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Control and Liability of Credit Rating Agencies under Netherlands Law

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1. Introduction

This article deals with credit ratings, credit rating agencies ('CRAs'), the control of CRAs and the liability of CRAs in the Netherlands.¹ The article is limited to the rating activities of CRAs and does not deal with their ancillary activities such as consultancy services and the issuing of public statements other than credit ratings, and it does not deal with criminal liability.²

CRAs play an important role in the Dutch capital market. The three most important CRAs are two American companies; Moody's Investors Service Inc. ('Moody's') and Standard & Poor's Corporation ('Standard & Poor's'), and one English company, Fitch Ratings Ltd. ('Fitch'). These CRAs have been around since the beginning of the twentieth century. The three CRAs are not established in the Netherlands through a subsidiary or a branch. They operate on the Dutch market mainly from London and sometimes from New York. There are no Dutch CRAs.

Both the Code of Conduct of the International Organization of Securities Commissions ('IOSCO') of December 2004 and the advice of the Committee of European Securities Regulators ('CESR') of March 2005³ define a credit rating as:

'An opinion regarding the creditworthiness of an entity, a credit commitment, a debt or debt-like security or an issuer of such obligations, expressed using an established and defined ranking system. Credit ratings are not recommendations to purchase or sell any security'.

A rating expresses the opinion of CRAs on the creditworthiness of a borrower and the risk that the borrower will not be able to repay a debt. The smooth functioning of

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² Criminal liability may arise in case of fraudulent misrepresentation or violation of the insider trading rules.

³ Both these documents will be discussed below.

global financial markets depends in part upon reliable assessments of investment risks, and ratings influence the provision of capital in those markets. A high rating can give companies access to the capital market. The higher the rating, the better the terms for the borrower. At the same time, ratings play a useful role in the financial decision making of institutional and small investors. Moody's, Standard & Poor's and Fitch distinguish twenty-one different ratings, around half of them investment grade and the other half non investment grade.

Where the issuing company participates in the rating process, CRAs will spend weeks or even months analyzing data, work methods and interviewing company management. Although CRAs have a responsibility to perform their rating with due care, the choice concerning the investments to be undertaken remains with the investor. There are some aspects which may influence investment decisions that the CRAs do not take into account. They do not, for example, take into account the reasonableness of the issue price, possibilities for capital gains, the liquidity in the secondary market, the risk of prepayment by the issuer or exchange risks. Sometimes CRAs allow issuers to veto the rating, if they object to the conclusion of the report.

The ratings are reevaluated annually, or more often, if there is reason to do so. A given rating is based on the information available at a particular point in time. As time goes by, many things change, affecting the debt servicing capabilities of the issuer. It is therefore essential, that as a part of their investor service, CRAs monitor all outstanding debt issues rated by them. In the context of emerging developments, the CRAs often put issuers under credit watch and upgrade or downgrade the ratings when necessary. For example CRAs can amend their ratings when there are revenue shortfalls, declining profits, distribution of dividends, regulatory changes, share issues or merger prospects. Normally, the decision to downgrade or upgrade the rating is taken after intensive interaction with the issuer.

A distinction can be made between solicited ratings (where the rating is based on a request of the bank or company and it participates in the rating process) and unsolicited ratings (where that is not the case).⁴ We are not aware of unsolicited ratings occurring in the Netherlands.

In the Netherlands, the 'credit rating scene' can be divided into two different categories:

1. the annual rating of banks, other financial institutions, and industrial companies; and
2. the rating of notes to be issued or loans.⁵

With respect to category (2), notes to be listed on Euronext are frequently rated and, to a lesser extent, private loans. For a bank or a company it may be particularly interesting to obtain a rating for notes where it does not itself have a rating or where it does not have a high rating. The rating of notes almost always takes place in case of securitizations. In the case of a securitization, a company or a bank sells part of its receivables to a special purpose vehicle. The issuing of notes by that special purpose vehicle finances the purchase price. The interest to be paid on the notes is influenced by the rating. The rating of the notes will be based on the quality of the portfolio of receivables. For instance, if the receivables are secured, the notes will obtain a higher

⁴ Paragraph 78 of CESR's advice shows that the distinction between a solicited rating and an unsolicited rating is not always clear.

⁵ Contrary to what is the case in Spain, Italy, France and Sweden, the rating of regional and local governments has not been requested in the Netherlands (see Van Woerden 1997, p. 10).

rating, thus enabling the special purpose vehicle to obtain a lower interest rate on the notes issued by it. Ratings are usually requested from two of the three prestigious CRAs.

Recent affairs such as Enron and WorldCom made it clear that not only directors and auditors play a role in corporate scandals, but that CRAs may also be implicated. Enron and WorldCom were rated investment grade by Moody's and Standard & Poor's three months before they went bankrupt.⁶ In the United States investors have filed claims against Moody's and Standard & Poor's in both cases. These affairs have triggered the discussion about the role of CRAs and other issues of financial reform.

2. Regulatory Aspects

2.1. General

To date, CRAs have not been subject to supervision in the Netherlands. The Authority for the Financial Markets (*Autoriteit Financiële Markten*) (the 'AFM') is responsible for supervising the operation of the financial markets in the Netherlands. This means that the AFM supervises the conduct of the entire financial market sector, in particular with regard to savings, investments, insurance and loans. In 2002 the AFM became the successor of the Securities Board of the Netherlands (*Stichting Toezicht Effectenverkeer*), which supervised all participants in the securities trade. The establishment of the AFM is a result of the policy of the Ministry of Finance to replace sector-based supervision by function-based supervision, which is divided into prudential supervision and supervision of market conduct. Prudential supervision addresses the question of whether participants in the financial markets can rely on their contracting parties to meet their financial obligations. The Dutch Central Bank (*De Nederlandsche Bank*) is responsible for prudential supervision. The supervision of market conduct focuses on the question of whether the participants in the financial markets are handled properly and whether they have accurate information. This supervision is the responsibility of the AFM.

There are no Dutch laws, regulations or rules specifically dealing with CRAs or credit ratings.⁷ There is no case law, the literature is scarce and there has hardly been any media attention. Following the recent financial scandals and in the context of the discussion on the Corporate Governance Code and the revision of the laws governing the financial markets, CRAs have, however, received some attention from the government and the AFM.

