increased competition among notified bodies could potentially undermine these goals.

Likewise, more competition might affect the public role of classification societies. Shipowners engage a society for the classification of their vessels. At the same time, the classification society acts as RO and offers statutory certification services. These services are in most cases paid by the shipowner. Consequently, a shipowner will incur additional costs if a classification society in its capacity of RO recommends improvements to the vessel. This in turn may tempt the shipowner to employ another society that does not ask for such improvements and which lowers its safety standards for that purpose.[1399]

435. Third, it remains unclear whether the major certifiers would no longer be dominant with more competition. The US Congress adopted the Credit Rating Agency Reform Act (CRARA) in 2006. It aims to improve the quality of ratings by fostering accountability, transparency and competition in the rating industry. The barriers for CRAs to get an NRSRO designation were lowered. The CRARA established "substantively undemanding"[1400] registration criteria aiming for more CRAs to apply for NRSRO designation and boost competition in the rating sector.[1401] COFFEE, however, notes that expanding the NRSRO club to include more CRAs has not reduced the dominance of

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[1396] B.M. FRY, "A Reasoned Proposition to a Perilous Problem: Creating a Government Agency to Remedy the Emphatic Failure of Notified Bodies in the Medical Device Industry", (22) *Willamette Journal of International Law & Dispute Resolution* 2014, 174-176.

[1397] Recital (5) Directive 93/42/EEC concerning medical devices.

[1398] Recital (1) Regulation 2017/745 on medical devices.

[1399] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 26-35; S. DURR, "An Analysis of the Potential Liability of Classification Societies: Developing Role, Current Disorder & Future Prospects", Shipping Law Unit University of Cape town, Research and Publications, paragraph 2.3.1.

[1400] J.P. HUNT, "Credit Rating Agencies and the "Worldwide Credit Crisis": The Limits of Reputation, the Insufficient of Reform, and a Proposal for Improvement", (1) *Columbia Business Law Review* 2009, 134.

[1401] See in this regard Section 15E ("Registration of National Recognized Statistical Rating Organizations") in the Credit Rating Agency Reform Act, Pub. L. 109–291, S.3850, September 29, 2006; J.C. COFFEE, "Ratings Reform: The Good, The Bad, and The Ugly", (1) *Harvard Business Law Review* 2010, 246-248; J.P. HUNT, "Credit Rating Agencies and the "Worldwide Credit Crisis": The Limits of Reputation, the Insufficient of Reform, and a Proposal for Improvement", (1) *Columbia Business Law Review* 2009, 131-138; Y. LISTOKIN & B. TAIBLESON, "If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation", (27) *Yale Journal on Regulation* 2010, 100-101; M. BLUMBERG CANE, "Below Investment Grade and Above the Law: A Past, Present and Future Look at the Accountability of Credit Rating Agencies", (17) *Fordham Journal of Corporate & Financial Law* 2012, 1084-1086.

Moody's, S&P and Fitch.[1402] In the EU, Regulation 462/2013 on CRAs also contains several provisions that aim to increase competition in the rating market.[1403] Despite these efforts, the 'Big Three' still dominate the rating sector. Their supremacy seems more based on first mover advantages and on the difficulty of entering the field without a proven track record. As such, the first entrant can operate more efficiently and exclude later entrants in the certification sector.[1404]

436. IACS-membership criteria and the potential infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) underpin this conclusion. The European Commission held that IACS members had a strong position in the vessel classification market and that a restriction of the competition on this market could occur.[1405] Certain IACS procedures might potentially infringe Article 101 of the TFEU because of 1) preventing classification societies that are not already members of IACS from joining the Association; 2) prohibiting their participation in IACS working groups and 3) preventing them from accessing IACS technical background documents.[1406] IACS failed to enact "admission requirements that were objective and sufficiently determinate so as to enable them to be applied uniformly and in a non-discriminatory manner and to provide an adequate system for including non-IACS [classification societies] in the process of developing IACS technical standards".[1407]

As a response, IACS established qualitative membership criteria and guidance provisions for their application. It also allowed non-member classification societies to participate in technical working groups and granted them access to IACS technical resolutions and related documents. A Commission Decision from October 14, 2009, made the IACS commitments legally binding.[1408] Notwithstanding these efforts, there seem no major

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[1402] J.C. COFFEE, "Ratings Reform: The Good, The Bad, and The Ugly", (1) *Harvard Business Law Review* 2010, 262-263.

[1403] The issuer needs to set up a rotation mechanism of CRAs which rate re-securitisations. Although there is only a limited number of CRAs active in the rating market for re-securitisations, that market is more naturally open to competition and a rotation mechanism could create more dynamics. Such a rotation of CRAs should bring more diversity to the assessment of creditworthiness. Multiple and different views, perspectives and methodologies applied by CRAs should produce more diverse credit ratings and ultimately improve the assessment of the creditworthiness of re-securitisations (Recitals (14)-(16) Regulation 462/2013 amending Regulation 1060/2009 on credit rating agencies & Article 6b Regulation 1060/2009 on credit rating agencies as inserted by Article 1(8) Regulation 462/2013).

[1404] J.C. COFFEE, "Ratings Reform: The Good, The Bad, and The Ugly", (1) *Harvard Business Law Review* 2010, 262-263.

[1405] European Commission, Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case 39.416-Ship classification, 2009/C 131/13. See in this regard also: A. EMANUELSON, "Standardisation agreements in the context of the new Horizontal Guidelines", (2) *European Competition Law Review* 2012, 71.

[1406] S. SATTLER, "Standardisation under EU competition rules-the Commission's new horizontal guidelines", (32) *European Competition Law Review* 2011, 346.

[1407] A. EMANUELSON, "Standardisation agreements in the context of the new Horizontal Guidelines", (2) *European Competition Law Review* 2012, 71.

[1408] EU Commission Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case 39416 Ship classification, October 14, 2009.

changes as IACS still consists of twelve major member societies, leaving the other ones outside its framework.[1409]

6. Liability of Gatekeepers as Source of Inspiration

437. Academic proposals have also been done regarding gatekeeping regimes and the liability of gatekeepers. These proposals aim to increase the chance that gatekeepers will detect a requesting entity's wrongful behaviour. The identification of such a behaviour will prevent them from issuing inaccurate or unreliable certificates. The proposals contain different modalities on gatekeepers' liability aiming to provide them with the necessary incentives to correctly perform their duties. As the function and notion of gatekeepers and certifiers are closely related,[1410] gatekeeping liability regimes might be used as a source of inspiration for certifiers as well. Although the notion of gatekeepers has already been briefly touched upon above,[1411] the working and benefits of gatekeeping liability regimes is briefly examined (part 6.1.). The analysis then proceeds with a discussion of existing proposals increasing the risk of a gatekeeper's liability (part 6.2.).

6.1. Gatekeeping Liability Regimes

438. In a gatekeeping liability regime, actors such as CRAs or classification societies will be held liable for wrongful acts committed by their clients. Gatekeeping liability, therefore, is a widely used strategy for controlling corporate wrongdoing.[1412] Several (overlapping) conditions must be met before a gatekeeping regime will be successful. These relate to enforcement insufficiency,[1413] the lack of alternative incentives for gatekeepers to issue accurate and reliable certificates, a gatekeeper's willingness to perform its role and the costs associated with establishing a gatekeeping liability regime.

439. First, requesting entities must commit misconduct that other penalties cannot deter. There should thus be a lack of alternative enforcement mechanisms and an advantage of turning to a gatekeeping liability regime.[1414] Gatekeeping liability, for instance, might be an alternative when public authorities cannot otherwise identify or prosecute a significant

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[1409] Several classification societies are thus not member of IACS such as Hellenic Register of Shipping and Registro Internacional Naval.

[1410] In this regard, BARNETT even uses the terms gatekeeper, certifier and intermediary interchangeably (J. BARNETT, "Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization", (37) *Journal of Corporation Law* 2012, 476).

[1411] See for more information on gatekeepers the discussion *supra* in nos 108-109.

[1412] A.F. TUCH, "The Limits of Gatekeeper Liability", (73) *Washington & Lee Law Review Online* 2017, 619.

[1413] R.H. KRAAKMAN, "Corporate Liability Strategies and the Costs of Legal Controls", (93) *Yale Law Journal* 1984, 888-892; J. MANNS, "Private Monitoring of Gatekeepers: The Case of Immigration Enforcement", (2006) *University of Illinois Law Review* 2006, 897.

[1414] R.H. KRAAKMAN, "Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy", (2) *Journal of Law, Economics and Organization* 1986, 56-58, 87-93 & 100-101; J. MANNS, "Private Monitoring of Gatekeepers: The Case of Immigration Enforcement", (2006) *University of Illinois Law Review* 2006, 894; F. PARTNOY, "Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime", (79) *Washington University Law Quarterly* 2001, 499.

proportion of the offences committed by requesting entities as primary wrongdoers.[1415] Imposing liability upon gatekeepers as participants "*outside* the circle"[1416] could induce them to discover and prevent a requesting entity's offenses and, as a consequence, issue more accurate and reliable certificates.[1417]

440. Second, market participants should not already be able to provide for adequate enforcement themselves. A reason or a comparative advantage has to exist for liability instead of rewarding gatekeepers or establishing market incentives encouraging them to identify a requesting entity's misconduct. Gatekeepers thus have to be punished for failure by means of liability rather than being rewarded for success.[1418]

441. Third, gatekeepers should be willing and able to prevent a requesting entity's misconduct at the gate, regardless of the latter's preferences or market alternatives, for instance, by switching to another gatekeeper.[1419] Put differently, a wrongdoer needs to pass a gate to reach his goal (e.g. marketing defective items), which is kept by a party – the gatekeeper – willing and able to decline access to those who would misuse it. The supply and demand conditions in the market for the service functioning as a gate need to support an enforcement regime: the gatekeeper must be willing to play that role and consumers of that service must be willing to accept it.[1420]

442. Fourth, the costs associated with a gatekeeper that has the ability to adequately monitor requesting entities should be acceptable. This last requirement relates to the cost of gatekeeping regimes and whether legislation can induce gatekeepers to detect misconduct at a reasonable cost.[1421] There needs to be a cost-effective law enforcement mechanism obliging gatekeepers to take actions aimed at averting misconduct when detected.[1422]

[1415] J. MANNS, "Private Monitoring of Gatekeepers: The Case of Immigration Enforcement", (2006) *University of Illinois Law Review* 2006, 897; R.H. KRAAKMAN, "Corporate Liability Strategies and the Costs of Legal Controls", (93) *Yale Law Journal* 1984, 868 & 888-896.

[1416] R.H. KRAAKMAN, "Corporate Liability Strategies and the Costs of Legal Controls", (93) *Yale Law Journal* 1984, 889.

[1417] R.H. KRAAKMAN, "Corporate Liability Strategies and the Costs of Legal Controls", (93) *Yale Law Journal* 1984, 868 & 888-896.

[1418] R.H. KRAAKMAN, "Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy", (2) *Journal of Law, Economics and Organization* 1986, 60-61, 93-100 & 101.

[1419] R.H. KRAAKMAN, "Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy", (2) *Journal of Law, Economics and Organization* 1986, 61 & 66-74; S.H. KIM, "Gatekeepers Inside Out", (21) *Georgetown Journal of Legal Ethics* 2008, 415; L.A. CUNNINGHAM, "Beyond Liability: Rewarding Effective Gatekeepers", (92) *Minnesota Law Review* 2007, 333-334.

[1420] R.J. GILSON, "The Devolution of the Legal Profession: a Demand Side Perspective", (49) *Maryland Law Review* 1990, 883-884.

[1421] R.H. KRAAKMAN, "Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy", (2) *Journal of Law, Economics and Organization* 1986, 75-87 & 101.

[1422] S.H. KIM, "Gatekeepers Inside Out", (21) *Georgetown Journal of Legal Ethics* 2008, 415; L.A. CUNNINGHAM, "Beyond Liability: Rewarding Effective Gatekeepers", (92) *Minnesota Law Review* 2007, 333-334. Refinements to this basic model have been suggested. MANNS, for instance, makes a distinction between two categories of gatekeepers, namely 'suppliers' and 'consumers'. This distinction determines their response to the threat of liability (J. MANNS, "Private Monitoring of Gatekeepers: The Case of

6.2. Evaluation of Existing Gatekeeping Liability Regimes

443. A gatekeeping regime, however, is not always successful. Things can go wrong with the gatekeeper itself,[1423] the gate that needs to be kept[1424] or the "market structure"[1425].[1426] Gatekeepers are thus not always able to detect or prevent misconduct by requesting entities. As a consequence, certificates might not be accurate or reliable.[1427] Modifying the modalities of a gatekeeper's liability could encourage them to monitor requesting entities more adequately and provide reliable and accurate certificates. However, there is a fierce academic debate on the form of gatekeeping liability regimes. Although this

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Immigration Enforcement", (2006) *University of Illinois Law Review* 2006, 897-899). Southwestern Law School professor KIM notes that successful gatekeeping requires gatekeepers 'willing' and 'able' to prevent misconduct. Gatekeepers must not only be prepared to 'interdict' misconduct but also to 'monitor' to detect such behavior. Gatekeepers should be evaluated by using four quadrants, namely their (1) willingness to interdict, (2) willingness to monitor, (3) capacity to monitor and (4) capacity to interdict (S.H. KIM, "Gatekeepers Inside Out", (21) *Georgetown Journal of Legal Ethics* 2008, 416-422).

[1423] A gatekeeper can go bankrupt or no longer meet the registration criteria. Gatekeeping failure can also be caused by individuals unable of advancing and protecting the firm's reputation. Bonding is more likely in corporate cultures in which individuals enjoy and expect to have long term relationships with a company. In recent times, however, there is a greater mobility among professionals. They more often move from one firm to another one. This mobility reduces the bonding between individuals and gatekeepers and diminishes individual incentives to advance and protect a gatekeeper's reputation (see in this regard L.A. CUNNINGHAM, "Beyond Liability: Rewarding Effective Gatekeepers", (92) *Minnesota Law Review* 2007, 350).

[1424] A gatekeeper might not be independent vis-à-vis requesting entities or lack reasonable grounds to issue the certificate. COFFEE refers to the 'market bubble story' to explain the failure of gatekeepers. For instance, auditors become less necessary in a bubble and experience a decline in both their leverage over their clients and the value of their reputational capital. In an atmosphere of market euphoria, investors rely less on auditors, while requesting entities consider their services more a formality than a necessity. Auditors provide a critical service when investors are cautious and sceptical and, therefore, rely on the former's services. In a market bubble, however, caution and scepticism are abandoned. If the auditor is largely ignored by euphoric investors, the auditor's best competitive strategy is to become as acquiescent and low cost as possible (J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 323-324).

[1425] S. CHOI, "Market Lessons For Gatekeepers", (92) *Northwestern University Law Review* 1998, 939.

[1426] There can be lack of competition between gatekeepers. BARNETT argues that entry barriers to the market cause failures in the certification market. Intermediaries are protected by entry barriers inducing them to act diligently to protect their stream of reputational rents against competitive threats as well as to exercise their market power by relaxing investments in certification quality. Entry barriers derive from two sources, namely the time lag required for any entrant to accumulate reputational capital to pose a competitive threat for an existing intermediary (supply side) and the switching costs users incur when going to a competing intermediary (demand side). These costs have a crucial implication: users of any established certification instrument do not have a credible threat of immediate termination every time an intermediary fails. A dominant intermediary will, therefore, shade on quality up to the point where users still prefer its degraded instrument over going to a competing provider, evaluating quality directly or leaving the market. If entrants cannot immediately replicate an incumbent's reputational capital and users cannot costless migrate to another intermediary, controlled underperformance by even the most well-established intermediaries can occur (J. BARNETT, "Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization", (37) *Journal of Corporation Law* 2012, 487-492).

[1427] See in general: J. PAYNE, "The Role of Gatekeepers", in: E. FERRAN, N. MOLONEY & J. PAYNE (eds.), *The Oxford Handbook of Financial Regulation*, Oxford, Oxford University Press, 2015, 277 (concluding that there are a number of limitations on the effectiveness of gatekeepers largely to do with the conflict of interest arising out of the funding model for gatekeepers, but exacerbated by factors which reduce a gatekeeper's incentive to perform its role well such as a lack of competition in the market, a lack of litigation risk and, in relation to CRAs, the development of a regulatory licence).

discussion has already been conducted elsewhere,[1428] the core issue is often whether strict (part 6.2.1.) or fault-based liability (part 6.2.2.) should be imposed upon gatekeepers.

6.2.1. Strict Gatekeeping Liability Regimes

444. Strict liability or liability without fault regimes have been advocated for gatekeepers. After a brief discussion of pure strict liability regimes and especially their shortcomings and strengths (part A.), two proposals that have been done for financial gatekeepers are elaborated upon.[1429] Whereas PARTNOY favours a 'modified' strict liability regime for gatekeepers (part B.), COFFEE suggests a 'stricter' liability regime (part C.).

A. General Considerations

445. Under a strict liability regime, a party will be held liable for the loss, even if that party was not at fault and took all reasonable care to prevent it.[1430] Strict liability attaches the duty to compensate the victim to the fact that the damage resulted from the realisation

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[1428] See for example: S. SHAVELL, "Strict Liability Versus Negligence", (9) *Journal of Legal Studies* 1980, 1; W.M. LANDES & R.A. POSNER, "The Positive Economic Theory of Tort Law", (15) *Georgia Law Review*, 1981, 851; G.T. SCHWARTZ, "The Vitality of Negligence and the Ethics of Strict Liability", (15) *Georgia Law Review*, 1981, 963; H.B. SCHAEFER & F. MUELLER-LANGER, "Strict Liability versus Negligence", in: M.G. FAURE (ed.), *Tort Law and Economics*, Cheltenham, Edward Elgar, 2009, 3-39. According to Harvard Law School professor SHAVELL, strict liability should apply in cases of unilateral accidents where only the injurer is able to influence the probability of a loss by choosing a particular level of activity. Strict liability might in those accidents lead to a more efficient care and activity level. In bilateral accidents, both the injurer's an victim's level of activity influence the accident rate. For those accidents, the choice between strict liability with a defence of contributory negligence and the negligence rule is a choice between the lesser of two evils. Strict liability with the defence will be superior to the negligence rule when it is more important that injurers are given an incentive through a liability rule to reduce their activity level than it would be to give victims a similar incentive (S. SHAVELL, "Strict Liability Versus Negligence", (9) *Journal of Legal Studies* 1980, 7).

[1429] Strict liability proposals have been made for individual gatekeepers as well. Most of them suffer from similar flaws and shortcomings as the more general ones thoroughly discussed in this part. Take the example of professors PACCES and ROMANO's 'mitigated' strict liability regime for CRAs. Rating agencies should be held liable to pay damages whenever a financial instrument they rated defaults. There should, however, be elements to avoid crushing liability for CRAs. The damage compensation, for instance, should be capped at a multiplier of a CRA's income. More specifically, the damages should be limited based on the income from the rating divided by the highest probability of default associated with the letter grade given to the defaulted asset (A.M. PACCES & A. ROMANO, "A Strict Liability Regime for Rating Agencies", European Corporate Governance Institute (ECGI) - Law Working Paper No. 245/2014, available at <https://ssrn.com/abstract=2405509>). Capping a CRA's liability based on the gatekeeper's income is similar to the proposal by COFFEE. As such, the existing flaws under COFFEE's proposal discussed in nos. 453-455 also apply to the 'mitigated' strict liability regime. CRAs should also be able to decide how much they commit themselves to the ratings by choosing a certain degree of liability exposure. CRAs should be given the opportunity in the rating agreement to determine at what level they want to commit their predictions. This allows a CRA's liability to reflect the uncertainty of the forecasting models available to CRAs. The limited ability to foresee the future, along with the unobservability of several variables affecting the performance of the market for ratings, is the reason why a contractual approach on a CRA's liability is preferable. The proposal of PARTNOY discussed in nos. 449-452 contains contractual elements as well and has been subject of criticism for that reason.

[1430] K. HORSEY & E. RACKLEY, *Tort Law*, New York, Oxford University Press, 2011, 528; H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 153-203; J.C.P. GOLDBERG & B.C. ZIPURSKY, *The Oxford Introductions to U.S. Law: Torts*, Oxford, Oxford University Press, 2010, 90-91; C. VAN DAM, *European Tort Law*, Oxford, Oxford University Press, 2013, 297-307.

of the risk the law attributes to the person bearing the liability. For such liability to attach, it is not required that the person held liable committed a wrongful act.[1431] A gatekeeper will be held liable for the misconduct committed by its clients – requesting entities. Applying a strict liability regime for gatekeepers has several benefits. It is considered to be efficient as it forces a gatekeeper to fully internalise the social costs of a requesting entity's wrongdoing. This gives gatekeepers a greater incentive to take optimal precautions and exercise due care. Strict liability also saves courts and regulators from establishing the required standard of care for gatekeepers as is the case under a fault-based regime. This reduces administrative costs.[1432] Strict liability provides gatekeepers with incentives to implement the optimal combination of measures aimed at detecting a requesting entity's misconduct, without imposing an onerous burden on the courts.[1433] It encourages a gatekeeper to take measures for preventing misconduct by requesting entities, without requiring a costly assessment whether the gatekeeper complied with a specific standard of conduct.[1434]

446. Yet, the implementation of a purely strict liability regime encounters some problems. The fee increase following the imposition of strict liability must be sufficiently high to enable gatekeepers surviving when they risk to be held liable for a requesting entity's wrongdoing. Requesting entities might be unable to pay the higher fees or even oppose to its increase, making the adoption of a strict liability regime (politically) infeasible.[1435] The PIP case also illustrates that gatekeepers are not always able to distinguish ex ante honest requesting entities from the more fraudulent ones such as Poly Implant Prothèse. Under strict liability, the gatekeeper will charge a single common but a much higher fee for both types of requesting entities. This inflated fee structure might allow fraudulent requesting entities to access the market, while at the same time forcing honest clients to leave the market.[1436] This can be explained by AKERLOF's 'market for lemons' arising in the context of information asymmetry.

447. Assume, for instance, that some requesting entities offer items of low quality ('lemons'), while others provide items of high quality ('cherries'). If gatekeepers know which entities offer 'lemons' and which do not, two markets would exist: a market for

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[1431] M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 116, no. 187.

[1432] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 347; N.S. ELLIS, L. M. FAIRCHILD & F. D'SOUZA, "Is Imposing Liability on Credit Rating Agencies a Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis", (17) *Stanford Journal of Law, Business & Finance* 2012, 218; A. TUCH, "Multiple Gatekeepers", (96) *Virginia Law Review* 2010, 1622; J. MANNS, "Rating Risk after the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability", (87) *North Carolina Law Review* 2009, 1077-1078; A. HAMDANI, "Gatekeeper Liability", (77) *Southern California Law Review* 2004, 102-103.

[1433] A. HAMDANI, "Gatekeeper Liability", (77) *Southern California Law Review* 2004, 59.

[1434] F. PARTNOY, "Strict Liability for Gatekeepers: A Reply to Professor Coffee", (84) *Boston University Law Review* 2004, 367-368, footnote 13 with further references.

[1435] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 347-349.

[1436] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 347-349.

'lemons' (for low quality items) and a market for 'cherries' (for high quality items). However, there can be a relationship of asymmetric information between requesting entities and gatekeepers leading to the 'adverse selection problem'. Gatekeepers do not always know which requesting entities offer 'lemons', whereas the latter do of course know. Therefore, a gatekeeper is aware there is some probability that the item it has to certify will be a 'lemon'.[1437]

As a consequence, the gatekeeper will charge a higher certification fee than it would if it were certain that the requesting entity was offering a high quality item. Gatekeepers will be charging a higher fee as there is a probability that what they are certifying is a 'lemon'. The uncertainty caused by this asymmetrical information will result in an increase of the certification fee for all certifiers. Fraudulent requesting entities that offer 'lemons' might be willing to pay the increased fee. Arguably, such entities incur less costs to produce the defective items as they do not comply with the applicable quality, safety and technical requirements. They make profits once such items are certified even with a free increase. This is not the case for requesting entities that provide high quality items and meet all requirements. The higher certification fee will discourage such entities to market their items. Eventually, all that will be left in the market are entities producing 'lemons'.[1438]

448. Moving into the direction of a strict liability regime is a "draconian response"[1439] as the fee increase could affect the entire market. Whether this is the case will ultimately depend upon market-specific factors (e.g. the proportion of wrongdoers in the pool of a gatekeeper's clients) influencing both the size of the fee hike and a requesting entity's response.[1440] Against this background, Tel Aviv University law professor HAMDANI concludes that imposing strict liability on a gatekeeper for a requesting entity's misconduct is desirable when the former can either price-discriminate among prospective clients based on their likelihood of engaging in misconduct or take steps eliminating wrongdoing by all of them. As a practical matter, however, these conditions will rarely apply. A gatekeeper, for instance, will not always have the necessary information to determine a fee for a requesting entity depending upon the risk of its misconduct. Acquiring such information might also be too costly.[1441] Therefore, alternatives to a purely strict liability regime have been suggested.

B. PARTNOY's 'Modified' Strict Liability Regime

449. The 'modified' strict liability proposal by PARTNOY needs to be seen in connection with provisions dealing with the registration statement under Section 11 of the US Securities Act of 1933. It has already been mentioned that liability under Section 11 is

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[1437] G.A. AKERLOF, "The Market for "Lemons": Quality Uncertainty and the Market Mechanism", (84) *The Quarterly Journal of Economics* 1970, 488.

[1438] G.A. AKERLOF, "The Market for "Lemons": Quality Uncertainty and the Market Mechanism", (84) *The Quarterly Journal of Economics* 1970, 488.

[1439] F. PARTNOY, "Strict Liability for Gatekeepers: A Reply to Professor Coffee", (84) *Boston University Law Review* 2004, 375.

[1440] A. HAMDANI, "Gatekeeper Liability", (77) *Southern California Law Review* 2004, 103.

[1441] A. HAMDANI, "Gatekeeper Liability", (77) *Southern California Law Review* 2004, 102-103.

not absolute. All defendants except for the issuer have a so-called 'due diligence' defence if they had no reason to believe the statement contained a misstatement or an omission.[1442]

450. According to PARTNOY, US Congress should amend Section 11 to impose strict liability upon all experts for material misstatements and omissions in an issuer's offering documents.[1443] Gatekeepers such as auditors would then be strictly liable for any securities fraud damages paid by the issuer pursuant to a settlement or judgment. Moreover, any due diligence-based defence for securities fraud should be removed. Instead, gatekeepers should be able to limit their liability by agreeing to a percentage of the issuer's liability measured by the damages he paid after a settlement or judgment. Gatekeepers should be able to specify the range of liability as a percentage of the issuer's paid damages, subject to a legal minimum percentage. The percentage could be reached through consensus between the parties, with a minimum limit such as the amount of the gatekeeper's fee or a fixed amount of one to five percent set by law.[1444] Gatekeepers will thus have to comply with a modified regime of strict liability under which the requesting entity and the gatekeeper contract for the latter to bear a minimum percentage of the issuer's damages,[1445] subject to a requirement that the gatekeeper at least bears some specified legal minimum percentage. Assume, for instance, that the minimum percentage set by Congress is five percent. This would in the *Enron* case have implied that Arthur Andersen would have needed to pay five percent of Enron's estimated $80 billion decline in market capitalisation, namely $4 billion.[1446]

451. This modified strict liability regime has some benefits such as avoiding the 'harshness' of a purely strict liability regime or reducing the cost of insurance due to a certain level of predictability on the compensation a gatekeeper will eventually have to pay.[1447] Several important shortcomings, however, remain as well. Concerns, for instance, exist with regard to the deterrence goals pursued by the proposal. Deterrence will be effective when the expected punishment costs for gatekeepers exceed the expected gains of wrongdoing. However, PARTNOY's proposal to use a percentage of the issuer's liability as minimum floor does not have any relationship to the expected gains of a gatekeeper's wrongdoing, nor does it increase the actual sanction for gatekeepers when a requesting entity's misconduct is detected.[1448]

[1442] See the discussion and further references *infra* in nos. 286-287.

[1443] F. PARTNOY, "Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime", (79) *Washington University Law Quarterly* 2001, 540.

[1444] F. PARTNOY, "Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime", (79) *Washington University Law Quarterly* 2001, 492 & 540.

[1445] A. HAMDANI, "Gatekeeper Liability", (77) *Southern California Law Review* 2004, 118.

[1446] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 350.

[1447] F. PARTNOY, "Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime", (79) *Washington University Law Quarterly* 2001, 541-544.

[1448] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 351-352.

452. Problems also arise with the constitutive elements of the proposal. The regime is in essence contract-based. The requesting entity and the gatekeeper contract for the latter to bear a minimum percentage of the entity's losses. Despite PARTNOY's expectations, the market might in most gatekeeping professions remain concentrated. Conscious parallelism in pricing behaviour between the few (major) gatekeepers becomes likely. If there are only four major audit firms, for instance, it is unlikely that they will "compete vigorously and accept liability significantly above any minimum required threshold".[1449] Audit firms could decide to keep their contracted minimum liability specifications low.[1450] Moreover, the requesting entity may not always be induced to bargain for a high percentage of the damages to be borne by the gatekeeper. A higher percentage for one gatekeeper will not meaningfully reduce the risk of liability for requesting entities, given the many items they market or services they offer in different sectors. Requesting entities might even prefer a lower minimum percentage as it would be easier to convince a gatekeeper with a low expected liability to tolerate risky practices.[1451] The proposal also relies on a percentage of the total damages to be paid by the requesting entity as a minimum floor, subject to a specified legal minimum percentage. There might thus be a risk that the way in which potential damages are calculated and the total amount a requesting entity has to compensate could bankrupt a gatekeeper.[1452]

C. COFFEE'S 'Stricter' Liability Regime

453. COFFEE also proposes a shift towards strict liability mechanisms for gatekeepers coupled with a ceiling on their liability. A gatekeeper should be converted into the functional equivalent of an insurer who would back its own certification with an insurance policy capped at a realistic level. If a requesting entity is found liable for €100 million, for instance, the auditor would have to contribute towards that liability up to the amount of its agreed policy.[1453]

The mandatory element under this proposal is a minimum floor on the gatekeeper's insurance policy. This floor would have to equal an adequate multiple of the highest annual revenues the gatekeeper received from its client over the last years. Let us, for instance, consider a multiplier of ten. This means that when the auditor receives a €2 million audit fee from the client, the damages that it will have to contribute would be €20

[1449] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 351.

[1450] F. PARTNOY, "Strict Liability for Gatekeepers: A Reply to Professor Coffee", (84) *Boston University Law Review* 2004, 368.

[1451] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 351; F. PARTNOY, "Strict Liability for Gatekeepers: A Reply to Professor Coffee", (84) *Boston University Law Review* 2004, 369.

[1452] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 350-351.

[1453] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 349-350.

million.[1454] This regime, citing COFFEE, will not require "any showing of fault, but it would also be limited to a level that achieves adequate deterrence without causing the market for gatekeeping services to unravel".[1455]

454. The proposal has several benefits. Foremost, it is essentially regulatory and not contractually. As such, it meets some of the concerns related to PARTNOY's scheme. Moreover, a gatekeeper's liability is not dependent upon the amount of damages a requesting entity might have to pay. The gatekeeper's bankruptcy becomes less likely if a multiple of the revenues from the requesting entity generates the minimum floor on the gatekeeper's insurance obligation. COFFEE also argues that his proposal falls, even if only barely, within the range of politically feasible initiatives as gatekeepers might support it.[1456]

455. At the same time, four fundamental flaws remain, making its implementation unlikely. Each of them is briefly addressed in the following paragraphs.

First, the proposal incorporates private contracting elements by allowing gatekeepers to seek insurance against liability. If a gatekeeper believes that it could obtain a competitive advantage by raising the liability cap and purchase more insurance, COFFEE would apparently permit such behaviour. In this way, the proposal is actually based on a contractual element as well, whereas he criticised PARTNOY's ideas for the same reason.[1457]

Second, problems also remain with regard to capping a gatekeeper's liability based on a multiple of its revenues. The proposal does not consider social costs. It focusses only on the private gains and losses of gatekeepers, not on those for society. Gatekeepers will have to disgorge a multiple of their revenues from a requesting entity, regardless of the magnitude of the latter's fraud. Whether the requesting entity engages in a scheme generating €1000 of harm or €100 million of harm, a gatekeeper will only be liable for a multiple of the highest annual revenues it received. This regime might create incentives for perverse suboptimal gatekeeping behavior.[1458]

Third, the calculation of the revenue and setting a fair and correct amount is not straightforward. The question, for example, arises if the gross or net revenue should be used. Another issue is whether only gatekeeping fees should be taken into account or other (consulting) incomes from the same requesting entity as well. In any case,

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[1454] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 349-350.

[1455] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 349. Also see: A. HAMDANI, "Gatekeeper Liability", (77) *Southern California Law Review* 2004, 118.

[1456] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 349-353.

[1457] F. PARTNOY, "Strict Liability for Gatekeepers: A Reply to Professor Coffee", (84) *Boston University Law Review* 2004, 369.

[1458] F. PARTNOY, "Strict Liability for Gatekeepers: A Reply to Professor Coffee", (84) *Boston University Law Review* 2004, 369.

gatekeepers will want to minimise the total revenues to reduce their liability, whereas requesting entities will have an opposite incentive. Bargaining over a correct amount could result in a compromise, but this can be complex and costly.[1459]

Fourth, the adverse selection problem faced by gatekeepers might increase when a regulator sets a minimum liability cap. It has already been mentioned that requesting entities and gatekeepers can face an information asymmetry. Requesting entities have information about their expected liability that gatekeepers do not possess. It is often too expensive for gatekeepers to monitor these entities to uncover such information, while the latter cannot credibly claim they have disclosed all information. As a result, gatekeepers charge a fee based on the average expected liability costs and not on the expected liability of an individual requesting entity.[1460]

To the extent gatekeepers would, nevertheless, be able to uncover information about a requesting entity's expected liability, they could price discriminate and reduce the adverse selection problem. Although gatekeepers might not be able to discover fraud, they can detect indicia of fraud. This allows gatekeepers to adjust certification fees in response to perceived changes in a requesting entity's expected liability. The problem, however, is that gatekeepers subject to a regime based on a multiple of revenues will find it more difficult to price discriminate. Gatekeepers might want to raise the certification fees for those 'risky' requesting entities, but doing so would increase their expected liability as well.[1461]

6.2.2. Fault-Based Liability Regimes for Gatekeepers

456. The analysis showed that strict liability proposals have several shortcomings. Therefore, some scholars advocate fault-based liability for gatekeepers. They rely on several reasons to come to that conclusion (part A.). As an illustration, I will focus on NYU law professor CHOI's 'self-tailored' gatekeeping liability regime, which incorporates fault-based elements (part B.).[1462]

[1459] F. PARTNOY, "Strict Liability for Gatekeepers: A Reply to Professor Coffee", (84) *Boston University Law Review* 2004, 371.

[1460] F. PARTNOY, "Strict Liability for Gatekeepers: A Reply to Professor Coffee", (84) *Boston University Law Review* 2004, 374.

[1461] F. PARTNOY, "Strict Liability for Gatekeepers: A Reply to Professor Coffee", (84) *Boston University Law Review* 2004, 374.

[1462] Similar to strict liability regimes, several fault-based proposals have been made for individual gatekeepers. For instance, MANNS advances a negligence-based regime for CRAs. He proposes a limitation of the liability of CRAs in cases of gross negligence coupled with a cap on the basis of a multiple of the annual rating fees. CRAs would be held liable when their behavior is of such a nature and degree that it constitutes a gross deviation from a reasonable person's standard of care. MANNS would complement this approach by providing the SEC with enforcement discretion to impose sanctions if CRAs act negligently (J. MANNS, "Rating Risk after the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability", (87) *North Carolina Law Review* 2009, 1080-1082). Different shortcomings, however, remain. Foremost, the analysis in no. 455 illustrated that capping a CRA's liability based on a multiple of fees can be problematic. The proposal is also mainly oriented on the situation in the US, making its implementation in other legal traditions less likely.

A. General Considerations

457. A fault-based liability regime might be a more appropriate standard for certifiers as it comes closer to reality in which certification is not an exact science.[1463] Moreover, a fault-based regime corresponds with the already existing framework for many certifiers[1464] and other professional actors.[1465] As a consequence, regimes based on a negligence standard might be more realistic to implement, especially when the government possess information necessary to set the gatekeeper's level of care and to examine whether it complied with that level of care.[1466] Washington University in St. Louis law professor TUCH examines the application of strict and fault-based liability for interdependent gatekeepers. Gatekeepers are interdependent to the extent a wrongful act is optimally deterred when more than one gatekeeper takes precautions. Policymakers should take into account that gatekeepers are interdependent and not independent – unitary – when designing liability regimes.[1467] By using numerical examples, he concludes that a fault-based regime under which interdependent gatekeepers would be jointly and severally liable is efficient.[1468]

458. Another reason why a fault-based liability regime might be a preferred option relates to the setting in which certification takes place. Strict liability is especially useful in the context of dangerous or hazardous activities. That is because accident risks cannot entirely be minimised or excluded by only increasing a party's level of care. The loss caused by an accident will depend upon a party's participation in the activity that might cause such loss. The risk of an accident and accompanying loss is also reduced to the extent a potential injurer performs the activity less frequently or simply chooses a less risky activity. Activity level changes, however, are not calculated into the due care standard in negligent claims. This standard only deals with the careful performance of services or activities. Strict liability, by contrast, also affects an injurer's activity level as he might reduce his risky activities or move towards less risky ones. If a potential injurer's activity is dangerous and creates a high accident risk, it will be more desirable to control his activity rather than to control the victim's activity. Strict liability is more appropriate

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[1463] N.S. ELLIS, L. M. FAIRCHILD & F. D'SOUZA, "Is Imposing Liability on Credit Rating Agencies a Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis", (17) *Stanford Journal of Law, Business & Finance* 2012, 219.

[1464] See for more information the discussion *supra* in Part II, Chapters I and III.

[1465] N.S. ELLIS, L. M. FAIRCHILD & F. D'SOUZA, "Is Imposing Liability on Credit Rating Agencies a Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis", (17) *Stanford Journal of Law, Business & Finance* 2012, 219.

[1466] A. HAMDANI, "Gatekeeper Liability", (77) *Southern California Law Review* 2004, 102-103.

[1467] A.F. TUCH, "Multiple Gatekeepers", (96) *Virginia Law Review* 2010, 1589-1604. HAMDANI also concludes that the proper regime should be tailored, taking into account several factors such as the presence of multiple gatekeepers. The existence of multiple parties complicates the task of designing an optimal regime of gatekeeper liability by requiring policymakers to identify which third parties should be designated as gatekeepers and held liable for a requesting entity's misconduct (A. HAMDANI, "Gatekeeper Liability", (77) *Southern California Law Review* 2004, 98 & 111).

[1468] A.F. TUCH, "Multiple Gatekeepers", (96) *Virginia Law Review* 2010, 1623-1634.

if it is more important to give injurers an incentive to change the activity level rather than providing victims with a similar incentive.[1469]

459. However, gatekeepers and by extension certifiers as well are not involved in dangerous activities. Therefore, a shift towards strict liability seems not desirable, nor necessary. Take the example of classification societies. Although they survey vessels that transport dangerous substances, the classification of a vessel by itself is not inherently dangerous. It is the actual operation of the vessel that creates the danger. Classification services even aim at making the vessel safer. They do not add perils to the existing dangers of shipping. Moreover, whereas the shipowner or the charterer have control over the vessel at all times, the classification society only surveys it. It is the shipowner who remains strictly liable for oil-pollution damage. If the classification society would be subject to strict liability, it might be held liable for something over which it had no control and for which it was not responsible.[1470]

460. Relying on a fault-based liability regime might also overcome some of the concerns related to a strict liability standard. Strict liability risks to have an over-deterring effect by punishing good-faith gatekeepers that comply with the applicable legislation, even when there was no way or at least no reasonably cost-effective way they could have identified a requesting entity's wrongdoing.[1471] Applying a strict liability standard might in those circumstances undermine the financial position of gatekeepers without much enforcement gain[1472] and cause the market for gatekeepers to fail.[1473] Using a negligence standard can prevent gatekeepers from leaving the market.[1474] Additionally, a strict liability regime only ascertains that a requesting entity committed a wrongful act the gatekeeper was not able to detect. It says nothing about the circumstances in which the action was committed or on the gatekeeper's role and performances. By contrast, a fault-

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[1469] S. SHAVELL, "Strict Liability Versus Negligence", (9) *Journal of Legal Studies* 1980, 24; M.G. FAURE, "Economic Analysis", in: B.A. KOCH, H. KOZIOL & F. D. BUSNELLI (eds.), *Unification of tort law: strict liability*, The Hague, Kluwer law international, 2002, 366-368; W.M. LANDES & R.A. POSNER, "The Positive Economic Theory of Tort Law", (15) *Georgia Law Review*, 1981, 877 & 907.

[1470] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 318-320; B.D. DANIEL, "Potential Liability of Marine Classification Societies to Non-Contracting Parties", (19) *University of San Francisco Maritime Law Journal* 2007, 283-284 coming to similar conclusions. In this regard, reference can be made to the International Convention on Civil Liability for Oil Pollution Damage ("CLC"), which as basic rule imposes strict liability upon the shipowner for any pollution damage caused by the ship (Article III). See for more information the discussion *infra* in nos. 539-545.

[1471] J. MANNS, "Rating Risk after the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability", (87) *North Carolina Law Review* 2009, 1078; H. HONKA, "Classification System and Its Problems with Special Reference to the Liability of Classification Societies", (19) *Tulane Maritime Law Journal* 1994, 22.

[1472] J. MANNS, "Rating Risk after the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability", (87) *North Carolina Law Review* 2009, 1078.

[1473] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 306; A. HAMDANI, "Gatekeeper Liability", (77) *Southern California Law Review* 2004, 102-103; R.H. KRAAKMAN, "Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy", (2) *Journal of Law, Economics and Organization* 1986, 76.

[1474] K. DENNIS, "The Ratings Game: Explaining Rating Agency Failures in the Build Up to the Financial Crisis", (63) *University of Miami Law Review* 2009, 1149.

based regime reveals more information on a gatekeeper's behaviour. This can lead to a gatekeeper's 'stigmatisation'. Socially useful incentives are provided by identifying a gatekeeper's wrongful act, thereby providing for greater deterrence.[1475]

B. CHOI's 'Self-Tailored' Liability Regime

461. The self-tailored liability regime advocated by CHOI incorporates some fault-based elements. Under his regime, gatekeepers themselves would be able to decide on the desired screening procedures and the level of accuracy they will apply. Gatekeepers would be required to submit their decision to the government. They should be allowed to bind or not bind themselves to the chosen procedures for a fixed period. Rather than having one set of duties for gatekeepers, lawmakers will offer a 'menu' of duties from which gatekeepers can make a selection. Gatekeepers should, for instance, be able to decide whether they will be subject to civil liability or criminal penalties for the violation of the procedures. A choice becomes necessary as well on the length of time that any particular liability provision should apply. Some gatekeepers may even completely opt-out of any liability under a self-tailored system if they find that the costs outweigh its benefits.[1476]

462. Gatekeepers that decide not to opt-out from the regime are able to choose from an infinite range of different screening procedures. Some gatekeepers, for instance, may select elaborate procedures that require an intensive investigation of a requesting entity or the latter's items. Others may simply indicate that they will exclusively rely on the requesting entities' statements. Gatekeepers that submit a set of procedures are bound to follow the submitted procedures under the threat of civil or criminal liability and public enforcement. Consequently, the accuracy and reliability of certificates could be increased simply by holding gatekeepers to the terms of their self-tailored regime. This implies that it is no longer required to determine the accuracy level or establish screening procedures. Unlike private contract arrangements, lawmakers can make public the screening procedures submitted to the government under a self-tailored regime. Different sets of standardised publicly available procedures covering a range of screening accuracies may over time arise.[1477]

463. Such a self-tailored regime has several benefits. It allows gatekeepers to bind themselves to a particular screening procedure over a specific period of time. Both present and future clients of gatekeepers may expect to receive the same level of screening accuracy. In a private contracting regime, by contrast, present clients run the risk that the gatekeepers will lower their screening accuracy for future clients. This may have negative effects on present contracting parties. Third parties, for instance, may be inclined to lower their overall assessment of the gatekeeper's screening capacity and unjustly increase their discount of all the existing certified items. Self-tailored liability might also reduce the

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[1475] B. DEFFAINS & C. FLUET, "Social Norms and Legal Design", October 2014, available at <www.law.berkeley.edu/files/LET_2014_2.pdf>.

[1476] S. CHOI, "Market Lessons For Gatekeepers", (92) *Northwestern University Law Review* 1998, 951-952.

[1477] S. CHOI, "Market Lessons For Gatekeepers", (92) *Northwestern University Law Review* 1998, 952-953.

cost of frivolous suits. It allows gatekeepers to avoid such claims simply by choosing not to face any liability at all. It is also argued that a self-tailored liability regime will not delay the ability of gatekeepers to develop new and more cost-efficient procedures. As technology changes and the need of third parties might shift, gatekeepers can respond with the implementation of new procedures in a self-tailored system.[1478]

Regulatory capture[1479] is also less likely with self-tailored liability. Under a traditional gatekeeper regime, only one standard of liability and one set of screening procedures apply. Therefore, gatekeepers may have an incentive to influence that standard and set of procedures. When the law, for example, imposes particular screening duties on gatekeepers, they may consult each other and try to influence regulators to install procedures that provide them with additional work and more profits. The expertise advantage of gatekeepers over regulators might force the latter to rely on gatekeepers when having to determine the content and application of existing legislation.[1480] Self-tailored liability, by contrast, is based on competition between gatekeepers to mitigate against regulatory capture. As legislation no longer involves only one standard of liability or set of screening procedures for all gatekeepers, they lack a collective goal to achieve. Individual gatekeepers competing for business from requesting entities might, therefore, undercut each other's attempts to introduce unnecessary and costly screening procedures. Gatekeepers will develop only those screening procedures that both requesting entities and third parties value as greater than their cost.[1481]

464. Several problems, however, remain under a self-tailored regime, making its implementation unlikely. Gatekeepers that falsely certify low quality items as high quality may abuse the regime and simply opt-out of any liability. Gatekeepers might also face free-riding problems when designing new screening procedures to choose from. Although a set of standardised options for screening procedures will arise under self-tailored liability, no gatekeeper will have incentives to initiate this process as other gatekeepers benefit from these efforts as well. The creation of new procedures is costly and subject to uncertainty in how courts or the government may enforce them. Moreover, gatekeeping markets are often characterised by only a few big players. Thus, the idea of gatekeepers competing for business from requesting entities thereby undercutting each other's attempts to introduce unnecessary and costly screening procedures might not be realistic. Gatekeepers may also find it difficult to establish the specific procedures to generate a desired level of screening accuracy. Gatekeepers that want to employ a seventy percent rate of screening accuracy, for example, will have to develop procedures they believe on average are accurate seventy percent of the time. A self-tailored liability may increase the

[1478] S. CHOI, "Market Lessons For Gatekeepers", (92) *Northwestern University Law Review* 1998, 953-954.

[1479] Regularity capture is the process by which regulatory agencies become dominated by the very industries they were charged to regulate. Regulatory capture implies that a regulatory agency formed to act in the public's interest behaves in ways that benefit the industry it needs to regulate rather than the public. See in this regard: <www.investopedia.com/terms/r/regulatory-capture.asp>.

[1480] S. CHOI, "Market Lessons For Gatekeepers", (92) *Northwestern University Law Review* 1998, 949 & 954.

[1481] S. CHOI, "Market Lessons For Gatekeepers", (92) *Northwestern University Law Review* 1998, 954.

cost of public enforcement as well. Regulators faced with different self-tailored liability regimes may not be able to detect violations for public enforcement.[1482]

7. Conclusions: Identifying the Evaluation Criteria

465. This chapter gave an overview of several proposals aiming to induce certifiers to issue more accurate and reliable certificates. Although each proposal has benefits, the analysis identified their shortcomings as well. These can relate to one or more of the following elements (1) a lack of mechanisms providing certifiers with the necessary incentives to issue more accurate and reliable certificates, (2) the costs associated with a specific proposal, (3) the absence of factors reducing the risk of a certifier's unlimited liability, and (4) practical problems or the absence of a link with existing practices, being it either case law or legislation. As a consequence of these shortcomings, the implementation of the existing proposals is unlikely. One could, therefore, say that their influence on the accuracy and reliability of certificates might be rather 'minor'. As these proposals are not effective, another approach becomes necessary.

[1482] S. CHOI, "Market Lessons For Gatekeepers", (92) *Northwestern University Law Review* 1998, 955-958.

Chapter II – Evaluation Criteria and Existing Proposals

466. This chapter will focus on the elements explaining why the existing proposals aiming to increase the accuracy and reliability of certificates are not always effective. The four identified elements can thus be used as criteria for policymakers to evaluate, reconsider, refine and adjust some of the existing proposals.

467. Not every criterion should or will have the same weight in each proposal. Policymakers may put more emphasis on a particular criterion if the law or a specific proposal already covers other criteria. Some proposals, for instance, could especially aim to provide certifiers with the necessary incentives to issue more accurate and reliable certificates when sufficient factors already exist that reduce the risk of a certifier's unlimited liability. Other proposals might focus on reducing the costs if there are already links with existing practices. One proposal could also be more valuable for a particular type of certifier, whereas another proposal more appropriate in the context of other types of certifiers. In other words, a one size-fits all regime does not exist as certifiers are not alike.[1483] The proper regime needs to be tailored,[1484] thereby taking into account several factors such as the extent to which the liability of a certifier is already addressed by the law, the jurisdiction where the proposal is being made, whether certifiers can monitor requesting entities or the behaviour of third parties relying on the certificate.

468. Even though four separate evaluation criteria are identified, there is no definite and clear delineation between them. They can to a certain extent even overlap. An important criterion is finding appropriate mechanisms inducing certifiers to issue certificates that are more reliable and accurate. This is the reason why it is examined more thoroughly (part 1.) than the costs associated with a specific proposal (part 2.), the lack of factors that reduce the risk of a certifier's unlimited liability (part 3.) and the absence of a link with existing practices (part 4.). In a concluding part, some of the existing proposals are adjusted thereby taking into account the evaluation criteria (part 5).

1. Criterion One: Triggering Mechanism

469. The first evaluation criterion is that proposals should in one way or another provide certifiers with sufficient *incentives* or *triggers* to issue accurate and reliable certificates. This is important as the idea behind certification is to increase confidence in a certified item. The existence of third-party certifiers sends a "clear message"[1485] that an independent entity examines whether an item complies with the applicable requirements. Despite the cautionary wording used to stress the 'limited value' of certificates,[1486] third

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[1483] Cf. A. LABY, "Differentiating Gatekeepers" (1) *Brooklyn Journal of Corporate, Financial & Commercial Law* 2006, 120. See in this regard also Part II, Chapter II concluding that there is not one certifier. Instead, they have different characteristics.

[1484] A. HAMDANI, "Gatekeeper Liability", (77) *Southern California Law Review* 2004, 98.

[1485] I. GIESEN, "Regulating regulators through liability. The case for applying normal tort rules to supervisors", (24) *Utrecht Law Review* 2006, 16.

[1486] See for more information the discussion *supra* nos. 61-65.

parties can rely on certificates when making decisions. Therefore, certifiers should be induced to issue accurate and reliable certificates.

470. Some of the existing proposals do not sufficiently induce certifiers to pay more attention to the reliability and accuracy of their certificates. It is, for instance, unsure whether increasing competition[1487] or establishing government-created and supervised certifiers[1488] will lead to more reliable certificates. Likewise, it remains uncertain if changing a third-party certifier's remuneration structure[1489] or disclosing and disgorging it profits[1490] will by itself enhance the accuracy and reliability of certificates. Tax-incentives for certifiers have also proven to be ineffective due to the impossibility to reward only those CRAs that issue accurate ratings and completely avoid rewarding non-deserving agencies.[1491]

471. One thus needs to find those elements that provide certifiers with incentives to perform their certification even better, in other words with more care and attention to the interests of parties relying on the certificate when making decisions. A possibility in this regard could be to refine proposals in such a way that they impose a risk of liability or an increased risk of liability upon certifiers. Some of the existing proposals dealing with gatekeeping regimes started from the same idea, namely that the threat of gatekeepers' liability or modifications to the applicable liability regime provide them with the necessary incentives to prevent a requesting entity's wrongdoing.[1492] Those proposals, however, encountered other problems. For instance, they were unsuccessful due to high costs related to their implementation or the lack of a link with existing practices.[1493]

472. These gatekeeping regimes are based on the assumption that liability can be used to direct and shape a party's behaviour to achieve a specific result. Against this background, I will examine whether a risk of liability or an increased risk of liability could indeed induce certifiers to issue more accurate and reliable certificates.[1494] A risk of liability can

[1487] See for more information the discussion *supra* in nos. 429-436.

[1488] See for more information the discussion *supra* in nos. 379-382.

[1489] See for more information the discussion *supra* in nos. 389-412.

[1490] See for more information the discussion *supra* in nos. 414-415.

[1491] See for more information the discussion *supra* in nos. 421-422.

[1492] In this regard, DARBELLAY & PARTNOY conclude that "[h]istorically, the threat of liability has been an effective tool in encouraging gatekeeper accountability. In general, gatekeepers are less likely to engage in negligent, reckless, or fraudulent behavior if they are subject to a risk of liability. As rational economic actors, gatekeepers factor in the expected costs of litigation, including the cost of defending lawsuits as well as any damage awards or settlements" (A. DARBELLAY & F. PARTNOY, "Credit Rating Agencies and Regulatory Reform", University of San Diego, Legal Studies Research Paper Series, Research Paper No. 12-083, April 2012, 16).

[1493] See for more information the discussion *supra* in nos. 437-464.

[1494] I do not start from the assumption that a risk of liability or an increased risk of liability necessarily influences a party's behavior. Some important nuances are required in this regard and will be further discussed in nos. 478-486. I am merely concluding that the existing gatekeeping regimes do start from that assumption.

be defined as a chance that liability of a certain nature and magnitude will occur.[1495] The analysis showed that the existing risk of liability by itself is not always sufficient to induce third-party certifiers to issue more accurate and reliable certificates.[1496] This means that certifiers are not always or not sufficiently encouraged to provide reliable and accurate certificates by 'fear' of liability. Therefore, and depending upon the situation, an increased risk of liability might be opportune.[1497]

473. Even when there is a difference between the 'risk' and an 'increased risk' of liability – this ultimately depends upon the situation or the modalities of a specific proposal – the underlying question is the same, namely whether providing an 'appropriate' risk of liability may induce certifiers to issue certificates that are more accurate and reliable. After some general considerations on civil and criminal liability (part 1.1.), a number of arguments are used to find an answer to that question. It is analysed to what extent certifiers can been seen as so-called cheapest cost avoiders of accidents (part 1.2.) and whether the optimum level of care argument can play a role in this regard (part 1.3.). The impact of a certifier's reduced exposure to liability on its incentives to issue reliable and accurate certificates is examined as well (part 1.4.). I will also assess if the reasons traditionally relied upon to deny or restrict liability are convincing for certifiers (part 1.5.). The main findings are summarised (part 1.6.).

