CREDIT RATING AGENCIES

1. Introduction. -

The rating agencies are financial market operators, having the nature of private companies, which issue summary judgments on the creditworthiness of an issuer and / or the degree of riskiness of a financial product [1], expressing the vote on sovereign debts and securities of public and private entities.
The main problems that are connected with the rating and that, here, deserve special attention, are that of the conflict of interests that often threatens to contaminate the process of formation of the judgment of the agencies and that of the nature of the responsibility for damages possibly caused to third parties by the erroneous, incomplete or misleading assessment made by rating agencies.
In this regard, it should be pointed out that, although repeated legislative interventions have followed and while recording some models of sentence, a solution has not yet been proposed that is resolute and satisfactory to both issues.

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[1] Al riguardo, si vedano, in dottrina, Capriglione, *I «prodotti» di un sistema finanziario evoluto. Quali regole per le banche? (Riflessioni a margine della crisi causata dai mutui sub-prime)*, in *Banca borsa tit. cred.*, 2008, 53; Presti, *Le agenzie di rating: dalla protezione alla regolazione*, in *Jus*, 2009, 67; Drigo, *La responsabilità delle agenzie di rating per il danno all'informato. L'esperienza statunitense*, in *Rass. dir. civ.*, 2006, 488; Olivieri, *Agenzie di rating nel quadro delle misure varate per fronteggiare la crisi finanziaria, la Commissione europea propone norme severe per regolamentare l'attività delle agenzie di rating del credito*, in *Società,* 2009, 119; Tonello, *Le agenzie di rating finanziario. Il dibattito su un modello economico esposto al rischio di conflitto di interessi. Verso un sistema pubblico di controllo?*, in *Contr. impr.*, 2005, 933 ss.; Bocchi, Lusignani, *L'impatto sul sistema bancario dell'avvio di Basilea 2: un'analisi empirica*, in *Banca impr. soc.*, 2008, 193 ss.; Bocchi, Lusignani, *La rischiosità delle imprese italiane con Basilea 2: prime indicazioni dall'applicazione dei modelli di rating interno*, in *Bancaria*, 2006, 14 ss.; Masullo, *Investor Relations. Comunicazione finanziaria e marketing & financial management*, Milano, 2005; Andenas, Deipenbrock, *Credit Rating Agencies and European Financial Market Supervision*, in *International and Comparative Corporate Law Journal*, 2011, 1 ss.; Lastra, Wood, *The Crisis of 2007-09: Nature, Causes, and Reactions*, in *Journal of International Economic Law*, 2010, 531 ss.; Véron, *Rate Expectations: What Can and Cannot Be Done About Rating Agencies*, in *Bruegel Policy Contribution*, 2011, 2; Lastra, Wood, *Responses to the Financial Crises*, in *Journal of International Banking Law and Regulation*, 2011, 307 ss.; Langevoort, *Global Securities Regulation after the Financial Crisis*, in *Journal of International Economic Law*, 2010, 799 ss.; Clermontel, *Le droit de la communication financière*, Paris, 2009; A. Principe (a cura di), *Le Agenzie di Rating. Atti del convegno Salerno 8-9 novembre 2012*, Milano, 2014; A. Troisi, *Le Agenzie di Rating. Regime disciplinare e profili evolutivi*, Padova, 2013.

But let's proceed with order.