On March 1, 2004, the Ministers of Finance, Justice, and Economic Affairs sent a letter which briefly considered CRAs to the Second Chamber of Parliament.⁸ This letter was the government's reaction to the new Corporate Governance Code for listed companies, which had been published by the Committee Tabaksblat on December 9, 2003. The letter stated that the CRAs had become the subject of discussion due to the recent bookkeeping scandals. Some critics had argued that the bad financial situation

⁶ Nofsinger & Kim 2004, p. 65.

⁷ There is one exception. There is a provision making reference to credit rating and CRAs. A company that has received a credit rating for itself or for securities issued by it from one of the CRAs recognized by the Dutch Central Bank is deemed to be a professional market party pursuant to a provision contained in a regulation based on the Act on the Supervision of the Credit Act (*Wet Toezicht Kredietwezen*). An entity that borrows money exclusively from professional market parties is exempt from the licence requirement. The provision is especially relevant for special purpose vehicles in securitization transactions.

⁸ Letter from the Ministers of Finance, Justice and Economic Affairs to the Second Chamber of Parliament, dated March 1, 2004, contained in the *Kamerstukken II* 2003/04, 29 449, nr. 1, p. 21.

of the companies involved could have been signalled beforehand by the CRAs. But, as the letter stated, at the same time it is possible that the CRAs were also victims of the fraudulent practices. In addition, the system for compensation of CRAs is under discussion because of the potential for conflicts of interest. The letter further noted that initiatives were being taken at the international level (drawing up rules of conduct by IOSCO) and at the European level (drawing up recommendations by the European Commission, CESR and the European Banking Committee on the transparency of CRAs and the question whether it is necessary to implement rules). The provisional view of the government is that the functioning of the market offers sufficient guarantees for prudent behaviour of CRAs. If the quality of the rating were inadequate or if CRAs were too frequently involved in scandals, their own position would be undermined. In that case the market and the investors would attach little or no importance to the ratings. Before taking a definitive view on the issue regarding the possible regulation of CRAs, the government wishes to await the results of the examination of the European Commission, CESR and the European Banking Committee. This issue requires a European view because CRAs are not established in all member states of the EU whereas they do exercise influence in each member state.

Since CRAs are not subject to supervision in the Netherlands and because the CRAs that are active on the Dutch market are foreign, the developments at the international and the European level are very important. The IOSCO Code of Conduct and the advice of CESR are especially relevant.

2.2. IOSCO Code of Conduct

IOSCO is an international financial market supervisory organization, which consists of 181 members. These members are the various supervisory authorities of countries all over the world, including the Dutch AFM.

On September 25, 2003, the IOSCO Technical Committee issued a Statement of Principles Regarding the Activities of CRAs.⁹ This Statement of Principles laid out high level objectives that CRAs, regulators, issuers and other market participants should strive towards in order to protect the integrity and analytical independence of the credit rating process. The Statement of Principles includes the reduction of asymmetry of information in the marketplace, independence of CRAs, the avoidance of conflicts of interest, transparency with respect to the activities of CRAs, and maintenance of the confidentiality of non-public information. The focus of this Statement of Principles was on objectives rather than on methods or standards. This Statement of Principles made clear that the manner in which the principles are given effect will depend on local market circumstances and on each jurisdiction's legal system. According to the Statement of Principles, mechanisms for implementing the principles may take the form of any combination of government regulation, regulation imposed by non-government statutory regulators, industry codes and internal rating agency policies and procedures.

On December 23, 2004, after consultation with the IOSCO members, CRAs, representatives of the Basel Committee on Banking Supervision, the International Association of Insurance Supervisors, issuers, and the public at large, IOSCO published its Code of Conduct Fundamentals for Credit Rating Agencies.¹⁰

⁹ This document can be downloaded from IOSCO's On-Line Library at <<http://www.osco.org>> (IOSCOPD 151).

¹⁰ This document can be downloaded from IOSCO's On-Line Library at <<http://www.osco.org>> (IOSCOPD 180).

The IOSCO Code of Conduct is addressed to CRAs and contains practical measures that serve as a guide and framework for the implementation of objectives set out in the Statement of Principles. The essential purpose of the Code of Conduct is to promote investor protection by safeguarding the integrity of the rating process. The Code of Conduct can be broken down into three sections:

1. the quality and integrity of the rating process;
2. CRA independence and avoidance of conflicts of interest; and
3. CRA responsibilities towards the investing public and issuers.

IOSCO believes that there will be sufficient market pressure on CRAs to abide by the voluntary code and that further regulation is not necessary. The measures are not intended to be all inclusive. CRAs and regulators should consider whether additional measures may be necessary for a specific jurisdiction. In addition, the IOSCO Code of Conduct is not designed to be rigid or formalistic. CRAs have a degree of flexibility in how those measures are incorporated in the CRAs' individual codes of conduct according to their specific legal and market circumstances. The IOSCO Code of Conduct proposes a comply or explain approach.

In the course of the year 2005 Moody's, Standard & Poor's and Fitch have each developed and published a code of conduct along the lines of the IOSCO Code of Conduct in order to create more transparency around their standard practice.

2.3. CESR's Advice

The European Commission established CESR in June 2001. It has a coordinating and advisory role and works to ensure the implementation of community legislation in the member states. Each member state has one member on the committee. The members are the heads of the national public authorities competent in the field of securities (in the Netherlands the AFM).

On March 30, 2005 CESR published a technical advice to the European Commission on possible measures concerning CRAs.¹¹ Pursuant to CESR's advice, the substance agreed by the IOSCO Code of Conduct provides the right answers to the issues raised by the European Commission mandate. It is felt that the IOSCO Code of Conduct will improve the quality and integrity of the rating process and the transparency of CRAs' operations. CESR supports a wait and see approach, where no registration system is set up at present. The effects of the IOSCO Code of Conduct are given time to work, as IOSCO and its members have committed to monitoring the implementation of the Code. In the case of failure of such self regulation, the need for statutory regulation will be reconsidered.

2.4. Subsequent Developments in the Netherlands

2.4.1. Reaction of the AFM and the Ministry of Finance

In April 2005, immediately after the publication of CESR's advice, the AFM published a summary of the advice, which it endorses, on its website.¹²

In a report of August 2005 concerning task analysis the Ministry of Finance stated that in the field of supervision on the financial markets it takes a reserved stance towards the expansion of supervision. It promotes self-regulation where

¹¹ CESR/05-139b.