1.1. The Choice for Civil Liability

474. Claims can be filed against certifiers under criminal or/and civil law. Some have relied on criminal liability and punishment to provide certifiers with necessary incentives to issue accurate and reliable certificates.[1498] Criminal law is more effective than a purely civil liability regime. It has been argued that a "narrowly tailored"[1499] criminal law targeting CRAs provides a powerful mechanism to punish high-risk misconduct. CRAs

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[1495] L. BERGKAMP, *Liability and Environment: Private and Public Law Aspects of Civil Liability*, The Hague, Martinus Nijhoff Publishers, 2001, 277.

[1496] See in this regard the discussion *supra* in Part II, Chapter III. Classification societies, for instance, can under certain circumstances benefit from sovereign immunity, making liability unlikely. Certifiers might also not have a duty of care towards third parties. Decisions by national courts in the PIP case illustrated that notified bodies do not always have extensive monitoring duties. This lowers the chance of certifiers to be held liable.

[1497] To determine whether an act will result in an increased risk of liability, an *ex ante* or *ex post* test can be used. Especially the *ex ante* approach is relevant for this study. It examines whether the certifier knew at the time when it acted that a particular action (e.g. the issuance of an inaccurate and unreliable certificate) would result in an increased risk of liability. Whether an increased risk of liability was known is determined by the state of the certifier's knowledge. Under an *ex post* approach, one has to examine whether at the time of the claim, it is known that the act results in an increased risk of liability, even if this was not the case when the author acted (L. BERGKAMP, *Liability and Environment: Private and Public Law Aspects of Civil Liability*, The Hague, Martinus Nijhoff Publishers, 2001, 277-278).

[1498] In this regard, a recent study concluded that the lack of criminal prosecutions of key financial executives has been an important factor in creating moral hazard leading to the 2008 financial crisis (N. MURRAY, A.K. MANRAI & L.A. MANRAI, "The Financial Services Industry and Society the Role of Incentives/Punishments, Moral Hazard, and Conflicts of Interests in the 2008 Financial Crisis", (22) *Journal of Economics, Finance & Administrative Science* 2017, 168-190).

[1499] D.A. MAAS, "Policing the Ratings Agencies: The Case for Stronger Criminal Disincentives in the Credit Rating Market", (101) *Journal of Criminal Law & Criminology* 2013, 1021.

should be subject to criminal punishment if they commit any misconduct, even absent knowledge or intent.[1500] Under this proposal, all ratings provided by a NRSRO must be approved by two persons. At least one of them has to be a person working at a CRA's management level. Whoever recklessly certifies or attempts to certify a falsely inflated or depressed rating shall be criminally fined or imprisoned not more than 15 years or both.[1501]

This idea has some advantages. One advantage is that the required *mens rea* (the so-called 'guilty mind') is expressly articulated as recklessness. An intentional element is thus not required. The dual certification requirement will also force the CRA's management to take responsibility for ratings along with rating analysts.[1502] Yet, the proposal is not entirely convincing. A standard of recklessness already existed for CRAs under Section 933(b) of the Dodd-Frank Act. Therefore, it is not as innovative as portrayed. This Section of the Dodd-Frank Act has been revoked by Section 857 of the Financial Choice Act. It seems thus unrealistic that this proposal will be adopted. Moreover, the potential sanctions for individuals are far-reaching. This is problematic as individuals might be subject of 'groupthink'.[1503] Several aspects of corporate structure and function (e.g. organisational norms or the pressure to conform) can undermine individual moral responsibility and lead to irrational decisions.[1504] Imposing criminal sanctions only affecting individuals might in those cases not influence the broader working of the certifier as such.

475. Therefore, Loyola University Maryland law professor ELLIS together with Michigan State University law professor DOW argue that using the corporate ethos model could be a powerful instrument in the context of CRAs. This model is based on the belief that organisations possess an identity independent from specific individuals controlling or working for it. Corporate criminal liability would be appropriate if the government can prove that the corporate ethos encouraged employees to engage in wrongdoing. Under the corporate ethos model, liability is imposed on an entity if its corporate culture encouraged and rewarded a particular criminal activity. The advantage of the corporate ethos model is that it focusses on the corporate culture in its entirety ("the bad barrel"),

[1500] D.A. MAAS, "Policing the Ratings Agencies: The Case for Stronger Criminal Disincentives in the Credit Rating Market", (101) *Journal of Criminal Law & Criminology* 2013, 1005-1038.

[1501] D.A. MAAS, "Policing the Ratings Agencies: The Case for Stronger Criminal Disincentives in the Credit Rating Market", (101) *Journal of Criminal Law & Criminology* 2013, 1028-1029.

[1502] D.A. MAAS, "Policing the Ratings Agencies: The Case for Stronger Criminal Disincentives in the Credit Rating Market", (101) *Journal of Criminal Law & Criminology* 2013, 1028-1029.

[1503] See in general: I.L. JANIS, *Groupthink: psychological studies of policy decisions and fiascoes*, Boston (Mass.), Houghton Mifflin, 1983, 349p.

[1504] W.H. SHAW & V. BARRY, *Moral Issues in Business*, Boston, Cengage Learning, 2015, 21; M.J. ROUSE & S. ROUSE, *Business Communications: A Cultural and Strategic Approach*, London, Thomson Learning, 2002, 38-39.

rather than singling out a specific individual engaged in wrongdoing ("the bad apple") even if the actions of that individual are imputed to the corporation.[1505]

Nevertheless, this model has some disadvantages as well. Proving that the corporate ethos encouraged class surveyors or rating analysts to engage in wrongdoing is not straightforward. It might be even more difficult than (merely) establishing their negligence during the certification process. Moreover, the *Enron* case and the collapse of Arthur Andersen showed that imposing criminal sanctions upon certifiers can have severe consequences. ELLIS and DOW are also wrong when assuming that the threat of civil liability is not effective in controlling corporate behavior. The arguments relied upon to come to that conclusion are not convincing.[1506] CRAs, for instance, are no longer able to always successfully invoke the freedom of speech defence.[1507] Disclaimers excluding the civil liability of CRAs are not always opposable towards investors or *per se* valid only because CRAs claim them to be so.[1508]

476. Against this background, proposals should especially focus on an appropriate risk of *civil* liability for certifiers. Criminal liability is based on assumptions that are not always relevant or applicable in the context of certifiers. The principle of legality can be used as an example. According to that principle, a crime or punishment cannot exist without legal ground (*nullum crimen sine lege, nulla poena sine lege*). A certifier's violation of the obligations during the certification process, however, is not necessarily a crime that is punished as well. Criminal law often requires that a specific act has been committed intentionally.[1509] Such an intent is not always present when certifiers violate their obligations during the certification process. It can simply follow from their negligent behaviour. As such, focussing on a risk of civil liability for certifiers might cover more situations and have a broader scope of application.

[1505] N.S. ELLIS & S.B. DOW, "Attaching Criminal Liability to Credit Rating Agencies: Use of the Corporate Ethos Theory of Criminal Liability", (17) *University of Pennsylvania Journal of Business Law* 2014, 172, 212-213 & 225-226 referring to P.H. BUCY, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability", (75) *Minnesota Law Review* 1991, 1099.

[1506] N.S. ELLIS & S.B. DOW, "Attaching Criminal Liability to Credit Rating Agencies: Use of the Corporate Ethos Theory of Criminal Liability", (17) *University of Pennsylvania Journal of Business Law* 2014, 225-226.

[1507] See for more information the discussion *supra* in Part II, Chapter IV.

[1508] See in this regard for example: *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651. F. Supp. 2d 155, 175-178 (S.D.N.Y. 2009); *Federal Home Loan Bank of Boston v. Ally Financial Inc*., N0. 11-10952-GAO, 3 (D. Mass. 2010); *King County, Washington et al v. IKB Deutsche Industriebank AG et al*, No. 09-08387, 49 (S.D.N.Y. 2012); *California Public Employees' Retirement System v. Moody's Corp*., no. A134912, 28-29 (Cal. Ct. App. 2014); *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2524-2525, 2541-2543; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraph 771. See for more information the discussion *infra* in nos. 552-586.

[1509] B.J. POLLACK, "Time to Stop Living Vicariously: A Better Approach to Corporate Criminal Liability", (46) *American Criminal Law Review* 2009), 1394; C. VAN DEN WYNGAERT, B. DE SMET & S. VANDROMME, *Strafrecht en strafprocesrecht in hoofdlijnen*, Antwerp, Maklu, 2011, 178 & 181-182.

1.2. The Cheapest Cost Avoider and Certifiers

477. There are several (academic) views on the role of tort law.[1510] In addition to corrective or distributive justice,[1511] law and economics scholars understand tort law as an instrument aimed largely at the goal of deterrence (part 1.2.1.).[1512] Once the necessary background is provided on the deterrence function, attention is given to the concept of the 'cheapest cost avoider' and its application in the context of certifiers (part 1.2.2.).

1.2.1. Tort Law and Deterrence

478. According to law and economics scholars, the purpose of damage payments in tort law is not to compensate injured parties but to provide incentives for potential injurers to take efficient cost-justified precautions to avoid causing the accident.[1513] An individual or entity makes the decision about whether or how to engage in a given activity by weighing the costs and benefits of the particular activity. The risk of liability and actual imposition of damage awards may lead parties to take into account externalities[1514] when they decide whether and how to act.[1515] The fact that someone can be held liable *ex post* can provide the necessary incentives *ex ante* to act in such a way to prevent liability.[1516] The purpose of tort law is to promote overall social welfare by efficiently deterring and

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[1510] G.T. SCHWARTZ, "Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice", (75) *Texas Law Review* 1997, 1801. See for an overview and further discussion: J. COLEMAN, S. HERSHOVITZ & G. MENDLOW, "Theories of the Common Law of Torts", in: E.N. ZALTA, *The Stanford Encyclopedia of Philosophy*, 2015, available at <plato.stanford.edu/entries/tort-theories/>.

[1511] Some scholars look at tort law as a way of achieving corrective justice (J. COLEMAN, "Moral Theories of Torts: Their Scope and Limits: Part I", (1) *Law and Philosophy* 1982, 371; E.J. WEINRIB, "Toward a Moral Theory of Negligence Law", (2) *Law and Philosophy* 1983, 37). Corrective justice is the idea that tort liability rectifies the injuries inflicted by one person to another one (E.J. WEINRIB, "Corrective Justice in a Nutshell", (52) *University of Toronto Law Journal* 2002, 349). Tort law can also be seen as a matter of distributive justice. It then deals with the fair apportionment of the burdens and benefits of risky activities or resources between members of the society or a community (G.C. KEATING, "Distributive and Corrective Justice in the Tort Law of Accidents", (74) *Southern California Law Review* 2000, 200).

[1512] See for example: G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 340p.; R.A. POSNER, "A Theory of Negligence", (1) *Journal of Legal Studies* 1972, 29.

[1513] P.H. RUBIN, "Law and Economics", in: D.R. HENDERSON, *The Concise Encyclopedie Economics*, Liberty Fund, 2008, available at <www.econlib.org/library/Enc/LawandEconomics.html>; M.G. FAURE, J.A. LOONSTRA, N.J. PHILIPSEN & W.H. VAN BOOM, "Naar een Kostenoptimalisatie van de letselschaderegeling: een verkenning", (21) *Aansprakelijkheid, Verzekering & Schade* 2011, online PDF version Kluwer Navigator, 3-4.

[1514] An externality, either positive or negative, is a term used in economics to describe a cost or benefit of a transaction incurred or received by other members of the society but not taken into account by the parties to the transaction. This means that parties other than the primary participants in the transaction (i.e. producers and consumers) can be affected by it (e.g. pollution). Tort litigation tries to shift the cost of negative externalities to those entities creating them (R. LIPSEY & A. CHRYSTAL, *Economics*, Oxford, Oxford University Press, 2015, 312).

[1515] J.C.P. GOLDBERG, "Twentieth-Century Tort Theory", (91) *Georgetown Law Journal* 2003, 545.

[1516] M.G. FAURE & T. HARTLIEF, *Nieuwe risico's en vragen van aansprakelijkheid en verzekering*, Deventer, Kluwer, 2002, 19; I. GIESEN, "Regulating Regulators through Liability - The Case for Applying Normal Tort Rules to Supervisors", (2) *Utrecht Law Review* 2006, 14-15; A.F. POPPER, "In Defense of Deterrence", (75) *Albany Law Review* 2012, 181.

reducing accidents in the future.[1517] In other words, tort liability aims to deter unreasonable risks.[1518]

479. The assumptions upon which the traditional law and economics literature is based have been challenged in academia. Behavioural law and economics scholars, for instance, question the underlying rational choice assumptions and endeavour to render economic analysis more realistic by using psychological insights.[1519] Several (empirical) studies even show that tort law does not always have the expected deterring influence on someone's behaviour.[1520] Taking these considerations into account, I will not conduct empirical research myself. Instead, I will merely examine the application of some (basic) ideas developed by law and economics scholars that can be relevant to increase the

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[1517] J.C.P. GOLDBERG, "Twentieth-Century Tort Theory", (91) *Georgetown Law Journal* 2003, 544; G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 24 & 26; M.G. FAURE, "Calabresi and Behavioural Tort Law and Economics", (1) *Erasmus Law Review* 2008, 93.

[1518] D. ROSENBERG, "The Judicial Posner on Negligence Versus Strict Liability: Indiana Harbor Belt Railroad Co. v. Am. Cyanamid Co", (120) *Harvard Law Review* 2007, 1212 (citing *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co*., 662 F. Supp. 635, 1181–82 (N.D. Ill. 1987)); A.D. MILLER & R. PERRY, "The Reasonable Person", (82) *NYU Law Review* 2012, 328. Some studies indeed assume that tort law has a deterring influence on a person's behaviour (e.g. T.C. JR. GALLIGAN, "Deterrence: The Legitimate Function of the Public Tort", (58) *Washington and Lee Law Review* 2001, 1020; A.F. POPPER, "In Defense of Deterrence", (75) *Albany Law Review* 2012, 181; W.M. LANDES & R.A. POSNER, *The Economic Structure of Tort Law*, Harvard, Harvard University Press, 1987, 10; J.H. ARLEN, "Compensation Systems and Efficient Deterrence", (52) *Maryland Law Review* 1993, 1133; G.T. SCHWARTZ, "Reality and the Economic Analysis of Tort Law: Does Tort Law Really Deter?", (42) *UCLA Law Review* 1994, 377; R. FISCHMAN, "The Divides of Environmental Law and the Problem of Harm in the Endangered Species Act", (83) *Indiana Law Journal* 2008, 685; Z. ZABINSKI & B.S. BLACK, "The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform", Northwestern Law & Econ Research Paper No. 13-09, February 15, 2015; S. SHAVELL, *Foundations of Economic Analysis of Law*, Cambridge, Belknap press of Harvard university press, 2004, 177-256.

[1519] See in this regard: K. MATHIS, *European Perspectives on Behavioural Law and Economics*, SpringerLink (Online service), 2015, 271p.; C. JOLLS, C.R. SUNSTEIN & R. THALER, "A Behavioral Approach to Law and Economics", (50) *Stanford Law Review* 1998, 1476 ("We will describe the differences by stressing three important "bounds" on human behavior, bounds that draw into question the central ideas of utility maximization, stable preferences, rational expectations, and optimal processing of information […]. People can be said to display *bounded rationality*, *bounded willpower*, and *bounded self-interest*"); J.D. WRIGHT & D.H. GINSBURG, "Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty", (106) *Northwestern University Law Review* 2015, 1033; Y. HALBERSBERG & E. GUTTEL, "Behavioral Economics and Tort Law", Hebrew University of Jerusalem Legal Studies Research Paper Series No. 02-15, September 1, 2014, 2, available at <https://ssrn.com/ abstract=2496786> holding that "[t]he variety and robustness of biases that affect people's [rational choice] assessments of probabilities is another reason for the importance of behavioral economics to tort law".

[1520] See for example: D.W. SHUMAN, "Psychology of Deterrence in Tort Law", (42) *University of Kansas Law Review* 1993, 165; R.N. PEARSON, "Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell", (36) *University of Florida Law Review* 1984, 417; M. VAN DAM, "Fault en no-fault. Een theoretisch en empirisch onderzoek naar de gedragseffecten van fault en no-fault bij verkeersongevallen", in: W.H. VAN BOOM, I. GIESEN & A.J. VERHEIJ (eds.), *Gedrag en privaatrecht. Over gedragspresumpties en gedragseffecten bij privaatrechtelijke leerstukken*, The Hague, Boom Juridische Uitgevers, 2008, 341-366; J.W. CARDI, R.D. PENFIELD & A.H. YOON, "Does Tort Law Deter Individuals? A Behavioral Science Study", (9) *Journal of Empirical Legal Studies* 2012, 567. See for an overview and further references: J.C.P. GOLDBERG, "Twentieth-Century Tort Theory", (91) *Georgetown Law Journal* 2003, 513-584; S.D. SMITH, "Critics and the Crisis a Reassessment of Current Conceptions of Tort Law", (72) *Cornell Law Review* 1987, 765-798; Z. ZABINSKI & B.S. BLACK, "The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform", Northwestern Law & Econ Research Paper No. 13-09, February 15, 2015, 4.

accuracy and reliability of certificates. The threat of liability and its influence to shape a particular behaviour might play a more important role in the context of certifiers than, for example, in traffic-related matters. The incentive provided by tort law will be lower in traffic as people are inclined to prevent accidents by the wish to protect their own safety rather than by the risk to be sued in court. This is an instinctive reaction and not "calculated negligence",[1521] whereas certifiers who are professional entities operating on a commercial basis can be presumed to act more rationally. As profit maximisers, they can weigh the costs and benefits of their actions carefully and take a decision to prevent liability.[1522]

480. Law and economics scholars argue that injurers might adopt cost-justified safety measures if the system holds them liable for the injury costs they generate.[1523] The risk of having to bear financial burdens due to liability could serve as an incentive for potential tortfeasors to avoid injury-causing activities or at least to provide them with greater regard for safety.[1524] If tort law is working correctly, the threat of civil liability will cause actors to take all and only those precautions that cost less than the harm that is expected to result if those precautions are not taken.[1525] Based on this reasoning, certifiers will take into account – 'internalise' – the risk of civil liability and potential damage awards when issuing their certificates.[1526] This in turn might enhance their reliability and accuracy. However, an appropriate risk of liability and its influence on the accuracy and reliability of certificates seems only useful if four conditions are met.

481. First, an appropriate risk of liability for certifiers does not create incentives to act carefully if there is no actual threat or possibility to file legal suits.[1527] A party might, for instance, be able to escape liability when the loss it caused is widely dispersed over many victims. Each of these victims then incurs a small fraction of the loss, making it 'unattractive' for them to individually initiate legal actions.[1528]

[1521] C. WITTING, *Streets on Tort*, Oxford, Oxford University Press, 2015, 18.

[1522] I. GIESEN, "Regulating regulators through liability. The case for applying normal tort rules to supervisors" (24) *Utrecht Law Review* 2006, 16; I. GIESEN, *Toezicht en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de rechtvaardiging voor de aansprakelijkheid uit onrechtmatige daad van toezichthouders ten opzichte van derden*, Deventer, Kluwer, 2005, 148-149.

[1523] S.D. SMITH, "Critics and the Crisis a Reassessment of Current Conceptions of Tort Law", (72) *Cornell Law Review* 1987, 772 with further references in footnote 28.

[1524] C. BROWN, "Deterrence in Tort and No-Fault: The New Zealand Experience", (73) *California Law Review* 1985, 976-977. See in this regard also: A. DARBELLAY, *Regulating Credit Rating Agencies*, Cheltenham, Edward Elgar, 2013, 226 concluding that the presence of litigation costs is deemed to encourage CRAs to provide more accurate ratings.

[1525] J.C.P. GOLDBERG, "Twentieth-Century Tort Theory", (91) *Georgetown Law Journal* 2003, 545.

[1526] See in this regard also: P. DUFFHUES & W. WETERINGS, "The quality of credit ratings and liability: the Dutch view", (8) *International Journal of Disclosure and Governance* 2011, 352.

[1527] S. SHAVELL, "Liability for Harm versus Regulation of Safety", (13) *The Journal of Legal Studies* 1984, 363.

[1528] S. SHAVELL, "Liability for Harm versus Regulation of Safety", (13) *The Journal of Legal Studies* 1984, 363.

Yet, this argument is not convincing in the context of certifiers. Claims have already been filed against certifiers even when the loss was widely dispersed. Thousands of PIP breast implants filled with sub-standard silicone gel were distributed around the world. Nevertheless, women who purchased the implants claimed compensation for the harm caused by their (potential) rupture. Victims brought proceedings against TüV Rheinland in Germany and France. The sinking of a vessel can also lead to widely dispersed damage. A maritime disaster can involve environmental pollution (e.g. the *Erika* case) or pure economic loss (e.g. the cases of the *Spero* or the *Paula*). Yet, claims have already been successful against classification societies that certified the vessels.[1529]

482. Parties might also be more reluctant to initiate a legal procedure when there is a longer period before the loss manifests itself after the wrongful act. The evidence necessary for a successful claim might, for instance, no longer be available or the responsible parties could already be out of business by the time the suit is initiated. Once again, this seems not a major concern for certifiers. Evidence that a certifier did not comply with its obligations during the certification process might in most cases keep on existing after the issuance of the certificate or the item's default. Certifiers are often required to keep records, documents and information during the certification process.[1530]

[1529] See for more information the discussion *supra* in Part II, Chapter III. It might in this regard be interesting to include claims against certifiers in the collective mass claims settlement procedure provided for in the Articles XVII.35-70 of the Belgian Code of Economic Law (Loi du 28 mars 2014 portant insertion d'un titre 2 "De l'action en réparation collective" au livre XVII "Procédures juridictionnelles particulières" du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique, no. 2014011217, published in the *Moniteur belge* on March 29, 2014). A class representative is allowed to introduce an action for collective redress where a group of consumers has suffered harm resulting from a company's breach of contract or violation of certain specified statutory provisions and EU regulations relating to consumer protection (P. TAELMAN & C. VAN SEVEREN, *Civil Procedure in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 108). Since recently, this also applies for micro, small and medium-sized enterprises (see in this regard: Loi du 30 Mars portant modification, en ce qui concerne l'extension de l'action en réparation collective aux P.M.E., du Code de droit économique, no. 2018011728, published in the *Moniteur belge* May 22, 2018). When this (limited) lists has to be amended, one could also include the MDR/MDD (ensuring a high level of safety and health for patients and users), the different EU regulations on credit rating agencies (aiming to achieve a high level of consumer and investor protection) and the legislation on ROs (enhancing safety at sea and preventing marine pollution). However, there are some important limitations as well. For instance, the class action has to be brought by an adequate class representative (e.g. consumer associations and authorised non-profit organisations, of which the statutory aim corresponds with the collective harm, have standing to bring a class action). It is also required that the class action appears to be more effective than (or superior to) an individual civil action (S. VOET, "Belgium's New Consumer Class Action", in: V. HARSAGI & R. VAN RHEE, *Multi-Party Redress Mechanisms in Europe: Squeaking Mouses?*, Antwerp, Intersentia, 2014, 95-98; P. TAELMAN & C. VAN SEVEREN, *Civil Procedure in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 108-109).

[1530] For instance, CRAs are required to have adequate records and audit trails of their rating activities. These include records documenting the procedures and methodologies used by the CRA to determine ratings or credit analysis and assessment reports (see in this regard Part 7 of Section B of Annex I of Regulation 1060/2009 on credit rating agencies). Classification societies also have to keep documents and records when they perform periodical surveys as ROs (see in this regard Part 3.6. IMO Code for Recognized Organizations, Resolution MSC.349 (92) adopted on 21 June 2013 MEPC.237(65)).

483. Moreover, certifiers might be qualified as deep-pocket defendants – the party with most financial means[1531] – considering that a requesting entity can go bankrupt after a scandal involving one of its items.[1532] In the PIP case, women who purchased the implants claimed compensation for the harm caused by their (potential) rupture. Law suits against manufacturer PIP were fruitless as the company went bankrupt in 2011. Therefore, plaintiffs had to find other targets to obtain compensation for the physical harm or the financial losses they incurred after buying the implants. Against this background, a number of victims brought proceedings against certifier TüV Rheinland.[1533] Similarly, classification societies are also often considered to be deep-pocket defendants, whereas other potential defendants such as shipowners do not always have enough financial means to pay for the loss caused.[1534]

484. Second, no other mechanisms should already make certifiers invest in the accuracy and reliability of certificates. Thus, an appropriate risk of liability has to be necessary to achieve reliable and accurate certificates due to the lack of alternatives ensuring this aim.[1535] This can be the case as reputational constraints alone have not always prevented certifiers from issuing inaccurate ratings,[1536] class certificates[1537] or certificates in the

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[1531] G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 40. See on the revenues of certifiers the discussion *supra* in nos. 7-22.

[1532] K.S. WAN, "Gatekeeper Liability versus Regulation of Wrongdoers", (34) *Ohio Northern University Law Review* 2008, 491-492. A certifier might face the risk of bankruptcy as well when it is qualified as deep-pocket defendant. However, this risk can be smaller than for the requesting entity. In the EU, for instance, Article 1 of the Product Liability Directive stipulates that the producer is liable for damage caused by a defect in his product (Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJ* L 210). Such a strict liability regime does not exist for certifiers in the EU. Moreover, I will show in nos. 577-583 that the floodgate argument, which might be closely related to the risk of a certifier's potential insolvency, is not convincing. In addition, proposals inducing certifiers to issue more accurate and reliable certificates should contain factors reducing the risk of a certifier's unlimited third-party liability, eventually resulting in its insolvency (see for more information the discussion *infra* in nos. 550-586).

[1533] See for more information the discussion *supra* in nos. 54 & 97-99.

[1534] J. BASEDOW & W. WURMNEST, *Third-Party Liability of Classification Societies: A Comparative Perspective*, Hamburg, Springer, 2005, 3.

[1535] G. HUSISIAN, "What Standard of Care Should Govern the World's Shortest Editorials? An Analysis of Bond Rating Agency Liability", (75) *Cornell Law Review* 1990, 440.

[1536] Some argued that following the accounting irregularities in the late 1990s, "reputational pressures alone do not create adequate incentives for issuers to disclose material facts, or for gatekeepers to certify that issuers have done so" (F. PARTNOY, "Strict Liability for Gatekeepers: A Reply to Professor Coffee", (84) *Boston University Law Review* 2004, 366). In the context of CRAs, for instance, MIGLIONICO observes that reputational capital and reputation alone are not a workable constraint on gatekeeper certification (A. MIGLIONICO, "Market failure or regulatory failure? The paradoxical position of credit rating agencies", (9) *Capital Markets Law Journal* 2014, 198). See in this regard also: K. DENNIS, "The Ratings Game: Explaining Rating Agency Failures in the Build Up to the Financial Crisis", (63) *University of Miami Law Review* 2009, 1131-1140; F. PARTNOY, "The Siskel and Ebert of Financial Markets: Two Thumbs Down for the Credit Rating Agencies", (77) *Washington University Law Quarterly* 1999, 655-681; V.P. GOLDBERG, "Accountable Accountants: Is Third-Party Liability Necessary?", (17) *Journal of Legal Studies* 1988, 295; R.J. GILSON & R.H. KRAAKMAN, "The Mechanisms of Market Efficiency", (70) *Virginia Law Review*1984, 549.

[1537] As opposed to the situation for CRAs, not many studies have been done on the relationship between the reputation of classification societies and its effect on the quality of certificates. The IACS Code of Ethics only stipulates that classification societies live on their reputation. DANIEL argues that reputational

conformity procedure of medical devices.[1538] Moreover, many of the proposals discussed in the previous parts have not been adopted so far or have several flaws. Therefore, proposals including a (higher) risk of liability might enhance the accuracy and reliability of certificates.

485. Third, an increased risk of liability holds merit if the judicial system is able to determine when exactly the certificate is unreliable or inaccurate.[1539] This is of particular importance considering the widespread use of fault-based liability regimes for certifiers.[1540] Proceedings will be in vain if courts do not have the necessary expertise to determine if a certifier violated its obligations during the certification process.[1541] Judges might not always have the required expertise and face "great difficulty distinguishing significant factors from insignificant ones"[1542] in cases dealing with the liability of certifiers.[1543] A higher risk of liability will increase claims against certifiers without enhancing the welfare of consumers or encouraging certifiers to apply more care if courts are unable to actually impose liability. Additionally, an increased risk of liability for certifiers requires substantial oversight by the government, especially in developing the

effects are sufficient for classification societies. Lawsuits against classification societies do not necessarily make international trade safer. However, that conclusion is not convincing as he starts from debatable assumptions. For instance, classification societies would not have the same incentives as normal for-profit businesses. I disagree with this view. Classification societies are profit-making businesses that provide (certification) services in different sectors with the aim of making profits as well (see in this regard also the Lord BERWICK's dissenting opinion in the *Marc Rich* case). Furthermore, he believes that because a society's managers and surveyors are engineers, they only try to "get things right" without making profits. This is a rather weak argument. Engineers do work at other profit-driven companies in the maritime sector as well (e.g. Dredging International or Jan De Nul). Classification societies have a private function, which illustrates that they can have the same incentives as a normal business (B.D. DANIEL, "Potential Liability of Marine Classification Societies to Non-Contracting Parties", (19) *University of San Francisco Maritime Law Journal* 2007, 292).

[1538] Reference can be made to the PIP breast implant case and the role of TüV Rheinland. Even if the plaintiffs allege that TüV Rheinland acted negligently, the event did not seem to have drastic consequences on the reputation of the certifier. When reading the "Facts and Figures" on its website, TüV achieved all of its major goals in 2015 with revenues of €1.88 billion. As a result, the Group's dynamic and single-minded growth path is set to continue. These facts date from after the claims have been filed against the certifier in Germany and France (TüV Rheinland, "Facts and Figures", available at <www.tuv.com/en/corporate/about_us_1/facts_figures_1/facts_figures.html>).

[1539] G. HUSISIAN, "What Standard of Care Should Govern the World's Shortest Editorials? An Analysis of Bond Rating Agency Liability", (75) *Cornell Law Review* 1990, 440; F.H. EASTERBROOK & D.R. FISCHEL, *The Economic Structure of Corporate Law*, Harvard, Harvard University Press, 1996, 284; S. CHOI, "Market Lessons for Gatekeepers", (92) *Northwestern University Law Review* 1998, 948.

[1540] See on the difference between fault-based liability and strict liability the discussion *supra* in nos. 443-464.

[1541] J.D. KREBS, "The Rating Agencies: Where We Have Been and Where Do We Go From Here", (3) *Journal of Business, Entrepreneurship & the Law* 2009, 158.

[1542] G. HUSISIAN, "What Standard of Care Should Govern the World's Shortest Editorials? An Analysis of Bond Rating Agency Liability", (75) *Cornell Law Review* 1990, 443.

[1543] G. HUSISIAN, "What Standard of Care Should Govern the World's Shortest Editorials? An Analysis of Bond Rating Agency Liability", (75) *Cornell Law Review* 1990, 440 & 443-444.

necessary performance standards. This can lead to additional costs that will eventually be passed on by the certifier to the purchaser of the item.[1544]

However, things need to be seen from a more nuanced perspective. Recent cases dealing with the liability of certifiers show that courts do have the technical capacity to determine when CRAs[1545] or notified bodies[1546] acted negligently. Judges have already held certifiers liable if they did not act with the required care, were not independent or lacked reasonable grounds to issue the certificate. The concerns related to the government's requirement to establish performance standards are not convincing either. Extensive supra- and national standards and regulations have already been adopted in the field of CRAs,[1547] classification societies[1548] and notified bodies.[1549] Some of this legislation even explicitly deals with their liability towards third parties.[1550] As such, regulators would not have to start from an empty sheet when drafting additional legislation dealing with the liability of a specific certifier.

486. Fourth, one can also use SHAVELL's determinants on the relative desirability of liability as opposed to safety regulations. Some determinants underpin the conclusion that proposals containing an appropriate risk of liability for certifiers are "desirable"[1551] from a social point of view.[1552] One determinant deals with the difference in knowledge between private parties and a regulatory authority regarding risky activities. This knowledge, for instance, relates to the benefits of activities, the costs of reducing risks or the probability and severity of the risks. When private parties have superior knowledge of these elements, it would be more appropriate for them to decide about the control of the risks. This indicates an advantage of liability rules.[1553]

[1544] M. GUDZOWSKI, "Mortgage Credit Ratings and the Financial Crisis: The Need for a State-Run Mortgage Security Credit Rating Agency", (1) *Columbia Business Law Review* 2010, 132.

[1545] See for example: *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200 affirmed in *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65.

[1546] See for example: Tribunal de Commerce Toulon, November 14, 2013, no. RG 2011F00517, no. 2013F00567, 144 (available at the online legal database Dalloz).

[1547] See for example: Regulation 1060/2009 on credit rating agencies and its subsequent amendments or Commission Delegated Regulation 447/2012 supplementing Regulation 1060/2009 on credit rating agencies by laying down regulatory technical standards for the assessment of compliance of credit rating methodologies.

[1548] See for example: Directive 2009/15 and Regulation 391/2009 on common rules and standards for ship inspection and survey organisations or the IMO Code for Recognized Organizations, Resolution MSC.349 (92) adopted on 21 June 2013 MEPC.237 (65).

[1549] See for example: Recommendation 2013/473 on the audits and assessments performed by notified bodies in the field of medical devices; Directive 93/42 concerning medical devices; Regulation 2017/745 on medical devices.

[1550] See for more information the discussion and further references *supra* in nos. 211-231.

[1551] S. SHAVELL, "Liability for Harm versus Regulation of Safety", (13) *The Journal of Legal Studies* 1984, 366.

[1552] S. SHAVELL, "Liability for Harm versus Regulation of Safety", (13) *The Journal of Legal Studies* 1984, 358-359.

[1553] S. SHAVELL, "Liability for Harm versus Regulation of Safety", (13) *The Journal of Legal Studies* 1984, 359.

Private parties can have more knowledge than regulatory authorities on a certifier's activities. This surely is the case for requesting entities that are in a confidential and close relationship with a certifier. Due to this relationship, requesting entities will often have a better understanding of a certifier's *modus operandi* than governmental bodies. Some third parties might even be in a better position than public entities to judge a certifier's activities. Take the example of sophisticated investors in the context of CRAs. Those private investors might have expertise concerning structured finance and access to more resources to examine a particular rating than financial supervisors. Even when a government has superior information regarding a certifier's activity, the adoption of direct regulation is not always socially more desirable.[1554] Public authorities, for instance, often supervise the working or registration of third-party certifiers.[1555] The government might, therefore, have more relevant and up-to-date information on a certifier's activities than certain private parties.[1556] Based on this information, regulators might file liability claims against certifiers.[1557]

1.2.2. Certifiers as Cheapest Cost Avoiders

487. These preliminary considerations show that proposals containing an appropriate risk of liability might be useful in the certification sector. This opens the door for more specific reasons why a risk of liability or an increased risk stimulates certifiers to issue certificates that are more accurate and reliable. One of these reasons is the cheapest cost avoider argument. Following that argument, liability should be imposed on the least cost avoider of socially undesirable harm. In order to reach this goal, one needs to hold those

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[1554] S. SHAVELL, "Liability for Harm versus Regulation of Safety", (13) *The Journal of Legal Studies* 1984, 359.

[1555] See for more information the discussion *supra* in nos. 112-135.

[1556] S. SHAVELL, "Liability for Harm versus Regulation of Safety", (13) *The Journal of Legal Studies* 1984, 360; K.S. WAN, "Gatekeeper Liability versus Regulation of Wrongdoers", (34) *Ohio Northern University Law Review* 2008, 491.

[1557] However, this is only possible when the requirements of the admissibility of a legal action are met. In Belgium, for instance, Articles 17-18 of the Judicial Code provide for two admissibility requirements: the party initiating a claim must have legal standing (*qualité*) and must demonstrate a legitimate, personal and immediate interest in bringing the case before the court (*intérêt*). Another important admissibility requirement is that the party bringing the action must have legal capacity (*capacité*) to do so (P. TAELMAN & C. VAN SEVEREN, *Civil procedure in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 77-78). There are also more specific requirements with regard to liability claims. For instance, harm will only considered damage if the injured interest is personal to the claimant. In case of injury to a public interest, the harm is considered not to be suffered by any individual person (M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 43, no. 59; H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoeding-sstelsels*, Bruges, die Keure, 2014, 57-60). As such, claims by public authorities against certifiers are not always possibible or succesful. Nevertheless, claims have already (succesfully) been filed against certifiers as well. Reference can be made to the *Erika* case in which the French Government initiated proceedings against classification society RINA (see for more information the discussion *supra* in nos. 172-173 and *infra* in no. 544). Another example has its roots in the 2008 financial crisis when the US Department of Justice filed a lawsuit against Standard & Poor's alleging that the CRA engaged in a scheme to defraud investors in structured financial products (see in this regard also the discussion *infra* in no. 503).

parties liable that are able to prevent the unwanted accidents at the lowest cost, namely the cheapest cost avoider.[1558]

488. Parties directly responsible for the item such as requesting entities will be the cheapest cost avoiders of losses caused by the item itself. They are responsible for creating or marketing the certified items. As such, those entities are in a good position to ensure their safety or quality during the production process, thereby preventing accidents from taking place. However, requesting entities are not necessarily able to verify the working, quality or safety of their items once they have been marketed or certified. They might be unable to reduce the costs once accidents occurred or after the marketing of a product that turns out to be defective. Requesting entities could also become judgement-proof when their certified items collapse. If those entities are insolvent, they cannot compensate any of the losses that third parties or the society incurred. This could lead to additional costs after the accident, for third parties will have to find alternatives to get compensation and initiate legal actions against other parties to that end.

489. Yet, requesting entities might not be the only parties able to minimise the sum of accident costs and costs of avoiding accidents associated with an item. By performing the certification process, certifiers can restrict the marketing of a potential defective item. Thus, they are in a position to prevent unwanted accidents with a particular item as well. A certifier can become the second best cheapest cost avoider due to the solution it provides for the asymmetric information relationship between the third party and the requesting entity. Certifiers can be labelled as the second cheapest cost avoiders of accidents with certified items as they can reduce the primary (part A.), secondary (part B.) and tertiary costs (part C.).[1559]

A. Reduction of Primary Costs

490. Primary costs directly result from the accident itself. They can be minimised by reducing the number and severity of accidents.[1560] Primary cost reduction can be achieved through general or specific deterrence.[1561] Accidents can always occur in the certification

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[1558] G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 135-140; R.A. POSNER, "Guido Calabresi's 'The Costs of Accidents': A Reassessment", (64) *Maryland Law Review* 2005, 15-16.

[1559] G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 26-28; R.A. POSNER, "Guido Calabresi's 'The Costs of Accidents': A Reassessment", (64) *Maryland Law Review* 2005, 15-16; S.G. GILLES, "Negligence, Strict Liability, and the Cheapest Cost-Avoider", (78) *Virginia Law Review* 1992, 1292.

[1560] G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 26-27 & 68-131; M.G. FAURE, "Calabresi and Behavioural Tort Law and Economics", (1) *Erasmus Law Review* 2008, 93.

[1561] General deterrence minimises the number and severity of accidents by deterring potential injurers to make an appeal to the market. If the price of every activity reflects its accident costs, individuals would be able to determine whether the benefits of a particular activity outweigh the costs. It gives them the choice to engage in the activity and pay the costs of doing so or, given the accident costs, participate in safer activities that might otherwise be less desirable. Specific deterrence implies that a collective decision is taken regarding the degree to which society wants a specific activity, who should participate in it and how it should be done. Activities that are desirable will be subsidised, those that are not will be penalised.

sector, for example when the requesting entity is fraudulent or masks certain shortcomings in the item that needs to be certified. Nevertheless, certifiers can reduce the number and severity of accidents in three ways.[1562]

491. First, certifiers can lower the costs to victims resulting from purchasing the defective or unsafe items (so-called 'damage costs'). Foremost, they are expected and can under law even be required to refuse issuing a certificate when the item does not comply with the applicable requirements. The requesting entity will not be able to market the item if a certificate is legally required. Even when certification is not mandatory, a certifier is still expected to independently establish whether an item complies with the applicable requirements. If this is not the case, certifiers should refrain from issuing a certificate. As a result, the item will not have a certificate when it is placed on the market. The lack of certificate might 'warn' the general public that the item can be defective and cause losses. Consequently, an item that is not certified will not be purchased by third parties, reducing damage costs.

Certifiers are also able to minimise the damage costs caused by the item's default considering their surveillance and monitoring obligations during the third stage of the certification process. They often have to monitor the certified item and withdraw the certificate if necessary. By doing so, certifiers can induce requesting entities to recall the items when they do no longer comply with the applicable requirements for which a certificate has been given.[1563]

492. Second, certifiers can reduce some of the costs made to prevent that a certified item causes losses (so-called 'prevention costs'). If certifiers correctly perform their services, items that do not comply with the applicable requirements are not marketed or given a certificate. The risk that defective items would cause losses eventually affecting society are thus reduced. The certifier incurs costs when performing the analysis during the certification process and issuing the certificate. However, the requesting entity pays a fee for these certification services covering the certifier's costs. Thus, the costs incurred by certifiers to examine the item's compliance with the applicable legal requirements to prevent accidents are counter-balanced by the certification fees.

Certifiers will often have to keep on monitoring whether the certified items or the requesting entities comply with the applicable standards during the third stage of the certification process. This might be more cost-effective than public authorities scrutinising each individual certified item or requesting entity. The government does not always have the required expertise to undertake such supervision or lacks the necessary confidential relationship with requesting entities. Certifiers can also focus on a small

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Specific restraints will reduce losses by establishing limits on a particular behavior (V. BRUGGEMAN, *Compensating Catastrophe Victims: A Comparative Law and Economics Approach*, Alphen aan den Rijn, Kluwer Law International, 2010, 49; G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 68-69).

[1562] G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 26-27 & 68-131.

[1563] See for more information the discussion *supra* in nos. 77-102.

subset of likely wrongdoers of which they have more and better confidential information.[1564] The certifier's performance costs are "well-spent […] as they reduce the total social cost of misconduct and enforcement".[1565]

More generally, parties use certificates to make decisions without having to examine the items themselves. The costs that individuals would have to bear if they had to examine each item themselves or seek advice from other experts are substantial compared to a situation in which only one expert institution, namely a certifier, issues certificates.[1566] The prevention costs associated with certifiers issuing one certificate for a particular item are lower than the costs individual third parties would have to bear upon examining the items they want to purchase. Put simply, "efficient trade would often be distorted, curtailed or blocked"[1567] without certifiers.

493. Third, a reason why certifiers qualify as second best cheapest cost avoiders actually relates to the increase of costs caused by a higher risk of liability. Even with those additional costs, certifiers still qualify as a cheapest cost avoider. These costs can include costs following an enhanced screening of requesting entities, the costs of monitoring requesting entities or certified items, the costs associated with decisions about whether and how to minimise liability exposure ('strategy costs'),[1568] record-keeping costs, costs resulting from compliance with legal requirements and expected litigation-related losses given the potential risk of additional litigation or judicial error.[1569]

494. Certifiers will try to pass on these costs to requesting entities or third parties that purchase the items by increasing the certification fees. Requesting entities will have to raise the price of their items as a consequence. This might be to the detriment of third parties purchasing the items who will eventually have to pay for the higher certification fees.[1570] As a result, those parties might stop purchasing the item when its price increases. Therefore, requesting entities could decide to no longer seek a certification when this is not legally required or, alternatively, refuse to pay the increased fee covering a certifier's additional costs. If this scenario becomes real, certifiers will have to weigh whether

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[1564] K.S. WAN, "Gatekeeper Liability versus Regulation of Wrongdoers", (34) *Ohio Northern University Law Review* 2008, 501-502.

[1565] R.H. KRAAKMAN, "Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy", (2) *Journal of Law, Economics & Organization* 1986, 76.

[1566] G. WAGNER, "Gatekeeper Liability: A Response to the Financial Crisis", Paper presented at the Law and Economics Workshop of Tel Aviv University, August 2013, 2, available at <https://ssrn.com/abstract=2317213>.

[1567] J. BARNETT, "Intermediaries Revisited: Is Efficient Certification consistent with profit maximization?", (37) *Journal of Corporation Law* 2012, 476.

[1568] J. MANNS, "Private Monitoring of Gatekeepers: The Case of Immigration Enforcement", (5) *University of Illinois Law Review* 2006, 905.

[1569] J.M. BARNETT, "Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization", (37) *Journal of Corporation Law* 2012, 497; L.A. CUNNINGHAM, "Beyond Liability: Rewarding Effective Gatekeepers", (92) *Minnesota Law Review* 2007, 341; R.H. KRAAKMAN, "Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy", (2) *Journal of Law, Economics & Organization* 1986, 75.

[1570] C.M. MULLIGAN, "From AAA to F: How the Credit Rating Agencies Failed America and What Can Be Done to Protect Investors'", (50) *Boston College Law Review* 2009, 1296-1297.

continued participation in the market in whole or in part is (still) profitable. They could, for instance, provide their services only to the highest valuing requesting entities or entirely leave the certification market.[1571] This would reduce the total amount of information on a specific items available for market participants[1572] but also lead to "adverse outcome" [1573] for both requesting entities as well as for third parties.[1574]

495. With regard to requesting entities, confidence in a particular item might lower without an independently issued certificate. Certifiers are the "linchpin in any market economy characterized by enormous volumes of transactions conducted among anonymous participants that have limited capacities to directly evaluate each other's products and services".[1575] Requesting entities will have to find other ways to promote their items and could thereby incur additional costs. Those entities, for instance, can perform the certification of an item themselves.[1576] They would not only have to acquire certification expertise to that end but will also lose valuable time to enhance a party's confidence in the certified item. The costs associated with these activities could be larger than merely paying an increased certification fee to the certifier. Independent certificates add value to items as third parties might be more induced to buy them.[1577]

496. The potential certifier's market exit or a restriction on its services can also affect third parties. If an item is offered without independent certificate, third parties will have to find other ways to assess its quality or safety. Such an activity could, however, make a difference in terms of "allocative efficiency".[1578] Allocative efficiency occurs when the production or distribution of goods is in accordance with the preferences of consumers.[1579] If certifiers provide certification services, third parties will not have to investigate the items themselves and incur costs accordingly. If certifiers leave the market or certification becomes restricted, third parties could be exposed to costs as a result

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[1571] J. MANNS, "Private Monitoring of Gatekeepers: The Case of Immigration Enforcement", (5) *University of Illinois Law Review* 2006, 905; J.M. BARNETT, "Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization", (37) *Journal of Corporation Law* 2012, 498.

[1572] J.M. BARNETT, "Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization", (37) *Journal of Corporation Law* 2012, 500.

[1573] J.M. BARNETT, "Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization", (37) *Journal of Corporation Law* 2012, 498.

[1574] See in this regard also: J. MANNS, "Private Monitoring of Gatekeepers: The Case of Immigration Enforcement", (5) *University of Illinois Law Review* 2006, 905; J.M. BARNETT, "Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization", (37) *Journal of Corporation Law* 2012, 498.

[1575] J.M. BARNETT, "Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization", (37) *Journal of Corporation Law* 2012, 476.

[1576] In such circumstances, they are no longer entities requesting for certification services. For reasons of clarity, however, the notion of requesting entities is still used.

[1577] J.M. BARNETT, "Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization", (37) *Journal of Corporation Law* 2012, 476. See in this regard also the discussion *supra* in nos. 4-5 on the existence of an asymmetric relationship between the requesting entity and a third party.

[1578] G. WAGNER, "Gatekeeper Liability: A Response to the Financial Crisis", Paper presented at the Law and Economics Workshop of Tel Aviv University, August 2013, 19.

[1579] G. HUBBARD, A. GARNETT & P. LEWIS, *Essentials of Economics*, Frenchs Forest NSW, Pearson Higher Education, 2012, 18.

thereof. Third parties will have to assess whether the items they purchase comply with the applicable requirements. Each party would have to collect and analyse information about the item, seek advice from experts or perform their own analysis before purchasing an item (e.g. medical devices, vessels or securities). Once again, the costs associated with such activities are substantial compared to the situation in which one certifier issues a certificate that can be used by all third parties.[1580]

497. Taking into account these adverse consequences, requesting entities might to a certain extent be willing to bear the higher certification fees. The question, therefore, arises whether an appropriate risk of liability would really affect the behaviour of certifiers. After all, certifiers might not be induced to 'perform better' when being aware that requesting entities will pay the higher fees anyway. However, the mere fact that certifiers will pass on these costs to requesting entities can already have an influence on their behaviour as well. Some of the costs (e.g. those associated with decisions about minimising liability exposure or expected litigation-related losses) can change over time depending upon whether claims have been filed against a certifier.

Suppose that a lawsuit has been initiated against a CRA or that the latter has been held liable by a court decision. This influences these types of costs. It is conceivable that litigation-related or strategic costs to prevent future claims might increase once a certifier has been subject to a legal claim. Thus, certifiers that have been targeted by third parties for not having complied with their obligations during the certification process or that have been held liable accordingly will have higher costs to pass on to requesting entities. This in turn might 'alarm' third parties and society that these certifiers are not always providing accurate and reliable certificates, eventually affecting the sale of an item certified by that certifier. Underinvesting certifiers will, therefore, be encouraged to invest in the accuracy of their certificates if they want to avoid losing business to competitors.[1581]

B. Reduction of Secondary Costs

498. Secondary costs include the societal costs resulting from the accident.[1582] These costs arise from the economic dislocation or the aggravation of the losses following an accident.[1583] Secondary costs exist due to an inefficient distribution of the losses over the population.[1584] Secondary costs relate to the "costs of bearing the costs of accidents".[1585]

[1580] G. WAGNER, "Gatekeeper Liability: A Response to the Financial Crisis", Paper presented at the Law and Economics Workshop of Tel Aviv University, August 2013, 20.

[1581] G. HUSISIAN, "What Standard of Care Should Govern the World's Shortest Editorials? An Analysis of Bond Rating Agency Liability", (75) *Cornell Law Review* 1990, 432-434.

[1582] G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 27 & 39-67.

[1583] T.E. BILEK, "Accountants' Liability to the Third Party and Public Policy: A Calabresi Approach", (39) *Southwestern Law Journal* 1985, 699; R. MICHAELS, "Two Economists, Three Opinions? Economic Models for Private International Law - Cross Border Torts as Example" in J. BASEDOW & T. KONO (eds.), *An Economic Analysis of Private International Law*, Tubingen, Mohr Siebeck, 2006, 154.

[1584] M.G. FAURE, *Tort Law and Economics*, Cheltenham, Edward Elgar, 2009, 217.

[1585] J. COLEMAN, "The Costs of The Costs of Accidents", (64) *University of Maryland Law Review* 2005, 340

Suppose that the default of a certified item (e.g. a defective implant) causes a €1000 loss to a victim (e.g. a patient that purchased the implant). Spreading such a loss over several parties will result in less dislocation than if it were born by only one person. Similarly, a wealthy person may suffer a smaller diminution of utility from a €1000 loss than a poor person.[1586] Such costs can be minimised by spreading the losses of an accident over different parties and over a longer period of time, by finding the deep-pocket defendant who can bear them or by insurance schemes.

499. The burden of a loss is smaller when more people share it ("interpersonal loss spreading"[1587]) or when they are spread over a longer period of time ("intertemporal loss spreading"[1588]). Liability should, therefore, be shifted from the victims to those parties who have a better capacity to spread the loss over many parties or over a longer period, thereby diluting the societal impact of the loss.[1589]

Arguably, certifiers can minimise secondary costs because they can spread the losses over different parties. A certifier generally has many clients and offers its services in several sectors.[1590] Suppose that a certifier issues a certificate for a particular item that later turns out to be defective. As a consequence, the purchaser that relied on the certificate to buy the item incurs financial losses. It can subsequently target the certifier to recover the loss by claiming that the latter violated its obligations during the certification process. The certifier can spread potential costs following liability over several of its clients by, for instance, minimally increasing the certification fees. Different parties would then carry the burden thereby "taking a series of small sums from many people" instead of taking "a large sum of one person".[1591] In addition, most certifiers already exist for quite a long time. They are able to spread the losses over a longer period. Expenses incurred at one moment might be compensated with incomes in a later stage.

500. Secondary costs can also be minimised by placing them on those persons that are least likely to suffer substantial dislocation as a result of bearing them. The costs of accidents will cause less disutility if they are paid by those parties who suffer limited "social or economic dislocations as a result of bearing them, usually thought to be the

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[1586] J. HARRISON, *Law and Economics in a Nutshell*, St. Paul, West Academic, 2016, 179.

[1587] G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 39; V. NOLAN & E. URSIN, *Understanding Enterprise Liability: Rethinking Tort Reform for the Twenty-First Century*, Philadelphia, Temple University Press, 1995, 133-134.

[1588] G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 42; V. NOLAN & E. URSIN, *Understanding Enterprise Liability: Rethinking Tort Reform for the Twenty-First Century*, Philadelphia, Temple University Press, 1995, 133-134.

[1589] J. STAPLETON, *Product Liability*, Cambridge, Cambridge University Press, 1994, 94.

[1590] See for more information the discussion *supra* in nos. 7-22 & 411-412.

[1591] G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 39.

wealthy [party]".[1592] This usually is the party with the most financial means.[1593] In this regard, it has already been argued that certifiers can be seen as deep-pocket defendants considering that the requesting entity might go bankrupt after a scandal involving one of its items.[1594]

501. Insurance schemes can also be used to minimise secondary costs. Certifiers are able or even required under EU law[1595] to seek insurance coverage for the losses they suffer when the certified item defaults. Certifiers, for instance, can purchase a general liability insurance[1596] or a professional liability insurance.[1597] The existence of these insurance schemes indicates that a certifier might be able to bear the secondary costs caused by the default of a certified item.[1598] Insurers will have to assess the risk of a certifier's potential liability towards third parties.[1599] The intensity of this risk and the amount of premiums that need to be paid accordingly are determined by several factors. These include the spreading of the risk, the frequency and probability with which a certifier will violate its obligations during the certification process and the amount of the loss caused.[1600] Although these elements might be difficult to estimate, they are not insurmountable in the context of certifiers.