2. Techniques and methods for resolving conflicts of interest. -

Investors are the end users of the agencies' evaluations, of which they become aware after they have been published and disseminated according to the chosen methods and to the outcome of an articulated training procedure in which analysts expert in the sector participated.
In principle, the public benefits from the possibility of knowing the rating of a particular security or issuing company without having to pay the agency any compensation, but simply for having received it through the media and information ordinary.
To these the rating is given either by the agency itself, or at the request of the clients, that is the institutions that have accepted and resolved to submit to the evaluation of their "creditworthiness" or "creditworthiness" of the securities they intend to place on the market.
When it expresses an evaluation of its own, without having received the assignment, the rating agency acts on the basis of the public information it finds on the market and, therefore, issues an assessment that, in most cases, must be integrated and / or corrected with the help of the confidential data available to the assessed subject.
Indeed, in the case of the cd. unsolicited rating the issuer is, against his will, exposed to an examination based on a partial and necessarily incomplete view of the company structure considered; and therefore, this most often is not true.
This is the reason why the issuer, provided it does not consider it appropriate to refuse publication of the rating, is encouraged to work to avoid risks and prevent unsatisfactory valuations. It is, so to speak, induced by the circumstances to confer the burdensome task on the agency, in order to provide it with all the documentation concerning it so as to make the judgment as much as possible conforming to its real economic-financial condition.
More frequent is the case in which the agencies receive from the issuers a special burdensome task to carry out their services, thus being able to count not only on the data and news available to the investor public, but also on the more confidential information, in addition to that on the accounting and financial

statement data, which are in the information assets of the companies evaluated.
This last phenomenon, called solicited rating, is by far the favorite and derives from a mandatory relationship established between rating agencies and clients, having as its object, on the one hand, the obligation to promote and define the procedure for rating issuing of the rating and, on the other hand, the obligation to pay a fee.
In the end, both the cases considered are contaminated by the agreement and by the delivery of a fee, which represents the due consideration of the rating activity and requires the agencies to operate according to the common criteria of diligence and correctness, according to art. 1176, co. 2, cc, but above all in pursuit of the creditor's interest, according to the more general prescription of the art. 1174 c.c.
And, if you agree that the satisfaction of the customer's interest is achieved only if the rating is close to its highest value, it is impossible not to agree on the fact that the whole system of creditworthiness certification is permeated by a serious problem of conflict of interest.
Indeed, the contrast that arises is between the interest in issuing an objective assessment and responding to the truth and the interest in receiving a reasonable consideration from the issuer; despite using the style clause that obviously preaches the impartiality of the evaluator, it is clear that those who are evaluated would like to receive a flattering, or at least acceptable, judgment.
The provision of a fee - which is added to the possibility for customers to purchase the cc.dd. ancillary services of the agencies - can therefore only distort the situation in which the issuer finds itself, which ends up searching the market for the credit rating most favorable to its needs, which inevitably coincides with the more expensive one.
In doing so, the phenomenon of the cd is triggered. rating shopping, which favors the publication of misleading judgments and alters the results and outcomes of financial transactions, compromising the proper performance of the market and causing negative repercussions on investors' assets.
We have discussed at length the possible solutions to this problem of conflict of interests which, moreover, is closely connected with that of the civil liability of rating agencies, to the extent that

investors suffer damage as a result of the improper behavior of the evaluators[2].

Needless to say, the issue is dealt with in different terms depending on your point of view, because, in addition to those who condemn a consolidated practice for more than a century, but do not foreshadow more edifying scenarios, there is a whole part of the doctrine which considers this system as the only possible one, since it draws its certainties and guarantees from the reputational value enjoyed by the agencies.

It is precisely the credibility, trust and impartiality that the agencies insist on to justify the reliability of their assessments and to avert any different solution, except possibly to separate the functions within them, assigning the task of treating the economic agreements to subjects other than those participating in the rating formation procedure[3].

The image that the agencies intend to convey to the investors is that of the third party and the independence with respect to the operations that are concluded on the market, which justify the entrustment on their evaluations and the payment of a fee by the judged subjects, proportionate to the tasks that the agencies are called to perform[4].