¹² This document can be downloaded at <<http://www.afm.nl>>.

possible, referring to the Corporate Governance Code of the Committee Tabaksblat as an example. Without making reference to the IOSCO and the CESR, the Ministry of Finance explicitly stated that it sees no reason to introduce supervision by the government in the field of CRAs.¹³

2.4.2. Recent Legislative Developments

With respect to the supervision in the financial markets there have been some recent legislative developments. The question arises whether these developments apply to CRAs. For example, Article 47e of the Act on the Supervision of the Securities Trade (*Wet toezicht effectenverkeer*) ('Wte') concerns investment advisors. This provision entered into force on October 1, 2005 and is based on an EU Directive of 2003.¹⁴ Article 47e Wte contains publication and information requirements for persons who render investment recommendations to the public. The purpose of this provision is to prevent the misleading of the public. The legislative history of this provision explicitly states that CRAs fall outside the scope of Article 47e. This is in line with recital (10) of the EU Directive of 2003, which reads in relevant part:

'Credit rating agencies issue opinions on the creditworthiness of a particular issuer or financial instrument as of a given date. As such, these opinions do not constitute a recommendation within the meaning of this Directive'.¹⁵

On January 1, 2006 the Dutch Financial Services Act (*Wet financiële dienstverlening*): the 'Wfd', entered into force. This Act changed the license obligations for many financial service providers and placed them under the supervision of the AFM. In order for CRAs to fall under the scope of this Act, the rating of CRAs would have to qualify as a 'financial service'. Under Article 10 of the Wfd, providing a financial service in the Netherlands without having received a license from the AFM, is prohibited. A financial service is defined in Article 1 of the Wfd as offering a financial product, advising or acting as an intermediary with respect to the offering of a financial product to a consumer. A financial product is defined as a checking account, securities, electronic money, credit, a saving account, insurance, and an investment object. A credit rating does not qualify as a financial product within the meaning of the Wfd and therefore rendering a rating does not qualify as offering a financial product. Furthermore, it is clear that a CRA does not act as an intermediary in any way. Then the question remains, whether rendering a rating must be deemed to be advising within the meaning of the Wfd. Pursuant to Article 1, Wfd the term 'advising' means: 'The recommending of one or more specific financial products to a specific consumer'.

Since a credit rating is not a recommendation, and certainly not a recommendation to a specific consumer, a credit rating does not fall under the term 'advising' within the meaning of the Wfd.

¹³ Ministerie van Financiën 2005, p. 20.

¹⁴ European Commission Directive 2003/125 of December 22, 2003 implementing Directive 2003/16 EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest.

¹⁵ Recital 10 of this Directive continues to state that CRAs should consider adopting internal policies and procedures designed to ensure that credit ratings published by them are fairly presented and that they appropriately disclose any significant interests or conflicts of interest concerning the financial instruments or the issuers to which their credit ratings relate.

The Netherlands has an elaborate system of supervision on financial institutions (e.g. banks, insurance companies and investment funds). The Ministry of Finance is working on a substantial revision of the legislation concerning this supervision, whereby eight statutes will be replaced by one single statute called the Act on the Financial Supervision (*Wet op het financieel toezicht*): the 'Wft'. The Wte and the Wfd are among these eight statutes. A (revised) legislative proposal for the Wft was submitted to the Second Chamber of Parliament on October 19, 2005.¹⁶ The explanatory note to Article 5:64 Wft (which is very similar to Art. 47e Wte) also states that CRAs fall outside its scope.¹⁷

Where CRAs may obtain price sensitive information in the process of preparing their rating, the Dutch insider trading rules may become relevant. These rules were amended on October 1, 2005.¹⁸ However, in view of the fact that these rules apply to all persons who are active in the financial markets, we will not discuss them here.

The foregoing leads to the conclusion that in the Netherlands the effects of the IOSCO Code of Conduct are given time to work and if there is reason to believe that the CRAs do not comply with this Code of Conduct, the government can still decide to take legislative action.

3. Liability of CRAs

3.1. General

The liability of CRAs can be distinguished between contractual liability vis-à-vis the issuing company and non-contractual liability.¹⁹

With respect to non-contractual liability, a distinction can be made between the rating of notes and the annual rating of companies, and between solicited and unsolicited ratings. Also one can distinguish between liability vis-à-vis investors and liability to the issuer and other interested parties such as competitors. Liability vis-à-vis investors may become relevant in particular where the company is bankrupt and the creditors do not find recourse with the company.

In the Netherlands there is no case law on the liability of CRAs. In addition, we have found only one legal article on this topic.²⁰ When faced with CRA liability, Dutch courts will probably make a comparison with the liability of banks for a prospectus or a fairness opinion, the liability of auditors for their opinions on the annual accounts and the liability of journalists and other persons who make statements in the media.²¹ The courts may also be inspired by the much more developed US, English and German case law and literature in this respect.

¹⁶ *Kamerstukken II 2005/06*, 29 708, nr 19.

¹⁷ *Kamerstukken II 2005/06*, 29 708, nr 19, p. 609.

¹⁸ Sections 45a up to and including 46a Wte.

¹⁹ We will not discuss the contractual liability where a bank or an investor (e.g. a pension fund) has requested and relied on a rating and where a subscriber of a newsletter has relied on a rating in a newsletter and wishes to take action based on the subscription agreement. In the first two examples contributory negligence will be an important element. In the third example the question arises whether the subscription agreement creates sufficient privity to allow a claim out of contract.

²⁰ Bertrams 1998, p. 341. This article pays special attention to the standard of care to be observed by CRAs.

²¹ Legal opinions are less suitable for a comparison because these are generally not published, but issued to a limited group of persons. In addition, there is no published case law and the literature on the liability for legal opinions under Netherlands law is scarce.

However, it is improbable that case law on CRA liability will develop very much in the Netherlands in the near future. As will be discussed below there are inherent limitations on the jurisdiction of Dutch courts and to the extent that there is jurisdiction, investors or other plaintiffs may prefer to take action outside the Netherlands. Furthermore, it is questionable to what extent the Dutch courts would apply Dutch law.