The risk of a certifier's third-party liability is not the only example where premiums are difficult to establish in advance. There are not that many nuclear plants or accidents either generating sufficient information to determine the premium for the insurance coverage. Nonetheless, the risks of nuclear accidents can be insured.[1601] Sufficient information also

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[1592] G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 40.

[1593] G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 40.

[1594] See for more information the discussion *supra* in nos. 7-22.

[1595] Notified bodies, for instance, have to take out appropriate liability insurance under the MDR (Article 1.4 Annex VII Regulation 2017/745 on medical devices).

[1596] This is a standard insurance policy issued to businesses to protect them against liability claims for bodily injury and property damage arising out of premises, operations, products and completed operations (see for more information: International Risk Management Institute, "commercial general liability (CGL) policy", available at <www.irmi.com/online/insurance-glossary/terms/c/commercial-general-liability-cgl-policy.aspx>).

[1597] Professional liability insurance covers errors and omissions that result in civil liability actions against a company or a person (e.g. rating analysist or class surveyor). If an incident occurs that could lead to civil liability, the insurance policy will pay for the costs of defence as well as any damage up to the policy limit (see in this regard: T.D. SCHNEID & M.S. SCHUMANN, *Legal Liability: A Guide for Safety And Loss Prevention Professionals*, London, Jones & Bartlett Learning, 2006, 197). Professional liability insurance deals with the protection given to a business from claims of negligence related to a professional service.

[1598] J. COLEMAN, *Risks and Wrongs*, Cambridge, Cambridge University Press, 1992, 204.

[1599] K.S. WAN, "Gatekeeper Liability versus Regulation of Wrongdoers", (34) *Ohio Northern University Law Review* 2008, 496.

[1600] L. SCHUERMANS & C. VAN SCHOUBROUCK, *Grondslagen van het Belgisch verzekeringsrecht*, Antwerp, Intersentia, 2015, 20-21; M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 2010, 195.

[1601] J. ROGGE, "Assurance de la responsabilité civile et nouveaux risques", in: J.L. FAGNART (ed.), *Liber amicorum Jean-Luc Fagnart*, Louvain-la-Neuve, Anthemis, 2008, 257; X., "Verzekering van kerncentrales", *Milieurama* 1984, 22-26.

needs to be available on a certifier's behaviour to calculate the risk of liability.[1602] Certifiers are not held liable on a daily basis. This makes it difficult for insurers to have a clear view on the frequency of the risk that certifiers will face third-party liability as well as the exact amount of the loss. Nevertheless, certifiers have recently incurred liability (e.g. the *Bathurst* case dealing with S&P) or at least been subject of litigation (e.g. the PIP case or the different cases against CRAs following the 2008 financial crisis). Information can thus be sought in these decisions as an indication to calculate the premiums.[1603]

C. Reduction of Tertiary Costs

502. Certifiers can also reduce tertiary costs associated with the default of a certified item. Tertiary costs arise from the treatment of accidents and include the costs of administering primary and secondary cost reduction.[1604] Administrative costs cover the time, efforts and legal expenses borne by private parties in the course of litigation or in coming to settlements, the verification costs of insurance companies and the public expenses of conducting trials or employing judges.[1605]

503. On a more general level, there is an underlying advantage of liability as opposed to detailed and extensive legislation. Third parties will file claims against certifiers only after having incurred the loss. Therefore, most of the potential administrative costs borne by certifiers or other parties will occur after the accident (*ex post*) and not before (*ex ante*).[1606] Even when claims are initiated against certifiers, certifiers might settle procedures in less expensive and burdensome ways than conducting a trial before a

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[1602] K.S. WAN, "Gatekeeper Liability versus Regulation of Wrongdoers", (34) *Ohio Northern University Law Review* 2008, 496.

[1603] In the *Bathurst* case, Local Government Financial Services (LGFS) that marketed the products, ABN Amro that created them and S&P that provided a triple A rating had to pay the New South Wales Regional Councils approximately $15.8M. S&P and ABN Amro also had to compensate LGFS in the amount of approximately $16M. The *Erika* and other recent decisions can provide information to insurers regarding the third-party liability risk of classification societies. RINA, for instance, was ordered to pay €192 million together with Total and the shipowners on top of the fine of €375.000 for maritime pollution. In the PIP case, the *Tribunal de Commerce* in Toulon ordered TüV Rheinland to pay a provisional compensation of €3.000 per person to approximately 1700 patients.

[1604] G. CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis*, New Haven, Yale University Press, 1970, 28.

[1605] S. SHAVELL, "Liability for Harm versus Regulation of Safety", (13) *The Journal of Legal Studies* 1984, 364; R. MICHAELS, "Two Economists, Three Opinions? Economic Models for Private International Law - Cross Border Torts as Example", in: J. BASEDOW & T. KONO (eds.), *An Economic Analysis of Private International Law*, Tübingen, Mohr Siebeck, 2006, 154; S. VAN GULIJK, *European Architect Law: Towards a New Design*, Apeldoorn, Maklu, 2009, 162.

[1606] S. SHAVELL, "Liability for Harm versus Regulation of Safety", (13) *The Journal of Legal Studies* 1984, 364.

court.[1607] In this way, administrative costs other than certain fixed costs can be reduced.[1608]

504. It is inevitable that certifiers will have to bear some of the administrative costs associated with proposals containing an increased risk of liability. Such costs might affect society in general as they can trigger "marketwide" changes.[1609] For instance, when the costs of monitoring requesting entities or legal expenses incurred during the course of litigation are high, certifiers may no longer contract with smaller or newly established requesting entities. The argument goes that such entities can more easily become insolvent or market items that have a higher chance to be defective.[1610] In other words, those entities increase the risk that a certifier will be held liable.[1611]

This argument, however, is not convincing. Besides the lack of data to confirm this conclusion, the 2008 financial crisis showed that not the "young or small or unstructured"[1612] companies posed the greatest risk. Financial incentives and the unreasonable conduct of CRAs themselves contributed to the collapse of financial markets. The unreasonable and profit-oriented behaviour of CRAs, and not the position or size of issuers was an important reason why CRAs have been held liable so far.[1613]

[1607] Certifiers can come to a settlement agreement with plaintiffs. S&P, for instance, agreed to pay $1.5 billion to resolve lawsuits over its ratings on mortgage securities leading to the 2008 financial crisis. The rating agency also reached a $125 million settlement with public pension fund CalPERS (see in this regard: A. VISWANATHA & K. FREIFELD, "S&P reaches $1.5 billion deal with U.S., states over crisis-era ratings", February, 2015, available at <www.reuters.com/article/us-s-p-settlement-idUSKBN0L71C120150203>). Moody's reached an agreement with the US Department of Justice and 21 US States. The CRA agreed to pay almost $864 million to resolve an investigation into ratings on subprime mortgage securities (see in this regard: M. SCULLY & D. MCLAUGHLIN, "Moody's Reaches $864 Million Subprime Ratings Settlement", January 14, 2017, Bloomberg).

[1608] S. SHAVELL, "Liability for Harm versus Regulation of Safety", (13) *The Journal of Legal Studies* 1984, 364.

[1609] R.H. KRAAKMAN, "Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy", (2) *Journal of Law, Economics & Organization* 1986, 75.

[1610] R.H. KRAAKMAN, "Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy", (2) *Journal of Law, Economics & Organization* 1986, 75.

[1611] G. HUSISIAN, "What Standard of Care Should Govern the World's Shortest Editorials? An Analysis of Bond Rating Agency Liability", (75) *Cornell Law Review* 1990, 437-439.

[1612] J.A. SILICIANO, "Negligent Accounting and the Limits of Instrumental Tort Reform", (86) *Michigan Law Review* 1988, 1967; J.C. COFFEE, "Ratings Reform: The Good, The Bad, and The Ugly", (1) *Harvard Business Law Review* 2010, 252 arguing that the threat of liability could lead the CRAs to stop rating "risky structured finance products".

[1613] In the *Abu Dhabi* case, the CRAs did not only rate complex securities but also advised issuers on how to structure and design them to qualify for the highest rating. At the same time, they received rating fees which were "contingent upon the receipt of desired ratings [for such securities] and only in the event that the transaction closed with those ratings" (*Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 167 (S.D.N.Y. 2009)). As such, CRAs knew "that the ratings process was flawed […] that the portfolio was not a safe, stable investment, and […] that [they] could not issue an objective rating because of the effect it would have on their compensation" (*Abu Dhabi Commercial Bank*, 651 F. Supp. 2d 155, 178-179 (S.D.N.Y. 2009)). The judge in the Australian *Bathurst* case concluded that S&P violated its duty of care because the CRA did not have reasonable grounds to assign the rating. The rating was not the result of reasonable care and skill (*Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2814-2836; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 12, 503 & 722). It was held that the analysis of S&P "involve[d] failures of

505. Proposals that are based on a certifier's higher risk of liability can also create administrative costs for governments. Judges, for instance, will have to determine whether a certifier complied with its obligations during the certification process more often. The government will also incur costs when initiating lawsuits against certifiers, monitoring and supervising their functioning or adopting legislation covering their obligations and/or liability.[1614] At the same time, the existence and purpose of certifiers providing services to requesting entities might lower the administrative costs for governments as well. Monitoring and policing certifiers is more cost-effective than extensively supervising all requesting entities individually. Certifiers are fewer in number to monitor and their misbehaviour might be easier to detect. The administrative costs for the government might thus still be lower with an increased risk of liability for certifiers than it would be with more and extensive supervision on all requesting entities.[1615]

1.3. Certifiers and the Optimal Level of Care

506. Another reason favouring proposals based on an appropriate risk of liability for certifiers relates to the optimal level of care argument. The optimal level is the quantity of care that results when the cost of care is equal to the accompanying benefits in terms of a reduction in the risk of loss. It is the level of care minimising the sum of the costs of care and the expected value of the loss.[1616]

507. When certifiers determine the level of care to be applied during the certification process, they will weigh the benefits of applying more or less care against the costs of doing so.[1617] From a theoretical perspective, it is argued that the level of care chosen by certifiers will gravitate to the point where only cost-effective precautions are taken.[1618] Certifiers will thus invest in the accuracy of certificates only until the marginal cost of doing so equals the increase in marginal revenues achieved by displaying greater care.[1619]

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such a character that no reasonable ratings agency exercising reasonable care and skill could have committed in the rating of the CPDOs". In sum, the "[rating] analysis was fundamentally flawed, unreasonable and irrational in numerous respects" (*Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraph 2836; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 12, 566-722).

[1614] For instance, legislation was adopted after the 2008-2009 financial crisis addressing CRAs in the United States (e.g. the Dodd-Frank Act) and in the EU (e.g. the Regulation 1060/2009 on credit rating agencies). Legislation dealing with the role and liability of ROs (e.g. Directive 2009/15 and Regulation 391/2009) was implemented after the *Erika* disaster (the so-called Erika III Package).

[1615] R.H. KRAAKMAN, "Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy", (2) *Journal of Law, Economics & Organization* 1986, 75.

[1616] W.F. SCHWARTZ, "Objective and Subjective Standards of Negligence: Defining the Reasonable Person to Induce Optimal Care and Optimal Populations of Injurers and Victims", (78) *Georgetown Law Journal* 1989, 243.

[1617] T. HAVINGA, "Draagt Aansprakelijkheidsrecht bij aan de Voedselveiligheid? Over de Preventieve Werking van Schadeclaims en Aansprakelijkheidsverzekering", (31) *Recht der Werkelijkheid* 2010, 27.

[1618] R.A. EPSTEIN, "Imperfect Liability Regimes: Individual and Corporate Issues", (53) *South Carolina Law Review* 2002, 1155.

[1619] The goal of companies is to maximise their profits. As such, they want to maximise the difference between their revenues and the costs. To find the profit maximising point, companies look at the marginal revenue and the marginal cost. The marginal revenue is the increase in the total revenue that results from the sale of one additional unit of output. The marginal cost of production is the change in total cost that

Underinvesting in the accuracy and reliability of certificates can, therefore, become a rational profit-maximising strategy for certifiers. This is the case when investing in the accuracy of certificates leads to a marginal change in revenue that is less than the benefits of not investing in an optimal level of accuracy. Certifiers can also be more lenient during the certification process by underinvesting in the accuracy of certificates as the market will not always discover such underinvestment straight away and only be confronted with it once the certified item defaults.[1620]

It is against this background that a proposal increasing the threat of liability could reduce the certifier's rational behaviour of underinvesting in the accuracy and reliability of certificates. A certifier would have to consider whether it is exposing itself to a higher risk of liability by its failure to invest in the accuracy of certificates during the certification process. Imposing the costs of underinvesting in the accuracy of certificates on certifiers might create an incentive for them to be 'more careful' when performing their obligations and issuing the certificate.[1621]

508. Another reason why an increased exposure to liability might rise the certifier's optimal level of care and enhance the accuracy and reliability of certificates can be found in scholarship dealing with a person's information on a product or service. Harvard Law School professor SHAVELL and Stanford Law School professor POLINSKY note that market forces[1622] as well as legislation[1623] can reduce product risks without the need for product liability – that is the liability of manufacturers of products for harms caused to their customers[1624]– when consumers are perfectly informed about the safety of a product.[1625] When consumer information about product risk is perfect, liability is not needed to induce optimal care. The desirable safety precautions have already been taken due to market forces or regulation.[1626]

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comes from making or producing one additional unit of output. When the marginal revenue of selling a good is greater than the marginal cost of producing it, companies are making a profit on that product (I. TUCKER, *Survey of Economics*, Minneapolis, Cengage Learning, 2008, 132).

[1620] G. HUSISIAN, "What Standard of Care Should Govern the World's Shortest Editorials? An Analysis of Bond Rating Agency Liability", (75) *Cornell Law Review* 1990, 431-432.

[1621] G. HUSISIAN, "What Standard of Care Should Govern the World's Shortest Editorials? An Analysis of Bond Rating Agency Liability", (75) *Cornell Law Review* 1990, 431-432.

[1622] When consumers know that the risk of a product is high, they could either avoid buying it or not pay as much as they otherwise would (M.A. POLINSKY & S. SHAVELL, "The Uneasy Case for Product Liability", (123) *Harvard Law Review* 2010, 1443.)

[1623] Products must often comply with specific safety or quality requirements before they can be marketed.

[1624] See in this regard Restatement of the Law, Third, Torts: Products Liability ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect"). See for more information of product liability in Belgium and within the EU: D. VERHOEVEN, *Productaansprakelijkheid en productveiligheid*, Antwerp, Intersentia, 2018, 37-83.

[1625] M.A. POLINSKY & S. SHAVELL, "The Uneasy Case for Product Liability", (123) *Harvard Law Review* 2010, 1443-1453; M. GEISTFELD, "Imperfect Information, the Pricing Mechanism, and Products Liability", (88) *Columbia Law Review* 1988, 1059.

[1626] M.A. POLINSKY & S. SHAVELL, "The Uneasy Case for Product Liability", (123) *Harvard Law Review* 2010, 1454-1455.

509. Considering the limited benefits and the high costs of product liability, both scholars conclude that it may be socially undesirable, especially for widely sold products with respect to which market forces and regulation are relatively strong.[1627] This conclusion does not seem tenable for certifiers. A certificate will probably not be considered as a product. Instead, it constitutes the outcome and result of a process, which is based on a contract of certification between the certifier and the requesting entity.[1628] A certificate gives information on a specific item that has been certified during the certification process. The certificate by itself only makes sense when it is related to the item that has been certified.[1629] Therefore, the relationship between the risk of liability of service providers (e.g. certifiers) to their customers (e.g. requesting entities) or 'strangers' (e.g. third parties) and the quality of the performed services is more relevant. Yet, SHAVELL and POLINSKY argue that even though liability for services is different than product liability, it is analytically identical to it. In the end, a person incurs a loss, either caused by a defective product or service.[1630]

510. However, consumer information with regard to the quality of the certification process is not perfect. It might, for instance, be more difficult for parties to identify and evaluate problems during the certification process than discovering defects associated with products.[1631] There can be a discrepancy between the informational value third parties or requesting entities think a certificate represents and the actual purpose of a certificate or the intention of certifiers.[1632] Certifiers emphasise the limited value of certificates and the responsibility of requesting entities regarding the safety and quality of the items that need to be certified. Nevertheless, third parties will perceive the certificate as a guarantee of safety or quality of the certified item. One could, therefore, argue that consumers' information regarding the certificate is by definition not perfect due to this discrepancy.[1633] Moreover, the information represented by a certificate is not

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[1627] M.A. POLINSKY & S. SHAVELL, "The Uneasy Case for Product Liability", (123) *Harvard Law Review* 2010, 1437.

[1628] B. DEMARSIN, *Expertise, veiling en certificaten in kunsthandel*, Bruges, die Keure, 2009, 357.

[1629] B. DEMARSIN, *Expertise, veiling en certificaten in kunsthandel*, Bruges, die Keure, 2009, 421.

[1630] M.A. POLINSKY & S. SHAVELL, "The Uneasy Case for Product Liability", Harvard Law and Economics Discussion Paper no. 647, 2009, 39, available at <https://ssrn.com/abstract=1468562> ("our logic does not depend on whether an individual is harmed by a defective service or a defective produc").

[1631] M.A. POLINSKY & S. SHAVELL, "The Uneasy Case for Product Liability", Harvard Law and Economics Discussion Paper no. 647, 2009, 39.

[1632] In the context of auditors, this is often referred to as the 'expectation gap'. The American Institute of Certified Public Accountants (AICPA) defines it as "the difference between what the public and financial statement users believe auditors are responsible for and what auditors themselves believe their responsibilities are" (American Institute of Certified Public Accountants, "The Expectation gap standards: progress, implementation issues, research opportunities", American Institute of Certified Public Accountants, 1993, iii).

[1633] See for more information the discussion *supra* in nos. 61-65. For instance, investors consider audit opinions to be a clean bill of health. Users of financial statements "continue to seek redress from the accounting profession under a variety of legal theories" (R.S. PANTTAJA, "Accountants' Duty to Third Parties: A Search for a Fair Doctrine of Liability", (23) *Stetson Law Review* 1994, 935). However, auditors themselves constantly inform their clients on the limited scope of the audit report. The AICPA also issued several 'Statements on Auditing Standards' to deal with the expectation gap (R.S. PANTTAJA,

perfect otherwise legislatures would not require parties to perform their own analysis before purchasing a certified item[1634] or reduce reliance on certificates.[1635]

511. In sum, the case against liability for providers of services for malpractices may be less strong than that against liability for defective products.[1636] An increased risk of liability for certifiers might thus be required to achieve an optimal level of care in the certification market as information related to a certificate is not perfect.[1637] An appropriate threat of civil liability for certifiers might also be relevant from another point of view. An increased risk of liability might induce certifiers to act more carefully during the certification process. Such a risk can operate as a market force and policymakers might even adopt specific legislation dealing with the liability of certifiers. As a consequence, product risk in general might be reduced, which lowers the need for product liability.

1.4. Limited Liability Risk for Certifiers

512. The absence of a sufficiently high risk of liability might be an important reason allowing certifiers to act with less care during the certification process. The situation of auditors in the US can be taken as an example in this regard. The risk that auditors would face liability during the 1990s declined, while the benefits of acquiescence increased. Plaintiffs, for instance, were no longer able to bring aiding and abetting claims against auditors.[1638] At the same time, the SEC was reducing enforcement measures against auditors and suffered budgetary shortfalls.[1639] Thus, "[u]nderdeterred"[1640] auditors not fearing any risk of liability were inclined to perform their obligations less strictly during

"Accountants' Duty to Third Parties: A Search for a Fair Doctrine of Liability", (23) *Stetson Law Review* 1994, 933-934).

[1634] See in this regard for example Article 5a Regulation 1060/2009 on credit rating agencies as inserted by Article 1(6) Regulation 462/2013.

[1635] Reference can be made to the multi-layer approach used by the EU in the field of CRAs to reduce overreliance on ratings. See for more information the discussion *supra* in nos. 427-428.

[1636] M.A. POLINSKY & S. SHAVELL, "The Uneasy Case for Product Liability", Harvard Law and Economics Discussion Paper no. 647, 2009, 39-40.

[1637] HUSISIAN, for instance, concludes that imposing a negligence standard might increase the standard of care that CRAs will apply due to the imperfect information in the context of CRAs (G. HUSISIAN, "What Standard of Care Should Govern the World's Shortest Editorials? An Analysis of Bond Rating Agency Liability", (75) *Cornell Law Review* 1990, 432).

[1638] The elements necessary to convict under aiding and abetting theory are (1) that the accused had a specific intent to facilitate the commission of a crime by another; (2) that the accused had the requisite intent of the underlying substantive offense; (3) that the accused assisted or participated in the commission of the underlying substantive offense; and (4) that someone committed the underlying offense. See for more information: United States Department of Justice, "2474. Elements Of Aiding And Abetting" with further references to case law, available at <www.justice.gov/usam/criminal-resource-manual-2474-elements-aiding-and-abetting>.

[1639] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 318; D.R. TIBBETS, "Tarnished Reputations: Gatekeeper Liability after Janus", (20) *Fordham Journal of Corporate and Financial Law*, 778; L.A. CUNNINGHAM, "Beyond Liability: Rewarding Effective Gatekeepers", (92) *Minnesota Law Review* 2007, 351.

[1640] J.C. COFFEE, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", (84) *Boston University Law Review* 2004, 318.

the certification process. This resulted in more inaccurate and unreliable audit opinions.[1641]

513. The question arises whether auditors and by extension other certifiers as well are (still) underdeterred today. Surely, legislation has been adopted that reduces the risk of a certifier's underdeterrence. Certifiers are monitored to prevent wrongdoing and enforcement measures can be taken by regulators when they do not comply with their obligations during the certification process.[1642] In the case of CRAs, for example, the national competent authority can take supervisory measures when the certifier breaches its obligations under Regulation 1060/2009 on CRAs. It can temporarily prohibit the CRA from issuing ratings with effect throughout the EU, take appropriate measures to ensure that the CRA continues to comply with the applicable requirements or refer matters for criminal prosecution to its relevant national authorities.[1643] Moreover, some of the existing defences invoked by certifiers are not always successful. While CRAs have already been denied First Amendment protection for ratings leading to the 2008 financial crisis,[1644] judges have the possibility to reject immunity protection to classification societies with regard to commercially operated vessels.[1645]

514. At the same time, however, there might still be some elements underdeterring certifiers as well. An in-depth law and economics analysis will have to identify those elements and bring clarity on the extent to which they underdeter certifiers. By way of illustration, one of these elements is examined in the following paragraphs, namely legal uncertainty. After a discussion of the concept (part 1.4.1.), its consequences on the accuracy and reliability of certificates are examined (part 1.4.2.).

1.4.1. The Concept of Legal Uncertainty

515. Legal uncertainty implies that a party is not able to predict in advance how a judge will apply the law or whether a specific action is legal or not.[1646] Identifying when the

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[1641] See for a more extensive discussion: J.C. COFFEE, "The Acquiescent Gatekeeper: Reputational Intermediaries, Auditor Independence and the Governance of Accounting", Columbia Law and Economics Working Paper No. 191, May 25, 2001.

[1642] See for more information the discussion *supra* in nos. 112-135.

[1643] Article 24 Regulation 1060/2009 on credit rating agencies.

[1644] See for more information the discussion *supra* in nos. 297-331.

[1645] See for example the recent case: Court of Appeal Bordeaux, March 6, 2017, no. 14/02185, 8 (available at the online legal database Lextenso). One should, however, also keep in mind that other decisions seem to accept that classification societies can benefit from sovereign immunity in their private role (see for more information the discussion *supra* in nos. 168-174).

[1646] See for example: A. D'AMATO, "Legal Uncertainty", (71) *California Law Review* 1983, 1-2 (using the example of a person seeking assistance from a lawyer regarding the likelihood of successfully suing someone else under a specific law. If a lawyer tells the person that he has a 0.9 chance of winning, the law is quite certain as applied to the facts of the case. However, at 0.7 it is less certain, while a prediction at 0.5 would indicate that the law gives no basis for predicting whether the person will win or lose. If the lawyers' predictions fall below 0.5, the law becomes increasingly certain that the person will lose. At zero, one could say with certainty that there is no cause of action under the applicable law); K.E. DAVIS, "The Concept of Legal Uncertainty", November, 2011, 5, available at <https://ssrn.com/ abstract=1990813> (using the example of the victim of a car accident suing the driver for his negligence. Suppose that ten different persons are asked whether the plaintiff is likely to win or lose the dispute. If all ten people say that the plaintiff has

law is uncertain, requires some indicia.[1647] A statutory provision, for instance, can be uncertain or ambiguous when a lawyer would litigate it in court.[1648] The PIP breast implant case showed that Annex II of the MDD containing the obligations of notified bodies has been litigated in courts in Germany,[1649] France[1650] and eventually even before the European Court of Justice.[1651] The law is also uncertain when legal questions can have multiple answers,[1652] as is the case when dissenting opinions are made.[1653] The dissenting opinion of Lord BERWICK in the *Marc Rich* case illustrates the uncertainty with regard to the existence of a classification society's duty of care towards third parties.[1654] In addition to these indicia, there are also more important elements showing that the certification sector is characterised by legal uncertainty.

516. Legal uncertainty could in the first place arise when doubts remain unresolved over a substantial period of time.[1655] Several examples show that this is the case for certifiers. For instance, courts disagree whether classification societies should benefit from immunity from jurisdiction in their private role. Whereas some rulings allow classification societies to rely on immunity in their private role,[1656] others are far more reluctant.[1657] Uncertainty can also arise with regard to the existence of a certifier's duty of care towards third parties under the tort of negligence. Whereas courts in England have traditionally been reluctant to accept that classification societies have a duty of care,[1658] the *Bathurst* decision held that a CRA can have a duty of care towards vulnerable

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a fifty percent chance of winning, the outcome is uncertain. If by contrast, they put the plaintiff's chance of winning at ten or ninety percent, the legal outcome is more certain); S. HOEPPNER & L. LYHS, "Behavior Under Vague Standards: Evidence from the Laboratory", Jena Economic Research Papers 2016 – 010, May 11, 2016, 2, available at <pubdb.wiwi.uni-jena.de/pdf/wp_2016_010.pdf>; M. LANG, "Legal Uncertainty: A selective deterrent", Preprints of the Max Planck Institute for Research on Collective Goods, No. 2014/17, November 2014, 1; M. LANG, "Legal Uncertainty as a Welfare Enhancing Screen", Preprints of the Max Planck Institute for Research on Collective Goods, no. 2014/17, October 2016, 1.

[1647] I. MACNEIL, "Uncertainty in Commercial Law", (13) *Edinburgh Law Review* 2009, 71-72.

[1648] G. MAGGS, "Reducing the costs of statutory ambiguity: alternative approaches and the federal courts study committee", (29) *Harvard Journal on Legislation* 1992, 125.

[1649] See for example: District Court of Nürnberg-Fürth, September 25, 2013, 11 O 3900/13 (available at the online legal databases Dejure and Juris). Also see: District Court Frankenthal, March 14, 2013, 6 O 304/12, *JurionRS* 2013, 37376, *Medizin Produkte Recht* 2013, 134-138; Court of Appeal Zweibrücken, January 30, 2014 , 4 U 66/13, *JurionRS* 2014, 10232.

[1650] See for example: Commercial Court Toulon, November 14, 2013, no. RG 2011F00517, no. 2013F00567 (available at the online legal database Dalloz).

[1651] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017.

[1652] K. KRESS, "Legal Indeterminacy", (77) *California Law Review* 1989, 320.

[1653] I. MACNEIL, "Uncertainty in Commercial Law", (13) *Edinburgh Law Review* 2009, 79; R. CRASWELL & J.E. CALFEE, "Deterrence and Uncertain Legal Standards", (2) *Journal of Law, Economics, & Organization* 1986, 283.

[1654] *Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 133.

[1655] I. MACNEIL, "Uncertainty in Commercial Law", (13) *Edinburgh Law Review* 2009, 70.

[1656] See in this regard the cases of the *Erika* and the *Al-Salam Boccaccio 98* discussed *supra* in nos. 171-174.

[1657] See for example: Court of Appeal Bordeaux, March 6, 2017, no. 14/02185, 8 (available at the online legal database Lextenso).

[1658] See for example: *Marc Rich & Co AG v. Bishop Rock Marine Co Limited*, [1994] 1 W.L.R. 1071.

investors.[1659] The PIP case also illustrated that uncertainty exists as courts in Germany and France came to different conclusions on the obligations of notified bodies during the conformity assessment procedure of medical devices.[1660]

517. In the second place, uncertainty can be caused by using vague or ambiguous terminology in legal rules.[1661] The choice of such a terminology is often the result of the negotiators' inability to agree on a more precise wording to express the obligations of certifiers or to define their liability.[1662] There are several examples of vague or undefined terms in legislation dealing with certifiers.

Article 35a of the Regulation on CRAs contains terms that are open for debate. The investor has to establish that he 'reasonably relied' on the rating in accordance with Article 5a(1) of the Regulation or otherwise with 'due care'. What is to be understood under the notion 'reasonable reliance' or 'due care' is unclear and not defined in the Regulation.[1663] In any case, users of ratings may not blindly rely on ratings but should take utmost care to perform an own analysis and conduct 'appropriate due diligence' regarding their reliance on credit ratings.[1664] Things are quite similar for classification societies acting as ROs. Article 5.2(b) of Directive 2009/15 deals with the liability of ROs when their activities cause harm for which the government has been held liable. One of the problems, however, is the unclear phrasing and the use of undefined terms such as 'negligence', 'gross negligence' or 'recklessness'.[1665]

518. In the third place, uncertainty can also occur when a settled view is changed by courts[1666] or when enforcement policies are adapted.[1667] Although such a drastic switch is rare, decisions dealing with the liability of certifiers have the potential to change ongoing practices, for they are quite rare and have significant consequences. After the *Bathurst* decision, for example, some claimed that CRAs were no longer bulletproof. As

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[1659] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200 affirmed *in ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65.

[1660] See for more information the discussion *supra* in Part II, Chapter I.

[1661] I. MACNEIL, "Uncertainty in Commercial Law", (13) *Edinburgh Law Review* 2009, 76 (making a distinction between 'conflicting usage' and 'unsettled usage' of a specific term). University of Baltimore School of Law professor MAXEINER also concludes that causes of legal indeterminacy include indefinite rules and an uncertain application of rules (J. MAXEINER, "Legal Indeterminacy Made in America: American Legal Methods and the Rule of Law", (41) *Valparaiso University Law Review* 2016, 522).

[1662] M. FONTAINE & F. DE LY, *Drafting International Contracts*, Leiden, BRILL, 2009, 227.

[1663] See for more information the discussion *supra* in no. 218.

[1664] Recital (10) Regulation 1060/2009 on credit rating agencies.

[1665] J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce*, 2005, 524–527. See for more information the discussion *supra* in no. 226.

[1666] I. MACNEIL, "Uncertainty in Commercial Law", (13) *Edinburgh Law Review* 2009, 70-71.

[1667] R. CRASWELL & J.E. CALFEE, "Deterrence and Uncertain Legal Standards", (2) *Journal of Law, Economics, & Organization* 1986, 279.

such, the decision had a major impact on the rating sector.[1668] Recent cases where First Amendment protection was denied or limited for CRAs have been widely reported in the media as they deviate from former decisions granting a broader protection.[1669] The protection of sovereign immunity to classification societies can also be used as an example. Whereas such protection has traditionally been accepted for ROs, the cases of the *Erika* or the *Al-Salam Boccaccio 98* show that classification societies may also benefit from sovereign immunity in their private role.[1670]

1.4.2. Legal Uncertainty and its Impact on Certifiers

519. The civil liability of certifiers is thus characterised by legal uncertainty. This can affect a certifier's responses to the law[1671] and changes the incentives created by legal rules in unexpected ways.[1672] Legal uncertainty can influence the incidence of unlawful activity as it blurs the boundary between what is allowed or required by law and what is not.[1673] More specifically, it can lead to overcompliance and undercompliance with the applicable requirements.[1674]

520. On the one hand, legal uncertainty could lead to undercompliance in the sense that certifiers will take less than optimal care when issuing certificates.[1675] POLINSKY and SHAVELL demonstrate that legal uncertainty ("legal errors") lowers deterrence as the expected sanctions are reduced and less lawsuits against certifiers are brought to court.[1676] Legal uncertainty leads to undercompliance with applicable requirements because certifiers will discount the magnitude of punishment for illegal acts by the probability of being caught.[1677] Legal uncertainty could induce certifiers to display more risky

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[1668] J.P. DOUGLAS-HENRY & R.F. HANS, "Australia: Ratings agencies are no longer bullet proof", DLA Piper Publication, November 8, 2012; A. SAHORE, "ABN Amro Bank NV v Bathurst Regional Council: Credit rating agencies and liability to investors", (37) *Sydney Law Review* 2015, 455.

[1669] See for example: A. JONES, "A First Amendment Defense for the Rating Agencies?", The Wall Street Journal, April 21, 2009; J. GAPPER, "Rating agencies must beware of the law", Financial Times, February 6, 2013; R.A. SCHWINGER & E.M. SHINNEMAN, "First Amendment protection denied to credit ratings privately disseminated", Lexology, March 1, 2012.

[1670] See for more information the discussion *supra* in nos. 168-174.

[1671] G.K. HADFIELD, "Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law", (82) *California Law Review* 1994, 543.

[1672] R. CRASWELL & J.E. CALFEE, "Deterrence and Uncertain Legal Standards", (2) *Journal of Law, Economics, & Organization* 1986, 298-299.

[1673] I. MACNEIL, "Uncertainty in Commercial Law", (13) *Edinburgh Law Review* 2009, 72.

[1674] See in this regard: G.K. HADFIELD, "Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law", (82) *California Law Review* 1994, 544; J. STAPLETON, *Product Liability*, Cambridge, Cambridge University Press, 1994, 118.

[1675] M. KAHAN, "Causation and Incentives to Take Care under the Negligence Rule", (18) *Journal of Legal Studies* 1989, 437.

[1676] A.M. POLINSKY & S. SHAVELL, "Legal Error, Litigation, and the Incentive to Obey the Law", (5) *Journal of Law, Economics & Organization* 1989, 100. Also see: M. LANG, "Legal Uncertainty as a Welfare Enhancing Screen", (91) *European Economic Review* 2017, 275 for an overview.

[1677] G.K. HADFIELD, "Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law", (82) *California Law Review* 1994, 544.

behaviour during the certification process as the chance of being held liable is uncertain. Therefore, legal uncertainty should be reduced.[1678]

521. On the other hand, some studies come to opposite or at least more nuanced conclusions. Increasing legal uncertainty would encourage socially beneficial activities and increase social welfare.[1679] CRASWELL and CALFEE, for instance, argue that legal uncertainty allows parties to reduce the probability of facing sanctions by playing it safer and modifying their behaviour even more than required by law.[1680] Increasing the vagueness of a legal standard may thus reduce excessively compliant behaviour that can be inefficient.[1681] Overcompliance is likely to occur in situations where legal uncertainty is relatively small. However, very broad uncertainty is more likely to lead to undercompliance again.[1682]

1.5. Critical Perspective on Arguments Against Liability

522. In addition to the previously discussed arguments, the arguments that certifiers traditionally invoke to reject liability might not be convincing. Third-party certifiers, for instance, can argue that they are not the parties primarily responsible for the loss caused by the certified item (part 1.5.1.). There is also a risk to 'overkill' certifiers when a proposal would contain a liability risk that is excessive (part 1.5.2.). Finally, 'certifier-specific' reasons are relied upon as well (part 1.5.3.).[1683]

1.5.1. Certifiers as 'Peripheral Parties'

523. Certifiers could try to argue that imposing liability for a certified item's default would not be fair as they are only peripheral parties.[1684] Requesting entities are the parties primarily responsible as they market those items that cause the loss. Requesting entities stand closer to the loss incurred by third parties after the default of the certified item.

[1678] A. D'AMATO, "Legal Uncertainty", (71) *California Law Review* 1983, 36-54; P. POPELIER, "Legal Certainty and Principles of Proper Law Making", (2) *European Journal of Law Reform* 2000, 339-340.

[1679] M. LANG, "Legal Uncertainty as a Welfare Enhancing Screen", (91) *European Economic Review* 2017, 274. See in this regard also: S. HOEPPNER & L. LYHS, "Behavior Under Vague Standards: Evidence from the Laboratory", Jena Economic Research Papers 2016 – 010, May 11, 2016, 2.

[1680] R. CRASWELL & J.E. CALFEE, "Deterrence and Uncertain Legal Standards", (2) *Journal of Law, Economics, & Organization* 1986, 280.

[1681] S. HOEPPNER & L. LYHS, "Behavior Under Vague Standards: Evidence from the Laboratory", Jena Economic Research Papers 2016 – 010, May 11, 2016, 2.

[1682] R. CRASWELL & J.E. CALFEE, "Deterrence and Uncertain Legal Standards", (2) *Journal of Law, Economics, & Organization* 1986, 280; S. HOEPPNER & L. LYHS, "Behavior Under Vague Standards: Evidence from the Laboratory", Jena Economic Research Papers 2016 – 010, May 11, 2016, 1-4.

[1683] See in the context of financial supervisors: I. GIESEN, "Regulating regulators through liability. The case for applying normal tort rules to supervisors" (24) *Utrecht Law Review* 2006, 17-20.

[1684] See in this regard: J. STAPLETON, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence", (111) *Law Quarterly Review* 1995, 301. See for instance the conclusion by Lord STEYN in the *Marc Rich* case (*Marc Rich & Co AG v. Bishop Rock Marine Co Ltd*, [1996] E.C.C. 120, 142-143 holding that "[i]n the present case the shipowner was primarily responsible for the vessel sailing in a seaworthy condition. The role of N.K.K. was a subsidiary one") and the comparison made with the liability of a Motor Vehicle Bureau in the *Sundance* case (*Sundance Cruises Corp. v American Bureau of Shipping*, 7 F.3d 1077, 1084, footnote 53 (2nd Circ. 1994)).

Requesting entities thus play a more important role than certifiers with regard to the infliction of a third party's loss.[1685]

524. However, this argument does not hold in the context of certifiers. Certifiers by definition will always be peripheral parties in comparison with the requesting entities. Certification is based on the idea that there is a primary party – the requesting entity – whose items are certified by another (potential) tortfeasor – the certifier. When being reluctant to impose secondary liability upon peripheral parties such as certifiers, the latter would actually be excluded from liability when a certified item defaults. This is not desirable as the third party incurring the loss caused by the certified item's default will often not commit any wrongful act. Such parties are thus not to blame, possible contributory negligence excluded. There is no reason why third parties should bear the costs of an item's default when requesting entities as well as certifiers were able to prevent the item from collapsing, and through their wrongful act failed to do so.[1686] Such parties are often removed even further from the act of the requesting entity or certifier that ultimately resulted in the default of the certified item.[1687]

525. Moreover, certifiers have to comply with their own obligations during the certification process. These obligations are different from those of requesting entities. The act for which the certifier might be sued by third parties is not necessarily related to the potential wrongful act committed by a requesting entity.[1688] Instead, they deal with

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[1685] C. MCIVOR, "Liability in Respect of the Intoxicated", (60) *Cambridge Law Journal* 2001, 125. See further references in: I. GIESEN, "Regulating regulators through liability. The case for applying normal tort rules to supervisors" (24) *Utrecht Law Review* 2006, 17-18.

[1686] See in the context of supervisors: I. GIESEN, "Regulating regulators through liability. The case for applying normal tort rules to supervisors" (24) *Utrecht Law Review* 2006, 20; I. GIESEN, *Toezicht en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de rechtvaardiging voor de aansprakelijkheid uit onrechtmatige daad van toezichthouders ten opzichte van derden*, Deventer, Kluwer, 2005, 152.

[1687] In several cases, it has been acknowledged that third parties rely on certificates because they often have no access to relevant other information. This illustrates that certifiers are in a better position to evaluate the specific risks of the item they certify than third parties. Therefore, certifiers have a closer connection with the certified item than third parties. In the *Bathurst* case, for instance, the court held that S&P owed such a duty of reasonable care and skill towards "vulnerable" and "unsophisticated" investors with whom the CRA does not have a contract. Investors are vulnerable if they are unable to assess the creditworthiness of the financial products or to "second-guess" the rating. This can occur if the only available information on the creditworthiness of the (issuer of the) securities is the rating (*Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 120, paragraphs 2767-2778; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 580, 599, 890-891, 1211 & 1263-1269). The court in the *Abu Dhabi* case concluded that the plaintiffs reasonably relied on the ratings because the market at large, including sophisticated investors, has come to rely on ratings issued by CRAs given "their NRSRO status and access to non-public information that even sophisticated investors cannot obtain" (*Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651. F. Supp. 2d 155, 180-181 (S.D.N.Y. 2009)). Similarly, the *CalPERS* court held that investors in the structured finance market cannot reasonably develop their own informed opinions because there is insufficient public information to do so. Reliance on ratings is thus justified if (sophisticated) investors are unable to conduct an own analysis or develop their views about potential investments (*California Public Employees' Retirement System v. Moody's Corp.*, no. A134912, 28-30 (Cal. Ct. App. 2014)).

[1688] I. GIESEN, "Regulating regulators through liability. The case for applying normal tort rules to supervisors" (24) *Utrecht Law Review* 2006, 20; I. GIESEN, *Toezicht en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de rechtvaardiging voor de aansprakelijkheid uit onrechtmatige daad van toezichthouders ten opzichte van derden*, Deventer, Kluwer, 2005, 152. This has also been

the violation of a certifier's obligations during the certification process. In other words, a third party can have claims against different parties once a certified item defaults.[1689]

1.5.2. The Risk of Liability and a Certifier's 'Defensive Conduct'

526. A higher liability risk could also result in defensive conduct.[1690] A certain amount of defensive conduct is desirable. It could induce certifiers to apply more care, thereby enhancing the accuracy and reliability of certificates. However, an increased risk of liability should not hinder certifiers to perform their obligations during the certification process. This so-called 'overkill argument' implies that those facing a risk of liability will respond by taking unnecessary excessive safety precautions or by giving up a socially beneficial activity altogether.[1691]

527. A decision where this argument was used is the *Marc Rich* case. Lord STEYN, writing for the majority, held that classification societies act in the public interest. A classification society is an independent and non-profit-making entity created and operating for the sole purpose of promoting the collective welfare, namely the safety of lives and ships at sea. Classification societies fulfil a role that in their absence would have to be done by flag States. Lord STEYN held that it was unlikely that classification societies would be able to carry out their functions as efficiently if they would become defendants in more cases. In

acknowledged by Lord BERWICK in his dissenting opinion in the *Marc Rich* case dealing with the liability of classification societies. By the words of Lord BERWICK, "I am not sure what is meant by saying that the shipowners are "primarily" responsible for taking care, and that this militates against the need to impose a similar duty on N.K.K. Of course the shipowners are primarily - indeed solely - responsible for getting the cargo to its destination; and of course the shipowners must take proper care of the cargo as bailees, subject to the terms of any contract of carriage between the parties. But I am unable to see why the existence of the contract of carriage should "militate against" a duty of care being owed by a third party in tort. The function of the law of tort is not limited to filling in gaps left by the law of contract" (*Marc Rich & Co AG v. Bishop Rock Marine Co Ltd*, [1996] E.C.C. 120, 127-128, paragraph 23).

[1689] In the PIP breast implant case, the ECJ also held in its judgement that " [w]hile it is incumbent on the manufacturer, in the first place, to ensure that the medical device complies with the requirements laid down in Directive 93/42, it is clear that that directive also imposes obligations to that end on the Member States and notified bodies" (C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 51).

[1690] I. GIESEN, "Regulating regulators through liability. The case for applying normal tort rules to supervisors" (24) *Utrecht Law Review* 2006, 22; *X (Minors) v. Bedfordshire*, [1995] 2 A.C. 633, 750; *Hill Appellant v. Chief Constable of West Yorkshire Respondent*, [1989] A.C. 53, 63.

[1691] A. MULLIS & K. OLIPHANT, *Torts*, Basingstoke, Palgrave Macmillan, 2011, 26. In this regard, the *Otto Candies* case can be used as an illustration. Judge JONES concluded that classification societies "could be deterred by the prospect of liability from performing work on old or damaged vessels that most need their advice. The spreading of liability could diminish owners' sense of responsibility for vessel safety even as it complicates liability determinations. Ultimately, broader imposition of liability upon classification societies would increase their risk management costs and rebound in higher fees charged to the societies' clients throughout the maritime industry. Whether such riskspreading is cost-efficient in an industry with well-developed legal duties and insurance requirements is doubtful". In other words, she warns for the risk and consequences of defensive conduct, which she refers to as an "essential caveat". This, however, does not mean that classification societies should not be held liable, which was the case in the *Otto Candies* decision (*Otto Candies LLC v. Nippon Kaija Kyokai Corp*., 346 F.3d 530n 535 (5th Cir. 2003)).

those circumstances, they might adopt a more defensive position when performing their services.[1692]

528. This argument has also been relied upon in the context of CRAs to reject an extensive liability risk. Such a risk of liability may cause CRAs to take greater effort and time in preparing the rating delaying the issuance of ratings. This reduces the benefit of rating services, namely to disseminate credit risk information as quickly as possible to market participants.[1693] CRAs could also withdraw from rating risky structured financial products, eventually leading to a stand-still or freezing effect as many 'vulnerable' investors do not have the expertise to make their own decisions.[1694]

529. Yet, this overkill argument needs to been seen from a more nuanced point of view. A risk of defensive conduct is not a valid reason why a third party that suffered a loss because of a certifier's wrongful act should not be able to get recovery. When someone commits a wrongful act thereby causing losses, liability should be imposed, irrespective of whether this would lead to defensive conduct.[1695] The question also arises at which level the certifier's additional safety precautions become unnecessary, leading to defensive conduct.[1696] Surely, the level required to qualify safety precautions as unnecessary is high. The financial crisis, for example, showed that the risk of liability was not high enough as CRAs did not take sufficient safety precautions. The lack of a sufficient liability risk caused CRAs to behave unreasonably, inter alia by being involved in structuring financial products or not spending the necessary time to carefully prepare the rating.[1697]

530. The strength of the overkill argument can also be refuted when taking a more practical look. If the argument were valid, certifiers would be inclined to limit their certification services once they have been subject of litigation. Classification societies,[1698]

[1692] *Marc Rich & Co AG v. Bishop Rock Marine Co Ltd*, [1996] E.C.C. 120, 147, paragraph 71; A. MULLIS & K. OLIPHANT, *Torts*, Basingstoke, Palgrave Macmillan, 2011, 26.

[1693] B.H. BROWNLOW, "Rating Agency Reform: Presenting the Registered Market for Asset-Backed Securities", (15) *North Carolina Banking Institute* 2011, 133-134.

[1694] J.C. COFFEE, "Ratings Reform: The Good, The Bad, and The Ugly", (1) *Harvard Business Law Review* 2010, 252.

[1695] I. GIESEN, "Regulating regulators through liability. The case for applying normal tort rules to supervisors" (24) *Utrecht Law Review* 2006, 23. By words of Lord BERWICK, "[r]emedies in the law of tort are not discretionary" (*Marc Rich & Co AG v. Bishop Rock Marine Co Ltd*, [1996] E.C.C. 120, 147, paragraph 38). In this regard, professor CANE concludes that "even if a [classification] society was performing public functions, it is not clear what significance this would have in the context of tort liability" (P. CANE, "The Liability of Classification Societies", *Lloyds Maritime and Commercial Law Quarterly* 1994, 364).

[1696] A. MULLIS & K. OLIPHANT, *Torts*, Basingstoke, Palgrave Macmillan, 2011, 26

[1697] See in this regard: *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 120; *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651. F. Supp. 2d 155, 180-181 (S.D.N.Y. 2009). Also see: N.S. ELLIS, L. M. FAIRCHILD & F. D'SOUZA, "Is Imposing Liability on Credit Rating Agencies a Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis", (17) *Stanford Journal of Law, Business & Finance* 2012, 216-217.

[1698] See for example: Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 313-317; Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 321-329; *Otto Candies LLC v. Nippon Kaija Kyokai Corp*., 346 F.3d 530 (5th Cir. 2003).

auditors,[1699] notified bodies[1700]and even CRAs[1701] have already been held liable in the past. Yet, these certifiers are still active on a global scale and seem to leave the certification market only in exceptional circumstances as was the case with Arthur Anderson in the Enron debacle.

531. Case law in several jurisdictions also illustrates the weakness of the overkill argument. Lord BERWICK argued in his dissenting opinion in the *Marc Rich* case that classification societies should have a duty of care even if they fulfil a public role and promote the collective welfare. He rejected the claim that this would lead to defensive conduct as there are other charitable non-profit making entities such as hospitals that are subject to the "same common duty of care […] as betting shops or brothels".[1702] When looking at case law in Belgium and France, one can even make other surprising discoveries. Following the overkill argument, the certifier's public role could be a reason to deny liability as the threat of liability would make certifiers give up socially beneficial activities.[1703] Yet, case law in Belgium dealing with the liability of auditors shows that their public role is often a reason why they can be held liable towards third parties.[1704] The ease with which a certifier's wrongful act is sometimes accepted in Belgium[1705] and France[1706] also underpins the conclusion that the overkill argument is not convincing.

1.5.3. Certifier-Specific Reasons

532. There are also more specific reasons invoked by certifiers to reject proposals imposing a higher risk of liability. Take the example of classification societies in the maritime sector. Classification societies often invoke two defences against imposing liability, namely the shipowner's non-delegable duty to provide a seaworthy vessel (part A.) and the lack of limitation of liability possibilities (part B.).

A. Shipowner's Duty to Provide a Seaworthy Vessel

533. Courts have on several occasions already ruled that classification societies cannot be held liable because the shipowner has a non-delegable duty to provide a seaworthy

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[1699] See for example: Court of First Instance Brussels, December 12, 1996, *Tijdschrift voor Rechtspersoon en Vennootschap-Revue Pratique des Sociétés* 1997, 41-42; Commercial Court Hasselt, June 25, 2002, *Tijdschrift voor Rechtspersoon en Vennootschap-Revue Pratique des Sociétés* 2003, 81.

[1700] See for example: Tribunal de Commerce Toulon, November 14, 2013, no. RG 2011F00517, no. 2013F00567 (available at the online legal database Dalloz). The ECJ also acknowledged that "the conditions under which culpable failure on the part of a notified body to fulfil its obligations […] may give rise to liability on its part vis-à-vis the end users of medical devices are governed by national law, subject to the principles of equivalence and effectiveness" (C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, ECLI:EU:C:2017:128, February 16, 2017, paragraph 59).

[1701] See for example: *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 120; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65.

[1702] *Marc Rich & Co AG v. Bishop Rock Marine Co Ltd*, [1996] E.C.C. 120, 147, paragraph 38.

[1703] A. MULLIS & K. OLIPHANT, *Torts,* Basingstoke, Palgrave Macmillan, 2011, 26.

[1704] See for example: Court of First Instance Brussels, December 12, 1996, *Tijdschrift voor Rechtspersoon en Vennootschap-Revue Pratique des Sociétés* 1997, 41-42.

[1705] See for more information the discussion *supra* in nos. 235-236 & 238.

[1706] See for more information the discussion *supra* in nos. 237-238.

vessel. Considering that this duty cannot be delegated to classification societies, they will not incur liability when the vessel sinks or the cargo gets lost.[1707] A classification does not take over the shipowner's obligation to provide a seaworthy vessel by agreeing to inspect and issue a class certificate.[1708]

534. However, the shipowner's non-delegable duty of seaworthiness by itself is not a reason why classification societies should not be held liable. The obligations of classification societies during the certification process are different from the shipowner's obligation to provide a seaworthy vessel. The task of classification societies is not to guarantee the vessel's seaworthiness but to issue a certificate when the vessel complies with its class rules. These are two distinctive obligations that can result in different liability claims by third parties.[1709] The issuance of a certificate does not relieve the shipowner of his non-delegable duty to maintain the ship in a seaworthy condition.[1710] A certificate does not warrant the seaworthiness of a vessel. It is merely a representation that the vessel complied with class rules at the time of the construction or the latest survey.[1711]

This can be illustrated by case law in Belgium. In several decisions, judges acknowledged the shipowner's non-delegable duty, while at the same time imposing liability upon a classification society because of a shortcoming to the general duty of care.[1712] If the shipowner fails to provide a seaworthy vessel and the classification society negligently issues a class certificate, both should bear the responsibility: the shipowner for breaching

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[1707] See for example: *Great American Insurance Company v. Bureau Veritas*, 338 F. Supp. 999, 1012 (S.D.N.Y. 1972); Court of First Instance Dendermonde, January 11, 1973, *Rechtspraak Haven van Antwerpen* 1974, 129; Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 327-328; Commercial Court Antwerp, September 20, 2006, A/02/04109, 6-8 (unpublished). Conventions and international rules depart from the same assumption. According to the Hague-Visby Rules, for instance, the carrier is bound to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage (Article III, International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924, 1953 UNTS 109), First Protocol 1968, 1979 UNTS 26, Second Protocol 1979, 1985 UNTS 122).

[1708] *Sundance Cruises Corporation v. American Bureau of Shipping*, 7 F.3d 1077, paragraph 51(2nd Cir. 1993); Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 314. See for more information the discussion *supra* in no. 63.

[1709] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 94-95.

[1710] M.A. MILLER, "Liability of Classification Societies from the Perspective of United States Law", (22) *Tulane Maritime Law Journal* 1997, 78.

[1711] B.D. DANIEL, "Potential Liability of Marine Classification Societies to Non-Contracting Parties", (19) *University of San Francisco Maritime Law Journal* 2007, 196.

[1712] See for example: Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 313; Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 327-328. The distinctive duties of classification societies and the shipowners have to a certain extent also been acknowledged in the *Otto Candies* case in the US. The Court of Appeals for the Fifth Circuit held that the "societies' surveys and certificate system are essential to maintaining the safety of maritime commerce, yet their activities should not derogate from shipowner's and charterers' nondelegable duty to maintain seaworthy vessels" (*Otto Candies LLLC v. Nippon Kaiji Kyokai Corporation*, 346 F. 3d 530, 535, paragraph 6 (5th Cir. 2003)).

its warranty of seaworthiness and the classification society for violating its obligations during the certification process.[1713]

B. Limitation of a Classification Society's Liability

535. Several parties in the shipping industry are subject to limited liability.[1714] Limitations of liability provisions are included in several international conventions and rules.[1715] These provisions coexist with global limitation regimes such as the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC) and the 1996 Protocol.[1716] There is at the moment no limitation of liability convention covering classification societies. Classification societies were believed to serve the public interest and not to act as commercial actors when the main conventions were established. The limitation of their liability was, therefore, not addressed.[1717]

536. This can be one of the reasons why courts are unwilling to impose liability upon classification societies.[1718] However, this is not a convincing argument. Several proposals have already been made allowing classification societies to limit their liability.[1719] Until

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[1713] M.A. MILLER, "Liability of Classification Societies from the Perspective of United States Law", (22) *Tulane Maritime Law Journal* 1997, 78.