Petitions of principle, reinforced by the diminishing of the relevance of the rating judgment, which is considered, from this line of thinking, as one of the many factors that the saver must

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[2] DUFF, *The Credit Ratings Agencies and Stakeholder Relations: Issues for Regulators*, in *Journal of International Banking and Financial Law*, 2009, 11 ss.; DEATS, *Talk That Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies from Regulation?*, in *Columbia Law Review*, 2010, 1818 ss.; BILSON, DELACOUR (eds.), *Credit Rating Agencies. Regulation and Reform Act Review*, New York, 2012, 94 ss.; Ó SÚILLEABHÁIN, *Who Will Watch the Watchmen? Rating-Agency Liability in Securities Litigation*, in *Securities Litigation Journal*, 2010, 8.

[3] DEZZANI, *«Basilea 2» e il merito creditizio delle imprese*, in *Società*, 2007, 405; MARIANELLO, *La responsabilità dell'agenzia di rating nei confronti dei terzi risparmiatori*, in *Resp. civ.*, 2008, 640; FANNI, *Il dibattito in corso sul riconoscimento formale delle agenzie di rating da parte di un'autorità pubblica europea o nazionale interessa il nostro Paese?*, in *Assicurazioni*, 2005, 97; SACCO GINEVRI, *Le agenzie di rating*, in *Consumerism 2010. Terzo rapporto annuale, disponibile su http://www.ilsole24ore.com/pdf2010/SoleOnLine5/_Oggetti_Correlati/Documenti/Economia/2010/11/Rapporto_Consumerism_2010_completo.pdf?uuid=37af029a-f190-11df-976fb9ac9dd44443*, 128; TONELLO, *Le agenzie di rating finanziario. Il dibattito su un modello economico esposto al rischio di conflitto di interessi. Verso un sistema pubblico di controllo?*, in *Contr. impr.*, 2005, 932-933.

[4] DE BELLIS, *La nuova disciplina europea delle agenzie di rating*, in *Gior. dir. amm.*, 2010, 456.

analyze in order to orient his investment on a given issuer or on a certain title, rather than not on another.
No particular glimmer can be glimpsed, in this regard, in the jurisprudence of the judges of merit or the Cassation, nor between the lines of the various regulations that have followed one another, especially at the Community level, in the matter of rating agencies.
If the jurisprudence is silent, at least for the moment, on the point, the legislator is absent, and the reference runs in particular to the community regulation n. 1060/2009[5] amended by EU regulation no. 513/2011 [6] as well as the Commission proposal of 15 November 2011 for a new regulation [7]. These texts repeat formulas that do not offer any decisive contribution to the problem of conflict of interest.
In fact, these regulations identify a series of obligations, as well as operational and organizational requirements required of the agencies in order to avoid conflicting situations.
But, beyond this, they do not provide any practical remedy for the case in which, despite the adoption of all the devised expedients, the ratings should be issued in opaque situations.
Recently, the European Parliament and the Council have returned to the issue of conflict of interest with regulation no. 462/2013, of 21 May 2013, which amended the first regulation issued in the field of credit rating agencies (n. 1060/2009), with the aim of solving the problems that the previous legislation had left open.
With this text the community legislator has proceeded to distinguish ratings from mere research, recommendations on investments, as well as opinions on the value or price of a financial instrument or a financial obligation; and so it has established that the rating agencies are not mere financial analysts, nor investment advisors, and that the ratings have "regulatory value" for credit institutions, insurance companies and other institutional investors.
Therefore, maximum attention was focused on methods of resolving conflicts of interest - which is inherent in rating activity

[5] Al riguardo, per l'individuazione degli obblighi che l'agenzia di *rating* deve osservare per evitare il conflitto di interessi, l'art. 6, paragrafo 2, del regolamento n. 1060/2009 rinvia all'allegato I, sezioni A e B.
[6] Il regolamento n. 513/2011 ha modificato anche l'allegato I del regolamento (CE) n. 1060/2009.
[7] La nuova proposta ha previsto altresì un'altra modifica dell'allegato I del regolamento (CE) n. 1060/2009.

- and the solutions reached seem to have satisfied the need for change that was long overdue in the sector.