3.2. *Private International Law*

We understand that most contracts of the reputable CRAs contain a forum clause pursuant to which the New York or London courts have jurisdiction. A contractual choice of a Dutch court would be extremely rare, even where the issuing company is Dutch. In the absence of a forum clause, it will probably be the New York or English Courts that have jurisdiction, because New York or London are the places where the CRAs are based (not having a branch in the Netherlands) and will probably be the places where the obligations of the CRAs must and have been performed. For a defendant CRA in New York this conclusion arises from Article 6 of the Dutch Code of Civil Procedure whereas for the defendant CRA in London this is based on Articles 2 and 5 of the EU Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.²² If a Dutch court would assume jurisdiction, that court would probably face a choice of law clause for New York or English law. In the absence of a choice of law clause, the Dutch court would most likely hold New York or English law applicable in any event, based on Article 4 of the EC Convention on the law applicable to contractual obligations.²³ Pursuant to that provision the law of the country where the party who is to affect the characteristic performance under the contract (i.e. the party other than the party that makes a payment under the contract) has its central administration, applies.

Non-contractual liability under Dutch law would be based on the general tort provision or the more specific tort provision relating to misleading advertising. Where the defendant is a CRA established in New York article 6 of the Code of Civil Procedure will apply whereas, if the defendant is a CRA established in London, article 5 of the above-mentioned EU regulation will apply. Both provisions are more or less similar. Pursuant to these provisions the Dutch courts have jurisdiction over tort actions if either the event that has caused the damage or the damage itself has occurred in the Netherlands. Based on these provisions the Dutch courts would probably assume jurisdiction if the issuing company is established in the Netherlands, because in that case the event that has caused the damage will probably be deemed to have taken place in the Netherlands. The mere fact that an investor who suffers financial damage is domiciled in the Netherlands does not mean that the damage has occurred in that same country, and is in itself insufficient to create forum in the Netherlands.²⁴ Pursuant to Article 3 of the Dutch Act on Law of Conflicts on Torts, a Dutch court, in the event that it assumes jurisdiction, would probably apply Dutch tort law, if the investors are domiciled in the Netherlands.

²² Council Regulation (EC) no 44/2001 of December 22, 2000.

²³ EC Convention on the law applicable to contractual obligations of June 19, 1980, Rome.

²⁴ European Court of Justice June 10, 2004, C-168/02, *Jur.* 2004, p. 1-6009 (*Kronhofer v Maier et al.*).

3.3. *Contractual Liability*

To an important extent the contractual liability of CRAs is determined by the contract existing between the CRA and the issuing company.

If Dutch law applies to the contract between the CRA and the issuing company, the contract would be qualified as a service contract (*overeenkomst van opdracht*), and would be governed by Articles 400 through 413 of Book 7 of the Dutch Civil Code ('DCC'). These provisions do not contain rules that are relevant for the contractual liability of CRAs.²⁵

We can think of two situations where a CRA could be held liable based on contract:

1. the situation where the company has received too low a rating, a downgrading or a refusal to upgrade;
2. the situation where the company is held liable by investors and makes a cross claim against the CRA.

If a company receives too low a rating, its access to the capital market may be limited and it may go bankrupt or pay excess interest on its debts. It is difficult to think up circumstances where too low a rating would result in liability of the CRA. The issuing company will have sufficient information to convince the CRA to render a fair rating, and if it does not succeed in convincing the CRA it can engage one of the other reputable CRAs. If the company does not succeed in obtaining a higher rating from the other CRAs either, it may be difficult to convince a court that the rating was too low. Similar considerations apply in the case of downgrading or refusal to upgrade.

Contractual liability may also arise where the issuing company is held liable by investors based on too high a rating, and where the company subsequently makes a cross claim against the CRA. In practice, this is not a likely scenario either. The CRA may raise as a defence that the company has purposely withheld relevant information. Furthermore, it will be difficult for the company to show damages. The company will be held liable if it is unable to repay the interest and principal. Had the rating been lower, the interest would have been higher, and in that case it would still have been more difficult to repay the investors, and that the company would not have obtained the financing at all. The situation where investors would claim, that they would have agreed upon a higher interest had they known the far lower rating, seems rather academic. In that case it will also be difficult to show damage caused by the CRA.

In addition, the contracts of Standard & Poor's and Moody's contain far reaching exoneration and indemnification clauses. They stipulate that the ratings are mere statements of opinion, that there is no warranty or liability with respect to the rating and that the rating is based on information provided by the client. The defence that the rating was a mere statement of opinion and no recommendation to buy, sell or hold the securities will probably not be effective but, in many circumstances, an exoneration clause will.

Generally, an exoneration is permitted under Dutch contract law. The limits, however, are found in the principle of reasonableness and fairness, which in exceptional circumstances can prevent a party from relying on a clause in a contract.

²⁵ Section 7:404 DCC provides that if it is the intention of the parties that a specific employee must perform the services, that person is personally jointly and severally liable with the contracting party for damage resulting from a breach of contract. In view of the nature of the contract with a CRA this provision will not be applicable.

Whether or not the principle of reasonableness and fairness prevents a party from relying on an exoneration clause depends on all the circumstances of the case such as the extent to which the exonerated party has been negligent, the nature and seriousness of the interests at stake, the nature and the further contents of the contract, the relative bargaining strength of the parties, the mutual relationship between the parties, the manner in which the clause came into existence and the extent to which the non-exonerated party was aware of the clause. This criterion was set forth in a landmark case before the Supreme Court.²⁶

3.4. *Non-contractual Liability*

3.4.1. General

The normal basis for non-contractual liability is tort. Dutch law contains tort provisions of a general nature in Article 162 et seq. of Book 6 DCC. From Articles 6:162 and 6:163 five requirements for liability in tort can be distilled: (1) a tortuous act; (2) imputability of the tortuous act to the tortfeasor; (3) damage; (4) causal connection between the act and the damage; and (5) relativity.

Article 162 distinguishes three categories of tort:

1. an infringement of another person's rights (e.g. an intellectual property right or another ownership right);
2. an act or failure to act in violation of a statutory duty; and
3. an act or failure to act in violation of the unwritten requirements of proper societal conduct.

For the liability of CRAs only categories (b) and (c) seem relevant.²⁷

Article 6:163, which contains the relativity requirement, provides that there is no obligation to pay damages if the rule that is violated is not intended to protect against the damage suffered by the injured party.²⁸ The question whether or not an act of failure to act is in violation of the unwritten requirements of proper societal conduct (in other words: a breach of a standard of care) and whether or not the other requirements for liability in tort have been met depends on all the circumstances of the case. As a result the doctrine and case law on tort are very casuistic.

3.4.2. Rating in a Prospectus relating to a Note Issue

The most probable scenario of liability of CRAs seems to be the non-contractual liability vis-à-vis investors, where the CRA has rendered too high a rating with respect to an issue of notes. The credit rating is usually published in a prospectus.