[1714] N.A.M. GUTIÉRREZ, *Limitation of Liability in International Maritime Conventions: the Relationship between Global Limitation Conventions and Particular Liability Regimes*, Oxon, Taylor and Francis, 2011, 5-22.

[1715] Such provisions have been adopted in different maritime sectors ranging from the carriage of goods by sea (e.g. Articles IV and IV*bis* in the Hague-Visby Rules), the carriage of passengers and their luggage by sea (e.g. Articles 7 and 8 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of December 13, 1974) and several maritime environmental law conventions (e.g. Article V International Convention on Civil Liability for Oil Pollution Damage of November 29, 1969 or Article 6 International Convention on Civil Liability for Bunker Oil Pollution Damage of March 23, 2001).

[1716] Convention on Limitation of Liability for Maritime Claims (LLMC), November 19, 1976 as adapted by the Protocol of 1996, May 2, 1996, 1987 UNTS 221.

[1717] J. BASEDOW & W. WURMNEST, "Classification Societies as General Insurers of Shipping Activities", in: N. VAN TIGGELE-VAN DER VELDE, G. KAMPHUISEN & B.K.M. LAUWERIER (eds.), *De Wansink- bundel: van draden en daden: liber amicorium prof.mr. J.H. Wansink*, Deventer, Kluwer, 2006, 30-32. Classification societies are able to limit their liability under EU law when they act as ROs (cf. Article 5.2(b) Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations).

[1718] See the opinion of Lord STEYN in the *Marc Rich* case: "It would also be unfair, unjust and unreasonable towards classification societies, notably because they act for the collective welfare and unlike shipowners they would not have the benefit of any limitation provisions" (*Marc Rich & Co AG v. Bishop Rock Marine Co Ltd*, [1996] E.C.C. 120, 148, paragraph 74). Also see: N.A.M. GUTIÉRREZ, *Limitation of Liability in International Maritime Conventions: the Relationship between Global Limitation Conventions and Particular Liability Regimes*, Oxon, Taylor and Francis, 2011, 208-209.

[1719] LAGONI urges the international community to adopt a new limitation of liability convention for classification societies. He suggests to develop the international convention under auspices of the IMO (N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 317). Also see: A.M. ANTAPASSIS, "Liability of Classification Societies", (11) *Electronic Journal of Comparative Law* 2007, 51 (arguing that the limitation of the liability of classification societies should be regulated "by way of a multilateral, open international convention"). Another possibility would be to incorporate the once existing CMI Model Clauses in agreements between classification societies and shipowners. The Clauses contain a provision limiting the liability of societies towards the shipowner (CMI, *CMI Yearbook 1996*, Antwerp, CMI Headquarters, 1996, 338-342; J.L. PULIDO BEGINES, "The EU Law on Classification Societies: Scope and Liability Issues", (36) *Journal of Maritime Law & Commerce* 2005, 498-499). The Clauses were not

the moment that any of the proposals is implemented, classification societies could rely on the existing conventions to limit their liability. Although classification societies will probably not be covered by the LLMC Convention[1720] or the Hague-Visby/Hamburg Rules,[1721] they can fall within the scope of the Rotterdam Rules and especially the International Convention on Civil Liability for Oil Pollution Damage ('CLC').

537. The Rotterdam Rules build upon and provide a modern alternative to earlier conventions related to the international carriage of goods by sea such as the Hague-Visby Rules and the Hamburg Rules.[1722] According to Article 4 of the Rotterdam Rules, a 'maritime performing party' can invoke the same defences and limitations of liability as the carrier. A maritime performing party performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship.[1723] There are

adopted by the CMI because of differing opinions between shipowners and classification societies on the maximum limits of liability (N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 298).

[1720] The shipowner can limit his liability for claims set out in Article 2 of the LLMC Convention. The shipowner's liability limitation is calculated based on the tonnage of the vessel. Pursuant to Article 1.2., the shipowner includes the owner, charterer, manager and operator of the seagoing vessel. Classification societies are thus not covered by that provision. According to Article 1.4., any person for whose act, neglect or default the shipowner is responsible is entitled to avail himself of the limitation of liability provided for in the Convention. However, it remains unlikely that the shipowner can be held responsible for the acts of classification societies. The contracting States emphasised that the limitation of liability only applied for a limited number of persons (see the references in: N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 285, footnote 1122). Whether a shipowner would be responsible for the acts of classification societies has to be determined by national legislation. LAGONI concludes that this is not the case in several jurisdictions such as Germany, the US or England. Classification societies are independent contractors for whom the shipowner cannot be responsible (N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 285-287). Classification societies have to be independent vis-à-vis the shipowner during the certification process. It has already been shown that both parties have different obligations (see for more information the discussion *supra* in no. 534).

[1721] The liability of the carrier is limited by provisions in the Hague-Visby Rules and in the Hamburg Rules dealing with international carriage of goods by sea. The carrier is defined in Article I(a) of the Hague-Visby Rules as the owner or the charterer who enters into a contract of carriage with a shipper. According to Article 1.1. of the Hamburg Rules, the carrier is the person in whose name a contract of carriage of goods by sea has been concluded with a shipper. Article IVbis of the Hague-Visby Rules stipulates that a servant or agent of the carrier can avail himself of the defences and limitations of liability the carrier is entitled to invoke. This does not apply if a servant or an agent is an independent contractor. Article 7 of the Hamburg Rules contains a similar phrasing. The servant and agent of the carrier can rely on the limitation provisions if they prove that they acted within the scope of their employment. It remains unlikely that classification societies will be considered as agents or servants of the shipowner. The shipowner cannot give orders to an independent classification society regarding the way class surveys should be done (N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 277-281). The Antwerp Court of Appeal held in the *Spero* case that the classification society did not perform any of the owner's contractual obligations to carry the cargo by classifying the vessel. A society is not acting as an executive agent of the shipowner but is considered to be a normal third party. Reliance on personal immunity principles for the shipowner's executing agent was, therefore, not accepted (Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 328-329).

[1722] UNCITRAL, United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York, 2008 (further referred to as 'Rotterdam Rules').

[1723] Article 1.7. Rotterdam Rules.

several reasons why a classification society might qualify as such a maritime performing party.[1724]

538. To start with, the drafters of the Rotterdam Rules envisaged a broad scope of application as the limitations and defences are not only restricted to the servant or agent of the carrier but also to the maritime performing party and persons that perform services on board of the vessel. These parties might include independent contractors such as surveyors.[1725] One of the carrier's obligations under the Rotterdam Rules is to exercise due diligence to make and keep the vessel seaworthy.[1726] Although this is a non-delegable duty of the carrier, the latter can invoke the certificate as an indication that he exercised due diligence to make and keep the vessel seaworthy. The carrier is free to rely on the services of classification societies as long as he assumes liability for the seaworthiness of the vessel in the end.[1727] Even when the certificate cannot be used as an absolute proof of seaworthiness,[1728] the carrier will have his vessel undergo surveys carried out by a classification society to prove that he exercised due diligence to make and keep the vessel seaworthy. Without these surveys, the carrier would not be in a position to guarantee the vessel's seaworthiness. Classification societies thus assist the carrier in performing his duties under the Rules to make and keep the ship seaworthy. Therefore, they are among the independent contractors that are able to rely on the protection of the defences and limitation of liability provided to the carrier by the Rotterdam Rules.[1729]

539. An even more viable option for classification societies is to rely on the International Convention on Civil Liability for Oil Pollution Damage[1730] as amended by the 1992 Protocol.[1731] The CLC was adopted to ensure that adequate compensation would be

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[1724] In this regard, one should make a distinction between the concept of 'maritime performing party' as used in the Rotterdam Rules and the (immunity of the) contracting party's performing agent as developed in Belgian law. It has already been mentioned that a performing agent – the subcontractor of a party's contractor – is considered to be quasi-immune in Belgium. Belgian courts repeatedly held that classification societies in their private role do not perform the shipowner's contractual obligations by classifying and certifying vessels. A classification society is not an agent acting on behalf of the shipowner. Instead, it is considered to be a 'normal' third party. The quasi-immunity does also not apply for ROs that perform an obligation of the flag State under international law and not a contractual obligation. Consequently, a classification society cannot rely on the personal immunity principles developed by the Court of Cassation (see the discussion *supra* in no. 145 for more information). There might thus be a collision between Belgian law (no immunity) and the application of the Rotterdam Rules (limitation of liability and other defences) for classification societies. As Belgium did not sign the Rotterdam Rules, the issue remains rather theoretical. Yet, it is an issue that needs to be considered by policymakers.

[1725] See in this regard also: P. BACKDEN, "Will Himalaya Bring Class Down from Mount Olympus - Impact of the Rotterdam Rules", (42) *Journal of Maritime Law & Commerce* 2011, 118-119.

[1726] Article 14(a) Rotterdam Rules.

[1727] Also see: Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 328; Commercial Court Antwerp, September 20, 2006, A/02/04109, 6-8 (unpublished).

[1728] Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 314.

[1729] P. BACKDEN, "Will Himalaya Bring Class Down from Mount Olympus - Impact of the Rotterdam Rules", (42) *Journal of Maritime Law & Commerce* 2011, 119-120.

[1730] International Convention on Civil Liability for Oil Pollution Damage, November 29, 1969, 973 UNTS 3 (further referred to as 'CLC').

[1731] International Maritime Organisation Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, November 27, 1992, 1956 UNTS.

available to persons that suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships.[1732] The Convention is of particular importance as recent cases where the liability of classification societies was invoked – such as the *Erika* or the *Prestige* – dealt with oil pollution.[1733]

540. The CLC places the liability for such damage on the owner of the vessel from which the polluting oil escaped or was discharged (the so-called 'channelling' to the shipowner).[1734] The shipowner is subject to limited liability under the Convention in respect of any incident to an aggregate amount as contained in Article V. He can limit his liability by constituting a fund in a court of a CLC jurisdiction where the action has been brought.[1735] Article III.4(b) stipulates that no claim for compensation for pollution damage can be made against the pilot or any other person who, without being a member of the crew, performs services for the ship, unless the damage resulted from their personal act or omission committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. There are three reasons why a classification society can be considered as a party performing services for the vessel.[1736]

541. First, one could rely on the linguistic construction of Article III.4 of the CLC. The Article enumerates all persons against whom no claim for compensation for oil pollution damage can be made. These inter alia include the servants or agents of the shipowners, charters or managers of the ship, salvors, or any person taking preventive measures. Classification societies are thus not explicitly mentioned. The argument, therefore, goes that they do not fall under this provision.[1737] According to some, the phrase 'the pilot or any other person who performs services for the ship' also stresses the limited category of persons entitled to benefit from the exemption.[1738] The use of 'or any other person' could refer to those persons exercising services similar to that of a pilot. The services of classification societies relate to the safety of the vessel and not to its navigation. Thus,

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[1732] See for more information: <www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx>.

[1733] See in this regard also: E. SOMERS & G. GONSAELES, "Consequences of the Sinking of the M/S ERIKA in European Waters: Towards a Total Loss for International Shipping Law", (41) *Journal of Maritime Law & Commerce* 2010, 64.

[1734] Article III CLC.

[1735] Article V.3. CLC.

[1736] Once again, one should bear in mind that there is a difference between a party performing services for the vessel within the meaning of the CLC and the subcontractor of the shipowner within the meaning of the immunity of the performing agent in Belgium. In decisions dating from 1994, Belgian judges held that a classification did not perform the shipowner's contractual obligations by classifying and certifying vessels. Reliance on the personal immunity principles was, therefore, not possible. In other words, a classification society is a normal third party under Belgian law (no immunity) that is subsequently able to rely on the provision included in the CLC stipulating that no claim can be made against the party performing services for the vessel (immunity).

[1737] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 288-289.

[1738] See for example: C. DE LA RUE & C.B. ANDERSON, *Shipping and the Environment*, London, Lloyd's of London Press, 1998, 97; N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 288-289 with further references in footnotes 1140-1142.

classification societies are not considered as 'any other person', and they might not benefit from the protection under the CLC.[1739]

However, this argument is not convincing. The use of 'or' can also be interpreted as meaning that the 'other party' does not necessarily relate to the pilot. Instead, protection is given to either the pilot of the vessel 'or' to any other party performing services for the vessel. This might include classification societies as well when they perform services for the ship. The broadest possible reference to 'any other person' shows that classification societies could be entitled to the liability limitation in the CLC.[1740] A broad interpretation of 'any other person who performs services for the ship' including classification societies would also make sense when making a comparison with the (stricter) wording used in other conventions and rules. Under the LLMC Convention as well as the Hague-Visby/Hamburg Rules, the limitation of liability applies to the persons for whose acts the shipowner is responsible or for the latter's agents and servants. These persons did not include classification societies.[1741] Under the CLC, no claim for compensation for oil pollution damage can be made against a whole list of parties. This indicates the broad ambit of the Convention and shows that classification societies might be considered as another party performing services for the vessel.

542. Second, classification societies have to be considered as parties performing services for the vessel. A shipowner contracts for services offered by a classification society.[1742] Classification societies may be called upon to provide a number of different functions and perform services for the vessel such as class surveys.[1743] When requested, they survey a vessel before, during and after its construction to verify compliance with the relevant safety conventions and applicable class rules.[1744] The objective of classification is to verify the structural strength and integrity of essential parts of the ship's hull and its appendages, as well as the reliability and function of the propulsion and steering systems, power generation and other features and auxiliary systems that have been built into the ship to maintain essential services on board. Classification societies aim to achieve this objective by developing and applying their class rules and by verifying compliance with the applicable safety regulations as ROs.[1745] Class surveys and the resulting certificates

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[1739] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 289-290.

[1740] B.D. DANIEL, "Potential Liability of Marine Classification Societies to Non-Contracting Parties", (19) *University of San Francisco Maritime Law Journal* 2007, 227; F. SICCARDI, "Pollution Liability and Classification societies: Is the System a Fair One?", *Il Diritto Marittimo* 2005, 707.

[1741] See for more information the discussion *supra* in footnotes 1720-1721.

[1742] *Carbotrade S.p.A. v. Bureau Veritas*, 99 F.3d 86, 91, paragraph 22 (2nd Cir.1996).

[1743] *Great American Insurance Company v. Bureau Veritas*, 338 F. Supp. 999, 1009-1010 (S.D.N.Y. 1972).

[1744] *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1078 (2nd Cir.1993); F. SICCARDI, "Pollution Liability and Classification societies: Is the System a Fair One?", *Il Diritto Marittimo* 2005, 707; B.D. DANIEL, "Potential Liability of Marine Classification Societies to Non-Contracting Parties", (19) *University of San Francisco Maritime Law Journal* 2007, 227.

[1745] International Association of Classification Societies, "Classification Societies: What, Why and How?", IACS Publications 2011, 3.

are either legally or practically required "before a shipowner may ply navigable waters".[1746]

543. Third, reference can also be made to the cases of the *Erika* and the *Prestige* that examined whether or not classification societies fall under Article III.4(b) of the CLC.

544. In the case of the *Erika*, proceedings were instituted by the French Government against several parties among which the shipowners, the owner of the cargo (Total) and classification society Registro Italiano Navale (RINA). The classification society argued that it had performed services for the Erika in the sense of Article III.4(b) CLC. Therefore, it could not be held liable to compensate the damage caused by the oil spill. However, the High Court in Paris took another stance when emphasising that a person performing services for a vessel should necessarily be someone who directly participates in the maritime voyage. It relates to parties that "s'acquittent de prestations pour le navire en participant directement à l'opération maritime" (own translation: parties that perform services for the navigation of the vessel by directly participating in its maritime operation).[1747] This was not the case for RINA due to the lack of a direct relationship to the operation of the *Erika.*[1748] The Court of Appeal in Paris upheld the findings of the lower court in its decision of March 30, 2010. RINA had an independent role as a classification society. Therefore, it could not benefit from the protection under Article III.4(b) of the Convention.[1749]

The *Cour de Cassation* largely upheld the judgement on appeal. RINA was criminally convicted because of involuntary marine pollution due to its imprudence when renewing the certificates. However, it held that the Court of Appeal was wrong in deciding that RINA could not benefit from the provisions in Article III.4(b) CLC. Even if a society has to remain independent vis-à-vis the shipowner during the certification process, it agrees to a "contrat de louage de service".[1750] Therefore, the society performs services for the vessel and falls within the scope of the channelling provision. The Court of Cassation decided that the loss resulted from RINA's own recklessness. As a consequence, it could not rely on the protection under the CLC.[1751]

545. The case of the *Prestige* dealt with a vessel that developed a starboard list[1752] and began to leak oil about 50 kilometres from the Galician coast. The ship's request for a secure shelter and safe harbour to pump off the cargo of oil was refused by the Spanish and Portuguese authorities. Arguing that the Prestige's draught was too large to enter into

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[1746] *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1081 (2nd Cir.1993).

[1747] High Court of Paris, January 16, 2008, no. 9934895010, JurisData no. 2008-351025, 304.

[1748] High Court of Paris, January 16, 2008, no. 9934895010, JurisData no. 2008-351025, 303-304.

[1749] Court of Appeal Paris, March 30, 2010, no. 08/02278, 423.

[1750] Court of Cassation, September 25, 2012, no. 10-82.938, JurisData no. 2012-021445, 221. This decision can be found online on Legifrance as well as on the legal database Dalloz.

[1751] Court of Cassation, September 25, 2012, no. 10-82.938, JurisData no. 2012-021445, 220-221. This decision can be found online on Legifrance as well as on the legal database Dalloz.

[1752] The right-hand side of a vessel as one faces forward.

the port of refuge, the vessel was towed towards the Atlantic Sea. Rough sea conditions caused it to break on November 19, 2002. A total of 64,000 tons of oil escaped from the vessel causing an enormous environmental pollution.[1753]

Spain commenced proceedings against American Bureau of Shipping (ABS) in the United States District Court of New York.[1754] ABS argued that it was either a servant or agent of the owner or another person who, without being a member of the crew, performed services for the ship. As such, ABS fell within the channelling provision within the meaning of CLC. Judge SWAIN, however, concluded that ABS was not an agent or servant of shipowner. This would be inconsistent with its position as independent classification society that does not work at the direction of or on behalf of shipowners.[1755]

ABS was more successful in showing that it could be considered as another person performing services for the vessel. The owner of the Prestige retained ABS to perform surveys to determine whether the vessel complied with class rules and the applicable legislation. ABS provided certification services to establish if the Prestige was seaworthy. The certification was thus necessary for the commercial operation of the vessel.[1756] The District Court eventually relied on Article IX(1) of the Convention to bar Spain's suit. As a signatory to the CLC, Spain was bound by the provisions in the CLC and had to pursue its claims under that Convention in its own courts or in those of another contracting state. Considering that the US is a non-contracting state to the CLC, the District Court lacked the jurisdiction necessary to adjudicate Spain's claims arising from the sinking of the Prestige. ABS' motion for summary judgment dismissing the plaintiff's claims was granted due to lack of subject matter jurisdiction.[1757]

[1753] E. GALIANO, "In the Wake of the PRESTIGE Disaster: Is an Earlier Phase-out of Single-Hulled Oil Tankers the Answer", (28) *Tulane Maritime Law Journal* 2004, 113-114.

[1754] *Reino de Espana v. American Bureau of Shipping*, 328 F.Supp. 2d. 489 (S.D.N.Y.2004).

[1755] *Reino de Espana v. American Bureau of Shipping*, 528 F.Supp.2d 455, 458 (S.D.N.Y. 2008).

[1756] *Reino de Espana v. American Bureau of Shipping*, 528 F.Supp.2d 455, 459 (S.D.N.Y. 2008).

[1757] *Reino de Espana v. American Bureau of Shipping*, 528 F.Supp.2d 455, 495 (S.D.N.Y. 2008). In a subsequent summary order, the Court of Appeals for the Second Circuit concluded that the District Court had erred in holding that the CLC deprived it of subject matter jurisdiction. Therefore, it vacated the District Court's judgment dismissing Spain's suit and ABS's counterclaims, and remanded for further proceedings (*Reino de Espana v. ABSG Consulting, ABS Marine Services, ABS Group of Companies and the American Bureau of Shipping*, 334 Fed.Appx. 383 (2nd Cir. 2009)). Thereafter, the District Court ruled that ABS was not liable for the sinking of the vessel under US law. Spain failed to identify any precedent case in which a classification society had a duty to prevent recklessness. The District Court even doubted whether such a duty could exist towards coastal States. Imposing liability upon classification societies to refrain from reckless or negligent behavior towards coastal States "would constitute an unwarranted expansion of the existing scope of tort liability. More importantly, by relieving shipowners of their ultimate responsibility for certified ships, such a rule would be inconsistent with the shipowner's nondelegable duty to ensure the seaworthiness of the ship". Furthermore, it was argued that a duty of care would undermine the relationship between shipowners and classification societies. Reference was made to the disproportionality between the small fees for classification services and its potentially unlimited scope of liability (*Reino de Espana v. The American Bureau of Shipping*, 729 F.Supp.2d 635, 645-646 (S.D. N. Y. 2010)). Spain appealed against the District Court's judgment. On August 29, 2012, the US Court of Appeals of the Second Circuit affirmed the earlier decision. Without addressing "more broadly […] the role of classification societies in maritime commerce and the potential duties of classification societies to third parties", the liability of a classification society in tort towards a third party such as Spain for reckless conduct in connection with the classification

1.6. Summary

546. The reasons discussed above show that proposals including an appropriate risk of liability may induce certifiers to issue certificates that are more accurate and reliable. A certifier qualifies as second best cheapest cost avoider of accidents with certified items. It can reduce the primary, secondary and tertiary costs associated with an accident involving a certified item. A risk of liability or an increased risk of liability can also provide certifiers with incentives to apply an optimal level of care during the certification process, thereby reducing the risk of inaccurate or unreliable certificates. Elements that can underdeter certifiers might still exist nowadays. Those elements give certifiers a shield to hide when things go wrong during the certification process. Legal uncertainty was used as an example in this regard. The analysis also showed that reasons traditionally invoked by certifiers to deny or restrict their liability are not convincing. Even when certifiers qualify as peripheral parties, they should be held liable when violating their obligations during the certification process. The overkill argument needs to be seen from a more nuanced perspective as well. Likewise, certifier-specific reasons such as the inability for classification societies to limit their liability should not be a reason to deny liability.

547. Certifiers should thus not be statutorily exempt from liability or immune as can be the case for financial supervisors.[1758] Certifiers create trust and confidence for those parties purchasing certified items. Third parties assume and trust that certifiers comply with their obligations during the certification process. According to Utrecht School of Law professor GIESEN, this trust, which is first created and then breached, is a strong argument in favour of liability.[1759] Moreover, an increased risk of liability for certifiers

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of vessels did not need to be examined (*Reino de Espana v. American Bureau of Shipping*, 691 F.3d, 476 (2nd Cir. 2012)). Even if it was assumed ('arguendo') that ABS owed a duty of reasonable care, Spain "failed to adduce sufficient evidence to create a genuine dispute of material fact as to whether [ABS] recklessly breached that duty such that their actions constituted a proximate cause of the wreck of the Prestige". As such, the District Court's grant of summary judgment to ABS was affirmed, "albeit on alternatives grounds" (*Reino de Espana v. American Bureau of Shipping*, 691 F.3d, 463 (2nd Cir. 2012)).

[1758] See in this regard: M. TISON, "Challenging the Prudential Supervisor: liability versus (regulatory) immunity", Financial Law Institute, Working Paper 2003-04, April 2003, 6-20, available at <https://ssrn.com/abstract=414901>; D. NOLAN, "The Liability of Financial Supervisory Authorities" (4) *Journal of European Tort Law* 2013, 190-222. Also see: P. DUFFHUES & W. WETERINGS, "The quality of credit ratings and liability: the Dutch view", (8) *International Journal of Disclosure and Governance* 2011, 354 concluding that "[i]n certain cases there may indeed be reason to assume liability. From the perspective of the incentive effect of civil liability, this must be possible. "Immunity" against liability for CRAs should be rejected".

[1759] I. GIESEN, "Regulating regulators through liability. The case for applying normal tort rules to supervisors" (24) *Utrecht Law Review* 2006, 16 with further references; I. GIESEN, *Toezicht en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de rechtvaardiging voor de aansprakelijkheid uit onrechtmatige daad van toezichthouders ten opzichte van derden*, Deventer, Kluwer, 2005, 149-150. This is not merely a theoretical argument but has already been a reason for judges to impose liability upon certifiers. In the *Bathurst* case, for instance, S&P's reliance on extensive disclaimers included in the rating reports to bar the plaintiff's recovery was rejected by the Federal Court. A disclaimer stipulating that an investor should not rely on the rating when making an investment decision is inconsistent with the very purpose why CRAs are paid to issue ratings. The model for rating structured products depends on potential investors who expect issuers to obtain a rating from CRAs. The court held that investors use ratings because they believe, and CRAs are aware thereof as their business model depends on such belief, that a rating

constitutes a form of additional or meta-supervision of certifiers by third parties. They could more easily bring claims against certifiers, giving judges a quicker opportunity to examine the quality of the certification process.[1760]

2. Criterion Two: Costs Associated with the Proposal

548. Several of the existing proposals impose considerable costs on society, certifiers or other parties. Creating tax-funded certifiers, for instance, would be to the benefit of only some third parties (e.g. investors or cargo owners), whereas the consequences and costs of unreliable and inaccurate certificates risk to potentially affect society in general. The CRAs' role in the 2008 financial crisis or oil spills and the position of ROs can be used as illustrations in this regard.[1761] The more 'radical' approaches to minimise conflicts of interest in the context of CRAs – such as the introducing handicaps – also entail considerable costs.[1762] Likewise, some of the proposals related to gatekeeping liability regimes impose costs. For example, moving into the direction of strict liability can distort market-entry decisions as a result of higher certification fees.[1763] The analysis showed that the applicable rules should induce gatekeepers to detect misconduct at a reasonable cost.[1764]

549. Proposals that want to be effective should thus not impose excessive costs upon certifiers, requesting entities, third parties or society. In this regard, the costs of some existing proposals are rather restricted, making their implementation more likely. Examples include disclosing and disgorging profits schemes or legislation regulating conflicts of interest following a certifier's remuneration.[1765] In any case, modifying existing proposals or introducing new ones will always entail some costs. One should have a clear understanding on their exact amount before making any changes or adopting

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represents "the best independent evidence available about the risk of loss on the investment" (*Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraph 2524). In the Belgian *Barrack Mines* decision, the Commercial Court in Brussels decided that the exoneration clause included in promotional materials distributed by a bank acting as intermediary in the investors' acquisition of financial instruments was invalid. Such a clause would render the role of the bank for the introduction and further support for the financial instrument after its listing worthless. The court emphasised that the bank had taken the stage to speak to the public. Therefore, the bank could not invoke an exclusion clause that would render its words meaningless and in effect warn the public that whenever it spoke in relation to a project, this word should not be taken seriously (Commercial Court Brussels, October 17, 2003, *Droit des Affaire-Ondernemingsrecht* 2004, 83-96 with annotation by S. DELAEY as reported in M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 407). See also the discussion *infra* in nos. 552-576.

[1760] I. GIESEN, "Regulating regulators through liability. The case for applying normal tort rules to supervisors", (24) *Utrecht Law Review* 2006, 26-27; I. GIESEN, *Toezicht en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de rechtvaardiging voor de aansprakelijkheid uit onrechtmatige daad van toezichthouders ten opzichte van derde*n, Deventer, Kluwer, 2005, 162-163.

[1761] See for more information the discussion *supra* in nos. 421-422.

[1762] See for more information the discussion *supra* in nos. 400-402.

[1763] See for more information the discussion *supra* in nos. 444-455.

[1764] See for more information the discussion *supra* in no. 442.

[1765] See for more information the discussion *supra* in nos. 383-412 & 414-415.

new proposals. However, identifying potential costs is not straightforward. Finding the right balance with the other three criteria is not evident either. The application of this criterion for proposals aiming to increase the accuracy and reliability of certificates should, therefore, be further examined by law and economics scholars.

3. Criterion Three: Factors Reducing the Risk of Certifier's Unlimited Liability

550. While an appropriate risk of liability is necessary to induce certifiers to issue certificates that are more reliable and accurate, there should also be factors reducing the risk of unlimited or crushing liability. While the first criterion considers the position of third parties, this one takes into account the position of certifiers. A threat of liability needs to be significant enough for certifiers to improve their performances but not to such an extent that they might withdraw or restrict their services altogether.[1766]

The importance of factors reducing the risk of a certifier's unlimited liability has been acknowledged in proposals dealing with gatekeeping liability regimes. Several authors argued that the liability of gatekeepers should be capped to a certain amount, being it a multiple of the highest annual certification revenues[1767] or a percentage of the requesting entity's damages after settlement or judgment.[1768] Other proposals, by contrast, do not contain such factors. The change of the remuneration structure for certifiers does by itself not provide factors reducing a certifier's risk of unlimited liability.[1769] The same conclusion applies for eliminating references to CRAs and their ratings in legislation[1770] or increasing competition in the certification sector.[1771]

551. The question thus arises to what extent existing general (legal) safeguards can sufficiently operate as factors preventing a certifier's risk to incur unlimited liability. Those general safeguards are not related to a specific proposal but have an overall application. Certifiers could, for instance, rely on exoneration clauses towards requesting entities as well as third parties to prevent crushing liability (part 3.1.). The 'floodgate' argument is also interesting to examine in this regard (part 3.2.). If these general safeguards are not sufficient to prevent the risk of crushing liability, each individual proposal should include additional and more specific factors. The main findings are summarised (part 3.3.).

[1766] J. PAYNE, "The Role of Gatekeepers", in: E. FERRAN, N. MOLONEY & J. PAYNE (eds.), *The Oxford Handbook of Financial Regulation*, Oxford, Oxford University Press, 2015, 273-274. It has already been mentioned that certifiers still provide their services even when they have already been subject to litigation and even liability. This third evaluation criterion is, therefore, especially of importance when existing proposals are being changed or new proposals are made that affect the position of certifiers. For instance, reversing the burden of proof with regard to causation or introducing strict liability for certifiers might require additional factors reducing the risk of unlimited liability (see in this regard the discussion *infra* in nos. 594-629).

[1767] See for more information the discussion *supra* in nos. 453-455.

[1768] See for more information the discussion *supra* in nos. 449-452.

[1769] See for more information the discussion *supra* in nos. 389-412.

[1770] See for more information the discussion *supra* in nos. 425-428.

[1771] See for more information the discussion *supra* in nos. 429-436.

3.1. Clauses Excluding or Limiting a Certifier's Liability

552. Certification contracts or terms and conditions often contain clauses that exclude or limit a certifier's liability towards requesting entities as well as towards other parties (e.g. third parties).[1772] The following paragraphs will examine whether these broad exclusion

[1772] See for credit rating agencies: "the Company agrees that, except for Standard and Poor's gross negligence or willful misconduct, the liability of Standard & Poor's […] on any ground and for any reason, to the Company or any other person, in relation to the rating or related analytic services shall not exceed, in aggregate, three times the aggregate fees paid by the Company up to a maximum of $ 1.000.000, and shall cover only direct losses and in particular, but without limitation, will not include lost profits, operating losses and opportunity costs. […] Standard & Poor's will not be liable in respect of any decisions made by the Company or any other person as a result of the issuance of the rating or the related analytic services"; "Moody's shall not be liable to the Issuer or the undersigned for any loss, injury or cost caused, in whole or in part, by any negligence (excluding willful misconduct) on the part of, or any contingency beyond the control of, Moody's […] in the procurement, compilation, analysis, interpretation, communication, dissemination, or delivery of any information or rating relating to the undersigned or the Issuer"; "Moody's […] disclaims liability to any person or entity for any indirect […] losses arising from or in connection with the information contained herein […] included but not limited to: (a) any loss of present or prospective profits or (b) any loss or damage arising where the relevant financial instrument is not the subject of the particular credit rating assigned by Moody's". See for classification societies: "In providing Services, information, or advice, the LR Group [Lloyd's Register] does not warrant the accuracy of any information or advice supplied. Except as set out in these Terms and Conditions, LR will not be liable for any loss, damage, or expense sustained by any person and caused by any act, omission, error, negligence, or strict liability of any of the LR Group or caused by any inaccuracy in any information or advice given in any way by or on behalf of the LR Group even if held to amount to a breach of warranty. Nevertheless, if the Client uses the Services or relies on any information or advice given by or on behalf of the LR Group and as a result suffers loss, damage, or expense that is proved to have been caused by any negligent act, omission, or error of the LR Group or any negligent inaccuracy in information or advice given by or on behalf of the LR Group, then LR will pay compensation to the Client for its proved loss up to but not exceeding the amount of the fee (if any) charged by LR for that particular service, information, or advice. 12. Notwithstanding the previous clause, the LR Group will not be liable for any loss of profit, loss of contract, loss of use, or any indirect or consequential loss, damage, or expense sustained by any person caused by any act, omission, or error or caused by any inaccuracy in any information or advice given in any way by or on behalf of the LR Group. 13. No LR Group entity will be liable or responsible in negligence or otherwise to any person not a party to the agreement pursuant to which any certificate, statement, data, or report is issued by an LR Group entity for (i) any information or advice expressly or impliedly given by an LR Group entity, (ii) any omission or inaccuracy in any information or advice given, or (iii) any act or omission that caused or contributed to the issuance of any certificate, statement data, or report containing the information or advice. Nothing in these Terms and Conditions creates rights in favour of any person who is not a party to the Contract with an LR Group entity"; "The combined liability of American Bureau of Shipping, its committees, officers, employees, agents or subcontractors for any loss, claim or damage arising from its negligent performance or nonperformance of any of its services or from breach of any implied or express warranty of workmanlike performance in connection with those services, or from any other reason, to any person, corporation, partnership, business entity, sovereign, country or nation, will be limited to the greater of a) $100,000 or b) an amount equal to ten times the sum actually paid for the services alleged to be deficient. The limitation of liability may be increased up to an amount twenty-five times that sum paid for services upon receipt of Client's written request at or before the time of performance of services and upon payment by Client of an additional fee of $10.00 for every $1,000.00 increase in the limitation. Under no circumstances shall American Bureau of Shipping be liable for indirect or consequential loss or damage (including, but without limitation, loss of profit, loss of contract, or loss of use) suffered by any person as a result of any failure by ABS in the performance of its obligations under these Rules. Under no circumstances whatsoever shall any individual who may have personally caused the loss, damage or expense be held personally liable". See for product certifiers: "SGS undertakes to exercise due care and skill in the performance of the Services and accepts responsibility only in cases of proven negligence. 12.2 Nothing in these General Conditions shall exclude or limit SGS' liability to the Client for death or personal injury or for fraud or any other matter resulting from SGS' negligence for which it would be illegal to exclude or limit its liability. 12.3 Subject to clause 12.2, the total liability of SGS to the Client in respect of any claim for loss, damage or expense of any nature and howsoever arising shall be limited,

clauses (e.g. on ‘any ground’ and for ‘any reason’, not be liable in respect ‘of any decision’ and towards ‘any person or entity’) can operate as a factor reducing the risk of a certifier’s unlimited liability.

553. Examples at the supranational level show that exoneration clauses can under certain circumstances operate as a factor reducing the risk of a certifier’s unlimited liability. Although CRAs cannot exclude their liability for gross negligence or intention, Article 35a of the Regulation on CRAs stipulates that their liability for gross negligence or intention can be limited in advance where the limitation is (a) reasonable and proportionate, and (b) allowed by the applicable national law. Whether a limitation is reasonable and proportionate needs to be interpreted in the light of national legislation.[1773] The EU also intervened in the context of auditors by adopting Recommendation 2008/473 containing three ways to limit an auditor’s liability. Likewise, the liability of ROs towards flag States can be limited to a certain amount pursuant to Article 5 of Directive 2009/15.[1774]

554. However, reliance on national law will often remain necessary to examine the use and validity of exclusion clauses.[1775] An in-depth comparative study on the exclusion of a certifier’s liability would take things too far. The aim of this part merely is to examine whether certifiers can seek shelter behind exclusion clauses. Although a comparative touch is included when relevant, the situation in Belgium is used as a starting point for the analysis. Belgian law can explicitly regulate whether parties are able to exclude or

in respect of any one event or series of connected events, to an amount equal to the fees paid to SGS under the Contract (excluding Value Added Tax thereon). 12.4 Subject to clause 12.2, SGS shall have no liability to the Client for claim for loss, damage or expense unless arbitral proceedings are commenced within one year after the date of the performance by SGS of the service which gives rise to the claim or in the event of any alleged non-performance within one year of the date when such service should have been completed. 12.5 Subject to clause 12.2, SGS shall not be liable to the Client nor to any third party: (a) for any loss, damage or expense arising from (i) a failure by Client to comply with any of its obligations herein (ii) any actions taken or not taken on the basis of the Reports or the Certificates; and (iii) any incorrect results, Reports or Certificates arising from unclear, erroneous, incomplete, misleading or false information provided to SGS; (b) for loss of profits, loss of production, loss of business or costs incurred from business interruption, loss of revenue, loss of opportunity, loss of contracts, loss of expectation, loss of use, loss of goodwill or damage to reputation, loss of anticipated savings, cost or expenses incurred in relation to making product recall, cost or expenses incurred in mitigating loss and loss or damage arising from the claims of any third party (including without limitation product liability claims) that may be suffered by the Client; and (c) any indirect or consequential loss or damage of any kind (whether or not falling within the types of loss or damage identified in (b) above)”.

[1773] See for example the English Credit Rating Agencies (Civil Liability) Regulations 2013, No. 1637.

[1774] See for more information the discussion *supra* in nos. 225-226.

[1775] See for example: Article L. 544-6 of Book V of the French *Code Monétaire et Financier*. In France, clauses limiting or excluding the liability of CRAs are prohibited and treated as inapplicable.

limit their liability.[1776] This is not different for certifiers.[1777] Yet, reliance on general principles of contract and tort law is necessary if there is no specific legislation covering the exclusion of a certifier's liability. The following paragraphs examine the exclusion of a certifier's liability towards requesting entities (part 3.1.1.) and towards other parties (part 3.1.2.).

3.1.1. Exclusion of Liability Towards Requesting Entities

555. Pursuant to Belgian contract law, exclusion clauses will have binding effect if the co-contractor explicitly or tacitly accepted it (*consentement*/*acceptation*). This requires that the co-contractor took or was reasonably able to take notice of the clauses (*connaissance*).[1778]

[1776] In order to prevent any misunderstanding and increase clarity, some terminological thoughts are necessary. There is a wide variety of exclusion clauses and they can be categorised in several ways under Belgian law. For instance, a division can be based on the scope and extent of the exclusion of liability. Clauses can entirely exclude a party's liability or only limit its liability to a certain amount. When using exclusion clauses in this dissertation, it also covers clauses that limit the certifier's liability to a certain amount unless indicated otherwise (E. DIRIX, "Exoneratiebedingen", *Tijdschrift voor Privaatrecht* 1988, 1172; R. KRUITHOF, "Les clauses d'exonération totale ou partielle de responsabilité. Rapport Belge", in: X, *In memoriam Jean Limpens*, Antwerp, Kluwer, 1987, 166-167; A. VAN OEVELEN, "Exoneratiebedingen en vrijwaringsbedingen", in: V. SAGAERT & D. LAMBRECHT (eds.), *Actuele Ontwikkelingen inzake Verbintenissenrecht*, Antwerp, Intersentia, 2009, 5).

[1777] For example, auditors are not allowed to exclude their liability, even partially, by a special agreement. Auditors are liable under civil law for carrying out their legal duties. Except for violations committed with fraudulent intent or with the intention of causing injury, this liability is limited to a sum of three million euros for the exercise of any of these duties to a person other than a listed company, increased to twelve million euros for the exercise of any of these duties in a listed company (Loi du 7 décembre 2016 portant organisation de la profession et de la supervision publique des réviseurs d'entreprises, no. 2016011493, published in the *Moniteur belge* on December 13, 2016. See for more information on the liability of auditors in Belgium: I. DE POORTER, *Controle van financiële verslaggeving: revisoraal en overheidstoezicht*, Antwerp, Intersentia, 2007, 183-305).

[1778] R. KRUITHOF, H. MOONS & C. PAULUS, "Overzicht rechtspraak (1965-1973), Verbintenisssenrecht", *Tijdschrift voor Privaatrecht* 1975, 516; E. MONTERO, "Les clauses limitatives ou exonératoires de responsabilité. Rapport belge", in: M. FONTAINE & G. VINEY (eds.), *Les sanctions de l'inexécution des obligations contractuelles: études de droit comparé*, Brussels, Bruylant, 2001, 406-407; A. VAN OEVELEN, "Exoneratiebedingen en vrijwaringsbedingen", in: V. SAGAERT & D. LAMBRECHT (eds.), *Actuele Ontwikkelingen inzake Verbintenissenrecht*, Antwerp, Intersentia, 2009, 6-9; W. VAN GERVEN with cooperation of A. VAN OEVELEN, *Verbintenissrecht*, Leuven, Acco, 2015, 177; E. WEEMAELS, "La responsabilité des agences de notation. Des sociétés responsables comme les autres?", (2) *Revue Pratique des Sociétés-Tijdschrift voor Rechtspersoon en Vennootschap* 2012, 158 with further references; L. CORNELIS, "Les clauses d'exonération de responsabilité couvrant la faute personnelle et leur interprétation", *Revue Critique De Jurisprudence Belge* 1981, 203; M. VAN QUICKENBORNE & H. VANDENBERGHE, "Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad. 2000-2008 [Foutvereiste. Overmacht en rechtvaardigingsgronden. Exoneratiebedingen]", (4) *Tijdschrift voor Privaatrecht* 2010, 2138-2145; E. DIRIX, "Exoneratiebedingen", *Tijdschrift voor Privaatrecht* 1988, 1181; B. DUBUISSON, "Les clauses limitatives ou exonératoire de responsabilité ou de garantie en droit belge", in: P. WERY (ed.), *Les clauses applicables en cas d'inexécution des obligations contractuelles*, Brussels, die Keure, 2001, 41; I. CLAEYS, "De tegenstelbaarheid van algemene bankvoorwaarden: een viertal scenario's", in: B. TILLEMAN & A. VERBEKE (eds.), *Actualia vermogensrecht: liber alumnorum KULAK als hulde aan Prof. dr. Georges Macours*, Bruges, die Keure, 2005, 460. See in this regard for example: Court of Appeal Antwerp, January, 16, 1996, *Rechtskundig Weekblad* 1995-1996, 1417; R. STEENNOT, "Beëindigings-, exoneratie- en schadebedingen bij bijzondere overeenkomsten", in: X, *XXXIVe Postuniversitaire Cyclus Willy Delva Bijzondere overeenkomsten*, Mechelen, Kluwer, 2008, 526-533.

556. The requirement of *connaissance* does not seem a major problem in the context of certifiers. Arguably, the requesting entity takes notice of the exclusion clause or is reasonably able to do so. Certifiers will probably forward their terms and conditions to the requesting entity together with or as a part of the actual certification agreement. The existing doctrinal discussion as to whether terms and conditions including the exclusion clause have to be a handed over to the requesting entity instead of merely referring to them in the certification contract is of minor importance in the context of certifiers.[1779] Requesting entities are familiar with the fact that terms and conditions including an exclusion clause are frequently used in the professional sector.[1780] They contract with certifiers on a regular basis to certify their items. It is also conceivable that exclusion clauses will be visible, plainly displayed and written in intelligible and understandable language.[1781] Furthermore, certification agreements such as those between CRAs and issuers can include a clause stipulating that the issuer read and understood the terms and conditions upon signing the certification agreement. The validity of such clauses, of course assuming that the requesting entity was reasonably able to take notice of the terms and conditions,[1782] is not contested in Belgium.[1783]

557. It is also conceivable that requesting entities explicitly or tacitly accepted the clause included in the agreement or its terms and conditions. If the certification contract contains the clause, the co-contractor will accept it upon signing the contract. The requesting entity

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[1779] See for an overview: D. BRULOOT & R. STEENNOT, "Clausules i.v.m. de tegenwerpelijkheid van algemene voorwaarden", in: G.L. BALLON *et al* (eds.), *Gemeenrechtelijke clausules*, Antwerp, Intersentia, 2013, 370; I. CLAEYS, "De tegenstelbaarheid van algemene bankvoorwaarden: een viertal scenario's", in: B. TILLEMAN & A. VERBEKE (eds.), *Actualia vermogensrecht: liber alumnorum KULAK als hulde aan Prof. dr. Georges Macours*, Bruges, die Keure, 2005, 464-468.

[1780] D. BRULOOT & R. STEENNOT, "Clausules i.v.m. de tegenwerpelijkheid van algemene voorwaarden", in: G.L. BALLON *et al* (eds.), *Gemeenrechtelijke clausules*, Antwerp, Intersentia, 2013, 370 with further references.

[1781] W. DE BUS, "Bespreking van een aantal gebruikelijke bepalingen in algemene voorwaarden", in: S. STIJNS & K. VANDERSCHOT (eds.), *Contractuele clausules rond de (niet-)uitvoering en de beëindiging van contracten*, Antwerp, Intersentia, 2006, 109 with further references in footnotes 97-98. See in this regard also: Commercial Court Hasselt, October 2, 2007, *Rechtskundig Weekblad* 2008-2009, 548 (terms and conditions that are hardly visible because of the small font are not opposable to the counterparty). In this regard, a comparison can be made with case law in the United States dealing with exclusion clauses in the context of classification societies. In the case of the *Sundanc*e, the question arose whether exclusion clauses in the classification contract were enforceable. The agreement between the shipowner and ABS contained a clause in bold capitals stipulating that the parties acknowledged that the terms and conditions contained in the contract had been reviewed. Term 11 referred to the society's Rules for Building and Classing Steel Vessels. According to Rule 1.25, neither Bureau Veritas nor any of its employees will, under any circumstances whatever, be liable in any respect for any act or omission, whether negligent or otherwise, of its surveyors, agents, employees or officers, nor for any inaccuracy or omission in the any publication, report, certificate or other document issued by classification society. The Southern District Court in New York, however, denied summary judgment. The placement and relative isolation of the clause and the torturous trail one had to follow to discover it raised a question of fact as to the actual intention of the parties (*Sundance Cruises v. American Bureau of Shipping*, 799 F. Supp. 363, 378 (S.D.N.Y. 1992)).

[1782] D. BRULOOT & R. STEENNOT, "Clausules i.v.m. de tegenwerpelijkheid van algemene voorwaarden", in: G.L. BALLON *et al* (eds.), *Gemeenrechtelijke clausules*, Antwerp, Intersentia, 2013, 377 with further references.

[1783] K. VANDERSCHOT, "Instemming met algemene voorwaarden: kennisname- en aanvaardings-clausules", in: S. STIJNS & K. VANDERSCHOT (eds.), *Contractuele clausules rond de (niet-)uitvoering en de beëindiging van contracten*, Antwerp, Intersentia, 2006, 33 with further references in footnote 127.

will also accept the clause when it is included in the terms and conditions and thus not directly incorporated in the contract. That is because terms and conditions might be forwarded with the agreement itself. Contracts can even stipulate that the terms and conditions are an integral part of the agreement.[1784] The acceptance of the terms and conditions including the exclusion clause follows from signing the agreement.[1785] Contracts might also contain a provision according to which the requesting entity agrees to the terms and conditions by signing the agreement. Although the validity of such contractual terms is more contested,[1786] it remains fair to say that the requesting entity will have accepted the terms and conditions upon signing the certification contract. It is in most cases a professional party with sufficient bargaining power that could rely on its own expertise or external (consulting) services when drafting the contract.[1787]

558. Exclusion clauses included in certification agreements or terms and conditions are principally valid under Belgian law. There are, however, three exceptions.[1788]

First, clauses excluding the liability of the certifier vis-à-vis requesting entities are not valid if they conflict with public policy[1789] or violate a statutory provision prohibiting a certifier to limit or exclude its liability.[1790] Second, the exclusion of liability may not

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[1784] See for example the rating contract with Standard and Poor's in the Annex.

[1785] C.A. DUMONT DE CHASSART, "De tegenstelbaarheid van algemene voorwaarden "offline"", in: S. ONGENA (ed.), *Algemene voorwaarden*, Mechelen, Kluwer, 2006, 19 at foonote 81; Q. VAN ENIS, "L'opposabilité des conditions générales off-line et on-line : de la suite des idées", in: B. KOHL *et al* (ed.), *Les Conditions Générales*, Collection du Jeune barreau de Mons, Louvain-la-Neuve, Anthemis, 2009, 16.

[1786] See for example the discussion in K. VANDERSCHOT, "Instemming met algemene voorwaarden: kennisname- en aanvaardingsclausules", in: S. STIJNS & K. VANDERSCHOT (eds.), *Contractuele clausules rond de (niet-)uitvoering en de beëindiging van contracten*, Antwerp, Intersentia, 2006, 33-34 with further references; D. BRULOOT & R. STEENNOT, "Clausules i.v.m. de tegenwerpelijkheid van algemene voorwaarden", in: G.L. BALLON *et al* (eds.), *Gemeenrechtelijke clausules*, Antwerp, Intersentia, 2013, 378-379 with further references; I. CLAEYS, "De tegenstelbaarheid van algemene bankvoorwaarden: een viertal scenario's", in: B. TILLEMAN & A. VERBEKE (eds.), *Actualia vermogensrecht: liber alumnorum KULAK als hulde aan Prof. dr. Georges Macours*, Bruges, die Keure, 2005, 468-469. See for an extensive discussion: R. STEENNOT, *Elektronisch betalingsverkeer: een toepassing van de klassieke principes*, Antwerp, Intersentia, 2002, 21-91.

[1787] E. WEEMAELS, "La responsabilité des agences de notation. Des sociétés responsables comme les autres?", (2) *Revue Pratique des Sociétés-Tijdschrift voor Rechtspersoon en Vennootschap* 2012, 158-159 with further references.

[1788] See in this regard the judgment by the Court of Cassation, September 25, 1959, *Arresten van het Hof van Verbreking* 1960, 86 & *Pasicrisie belge* 1960, I, 113. See for an overview: A. VAN OEVELEN, "Exoneratiebedingen en vrijwaringsbedingen", in: V. SAGAERT & D. LAMBRECHT (eds.), *Actuele Ontwikkelingen inzake Verbintenissenrecht*, Antwerp, Intersentia, 2009, 10-19; L. CORNELIS, "Les clauses d'exonération de responsabilité couvrant la faute personelle et leur interprétation", *Revue Critique De Jurisprudence Belge* 1981, 204-209. See in this regard also Article 5.92 of Book 5 on the law of obligations that will be included in the new Belgian Civil Code. The Article contains the exceptions to the validity of exoneration clauses (*Avant-projet de loi approuvé*, le 30 mars 2018, par le Conseil des ministres, tel que préparé par la Commission de réforme du droit des obligations instituée par l'arrêté ministériel du 30 septembre 2017 et adapté, eu égard aux observations reçues depuis le début de la consultation publique lancée le 7 décembre 2017).

[1789] There have also been decisions in the US according to which exclusion clauses in classification contracts or survey reports were unenforceable as they were contrary to public policy. These decisions are further discussed as they come closer to the third exception under Belgian law.

[1790] A. VAN OEVELEN, "Exoneratiebedingen en vrijwaringsbedingen", in: V. SAGAERT & D. LAMBRECHT (eds.), *Actuele Ontwikkelingen inzake Verbintenissenrecht*, Antwerp, Intersentia, 2009, 12-13.

apply to a certifier's personal fraud or intentional fault.[1791] As such, contracting parties are principally allowed to exclude their liability for gross negligence in Belgium.[1792] Third, exclusion clauses are invalid if they render nugatory or meaningless the object of a certifier's obligations or promises under the certification contract.[1793] According to some authors, the object of the contract can be rendered nugatory when the exclusion clause applies to its principal obligations.[1794] Others are stricter and require that the entire certification contract is rendered meaningless by the clause. This is less evident to prove as a contract will often maintain some meaning, unless the exclusion clause applies to all obligations under the certification agreement.[1795]

559. This third exception has already been at stake in cases dealing with the liability of providers of information and certifiers. Such clauses have already been nullified when

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[1791] Court of Cassation, September 25, 1959, *Arresten van het Hof van Verbreking* 1960, 86 & *Pasicrisie belge* 1960, I, 113 with annotation by P. MAHAUX; Court of Cassation, January 5, 1961, *Arresten van het Hof van Cassatie* 1961, 440 & *Pasicrisie belge* 1961, 483; Court of Cassation, February 28, 1980, *Arresten van het Hof van Cassatie* 1979, 801 & *Pasicrisie belge* 1980, 794. See in this regard also Article 5.92 in Book 5 on the law of obligations that will be included in the new Belgian Civil Code (*Avant-projet de loi approuvé*, le 30 mars 2018, par le Conseil des ministres, tel que préparé par la Commission de réforme du droit des obligations instituée par l'arrêté ministériel du 30 septembre 2017 et adapté, eu égard aux observations reçues depuis le début de la consultation publique lancée le 7 décembre 2017).

[1792] Court of Cassation, September 25, 1959, *Arresten van het Hof van Verbreking* 1960, 86 & *Pasicrisie belge* 1960, I, 113 with annotation by P. MAHAUX; Court of Cassation, January 5, 1961, *Arresten van het Hof van Cassatie* 1961, 440 & *Pasicrisie belge* 1961, 483; Court of Appeal Brussels, March 25, 1997, *Algemeen Juridisch Tijdschrift* 1997, 258 with annotation by E. MORTIER. See for a discussion and references to case law: E. MONTERO, "Les clauses limitatives ou exonératoires de responsabilité. Rapport belge", in: M. FONTAINE & G. VINEY (eds.), *Les sanctions de l'inexécution des obligations contractuelles: études de droit comparé*, Brussels, Bruylant, 2001, 413-414. However, Article 5.92 of Book 5 on *«Les obligations»* specifies that an exclusion of a "faute" is considered "non écrites" when it "cause une atteinte à la vie ou à l'intégrité physique d'une personne" (*Avant-projet de loi approuvé*, le 30 mars 2018, par le Conseil des ministres, tel que préparé par la Commission de réforme du droit des obligations instituée par l'arrêté ministériel du 30 septembre 2017 et adapté, eu égard aux observations reçues depuis le début de la consultation publique lancée le 7 décembre 2017).