And, indeed, already the declarations of principle, exposed in the new version of the art. 6, constitute the prelude to the accurate discipline envisaged in the field of conflict of interest: each rating agency must adopt all the necessary measures to guarantee that the issuance of a rating or the prospect of a rating is not influenced by any existing conflict of interest or potential, nor from business relationships concerning the rating agency or the rating perspective, its shareholders, its managers, its rating analysts, its employees or any other natural person whose services are placed available or under the control of the rating agency, or any person directly or indirectly connected to it by a controlling relationship (paragraph 1); each rating agency must create, maintain, apply and document an effective internal control structure, which deals with the implementation of policies and procedures to prevent and mitigate possible conflicts of interest and to ensure the independence of the ratings, of the analysts of the ratings and rating teams with respect to shareholders, administrative and management bodies, and sales and marketing activities. The agencies must establish standard operating procedures (cc.dd. POS) concerning corporate governance, organization and management of conflicts of interest (section 4).

The community legislator has declined in detail the hypotheses in which situations of conflict of interest can be configured, with the introduction of a new provision, the art. 6 bis, paragraph 1, which is concerned with avoiding conflicts concerning the holders of holdings of several rating agencies: the imprecise wording of the text in the Italian version states that «to the shareholder or member of a credit rating agency who holds at least 5% of the capital or voting rights in such a credit rating agency or in a company that has the power to exercise control or dominant influence over such credit rating agency is prohibited: a) to hold the 5% or more of the capital of other credit rating agencies; b) have the right or the power to exercise 5% or more of the voting rights of other credit rating agencies; c) have the right or the power to appoint or dismiss members of the administrative or supervisory board of other credit rating agencies; d) be a member of the administrative or supervisory board of other credit rating

agencies; e) exercise or have the power to exercise control or a dominant influence on other credit rating agencies »[8].
However, the law, if on the one hand resolves some questions regarding situations in which conflict of interests can be determined, on the other hand does not take into consideration the case that, undoubtedly, can present a certain risk of conflict and that is verifies when the issuer, which must place its securities on the market and must submit to the judgment of a rating agency, has a more or less substantial participation in the agency that must evaluate it.
In this regard, no prescription is provided with regard to the possibility for the body judged to hold a stake or a position of control over the evaluating entity and, therefore, the wish of the scholars and operators is that of a new and further targeted regulatory intervention, which, taking note of the seriousness of the problem, takes care to deliver the guidelines for its definition to the interpreter.

3. Rating and protection of savings: new responsibility profiles. -

The second complex problem that the interpreter has to face concerns the imputation of civil liability to the rating agencies for the damage caused to the investors who have trusted in the goodness and congruity of their judgments.
This is closely linked to the role played by the agencies and, not secondary, to the trust that the agencies generate in the subjects that operate on the financial markets, precisely because of that reputational value that, as we have seen, the agencies invoke when they have to justify the their "conflicts of interest".
The role is relevant, if we consider that the agencies fall within the main market gatekeepers and have the precise function of controlling and selecting the subjects that can access the financial markets, controlling and certifying the requirements [9].

[8] L'art. 6 *bis*, con il primo comma, esclude che il divieto di detenere il cinque per cento, o più, del capitale di altre agenzie di *rating* si applichi alle partecipazioni in regimi di investimento collettivo diversificato, compresi i fondi gestiti, quali i fondi pensione o le assicurazioni vita, a condizione che le partecipazioni in tali regimi non mettano l'azionista o il socio di un'agenzia di *rating* nella posizione di esercitare un'influenza significativa sulle attività economiche di tali regimi; con il secondo comma, esclude l'applicazione dei divieti agli investimenti in altre agenzie di *rating* appartenenti allo stesso gruppo di agenzie di *rating*.
[9] DENNIS, *The Ratings Game: Explaining Rating Agency Failures in the Build up to the Financial Crisis*, in *University of Miami Law Review*, 2009, 1111 ss.; DUFF, *The Credit*

This function derives from the fact that the rating, as is known, assesses the solvency of an entity, as well as the creditworthiness and future risk of a security and, therefore, is able to influence the economic choices of investors, especially those medium-small and retail businesses that lack the technical skills necessary to operate independently[10].