We believe that when a Dutch court will be confronted with a claim by investors against a CRA, in particular when the claim is made in connection with a note issue, the court will be strongly inspired by the case law and literature about the liability of a lead bank for a misleading prospectus and the liability of a bank for a misleading fairness opinion, for the following reasons:

²⁶ HR (Dutch Supreme Court) 19 May 1967, *NJ* 1967, 261 (*Saladin v HBU*); this decision was followed by a number of other Supreme Court decisions, in which additional relevant circumstances were discussed.

²⁷ As far as category (2) is concerned only Section 6:194 DCC, to be discussed below, seems relevant.

²⁸ A comparison may be made with the US doctrine of the foreseeable plaintiff.

1. the banks operate in the same market as CRAs, the capital market, where the requirements for transparency, provision of information and protection of investors are pre-eminent;
2. although there is no obligation to involve a bank in the issue of securities or to obtain a fairness opinion in a public offer, it is practically impossible not to involve a bank; the same goes for CRAs;
3. although there is no statutory or regulatory obligation to do so, both the banks and the CRAs have a duty to perform an examination of documents and other information relating to the company;
4. for the performance of their tasks the banks – as well as the CRAs, – are heavily dependent on a proper provision of information by the company; and
5. as is the case for credit ratings of CRAs, the statements of banks are contained in a prospectus.

A more specific basis for liability vis-à-vis investors in the context of a note issue under Dutch law could be Article 194 of Book 6 DCC. This provision is a *lex specialis* of the general tort provision and concerns misleading advertisement. Its purpose is to provide protection to consumers. The relevant part of Article 6:194 reads:

‘A person who makes public or allows to be made public a statement regarding goods or services which he, or the person on whose behalf he acts, offers in the conduct of a profession or business, acts unlawfully if this statement is misleading in one or more of the following respects, for example as to

(a) the nature, composition, quantity, quality, characteristics or possibilities for use;

.....

(d) the price or its method of calculation;

.....

(g) the conditions under which goods are supplied, services are rendered or payment is made;

(h) the extent, content or duration of the warranty;

....’

Article 6:195 shifts the burden of proof to the detriment of the person who has determined or co-determined or has caused to be determined or co-determined the content and the presentation of the statement in whole or in part with respect to two factors (1) the accuracy and completeness of the facts contained in the statement; and (2) imputability.

Case law has firmly established that Articles 6:194 and 6:195 can serve as the basis for liability of the issuing company and the accompanying bank to investors for a misleading prospectus. In the past decades the Supreme Court rendered three decisions on prospectus liability. In all three cases a bank was involved as a party.

The milestone case for the prospectus liability of banks is the decision of the Supreme Court of 1994 in the Co op case.²⁹ That case related to the issue of bonds.

²⁹ HR 2 December 1994, NJ 1996, 246 (*ABN AMRO v The Association for the representation of the interests of bondholders of Coopag Finance BV*).

The investors filed a claim against lead bank ABN AMRO based on Articles 6:194 and 6:195. An important reproach towards ABN AMRO was that the annual accounts of 1986 and 1987 (which formed part of the prospectus) had not consolidated 214 affiliated companies, which had debts of more than DM 1.5 billion. The Court of Appeals of Amsterdam held that the relevant inquiry concerns the duty of care that a bank must observe vis-à-vis the average investor. The bank argued that it had not made the misleading annual accounts public because those accounts had already been made public before the issue of the prospectus. The Court of Appeals rejected that argument and held that the term ‘making public’ must be broadly interpreted and that there exists no such ‘rule of exhaustion’. The Supreme Court also rejected the defence of the bank that it had relied exclusively on the unqualified auditors’ opinion relating to the relevant annual accounts. To what extent a bank is allowed to rely on an auditors’ opinion depends on the circumstances of the case.

In another important decision the Supreme Court considered prospectus liability in the 1998 *Boterenbrood* case.³⁰ In that case private investors claimed that a bank was liable based on Articles 6:194 and 6:195 because the prospectus of an investment fund (in Canadian real estate) did not mention that the participants (partners) in the fund (a Canadian limited partnership under the laws of Alberta) who had sold their participation to the fund could still be held liable by the fund up to the amount of the sales price. The Court of Appeals of Amsterdam overturned the decision of the District Court and held that the prospectus was not misleading because the liability of an exiting partner of the Canadian fund would not materially deviate from the liability of an exiting partner of a Dutch partnership. The Supreme Court reversed the decision of the Court of Appeals. It held that the bank had the burden of proving that this continuing liability after exit was so customary that there was no need to make mention of this relevant fact in the prospectus. It also held that the prospectus must contain complete information that is not misleading and that the incomplete or misleading character cannot be taken away by the possibility for the investors to seek further information.

The more recent DAF case of 2001 concerned a negative pledge in a prospectus.³¹ The bondholders of DAF NV (represented by NTM) claimed that the negative pledge related to the assets of the entire DAF group based on a broad interpretation of the negative pledge, thereby relying on the reasonable intentions and expectations of the parties, whereas the trustees held the view that the negative pledge was limited to the assets of the top holding company DAF NV only, thereby relying on the strict wording of the relevant clause. The Supreme Court reversed the decision of the Court of Appeals of Amsterdam, and held that contrary to the general rule of contract interpretation, in the case of bond provisions contained in a prospectus the wording is generally decisive. The Supreme Court referred the matter to the Court of Appeals of The Hague. That Court rejected the claims of the bondholders following the narrow interpretation of the negative pledge clause. The Court held that it is not necessary for an investor to have read the prospectus in order to invoke Article 6:194. In addition, it ruled that the relevant inquiry should focus on the average investor notwithstanding the fact that the majority of the investors were professionals. The Court also held that the bank could reduce its liability by taking corrective measures.

³⁰ HR 8 May 1998, *NJ* 1998, 888 (*Boterenbrood v MeesPierson*).

³¹ HR 23 March 2001, *NJ* 2003, 715 (*The Trustees of DAF, Stichting OFASEC and ABN AMRO v NTM*).