[1793] Court of Cassation, September 27, 1990, 8676, *Arresten van het Hof van Cassatie* 1990, 88 & *Pasicrisie belge* 1991, I, 82; Court of Cassation, March 26, 2004, C.02.0038.F, *Arresten van het Hof van Cassatie* 2004, 537 & *Pasicrisie belge* 2004, 513; Court of Cassation, November 23, 1987, 7584, *Arresten van het Hof van Cassatie* 1987, 371 & *Pasicrisie belge* 1988, I, 347; Court of Appeal Brussels, December 8, 2004, *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2006, 136. Article 5.92 of Book 5 on *«Les obligations»* specifies that clauses "qui vide le contrat de sa substance" are invalid (*Avant-projet de loi approuvé*, le 30 mars 2018, par le Conseil des ministres, tel que préparé par la Commission de réforme du droit des obligations instituée par l'arrêté ministériel du 30 septembre 2017 et adapté, eu égard aux observations reçues depuis le début de la consultation publique lancée le 7 décembre 2017).

[1794] T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 903; N. CARETTE, "Exoneratiebedingen in het gemeen recht", (1) *Jura Falconis* 2004-2005, 82 with further references; B. DUBUISSON, "Les clauses limitatives ou exonératoire de responsabilité ou de garantie en droit belge", in: P. WERY (ed.), *Les clauses applicables en cas d'inexécution des obligations contractuelles*, Brussels, die Keure, 2001, 64-65; O. VANDEN BERGHE, "Bedingen en schadevergoeding: strafbedingen, opzegbedingen en exoneratiebingen", in: S. STIJNS (ed.), *Verbintenissenrecht*, Bruges, die Keure, 2004, 66; R. STEENNOT, "Beëindigings-, exoneratie- en schadebedingen bij bijzondere overeenkomsten", in: X, *XXXIVe Postuniversitaire Cyclus Willy Delva Bijzondere overeenkomsten*, Mechelen, Kluwer, 2008, 536.

[1795] R. KRUITHOF, "Les clauses d'exonération totale ou partielle de responsabilité. Rapport Belge", in: X, *In memoriam Jean Limpens*, Antwerp, Kluwer, 1987, 189-190; E. DIRIX, "Exoneratiebedingen", *Tijdschrift voor Privaatrecht* 1988, 1191. See for further references: T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 903, footnotes 4474-4475.

they are worded too broadly. This can be the case when they entirely exclude the liability of a provider of information by depriving parties from any possible recourse.[1796] In the *Paula* decision, the Antwerp Court of Appeal had to shed light on the validity of an exclusion clause in the context of classification societies. The clause in the contract stipulated that the issuance of a certificate of class could not lead to any liability on the part of the classification society or its employees.[1797] The court rejected the use of such a broad exclusion clause on the ground that it would render meaningless the content of the classification society's contractual obligations.[1798] Exclusion clauses are thus invalid to the extent that they entirely render meaningless the certification contract by, for example, leaving no recourse possibilities to the co-contractors to recover any loss.[1799] Clauses excluding a certifier's liability for 'any reason' and on 'any ground' can be invalid under Belgian law. Therefore, they cannot serve as a factor reducing the risk for certifiers to incur unlimited liability.

560. However, things can be more complicated. Certifiers could, for instance, not exclude their liability for 'any reason' or on 'any ground' but only for specific obligations related to the issuance of the certificate. The question then arises which obligations qualify as essential under the certification agreement, for the object of the contract can be rendered nugatory when the exclusion clause applies to these obligations. Identifying a certifier's essential obligations under the agreement is not straightforward. Although this is primarily the task of the judge who has to interpret the contract,[1800] an indication of the core in the certification agreement – the "harde kern"[1801] or "minimum contractuel"[1802] –

[1796] Court of Appeal Brussels, December 8, 2004, *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2006, 135-137 ("La clause par laquelle le professionnel s'exonère de toute responsabilité est nulle dans la mesure où elle vide son obligation de sa substance, en privant le contractant de tout recours possible"). The clauses excluded liability "quelconque de la part de la SA Sogasander " (any liability on part of Sogasander). The use of "zonder enige verantwoordelijkheid" (without any responsibility) also appeared in several reports.

[1797] Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 311 ("geen enkele aansprakelijkheid kan doen ontstaan").

[1798] Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 315.

[1799] Judges in the US dealing with the validity of exclusion clauses in classification contracts and survey reports came to similar conclusion, even though another ground was relied upon to render the clause invalid. In the *Great American* case, for instance, the exclusion clause stipulated that Bureau Veritas declined any responsibility for errors of judgment, mistakes or negligence committed by its technical or administrative staff or by its agents. The Southern District Court in New York concluded that the clause was "overbroad and unenforceable as contrary to public policy" (*Great American Insurance Company v. Bureau Veritas*, 338 F. Supp. 999, 1015 (S.D.N.Y. 1972), footnote 6; *Sundance Cruises v. American Bureau of Shipping*, 799 F. Supp. 363, 378 (S.D.N.Y. 1992)).

[1800] A. VAN OEVELEN, "Exoneratiebedingen en vrijwaringsbedingen", in: V. SAGAERT & D. LAMBRECHT (eds.), *Actuele Ontwikkelingen inzake Verbintenissenrecht*, Antwerp, Intersentia, 2009, 18.

[1801] N. CARETTE, "Exoneratiebedingen in het gemeen recht", (1) *Jura Falconis* 2004-2005, 82-83.

[1802] B. DUBUISSON, "Les clauses limitatives ou exonératoire de responsabilité ou de garantie en droit belge", in: P. WERY (ed.), *Les clauses applicables en cas d'inexécution des obligations contractuelles*, Brussels, die Keure, 2001, 64; L. CORNELIS, "Les clauses d'exonération de responsabilité couvrant la faute personnelle et leur interprétation", *Revue Critique De Jurisprudence Belge* 1981, 208.

is what contracting parties expected from each other.[1803] Contractual obligations are also essential to the extent that parties consider them to be so.[1804]

561. The issuance of the certificate in an independent way can qualify as an essential obligation under the certification contract for three reasons.

First, several sources require a certifier to remain independent from requesting entities when issuing a certificate (e.g. legislation, codes of conduct, charters and case law).[1805] Moreover, the obligation to remain independent is often considered essential for other professionals such as architects that also have a public role in addition to their private contract.[1806] There is no reason why this should be different for certifiers. Second, inspiration can be sought in case law from other jurisdictions to qualify the issuance of a certificate in an independent way as an essential obligation for certifiers. Especially case law dealing with the liability of CRAs in the US reveals that their independence and the proper management of conflicts of interest is often considered essential.[1807] Third, some scholars argue that the role and position of certifiers as intermediaries urges them to display the necessary independence vis-a-vis requesting entities (cf. the idea of reputational capital).[1808]

[1803] E. DIRIX, "Exoneratiebedingen", *Tijdschrift voor Privaatrecht* 1988, 1191.

[1804] B. DUBUISSON, "Les clauses limitatives ou exonératoire de responsabilité ou de garantie en droit belge", in: P. WERY (ed.), *Les clauses applicables en cas d'inexécution des obligations contractuelles*, Brussels, die Keure, 2001, 65, footnote 118.

[1805] See for more information the discussion *supra* in nos. 66-77.

[1806] The architect is required to be independent vis-à-vis the principal (client), building contractors and other parties involved in the construction process. Such independence is necessary to properly perform his profession. See in this regard: Article 4, Ordre des architects-Reglement de Deontologie du 18 avril 1985 published on May, 8, 1985. The public interest benefits from safe buildings. Therefore, the quality control of such buildings has to be performed by an expert who is independent from the persons responsible for building the construction. The architect who does not remain independent violates the Act of 20 February 1939 concerning the protection of the title of architect (Loi du 20 février 1939 sur la protection du titre et de la profession d'architecte, no. 1939022050, published in the *Moniteur belge* on March, 25, 1939). See in this regard: P. COLLE & K. TROCH, "Algemeen overzicht van de beginselen inzake aansprakelijkheid van de bouwheer, architect, aannemer, ingenieur en/of studiebureau", (3) *Tijdschrift Verzekeringsrecht* 2000, 28 with further references; W. NACKAERTS, "De Architect", in: D. MEULEMANS (ed.), *Een pand bouwen en verbouwen. Praktijkgids vastgoedrecht 3*, Leuven, Acco, 2005, 100. Several decisions have also accepted that the architect's independence is the cornerstone of his profession: Court of Cassation, December 1, 1994, D.94.22.F, *Arresten van het Hof van Cassatie* 1994, 1038 & *Pasicrisie belge* 1994, I, 1031; Court of Appeal Ghent, June 29, 2007, *Rechtskundig Weekblad* 2010-2011, 1136-1338; Commercial Court Hasselt, March 30, 1999, *Limburgs Rechtsleven* 2003,157.

[1807] It has already been mentioned that the court in the *Abu Dhabi* case held that the market at large relies on the accuracy of ratings and the independence of rating agencies. The CRA's role as unbiased reporter of information requires it to remain independent of the issuers for which it rates notes (*Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651 F. Supp. 2d 155, 166 & 181 (S.D.N.Y. 2009)). In *King County*, it was held that ratings "convey to investors that the product has been evaluated by an objective and independent third-party" (K*ing County, Washington, et al v. IKB Deutsche Industriebank AG et al*, 09 Civ. 8387, 8 (SAS) (S.D.N.Y. 2012)). Provisions dealing with a CRA's independence in codes of conduct are not couched in aspirational terms. They are a promise that policies and procedures are implemented to manage and avoid conflicts of interest (*In re Moody's Corporation Securities Litigation*, 599 F. Supp. 2d 493, 509 (S.D.N.Y. 2009)). Also see the discussion *supra* in no. 69.

[1808] See for more information the discussion *supra* in no. 67.

562. The exclusion for losses following a certifier's lack of independence might thus be invalid as it renders nugatory the essential object of the contract. This also implies that a certifier can exclude its liability for the violation of other obligations under the certification agreement as they would not render meaningless the object of the contract. Against this background, it can be concluded that a clause excluding the liability of the certifier for the losses incurred by requesting entities because the certificate incorrectly reflects the 'actual' or 'true' value of the certified item is valid under Belgian law. Such exclusion of liability does not render nugatory the object of the contractual promise of the certifier as it does not affect the principal obligation.[1809]

3.1.2. Exclusion of Liability Towards Non-Requesting Entities

563. Most exclusion clauses in certification contracts also state that certifiers cannot be held liable towards 'any other person' besides the requesting entity. Whether these exclusion clauses are binding and valid can be determined by the way in which that 'other person' became aware or took notice of them. I will focus on CRAs to illustrate the use and validity of exclusion clauses in those circumstances. Nevertheless, the conclusions of the analysis extend to other certifiers as well whenever non-requesting entities were informed of the clauses in similar ways. A non-requesting entity can become aware of the rating in different ways. Two scenarios are briefly discussed. Someone can visit the website of a CRA to consult the rating online (part A.). Parties might also be informed of the clause in other ways than by consulting the credit rating online (part B.).

A. Online Subscribers

564. Parties can visit the website of a CRA where most ratings are publicly available. Parties consulting websites of CRAs have to register and agree with the terms of use before they have access to the rating. The terms of use are clearly displayed on the CRA's website. The user does not have to take additional steps to view their content. The terms of use contain clear, visible, easily understandable and in print letters displayed clauses excluding the liability of CRAs. Parties are thus well-informed. They are at least reasonably able to take notice of the existence and the content of the terms of use before creating an account on the websites (cf. the requirement of *connaissance*).

565. Parties visiting the website of CRAs have to agree and consent with the terms of use before getting access to the rating. The different websites require users to mark the icon "I have read and agree to the above terms of use" (the so-called 'click-wrap agreement'). Generally, visitors seek to find a particular credit rating or financial information offered on the website. The user might thus have had the actual will and intent to contract with the CRA as he consented to the terms of use by clicking the box. Such boxes were specifically developed to indicate the consent of the users when they mark the icon. In addition, with the exception of the website of S&P, the terms of use included in the online

[1809] See for CRAs: M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law,* Brussels, Bruylant, 2006, 378-379.

user agreements of the other major CRAs are often displayed above the "I agree" box, which implies that users of websites are expected to have read them.[1810] The user accepts the online offer on the website when marking the "I agree" box. As a result, a contract between the user and the CRA comes into existence because both parties agreed on the terms of use and had the actual will to contract (cf. the requirement of *consentement*).[1811]

566. Some scholars, however, note that the mere clicking of the "I Agree" box does by itself not show that the user of the website accepted the terms and conditions and/or had the actual will to contract with the CRA. There might in such situations be a discrepancy between the expressed will (to agree with the terms of use) and the real will (to not agree with the terms of use). It will depend upon the reasons and the state of mind of the user clicking the box whether or not a contract is agreed upon. If the user had the intention to accept the terms and agree a contract on that ground, there might be a meeting of the minds.[1812] Yet, even if there is a discrepancy between the expressed and the real will – no meeting of the minds – one can rely on the doctrine of the legitimate expectations (*la théorie de l'apparence*) to conclude that a contract has been formed with the CRA.[1813]

567. CRAs can thus invoke the doctrine of legitimate expectations to hold users to the content of terms and conditions once they ticked the box. By clicking the box, users create reasonable expectations on the side of CRAs that they had the actual intention to agree with the terms and conditions, including the exoneration clauses. This can give rise to

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[1810] Q. VAN ENIS, "L'opposabilité des conditions générales off-line et on-line : de la suite des idées", in: B. KOHL *et al* (ed.), *Les Conditions Générales*, Collection du Jeune barreau de Mons, Louvain-la-Neuve, Anthemis, 2009, 28. See in this regard also several US decisions, which have enforced click-wrap agreements at different occasions. According to these decisions, parties entered into a valid contract because the user clicked "I Agree" to show that it accepted the terms of the click-wrap. See for example: *A.V. v. iParadigms LLC*, 544 F.Supp.2d 473 (E.D.Va. 2008). See for an overview and discussion: M. RUSTAD, *Software Licensing: Principles and Practical Strategies*, Oxford, Oxford University Press, 2010, 323-324, footnote 989.

[1811] D. ROMBOUTS & K. DE VULDER, "De elektronische algemene voorwaarden en hun tegenstelbaarheid", in: S. ONGENA (ed.), *Algemene voorwaarden*, Mechelen, Kluwer, 2006, 56. Also see the discussion *supra* in nos. 555-557 for more information.

[1812] L. CORNELIS & P. GOETHALS, "Contractuele aspecten van e-commerce", in: L. CORNELIS (ed.), *Tendensen in het bedrijfsrecht. 10: de elektronische handel*, Brussels, Bruylant, 1999, 5-6.

[1813] See for a discussion of this doctrine: M.E. STORME, "Rechtszekerheid en vertrouwensbeginsel in het Belgisch verbintenissenrecht", *Tijdschrift voor Privaatrecht* 1997, 1861; S. STIJNS & I. SAMOY, "La confiance légitime en droit des obligations", in: S. STIJNS & P. WÉRY (eds.), *De bronnen van niet-contractuele verbintenissen*, Bruges, die Keure, 2007, 47; I. VEROUGSTRAETE, "Wil en vertrouwen bij het totstandkomen van overeenkomsten", *Tijdschrift voor Privaatrecht* 1990, 1163. According to the mainstream Belgian legal theory, a meeting of the minds is necessary for the formation of a contract (see for example: P. VAN OMMESLAGHE, *Droit des obligations, I, Sources des obligations (première partie)*, Brussels, Bruylant, 2010, 225; W. VAN GERVEN with cooperation of A. VAN OEVELEN, *Verbintenissenrecht*, Leuven, Acco, 2015, 71-75 with references). It does not fall within the scope of this dissertation to examine whether this theory (still) covers all situations under Belgian law. However, the doctrine of the legitimate expectations might be relied upon as well to explain the formation of a contract (see in this regard for example: M.E. STORME, "Rechtszekerheid en vertrouwensbeginsel in het Belgisch verbintenissenrecht", *Tijdschrift voor Privaatrecht* 1997, 1861).

contractual obligations even when the inspired expectation does not correspond with the actual will of the user.[1814]

Let me take the example of a person who only registered with the online services of CRAs for research purposes. The only purpose of clicking the "I Agree" box was to examine the use of click-wrap agreements (the real will). However, the clicking of the box might and will be perceived differently by CRAs. They can reasonably expect that someone subscribes to its website to get access to the rating, even when this was by accident or out of research purposes and thus not with the intention to consult ratings.[1815] As such, even if the real will (the intention to do research) and the declared will (to consult ratings and financial information) do not correspond, CRAs can reasonably expect that someone subscribes to get access to the credit ratings. This is explicitly displayed as the reason why registration is necessary. The CRA may thus expect that users agree with the content of the terms including the exclusion clauses upon registration.[1816]

568. As is the case with clauses in rating agreements with issuers, online clauses exclude the liability of CRAs in nearly all cases. CRAs often exclude their liability for 'any' loss arising in connection with the access to or use of the website and its content or information. It is particularly interesting to examine whether such clauses render meaningless the object of the online agreements with subscribers. This implies that one has to examine what constitute the CRA's essential obligations under the online subscriber agreement.[1817]

It remains uncertain which stance the courts will take on this issue. It could, on the one hand, be argued that CRAs might be bound to perform the same essential obligation as those under the rating agreement with the issuer, namely issuing a rating in an independent way.[1818] On the other hand, the essential obligations of CRAs under the user

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[1814] S. JANSENS & S. STIJNS, "De basisbeginselen van het contractenrecht: kroniek van de recentste evoluties", (1) *Revue Générale de Droit Civil Belg*e 2013, 17-19 with further references; G. DE GEEST, B. DE MOOR & B. DEPOORTER, "Misunderstandings between Contracting Parties: Towards an Optimally Simple Legal Doctrine", (9) *Maastricht Journal of European and Comparative Law* 2002, 165. Also see: Commercial Court Brussels, February 1, 2008, *Rechtskundig Weekblad* 2009-10, 461.

[1815] Moody's explicitly displays that one has to register to get access to ratings on over 170,000 corporate, government and structured finance securities. Similarly, users subscribe on the website of Fitch to get free access to global credit ratings.

[1816] K. VANDERSCHOT, "Instemming met algemene voorwaarden: kennisname- en aanvaardings-clausules", in: S. STIJNS & K. VANDERSCHOT (eds.), *Contractuele clausules rond de (niet-)uitvoering en de beëindiging van contracten*, Antwerp, Intersentia, 2006, 34-35 with further references.

[1817] Exclusion clauses also contain limitations of liability that can render the object of the user agreement nugatory. The limitation clauses inserted in the disclaimers of S&P and Moody's stipulate that the maximum liability of both CRAs related to the use of the websites and its contents may not exceed (a) the total amount paid by the subscribers to the CRAs for use of the website during the 12 months immediately preceding the event giving rise to the alleged liability, or (b) $100. Considering that subscribers do generally not pay to have access to the ratings on the website, option (a) remains without effect. As such, both CRAs face a maximum liability of $100. Against this background, it is conceivable that the judge might decide that such limitation of liability renders meaningless the object of the user agreement.

[1818] Several arguments can be used to come to that conclusion. First, the essential obligation of CRAs under the rating contract with an issuer is also identified in the terms and conditions included in the agreements with online subscribers. The agreement with Moody's, for example, stipulates that the CRA is paid a fee

agreement might be less extensive. The online terms underline that CRAs provide users access to credit ratings and other information for non-commercial use. Ratings can on an occasional and irregular basis be downloaded and printed for personal use. Therefore, giving subscribers access to ratings for personal use through online registration can be a CRA's essential obligation under the user agreement.[1819]

569. The second approach is to be preferred. Following Article 1156 BCC,[1820] judges have to find the common intent of the parties rather than sticking to the literal meaning of the words in the contract when a dispute arises. The real intent of CRAs and subscribers has to be found by interpreting the agreement including the online terms and conditions. The common intent can be determined by examining the expressed written intention of the CRA and subscribers in the user agreement. Judges may, with respect to the evidential force of a written instrument, also take into consideration extrinsic elements (that is evidence not contained in the user agreement itself) to find the common intent. These, for example, include the conduct of the parties while performing the online subscriber agreement, the practices that parties have established between themselves or the nature

by the issuer for its services ranging from $1,500 to $2,400,000. Moody's, nonetheless, maintains policies and procedures to safeguard the independence of its ratings and rating processes. Similarly, S&P separates certain business activity units from each other to preserve the independence and objectivity of each activity. Moreover, investors that register online surely benefit from independent ratings and other reliable and objective information (H. OOGHE *et al* (eds.), *The Economic and Business Consequences of the EMU: A Challenge for Governments, Financial Institutions, and Firms*, Massachusetts, Springer Science & Business Media, 2000, 416-417; A.N.R. SY, "The Systemic Regulation of Credit Rating Agencies and Rated Markets", International Monetary Fund, IMF Working Paper 09/129, 2009, 11-13). Second, disclaimers included in the user agreements generally apply to losses arising out of or in connection with the access and use of ratings available on the website of the CRAs. The rating that has been issued under the original rating agreement will probably also be available on the website. Subscribers thus consult a rating, which has been provided under the rating agreement with the issuer. They can expect that CRAs complied with their essential obligation under the original agreement when giving the rating. Thus, the essential obligation under the initial rating agreement with the issuer also constitute the basis for the contract with the subscriber. Third, the broad wording used in the online disclaimers indicates that CRAs are expected to perform more under the user agreement than merely giving access to ratings or making them public. The exclusion for any losses following the use of ratings seems not necessary if CRAs would not 'fear' claims by subscribers when an incorrect rating is issued. If CRAs are only bound to give subscribers access to ratings or allow them to use credit ratings to compare financial products without this being investment advice, such broad exclusion clauses would not be necessary. The use of exclusion clauses seems also contradictory with the fact that a CRA's statements and codes of conduct stress that ratings are mere opinions and that subscribers should never rely on them to make investment decisions. If a rating is only an opinion that can be compared with an article written by financial journalists, why do CRAs still incorporate clauses that exclude their liability in nearly all cases?

[1819] There is an important argument to come to that conclusion. As opposed to issuers of financial instruments, subscribers register for free and do not pay any fees to get access to ratings. It seems thus not fair to require CRAs to comply with the same obligations under the (online) user agreement as those included in the rating agreement with issuers but without providing any form of direct compensation for their services.

[1820] A similar provision is included in Article 5.67 in Book 5 dealing with the law of obligations that is to be included in the new Belgian Civil Code (*Avant-projet de loi approuvé*, le 30 mars 2018, par le Conseil des ministres, tel que préparé par la Commission de réforme du droit des obligations instituée par l'arrêté ministériel du 30 septembre 2017 et adapté, eu égard aux observations reçues depuis le début de la consultation publique lancée le 7 décembre 2017).

and purpose of the agreement.[1821] It remains unlikely that judges will decide that the performance of the essential obligation under the rating agreement with the issuer also constitutes the common intent under the user contract with subscribers. Instead, the common intent in the user agreement is that CRAs provide access to ratings and other online information.[1822]

570. The exclusion of liability for losses caused by technical problems with the website is thus invalid. This can happen when the CRA uploaded an alphabetically wrong rating that does not correspond with the one given to the issuer or when it had problems uploading the rating. The CRA will also not be able to invoke the clause when it attributed the wrong rating to an issuer on its online platform. Yet, it remains unlikely that this scenario will often occur. Subscribers will more likely sustain a loss when the CRA gives an unreliable rating because of not remaining independent vis-à-vis the requesting entities. However, the exclusion of liability in the user agreement for those losses is valid. It does not render meaningless the object of the user agreement.

B. Other Parties

571. Parties can become informed of the rating in other ways than by subscribing online. They can read rating reports that are publicly disseminated in which an exoneration clause is inserted.[1823] However, the rating might also be reported in the press (e.g. Reuters or Bloomberg) or mentioned during contract negotiations, without the user at the same time seeing the exoneration clause that the certifier inserted in the original publication of the

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[1821] W. VAN GERVEN with cooperation of A. VAN OEVELEN, *Verbintenissenrecht*, Leuven, Acco, 2015, 95-98 with further references; W. DE BONDT, "Contracts", in: H. BOCKEN & W. DE BONDT (eds.), *Introduction to Belgian law*, The Hague, Kluwer law international, 2001, 231.

[1822] There are several reasons why I come to that conclusion. First, the terms and conditions emphasise the behaviour and responsibilities of subscribers. More specifically, the terms and conditions of the three major CRAs stress that users are entirely liable for activities conducted through their online account. The disclaimer with Fitch, for instance, stipulates that any person or entity using the rating does so at his or its own risk. Second, subscribers have to expressly agree with the terms and conditions of Moody's that the ratings on the website do not take into account the personal objectives, financial situations or needs of users. The disclaimers further state that ratings have to be used, if at all, as one factor in an investment decision made by subscribers. Accordingly, users have to make their own study and assessment when purchasing securities. Subscribers agree that the information made available on the website is not a substitute for the exercise of independent judgment and expertise. The subscriber should always seek assistance of a professional party for advice on investments or other professional matters. The disclaimer with S&P even states that it would be reckless for retail investors (i.e. individual investors who buy and sell securities for their personal account and not for another company or organisation) to consider ratings or publications in making decisions. Finally, the terms and conditions underline that ratings are not statements of fact and do not recommend to purchase or sell securities or make any other investment decisions.

[1823] By way of example, a disclaimer in a rating report issued by Moody's stipulates that "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 […] 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)".

rating report. In all of these situations, the question arises whether CRAs can invoke the clause to refute third-party liability.

572. From a Belgian point of view, the exclusion of liability based on an exoneration clause only applies between the parties explicitly or implicitly agreeing to the contract, and as such does not affect third parties to this agreement. In other words, the contractual exclusion of a CRA's liability will not limit the extra-contractual liability towards third parties.[1824] Belgian case law[1825] and scholars[1826] require that the party claiming recovery (explicitly or implicitly) accepted the exclusion clause, which implies that it was (reasonably) able to take notice of it.[1827] Courts will probably not accept that persons took notice of an exclusion clause and explicitly or implicitly consented to it when they "have never seen or heard of [it]"[1828] because it is included in an agreement/report of which they are not informed.[1829] Therefore, a CRA will not be able to rely on the exclusion clause towards parties that are not aware of the existence of the rating, even when the rating was necessary to market a financial product.

573. This conclusion is of particular relevance for (potential) contractors of the issuer such as a creditor who might 'discover' the rating due to the close or longstanding relationship with the former party. Because of the confidence arising from such a relationship, the issuer might mention the rating during contract negotiations. Similarly, someone who wants to make an investment can ask a bank or another institution to assist

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[1824] A. VAN OEVELEN, "Exoneratiebedingen en vrijwaringsbedingen", in: V. SAGAERT & D. LAMBRECHT (eds.), *Actuele Ontwikkelingen inzake Verbintenissenrecht*, Antwerp, Intersentia, 2009, 29-30; E. DIRIX, "Exoneratiebedingen", *Tijdschrift voor Privaatrecht* 1988, 1195-1197; J. HERBOTS, "De exoneratiebedingen in het gemeen recht", in: J. HERBOTS & C. PAUWELS (eds.), *Exoneratiebedingen*, Bruges, die Keure, 1993, 13-14.

[1825] See for example: Court of Appeal Antwerp, March 28, 2000, *Europees Vervoersrecht* 2000, 697; Court of Appeal Antwerp, January 16, 1996, *Rechtskundig Weekblad* 1995-1996, 1417; Court of Appeal Antwerp, March 20, 1996, *Europees Vervoersrecht* 1996, 721.

[1826] See for example: L. CORNELIS, "Les clauses d'exonération de responsabilité couvrant la faute personelle et leur interprétation", *Revue Critique de Jurisprudence Belge* 1981, 202-203; R. KRUITHOF, "Les clauses d'exonération totale ou partielle de responsabilité. Rapport Belge", in: X, *In memoriam Jean Limpens*, Antwerp, Kluwer, 1987, 173-174; E. MONTERO, "Les clauses limitatives ou exonératoires de responsabilité. Rapport belge", in: M. FONTAINE & G. VINEY (eds.), *Les sanctions de l'inexécution des obligations contractuelles: études de droit comparé*, Brussels, Bruylant, 2001, 406-407; H. VANDENBERGHE, M. VAN QUICKENBORNE & L. WYNANT, "Overzicht van rechtspraak- aansprakelijkheid uit onrechtmatige daad 1985-1993", *Tijdschrift voor Privaatrecht* 1995, 1236; T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 889-891; W. VAN GERVEN with cooperation of A. VAN OEVELEN, *Verbintenissenrecht*, Leuven, Acco, 2015, 177-178.

[1827] See for extensive overview and discussion: B. KOHL & D. GRISARD, "Les clauses exonératoires ou limitatives de responsabilité insérées dans les conditions générales: leurre ou évidence?", in: B. KOHL *et al* (eds), *Les Conditions Générales*, Collection du Jeune barreau de Mons, Louvain-la-Neuve, Anthemis, 2009, 82-95; Q. VAN ENIS, "L'opposabilité des conditions générales off-line et on-line: de la suite des idées", in: B. KOHL *et al* (ed.), *Les Conditions Générales*, Collection du Jeune barreau de Mons, Louvain-la-Neuve, Anthemis, 2009, 19-20; T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 889-891.

[1828] M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 408.

[1829] E. WEEMAELS, "La responsabilité des agences de notation. Des sociétés responsables comme les autres?", (2) *Revue Pratique des Sociétés-Tijdschrift voor Rechtspersoon en Vennootschap* 2012, 213.

in (and prepare) the transaction. In case only (a reference to) the rating is included in the documents or when it is orally mentioned by the bank during the (contract) negotiations, it is conceivable that the other party was not able to take notice of the exclusion clause, nor to agree with it.[1830] Merely being informed of the rating by the issuer or the institution preparing the investment does not suffice for a party to be deemed to have consented to the clause in the report. As the exclusion of the CRA will probably not apply towards such parties, they can pursue with claims to recover their losses from the CRA on the basis of Articles 1382-1383 BCC.

574. Assuming that such clauses are sufficiently visible or clear and displayed at an obvious place allowing the party to take notice of it,[1831] a more relevant question is whether the exclusion of liability in rating reports has been (explicitly or implicitly) accepted by parties who merely read or rely on the reports to make a decision. To give an answer to that question, inspiration can be sought in case law dealing with clauses displayed at the entry of a parking or carwash excluding the owner's liability if something should happen on his premises.

According to some decisions, exclusion clauses are considered to have been implicitly accepted when a person (frequently) enters the premises without making any objections.[1832] Yet, there are decisions that come to opposite conclusions as well. The mere display of a disclaimer notice at the entry of a private domain does by itself not imply that it has been accepted by the visitor.[1833] In the same vein, the acceptance of such a clause cannot be deduced by merely entering the premises.[1834] When the recipient of the information, for instance, reads the rating report and subsequently purchases the rated

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[1830] Also see: M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 408.

[1831] See for an overwiew of relevant case law in this regard: T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 890, footnotes 4388-4392. E. DIRIX, "Exoneratiebedingen", *Tijdschrift voor Privaatrecht* 1988, 1183-1184. The judge in the Australian *Bathurst* decision came to a similar conclusion. If CRAs want to exclude their liability, they should at least display the disclaimer in a prominent and visible way. They must make sure that the disclaimer is sufficiently ("far more prominent") brought to the attention of potential investors (*Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2524, 2541-2543).

[1832] Court of Appeal Antwerp, December 15, 1994, *Europees Vervoersrecht* 1995, 358; Court of First Instance Antwerp, October 24, 2006, *Nieuw Juridisch Weekblad* 2007, 325; Court of Appeal Antwerp, December 2, 2013, *Verkeer aansprakelijkheid verzekering-Circulation responsabilité assurances* 2014, 18.

[1833] Court of Appeal Ghent, March 16, 2001, *Tijdschrift voor verzekeringen* 2002, 256 with annotation by H. ULRICHTS; Court of Appeal Antwerp, March 20, 1996, *Europees Vervoerrecht* 1996, 721; Police Court Bruges, December 18, 2000, *Tijdschrift voor Aansprakelijkheid en Verzekering in het Wegverkeer* 2002, 200 and *Verkeersrecht* 2001, 255.

[1834] Police Court Ghent, December 22, 2003, *Rechtskundig Weekblad* 2005-2006, 1433; Police Court Bruges, March 21, 2001, *Verkeersrecht* 2002, 25; Police Court Bruges, April 29, 2004, *Rechtskundig Weekblad* 2007-2008, 1382; Police Court Bruges, December 18, 2000, *Tijdschrift voor Aansprakelijkheid en Verzekering in het Wegverkeer* 2002, 201 and *Verkeersrecht* 2001, 255.

securities, it remains highly contentious whether this action alone implies that this person (explicitly or tacitly) accepted the clauses included in the report.[1835]

575. The acceptance of exclusion clauses by the public at large can thus be problematic.[1836] Some decisions, therefore, go a step further and seem to skip the question whether the recipient of the information accepted the clause.[1837] Dealing with prospectus liability, the judge in the *Barrack Mines* case did not address the issue to which extent the investors consented to the exclusion clauses included in the prospectus.[1838] Instead, the judge assumed that the clause included in promotional materials distributed by a bank acting as intermediary in the investors' acquisition of financial instruments would render the role of the bank for the introduction and further support for the financial instrument after its listing worthless. The Court emphasised that the bank had mounted the stage to address the public. Therefore, the bank could not invoke an exclusion clause that would render its words meaningless and in effect warn the public that whenever it spoke in relation to a project, its word should not be taken seriously.[1839] This conclusion can also apply for CRAs. They should not be able to invoke an exclusion clause making the value of their opinions meaningless and warning the public that whenever they issue a rating, they should not be taken seriously. Against this background, a general exclusion of a CRA's liability included in the rating report seems not binding towards other parties either.[1840]

576. A brief comparative analysis also shows that clauses excluding the liability of CRAs in rating reports are not always accepted by the recipients of the rating reports or considered valid. The court in the *CalPERS* case, for instance, held that an investor could

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[1835] See in this regard also: E. WEEMAELS, "La responsabilité des agences de notation. Des sociétés responsables comme les autres?", (2) *Revue Pratique des Sociétés-Tijdschrift voor Rechtspersoon en Vennootschap* 2012, 213.

[1836] Commercial Court Brussels, October 17, 2003, *Droit des Affaires-Ondernemingsrecht* 2004, 84. See in this regard also: M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 123, no. 202 concluding that "Belgian courts often consider such unilateral declarations to be offers to contract, so that they are only binding if truly accepted by the victim. This allows the courts to be very strict, and most often ignore such notices, justifying this decision by their finding that the fact that the victim could have seen the notice does not imply that he accepted it. Of course, this leads to many factual disputes, resulting in casuistic case law from which no real general rules can be distilled. In the end, it depends on the personal opinion of the judge, who has a large margin to be sympathetic to either party".

[1837] See for example: Commercial Court Brussels, October 17, 2003, *Droit des Affaires-Ondernemingsrecht* 2004, 84 & 91; Court of First Instance Antwerp, October 24, 2006, *Nieuw Juridisch Weekblad* 2007, 325.

[1838] Commercial Court Brussels, October 17, 2003, *Droit des Affaires-Ondernemingsrecht* 2004, 91 with annotation by S. DELAEY.

[1839] Commercial Court Brussels, October 17, 2003, *Droit des Affaires-Ondernemingsrecht* 2004, 83-96 with annotation by S. DELAEY. I have taken the translation of the court decision as reported in M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 407-408.

[1840] M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 407; E. WEEMAELS, "La responsabilité des agences de notation. Des sociétés responsables comme les autres?", (2) *Revue Pratique des Sociétés-Tijdschrift voor Rechtspersoon en Vennootschap* 2012, 214.

recover his losses unless his conduct, in the light of his own information and intelligence, was "preposterous and irrational".[1841] The effectiveness of exclusion clauses used in rating reports has to be assessed in light of these principles as well. The court held that the mere presence of broad clauses in rating reports does not necessarily render an investment decision to purchase securities preposterous or irrational.[1842] Exclusion clauses included in rating reports will not automatically have effect and bar investors from recovery. In other words, a decision of an investor is not *per se* preposterous and irrational only because the report contains an exclusion clause. Especially the behaviour of the investor, namely his professional capacity and the information at his disposal, seems to determine whether CRAs can successfully exclude their liability.

The Australian *Bathurst* decision also addressed the use of exclusion clauses in rating reports. The reliance of S&P on extensive clauses included in the reports to bar the plaintiff's recovery was rejected by the court. The specific context was invoked to conclude that it would be difficult for CRAs to draft an effective exclusion clause.[1843] They can be used to make sure that investors understand that CRAs do not give financial advice on the purchase of financial instruments. That is because CRAs are often not aware of the particular reasons and circumstances why the purchaser wants to buy securities. However, the provisions cannot be interpreted as clauses excluding any exercise of care and skill when CRAs issue ratings. That would make the rating "futile and selfdefeating"[1844] and "content-less".[1845]

3.2. Opening the 'Floodgates'

577. The analysis showed that exclusion clauses will not always operate as a factor reducing the risk of a certifier's unlimited liability, especially towards other parties than requesting entities and online subscribers. In combination with proposals including a higher risk of liability, frivolous litigation against certifiers might be encouraged.[1846] Thus, the 'floodgates' against certifiers can be opened. This could have dramatic

[1841] *California Public Employees' Retirement System v. Moody's Corp*., no. A134912, 28-29 (Cal. Ct. App. 2014).

[1842] *California Public Employees' Retirement System v. Moody's Corp*., no. A134912, 28-29 (Cal. Ct. App. 2014).

[1843] See in this regard also: A. SAHORE, "ABN Amro Bank NV v Bathurst Regional Council: Credit Rating Agencies and Liability to Investors", (37) *Sydney Law Review* 2015, 448.

[1844] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraph 2525.

[1845] *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraph 613.

[1846] This is especially a risk in those jurisdictions that have a discovery procedure such as the United States. See in this regard also the discussion *infra* in nos. 582-583.

consequences for the certification business.[1847] Certifiers risk to be exposed to liability for an "indeterminate amount for an indeterminate time to an indeterminate class".[1848]

578. The floodgate argument is not something merely fictional. It has already been invoked in cases dealing with the liability of certifiers. The *Marc Rich* case can serve as an example. The House of Lords refused to accept that a classification society had a duty of care towards cargo owners. Classification societies would become potential defendants in many more cases if they had such a duty of care. This evolution would not only result in more expensive or complex procedures but also undermine the relatively simple existing system of settling cargo claims.[1849] The existence of a duty of care would extend to every type of survey that classification societies perform. This would increase the exposure of classification societies to claims in tort, thereby not only creating an "extra layer of insurance",[1850] but also opening the door for additional third-party liability claims.[1851]

579. However, the floodgate argument is not always convincing. To start with, courts in countries where recovery for pure economic loss is possible, have not been 'flooded' with claims.[1852] There is a lack of evidence supporting the floodgate argument.[1853] Moreover, the 'threat' of liability cannot be equated to the 'actual' liability of certifiers. After all, plaintiffs have to prove different elements for their liability claims against certifiers to be

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[1847] See in this regard: C. HILL, "Regulating Rating Agencies", (82) *Washington University Law Quarterly* 2004, 89; C.M. MULLIGAN, "From AAA to F: How the Credit Rating Agencies Failed America and What Can Be Done to Protect Investors", (50) *Boston College Law Review* 2009,1297; N.D. HORNER, "If You Rate It, He Will Come: Why Uncle Sam's Recent Intervention with the Credit Rating Agencies Was Inevitable and Suggestions for Future Reform", (41) *Florida State University Law Review* 2014, 504: A. PINTO, "Control and Responsibility of Credit Rating Agencies in the United States", (54) *American Journal of Comparative Law* 2006, 355.

[1848] *Ultramares Corporation v. Touche Niven & Company* 255 NY 170, 179 (1931).

[1849] *Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 120 & 146-147.

[1850] *Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 133.

[1851] *Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, 147-148.

[1852] W.H. VAN BOOM, "Pure Economic Loss. A Comparative Perspective", in: W.H. VAN BOOM, H. KOZIOL & C.A. WITTING (eds.), *Pure Economic Loss*, Vienna, Springer, 2004, 43-44.

[1853] I. GIESEN, *Toezicht en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de rechtvaardiging voor de aansprakelijkheid uit onrechtmatige daad van toezichthouders ten opzichte van derden*, Deventer, Kluwer, 2005, 154-155; I. GIESEN, "Regulating regulators through liability. The case for applying normal tort rules to supervisors", (24) *Utrecht Law Review* 2006, 22. In this regard, GIESEN writes that "Van Boom states, and rightly so, that what matters is that a court has to take the consequences of its decisions into consideration. If the foreseeable result of would be that the defendants would indeed be liable for an indeterminate amount to an indeterminate group of people, then this would be ample reason to restrict liability" (I. GIESEN, "Regulating regulators through liability. The case for applying normal tort rules to supervisors", (2) *Utrecht Law Review*, 2006, 22; W.H. VAN BOOM, "Pure Economic Loss. A Comparative Perspective", in: W.H. VAN BOOM, H. KOZIOL & C.A. WITTING (eds.), *Pure Economic Loss*, Vienna, Springer, 2004, 44-45).

successful.[1854] Several examples illustrate that this is not always straightforward, which means that not all of the gates are automatically wide-opened.[1855]

580. In Belgium, for instance, plaintiffs have to base their claims on Articles 1382-1383 of the BCC to recover in tort from certifiers when there is no specific legislation. Third parties will have to prove that the certifier committed a wrongful act, that they incurred a loss and that there is a causal link between both elements.[1856] A third party might, however, not always be able to prove each of these requirements. As such, courts will not automatically hold certifiers liable merely because they have already incurred liability in the past.[1857] Reference can be made to Belgian case law dealing with the liability of classification societies. In each case, a third party (e.g. cargo-owner or ship insurer) has to prove that he incurred a loss (e.g. financial losses or physical harm) and that there was a causal link with the issuance of the incorrect certificate, even when courts already held the certifier liable towards third parties on several occasions in the past.[1858]

581. Another case showing that the mere possibility of holding certifiers liable will not open the floodgates is the *Vie d' Or* decision. In that decision, the Dutch highest court set the boundaries of the third-party liability of the auditor. The *Hoge Raad* held that accountants have a duty of care towards third parties when performing tasks that have a wider public importance such as the certification and the control of annual accounts.[1859] To determine whether auditors can be held liable towards a specific third party, the judge needs to examine how a reasonable and competent accountant who carefully performs his duties and takes into account the third party's interests would have acted.[1860]

[1854] N.S. ELLIS, L. M. FAIRCHILD, F. D'SOUZA, "Is Imposing Liability on Credit Rating Agencies a Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis", (17) *Stanford Journal of Law, Business & Finance* 2012, 217; W.H. VAN BOOM, "Pure Economic Loss. A Comparative Perspective", in: W.H. VAN BOOM, H. KOZIOL & C.A. WITTING (eds.), *Pure Economic Loss*, Vienna, Springer, 2004, 44; J. DE BRUYNE & C. VANLEENHOVE, "Liability in the medical sector: the 'Breast-taking' Consequences of the poly implant prothèse case", (24) *European Review of Private* Law 2016, 852 with further references.

[1855] See for more information the discussion *supra* in Part II, Chapter III on the liability of certifiers in different jurisdictions.

[1856] H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoeding-sstelsels*, Bruges, die Keure, 2014, 46-203; P. WÉRY, *Droit des obligations. 2: Les sources des obligations extracontractuelles. Le régime général des obligations*, Brussels, Larcier, 2016, 74 and further.

[1857] For instance, courts have already held that a provider of information cannot be held liable when third parties do not establish that they suffered any actual loss (Court of Appeal Antwerp, September 12, 2012, *Nieuw Juridisch Weekblad* 2014, 130 with annotation by J. DE BRUYNE).

[1858] See for example: Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 325-327; Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 313-317.

[1859] Hoge Raad, October 13, 2006, no. C04/281HR, ECLI:NL:HR:2006:AW2080, *Nederlandse Jurisprudentie* 2008, 528, paragraph 5.4.1.

[1860] Hoge Raad, October 13, 2006, no. C04/281HR, ECLI:NL:HR:2006:AW2080, *Nederlandse Jurisprudentie* 2008, 528, paragraph 5.3.

Whether the accountant violated his duty of care has to be established by taking into account all circumstances of the case.[1861] The *Hoge Raad* enumerated a checklist to decide if the accountant violated his duty of care. Factors that have to be considered are (1) the extent to which the requirements concerning financial audit reporting incorporated in EU and national legislation have been respected; (2) the nature of the violated norm; (3) the seriousness of the violation; (4) the measures taken or information given by the accountant to limit the financial loss; (5) the degree to which the accountant could reasonably foresee that the impairment of third-party pecuniary interests would result in economic loss; and (6) the extent to which the accountant took those control measures and issued warnings that could reasonably be expected from him in the given situation to avoid the economic loss.[1862] Besides the violation of the auditor's duty of care, the other requirements to base a claim on Article 6:162 of the Dutch Civil Code must also be established. For instance, there must be a causal link between the auditor's violation of his duty of care and the incurred financial losses by the third party. The *Hoge Raad* eventually concluded in the *Vie d'Or* case that the Court of Appeal erred in finding that there was a causal link. The auditor was, therefore, not held liable.[1863]

582. In the United States and other common law jurisdictions, the risk of frivolous litigation is more apparent due to the so-called discovery procedure.[1864] This pre-trial stage is unknown in other jurisdictions such as Belgium. Discovery procedure implies that each party can use a number of procedural devices to obtain information and gather evidence about the case from the other party or from third parties before the actual trial starts. Parties are given access to documents, information, records and other evidence.[1865] Discovery allows all parties to an action to discover what evidence will be offered at the trial on the matter's merits. It gives parties the opportunity to examine the evidence that will be used against them as well as to find or discover the evidence to be used in their favour.[1866] Discovery can sometimes take many years and involve millions of

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[1861] Hoge Raad, October 13, 2006, no. C04/281HR, ECLI:NL:HR:2006:AW2080, *Nederlandse Jurisprudentie* 2008, 528, paragraph 5.4.2.

[1862] Hoge Raad, October 13, 2006, no. C04/281HR, ECLI:NL:HR:2006:AW2080, *Nederlandse Jurisprudentie* 2008, 528, paragraph 5.4.2.

[1863] Hoge Raad, October 13, 2006, no. C04/281HR, ECLI:NL:HR:2006:AW2080, *Nederlandse Jurisprudentie* 2008, 528, paragraph 6.4.2. See for a discussion: I. GIESEN, *Bewijslastverdeling bij beroepsaansprakelijkheid*, Deventer, Tjeenk Willink, 1999, 77-78; B. TEN DOESSCHATE & R. EEKHOF, "Aansprakelijkheid van de accountant jegens derden", (2) *Financiële Studievereniging Amsterdam* 2008, 50-51.

[1864] See for more information: M.L. INKER & P.R. SUGARMAN, "Pre-Trial Discovery", (57) *Massachusetts Law Quarterly* 1972, 151; R.S. HAYDOCK & D.F. HERR, *Discovery Practice*, New York, Wolters Kluwer Law & Business, 2016, 1230p.

[1865] R. LEROY MILLER & F.B. CROSS, *The Legal Environment Today: Business In Its Ethical, Regulatory, E-Commerce, and Global Setting*, South Western, Cengage Learning, 2012, 69; M. DORE, "Confidentiality Orders - The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed through the Pre-Trial Discovery Process", (14) *New England Law Review* 1979, 2.

[1866] P. FINKELMAN, *Encyclopedia of American Civil Liberties*, New York, Routledge, 2013, 421.

documents.[1867] The procedure can be quite costly, which gives the defendant an incentive to settle prior to discovery.[1868]

583. Against this background, third parties might indeed more easily initiate a legal suit against certifiers in the United States, eventually forcing them to a settlement procedure. Yet, a certifier can already be required to keep documents and records on its procedures under US law.[1869] As such, it could provide third parties access to all these documents during the discovery procedure, without incurring extensive additional costs. Assuming that a settlement cannot be reached, third parties will have to prove several elements in claims against certifiers.[1870] A claim for negligent misrepresentation, for instance, requires a special relationship of proximity between the certifier and the party relying on the certificate (e.g. a privity-like special relationship).[1871] Additionally, a plaintiff will have to be part of a limited class or select group of persons whose reliance on the certificate was foreseeable to the certifier.[1872]

In case of negligence, a third party has to establish that a certifier had a duty of care. Several decisions dealing with the liability of classification societies in England have already denied the existence of a duty of care towards cargo owners due to a lack of proximity or because it would not be fair, just and reasonable to impose such a duty.[1873] Even if a duty of care was accepted, the gates are not automatically opened merely because the certified item defaults. The *Bathurst* case can be used as an example. The question was not whether S&P had to give another, more correct and appropriate

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[1867] W.R. BUCKLEY & C.J. OKRENT, *Torts and Personal Injury Law*, New York, Cengage Learning, 2004, 11.

[1868] J. LEHMAN & S. PHELPS, *West's Encyclopedia of American Law*, Thomson/Gale, 2005, 447; C.W. ADAMS, "Civil Discovery in Oklahoma: General Principles", (16) *Tulsa Law Review* 1980, 187.

[1869] For instance, the Credit Rating Agency Reform Act and the Dodd-Frank Act contain disclosure and recordkeeping obligations for NRSROs. An application for registration requires the CRA to submit (1) credit ratings performance measurement statistics over short-term, mid-term and long-term periods and (2) procedures and methodologies that the applicant uses in determining credit ratings (Credit Rating Agency Reform Act, Section 15E(a)(1)(B)). Pursuant to Section 932(a)(3) of the Dodd-Frank Act, NRSROs have to establish and document an effective internal control structure that governs the implementation of and adherence to policies, procedures and methodologies for determining credit ratings. More importantly, NRSROs have to make and retain records listed in Section 240.17g-2 of the Code of Federal Regulations (e.g. a record documenting the procedures and methodologies used by the CRAs to determine credit ratings).

[1870] See for more information the discussion *supra* in nos. 253-290.

[1871] See for example: *King County, Washington et al v. IKB Deutsche Industriebank AG et al*, no. 09-08387, 43 (S.D.N.Y. 2012); *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 551 (1985); *In re National Century Financial Enterprise*, 580 F. Supp. 2d 630, 647 (S.D. Ohio 2008); *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Services. LLC*, 2012 WL 5990337, no. 11-4203, 15 (6th Cir. 2012); *Anschutz Corp. v. Merrill Lynch & Co*., 690 F.3d 98, 114 (2nd Cir. 2012); *Federal Home Loan Bank of Boston v. Ally Financial Inc*., no. 11-10952-GAO, 3 (D. Mass. 2010).

[1872] *In re National Century Financial Enterprise*, 580 F. Supp. 2d 630, 646-648 (S.D. Ohio 2008); *LaSalle National Bank v. Duff & Phelps Credit Rating Co.*, 951 F. Supp. 1071, 1092-1096 (S.D.N.Y. 1996); *California Public Employees' Retirement System v. Moody's Corporation*, no. A134912, 22-25 (Cal. Ct. App. 2014); *King County, Washington et al v. IKB Deutsche Industriebank AG et al*, no. 09-08387, 40-43 (S.D.N.Y. 2012).

[1873] See for example: *Mariola Marine Corporation v. Lloyd's Register of Shipping (The Morning Watch)*, [1991] E.C.C., 103; *Marc Rich & Co AG v. Bishop Rock Marine Co Ltd*, [1996] E.C.C. 120.

rating.[1874] Instead, S&P violated its duty of care because the CRA did not have reasonable grounds to assign the rating. The credit rating was not the result of reasonable care and skill.[1875]

3.3. Summary

584. Exclusion clauses can under certain circumstances operate as a factor reducing the risk of unlimited liability towards requesting entities. For example, a clause excluding a certifier's liability for the losses incurred by requesting entities because the certificate incorrectly reflects the 'actual' or 'true' value of the certified item is valid under Belgian law. Such an exclusion of liability does not render nugatory the object of the contractual promise of the certifier as it does not affect its principal obligations.[1876] The exclusion for the losses caused by the lack of a certifier's independence during the certification process might be invalid as it renders nugatory the essential object of the contract.

585. Things are more complex when it comes to the use of exclusion clauses towards non-requesting entities. Online subscribers are assumed to have accepted the clause as they agreed with the terms of use before getting access to the certificate. The essential obligation under the user agreement is giving subscribers access to the certificates for personal use through online registration. Therefore, an exclusion of liability for losses caused by the certifier's lack of independence or because the certificate did not correspond with the 'true' or 'actual' value is valid. Exclusion clauses can in those circumstances thus serve as a factor reducing the risk of a certifier's unlimited liability.

However, it remains uncertain whether exclusion clauses will have effect towards third parties. Under Belgian law, it is required that the party claiming recovery was (reasonably) able to take notice of the clause and (explicitly or implicitly) accepted it. An analysis of Belgian decisions as well as some rulings in other jurisdictions revealed that this is not always the case. Therefore, exclusion clause will not always serve as a factor reducing the risk of a certifier's unlimited liability towards third parties such as the investing public, consumers or cargo-owners. Even when exclusion clauses will not operate as such a factor under those circumstances, a third party still has to prove the required elements for a claim against a certifier to be successful. The proof of these elements can minimise or prevent the risk of opening the floodgates, which could lead to a certifier's unlimited liability.

[1874] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraph 2482; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraph 722 holding that CRAs do not have "a duty to be correct".

[1875] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2814-2836; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 12, 503 & 722. See for more information on the certifier's *obligations de moyen* during the certification process the discussion *supra* in Part II, Chapter I.

[1876] See for CRAs: M. KRUITHOF & E. WYMEERSCH, "The Regulation and Liability of Credit Rating Agencies in Belgium", in: E. DIRIX & Y.H. LELEU (eds.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 378-379.

586. In any case, whenever policymakers change the modalities of existing proposals, factors reducing the risk of a certifier's unlimited liability need to be ensured. When the modifications of a proposal affect general safeguards such as the ones discussed above, other specific factors need to be adopted to prevent a certifier's unlimited liability. One should thereby also take into account the specific features of a legal system such as the existence of a discovery procedure, whether recovery for pure economic loss is possible, the availability of a collective mass claims settlement procedure, the requirement of a duty of care and the accepted theory of causation.

4. Criterion Four: Link With Existing Practices and Practical Concerns

587. A last criterion is less important. Proposals should have a link with existing practices. This can be legislation or case law. The implementation of many proposals remains unlikely due to practical concerns or lack of a linking factor with existing practices. For instance, 'handicapping' CRAs,[1877] introducing a financial statements insurance scheme[1878] or changing the remuneration structure[1879] have proven to encounter many practical problems. Other initiatives such as the disclose or disgorge approach,[1880] legislation to minimise conflicts of interest caused by the certifier's remuneration structure[1881] or providing tax incentives turned out to encounter less practical problems.[1882]

588. However, it should be stressed that this criterion can sometimes be redundant. It is conceivable that proposals containing a triggering mechanism while preventing a certifier's unlimited liability at a reasonable cost will be implemented, even when there is no link with existing practices. The reason why this criterion is still included in the framework relates to an additional argument as to why a proposal should be adopted or changed in a specific way. In other words, it serves to strengthen a particular choice with regard to a specific proposal even more.