After a certain date it had become clear to the market that the bank held the narrow view.³²

The liability for fairness opinions may also be a source of inspiration for the liability for credit ratings. A fairness opinion of a bank is often included in a prospectus for the offer on listed shares, and has as its' purpose, to give the management board of the target comfort about the price. In the Netherlands there is no case law on liability for fairness opinions, but there are two legal authors who have paid attention to this topic: J.M. Van Dijk in an article in 1998³³ and S. Parijs in a recent dissertation.³⁴ According to both authors Article 6:194 is the legal basis for liability of a fairness opinion, not only to the management board as the addressee of the opinion, but also to the existing shareholders who are invited to sell their shares. They agree that a fairness opinion contains statements within the meaning of that provision, that the bank makes these statements public or allows the statements to be made public, and that shares are goods within the meaning of Article 6:194.

A CRA will be liable under Articles 6:194 and 6:195 if the following requirements have been met:

1. the CRA must make a statement public or allow a statement to be made public;
2. the CRA must act for a person who offers goods or services in the conduct of a profession or business;
3. the statement must be misleading;
4. the misrepresentation must be imputable to the CRA;
5. the investors must have suffered damage;
6. there must be a causal connection between the damage and the misleading statement; and
7. there must be relativity between the misrepresentation and the damage as suffered by the investors.

There can be no doubt that a credit rating is a statement within the meaning of Article 6:194. In our view the CRA makes it's rating public or allows it to be made public. The Dutch wording of Article 6:194 '*laten openbaar maken*' is not unequivocal. It can mean 'to cause to be made public', but it can also mean, 'to allow to be made public'. In our view the correct interpretation would be 'allow to be made public'. The parliamentary documents, though not specifically dealing with the distinction between 'causing' and 'allowing' to be made public, promote a broad interpretation of publishing and state that it is sufficient that the public could have access to the information.³⁵ It is not necessary that the claiming investors have indeed acquainted themselves with the statement. The Supreme Court in the Co-op case and the District Court of Amsterdam in the Boterenbrood case³⁶ also propagated, though in different contexts, a broad interpretation of publishing. In the context of the discussion about the fairness opinion both Van Dijk and Parijs hold the broad view that the term '*laten openbaar maken*' means, 'allowing to be made public'.³⁷ Another argument for the

³² Court of Appeals of the Hague 29 June 2004, *JOR* 2004, 298 (*NTM v The Trustees of DAF, Stichting OFASEC and ABN AMRO*).

³³ Van Dijk 1998, p. 318.

³⁴ Parijs 2005; this dissertation has been written in English.

³⁵ *Kamerstukken II* 1975/76, 13 611, nr 3, p. 9.

³⁶ District Court of Amsterdam 12 July 1995, unpublished, referred to in HR 8 May 1998, *NJ* 1998, 888 (*Boterenbrood v MeesPierson*).

³⁷ Van Dijk 1998, p. 320; Parijs 2005, p. 166. Blom 1996, p. 70 and 71, holds a contrary view.

broad view on ‘*laten openbaar maken*’ is that Article 6:195 uses the active word ‘*doen*’ (which undoubtedly means ‘to cause’) instead of ‘*laten*’ (which can mean either ‘to cause’ or ‘to allow’). Whether a CRA publishes the rating on its website or in newsletters, there can be no doubt that it makes the rating public.

It is clear for these prospectus ratings that a CRA acts for a person who offers goods or services in the conduct of a business. All three Supreme Court cases and all legal authors have confirmed that securities (including notes) qualify as ‘goods’ within the meaning of Article 6:194.

A statement can be misleading if it is incorrect or incomplete. Concerning ratings, the reproach will almost always be that it is incorrect. The statement must concern a material fact. This requirement is fulfilled because they are investors who make their decision to invest in notes are heavily influenced by the credit rating. We can imagine that a CRA has some discretion. For example, it may be difficult for an investor to show that rating BBB is incorrect but that instead rating BBB – is correct. The criterion is the average investor. The question whether there is mis-representation will also be influenced by the high professional level that can be expected from a CRA.

The misrepresentation must be imputable to the CRA. This means that it must be due to negligence or be for the risk or account of the CRA. Since misleading information without negligence is for the risk and account of the issuing company, it is decisive whether or not the CRA has been negligent. The CRA must perform a proper examination of the information provided to it. The IOSCO Code of Conduct hardly contains any clear guidelines for a proper examination. A defence may be that the company provided incorrect information or withheld relevant information from the CRA, but the CRA should always be suspicious and be able to smell a rat. It is possible that the CRA has performed a proper examination but subsequently has drawn the wrong conclusion. Probably, as a general rule, a CRA cannot exclusively rely on the opinion of auditors on the annual accounts.³⁸ The duty of care may be higher because a high professional level is expected from the CRA, the issuing companies are often forced to obtain a rating and the three top companies enjoy an oligopoly.³⁹

An investor who does not receive repayment on his note can in most cases easily show damage. Causal connection between the damage and the publishing of misleading information must also be shown. With respect to prospectus liability the general view is that this hurdle is not very big. Even if the investor has not read the prospectus there may a causal connection, because the inaccuracy of the rating may create a positive market sentiment concerning the offer, which may influence investors to purchase notes.⁴⁰

The relativity requirement will be easily satisfied. The purpose of Article 6:194 is to protect consumers and other persons to whom goods have been offered under misrepresentation. The Supreme Court decisions in the Coop and DAF cases and the decision of the District Court in the Boterenbrood case confirm that investors in securities enjoy the protection of Articles 6:194.

³⁸ This was decided for the prospectus of lead bank ABN AMRO in HR 2 December 1994, *NJ* 1996, 246 (*ABN AMRO v The Association for the representation of the interests of bondholders of Coopag Finance BV*).

³⁹ HR 2 December 1994, *NJ* 1996, 246 (*ABN AMRO v The Association for the representation of the interests of Coopag Finance BV*) and Court of Appeals of The Hague 29 June 2004, *JOR* 2004, 298 (*NTM v The Trustees of DAF, Stichting OFASEC and ABN AMRO*).

⁴⁰ Den Boogert 2002, p. 190; Maris & Boele 1996, p. 146 and Parijs 2005, p. 167.

Now that in the context of a note issue the CRA falls within the scope of Article 6:194, it is highly probable that it fulfils the requirement of Article 6:195: the CRA will be deemed to have determined or co-determined the part of the prospectus that relates to the credit rating. The CRA is usually involved in the drafting of the prospectus or at least in drafting those pages of the prospectus that concern the rating. This means that the CRA will have the burden of proving that the information (concerning the rating) was correct and that it has not been negligent. The CRA may even publish the rating directly on its website.

Finally, the question arises what the CRAs' liability is with respect to a failure to downgrade or an unjustified upgrading with respect to the issue of notes. The legal basis for such liability will no longer be Article 6:194 but Article 6:162 because this upgrading and downgrading will be done after the notes have been offered and sold by the issuer. Probably the relativity requirement will be fulfilled as far as investors are concerned. However, negligence will be hard to prove, although the court may under certain circumstances shift the burden of proof to the CRA on the basis of reasonableness. In addition, it may be difficult to show damage and causal connection.

3.4.3. Solicited Rating of the Company

Now that we have dealt with the most probable scenario for liability for a credit rating, i.e. the issue of notes, the question arises of what the exposure to liability is in case of a solicited rating of the company itself, which, in principle, takes place on an annual basis. In such a case, Article 6:194 will not apply, because such a rating does not concern a statement regarding goods or services that are offered. In this situation the general tort provision contained in Article 6:162 should be the basis. Causal connection and relativity may be a problem for the investor.

Solicited credit ratings bear some resemblance to accountants' opinions on the annual accounts. Both ratings and accountants' opinions are published statements of an independent and objective expert, paid by the company. Concerns of confidentiality and conflicts of interest play a role. To a large extent both ratings and accountants' opinions are based on information provided by the company and are rendered for the benefit of third parties to a large extent. Both CRAs and accountants lend their reputation in rendering an opinion concerning the financial situation of the company. Actual and potential stakeholders of the company attach importance to ratings and accountants' opinions.

As to the standard of care an accountant must exercise the reasonable care of a competent person within his profession.⁴¹ To what extent third parties such as existing and future shareholders, noteholders and other creditors can hold accountants liable based on negligence with respect to their opinions has not been clearly defined by case law. In an interesting article E.A. de Jong provides a summary of the case law on third party liability of accountants for their opinions.⁴²

There is one relevant Supreme Court decision in a somewhat different context.⁴³ In this case the accountant rendered an opinion on the value of a contribution in kind in the context of an incorporation of a company. Shortly after its incorporation, the company went bankrupt. The trustee in bankruptcy held the accountant liable because he had assigned too high a value to the assets contributed by the founders. According

⁴¹ For example District Court of Rotterdam 19 November 1998, *JOR* 1999, 31 (*Van der Vorst v Sijstermans*).

⁴² De Jong 2003, page 600; see also Koolmees 2005, p. 457.

⁴³ HR 6 December 2002, *NJ* 2003, 63 (*Goedèl v Arts*).

to the Supreme Court, in view of the statutory provision that requires the accountant's opinion, the accountant's opinion with regard to the contribution in kind must be regarded as a safeguard for shareholders and other third parties. The Court of Appeals had ruled that rendering a faulty opinion does not only constitute a breach of contract to the company, but also a tort vis-à-vis the collectivity of creditors.

There is case law of lower courts that shed some light on the duty of care vis-à-vis third parties with respect to accountants' opinion on the annual accounts. Although the decisions are not always consistent the general rule may be derived that there is liability to a third party where it was foreseeable for the accountant that the third party would rely on the opinion without itself conducting an examination. The accountant may avoid liability based on contributory negligence where the third party is an expert.⁴⁴

Dutch legal authors often refer to the famous *Caparo* case of the English House of Lords.⁴⁵ When deciding a case on accountant's liability, the Dutch Supreme Court will probably take this English decision on accounts' liability into consideration. The House of Lords set out three criteria:

1. the reliance upon the accountant's opinion must be reasonably foreseeable;
2. there must be sufficient proximity between plaintiff and the accountant; and
3. it must be just and reasonable under the circumstances to impose a duty of care on the accountant.

Although solicited ratings show resemblance with accountants' opinions there are also some differences. Accountants play a more central role than CRAs. All companies, except those exempted, must appoint an accountant. He has a public task and is governed by statutes and professional rules and guidelines. Pursuant to one of these rules, an accountant must inform the management board in writing of a reasonable suspicion of fraud, and if the management board is involved in the fraud, he must inform the supervisory board. An accountant has a more active involvement in the company's affairs. As a result, the exposure to liability of an accountant will be higher than that of a CRA. There are also some other factors that CRAs propagate in their codes of conduct (e.g. no expert status, no duty to verify, no statement of fact) which may further decrease the risk of liability. These factors will be discussed below under limitation of liability.

Other factors which may influence the liability of a CRA will be the expertise of the user of the rating, the lapse of time between the rating and the relevant transaction of the plaintiff and the nature of the plaintiff. As a general rule, due to the relativity requirement a noteholder will have a stronger claim based on a negligent credit rating than a shareholder.

⁴⁴ Court of Appeals of Den Bosch 28 September 1983, *NJ* 1983, 120; Court of Appeals of The Hague 27 June 2000, *JOR* 2001, 70 (*Sistermans v Van der Vorst*); Court of Appeals of Amsterdam 6 February 2003, *JOR* 2003, 93 (*Van Lanschot Bankiers v KPMG*); Court of Appeals of The Hague 27 May 2004, *JOR* 2004, 206 (*Stichting Vie d'Or v Deloitte & Touche*); District Court of Breda 20 June 1995, *NJ* 1997, 712; District Court of Amsterdam 11 June 1997, *JOR* 1997, 120 (*Kesler v KPMG*); see for a different view District Court of Zutphen 12 December 2002, *NJkort* 2003, 26, which ruled that except for special circumstances it is only the company that can hold an accountant liable for negligence.

⁴⁵ *Caparo Industries v Dickman* [1990] 1 All ER 568.

3.4.4. Unsolicited Rating

In the case of an unsolicited rating, it may occur that the company feels that the rating is too low or unjustifiably lowered, and that as a result it must pay too high an interest on notes or its shares must suffer a loss of points on the stock exchange. In such a case the company may consider bringing action against the CRA based on defamation, which is governed by the general tort provision of Article 6:162. In this respect the standard of care for making public statements in the media and newsletters becomes relevant. There exists much case law on this topic in the Netherlands.