5. Conclusions: Application of the Criteria and Existing Proposals

589. This chapter examined the criteria that can be used to assess the effectiveness of existing proposals. They relate to triggering mechanisms, costs associated with the proposal, factors reducing the risk of a certifier's unlimited liability and a link with existing practices. The first and the third criterion were thoroughly examined as they are interesting from a legal point of view. Proposals complying with these four criteria are more realistic to implement and might, therefore, have a 'major' impact on the accuracy and reliability of certificates. This means that they are more effective. As such, existing proposals should be modified taking into account these criteria. One can thus rely on the

[1877] See for more information the discussion *supra* in nos. 401-402.

[1878] See for more information the discussion *supra* in nos. 403-406.

[1879] See for more information the discussion *supra* in nos. 391-395.

[1880] See for more information the discussion *supra* in nos. 414-415.

[1881] See for more information the discussion *supra* in nos. 410-412.

[1882] See for more information the discussion *supra* in nos. 421-422.

four criteria to identify the weaknesses of each proposal to subsequently adjust it by adopting the necessary measures. This is illustrated with several examples.

590. The ineffectiveness of some proposals can be due to the lack of sufficient triggers and is not necessarily caused by shortcomings relating to the other three criteria. One of the problems with a governmental body allocating contracts to a particular certifier, for instance, is the creation of a minimum standard. Certifiers complying with that minimum standard will have little incentives to attain a higher level of accuracy for their certificates.[1883] Eliminating references to certifiers or certificates in legislation does not necessarily increase the accuracy and reliability of certificates either.[1884] As such, the solution in those proposals is to include sufficient additional or other incentives for certifiers to issue more accurate and reliable certificates. A possibility in this regard might be to lower the burden of proof for third parties with regard to certain aspects of the claim.

591. Other proposals are not effective due to the lack of factors reducing a certifier's risk of unlimited liability. This criterion is especially important when some of the general safeguards are affected by a specific proposal. This can be the case when the certifier's use and reliance on exoneration clauses is restricted or when the pleading requirements are lowered (cf. Section 933 of Dodd-Frank). Punishing certifiers under the proposed performance schemes in combination with the existing threat of liability could also lead to an extensive liability of certifiers. More specific factors reducing this risk might thus have to be included in some of the existing proposals. In addition to capping mechanisms, a no-fault compensation fund might be a viable option in this regard. Although more research needs to be done on its modalities, a fund can cover the losses incurred by third parties when a certificate does not correspond with the 'true' and 'actual' value of the item. Such a fund operates as a factor that can reduce the risk of a certifier's unlimited liability.[1885]

592. Numerous proposals were also not effective because of practical problems or an absence of a link with existing practices. These problems, for instance, related to the lack of a governmental certifier's knowledge/expertise, the need to reorganise the entire certification process (e.g. when 'handicapping' CRAs) or the creation of a more complex certification process. Some proposals were also US-based and thus not applicable in EU Member States. All of these shortcomings can be remedied by bringing proposals closer

[1883] See for more information the discussion *supra* in no. 382.

[1884] See for more information the discussion *supra* in no. 428.

[1885] Certifiers and requesting entities might have to contribute to the fund on a periodical basis. To create a deterring effect, a certifier's financial contributions to the fund could be made dependent upon factors relating to its performances or the amount of claims that have been made against it in the past (N.J. PHILIPSEN, "Compensation for industrial accidents and incentives for prevention: a theoretical and empirical perspective", (28) *European Journal of Law and Economics* 2009, 166. See for more information: J.H. ARLEN, "Compensation Systems and Efficient Deterrence", (52) *Maryland Law Review* 1993, 1093). The establishment of such a fund can also find a link with existing practices in the sense that funds have already been established at the national (e.g. the Fund for Medical Accidents in Belgium) and at the supranational level (e.g. the European Union Solidarity Fund allowing for a rapid, efficient and flexible response to emergency situations following natural disasters).

to reality. Instead of creating a governmental certifier, for instance, one could focus on more enhanced forms of cooperation between public authorities and private certifiers.

Chapter III – Evaluation Criteria and New Proposals

593. In addition to reconsidering and refining existing proposals, the four evaluation criteria can also be used by policymakers to suggest new proposals inducing certifiers to issue more accurate and reliable certificates. The evaluation criteria have an 'overall' application in the sense that their content can vary and be specifically shaped according to the jurisdiction where a particular proposal is to be applied. Based on the evaluation criteria, two new proposals are done. A first proposal deals with the application of the law of evidence in the context of certifiers (part 1). A second one requires the involvement of a peer certifier in the certification process (part 2). The situation in Belgium is thereby used as a starting point. Comparative elements are included whenever this increases the quality of the arguments or better illustrate the application of the criteria within each proposal. The most important findings are summarised (part 3).

1. Reversal of the Burden of Proof in the Context of Certifiers

594. The law of evidence can serve as an instrument to attain a desired solution[1886] such as ensuring that certifiers issue accurate and reliable certificates. The allocation of the burden of proof can thus be a strategic tool for legislatures and courts. It allows them to create incentives to achieve desired out-of-court behavior including the careful performance of a certifier's obligations during the certification process.[1887]

595. My proposal would be that when a certificate does not correspond with the 'true' or 'actual' value of the certified item, the certifier will have to prove that it did not commit the act resulting in a valid ground to establish liability. Such a provision can be included in the applicable legislation covering a particular certifier. The proposal implies that the certifier will have to show compliance with the obligations during the three stages of the certification process. The certifier will need to establish that it acted with the required care during the first and third stage and that it independently issued the certificate during the second stage of the process.[1888] The reversal of the burden of proof is thus introduced

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[1886] I. GIESEN, "The reversal of the burden of proof in the Principles of European Tort Law. A comparison with Dutch tort law and civil procedure rules", (6) *Utrecht Law Review* 2010, 30.

[1887] F. GOMEZ, "Burden of Proof and Strict Liability: An Economic Analysis of a Misconception", InDret, Barcelona, January 2001, 7.

[1888] Depending on the situation, one could also include a rebuttable presumption in the law instead of relying on a reversal of the burden of proof. This means that when a certificate has been given that does not correspond with the 'true' or 'actual' value of the certified item, there should be a rebuttable presumption that the certifier committed the act potentially giving a basis to impose liability towards third parties. There is a rebuttable presumption that the certifier did not comply with its obligations during the certification process. Put differently, the certifier will have to show compliance with its obligations during the three stages of the certification process. A presumption in essence is a mode of reasoning that leads to certain inferences being drawn. It deals with the acceptance of facts or legal consequences from other proven facts. Presumptions provide the judge with the opportunity to base the existence of certain factual elements on the presence of another fact that has been proven (I. GIESEN, "The Burden of Proof and other Procedural Devices in Tort Law", in: H. KOZIOL, B.C. STEININGER & C. ALUNARU (eds.), *European tort law 2008*, Vienna, Springer, 2009, 56). Presumptions are conclusions about unknown facts that the law or a judge draws from known facts (cf. Article 1349 BCC). When the conclusion to be drawn is prescribed by law, it is called a legal presumption (cf. Article 1350 BCC). When it is merely an inference that may be done by the judge, one speaks of factual presumptions (cf. Article 1353 BCC) (P.E. HERZOG & M. WESER, *Civil*

for a certifier's violation of its obligations during the certification process and not with regard to the (transaction) causation. Yet, some of the arguments relied upon in the following parts might also be used to justify a reversal of the burden of proof on (transaction) causation. A reversal of the burden of proof regarding (transaction) causation might, however, be too far-reaching. Although examples of such a reversal of the burden of proof exist, [1889] the risk that it will not be accepted by policymakers is higher than a proposal (merely) dealing with a certifier's violation of its obligations.[1890] In any case, when policymakers would adopt a reversal of the burden of proof relating to (transaction) causation, other factors to reduce the risk of a certifier's unlimited liability need to be guaranteed.[1891]

596. After a brief discussion of some elements that are relevant to understand the proposal (part 1.1.),[1892] its compliance with the four evaluation criteria is shown. It increases the

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Procedure in France, Dordrecht, Springer, 2014, 313). With regard to legal presumptions, a distinction is further made between rebuttable (*iuris tantum*) and non-rebuttable (*iuris et de iure*) presumptions (B. SAMYN, "De bewijslast. Rechtsleer getoetst aan tien jaar cassatierechtspraak", (1) *Tijdschrift voor Procesrecht en Bewijsrecht-Revue de Droit Judiciaire et de la Preuve* 2010, 63-64; A. CAPONE & F. POGGI, *Pragmatics and Law Philosophical Perspectives*, SpringerLink (Online service), 2016, 80). There is a debate on the question whether a legal rebuttable presumption also imposes or entails a reversal of the burden of proof. According to some, rebuttable presumptions do indeed imply a reversal of the burden of proof (see for example: B. CATTOIR, *Burgerlijk bewijsrecht: algemene praktische rechtsverzameling*, Mechelen, Kluwer, 2013, 84, no. 147 with further references; O. MICHIELS, "L'article 1315 du Code civil: contours et alentours", *Actualités du Droit* 1998, 380 with further references; A. CAPONE & F. POGGI, *Pragmatics and Law Philosophical Perspectives*, SpringerLink (Online service), 2016, 80). This has also been affirmed by the Belgian *Cour de Cassation* (e.g. Court of Cassation, March 11, 2010, F.09.0032.N, *Arresten van het Hof van Cassatie* 2010, 729 & *Pasicrisie belge* 2010, 784. See for a discussion and further references: B. ALLEMEERSCH, I. SAMOY & W. VANDENBUSSCHE, "Overzicht van rechtspraak. Het burgerlijk bewijsrecht 2000-2013, [De burgerlijke bewijsmiddelen] Uitzonderingen op de basisregel", (2) *Tijdschrift voor Privaatrecht* 2015, 761). Others, however, stress that the existence of a presumption does not change the (legal) burden of proof (see for example: I. GIESEN, "The Burden of Proof and other Procedural Devices in Tort Law", in: H. KOZIOL, B.C. STEININGER & C. ALUNARU (eds.), *European tort law 2008*, Vienna, Springer, 2009, 56; W. VANDENBUSSCHE, *Bewijs en onrechtmatige daad*, Antwerp, Intersentia, 2017, 245-246).

[1889] See for some examples the discussion *infra* in footnoot 2007.

[1890] The Proposal for a Regulation amending Regulation 1060/2009 on credit rating agencies contained a reversal of the burden of proof with regard to a CRA's committed infringement and its impact on the issued rating. Yet, Recital (26) specified that "the burden of proof as regards the existence of a damage and the causality of the infringement for the damage, both being closer to the sphere of the investor, should fully be on the investor" (Proposal for a Regulation amending Regulation 1060/2009 on credit rating agencies, COM/2011/0747 final - 2011/0361 (COD)).

[1891] See in this regard also the discussion *infra* in nos. 614-626.

[1892] An extensive analysis of procedural matters does not fall within the scope of this research due to legal challenges and difficulties to determine which party should bear the burden on which issue (C.W. SANCHIRICO, "A Primary Activity Approach to Proof Burdens", (37) *The Journal of Legal Studies* 2008, 274). One question, for instance, is to what extent a reversal of the burden of proof is compatible with the freedom of speech as guaranteed by Article 10 ECHR. Certifiers could argue that a reversal of the burden of proof affects their freedom of expression. In any case, such a reversal needs to comply with the restrictions discussed *supra* in nos. 350-360. It has to be prescribed by law, which will not be a major problem. It also has to pursue a legitimate interest such as protecting the interest of the public in general, the rights of market participants or the reputation of requesting entities. The restriction needs to be necessary in a democratic society as well. Without going into further detail and calling for additional research on this matter, adopting a reversal of the burden of proof seems not by itself to be a violation of Article 10 ECHR. National authorities have a wider margin of appreciation to regulate certificates when they are (purely) commercial matters or advertisements. Moreover, there is a case in which the Dutch *Hoge Raad* concluded

risk of liability for certifiers, thereby triggering them to issue more accurate and reliable certificates (part 1.2.). The costs associated with the proposal seem also restricted (part 1.3.). The proposal includes factors reducing a certifier's risk to incur unlimited liability (part 1.4.) and has a link with existing practices as well (part 1.5.).

1.1. General Considerations on the Allocation of the Burden of Proof

597. A "general, worldwide accepted rule"[1893] in the law of evidence is that each party has to prove its claims and contentions (*actori incumbit probatio*).[1894]

In Belgium, for instance, Article 1315 of the BCC stipulates that the person who claims the performance of an obligation has to prove the existence of this obligation. The defendant has to show that he has been relieved because the obligation was already performed (*reus in excipiendo fit actor*). This provision is considered to have a general scope of application and also cover claims in tort, even when it is included in the BCC's part on contractual obligations.[1895] Article 870 of the Belgian Judicial Code (BJC) further contains the basic procedural rule regarding the burden of proof: every party has the burden to adduce evidence for his allegations (*onus probandi incumbit ei qui dicit*).[1896]

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that the reversal of the burden of proof included in Article 6:195 of the Dutch Civil Code regarding the correctness and completeness of the advertisement does not violate Article 10 ECHR (Hoge Raad, January 15, 1999, no. C97/213, ECLI:NL:HR:1999:ZC2817, *Nederlandse Jurisprudentie* 1999, 665). See in this regard also: I. GIESEN, *Bewijs en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de bewijslast, de bewijsvoeringslast, het bewijsrisico en de bewijsrisico-omkering in het aansprakelijkheidsrecht*, The Hague, Boom Juridische Uitgevers, 2001, 304-305 with further references.

[1893] I. GIESEN, "The Burden of Proof and other Procedural Devices in Tort Law", in: H. KOZIOL, B.C. STEININGER & C. ALUNARU (eds.), *European tort law 2008*, Vienna, Springer, 2009, 50.

[1894] M. KAZAZI, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, The Hague, Martinus Nijhoff Publishers, 1996, 378.

[1895] W. VANDENBUSSCHE, *Bewijs en onrechtmatige daad*, Antwerp, Intersentia, 2017, 34 with further references in footnote 135; J. LAENENS, D. SCHEERS, P. THIRIAR, B. VANLERBERGHE & S. RUTTEN, *Handboek gerechtelijk recht*, Antwerp, Intersentia, 2016, 562; B. CATTOIR, *Burgerlijk bewijsrecht: algemene praktische rechtsverzameling*, Mechelen, Kluwer, 2013, 74-75, no. 128; J. KIRKPATRICK, "Essai sur les règles régissant la charge de la preuve en droit belge", in: X, *Liber amicorum Lucien Simont*, Brussels, Bruylant, 2002, 105. Claims for negligence require the plaintiff to establish a certifier's *faute* under Belgian law (see for classification societies: Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 313-317; Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 321-329).

[1896] I used the translation provided by P. TAELMAN & C. VAN SEVEREN, "The judicial system and civil procedure", in: M. KRUITHOF & W. DE BONDT (eds.), *Introduction to Belgian law*, Alphen aan den Rijn, Kluwer Law International, 2017, 118-119. See for more information on the relationship between Article 1315 BCC and Article 870 BJC: M.E. STORME, "Goede trouw in geding en bewijs - De Goede trouw in het geding? De invloed van de goede trouw in het privaat proces- en bewijsrecht", (2) *Tijdschrift voor Privaatrecht* 1990, 505-506, no. 111; B. CATTOIR, *Burgerlijk bewijsrecht: algemene praktische rechtsverzameling*, Mechelen, Kluwer, 2013, 72, no. 123. See more general on the law of evidence in Belgium and the allocation of the burden of proof: M. STORME, *De bewijslast in het Belgisch privaatrecht*, Ghent, Story-Scientia, 1962, 475p.; J. LAENENS, D. SCHEERS, P. THIRIAR, B. VANLERBERGHE & S. RUTTEN, *Handboek gerechtelijk recht*, Antwerp, Intersentia, 2016, 944p; B. ALLEMEERSCH, "Stand van zaken en recente ontwikkelingen op het vlak van bewijs in rechte", in: P. VAN ORSHOVEN *et al* (eds.), *Themis Gerechtelijk Recht*, Bruges, die Keure, 2010, 35-66; O. MICHIELS, "L'article 1315 du Code civil: contours et alentours", *Actualités du Droit* 1998, 363-383; B. ALLEMEERSCH, I. SAMOY & W. VANDENBUSSCHE, "Overzicht van rechtspraak. Het burgerlijk bewijsrecht 2000-2013, [De burgerlijke bewijslast] Interpretatie van de basisregel", (2) *Tijdschrift voor Privaatrecht* 2015, 682-710; B. ALLEMEERSCH, I. SAMOY & W. VANDENBUSSCHE, "Overzicht van rechtspraak. Het burgerlijk bewijsrecht 2000-2013, [De burgerlijke

The principle *actori incumbit probatio* is also incorporated in Article 8.3 of the *Avant-projet de loi portant insertion du Livre 8 «La preuve»*, which will be included in the new Belgian Civil Code.[1897]

A similar default rule exists in other EU Member States such as the Netherlands. Article 150 of the Dutch Code of Civil Procedure stipulates that the party who invokes the legal consequences of the facts or rights posed by him has the burden to prove these facts or rights.[1898] In other jurisdictions, third parties are also required to prove the certifier's act potentially giving a basis to impose liability.[1899] For instance, a claim for negligent misrepresentation under Section 552 Restatement (Second) of Torts will be successful if the plaintiff shows that a defendant, in the course of its business or in any transaction in which it has a pecuniary interest, supplied false information for the plaintiff's guidance in its business transactions and failed to exercise reasonable care or competence in obtaining or communicating the information.[1900]

598. There are, however, some exceptions to this general rule. One of them is relied upon in the first proposal, namely a reversal of the burden of proof. Such a reversal implies that a party other than the one who carries the burden under the basic rule will have to prove a certain element of a claim. That other party also bears the consequences and risks of a possible failure to do so.[1901] A reversal of the burden of proof might in some circumstances be allowed and even appropriate.[1902] Therefore, it can be explicitly

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bewijslast] Concrete toepassing van de basisregel", (2) *Tijdschrift voor Privaatrecht* 2015, 710-758; L. SIMONT, "La charge de la preuve. Jurisprudence récente de la Cour de Cassation", in: P.A. FORIERS (ed.), *Actualité du droit des obligations*, Brussels, Bruylant, 2005, 23-37.

[1897] *Avant-projet de loi portant insertion du Livre 8 «La preuve» dans le nouveau Code civil* approuvé, le 27 avril 2018, par le Conseil des ministres, tel que préparé par la Commission de réforme du droit de la preuve instituée par l'arrêté ministériel du 30 septembre 2017 et adapté, eu égard aux observations reçues depuis le début de la consultation publique lancée le 7 décembre 2017.

[1898] This is a translation of the wording in the Article "De partij die zich beroept op rechtsgevolgen van door haar gestelde feiten of rechten, draagt de bewijslast van die feiten of rechten, tenzij uit enige bijzondere regel of uit de eisen van redelijkheid en billijkheid een andere verdeling van de bewijslast voortvloeit". The reversal of the burden of proof included in this article is discussed later. See for more information on the allocation of the burden of proof in the Netherlands: I. GIESEN, *Bewijs en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de bewijslast, de bewijsvoeringslast, het bewijsrisico en de bewijsrisico-omkering in het aansprakelijkheidsrecht*, The Hague, Boom Juridische Uitgevers, 2001, 570p.; W.D.H. ASSER, *Burgerlijk Proces & Praktijk 3 – Bewijslastverdeling*, Deventer, Wolters Kluwer, 2004, 303p.

[1899] Claims against CRAs under common law fraud in New York, for instance, require a plaintiff to establish a misrepresentation or omission of material fact, which the CRA knew to be false (*Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651. F. Supp. 2d 155, 171 (S.D.N.Y. 2009)). In England, plaintiffs have to prove that a certifier had a duty of care, which it subsequently violated. Such a duty of care will be violated when the certifier has fallen below the particular standard of care demanded by the law (K. HORSEY & E. RACKLEY, *Tort Law*, Oxford, Oxford University Press, 2011, 197). In the Australian *Bathurst* case, the plaintiffs showed that S&P violated its duty of care because the CRA did not have reasonable grounds to assign the rating. The rating was not the result of reasonable care and skill (*Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 1200, paragraphs 2814-2836; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 12, 503 & 722).

[1900] See for more information the discussion *supra* nos. 253-280.

[1901] I. GIESEN, "The Burden of Proof and other Procedural Devices in Tort Law", in: H. KOZIOL, B.C. STEININGER & C. ALUNARU (eds.), *European tort law 2008*, Vienna, Springer, 2009, 51; W. VANDENBUSSCHE, *Bewijs en onrechtmatige daad*, Antwerp, Intersentia, 2017, 658-659.

[1902] See for those circumstances the discussion *infra* in nos. 600-607.

included in the law. An example can be found in the Product Liability Directive.[1903] The producer will be held liable for the damage caused by a defect in his product.[1904] According to Article 7, however, the producer will not be liable if he proves that he did not put the product into circulation or that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation or that this defect came into being afterwards.[1905]

599. In addition to a reversal of the burden of proof explicitly included in legislation, statutes may also stipulate that a judge is allowed to accept a reversal of the burden of proof under certain circumstances. As a consequence thereof, the court is "vested with discretionary powers".[1906] Article 4:201 of the Principles of European Tort Law, for instance, stipulates that "[t]he burden of proving fault may be reversed in light of the gravity of the danger presented by the activity".[1907] Another example is included in Article 150 of the Dutch Code of Civil Procedure, which gives judges the discretionary power to reverse the burden of proof if this is stipulated by a special statute or when it is seen to be reasonable and fair. Article 8.3 of the Belgian *Avant-projet de loi portant insertion du Livre 8 «La preuve»* also contains a provision allowing the judge to shift the burden of proof. The judge can freely determine who should carry the burden of proof when the application of the 'normal' rules included in Article 8.3. would be "manifestement déraisonnable".[1908]

[1903] Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. The Directive has been implemented in Belgium by the Product Liability Act (Loi du 25 février 1991 relative à la responsabilité du fait des produits défectueux, no. 1991009354 published in the *Moniteur belge* on March 22, 1991).

[1904] Article 1 Directive 85/374 concerning liability for defective products.

[1905] See for more information on the liability for damage caused by defective products: D. FAIRGRIEVE, *Product liability in comparative perspective*, Cambridge, Cambridge University Press, 2005, 378p.; P. MACHINKOWSKI, *European Product Liability – An Analysis of the State of the Art in the Era of New Technologies*, Cambridge, Intersentia, 2016, 705p.; S. WHITTAKER, *The Development of Product Liability*, Cambridge, Cambridge University Press, 2014, 304p.; D. VERHOEVEN, *Productaansprakelijkheid en productveiligheid*, Antwerp, Intersentia, 2018, 730p.; R. STEENNOT, "De vergoedbare schade bij schade ingevolge onveilige en gebrekkige producten", in: I. CLAEYS & R. STEENNOT (eds.), *Aansprakelijkheid, kwaliteit en veiligheid*, Mechelen, Wolters Kluwer, 2015, 225-267.

[1906] I. GIESEN, "The reversal of the burden of proof in the Principles of European Tort Law A comparison with Dutch tort law and civil procedure rules", (6) *Utrecht Law Review* 2010, 26.

[1907] European Group on Tort Law, *Principles of European Tort Law: Text and Commentary*, Vienna, Springer, 2009, 282p.

[1908] *Avant-projet de loi portant insertion du Livre 8 «La preuve» dans le nouveau Code civil* approuvé, le 27 avril 2018, par le Conseil des ministres, tel que préparé par la Commission de réforme du droit de la preuve instituée par l'arrêté ministériel du 30 septembre 2017 et adapté, eu égard aux observations reçues depuis le début de la consultation publique lancée le 7 décembre 2017. This provision is innovative as a reversal of the burden of proof by a judge is generally not accepted in Belgium (e.g. Court of Cassation, January 22, 2009, C.06.0650.F, *Arresten van het Cassatie* 2009, 227 & *Pasicrisie belge* 2009, 196; Court of Cassation, April 10, 2003, C.02.0213.F, *Arresten van het Cassatie* 2003, 935 & *Pasicrisie belge* 2003, 779). See for an overview and discussion: B. ALLEMEERSCH, I. SAMOY & W. VANDENBUSSCHE, "Overzicht van rechtspraak. Het burgerlijk bewijsrecht 2000-2013, [De burgerlijke bewijslast] Uitzonderingen op de basisregel", (2) *Tijdschrift voor Privaatrecht* 2015, 771-774.

1.2. The Risk of Liability and Providing Incentives for Certifiers

600. This proposal imposes the consequences and risks upon the certifier when it fails to show compliance with its obligations during the certification process in case the certificate did not correspond with the 'true' or 'actual' value of the certified item.[1909] Shifting the burden of proof so that the certifier has to establish that it complied with its obligations can aggravate liability.[1910] A reversal of the burden of proof leads to a "tightening up of liability".[1911] Third parties might more rapidly file a claim against a certifier if the latter carries the burden of proof to show compliance with its obligations. If the certificate does not correspond to the 'actual' or 'true' value of the certified item, third parties could initiate the claim. The certifier will then have to show that it did not violate its obligations during the certification process. As such, a reversal of the burden of proof might function as a deterrent and prevent certifiers from issuing unreliable and inaccurate certificates.[1912]

601. The idea of working with a reversal of the burden of proof has already been suggested by scholars for some certifiers. LAGONI, for instance, proposes a shift of the burden of proof regarding a classification society's negligent behaviour. Such a shift could be to the victim's benefit. The latter may face difficulties in establishing that a society acted negligently due to the lack of information. A classification society has to document all its activities. The society is, therefore, in a better position to prove that "it did everything right than the victim, who should prove that it did something wrong".[1913] I would suggest to extend such a reversal of the burden of proof to all other certifiers.[1914]

[1909] Assuming of course that a third party successfully established the other legal requirements of a civil liability claim against a certifier such as the required (transaction) causation and proof of loss (see the discussion *infra* in nos. 615-622 for more information on the requirement of causation).

[1910] S. JORGENSEN, "Towards Strict Liability in Tort", (7) *Scandinavian Studies in Law* 1963, 41.

[1911] I. GIESEN, "The reversal of the burden of proof in the Principles of European Tort Law A comparison with Dutch tort law and civil procedure rules", (6) *Utrecht Law Review* 2010, 25.

[1912] See in this regard also: M. HEMRAJ, *Credit Rating Agencies: Self-regulation, Statutory Regulation and Case Law*, SpringerLink (Online service), 2015, 175.

[1913] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 322.

[1914] GIESEN concludes that using a reversal of the burden of proof regarding a supervisor's negligence might not be that straightforward or necessary (I. GIESEN, *Toezicht en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de rechtvaardiging voor de aansprakelijkheid uit onrechtmatige daad van toezichthouders ten opzichte van derden*, Deventer, Kluwer, 2005, 202). Instead, he relies on the concept of 'aanvullende stelplicht' or 'gemotiveerde betwisting', which he translates as "the duty to provide an extra motivated pleading" (I. GIESEN, "The Burden of Proof and other Procedural Devices in Tort Law", in: H. KOZIOL, B.C. STEININGER & C. ALUNARU (eds.), *European tort law 2008*, Vienna, Springer, 2009, 59). A defendant will not only have to deny the plaintiff's statement of claim and the facts asserted therein, but also take an additional step when denying the asserted facts by supplying a certain degree of extra information. This information is typically not available to the plaintiff. By using the 'aanvullende stelplicht', the substantiation of a claim is put partly upon the defendant. However, the (legal) burden of proof is not reversed. Only the (evidential) burden of producing (pieces of) evidence is shifted. If the defendant complies with this duty, the plaintiff is still obliged to prove his claim by using the extra provided information (I. GIESEN, "The Burden of Proof and other Procedural Devices in Tort Law", in: H. KOZIOL, B.C. STEININGER & C. ALUNARU (eds.), *European tort law 2008*, Vienna, Springer, 2009, 59-60 with further references).

602. In addition to creating an increased risk of liability, there are other justifications for the reversal of the burden of proof in the context of certifiers. These are based on factors of logic and policy.[1915] One could, for instance, burden the party whose bad behaviour should be deterred. This idea relates to the social objectives of legislation. Burdening the certifier to prove that it complied with its obligations during the certification process can make litigation a worse outcome for this defendant due to the time and efforts put in the procedure. This might give the certifier a greater incentive to avoid litigation, which it can do by taking adequate precautions during the actual certification process.[1916] Another reason relates to the element of trust that has already been dicussed. Third parties, especially the weak or "unsophisticated"[1917] ones, need to be able to (at least to a certain extent) trust that certifiers function properly. That trust should not be broken without a sanction, which could consist in a higher chance of liability due to the reversal of the burden of proof.[1918]

603. The realisation of rules of substantive law ("*verwezenlijking van de materiële norm*"[1919]) should remain possible as well and might justify a reversal of the burden of proof. GIESEN argues that a reversal of the legal burden of proof might be justified in those cases where the liability of the defendant is in principle just and fair, taking into account the applicable substantive legal rule, and that liability cannot be reached, with the consequence that the realisation of the purpose of the substantive rule is no longer achievable, because in the majority of those cases a structural form of evidential impossibility is encountered. Whether the realisation of a substantive norm is no longer possible depends on the presence of two conditions.[1920]

On the one hand, there needs to be a 'structural evidential impossibility' ("*structurele bewijsnood*"[1921]). This requirement means that in the majority of cases that could in theory

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[1915] I.H. DENNIS, *The Law of Evidence*, London, Sweet and Maxwell, 1999, 388. See for an overview of different reasons for a shift in the legal burden of proof: I. GIESEN, *Bewijs en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de bewijslast, de bewijsvoeringslast, het bewijsrisico en de bewijsrisico-omkering in het aansprakelijkheidsrecht*, The Hague, Boom Juridische Uitgevers, 2001, 409-422 & 537-538.

[1916] C.W. SANCHIRICO, "A Primary Activity Approach to Proof Burdens", (37) *The Journal of Legal Studies* 2008, 276.

[1917] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5),* [2012] FCA 120, paragraphs 2767-2778; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 580, 599, 890-891, 1211 & 1263-1269.

[1918] I. GIESEN, *Bewijs en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de bewijslast, de bewijsvoeringslast, het bewijsrisico en de bewijsrisico-omkering in het aansprakelijkheidsrecht*, The Hague, Boom Juridische Iitgevers, 418 & 537-538.

[1919] I. GIESEN, *Bewijs en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de bewijslast, de bewijsvoeringslast, het bewijsrisico en de bewijsrisico-omkering in het aansprakelijkheidsrecht*, The Hague, Boom Juridische Uitgevers, 2001, 449.

[1920] I. GIESEN, *Bewijs en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de bewijslast, de bewijsvoeringslast, het bewijsrisico en de bewijsrisico-omkering in het aansprakelijkheidsrecht*, The Hague, Boom Juridische Uitgevers, 2001, 449-451 & 538-540.

[1921] I. GIESEN, *Bewijs en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de bewijslast, de bewijsvoeringslast, het bewijsrisico en de bewijsrisico-omkering in het aansprakelijkheidsrecht*, The Hague, Boom Juridische Uitgevers, 2001, 450.

be solved under the substantive rule, the solution is no longer attainable because the facts that need to be present cannot be proven on a structural level. The model is only applicable when the substantive rule loses its effectiveness. On the other hand, liability or a 'stricter' form of liability, should be desirable. Whether liability is desirable depends on the interpretation of the substantive rule, which is determined by its purpose. Accepting a reversal in the burden of proof is, therefore, determined by whether or not the purpose of the substantive rule can still be realised.[1922]

604. With an example stemming from the sector of CRAs, it is illustrated that this theoretical framework on the reversal of the burden of proof might be relevant in the context of certifiers.

According to Article 35a of the Regulation 462/2013 on CRAs, an investor will have to prove several elements before he will be compensated by the CRA for the incurred losses. These elements include an infringement listed in Annex III of the Regulation on CRAs that needs to be committed by the agency in an intentional way or with gross negligence. The investor must also show the causal link between the CRA's infringement and the loss he suffered. The investor must prove that he reasonably or with due care relied on the credit rating for making an investment decision. The infringement must have (had) an impact on the rating as well.[1923] The purpose of Article 35a has to be seen in connection with the subject matter of the Regulation on CRAs as well as with its Recitals.

The Regulation introduces a common regulatory approach aiming to enhance the integrity, transparency, responsibility, good governance and independence of rating activities, thereby contributing to the quality of ratings issued in the EU and to the smooth functioning of the internal market, while achieving a high level of consumer and investor protection.[1924] Recital (32) stipulates that credit ratings have a significant impact on investment decisions. As a consequence, rating agencies have an important responsibility towards investors in ensuring compliance with the applicable requirements so that their ratings are independent, objective and of adequate quality. The problem is that investors are not always in a position to enforce a CRA's responsibility towards them. It can be particularly difficult to establish the civil liability of a CRA in the absence of a contractual relationship. Against this background, the purpose of Article 35a is to provide investors with an adequate right of redress when they reasonably relied on a rating issued in breach of the Regulation on CRAs.

[1922] I. GIESEN, *Bewijs en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de bewijslast, de bewijsvoeringslast, het bewijsrisico en de bewijsrisico-omkering in het aansprakelijkheidsrecht*, The Hague, Boom Juridische Uitgevers, 2001, 449-451 & 538-540. In this regard, PARCHOMOVSKY & STEIN conclude that rights and remedies do not operate in a vacuum. They are meaningless unless actors can produce the evidence necessary to substantiate them (G. PARCHOMOVSKY & A. STEIN, "The Distortionary Effect of Evidence on Primary Behavior", (124) *Harvard Law Review* 2010, 528).

[1923] Article 35a Regulation 1060/2009 on credit rating agencies as introduced by Article 1(22) Regulation 462/2013. See for more information the discussion *supra* in nos. 213-218.

[1924] Article 1 Regulation 1060/2009 on credit rating agencies as replaced by Article 1(1) Regulation 462/2013.

However, investors face a high threshold when having to prove all the necessary elements listed in Article 35a. The realisation of the substantive (liability) rule can thus be problematic and remain uncertain. Imposing liability upon CRAs might be desirable because of its advantageous effect on the accuracy and reliability of credit ratings. A reversal of the burden of proof is in these circumstances justified.

605. The EU Commission Proposal for a Regulation amending Regulation 1060/2009 on credit rating agencies contained such a reversal of the burden of proof as well. It was specified that when an investor establishes facts from which it may be inferred that a CRA committed any of the listed infringements, the CRA has to prove that it has not committed that infringement or that the infringement did not have an impact on the issued rating.[1925] The proposed reversal of the burden of proof was eventually not adopted as interest-groups,[1926] the Council of the European Union[1927] and the EU Parliament[1928] opposed to its inclusion.[1929] However, the reasons why a reversal of the burden of proof were rejected are not convincing.

Credit rating agencies, for instance, warned that placing the burden of proof upon them would encourage investors to more easily bring claims. This would become costly for the CRAs to defend. However, the analysis in nos. 577-583 showed that the risk of frivolous suits is not necessarily a convincing argument and depends upon several factors. Another argument why the reversal of a burden of proof was not accepted related to the fact that investors would be less responsible for the risks they would take when the CRA carried the burden of proof. Once again, this argument is not convincing. The analysis in no. 218 illustrated that the (institutional) investors mentioned in the Regulation who rely only on a rating for a decision without making their own credit risk assessment might find it difficult to convince a judge that they reasonably relied on that rating. Private investors, by contrast, will have to prove that they reasonably relied on the rating alone, which remains challenging.[1930]

[1925] Article 1(20) Proposal for a Regulation amending Regulation 1060/2009 on credit rating agencies, COM/2011/0747 final - 2011/0361 (COD).

[1926] See for an overview and discussion: B. HAAR, "Civil Liability of Credit Rating Agencies after CRA 3-Regulatory All-or-Nothing Approaches between Immunity and Over-Deterrence", (2) *European Business Law Review* 2014, 326.

[1927] Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies, General approach, May 25, 2012, Interinstitutional File 2011/0361 (COD).

[1928] European Parliament, Committee on Economic and Monetary Affairs, Report on the proposal of for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies, August, 24, 2012, COM(2011)0747–C7-0420/2011–2011/0361(COD)).

[1929] See for an overview and discussion: B. HAAR, "Civil Liability of Credit Rating Agencies after CRA 3-Regulatory All-or-Nothing Approaches between Immunity and Over-Deterrence", (2) *European Business Law Review* 2014, 326-330.

[1930] M. HEMRAJ, *Credit Rating Agencies: Self-regulation, Statutory Regulation and Case Law Regulation in the United States and European Union*, SpringerLink (Online service), 2015, 175. See in this regard also: F. DE PASCALIS, "Civil Liability of Credit Rating Agencies from a European Perspective: Development and Contents of Art 35(a) of Regulation (EU) No 462/2013", University of Oslo Faculty of Law Research Paper No. 2015-05, January 10, 2015, 11-12, available at <https://ssrn.com/ abstract=2546756> discussing

606. A more important and relevant but contested reason justifying a reversal of the burden of proof relates to a certifier's possibility to gather evidence. The burden of proof could be placed on the party with better access to relevant information.[1931] This deals with the ability of a party to gather the necessary evidence. One has to examine for which actor collecting the evidence would be the less burdensome.[1932] Some scholars argue that this element should in principle not be a reason to shift the burden of proof. The party with better access to relevant information is not necessarily best placed to provide evidence when bearing the burden of proof. The party with better access to proof might also be the one trying to manipulate the evidence.[1933] In this regard, there is a Belgian decision by the Court of Appeal in Ghent explicitly rejecting the relevance of a party's capacity and ability to provide the evidence.[1934]

607. Nevertheless, a certifier's access to information and ability to provide evidence should be an element that needs to be taken into account when determining the burden of proof.[1935] Third parties do not always have access to the required (confidential)

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similar reasons as to why CRAs opposed to including a liability regime in Regulation 462/2013 (e.g. unlimited exposure to litigation every time a rating change occurred).

[1931] See for an overview: C.W. SANCHIRICO, "A Primary Activity Approach to Proof Burdens", (37) *Journal of Legal Studies* 2008, 275, footnote 3; E.A. POSNER, "Fault in Contract Law", (107) *Michigan Law Review* 2009, 1444.

[1932] B. ALLEMEERSCH, I. SAMOY & W. VANDENBUSSCHE, "Overzicht van rechtspraak. Het burgerlijk bewijsrecht 2000-2013, [De burgerlijke bewijslast] Concrete toepassing van de basisregel", (2) *Tijdschrift voor Privaatrecht* 2015, 726; J. LAENENS, D. SCHEERS, P. THIRIAR, B. VANLERBERGHE & S. RUTTEN, *Handboek Gerechtelijk Recht*, Antwerp, Intersentia, 2016, 563 with further references.

[1933] See for example: J. DE MOT, "De verdeling van de bewijslast economisch bekeken", in: J. DE MOT (ed.) *Liber amicorum Boudewijn Bouckaert. Vrank en vrij*, Bruges, die Keure, 2012, 18; B. SAMYN, "De bewijslast. Rechtsleer getoetst aan tien jaar cassatierechtspraak", (1) *Tijdschrift voor Procesrecht en Bewijsrecht- Revue de Droit Judiciaire et de la Preuve* 2010, 17. See for an overview: I. GIESEN, *Bewijs en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de bewijslast, de bewijs- voeringslast, het bewijsrisico en de bewijsrisico-omkering in het aansprakelijkheidsrecht*, The Hague, Boom Juridische Uitgevers, 2001, 417-420 & 425-444.

[1934] Court of Appeal Ghent, December 13, 2001, *Bank- en Financieel Recht-Droit Bancaire et Financier* 2002, 167 with annotation by S. DEJONGHE ("In beide gevallen komt het derhalve aan appellant toe om aan te tonen, dat de aangestelde van geïntimeerde zijn mondeling beursorder verkeerd heeft uitgevoerd. De door appellant ingeroepen theorie van 'betere geschiktheid' van de bank tot het leveren van bewijs doet daaraan alleszins geen afbreuk, nu de beursorder telefonisch werd doorgegeven en onmiddellijk diende uitgevoerd en appellant niet aantoont dat de bank beter geplaatst is om het bewijs van mondelinge afspraken te leveren").

[1935] Several other scholars in Belgium also argue that a party's ability to gather evidence and access to the evidence can be taken into account when allocating the burden of proof. See for example: S. RUTTEN, "Beginselen van behoorlijke bewijsvoering in het burgerlijk proces: enkele aandachtspunten", in: A. DE BOECK *et al* (eds.), *Het vermogensrechtelijk bewijsrecht vandaag en morgen*, Bruges, die Keure, 2009, 22 ("De bewijslast rust in begin-sel op de daartoe het meest geschikte partij, terwijl het bewijsrisico bepaalt wie het risico draagt dat een bepaald rechtsfeit niet bewezen raakt. Deze kunnen weliswaar samenvallen, maar dit is zeker niet steeds het geval"); J. LAENENS, D. SCHEERS, P. THIRIAR, B. VANLERBERGHE & S. RUTTEN, *Handboek Gerechtelijk Recht*, Antwerp, Intersentia, 2016, 563 ("Aangenomen wordt dat de rechter de bewijslast ook kan bepalen aan de hand van de geschiktheid van een procespartij om zich bewijsmateriaal te ver-schaffen"); M.E. STORME, "Goede trouw in geding en bewijs - De Goede trouw in het geding? De invloed van de goede trouw in het privaat proces- en bewijsrecht", (2) *Tijdschrift voor Privaatrecht* 1990, 509, no. 112 ("dat de *bewijslast* bepaald wordt door de *geschiktheid om zich bewijsmateriaal* voor de desbetreffende feitelijke toedracht te *verschaffen*"); W. VANDENBUSSCHE, *Bewijs en onrechtmatige daad*, Antwerp, Intersentia, 2017, 707-708.

information to prove that a certifier did not comply with its obligations during the certification process.[1936] The proof of a certifier's act potentially leading to liability can, therefore, become quite challenging. Certifiers aware thereof might be induced to perform their obligations less strictly during the certification process.[1937] In those circumstances, a reversal of the burden of proof could be useful as it might prevent the issuance of unreliable and inaccurate certificates.[1938]

A third-party certifier can be the actor facing the least problems gathering the necessary evidence, both in terms of timing to provide it as well as regarding the workload that it would thereby incur.[1939] More generally, a reversal of the burden of proof is desirable as there can be an information asymmetry between a certifier and a third party.[1940] Certifiers will in most cases possess more relevant information about a certified item than third parties. Certifiers are often required by law to keep the necessary documents and track records that they obtain because of the confidential relationship with a requesting entity. A certifier has access to documents on the certified item due to its confidential relationship with the requesting entity, which a third party does not always have.[1941]

[1936] See in this regard, for example: *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651. F. Supp. 2d 155, 180-181 (S.D.N.Y. 2009); *California Public Employees' Retirement System v. Moody's Corp.*, no. A134912, 28-30 (Cal. Ct. App. 2014). In *Quinn*, the Court of Appeals for the Seventh Circuit affirmed that Quinn could not show that he reasonably relied on the rating because he was an "experienced" banker who should have done "his own homework". It seems, nonetheless, that Quinn had access to inside information and "chose to take no action at that time; indeed, he let matters ride for a long time, until after S & P had downgraded its own rating" (*Quinn v. McGraw-Hill Cos.*,168 F.3d 331, 336, paragraph 17 (7th Cir.1999)).

[1937] J. DE MOT, "De verdeling van de bewijslast economisch bekeken", in: J. DE MOT (ed.), *Liber amicorum Boudewijn Bouckaert. Vrank en vrij*, Bruges, die Keure, 2012, 24.

[1938] J. DE MOT, "De verdeling van de bewijslast economisch bekeken", in: J. DE MOT (ed.), *Liber amicorum Boudewijn Bouckaert. Vrank en vrij*, Bruges, die Keure, 2012, 24; M. HEMRAJ, *Credit Rating Agencies: Self-regulation, Statutory Regulation and Case Law Regulation in the United States and European Union*, SpringerLink (Online service), 2015, 175. See in this regard also Belgian cases where the link between the reversal of the burden of proof and the ability and capacity of a party to gather evidence has been acknowledged: Commercial Court Brussels, December 3, 1996, *Revue Générale des Assurances et des Responsabilité* 1999, no. 13.059; Court of Appeal Antwerp, June 15, 2015, *Le Droit des Affaires-Het Ondernemingsrecht* 2016, 31.

[1939] W. VANDENBUSSCHE, *Bewijs en onrechtmatige daad*, Antwerp, Intersentia, 2017, 714-715.

[1940] M.G. FAURE, *Tort Law and Economics*, Cheltenham, Edward Elgar, 2009, 30; J. BASEDOW, *Private Enforcement of EC Competition Law*, Alphen aan den Rijn, Kluwer Law International, 2007, 298; I. GIESEN, *Bewijs en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de bewijslast, de bewijsvoeringslast, het bewijsrisico en de bewijsrisico-omkering in het aansprakelijkheidsrecht*, The Hague, Boom Juridische Uitgevers, 2001, 537; B.A. KOCH, *Damage Caused by Genetically Modified Organisms: Comparative Survey of Redress Options for Harm to Persons, Property or the Environment*, Berlin, New York, Walter de Gruyter, 2010, 847. The existence of an information asymmetry is also a reason why (legal) presumptions are created. Presumptions try to equalise the position of the parties in those cases where all the factual evidence is in the hands of the defendant (C. VOLPIN, "The Ball is in Your Court: Evidential Burden of Proof and Proof-Proximity Principle in EU Competition Law", (51) *Common Market Law Review* 2014, 1165).

[1941] See for more information also the discussion *supra* in Part II, Chapter I.

1.3. Costs Associated With the Proposal

608. A shift in the burden of proof can reduce the costs incurred by certifiers, third parties and society. To come to that conclusion, Harvard Law School professor HAY starts by analysing the common rationale for allocating the burden of proof to the plaintiff, namely that it conserves legal resources. It is more costly for the court to intervene in a dispute between parties than it would be to not intervene. The available resources might be used for other purposes when a court is not involved in such disputes. The third party – plaintiff – is the one pressing for judicial intervention when claiming recovery from certifiers. As a consequence, it will have to show that it is entitled to the relief sought. The default rule according to which a third party carries the burden of proof ensures that the legal system will only intervene in cases where there is a good reason for doing so, in other words where relief is warranted.[1942]

609. According to HAY, the default rule of placing the burden of proof on the plaintiff does not consider that it actually takes two parties to file a lawsuit. The certifier – defendant – could have taken steps to ensure that a third party would not file a lawsuit with all ensuing costs. For instance, it could have prevented a lawsuit by giving what a third party demanded or by adhering to mediation. In those cases, a court intervention would not have been necessary. The underlying idea is that a certifier can be as responsible as a third party for the fact that litigation is started. Against this background, the conventional argument why the plaintiff should carry the burden of proof can be turned around. The certifier will thus have to establish that a third party is not entitled to the relief sought. The reversal of the burden of proof will ensure that third parties with sound claims will not needlessly be forced to sue. Such plaintiffs could be compensated by certifiers and the initiation of lawsuits would be prevented. This eventually preserves judicial resources.[1943]

610. Procedural rules can be used as a device for minimising social costs.[1944] More specifically, a court or legislature's objective in allocating the burden of proof could be to minimise the costs of resolving disputes, also known as litigation costs.[1945] The allocation of a burden of proof can be seen as mechanism to reduce the sum of both process and error costs. Process or direct costs are those associated with litigation and include private (e.g. presenting evidence by the parties) as well as public costs (e.g. the organisation of the judicial system).[1946] Error costs are caused by erroneous legal

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[1942] B.L. HAY, "Allocating the Burden of proof", (72) *Indiana Law Journal* 1997, 656-657.

[1943] B.L. HAY, "Allocating the Burden of proof", (72) *Indiana Law Journal* 1997, 656-657.

[1944] T.R. LEE, "Pleading and Proof: The Economics of Legal Burdens", (1997) *Brigham Young University Law Review* 1997, 3. The social cost is the total cost to society. It includes private costs plus any external costs. A private cost is a cost borne solely by the individuals involved in a transaction that created the costs. External costs are borne by parties not directly involved in the transaction (W. BOYES & M. MELVIN, *Microeconomics*, Boston, Cengage Learning, 2015, 260).

[1945] B.L. HAY & K.E. SPIER, "Burdens of Proof in Civil. Litigation: An Economic Perspective", (26) *Journal of Legal Studies* 1997, 413, 422-423.

[1946] I rely on the terms used by HAY but process or direct costs correspond with CALABRESI's concept of tertiary costs.

judgements. They relate to disadvantages following an outcome favouring one party, whereas the evidence supports another party. Such errors may undermine objectives such as deterrence or any other function of the substantive law.[1947]

611. There is a *prima facie* case to place the burden of proof on the defendant when parties are perfectly informed about whether the plaintiff's claim will be meritorious and when there is no possibility of settlement.[1948] The plaintiff will not have an incentive to bring a meritless claim and he would suffer the costs of presenting evidence when bearing the burden of proof in such cases. However, parties are never perfectly informed and certain on a procedure's outcome. Therefore, a more realistic perspective needs to be taken. One has to reconsider which party should bear the burden of proof from the viewpoint of minimising the sum of process and error costs.[1949]

612. Against this background, HAY concludes that the optimal allocation of the burden of proof to either the defendant or plaintiff depends upon five factors, namely the probability that a party's position is correct, the party's estimate of its chance of success, the party's costs of presenting evidence to support its position, the amount at stake for the party and the social costs of an erroneous ruling against the party.[1950] As a general rule, the burden of proof should be allocated to the plaintiff when the court knows or would know that the probability of a plaintiff having a meritorious claim is relatively small and the other elements (e.g. a party's estimate of the chance of success and the interests at stake) are roughly the same for both parties. The plaintiff should thus carry the burden of proof when the facts known to the court when assigning the burden are such that, without more information, it seems that the defendant is probably correct.[1951]

Allocating the burden of proof to the defendant would in those circumstances have two undesirable consequences. On the one hand, the plaintiff would tend to sue even when the chances of success are rather small. The defendant will then be required to present the necessary evidence. On the other hand, the plaintiff would be inclined to file a suit even if he knows that the claim is meritless, hoping to induce the defendant to pay to drop the claim.[1952] If the amount of this compensation is less than the defendant's costs for presenting the evidence showing that the claim is meritless, the defendant may indeed have an incentive to agree with an out-of-court settlement.[1953] As a result thereof, the total

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[1947] B.L. HAY, "Allocating the Burden of proof", (72) *Indiana Law Journal* 1997, 654.

[1948] If the evidence supports the claim, the claim is meritorious; if the evidence defeats the claim, the claim is meritless.

[1949] B.L. HAY, "Allocating the Burden of proof", (72) *Indiana Law Journal* 1997, 657-660; T.R. LEE, "Pleading and Proof: The Economics of Legal Burdens", (1997) *Brigham Young University Law Review* 1997, 4-6.

[1950] B.L. HAY, "Allocating the Burden of proof", (72) *Indiana Law Journal* 1997, 663.

[1951] B.L. HAY, "Allocating the Burden of proof", (72) *Indiana Law Journal* 1997, 676-677.

[1952] B.L. HAY, "Allocating the Burden of proof", (72) *Indiana Law Journal* 1997, 677-678.

[1953] K. SAITO, "Yardsticks for "Trade and Environment": Economic Analysis of the WTO Panel and the Appellate Body Reports regarding Environment-oriented Trade Measures", Jean Monnet Center NYU School of Law, available at <www.jeanmonnetprogram.org/archive/papers/01/013701-06.html>.

of process and error costs is likely to be higher when the defendant bears the burden of proof.[1954]

613. However, things might be somewhat different and more complicated in the context of certifiers. The information available to the court might, for instance, show that a third party can sometimes have a meritorious claim. There have already been cases where the certifier has been found liable towards third parties. Put simply, the defendant is not always correct.[1955] Moreover, a shift of the burden of proof to the defendant can be justified when the plaintiff's costs of presenting and gathering evidence are higher than those for the defendant.[1956] Other things being equal, the lower a party's relative costs for gathering and producing evidence, the stronger the argument for giving him the burden of proof.[1957] This is also referred to as the relative-cost-of-proof argument. When the defendant can produce core evidence on a relevant issue at a lower cost than the plaintiff, assigning the burden of proof to the defendant might minimise social losses. Relative costs depend on the party's access to proof.[1958] Assigning the burden of proof to the party with lower relative costs of proof saves on direct costs by giving incentives to the least cost producer of proof to establish the core evidence.[1959] Certifiers are often required to keep the necessary documents or records to show compliance with their obligations during the certification process. They also have access to evidence due to the confidential relationship with requesting entities. Therefore, a certifier will likely not incur as many costs as third parties when presenting evidence that they complied with the obligations during the certification process.[1960]

[1954] B.L. HAY, "Allocating the Burden of proof", (72) *Indiana Law Journal* 1997, 677; K. SAITO, "Yardsticks for "Trade and Environment": Economic Analysis of the WTO Panel and the Appellate Body Reports regarding Environment-oriented Trade Measures", Jean Monnet Center NYU School of Law.

[1955] See for more information the discussion *supra* in Part II, Chapter III.

[1956] B.L. HAY, "Allocating the Burden of proof", (72) *Indiana Law Journal* 1997, 677; K. SAITO, "Yardsticks for "Trade and Environment": Economic Analysis of the WTO Panel and the Appellate Body Reports regarding Environment-oriented Trade Measures", Jean Monnet Center NYU School of Law.

[1957] B.L. HAY & K.E. SPIER, "Burdens of Proof in Civil. Litigation: An Economic Perspective", (26) *Journal of Legal Studies* 1997, 419 & 426-427; F. GOMEZ, "Burden of Proof and Strict Liability: An Economic Analysis of a Misconception", InDret, Barcelona, January 2001, 17.

[1958] This relative-cost theory depends on two assumptions. First, the party not assigned the burden of proof will do nothing (or at least spend relatively less on proof) until the party assigned the burden has produced some proof. Second, each party will be able to share at least some fraction of the proof produced by the other one. There is some essential evidence forming the core of the proof shared by the parties. This core must be generated by one of the parties but does not need to be duplicated by the other one (T.R. LEE, "Pleading and Proof: The Economics of Legal Burdens", (1997) *Brigham Young University Law Review* 1997, 17).