The liability is dependent on a weighing of the interests of the plaintiff, the defendant, and the public interest. As a general rule, there is liability if the defamatory statement is incorrect and the perpetrator knew or should have known this. The public interest plays a role with respect to statements in the media. The public interest is imbedded in the freedom of speech guaranteed by the Dutch Constitution and the European Convention for Human Rights.⁴⁶ Where there is a personal opinion the courts will be more hesitant to hold a statement unlawful than in case of a statement (or suggestion) of facts.⁴⁷ Pursuant to the Supreme Court, whether or not a public statement is lawful depends on all the circumstances of the case, such as the nature of the statements, the seriousness of the consequences of the publication for the injured party and the extent to which the statements were supported by facts available at the time of the publication.⁴⁸ The Supreme Court also held that the nature of the medium is relevant (television is more pervasive than newspapers) as well as the image of impartiality and expertise that the person who makes the statement enjoys with the public.⁴⁹ In this case the Supreme Court held that the nature and purpose of the television program 'Ombudsman' created the impression with the public that the statements in the program originate from an impartial institution which is active in the public interest. Therefore, the public would assume that statements, qualifications and accusations made in this program were correct and well founded more readily than for those made in the media in general. As a result, the producers of this program must observe a higher duty of care than is normally required in journalism. A more recent decision of the Court of Appeals of Amsterdam is in line with this Supreme Court decision. In that case Lakeman had published statements in a professional journal about a doubtful payment by DASA to the CEO of aircraft company Fokker in connection with the sale of Fokker to DASA. Lakeman had made clear that his statements were based on rumours and on an anonymous letter in his possession. Lakeman had not consulted with Fokker, the CEO or DASA before issuing his statements. The Court of Appeals ruled that such consultation would have been desirable. The Court of Appeals ruled that Lakeman is a well known figure in the world of companies and multinationals to whose publications in a professional journal will be attached more importance than to a small article in the newspaper of an average journalist. As a result, a higher degree of care is expected from him in taking into account the interests of DASA.⁵⁰ Nevertheless, the Court of Appeals held that Lakeman had complied with the required standard of care.

⁴⁶ Article 7 of the Dutch Constitution and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁴⁷ Asser-Hartkamp 2002, paragraph 239.

⁴⁸ HR 24 June 1983, *NJ* 1984, 801.

⁴⁹ HR 27 January 1984, *NJ* 1984, 803 (*Leading Succes People v VARA*).

⁵⁰ Court of Appeals of Amsterdam 30 May 1996, *Mediaforum* 1996-9, p. B 109 (*Lakeman v DASA*).

Where the unsolicited rating is too high or too low (or where the CRA fails to downgrade or upgrade such a rating) investors or other market parties who rely on it may suffer damage and bring a claim against the CRA. Such a claim cannot be based on Article 6:194 because the CRA has not acted on behalf of the company, and, in addition, where ratings of the company are concerned, has not rendered a statement regarding an offer of goods or services. It will be difficult to bring a successful claim on the basis of Article 162, especially where the CRA has made clear that the rating was unsolicited.⁵¹ It is improbable that causal connection and relativity will be established. A solid defence for the CRA may be that the user of the information should have verified the information by examining more official documents or by consulting a professional advisor. We are not aware of any case law concerning liability of persons for public statements of a commercial nature based on the general tort provision.

3.4.5. Limitation of Liability and Contributory Negligence

The general view is that an exclusion from liability based on Article 6:194 and Article 6:162 has no effect.⁵² However, it will be possible to limit the duty of care to a certain extent, in particular by limiting the scope of the opinion. As the banks do in their fairness opinions, CRAs have included in their respective codes of conduct a number of provisions that serve this purpose. For instance, they state that the ratings are based on public information and information provided by the company, and that they have not verified this information, that the ratings do not constitute an investment, financial or other advice, that the ratings are valid only as of the day of the rating, that they are not experts, that the ratings are mere opinions and not recommendations to purchase, sell or hold securities, and that the ratings are not statements of fact. These disclaimers will decrease the exposure to liability to a certain extent. However, some of them will have only a limited effect.⁵³

In our view, the reservation that the rating is not a recommendation to buy, sell or hold securities, and the disclaimer of expert status will not be very effective, and the fact that a rating is labelled an opinion is not conclusive if there are materially false factual components. The disclaimers will be less effective if they are simply included in the codes of conduct than if they are actually included in the rating itself.

Another circumstance that may decrease the liability of the CRA is contributory negligence of the user of the rating. Article 6:101 DCC provides that if the damage can be imputed to the injured person himself, the obligation to pay damages is apportioned between the injured person and the tortfeasor *pro rata parte* the degree the damage can be imputed to each of these persons. For instance, if the CRA assigns a high credit rating, but recent annual accounts clearly show that the company is near bankruptcy, contributory negligence will reduce the liability of the CRA to a certain degree, in particular where the user of the rating is a professional party.

⁵¹ Measure 3.9 of the IOSCO Code of Conduct provides for disclosure of whether the issuer has requested a credit rating and whether the issuer has participated in the rating process. The CRA should disclose its policies and procedures regarding unsolicited ratings.

⁵² Van Dijk 1998, p. 321; Parijs 2005, p. 172; this rule can also be derived from the decision of the HR 2 December 1994, NJ 1996, 246 (*ABN AMRO v The Association for the representation of the interests of bondholders of Coopag Finance BV.*).

⁵³ Van Dijk 1998, p. 321; Parijs 2005, p. 170-172.

3.4.6. Liability vis-à-vis Competitors

One could also think of a situation where, should a CRA give too high a rating on notes issued by a company, the competitor of that company would file a claim against the CRA. The basis for such a claim could be Article 6:194. The relativity requirement will probably be fulfilled, because the purpose of Article 6:194 is not only to protect consumers, but also to protect competitors. However, damage and causal connection will constitute a problem. In the case of an annual rating of the company, a claim will probably be based on Article 6:162. Here, in addition to the damage and causal connection requirements, the relativity requirement may constitute a problem.

4. Conclusion

CRA's are not subject to supervision in the Netherlands. Presently, there are no plans to create such supervision. The effects of the IOSCO Code of Conduct will be given time to work. If the CRA's do not abide by these rules, the Dutch government may take action.

The risk of contractual liability seems remote. The largest exposure to liability of CRA's exists in the case of publication of a rating in a prospectus in the context of a notes issue. This liability vis-à-vis investors is governed by Articles 6:194 and 6:195 DCC. Except for the unlikely liability pursuant to these provisions vis-à-vis competitors of the issuer, non-contractual liability in other cases will be based on the general tort provision of Article 6:162 et seq. DCC. This provision may give rise to liability of investors in case of unjustified upgrading or failure to downgrade notes. The exposure to liability for the rating of a company will generally be lower than for a rating of notes in a prospectus. The risk that unsolicited ratings will lead to liability is even more remote, provided that the CRA makes clear that the rating is unsolicited.

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