[1959] T.R. LEE, "Pleading and Proof: The Economics of Legal Burdens", (1997) *Brigham Young University Law Review* 1997, 16-17.

[1960] See for more information also the discussion *supra* in Part II, Chapter I and no. 583. Also see: T.R. LEE, "Pleading and Proof: The Economics of Legal Burdens", (1997) *Brigham Young University Law Review* 1997, 17; M.T. GRANDO, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement*, Oxford, Oxford University Press, 2009, 202.

1.4. Factors Reducing the Risk of a Certifier's Unlimited Liability

614. Even when this proposal is adopted, there remain factors reducing the risk of a certifier's unlimited liability. A certifier will not be held liable towards third parties once a judge accepts that it complied with its obligations. If, however, a judge comes to an opposite conclusion, mechanisms that limit liability might come into play. Similar to auditors, capping mechanisms could be adopted for the other certifiers as well. This will prevent their unlimited liability towards third parties.[1961] Moreover, irrespective of the reversal of the burden of proof regarding a certifier's violation of its obligations during the certification process, third parties will still have to show the other elements for a claim to be successful. Although this has already been briefly touched upon above,[1962] some elements are particularly relevant in this proposal. They can be found in Belgium (part 1.4.1.) and in other jurisdictions (part 1.4.2.).

1.4.1. The Situation in Belgium

615. The requirement of causation can operate on different levels such as between a certifier's alleged wrongful act and the inaccuracy of the certificate or between this inaccuracy and a third-party's loss. The proof of a causal link also needs to be established between a certifier's violation of its obligations during the certification process and the loss incurred by the third party.[1963] An in-depth discussion of the requirement of causation in the context of certifiers or other providers of information does not fall within the scope of this dissertation.[1964] The third-party liability of certifiers as such and some of the required elements for a liability claim were discussed in nos. 233-239. The following paragraphs merely show that the requirement of causation can operate as a factor reducing the risk of a certifier's unlimited liability, even when a reversal of the burden of proof is accepted.

616. The traditionally accepted theory in Belgium is the doctrine of the equivalence of conditions.[1965] This doctrine is, therefore, taken as starting point of the analysis. Under

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[1961] See for more information also the discussion *supra* in nos. 221-222

[1962] See for more information also the discussion *supra* in Part II, Chapter III.

[1963] J. BELSON, *Certification Marks*, London, Sweet & Maxwell, 2002, 49-50 (the certifier will avoid liability when no causal link is established between the certifier's act and the damage incurred by a third party).

[1964] See for more information on causation and certifiers, gatekeepers or providers of information: A.M. ERDLEN, "Timing is Everything: Markets, Loss, and Proof of Causation in Fraud on the Market Actions", (80) *Fordham Law Review* 2011, 877; E. VANDENDRIESSCHE, *Investor Losses: A Comparative Legal Analysis of Causation and Assessment of Damages in Investor Litigation*, Cambridge, Intersentia, 2015, 566p.; I. GIESEN & K. MAES, "Omgaan met bewijsnood bij de vaststelling van het causaal verband in geval van verzuimde informatieplichten", (27) *Nederlands Tijdschrift voor Burgerlijk Recht* 2014, 219. See in general: S. STEEL, *Proof of Causation in Tort Law*, Cambridge, Cambridge University Press, 2015, 462p.; M. INFANTINO & E. ZERVOGIANNI (eds.), *Causation in European Tort Law*, Cambridge, Cambridge University Press, 2018, 780p.

[1965] T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 763-873 with further references; J.L. FAGNART, "Petite navigation dans les méandres de la causalité", *Revue Générale des Assurances et des Responsabilités* 2006, 14.080, no. 3; M. VAN QUICKENBORNE, *Oorzakelijk verband tussen onrechtmatige daad en schade*, Mechelen, Kluwer, 2007, 31-46 with further references. See, however: M. KRUITHOF, "Oorzaak of aanleiding? Geen causaal verband

this rule, the court is required to accept legal causality between a fact and the incurred loss if it has been established that the invoked fact was necessary in the given circumstances for the loss to occur (the so-called *conditio sine qua non* or 'but-for test'). Although the suggested Article 5.162 that might be included in the new Belgian Civil Code contains an exception, the *conditio sine qua non requirement* is still used as a basis to establish causation.[1966] Causation is established when the loss incurred by third parties would not have occurred the way it did without that certifier's wrongful act.[1967] When it comes to certifiers, a distinction has to be made between two situations, depending on whether the certifier can be qualified as a gatekeeper or not.

617. Consider first the situation in which a certifier does not act as a gatekeeper. A third party claiming recovery from a certifier will have to prove that the loss it incurred was caused by a certifier's wrongful act, consisting of a non-compliance with its obligations during the certification process. This can be challenging as it is a defective breast implant or a vessel that causes a third party's damage, not the certificate that has been issued during the certification process. A third party's loss might still have occurred without a certifier's wrongful act. The certificate merely assists or guides a third party to purchase the (defective) certified item. A third party will in any case have to prove that it incurred the loss because of relying on the certificate, which results from a certifier's violation of the obligations during the certification process. The proof by a third party of its *ex post*

zonder causale bijdrage", in: T. VANSWEEVELT & B. WEYTS (eds.), *Actuele ontwikkelingen in het aansprakelijkheidsrecht en verzekeringsrecht. Iste Interuniversitair Congres over Aansprakelijkheids- en Verzekeringsrecht*, Antwerp, Intersentia, 2015, 139-208 (concluding that another rule than the equivalence theory can better describe Belgian positive law on causation in civil liability. Under this rule a fact is a cause of a loss if (i) the loss would in the given circumstances not have occurred as it specifically occurred without the fact and (ii) the fact has increased the specific risk of which the specific loss occurrence was a realisation). See in this regard also the suggested Article 5.162 *Avant-projet de loi portant insertion des dispositions relatives à la responsabilité extracontractuelle dans le nouveau Code civil*, Rédigé par la Commission de réforme du droit de la responsabilité instituée par l'arrêté ministériel du 30 septembre 2017, March 28, 2018.

[1966] The article stipulates that: "[l]e dommage doit être réparé si un fait générateur de responsabilité en est la cause. Tel est le cas lorsque le dommage ne serait pas survenu sans ce fait ou si le fait en question est la seule explication possible du dommage". As such, Article 5:162 starts from the *conditio sine qua non* test. However, it specifies that "[t]outefois, il n'y a pas de responsabilité si le lien entre le fait générateur de responsabilité et le dommage est à ce point étendu qu'il serait manifestement déraisonnable d'imputer ce dommage à celui auquel la réparation est demandée. Dans cette appréciation, il peut être tenu compte, en particulier, du caractère imprévisible du dommage au regard des conséquences normales du fait générateur de la responsabilité et de la circonstance que celui-ci n'a pas contribué de manière significative à la survenance du dommage". There is thus an exception when the relationship between the fact leading to the loss and the suffered loss is so remote that it would be "manifestement déraisonnable" to impose liability upon the defendant.

[1967] M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 126-127 , nos. 205-207 with further references to case law; H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 66. See in general on causation in Belgium: M. VAN QUICKENBORNE, *Oorzakelijk verband tussen onrechtmatige daad en schade*, Mechelen, Kluwer, 2007, 160p.; J.L. FAGNART, *La causalité*, Waterloo, Kluwer, 2009, 366p.; I. BOONE & H. BOCKEN, "Causaliteit in het Belgische recht", (4) *Tijdschrift voor Privaatrecht* 2002, 1625; P. FORIERS, "Aspects du dommage et du lien de causalité. (Parcours dans la jurisprudence récente de la Cour de cassation)", in: J. ROMAIN (ed.), *Droit des obligations. Notions et mécanismes en matière de responsabilité*, Brussels, Bruylant, 2014, 7-52; I. DURANT, "A propos de ce lien qui doit unir la faute au dommage", in: B. DUBUISSON & P. HENRY (eds.), *Droit de la responsabilité. Morceaux choisis*, Brussels, Larcier, 2004, 7-68.

reliance on a certificate, however, is not straightforward. It remains uncertain whether a third party would have taken another decision if the certifier would have complied with its obligations during the certification process.[1968] Arguably, the issuance of a certificate by a third-party certifier resulting from a violation of the certification process is not always by itself a necessary condition for the loss to occur. The causal link between the certifier's wrongful act and the inaccuracy of the certificate is uncertain. The certificate might also have been inaccurate without the certifier's fault. Moreover, causality between the certificate's inaccuracy and a third-party's decision to rely on a certificate is uncertain as well. As a consequence, a strict and correct application by judges of the *conditio sine qua non* test might serve as a factor reducing the risk of a certifier's unlimited liability.

618. Things can be different when certifiers act as gatekeepers. The causal link between the violation of a gatekeeper's obligations during the certification process and the loss incurred by third parties might be more easily established as the certificate is a necessary condition for the certified item to be marketed and thus for the loss to occur. Without the issuance of a certificate, third parties would not have been able to purchase the certified item in the first place. Therefore, one could argue that there is objective reliance by third parties on the certificate and thus a causal link as well. This has been acknowledged in Belgian case law dealing with the liability of classification societies. In the *Paula* case, a society's negligence – and issuance of a certificate – made it possible for the shipowner to continue using the vessel for maritime activities. The certificate created a false appearance of safety. The commercial use of the vessel depended upon the existence of a class certificate as this was required by the applicable legislation.[1969] In the *Spero* case, the causal link between the damage to the plaintiff and the classification society's negligent act was also established as the issuance of the certificate allowed the vessels to be retained in maritime transport.[1970]

619. Despite the conclusion in the previous paragraph, the requirement of causation as applied by Belgian judges might still reduce the risk of unlimited liability in the context of gatekeepers. When applying the *conditio sine qua non* test, a judge needs to hypothetically reconstruct the event leading to the loss and leave out the defendant's wrongful act. If the loss remains the same, a defendant's wrongful act was not a necessary condition for it to occur.[1971] The application of this *théorie de l'alternative légitime*,

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[1968] E. VANDENDRIESSCHE, "Causaliteit en bewijslast in het Belgische financiële aansprakelijkheids-recht bij beleggingsdienstverlening", in: D. BUSCH, C. KLAASSEN & T. ARONS (eds.), *Aansprakelijkheid in de financiële sector*, Deventer, Kluwer, 2013, 190-193; E. VANDENDRIESSCHE, *Investor Losses: A Comparative Legal Analysis of Causation and Assessment of Damages in Investor Litigation*, Cambridge, Intersentia, 2015, 189-233.

[1969] Court of Appeal Antwerp, May 10, 1994, *Rechtspraak Haven van Antwerpen* 1995, 314.

[1970] Court of Appeal Antwerp, February 14, 1995, *Rechtspraak Haven van Antwerpen* 1995, 329.

[1971] H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedings-recht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 67-68; T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 778-779. See for more information: P. VAN OMMESLAGHE, "Le concept de l' «alternative légitime» en droit de la responsabilité civile", in: X, *Justitie: vraagstukken en perspectieven voor morgen*, Bruges, die Keure, 2013, 131-137; H. BOCKEN, "De conditio sine qua non en het rechtmatig alternatief", in: X, *Justitie: vraagstukken en perspectieven voor morgen*, Bruges, die Keure, 2013, 109-129; R.

however, is not always straightforward.[1972] Without going into detail, the use of this theory allows judges to deny causation in the context of gatekeepers.[1973]

620. This can be illustrated with a hypothetical example of a classification society acting as gatekeeper when issuing a certificate to a vessel that has problems with its mast. This piece of equipment does not comply with the class rules, which the gatekeeper fails to detect because of a violation of its obligations. Therefore, the gatekeeper commits a wrongful act by giving a certificate after the certification process. Suppose now that rough sea conditions cause the bottom planking to break, thereby causing pollution. According to the *condition sine qua non* doctrine, the fact that a classification society issued the certificate is a necessary condition for the damage to occur. Without the certificate, the vessel would not have been allowed to sail and if it had not sailed, it would not have sunk. The causal link between the loss and the gatekeeper's wrongful act seems obvious.

However, a Belgian judge can come to another conclusion when applying the doctrine of *l'alternative légitime*.[1974] A judge might assume that the *alternative légitime* is the certification of a vessel without any problems to its mast. In those circumstances, the breaking of the bottom planking would still have caused the vessel to sink. The certification of the vessel with a defective mast is thus not considered to be a necessary condition for the damage to occur. As a consequence, causation can be denied.[1975] An

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JAFFERALI, "L'alternative légitime dans l'appréciation du lien causal, corps étranger en droit belge de la responsabilité?", in: F. GLANSDORFF (ed.), *Droit de la responsabilité. Questions choisies*, Brussels, Larcier, 2015, 94-164; M. VAN QUICKENBORNE, *Oorzakelijk verband tussen onrechtmatige daad en schade*, Mechelen, Kluwer, 2007, 46-48. See for an application: Police Court Ghent, October 8, 2012, *Rechtskundig Weekblad* 2012-2013, 955; Court of First Instance Brussels, March 31, 2014, *Consilio Manuque: Belgisch tijdschrift voor lichamelijke schade en gerechtelijke geneeskunde* 2015, 28 with annotation by E. LANGENAKEN.

[1972] M. VAN QUICKENBORNE, *Oorzakelijk verband tussen onrechtmatige daad en schade*, Mechelen, Kluwer, 2007, 46 concluding that its application can be complex in certain situations. See in this regard for example: Court of Cassation, September 23, 2011, C.10.0744.F, *Arresten van het Hof van Cassatie* 2011, 1909 & *Pasicrisie belge* 2011, 2034; Court of Cassation, October 8, 1996, P.95.0603.N, *Arresten van het Hof van Cassatie* 1996, 881 & *Pasicrisie belge* 1996, I, 943; M. VAN QUICKENBORNE & H. VANDENBERGHE, "Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad 2000-2008 [Kenmerken van het oorzakelijk verband]", *Tijdschrift voor Privaatrecht* 2010, 305, footnote 56.

[1973] See for a discussion on the (lack of) compatibility of this doctrine with the *conditio sine qua non* test: M. KRUITHOF, "Oorzaak of aanleiding? Geen causaal verband zonder causale bijdrage", in: T. VANSWEEVELT & B. WEYTS (eds.), *Actuele ontwikkelingen in het aansprakelijkheidsrecht en verzekeringsrecht. Iste Interuniversitair Congres over Aansprakelijkheids- en Verzekeringsrecht*, Antwerp, Intersentia, 2015, 150-153.

[1974] See for an overview and a discussion of some decisions where causation was not accepted, even when the wrongful act was a necessary condition for the loss: H. BOCKEN, "De conditio sine qua non en het rechtmatig alternatief", in: X, *Justitie: vraagstukken en perspectieven voor morgen*, Bruges, die Keure, 2013, 119-121.

[1975] See in this regard: Court of Casation, May 28, 2008, P.08.0226.F, *Arresten van het Hof van Cassatie* 2008, 1368, *Pasicrisie belge* 2008, 1335, *Forum de l'assurance* 2008, 132 with annotation by J.L. FAGNART & *Rechtspraak Antwerpen Brussel Gent* 2009, 655 with annotation by N. VAN DE SYPE ("Het staat hem dus vrij het foutieve karakter van de inverkeerstelling van het voertuig te vervangen door de correcte uitvoering ervan en daaruit af te leiden dat deze fout al dan niet in oorzakelijk verband met de schade staat naargelang zonder die fout, de schade zich al dan niet zou hebben voorgedaan"); Court of Cassation, December 19, 2007, P.07.1314.F, *Arresten van het Hof van Cassatie* 2007, 2512 & *Pasicrisie belge* 2007, 2385. Some caution is, however, needed in this regard. Only the defendant's wrongful act should be left out of when reconstructing *l'alternative légitime*. Other circumstances of the case cannot be changed (see

interesting comparison can also be made with the situation in which a decision by a public authority is nullified due to the lack of sufficient (formal) motivation. Establishing the *alternative légitime* will not always be evident in those circumstances. A legitimately acting authority might take different decisions on the ground of its discretionary powers.[1976] Therefore, the public authority's wrongful act – lack of sufficient motivation – is not necessarily a cause of the loss as it has not been shown that the authority would have taken another decision with the proper motivation.[1977]

621. Considering that the proof of causation can be quite challenging and sometimes even impossible, mechanisms have been developed by national judges to overcome this hurdle.[1978] Courts might apply these mechanisms to remedy the proof of a third party's

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in this regard: Court of Cassation, March, 28, 2001, P.00.1659.F, *Arresten van het Hof van Cassatie* 2001, 514 & *Pasicrisie belge* 2001, 508; Court of Cassation, September 23, 2011, C.10.0744.F, *Arresten van het Hof van Cassatie* 2011, 1909 & *Pasicrisie belge* 2011, 2034; Court of Cassation, June 12, 2017, C.16.0428.N (available online at <jure.juridat.just.fgov.be>); T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 778; H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedings-recht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 67-68; P. VAN OMMESLAGHE, "Le concept de l' «alternative légitime» en droit de la responsabilité civile", in: X, *Justitie: vraagstukken en perspectieven voor morgen*, Bruges, die Keure, 2013, 135).

[1976] H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedings-recht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 68.

[1977] See in this regard: Court of Appeal Ghent, June 11, 2010, *Tijdschrift voor Gentse Rechtspraak en Tijdschrift voor West-Vlaamse Rechtspraak* 2010, 304; Court of Appeal Ghent, May 5, 2011, *Nieuw Juridisch Weekblad* 2012, 300 with annotation by I. BOONE. The outcome of the application of the doctrine of *l'alternative légitime* thus depends upon what judges will consider to be the 'wrongful act'. A recent decision by the Court of Cassation can serve as an illustration. The case dealt with the lack of legally required (formal) motivation and the non-compliance with the legal requirement to hear a person before a public authority is allowed to take a decision. There are two ways to determine *l'alternative légitime*. On the one hand, *l'alternative légitime* could be that a decision is taken with the required motivation and hearing (cf. Court of Cassation, June 12, 2017, C.16.0428.N (available online at <http://jure.juridat.just.fgov.be>)). On the other hand, *l'alternative légitime* could be that no decision is taken at all, given that the required hearing has not taken place and no motivation is present.

[1978] An example in Belgium is the loss of a chance doctrine, which has been allowed by the Court of Cassation. Courts can award compensation for the value of the lost chance the victim had of not suffering the disadvantage. The value of this lost chance will be estimated as a fraction of the value of the disadvantage that the victim ultimately has suffered (e.g. Court of Cassation, March 15, 2010, C.09.0433.N, *Arresten van het Hof van Cassatie* 2010, 167 & *Pasicrisie belge* 2010, 839; Court of Cassation, January 19, 1984, 6956, 6963, *Arresten van het Hof van Cassatie* 1984, 585 & *Pasicrisie belge* 1984, 548; H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 47-50 with further references; M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 127, nos. 208-209; D. PHILIPPE, "Quelques réflexions sur la perte d'une chance et le lien causal", (119) *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2013, 1004; H. BOCKEN, "Verlies van een kans: het cassatiearrest van 5 juni 2008: vervolg en (voorlopig) slot", *Nieuw Juridisch Weekblad* 2009, 1; B. DUBUISSON, "La théorie de la perte d'une chance en question: le droit contre l'aléa?", (126) *Journal des Tribunaux* 2007, 489). Another example in Belgium exists with regard to the proof of a defect in an object pursuant to the first paragraph of Article 1384 BCC (proposed Article 5.160 of the *Avant-projet de loi portant insertion des dispositions relatives à la responsabilité extracontractuelle dans le nouveau Code civil*, Rédigé par la Commission de réforme du droit de la responsabilité instituée par l'arrêté ministériel du 30 septembre 2017, March 28, 2018). Belgian courts are lenient towards a victim facing difficulties in providing positive evidence of the defect that caused the object to be damaging. Courts allow a negative or indirect proof of the defect. The existence of a defect is then accepted if all other reasonable causes for the so-called 'abnormal behaviour' of the object can be

ex post reliance on the certificate and/or the fact that it would have taken another decision. However, one should bear in mind that lowering the burden of proof with regard to causation in addition to the suggested reversal of the burden of proof in this proposal can lead to a certifier's unlimited liability. Policymakers should, therefore, make sure that other factors such as capping mechanisms are adopted to reduce the risk of unlimited liability.

622. A third party's knowledge and position might constitute a factor reducing the risk of a certifier's unlimited liability as well. If the victim – a third party – is also responsible for the harm causing event, the liability between the involved parties can be shared. This will reduce a certifier's liability to the extent that the victim also contributed to causing the event.[1979] The fraction of the loss each party will have to bear has to be measured based on the relative role the fact for which it is liable played in causing the harm.[1980] The question that arises is thus whether a third party's reliance on the certificate might qualify as a wrongful act leading to (at least) shared liability with the certifier.

A judge will have to determine whether a normally careful and prudent third party would have been aware that the certificate did not correspond with the 'true' and 'actual' value of the certified item, and that it should thus not have been purchased (cf. Article 1382 BCC).[1981] In this regard, the professional function, experiences or qualification of a

excluded (e.g. Court of Cassation, January 29, 1987, 7635, *Arresten van het Hof van Cassatie* 1987, 693 & *Pasicrisie belge* 1987, I, 624; Court of Cassation, September 11, 2008, C.07.0200.F, *Arresten van het Hof van Cassatie* 2008, 1917 & *Pasicrisie belge* 2008, 1916; Court of Cassation, February 9, 1989, 8405, *Arresten van het Hof van Cassatie* 1989, 680 & *Pasicrisie belge* 1989, I, 611; M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 91-92, nos. 146-149). Several mechanisms to remedy the high burden of proof faced by third parties have also been adopted in other civil law countries such as the Netherlands. In addition to the loss of a chance theory, an example is the *omkeringsregel*, which is a presumption of fact as to the existence of the *conditio sine qua non* requirement (I. GIESEN, "The Burden of Proof and other Procedural Devices in Tort Law", in: H. KOZIOL, B.C. STEININGER & C. ALUNARU (eds.), *European tort law 2008*, Vienna, Springer, 2009, 57; A.J. AKKERMANS, *De omkeringsregel bij het bewijs van causaal verband*, The Hague, Boom Juridische Uitgevers, 2002, 181p.; I. GIESEN, "De aantrekkingskracht van Loreley. Over de opkomst en ondergang (?) van de 'omkeringsregel'", in: T. HARTLIEF & S.D. LINDENBERGH (eds.), *Tien pennenstreken over personenschade*, The Hague, Vermande/SDU, 2009, 69-86). See for an overview and discussion of these "bewijsrechtelijke tegemoetkomingen": I. GIESEN & K. MAES, "Omgaan met bewijsnood bij de vaststelling van het causaal verband in geval van verzuimde informatieplichten", (27) *Nederlands Tijdschrift voor Burgerlijk Recht* 2014, 219-232).

[1979] H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedings-stelsels*, Bruges, die Keure, 2014, 76; T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 821-835; Court of Cassation, October 2, 2009, C.08.0168.F, *Arresten van het Hof van Cassatie* 2009, 2190 & *Pasicrisie belge* 2009, 2110. See in general on the role of the victim's wrongful act in Belgium: B. WEYTS, *De fout van het slachtoffer in het buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2003, 565p.

[1980] M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 130-131, nos. 214-216 with further references to case law in footnote 704; H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedings-stelsels*, Bruges, die Keure, 2014, 76-77. See for an overview of case law: B. WEYTS, *De fout van het slachtoffer in het buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2003, 380-389.

[1981] T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 822.

person are relevant to decide whether or not he acted negligently.[1982] A third party's professional capacity and knowledge might thus be a factor to take into account when having to determine the certifier's liability.[1983] By way of analogy, reference can be made to a case in which liability was shared between a garage owner and the client-victim due to the latter's (professional) qualification and background. The client was trained to work in a garage and should, therefore, have been aware of the risks associated with some of the activities taking place in such an environment. The client was standing too close without having taken any safety precautions when the car tire was being inflated. As a consequence, he accepted the risk associated with the explosion of the tire and had to bear one third of the incurred damage.[1984] A similar reasoning can be applied when a

[1982] M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 49, no. 67; B. WEYTS, *De fout van het slachtoffer in het buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2003, 22-26; H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 90-91. See for an overview of case law: H. VANDENBERGHE, M. VAN QUICKENBORNE, L. WYNANT & M. DEBAENE, "Aansprakelijkheid uit onrechtmatige daad. Overzicht van rechtspraak 1994-1999 [Foutvereiste: algemene kenmerken]", (4) *Tijdschrift voor Privaatrecht* 2000, 1606-1610.

[1983] See for a more nuanced view: I. GIESEN, "Aansprakelijkheid van de (letselschade)advocaat voor informatieverzuimen: het bewijs van de zorgplichtschending en de (ontbrekende) eigen schuld van de cliënt", (2) *Tijdschrift voor Vergoeding Personenschade* 2016, 42 ("een gebrek aan eigen inzicht en het nalaten te handelen daarnaar teneinde bepaalde risico's tegen te gaan kunnen de (niet-deskundige) cliënt niet als eigen schuld worden aangerekend, als de gevolgen van dat gebrekkige inzicht juist tegengegaan hadden moeten worden door de deskundige beroepsbeoefenaar"). He argues that an unexperienced client's own fault should not be a reason to apportion liability between him and a professional party with whom he contracts (cf. Article 6:101 Dutch Civil Code). Deciding otherwise would make the professional's role redundant. They have been established to provide services that clients no longer have to perform themselves. The consequences of a party's lack of understanding or insight into the subject matter is remedied by contracting with a professional party. His conclusion especially seems to relate to a non-professional client ("(niet-deskundige) client" or "leek"). The analysis of the situation in Belgium discussed in no. 623 and in common law jurisdictions discussed in nos. 625-626 shows that courts come to similar conclusions: it is the professional capacity of a party that will be of importance to determine whether he committed a wrongful act and whether liability will be shared.

[1984] Court of First Instance Hasselt, November 13, 1995, *Tijdschrift voor verzekeringen* 1997, 317. In her analysis, VANDENDRIESSCHE examines case law dealing with parties that claim recovery for the losses they incurred due to an investment advisor's allegedly negligent financial advice. She discusses several decisions where judges did even not accept causation between the negligent advice and a party's loss due to the latter's professional capacity and knowledge. The requirement to provide information might seize to exist when the recipient of the information – the client – no longer needs it due to his knowledge about the nature of the transaction and the risks it represents. In these circumstances, the causal link no longer exists due to the client's knowledge (Court of Appeal Brussels, March 23, 2006, *Tijdschrift voor Handelsrecht-Revue de Droit Commercial Belge* 2008, 80 with annotation by B. CAULIER ("*Ce devoir d'information cesse là où le créancier d'informa-tion n'en a nul besoin, parce qu'il a connaissance de la teneur de l'opération et des risques qu'elle comporte. Dans ce cas, il y a interruption du lien de causalité par le fait du client*"). See in this regard: E. VANDENDRIESSCHE, "Causaliteit en bewijslast in het Belgische financiële aansprakelijkheidsrecht bij beleggingsdienstverlening", in: D. BUSCH, C. KLAASSEN & T. ARONS (eds.), *Aansprakelijkheid in de financiële sector*, Deventer, Kluwer, 2013, 195-201. It should be noted that such decisions do not correspond with the *conditio sine qua non* test, according to which a victim's own fault does not interrupt the causal link between the defendant's (first) wrongful act and the incurred loss (H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 74-75).

professional party might be aware that the item is defective but still decides to rely on the certificate.

623. One can in this regard also make a comparison with the information duty resting on investment service providers towards their clients to illustrate that a party's capacity or knowledge/experience can be relevant when a judge is confronted with issues on a certifier's liability. A service provider's obligation to provide information applies until his client is actually informed. As a consequence, service providers will have a less extensive information duty towards informed customers than towards uninformed clients.[1985] Within the MiFID II framework, more extensive information must be provided to retail than to professional clients.[1986] A professional client is someone who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks it will incur.[1987] Professional clients might require less protection as they have sufficient experience, knowledge or expertise to make their own decisions and correctly assess the risks connected thereto.[1988] As opposed to uninformed or inexperienced clients, professional clients can be presumed to realise when they do not know something they should know. They can be expected to ask for the information they need.[1989]

Against this background, courts have already taken into account a party's level of education,[1990] his (former) profession or professional experience[1991] and membership of an investors club.[1992] Private investors might thus more easily be considered as experienced or informed based on their education or experience, resulting in less information duties being imposed on service providers.[1993] As a consequence, there is a

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[1985] M. KRUITHOF, "A differentiated approach to client protection: the example of MiFID", in: S. GRUNDMANN & Y.M. ATAMER (eds.), *Financial services, financial crisis and general European contract law: failure and challenges of contracting*, Alphen aan den Rijn, Wolters Kluwer Law & Business, 2011, 156 referring to F. LONGFILS, *La responsabilite des intermediaires financiers*, Waterloo, Kluwer, 2006, 12.

[1986] D. BUSCH, L. MACGREGOR & P. WATTS (eds.), *Agency Law in Commercial Practice*, Oxford, Oxford University Press, 2016, 155.

[1987] Annex II Directive 2014/65 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

[1988] R. VEIL, *European Capital Markets Law*, Oxford, Hart Publishing, 2017, 126.

[1989] M. KRUITHOF, "A differentiated approach to client protection: the example of MiFID", in: S. GRUNDMANN & Y.M. ATAMER (eds.), *Financial services, financial crisis and general European contract law: failure and challenges of contracting*, Alphen aan den Rijn, Wolters Kluwer Law & Business, 2011, 156.

[1990] See for example: Court of Appeal Ghent, April 4, 2005, *Tijdschrift voor Belgisch Burgerlijk Recht-Revue Générale de Droit Civil* 2005, 538, with annotation by G. GATHEM.

[1991] See for example: Court of Appeal Ghent, June 18, 2007, no. 2006/AR/1150 (unpublished); Commercial Court Mons, February 22, 2001, *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 2003, 63 with annotation by J. BUYLE.

[1992] See for example: Court of First Instance Dendermonde, September 14, 1992, *Revue de Droit Commercial Belge-Tijdschrift voor Belgisch Handelsrecht* 1993, 1063.

[1993] M. KRUITHOF, "A differentiated approach to client protection: the example of MiFID", in: S. GRUNDMANN & Y.M. ATAMER (eds.), *Financial services, financial crisis and general European contract law: failure and challenges of contracting*, Alphen aan den Rijn, Wolters Kluwer Law & Business, 2011, 157.

smaller chance that they will be held liable because of providing incorrect or insufficient information.[1994]

1.4.2. The Situation in Other Jurisdictions

624. Belgium is not the only jurisdiction where factors reducing the risk of a certifier's unlimited liability exist. The PIP case illustrated that German courts also use mechanisms to prevent a certifier's unlimited liability. The *Oberlandesgericht* in Zweibrücken concluded that the group of persons covered by protective effects of the certification contract may not be too large. The Court held that the circle of persons who benefit from the protective effects of the agreement should be limited to those parties in whose interest the certifier fulfils the contractual obligations as explicitly or tacitly agreed by the contracting parties.[1995] The group of persons to whom notified bodies might owe a duty of care needs to be capable of being objectively identified. In other words, patients who purchased the implants need to be part of an objectively determinable group.[1996] The certifier must have been able to foresee that its actions could harm and affect both its co-contractor as well as third parties such as the women who bought the implants. The risk of liability must be comprehensible, calculable and enable a certifier to seek appropriate insurance coverage.[1997] Certifiers do not need to know the precise number, the name or the identity of the protected third parties.[1998] Of importance is whether the expert opinion was ordered to submit it to a group of third parties who subsequently use it to take decisions.[1999]

In the PIP case, the contact between the patients and the manufacturer was not sufficient to conclude that the parties bound by the certification agreement intended to include all

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[1994] See for an overview of Belgian case law: V. COLAERT, "Welke bescherming voor welke belegger?", (6) *Financieel forum: bank- en financiewezen* 2007, 398-400

[1995] Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13, *JurionRS* 2014, 10232, Part II, 1. b); A. ZENNER, "Der Vertrag mit Schutzwirkung zu Gunsten Dritter – Ein Institut im Lichte seiner Rechtsgrundlage", (62) *Neue Juristische Wochenschrift* 2009, 1030-1034; W. REHMANN & D. HEIMHALT, "Medical devices: liability of notified bodies?", *TaylorWessing*, May 2015. In Belgium, this question is covered by the doctrine of the *coexistence passive*. The certifier's improper performance of the contract will lead to its liability towards third parties on the ground of Articles 1382-1383 BCC if the certifier's behaviour on which the claim is based also violates a generally applicable standard of care (see for more information the discussion *supra* in nos. 234-236).

[1996] BGH, January 23, 1985, *Neue Juristische Wochenschrift-Rechtsprechungs-Report (Zeitschrift*) 1986, 486; J. JOUSSEN, *Schuldrecht I - Allgemeiner Teil*, Stuttgart, W. Kohlhammer Verlag, 2008, 413.

[1997] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 202-203 with further references in footnote 752; M. LIEBMANN, *Der Vertrag mit Schutzwirkung zugunsten Dritter*, Frankfurt am Main, Peter Lang, Europäische Hochschulschriften/European University Studies/Publications Universitaires Européennes, 2006, 118-119; BGH, April 20, 2004, *Neue Juristische Wochenschrift* 2004, 3035; BGH, June 18, 1968, *Neue Juristische Wochenschrift* 1968, 1931.

[1998] See for example BGH, November 26, 1986, *Neue Juristische Wochenschrift* 1987, 1760; BGH, November 10, 1994, *Neue Juristische Wochenschrift* 1995, 392 as referred to in N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 199 & 202-203, footnote 753.

[1999] N. LAGONI, *The Liability of Classification Societies*, Berlin, Springer, 2007, 199 with references to case law in footnote 741; J. JOUSSEN, *Schuldrecht I - Allgemeiner Teil*, Stuttgart, W. Kohlhammer Verlag, 2008, 413; G. WILDMOSER, K.J. SCHIFFER & B. LANGOTH, "Haftung von Ratingagenturen gegenuber Anlegern?", (10) *Recht der Internationalen Wirtschaft* 2009, 665-666.

women who purchased the implants within its protective scope. The risk of liability for notified bodies arising from the certification agreement would become incalculable if it was accepted that TüV Rheinland had to compensate the losses suffered by all women who bought the implants.[2000] The application of the contract with protective effects towards third parties was also rejected by the OLG Düsseldorf in a case dealing with the liability of credit rating agencies. The Court denied the company's interest in including the investors in the protective scope of the rating agreement. There were no indications that the company intended to establish more protective duties towards potential investors than it had done in the bond terms. The OLG also stressed that the risk of liability was not calculable, nor insurable for the credit rating agency. The CRA was not able to influence or even retrace the dissemination of a corporate rating once it was published. It was not foreseeable for the CRA which parties would use the rating to make decisions in connection with the rated company.[2001]

625. In common law countries, factors reducing the risk of unlimited liability can be found as well. Claims against certifiers have already been dismissed to the extent that third parties did not justifiably or reasonably rely on the certificates. In *Carbotrade*, the plaintiff failed to establish that he actually relied on Bureau Veritas's classification of the vessel. The plaintiff's claim of reliance on the certificate was undercut by the fact that he began loading cargo several days before the classification society had completed the survey and extended the vessel's certification.[2002] In *Cargill*, plaintiffs were also not able to establish that they relied on Bureau Veritas' certificate. There was no evidence that they even had consulted Bureau Veritas' Register classifying the vessel. Moreover, the plaintiffs hired their own independent surveyor to examine the vessel one week after Bureau Veritas last surveyed it. No inference could, therefore, be reasonably drawn that the plaintiffs relied on the society's certificate.[2003]

626. Even when reliance on a certificate might be established,[2004] other factors can prevent a certifier's unlimited liability. The *Marc Rich* case, for instance, highlighted the

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[2000] Court of Appeal Zweibrücken, January 30, 2014, 4 U 66/13, *JurionRS* 2014, 10232, Part II, 2. b) bb); W. REHMANN & D. HEIMHALT, "Medical devices: liability of notified bodies?", TaylorWessing, May 2015.

[2001] Court of Appeal Düsseldorf, February 8, 2018, I-6 U 50/17, *Neuen Juristischen Wochenschrift* 2018, 1615, paragraphs 26-35 as reported by: H.C. SALGER & A. BARASIŃSKI, "Credit Rating Agencies Not Liable to Investors for Corporate Ratings", Schalast News, February 13, 2018.

[2002] *Carbotrade SpA v. Bureau Veritas*, 901 F. Supp. 737, 748-749 (S.D.N.Y. 1995).

[2003] *Cargill v. Bureau Veritas*, 902 F. Supp. 49, 53 (S.D.N.Y 1995).

[2004] See for example: *Otto Candies LLC v. Nippon Kaija Kyokai Corp*., 346 F.3d, 538 (5th Cir. 2003). The availability of information will often be of importance to determine whether reliance was justifiable or reasonable. The court in the *Abu Dhabi* case, for instance, concluded that the plaintiffs reasonably relied on the ratings because the market at large, including sophisticated investors, rely on ratings issued by independent CRAs given "their NRSRO status and access to non-public information that even sophisticated investors cannot obtain" (*Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc*., 651. F. Supp. 2d 155, 180-181 (S.D.N.Y. 2009)). The *CalPERS* court also held that investors in the structured finance market cannot reasonably develop their own informed opinions due to the lack of public information to do so. Reliance on ratings is thus justified if (sophisticated) investors are unable to conduct an own analysis or develop their independent views about potential investments (*California Public Employees' Retirement System v. Moody's Corp.*, no. A134912, 28-30 (Cal. Ct. App. 2014); *King County, Washington et al v. IKB*

importance of policy considerations. Elements of fairness such as the floodgate argument or its public role were used to deny the existence of a classification society's duty of care.[2005] The professional capacity of third parties might also be taken into account to determine the scope of a certifier's liability. The judge in the *Bathurst* case held that S&P owed a duty of reasonable care and skill towards "vulnerable" and "unsophisticated" investors with whom the CRA does not have a contract. Investors are vulnerable if they are unable to assess the creditworthiness of financial products or to "second-guess" the rating.[2006]

1.5. Link With Existing Practices

627. A shift of the burden of proof as the one in the proposal can be found in other sectors as well. In other words, it has a link with existing practices both in national as well as EU law.[2007]

Deutsche Industriebank AG et al, no. 09-08387, 49 (S.D.N.Y. 2012); *Anschutz Corp. v. Merrill Lynch & Co. Inc*., 785 F. Supp. 2d 799, 827 (N.D. Cal. 2011)).

[2005] See for more information the discussion *supra* in nos. 240-252.

[2006] *Bathurst Regional Council v. Local Government Financial Services Pty Ltd (No 5)*, [2012] FCA 120, paragraphs 2767-2778; *ABN AMRO Bank NV v. Bathurst Regional Council*, [2014] FCAFC 65, paragraphs 580, 599, 890-891, 1211 & 1263-1269.

[2007] One could also work with rebuttable presumptions in the context of professional service providers. Rebuttable presumptions can be used with regard to a wrongful act but also for the required causation. In this regard, Article 61 of the Belgian Prospectus Law stipulates that any loss incurred by an investor is presumed to be a result of misleading, erroneous or incomplete information. This presumption is rebuttable and relates to information likely to have a material impact on the market (Loi relative aux offres publiques d'instruments de placement et aux admissions d'instruments de placement à la négociation sur des marchés réglementés, June 16, 2006, no. 2006009492, published in the *Moniteur belge* on June 21, 2006). Rebuttable presumptions have also been introduced with regard to the liability of teachers for the loss caused by their pupils. According to Article 1384, paragraph 4, BCC, teachers are liable for the loss caused by their pupils during the time that they are under their supervision. This liability is based on a rebuttable presumption of a teacher's fault during supervision (H. BOCKEN & I. BOONE with cooperation of M. KRUITHOF, *Inleiding tot het schadevergoedingsrecht: buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels*, Bruges, die Keure, 2014, 125; M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 88-89, nos. 143-145; Court of Appeal Brussels, June 26, 2006, *Revue générale des assurances et des responsabilités* 2007, no. 14314). Therefore, teachers will not be held liable when proving that they did not commit any fault – by showing that they applied sufficient supervision – or that their (presumed) wrongful act did not cause the actual harm creating event (Court of Cassation, October 10, 2003, C.02.0628.F, *Arresten van het Hof van Cassatie* 2003, 1845 & *Pasicrisie belge* 2003, 1583; M. KRUITHOF, *Tort Law in Belgium*, Alphen aan den Rijn, Kluwer Law International, 2018, 89, no. 145; M. VAN QUICKENBORNE & H. VANDENBERGHE, "Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad. 2000-2008 [Aansprakelijkheid van leraars, onderwijsinstellingen en ambachtslieden]", (2) *Tijdschrift voor Privaatrecht* 2011, 570 with further references to case law; L. CORNELIS, "L'instituteur piégé par les conjugaisons horizontales et verticales?", *Revue Critique de Jurisprudence Belge* 1997, 42; P. DE TAVERNIER, *De buitencontractuele aansprakelijkheid voor schade veroorzaakt door minderjarigen*, Antwerp, Intersentia, 2006, 670p.). Article 30*ter* of the Law of 2 August 2002 on the supervision of the financial sector and on financial services also contains a rebuttable presumption. In the event that a person referred to in the second paragraph of the first section of the Article commits a breach during a financial transaction defined in the second section of the article of one or more of the provisions listed in the third section, and the user of the financial products or services concerned suffers damage as a result, the transaction in question shall be deemed to have resulted from the breach, unless proven otherwise (Loi du 2 août 2002 relative à la surveillance du secteur financier et aux services financiers, no. 2002003392, published in *Moniteur belge* September 4, 2002). Thus, the presumption entails that the investor would not have made the same decision without the breach (C. HODGES & S. VOET, *Delivering Collective Redress:*

628. National law can impose a shift of the burden of proof for certain professional service providers. In Belgium, for instance, Article VII.2, § 4 of the Belgian Code of Economic Law stipulates that the supplier of credit has to prove that he complied with his obligations regarding the evaluation of a client's creditworthiness.[2008] There is also case law by the Belgian Court of Cassation dealing with the obligation to provide information (e.g. by doctors or attorneys) accepting a reversal of the burden of proof. It is the provider of the information who has to prove that he informed his client and not the client who needs to establish that he has not been given the required information.[2009]

629. In addition to provisions in national law, there are some examples at the EU level as well. These examples are more relevant and important as they have a wider reach than mere national provisions. An example can be found in Article 9 of the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content. If the digital content is defective, the consumer will not have to prove that the defect existed at the time of supply. Due to the technical nature of digital content, it can be difficult for consumers to prove the cause of the problem. Therefore, the supplier who has more expertise has to prove the conformity with the contract.[2010] Article 5 of Regulation 261/2004 on passenger rights stipulates that the burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of his flight rests with the operating air carrier.[2011] According to the former Directive 1999/93 dealing

New Technologies, Oxford, Bloomsbury Publishing, 2018, 159). One could also introduce such as reversal of the burden of proof regarding transaction causation for non-gatekeeping certifiers. Yet, other factors reducing the risk of unlimited liability need to be provided in such a case.

[2008] Loi du 28 février 2013 introduisant le Code de droit économique, no. 2013A11134, published in the *Moniteur belge* on March 29, 2013.

[2009] See for example: Court of Cassation, January 14, 2005, C.03.0622.N, *Arresten van het Hof van Cassatie* 2005, 95 & *Pasicrisie belge* 2005, 95; Court of Cassation, June 25, 2015, C.14.0382.F, *Arresten van het Hof van Cassatie* 2015, 1763 & *Pasicrisie belge* 2015, 1753 & *Tijdschrift voor Gezondheidsrecht-Revue de Droit de la Santé* 2015-2016, 368 with annotation by C. LEMMENS; Court of Appeal Antwerp, November 21, 2016 & December 12, 2016 *Tijdschrift voor Gezondheidsrecht-Revue de Droit de la Santé* 2017-2018, 32 with annotation by C. LEMMENS & *Nieuw Juridisch Weekblad* 2017, 542 with annotation by L. BODDEZ & S. CALLENS. Even when such a reversal of the burden of proof is not accepted by all scholars (e.g. A. DE BOECK, *Informatierechten en -plichten bij de totstandkoming en uitvoering van overeenkomsten: grondslagen, draagwijdte en sancties*, Antwerp, Intersentia, 2000, 467; S. LIERMAN, "Het pleit beslecht: de patiënt draagt de bewijslast van de informatiemiskenning door de arts", (4) *Tijdschrift voor Gezondheidsrecht-Revue de Droit de la Santé* 2004-2005, 305) nor included in Article 8.3. of Book 8 «La preuve» (*Avant-projet de loi portant insertion du Livre 8 «La preuve» dans le nouveau Code civil* approuvé, le 27 avril 2018, par le Conseil des ministres, tel que préparé par la Commission de réforme du droit de la preuve instituée par l'arrêté ministériel du 30 septembre 2017 et adapté, eu égard aux observations reçues depuis le début de la consultation publique lancée le 7 décembre 2017), it has a link with existing case law.

[2010] Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM/2015/0634 final - 2015/0287 (COD).

[2011] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, *OJ* L 46. See in this regard also: R. VAN DER BRUGGEN, "Compliance with the Air Passenger Rights Regulation: past, present and future", (5) *European Transport Law/Europees Vervoerrecht* 2017, 473; R. VAN DER BRUGGEN, "European air passenger rights: delay and cancellation", (2015) *Revue Europeenne de Droit de la Consommation/European Journal of Consumer Law* 2016, 107.

with electronic signatures, a certification-service-provider[2012] was liable "for damage caused to any entity or legal or natural person who reasonably relies on that certificate […] unless the certification-service-provider proves that he has not acted negligently".[2013]

2. Involving a 'Peer Certifier' in the Certification Process

630. In addition to the reversal of the burden of proof, another idea could be to involve more than one certifier in the certification process. After an overview of some possibilities in this regard and especially of their shortcomings (part 2.1.), it will be shown that the idea of working with a 'peer certifier' has a triggering mechanism (part 2.2.). The costs associated with this proposal remain restricted as well (part 2.3.). Moreover, factors to prevent unlimited liability are guaranteed when involving a peer certifier in the certification process (part 2.4.). The idea of working with a peer review mechanism also has a link with existing practices (part 2.5.).

2.1. General Considerations on Using Different Certifiers

631. There are several mechanisms that rely on the services of more than one certifier to ensure that they issue accurate and reliable certificates. An example is the periodical rotation of certifiers. The requesting entity will have to change from certifier after a certain time. This approach has a link with existing practices, for instance in the context of auditors and CRAs.

632. Regulation 537/2014 on the requirements regarding statutory audits of public-interest entities includes a rotation mechanism for auditors. The Regulation is based on the premise that a maximum duration of the auditor's engagement strengthens his independence and hence the quality of audit opinions.[2014] The periodical rotation of auditors can increase the risk of auditor liability as a new auditor would bring "a *fresh*

[2012] A certification-service-provider is an entity or a legal or natural person who issues certificates or provides other services related to electronic signatures (Article 2.11. Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, *OJ* L 13).

[2013] Article 6 Directive 1999/93 on a Community framework for electronic signatures. The Directive has been repealed by: Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market, *OJ* L 257.

[2014] A public-interest entity (PIE) needs to appoint a statutory auditor or an audit firm for an initial engagement of at least one year. The engagement may be renewed. Neither the initial engagement of a particular statutory auditor or audit firm, nor this in combination with any renewed engagements therewith may exceed a maximum duration of ten years. Member States can, however, establish shorter rotation periods as well as extend the audit engagement (e.g. by an additional fourteen years in the case of a joint audit when more than one statutory auditor or audit firm is simultaneously engaged). Moreover, the key audit partners responsible for carrying out a statutory audit need to cease their participation in the statutory audit of the audited entity not later than seven years from the date of their appointment. They are not allowed to participate again in the audit of the audited entity before three years have elapsed following that cessation (Recital (21) & Article 17 Regulation No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC, *OJ* L 158. Also see: European Commission, "Reform of the EU Statutory Audit Market", Brussels, June 17, 2016, available at <europa.eu/rapid/press-release_MEMO-16-2244_en.htm>).

look to the auditing task".[2015] There is thus a possibility that the newly appointed auditor might detect misstatements the replaced auditor did not discover.[2016] This enhances the chance of lawsuits against the first auditor and increases his risk of incurring liability. The underlying idea is that the new auditor will be more objective, which might result in more accurate and reliable audits.[2017] There would also be more competition between auditors with a rotation mechanism. Consequently, they might want to differentiate themselves in terms of service by putting more efforts into the quality of audit opinions.[2018]

633. A rotation mechanism has also been adopted in the context of CRAs. Regulation 462/2013 on CRAs introduces a mandatory rotation rule. With some exceptions (e.g. for small CRAs), the issuers of structured finance products with underlying re-securitised assets have to switch to a different CRA every four years. An outgoing CRA is not allowed to rate re-securitised products of the same issuer for a period equal to the duration of the expired contract, though not exceeding four years.[2019] Recital (12) of the same Regulation stipulates that establishing a maximum duration of the contractual relationship between the issuer and the CRA will remove the incentive for issuing favourable ratings. The idea is that multiple and different views, perspectives and methodologies applied by CRAs should produce more diverse ratings, and ultimately improve the assessment of the creditworthiness of re-securitisations.[2020]

634. It is, however, unsure whether a periodical rotation of auditors, CRAs or other certifiers is compatible with the remaining evaluation criteria. Empirical studies, for instance, show that the voluntary or mandatory rotation of auditors does not increase the quality of audit opinions.[2021] Auditors might also not be able to assess the true financial

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[2015] T. LU & K. SIVARAMAKRISHNAN, "Mandatory audit firm rotation: Fresh look versus poor knowledge", (28) *Journal of Accounting and Public Policy* 2009, 72.

[2016] J. TRITSCHLER, *Audit Quality: Association between published reporting errors and audit firm characteristics*, Wiesbaden, Springer Science & Business Media, 2013, 50.

[2017] A.B. JACKSON, M. MOLDRICH & P. ROEBUCK, "Mandatory audit firm rotation and audit quality", (23) *Managerial Auditing Journal* 2008, 422 with further references to studies.

[2018] A.B. JACKSON, M. MOLDRICH & P. ROEBUCK, "Mandatory audit firm rotation and audit quality", (23) *Managerial Auditing Journal* 2008, 421 with further references to studies; D.R. DEIS & G.A. GIROUX, "Determinants of Audit Quality in the Public Sector", (67) *The Accounting Review* 1992, 470. See in general: J. HOYLE, "Mandatory Auditor Rotation: The Arguments and an Alternative", (145) *The Journal of Accountancy* 1978, 69; J.O. ODIA, "Auditor Tenure, Auditor Rotation and Audit Quality: A Review", (3) *European Journal of Accounting, Auditing and Finance Research* 2015, 82; P.A. COLPLEY & M.S. DOUCET, "Auditor Tenure, Fixed Fee Contracts, and the Supply of Substandard Single Audits", (13) *Public Budgeting & Finance* 1993, 23; R.K. MAUTZ & H.A. SHARAF, *The Philosophy of Auditing*, Sarasota, American Accounting Association, 1961, 248p.; A. EBIMOBOWEI & O.J. KERETU, "Mandatory rotation of auditors on audit quality, costs and independence in South-South, Nigeria", (5) *International Business Management* 2011, 166.

[2019] Article 6b Regulation 1060/2009 on CRAs as inserted by Article 1(8) Regulation 462/2013.

[2020] Recital (15) Regulation 462/2013 amending Regulation 1060/2009 on credit rating agencies.

[2021] See for example: R. ELITZUR & H. FALK, "Planned audit quality", (15) *Journal of Accounting and Public Policy* 1996, 247; J.N. MYERS, L.A. MYERS & T.C. OMER, "Exploring the Term of the Auditor-Client Relationship and the Quality of Earnings: A Case for Mandatory Auditor Rotation?", (78) *The Accounting Review* 2003, 779; D.R. DEIS & D. GIROUX, "The Effect of Auditor Changes on Audit Fees, Audit Hours, and Audit Quality", (15) *Journal of Accounting and Public Policy* 1996, 55. EWELT-KNAUER,

situation of a company because their understanding of a client's business, operations and systems would be limited to only a few years.[2022] This lack of insight and knowledge may result in less accurate and reliable audit opinions.

The benefits of rotation, if any at all, could also be outweighed by the costs of switching to another certifier.[2023] In this regard, Recital (13) of Regulation 462/2013 on CRAs stresses that the rotation mechanism has to be designed in such a way that the benefits of the mechanism outweigh its possible negative consequences. The rotation could result in increased costs for issuers and CRAs because the cost associated with rating a new entity or financial instrument can be higher than the cost of monitoring a rating that has already been issued. Switching costs might also arise with the auditor's periodical rotation. The duplication of start-up costs including the time that auditors will spend gaining familiarity with the requesting entity increases the former's costs. Requesting entities may also incur costs when auditor rotation is compulsory. The management of a company will face the disruptive, time-consuming and expensive process of selecting new auditors and familiarising them with the working of the company.[2024]

635. One could also develop a scheme under which two certifiers need to issue a certificate for a particular item before it can be marketed. The involvement of a second certifier means that two additional eyes are looking at the same item that needs to be certified. If the certificates for a particular item do not correspond, there might be an indication that one of the certifiers did not comply with its obligations during the certification process.[2025] This creates a higher risk of liability for a certifier and hence

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GOLD & POTT conclude that "[i]n summary, the findings of archival studies are mixed, but overall, there is limited evidence to suggest beneficial effects of mandatory rotation" (C. EWELT-KNAUER, A. GOLD & C. POTT, "Mandatory Audit Firm Rotation: A Review of Stakeholder Perspectives and Prior Research", (10) *Accounting in Europe* 2013, 33). See for an overview of the empirical studies: M. CAMERAN, G. NEGRI & A.K. PETTINICCHIO, "The Audit Mandatory Rotation Rule: The State of the Art", (2) *Journal of Financial Perspectives* 2015, 14-20 concluding that empirical results on the relationship between audit quality and voluntary or mandatory rotation are mixed.

[2022] A.H. CATANACH JR. & P.L. WALKER, "The International Debate Over Mandatory Auditor Rotation: A Conceptual Research Framework", (8) *The Journal of International Accounting, Auditing and Taxation* 1999, 45 with further references to studies.

[2023] M. CAMERAN, G. NEGRI & A.K. PETTINICCHIO, "The Audit Mandatory Rotation Rule: The State of the Art", (2) *Journal of Financial Perspectives* 2015, 24 concluding that there is no proof that the benefits of mandatory audit rotation would outweigh the costs; A. GHOSH & D. MOON, "Auditor Tenure and Perceptions of Audit Quality", (80) *The Accounting Review* 2005, 585 concluding that mandatory limits on the duration of the auditor-client relationship might impose unintended costs on capital market participants; A.B. JACKSON, M. MOLDRICH & P. ROEBUCK, "Mandatory audit firm rotation and audit quality", (23) *Managerial Auditing Journal* 2008, 420 holding that, given the additional costs associated with switching auditors, there are minimal, if any, benefits of mandatory audit firm rotation.

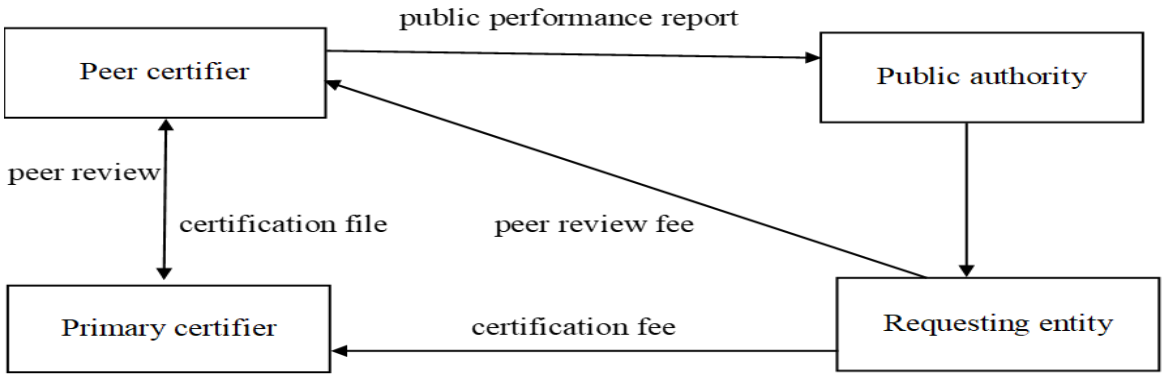
[2024] A.H. CATANACH JR. & P.L. WALKER, "The International Debate Over Mandatory Auditor Rotation: A Conceptual Research Framework", (8) *The Journal of International Accounting, Auditing and Taxation* 1999, 45 with further references to studies.

[2025] This can to a certain extent be linked to the 'four-eye principle', which implies that two parties have to approve an action before it can be taken (Organisation for Economic Co-operation and Development, *OECD Public Governance Reviews Integrity Framework for Public Investment*, OECD Publishing, 2016, 79).

could increase the probability that it will issue certificates that are more reliable and accurate.[2026]

The idea of involving a second certifier is not entirely imaginary as it has a link with existing practices.[2027] In the context of CRAs, for instance, an issuer who intends to solicit a rating for a structured finance instrument has to appoint at least two CRAs to provide ratings independently from each other.[2028] However, requiring a second certifier to continuously provide a certificate for each item is not realistic, taking into account the potential time and costs that two certifiers will have to put in the process of certifying the same item.

636. Against this background, another more realistic approach should be taken. My proposal is to involve a second 'peer certifier' in the certification process. Whereas the primary certifier remains responsible for issuing the certificate during the certification process, the peer certifier has to perform a review and submit a performance report to the public authority.[2029] This public authority could use this report for its existing supervisory and monitoring duties.[2030] The proposal might encounter some problems or need some refinements but it is worth considering and applying. The figure below illustrates the proposal, which will be used as a starting point for the analysis in the following paragraphs:



[2026] Several studies have acknowledged the relationship between the four-eye principle and the quality and safety of an item or service (e.g. T. SCHWECKENDIEK, A.F. VAN TOL & D. PEREBOOM, *Geotechnical Safety and Risk*, Amsterdam, IOS Press, 2015, 46-77; R. KATZENBACH, S. LEPPLA & D. CHOUDHURY, *Foundation Systems for High-Rise Structures*, London, CRC Press, 2016, 115).

[2027] See in this regard also: T.M.J. MÖLLERS & C. NIEDORF, "Regulation and Liability of Credit Rating Agencies – A More Efficient European Law?", (3) *European Company and Financial Law Review* 2014, 342-343 calling for a second mandatory European rating as this could strengthen the creation of European agencies and lead to more independence from the three US-based CRAs.

[2028] Article 8c Regulation 1060/2009 as inserted by Article 1 (11) Regulation 462/2013 on credit rating agencies.

[2029] There are also other proposals that impose a reporting duty upon gatekeepers. In the proposal of University of California Law School professor GADINIS and attorney at law MANGELS, gatekeepers have to report their suspicions of a client's wrongdoing to regulators (S. GADINIS & C. MANGELS, "Collaborative Gatekeepers", (73) *Washington and Lee Law Review* 2016, 797).

[2030] See for more information the discussion *supra* in nos. 112-135.

2.2. The Risk of Liability and Providing Incentives for Certifiers

637. To understand this proposal relying on the services provided by a peer certifier, one needs to have a background on the traditional peer review process (part 2.2.1.). Once this has been provided, the application of open peer review is examined more thoroughly (part 2.2.2.).

2.2.1. Understanding the Peer Review Process

638. Peer review is the examination and evaluation of a professional's performance by another expert working in the same sector.[2031] It is the process of subjecting someone's work to the scrutiny of 'peers'.[2032] Peer review has a long tradition in academia, where it is considered to be a core mechanism for quality control.[2033] In its current systematised and institutionalised form, peer review has especially been developed since the Second World War. It is a standard practice used by most credible scientific journals and intends to serve two main purposes. On the one hand, peer review is a filter to ensure that only high quality research is published by determining the validity, significance and originality of the submitted work. On the other hand, it aims to improve the quality of manuscripts deemed suitable for publication. Peer reviewers provide suggestions to authors on how to increase the quality of their manuscripts and identify any errors that need to be corrected before publication.[2034]

639. Arguably, a peer review mechanism can also be used in the context of certifiers. The primary certifier will have to submit a 'certification file' to a peer certifier on a regular basis (e.g. every year). This certification file needs to include information on the way the certification process is conducted or on the reasons why specific certificates have been given. It could provide information on the *modus operandi* of the primary certifier and include supporting documents. The file could also contain issues the primary certifier will pay attention to in the future as well as an overview of the challenges it resolved during the covered period.

640. I am aware that certifiers might not always be willing to submit all these details on the certification process due to commercial and/or confidentiality concerns. Yet, certifiers already have to make several elements public. Submitting a certification file to a peer certifier might, therefore, be a viable option for the primary certifier.[2035]

[2031] See the definition of 'peer review' in the online Cambridge English Dictionary as well in the Legal Dictionary.

[2032] J. RECKER, *Scientific Research in Information Systems: A Beginner's Guide*, Heidelberg, Springer Science & Business Media, 2012, 116-117.

[2033] J.M. WICHERTS & G.E. DERRICK, "Peer Review Quality and Transparency of the Peer-Review Process in Open Access and Subscription Journals", (11) *PLoS One* 2016, 2.

[2034] J. KELLY, T. SADEGHIEH & K. ADELI, "Peer Review in Scientific Publications: Benefits, Critiques, & A Survival Guide", (25) *The electronic Journal of the International Federation of Clinical Chemistry and Laboratory Medicine* 2014, 228-229.

[2035] In this regard, some scholars even developed (software) programs to make credit rating data publicly available in an easily accessible or comprehensive way (M.D. JOFFE & F. PARTNOY, "Making Credit

For instance, a CRA has to disclose to the public the methodologies, models and key rating assumptions it uses in its activities.[2036] It also has to disclose its policies and procedures with regard to unsolicited ratings.[2037] In addition, the CRA has to annually publish a transparency report. This report needs to include specific information listed in Annex I of Regulation 1060/2009 on CRAs (e.g. a description of internal control mechanisms and an agency's record-keeping policy).[2038] Things are similar for ROs operating in the maritime sector. Since transparency and the exchange of information between interested parties, as well as the public right of access to information are fundamental tools for preventing accidents at sea, ROs should provide all relevant statutory information concerning the conditions of the ships in their class to port State control authorities and "make it available to the general public".[2039]

641. The requesting entity will under the proposed scheme be free to choose the certifier that needs to do the peer review. The peer certifier will have to conduct an analysis of the documents included in the certification file and draft a 'performance report' on the primary certifier's working. This performance report should subsequently be submitted to the responsible public authority. The latter can make it public and use it for its own supervision obligations.[2040] The submission of this report enhances the likelihood that a primary certifier's underperformance during the certification process will be detected, and increases the risk of liability accordingly.

The public authority can to a certain extent be compared to the editor, as it takes decisions regarding the registration of a certifier or the withdrawal and suspension of its certificates. Such authorities could rely on the performance reports to inform and motivate the choices they make on the working of certifiers.[2041] The proposal thereby overcomes some of the concerns related to the creation of a governmental certifier or a public body supervising a certifier.[2042] As opposed to a governmental agency, for instance, a peer certifier might have more expertise and experience to assess the primary certifier's performance during the certification process. A certifier is more acquainted with the *do's* and the *don'ts* and potential other pitfalls of the certification process. Therefore, the peer certifier might be in a better position to examine the primary certifier's performances.

642. The primary certifier knows that it will have to submit a certification file for review to a peer certifier. This might raise the quality of the certification process and make the

Ratings Data Publicly Available", San Diego Legal Studies Paper No. 18-320, January 18, 2018, available at <https://ssrn.com/abstract=3103974>).

[2036] Article 8.1. Regulation 1060/2009 on credit rating agencies.

[2037] Article 10.4. Regulation 1060/2009 on credit rating agencies.

[2038] Article 12 Regulation 1060/2009 on credit rating agencies.

[2039] Recital (19) Regulation 391/2009 on common rules and standards for ship inspection and survey organisations.

[2040] See for more information the discussion *supra* in nos. 112-135.

[2041] P. AZAM ALI & R. WATSON, "Peer review and the publication process", (3) *Nursing Open* 2016, 194-195.

[2042] See for more information the discussion *supra* in nos. 379-382.

primary certifier self-monitor its performances.[2043] Comments provided by the peer certifier in the performance report might also guide and assist the public authority to identify those primary certifiers that might not comply with the obligations during the certification process. Public authorities could more easily and efficiently target underperforming certifiers. The introduction of a peer certifier and subsequent submission of the performance report might thus create an additional safeguard that the primary certifier will comply with its obligations. This can raise the probability that a primary certifier will issue more reliable and accurate certificates. In sum, peer certifiers act as advocates or referees for requesting entities and enable public authorities to make decisions on primary certifiers.[2044]

643. Of course, the traditional peer review process is not entirely flawless. It can be slow, time consuming, unable to detect plagiarism or lack competent reviewers.[2045] In addition, there is little evidence[2046] showing that peer review is "an effective screen for good quality scientific work".[2047] Its effect on the quality of scholarship is thus contested.[2048] At the same time, however, some studies also stress the benefits of peer review. In a survey conducted by WARE, the large majority of authors concluded that peer review had improved their own last published paper. Around ninety percent of the respondents agreed with the general statement that peer review improved the quality of published papers.[2049] The very fact authors know that their work will be scrutinised raises the standard of a publication before it is even sent to a journal. Peer review is a way in which someone's

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[2043] F. GANNON, "The essential role of peer review", (2) *EMBO Reports* 2001, 743.

[2044] K.D. MAYDEN, "Peer Review: Publication's Gold Standard", (3) *Journal of the Advanced Practitioner in Oncology* 2012, 121.

[2045] See for an overview of the different problems: T. ROSS-HELLAUER, "What is open peer review? A systematic review", (6) *F1000Research* 2017, 4-5; J. KELLY, T. SADEGHIEH & K. ADELI, "Peer Review in Scientific Publications: Benefits, Critiques, & A Survival Guide", (25) *The electronic Journal of the International Federation of Clinical Chemistry and Laboratory Medicine* 2014, 238-240; R. WALKER & P. ROCHA DA SILVA, "Emerging trends in peer review—a survey", (9) *Frontiers in Neuroscience* 2015, 3-4. See for an analysis of the challenges associated with the peer review of empirical studies by journals: W. VAN BOOM & I. GIESEN, "Tien jaar civilologie: hoe ver staan de luiken open?", in: J. BAECK (ed.), *Privaatrecht in actie*, Bruges, die Keure, 2018, 42-43.

[2046] T. JEFFERSON, P. ALDERSON, E. WAGER & F. DAVIDOFF, "Effects of Editorial Peer Review: A Systematic Review", (287) *Journal of the American Medical Association* 2002, 2784-2786.

[2047] J. KELLY, T. SADEGHIEH & K. ADELI, "Peer Review in Scientific Publications: Benefits, Critiques, & A Survival Guide", (25) *The electronic Journal of the International Federation of Clinical Chemistry and Laboratory Medicine* 2014, 238.

[2048] See for example: R. SMITH, "Peer review: a flawed process at the heart of science and journals", (99) *Journal of the Royal Society of Medicine* 2006, 178 with further references; T.O. JEFFERSON, P. ALDERSON, F. DAVIDOFF & E. WAGER, "Editorial peer-review for improving the quality of reports of biomedical studies", July 23, 2001, Cochrane Methodology Review Group (concluding that the practice of peer-review is based on faith in its effects, rather than on facts); E. WHITE, "The Peer Review Process: Benefit or Detriment to Quality Scholarly Journal Publication", (13) *Totem: The University of Western Ontario Journal of Anthropology* 2005, 55-56; P. AZAM ALI & R. WATSON, "Peer review and the publication process", (3) *Nursing Open* 2016, 200 with further references; T. ROSS-HELLAUER, "What is open peer review? A systematic review", (2) *F1000Res.* 2017, 4.

[2049] M. WARE, *Peer Review: Benefits, Perceptions and Alternatives*, London, Publishing Research Consortium, 2008, 12.

work is self-monitored.[2050] For instance, a study illustrates that peer review in local or regional group or teams of care providers is a valuable and effective method for quality improvement.[2051]

2.2.2. The Peer Certifier in a System of Open Peer Review

644. Even when the peer review process has flaws and its application might raise questions in the context of certifiers, the fundamental idea remains sound, namely letting peers evaluate each other's work to safeguard and increase its quality. A more suitable method to examine scholarship has not yet been proposed or developed.[2052] While the process is not perfect, "traditional peer review remains the gold standard for evaluating and selecting quality scientific publications".[2053] It is a process that is unlikely to be eliminated from the publication process.[2054] Potential issues relate more to its execution.[2055] As a consequence, systems of open peer review (OPR) have been suggested to counter some challenges associated with the traditional (blind) peer review process.[2056]

645. Although finding an appropriate definition of open peer review is not straightforward,[2057] a number of elements associated with OPR that clearly have advantages are included in my proposal as well. This makes its implementation even more relevant and worth a try at least. These elements relate to knowing each other's identity ('open identities'), publishing the review reports ('open reports') and establishing an interactive setting between the concerned parties ('open interaction').

646. The concept of 'open identities' implies that authors and peer reviewers are aware of each other's identity.[2058] This counters the criticism that it is unjust that authors are judged by anonymous reviewers in the traditional blind peer review process.[2059] There is

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[2050] F. GANNON, "The essential role of peer review", (2) *EMBO Reports* 2001, 743.

[2051] R. GROL, "Quality improvement by peer review in primary care: a practical guide", (3) *Quality in Health Care* 1994, 152.

[2052] J. KELLY, T. SADEGHIEH & K. ADELI, "Peer Review in Scientific Publications: Benefits, Critiques, & A Survival Guide", (25) *The electronic Journal of the International Federation of Clinical Chemistry and Laboratory Medicine* 2014, 242.

[2053] K.D. MAYDEN, "Peer Review: Publication's Gold Standard", (3) *Journal of the Advanced Practitioner in Oncology* 2012, 121.

[2054] P. AZAM ALI & R. WATSON, "Peer review and the publication process", (3) *Nursing Open* 2016, 201.

[2055] D.R. SHANAHAN & B.R. OLSEN, "Opening peer-review: the democracy of science", (13) *Journal of Negative Results in BioMedicine* 2014, 1.

[2056] T. ROSS-HELLAUER, "What is open peer review? A systematic review", (2) *F1000Res.* 2017, 1-37; E. FORD, "Open peer review at four STEM journals: an observational overview", (2) *F1000Res.* 2015, 1-15.

[2057] ROSS-HELLAUER concludes there are twenty-two definitions of OPR (T. ROSS-HELLAUER, "What is open peer review? A systematic review", (2) *F1000Res.* 2017, 9). FORD identifies common definitions of open peer review and describes eight common characteristics of such a review (E. FORD, "Defining and Characterizing Open Peer Review: A Review of the Literature", Portland State University, PDXScholar, Library Faculty Publications and Presentations. Paper 1, January 7, 2013).

[2058] T. ROSS-HELLAUER, "What is open peer review? A systematic review", (2) *F1000Res.* 2017, 9.

[2059] S. VAN ROOYEN, F. GODLEE, S. EVANS, N. BLACK & R. SMITH, "Effect of open peer review on quality of reviews and on reviewers' recommendations: a randomised trial", (318) *British Medical Journal* 1999, 23.

evidence suggesting that open peer review leads to better reports.[2060] As such, the quality of review reports would be higher in an open peer review model than under an anonymous system.[2061] Reviewers will be more motivated and invest additional care in reviewing if their names are attached to the reports.[2062]

647. In the proposed scheme, the peer and primary certifier know each other's identity. The primary certifier will have to submit a certification file to the peer certifier for a periodical evaluation. Based on the logic of OPR, the peer certifier might perform the review with more care as its name is associated to the performance report that will be submitted to the public authority. A concern is that the primary and peer reviewer might not be that critical towards each other. The primary certifier could take 'revenge' in a subsequent peer review process if the performance report would be too negative. A positive performance report would thus be to the benefit of both the peer and primary certifier. They can help each other by providing positive performance reports. Smaller certifiers might also be less inclined to critically review a major player's certification file.[2063] Yet, these concerns are not always convincing.

As opposed to regular reviewers, the peer certifier is compensated for reviewing the certification file. It might have necessary incentives to properly perform the peer assessment.[2064] There is a kind of external element/trigger to the relationship between the peer and primary certifier – namely the peer review fee – that can have a positive influence on the former's behavior. Moreover, public authorities receive a performance report drafted by the peer certifier. As public authorities will examine these reports and compare them with each other, peer certifiers might be induced to properly perform the analysis. The public authority might also consider to accredit or appoint certifiers that will be able to act as peers based on the quality of previous performance reports. Less important practical reasons exist as well. Peer review is (still) relied upon in many sectors. The widespread use of this process actually shows its value, which can be a reason to implement it in the context of certifiers as well.

648. Review reports could be 'openly published' together with the article. This is not the normal procedure under a regular peer review process. Review reports, however, contain

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[2060] See for example: S. VAN ROOYEN, F. GODLEE, S. EVANS, N. BLACK & R. SMITH, "Effect of open peer review on quality of reviews and on reviewers' recommendations: a randomised trial", (318) *British Medical Journal* 1999, 23 with further references.

[2061] M.K. KOWALCZUK, F. DUDBRIDGE, S. NANDA, S.L. HARRIMAN & E.C. MOYLAN, "A comparison of the quality of reviewer reports from author-suggested reviewers and editor-suggested reviewers in journals operating on open or closed peer review models", Paper presented at the 7th International Congress on Peer Review and Biomedical Publication, 2013, available at <f1000research.com/posters/ 1094564>. Also see: T. PRUG, "Open Process academic publishing", (10) *Ephemera theory & politics in organization* 2010, 40; D.R. SHANAHAN & B.R. OLSEN, "Opening peer-review: the democracy of science", (13) *Journal of Negative Results in BioMedicine* 2014, 1.

[2062] T. ROSS-HELLAUER, "What is open peer review? A systematic review", (2) *F1000Res.* 2017, 9.

[2063] See in this regard: J. KELLY, T. SADEGHIEH & K. ADELI, "Peer Review in Scientific Publications: Benefits, Critiques, & A Survival Guide", (25) *The electronic Journal of the International Federation of Clinical Chemistry and Laboratory Medicine* 2014, 233-234.

[2064] T. ROSS-HELLAUER, "What is open peer review? A systematic review", (2) *F1000Res.* 2017, 4.

information that remains relevant and useful, even after the publication of the article. Reports enable the readers to consider these criticisms and give them the opportunity "to examine and appraise this process of "creative disagreement" and form their own opinions".[2065] Making reports public adds another layer of quality assurance as they are open to scrutiny by the wider community. It could increase review quality because the idea of making reports 'open' motivates reviewers to be more thorough in their activities.[2066] Disclosing the conversation between authors and peer reviewers provides readers with an expanded contextual debate on a particular subject.[2067]

649. The proposed scheme relies on an element relating to this form of OPR: the peer certifier has to submit a report on the primary certifier's performances to the public authority. This report could be made available to the public as well. It would then become open for scrutiny by the wider community and increase the primary certifier's risk of liability. Interested parties could get an idea on the primary certifier's performances. Making the performance report public might also increase a peer certifier's review quality as the awareness of its work being disclosed could induce the latter to perform the review more thoroughly. As a consequence thereof, an underperforming primary certifier will be more easily identified.

650. The peer review process could also put more emphasis on an 'open interaction' between the different parties. This can lead to more discussion between reviewers and/or between authors and reviewers. In a traditional peer review process, reviewers and authors only correspond with the editors. Reviewers have no direct contact with each other and authors usually have no opportunity to directly question or respond to a reviewer's comments. Allowing interaction amongst reviewers or between authors and reviewers makes the review process more open. This enables the editors and reviewers to work together with authors to improve the quality of their manuscript. Referees and authors could in an open interaction setting discuss issues with the aim of finding ways to improve a manuscript instead of dismissing it.[2068] In this regard, a study showed that enhanced cooperation between referees and authors improved reviewing accuracy.[2069]

651. There is room for interaction between the peer and the primary certifier in the proposal. They will have to meet periodically, for instance on a yearly basis, to exchange ideas on the certification file and performance report. The peer certifier has to provide the

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[2065] D.P. PETERS & S.J. CECI, "Peer-Review Practices of Psychological Journals: The Fate of Published Articles Submitted Again", (5) *The Behavioral and Brain Sciences* 1982, 194 as reported in T. ROSS-HELLAUER, "What is open peer review? A systematic review", (2) *F1000Res.* 2017, 10.

[2066] T. ROSS-HELLAUER, "What is open peer review? A systematic review", (2) *F1000Res.* 2017, 10; J.S. ARMSTRONG, "Barriers to Scientific Contributions: The Author's Formula", Marketing Papers June 1982, 5, available at <repository.upenn.edu/cgi/viewcontent.cgi?article=1124&context=marketing_papers>.

[2067] E. FORD, "Open peer review at four STEM journals: an observational overview", (4) *F1000Research* 2015, 2.

[2068] J.S. ARMSTRONG, "Barriers to Scientific Contributions: The Author's Formula", Marketing Papers June 1982, 5; T. ROSS-HELLAUER, "What is open peer review? A systematic review", (2) *F1000Res.* 2017, 11.

[2069] J.T. LEEK, M.A. TAUB & F.J. PINEDA, "Cooperation between Referees and Authors Increases Peer Review Accuracy", (6) *PLoS ONE* 2011, 1-11.

primary certifier with input and feedback on its performances. Such an open interaction and discussion might be to the benefit of the quality of a primary certifier's performances during the certification process. The emphasis is placed on sharing professional experiences between parties in an open interactive setting. It provides certifiers with an opportunity to discuss problems that occurred during the certification process. A periodical meeting allows them to share different approaches, experiences and practices that may have been (un)successfull during the certification process.[2070]

2.3. Costs Associated With Establishing a Peer Certifier

652. The introduction of a peer certifier entails four major costs, namely the fee a requesting entity will have to pay to a peer certifier, the costs incurred by the primary certifier because of preparing the certification file, the costs borne by the peer certifier when performing the review and the costs associated with providing the performance report to the public authority. Even when those costs arise by adopting the proposal, they are not excessive and can to a certain extent even be compensated by savings elsewhere.

653. First, the requesting entity and peer certifier will have to come to an agreement on the 'peer review' fee. It is conceivable that the requesting entity will pool the certification and peer review fee in one total amount. This will lead to an increase of the certified item's price, which the third party eventually has to pay for. In other words, third parties will in the end incur the additional costs of involving a peer certifier. Nevertheless, they might be willing to bear that cost for several reasons.

The price increase is due to the involvement of a second certifier. By involving a peer certifier, there is a higher probability that the primary certifier will spend more time and effort in performing its obligations during the certification process. The primary certifier might thus be providing a certificate that corresponds with the 'actual' and 'true' value of the item. As a consequence, it becomes less likely that third parties and requesting entities will incur the losses and costs associated with the default of the certified item. The potential costs incurred by third parties under the proposal will thus be balanced by a higher probability that a certified item complies with the applicable requirements. Potential litigation costs faced by third parties are lowered as well when the risk that a primary certifier does not comply with obligations during the certification process becomes less likely. More generally, the involvement of a peer certifier could especially enhance confidence in the primary certifier and the items it certifies. The performance report could induce requesting entities to contract with the 'best-performing' primary certifier, which in turn is to the benefit of third parties. One could even argue that the additional cost third parties will have to bear are minimal as the requesting entity can spread it among many of its clients.

654. Second, the primary certifier will incur costs when preparing the certification file that has to contain the necessary documents. Certifiers already have to maintain

[2070] G. DEXTER & M. WASH, *Psychiatric Nursing Skills: A patient-centred approach*, California, Springer, 2013, 89.

documents on the performance of their obligations during the certification process. The documents they are required to keep can thus be the basis of the certification file. Therefore, the costs associated with completing the file are not that exorbitant. This is illustrated with some examples.

For instance, a CRA has to arrange for adequate records and, where appropriate, audit trails of its activities to be kept. Those inter alia include records documenting the established procedures and methodologies used by the agency to determine ratings; the internal records and files, including non-public information and work papers, used to form the basis of any rating decision taken; credit analysis reports, credit assessment reports and private credit rating reports and internal records, including non-public information and work papers, used to form the basis of the opinions expressed in such reports; and records of procedures and measures implemented by the CRA to comply with the applicable legal requirements.[2071] A notified body also has to establish, document, implement, maintain and operate a quality management system that is appropriate to the nature, area and scale of its conformity assessment activities. This quality management system should be capable of supporting and demonstrating the fulfilment of the requirements under the applicable legislation.[2072] A notified body needs to have documented processes and sufficiently detailed procedures to conduct each conformity assessment activity for which it is designated. These processes and procedures should comprise the notified body's actions ranging from pre-application activities up to decision-making and surveillance.[2073]

655. Third, the peer certifier will have to perform the review of the certification file, regularly meet with the primary certifier and draft a performance report that will need to be submitted to the public authority. This requirement creates potential costs for the peer certifier. The actual peer review process will also take time and effort, which is not always compensated under a normal peer review process.[2074] In the proposal, however, the peer review fee covers the peer certifier's time and efforts in preparing and submitting the performance report. Therefore, there is no real cost for the peer certifier as it will receive a fee from the requesting entity to cover the review process.

In any case, the time or efforts and accompanying costs that the peer certifier will put in the performance report might be limited when making the comparison with the potential costs incurred by some of the other actors. The peer certifier has expertise and the required knowledge to examine the performances of another certifier. It is aware of the *modus operandi* of certifiers. This mechanism might be more effective than requiring a public authority or third party to perform the same activities.[2075] Moreover, reporting duties have already been established for certifiers under the applicable legal framework. Notified

[2071] Annex I, Section B.7 Regulation 1060/2009 on credit rating agencies.

[2072] Annex VII, 2.1. Regulation 2017/745 on medical devices.

[2073] Annex VII, 4.1. Regulation 2017/745 on medical devices.

[2074] T. ROSS-HELLAUER, "What is open peer review? A systematic review", (2) *F1000Res.* 2017, 4.

[2075] See for more information the discussion *supra* in nos. 494-497.

bodies, for example, have to make available and submit upon request all the relevant documents including the manufacturer's documentation to the authority responsible for notified bodies. This authority can base its assessment, designation, notification, monitoring and surveillance activities of notified bodies on this information.[2076] The idea of a certifier being required to submit a report to the authority can thus be found in the law. The only thing that would change is that not the primary certifier, but the peer certifier will have to submit the performance report to the public authority.

656. Fourth, the responsible public authority will have to bear costs when analysing the performance report to subsequently use it for its supervisory and monitoring obligations. The authority, however, might incur more costs without the performance report as it would then have to start from scratch. The performance report containing a preliminary analysis could be an asset in monitoring primary certifiers. It might allow the public authority to more easily take some of the actions discussed above (e.g. withdrawal of the registration or imposing penalties on the primary certifier).[2077]

In other words, the safeguards and powers given to public authorities might be put into practice and even be strengthened with the establishment of a peer certifier. This could create additional incentives for the primary certifier to comply with its obligations during the certification process as there is a higher risk that potential misconduct will be detected. With a public authority taking preventive or corrective actions, scandals in the certification sector might be more easily prevented. A primary certifier's lack of compliance with the obligations during the certification process can also be detected at a much earlier stage with a peer certifier regularly submitting a performance report.[2078] This spares costs associated with the default of a certified item.

2.4. Factors Reducing the Risk of a Certifier's Unlimited Liability

657. Several factors reducing the certifier's risk of unlimited liability also exist under this proposal. Foremost, it does not affect the existing mechanisms discussed in nos. 614-626 preventing a peer certifier's unlimited liability towards third parties (e.g. causality, shared liability or reasonable reliance on the certificate). A repeated extensive discussion of these factors is, therefore, not necessary.

2.5. Link With Existing Practices

658. Peer review mechanisms are used across many sectors and at different levels.[2079] Although these examples do not directly relate to the proposed scheme or to certifiers in

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[2076] Article 36.2 Regulation 2017/745 on medical devices.

[2077] See for more information the discussion *supra* in nos. 112-135.

[2078] See in this regard also: S. GADINIS & C. MANGELS, "Collaborative Gatekeepers", (73) *Washington and Lee Law Review* 2016, 838.

[2079] The 'Peer Reviews' of the Mutual Learning Programme (MLP), for instance, provide a forum for EU government representatives to exchange information and experiences on a topic relating to the European Employment Strategy (EES). The MLP's main objectives are to support, coordinate and encourage mutual learning between EU Member States and to enhance the transferability of the most effective policies within key areas of the European Employment Strategy. The EES goes back to 1997 when Member States

general, they are based on the idea that peer review can be used as mechanism to increase quality. In that sense, a proposal incorporating peer review elements might encounter less practical barriers. Two examples of peer review mechanisms are discussed in the following paragraphs, one stemming from the maritime sector and one finding its origins in the medical field.

659. The way in which classification societies can become member of IACS illustrates the importance of peer review in the maritime sector. A society that wants to become member has to submit an application to the IACS Council. This application has to contain all the relevant information, evidence and explanations with a view of demonstrating compliance with the IACS Membership Criteria.[2080]

The Council is the governing body of IACS and consists of one representative of each society.[2081] The Council will appoint a Review Panel to assist with the review of membership applications. The Review Panel needs to be composed of three IACS Council members with one Council member being replaced each year. Within six months after receipt of the application, the Review Panel has to assess whether the applicant complies with the Membership Criteria. As such, the assessment is done by peers. The Review Panel needs to draw up its recommendation and submit it to the Council. Within

undertook to establish a set of common objectives and targets for employment policies. Its most important aim is the creation of more and better jobs throughout the entire EU. Peer Review is a learning event hosted by a Member State wishing to present an effective policy or practice to a group of peer countries. The goal is to discuss a specific topic and identify good practices on the basis of a real policy implementation (see for more information: EU Commission, Employment, Social Affairs and Inclusion, European Employment Strategy, Peer learning events, available at <ec.europa.eu/ social/main.jsp?catId=1070&langId=en>). Another example at the supranational level is included in Article 10 of Regulation 765/2008 dealing with the accreditation and market surveillance relating to the marketing of products. National accreditation bodies should subject themselves to peer evaluation. The outcome of this peer evaluation has to be published and communicated to all Member States and the Commission (see in this regard: Regulation No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, *OJ* L 218/30).

The Environmental Performance Review (EPR) used in the United Nations Economic Commission for Europe (UNECE) is an example of a peer review mechanism at the international level. The UNECE was set up by the United Nations Economic and Social Council (ECOSOC) and is one of the five UN regional commissions. As a multilateral platform, the UNECE facilitates economic cooperation and integration among its member countries. It aims to promote sustainable development and economic prosperity. A peer review mechanism is used for the UNECE's environmental policy. EPR is an assessment of the country's progress in reconciling environmental and economic targets and in meeting environmental commitments. The EPR Programme assists countries in improving their environmental management and performance. It promotes information exchange between countries on environmental policies or experiences and helps them integrating environmental policies into economic sectors (see for more information: United Nations Economic Commission for Europe, "Environmental Performance Review", available at <www.unece.org/env/epr.html>). The Eighth Environment for Europe Ministerial Conference acknowledged the contribution of the EPR Programme as an effective and practical policy tool (see in this regard: United Nations Economic Commission for Europe, Eighth Environment for Europe Ministerial Conference, "Greener, cleaner, smarter!", June 2016, paragraph 9, 3, available at <www.unece.org/ env/epr.html>).

[2080] Annex 1, Article 1.1., "IACS Charter", October 27, 2009, revised January 2018.

[2081] Article 4.2., "IACS Charter", October 27, 2009, revised January 2018.

three months after receipt of the Panel's recommendation and after an oral hearing, the Council decides whether to accept or reject the application.[2082]

660. A peer review mechanism is also included in legislation dealing with ROs. Recognised Organisations have to periodically consult with each other to maintain and harmonise their rules and procedures and the implementation thereof. Moreover, they have to cooperate with each other to achieve a consistent interpretation of international conventions, without prejudice to the powers of the flag States. ROs have to agree on the technical and procedural conditions under which they will mutually recognise certificates for materials, equipment and components based on equivalent standards, taking the most demanding and rigorous standards as reference.[2083]

661. Peer review mechanisms have been used in the medical sector as well. In addition to clinical peer review between physicians in the US,[2084] an example can be found in the Regulation on Medical Devices. The European Commission has to establish a mechanism making it possible to exchange experiences and coordinate administrative practice between national authorities responsible for notified bodies. Such an exchange has to cover different elements including the development of best practice documents relating to the authorities' activities, the monitoring of trends concerning changes with regard to the designations/notifications of notified bodies and evolutions in the withdrawal of certificates. Authorities responsible for notified bodies have to participate in a peer review every third year. The Commission has to contribute to the organisation and provide support to the implementation of the review mechanism.[2085]

3. Conclusions: Proposals Complying with the Evaluation Criteria

662. By using the four evaluation criteria, policymakers can adopt new proposals that induce certifiers to issue more accurate and reliable certificates. Two proposals have been discussed. The first proposal introduced a reversal of the burden of proof with regard to a certifier's violation of its obligations during the certification process. When a certificate has been given that does not correspond with the 'true' or 'actual' value of the certified item, the certifier will have to prove that it did not commit the act resulting in a valid ground to establish liability. The second proposal dealt with a peer certifier. Although the primary certifier remains responsible for issuing the certificate during the certification process, the peer certifier has to perform a review and submit a performance report to the public authority.

663. Both proposals comply with the four identified evaluation criteria. They might thus be effective and have a higher chance to be implemented by supra- or national

[2082] Annex 1, Article 1.1., "IACS Charter", October 27, 2009, revised January 2018.

[2083] Article 10 Regulation 391/2009 on common rules and standards for ship inspection and survey organisations.

[2084] See in this regard for example: D. VYAS & A.E. HOZAIN, "Clinical peer review in the United States: History, legal development and subsequent abuse", (20) *World Journal of Gastroenterology* 2014, 6357.

[2085] Article 48 Regulation 2017/745 on medical devices.

policymakers. As a consequence, it is conceivable that they can have a ‘major’ impact on the accuracy and reliability of certificates.

Chapter IV – Concluding Remarks

664. Third parties use certificates to make decisions. Therefore, certifiers have to make sure that certificates correspond with the 'true' or 'actual' value of the certified item. Several academic proposals have already been formulated to encourage certifiers to issue more accurate and reliable certificates. Yet, the analysis showed that all of them have shortcomings. Whereas some proposals do not contain sufficient incentives, others tend to be quite costly or lack a link with existing practices. Some proposals did also not prevent the risk of a certifier's unlimited liability. These proposals will, therefore, not always be implemented. They are not effective as their influence on the accuracy and reliability of certificates remains 'minor'.

665. Against this background, four evaluation criteria were identified, namely (1) sufficient triggers, (2) limited costs associated with a proposal, (3) factors reducing the risk of unlimited liability and (4) a link with existing practices or absence of practical problems. A framework based on these evaluation criteria is innovative for two reasons. On the one hand, the criteria can be used to refine the existing proposals. Policymakers should examine to which extent those proposals comply with each of the identified evaluation criteria. This evaluation can then be used to identify the weaknesses of existing proposals and to refine them accordingly. The four criteria can, on the other hand, also be used by policymakers to design new mechanisms encouraging certifiers to issue more accurate and reliable certificates. An advantage of the four evaluation criteria is their overall scope of application in the sense that their content can be adjusted according to the jurisdiction where the proposal is made. Proposals complying with these four criteria are more realistic to implement. Therefore, they will be more effective and likely have a 'major' influence on the accuracy and reliability of certificates.

PART IV – GENERAL CONCLUSIONS

666. An analysis of certifiers and finding mechanisms to increase the accuracy and reliability of certificates has proven to be complex and intellectually challenging. Many unexpected and interesting issues arose when taking a closer look at the function of certifiers and their certificates. In this concluding part, I will give an answer to each individual research question. Considering the general and holistic approach taken in this study, some ideas for future research are provided as well.

667. In order to answer the first research question, the obligations of certifiers were thoroughly examined. It was shown that the certification process consists of three stages, each of them imposing different obligations upon certifiers. In the first stage, a certifier has 'pre-issuance' obligations. One of these is to analyse the item or related information that needs to be certified. This analysis makes it possible to determine the certificate. Certifiers subsequently have to issue the certificate in an independent way during a second stage of the process. The most important 'post-issuance' obligation during a third and last stage of the certification process relates to monitoring and surveying the item that has been certified.

The nature of these obligations determines whether there will be a basis to impose liability upon certifiers. The obligation to analyse the item or related information during the first stage of the certification process is an *obligation de moyen*. There will thus be a basis for liability if the certifier did not carefully perform the assessment of the item or related information that needs to be certified. Monitoring and surveying the item that has been certified during the third stage is an *obligation de moyen* as well. Certifiers will only face liability to the extent that they did not perform the post-issuance surveillance and monitoring obligation in a careful way, regardless of the question whether the certificate was actually suspended, withdrawn or updated. The obligation to issue a certificate in an independent way, by contrast, is an *obligation de résultat*. There will be a basis for liability whenever the certifier did not remain independent vis-à-vis the requesting entity when issuing the certificate, regardless of the level of care it applied during the second stage. This framework can be relied upon by policymakers and judges when they have to take decisions relating to the liability of certifiers.

668. The second research question assessed whether different types of certifiers function similarly or, instead, have their own characteristics that are legally relevant. By examining several characteristics, the analysis illustrated that certifiers are not all alike. There are, for instance, several ways to organise (public) supervision of certifiers or to ensure their independence. The relationship between certifiers and public authorities can be addressed differently as well. Policymakers should take into account the differences between certifiers when framing proposals aiming to increase the reliability and accuracy of certificates. A specific proposal for one certifier can be more difficult to adopt and

implement for the others. Future research might identify other characteristics that can be used to find differences and/or similarities between certifiers.

669. Whether and under which conditions certifiers will be held liable towards third parties was examined in a third research question. This will largely depend upon the jurisdiction where the claim is filed. Closely related to the liability of certifiers is the questions to which extent they can and should be able to invoke the freedom of speech defence. The situation in the US and under the ECHR illustrate that it is unlikely that certificates will qualify as value judgements/non-factual opinions or as factual statements related to a public interest or contributing to a debate on that interest. Certificates might be seen as commercial speech in both jurisdictions, which is given less protection. In any case, there are sufficient possibilities for courts to deny an extensive freedom of speech protection to certifiers.

The answers pave the way for additional (more specialised) research. For instance, it can be examined whether their civil liability towards third parties can be addressed at the supranational level. The analysis showed that EU legislation on third-party certifiers and their liability is often not effective. Yet, a supranational approach might offer some solutions to the diverging approaches by national courts with regard to a certifier's liability. The 'interaction' between private and public law in the context of certifiers can be analysed more thoroughly as well. An interesting question in this regard is to which extent certifiers should be allowed to rely on fundamental rights and/or other public law mechanisms to refute or restrict liability. Regardless of their own rhetoric, certifiers play an important role in remedying information asymmetries between requesting entities and third parties. The certification system is based on the premise that certifiers know that third parties will use their certificate to make decisions with regard to a certified item. Therefore, there should at least be some (legal) restrictions on the use of these defences by certifiers.

670. Whether mechanisms have already been proposed or implemented to safeguard the accuracy and reliability of certificates was the starting point of the fourth research question. Several proposals aiming to induce certifiers to issue more accurate and reliable certificates were discussed. These included the creation of governmental certifiers, enhancing public oversight on private certifiers, increasing competition in the certification sector, providing rewards or sanctions for certifiers or adopting gatekeeping liability regimes. The list of proposals that have been discussed is not exhaustive. There might thus be other mechanisms as well that induce certifiers to issue more reliable and accurate certificates. Additional research might focus on finding those mechanisms and examining their effectiveness.

671. The last research question focussed on those measures and mechanisms that can make a difference when it comes to ensuring that certifiers issue certificates that are more reliable and accurate. The answer to the previous research question was thereby used as a starting point for the analysis. Although the existing proposals have their advantages, they are not entirely flawless. They encountered numerous problems making their

implementation unlikely. As a consequence, these proposals are not effective. The elements explaining why existing proposals are ineffective can be used as evaluation criteria. These criteria were defined as: (1) triggering mechanisms, (2) limited costs of a proposal, (3) factors reducing the risk of a certifier's unlimited liability, and (4) a link with existing practices. Future academic research might build upon this framework and identify other shortcomings or benefits that can operate as additional evaluation criteria to strengthen the framework.

672. Special attention was given to the first criterion. An appropriate risk of civil liability for certifiers turned out to be a viable mechanism inducing certifiers to issue more accurate and reliable certificates. Finding the appropriate risk of liability, however, is not always straightforward. Although this should be further examined from a law and economics perspective, the conclusion that a risk of civil liability or an increased risk thereof might induce certifiers to issue more accurate and reliable certificates has several consequences that can be used straight away. Policymakers could, for instance, mainly focus on this track instead of refining other proposals such as increasing competition in the certification sector, regulating conflicts of interest or adopting performance and compensation schemes. This will allow policymakers to use a more oriented approach, thereby saving resources. The use of some public law defences such as the freedom of speech or sovereign immunity might also need to be restricted for certifiers. In addition, certifiers should not be given immunity as can be the case for financial supervisors.

673. The four evaluation criteria can be used to refine some of the existing proposals. Policymakers can rely on the criteria to first identify the weaknesses of a specific proposal and subsequently adjust it by making the required changes. Moreover, these criteria can also be used as a framework to develop new proposals that increase the accuracy and reliability of certificates. Those proposals will be effective to the extent that they comply with the criteria. Two suggestions have been made in this regard. Whereas one of them relates to a reversal of the burden of proof, another one introduced the concept of a peer certifier. Additional research might develop other innovative proposals. One will thereby always need to find the right balance between the four criteria. This is a delicate exercise and might require more than only a legal approach. Instead, traditional barriers should be crossed to find inspiration in other disciplines when designing proposals inducing certifiers to issue more accurate and reliable certificates.

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ANNEX

STANDARD
&POOR'S

21-25, Rue Balzac
75406 Paris Cedex 08
Tél. 01 44 20 66 50
Fax 01 44 20 66 51

RATING AGREEMENT

BETWEEN

a registered in the Commercial Register under the number having its registered office at

("**the Company**")

AND

STANDARD & POOR'S CREDIT MARKET SERVICES FRANCE SAS
a Société par Actions Simplifiée à associé unique registered in the Paris Registre du Commerce et des Sociétés under the number 522 211 549, having its registered office at 112 avenue Kleber 75116 Paris, France
("**Standard & Poor's**")

This Rating Agreement replaces the Agreement signed on 30 April 2010 between and Standard & Poor's Credit Market Services Europe Ltd. and is the only document governing the relationship between the Company and Standard & Poor's.

It is hereby agreed as follows

1. Contractual framework

1 1 At the Company's request, Standard & Poor's will perform an analytic review in order to assign a rating to the Company in accordance with the terms of this Agreement and the Terms and Conditions Applicable to Corporate Ratings scheduled hereto. The parties understand and agree that the Terms and Conditions and the Fee Schedule mentioned in article 2 below form an integral part of this Agreement. In case of contradiction or discrepancy between these documents, the terms of this Agreement shall prevail.

1.2 The Company acknowledges its full understanding of the Terms and Conditions and the Fee Schedule and agrees to comply with all the terms thereof.

2. Surveillance of rating and future issues

It is understood and agreed that, if the initial rating is made public by the Company or with its consent in accordance with the terms and Conditions:

(a) the rating will be subject to Standard & Poor's surveillance, and

(b) Upon receipt of a Standard & Poor's rating, the Company enters into a long-term relationship with Standard & Poor's whereby Standard & Poor's will maintain an Entity Credit Rating (issuer rating) on the Company and expect to rate any and all future issues of publicly distributed debt, including but not limited to bond issues, syndicated loans that feature the characteristics set out from time to time in the Current Fee Schedule, sukuk financings, private placements, preferred stock, hybrid debt/equity securities (including convertibles) and debt of a subsidiary or associated entity guaranteed by the Company

3. Fees

3 1 In consideration of the issuance of the initial credit rating and the related analytical review, the Company will pay Standard & Poor's an amount of Euros plus VAT. Thirty per cent (30%) of this amount, being Euros plus VAT shall be payable upon execution of this Agreement, the balance being payable when the initial rating is notified to the Company Such fees will be due irrespective of the rating issued or the Company's acceptance of such rating.

3.2 If the rating is not issued for any reason, the Company shall compensate Standard & Poor's based on time, effort and charges incurred by Standard & Poor's through the date upon which the rating process is terminated.

3.3 Whether the rating is issued or not, the Company shall reimburse Standard & Poor's for its reasonable legal fees, if any, incurred in connection with the services described in this Agreement (subject to the provision of supporting documentary evidence).

3.4 Annual surveillance fees shall be charged to the Company commencing twelve months after the initial rating date. The amount of such rating fees will be 55,000 Euros plus VAT for the first year commencing twelve months after the initial rating date, and will be revised annually thereafter in accordance with Standard & Poor's fee schedule then in effect. The fee schedule, which includes the details of Standard & Poor's fees and services for 2010 (the "Fee Schedule"), is annexed to this Agreement. The Fee Schedule is revised periodically Such revisions will be communicated to the Company The Fee Schedule in effect from time to time is deemed included in this Agreement and forms an integral part thereof.

3.5 Fees relating to the rating of future issues and other borrowings referred to in article 2 shall be charged in accordance with the Fee Schedule in effect at the time of such rating.

3.6 Fees and expenses relating to the rating of securitisation and structured finance transactions will be agreed by the parties on the basis of the size and complexity of the transaction and will be charged separately.

STANDARD & POOR'S
CREDIT MARKET SERVICES FRANCE SAS

Represented by:

Ian Byrne
Vice President
Signed on. [date]

Represented by·

Signed on. [date]

STANDARD
&POOR'S

STANDARD
&POOR'S

Standard & Poor's Ratings Services

Terms and Conditions

(Applicable to Corporate Ratings)

1. Nature of Ratings

It is understood and agreed that

(a) an issuer rating reflects Standard & Poor's current opinion of the Company's overall financial capacity to pay its financial obligations as they come due , an issue rating reflects Standard & Poor's current opinion of the likelihood that the Company will make payments of principal and interest on a timely basis in accordance with the terms of the obligation.

(b) a rating is an opinion and is not a verifiable statement of fact.

(c) ratings are independent opinions based on information supplied by the Company and upon other information obtained by Standard & Poor's from other sources it considers reliable.

(d) Standard & Poor's relies exclusively on the Company, its accountants, counsel, and other experts for the accuracy and completeness of the information submitted pursuant to this Agreement. Standard & Poor's has no duty to verify such information and does not guarantee its accuracy, completeness or timeliness, or the results obtained from the use of such information.

(e) Standard & Poor's does not perform an audit in connection with any rating and a rating does not represent an audit by Standard & Poor's.

(f) Standard & Poor's may raise, lower, suspend, place on CreditWatch, or withdraw a rating at any time, in Standard & Poor's sole discretion.

(g) a rating is not a "market" rating nor a recommendation to buy, hold, or sell any financial obligation.

2. Role of Standard & Poor's

Standard & Poor's is not acting as an investment, financial, or other advisor to the Company, recipients of the rating or any other third party and has no fiduciary obligation towards any of them. The Company acknowledges and agrees that neither the rating nor any other information provided by Standard & Poor's constitutes or should be used as investment or financial advice. The Company understands and agrees that Standard & Poor's has not consented to and will not consent to being named an "expert" under any applicable securities laws.

3. Information to be provided by the Company

3.1 The Company agrees to provide Standard & Poor's promptly with all information required for the initial rating and surveillance of the rating including information on material changes to information previously supplied to Standard & Poor's. The Company also agrees to meet with Standard & Poor's for an analytic review at any reasonable time Standard & Poor's requests.

3.2. The rating may be affected by Standard & Poor's opinion of the accuracy, completeness, timeliness, and reliability of information received from the Company. Standard & Poor's reserves the right to withdraw the rating if the Company fails to provide Standard & Poor's with accurate, complete, timely, or reliable information.

4. Publication

4.1 Standard & Poor's will not publish the rating without the Company's consent. If the Company consents to publication, Standard & Poor's shall have the right to publish, disseminate, or license others to publish or disseminate the rating and the rationale for the rating by any means and through any medium of its choice.

4.2 The Company understands and agrees that, if the Company does not wish the rating to be public, it shall not disclose it to any party If a confidential rating subsequently becomes public through disclosure by the Company or a third party other than Standard & Poor's, Standard & Poor's reserves the right to publish it.

4.3 As a matter of policy, Standard & Poor's publishes ratings for all public issues in the U.S. market and U.S. 144A issues with registration rights.

4.4 Standard & Poor's may publish explanations of Standard & Poor's ratings criteria from time to time and nothing in this Agreement shall be construed as limiting Standard & Poor's ability to modify or refine Standard & Poor's criteria at any time as Standard & Poor's deems appropriate.

5. Confidential Information

5.1 For purposes of this Agreement, "Confidential Information" shall mean information received by Standard & Poor's from the Company, the proprietary and confidential nature of which has been specified in writing to Standard & Poor's, provided that the following shall not constitute Confidential Information:

(i) information which was substantially known by Standard & Poor's at the time of such disclosure, or which was or becomes known to the public (other than by Standard & Poor's act) ,

(ii) information which is disclosed lawfully to Standard & Poor's by a third party (through no breach of a confidentiality obligation) , or

(iii) information which is developed independently by Standard & Poor's without reference to the Confidential Information.

5.2 As from the date on which this Agreement enters into force, and unless otherwise agreed by the Company in writing, Confidential Information may only be used by Standard & Poor's in connection with the assignment and monitoring of ratings and may not be directly disclosed to any third party. The Company agrees that Confidential Information may be used to raise, lower, suspend, withdraw, place on CreditWatch, and change the Outlook assigned to any rating if the Confidential Information is not directly disclosed. Standard & Poor's may also use Confidential Information for research and modeling purposes provided that the Confidential Information is not presented in a way that can be directly tied to the Company

5.3 The restrictions contained in this Article shall not prevent the disclosure of Confidential Information where such disclosure is required by law, provided that notice of such required disclosure is given to the Company if such notice is permitted by law

6. Limitation on Damages

6 1 The Company agrees that, except for Standard & Poor's gross negligence or wilful misconduct, the liability of Standard & Poor's, its officers, directors, shareholders, employees and agents, on any ground and for any reason, to the Company or any other person, in relation to the rating or related analytic services shall not exceed, in aggregate, three times the aggregate fees paid by the Company up to a maximum of US$1,000,000, and shall cover only direct losses and in particular, but without limitation, will not include lost profits, operating losses and opportunity costs. In furtherance and not in limitation of the foregoing, Standard & Poor's will not be liable in respect of any decisions made by the Company or any other person as a result of the issuance of the rating or the related analytic services provided by Standard & Poor's hereunder or based on anything that appears to be advice or recommendations.

6.2 The Company acknowledges and agrees that Standard & Poor's does not waive any protections, privileges, or defences it may have under any law including, but not limited to, laws relating to freedom of expression.

7. Long-term Relationship

Once the Company accepts a Standard & Poor's rating, it enters into a long-term relationship with Standard & Poor's. As part of this, it is Standard & Poor's policy to assign and maintain ratings for the Company, including a Long-Term Corporate Credit Rating (issuer rating) and issue ratings on syndicated bank loans and any and all public debt that is issued by, guaranteed by, and/or is in any other manner an obligation of the Company

8. Term

This Agreement is entered into for an indefinite duration and may be terminated by either party at any time upon 60 day prior written notice (sent by registered mail with acknowledgement of receipt), without prejudice to Standard & Poor's right to revise, suspend or withdraw the Company's rating at any time without notice. It is understood that, in case of termination, Standard & Poor's shall remain entitled to maintain the rating of public issues and programs then outstanding.

If Standard & Poor's determines that it does not have sufficient information to maintain such ratings, the withdrawal of the relevant ratings will be publicly announced.

Notwithstanding the foregoing, the clauses above entitled "Role of Standard & Poor's", "Confidential Information", and "Limitation on Damages" shall survive the termination of this Agreement or any withdrawal of a rating.

9. Miscellaneous

9 1 Nothing in this Agreement, or the rating when issued, is intended as creating any rights on behalf of any third parties, including, without limitation, any recipient of the rating, by way of third party stipulation or otherwise.

9.2 This Agreement shall be binding on, and inure to the benefit of, the parties hereto and their successors and assigns.

9.3 This Agreement constitutes the complete agreement between the parties with respect to its subject matter This Agreement may not be modified except in a writing signed by authorized representatives of both parties.

9.4 In the event that any term or provision of this Agreement shall be held to be invalid, void, or unenforceable, then the remainder of this Agreement shall not be affected, impaired, or invalidated, and each such term and provision shall be valid and enforceable to the fullest extent permitted by law

10. Governing law and jurisdiction

This Agreement shall be governed by French law Any dispute which may arise in relation to its interpretation or enforcement shall be settled by the competent courts within the district of the Paris Court of Appeal.

The principal methodology used in this rating was US Local Government General Obligation Debt published in December 2016. Please see the Rating Methodologies page on www.moodys.com for a copy of this methodology.

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