Just think of the incidence of the rating on investments from all over the world, considering that the regulations of collective and institutional investors oblige managers to invest only in bonds marked by a certain rating judgment and, in any case, exclude investments in securities with a speculative grade rating[11].

Ratings Agencies and Stakeholder Relations: Issues for Regulators, cit., 11 ss.; VIRGA, *Le operazioni di cartolarizzazione tra tutela degli investitori ed esigenze del capitale finanziario*, in *Contr. impr.*, 2007, 1034 ss.; ENRIQUES, GARGANTINI, *Regolamentazione dei mercati finanziari, rating e regolamentazione del rating*, in *An. giur. econ.*, 2010, 475; MARIANELLO, *Cartolarizzazione e responsabilità della società di rating*, Roma, 2004, 37 ss.; JHONSON, *Rating Agency Actions Around the Investment-Grade Boundary*, in *The Journal of Fixed Income*, 2004, 25 ss.; DE VITIS, *Le società di rating*, in FERRO LUZZI, PISANTI (a cura di), *La cartolarizzazione. Commento alla legge n. 130/99*, Milano, 2005, 229 ss.; AA.VV., *Modelli per la gestione del rischio di credito. I "ratings" interni*, Roma, 2000; INFRICCIOLI, *La responsabilità delle società di rating nelle operazioni di cartolarizzazione*, in *Mondo banc.*, 2008, 43 ss.; PARMEGGIANI, *La regolazione delle agenzie di rating tra tentativi incompiuti e prospettive future*, in *Giur. comm.*, 2010, 121; PARTNOY, *How and Why Credit Rating Agencies are Not Like Other Gatekeepers*, in Fuchita, Litan (eds.), *Financial Gatekeepers: Can They Protect Investors?*, Washington, 2006, 59 ss.; ID., *Rethinking Regulation of Credit-Rating Agencies: an Institutional Investor Perspective*, in *Journal of International Banking Law and Regulation*, 2010, 188; PARRILLO, *I rating interni. Il ruolo essenziale nella funzione di governo del credito*, in *Rivista bancaria*, 2003, 69 ss.; RABITTI BEDOGNI, *L'informativa derivata. La previsione degli analisti e i giudizi delle agenzie di rating. Problemi attuali e possibili sviluppi regolamentari*, disponibile su *http://www.uniroma1.it/dirittomercatifinanziari/rating.pdf*; FERRARESE, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Bologna, 2000, 105; ELLIS, *Different Sides of the Same Story: Investors' and Issuers' Views of Rating Agencies*, in *The Journal of Fixed Income*, 1998, 33 ss.; PORTES, *Agenzie di rating, la riforma è un rompicapo*, 2008, disponibile su *www.voce.info*; PATE, *Triple-A Ratings Stench: May the Credit Rating Agencies Be Held Accountable?*, in *Barry Law Review*, 2010, 25 ss.

[10] DEZZANI, *«Basilea 2» e il merito creditizio delle imprese*, cit., 405; DE SANCTIS, *Il rating delle imprese ed i rischi di fallimento*, in *Foro tosc.*, 2003, 409 ss.; FANNI, *La finanza moderna ed il rating per lo sviluppo sostenibile*, in *Assicurazioni*, 2003, 199 ss.; SACCO GINEVRI, *Le società di rating nel regolamento CE n. 1060/2009: profili organizzativi dell'attività*, in *Nuove leggi civ. comm.*, 2010, 294, nota 15; DRIGO, *La responsabilità delle agenzie di rating per il danno all'informato. L'esperienza statunitense*, in *Rass. dir. civ.*, 2006, 488-489; CAPRIGLIONE, *I «prodotti» di un sistema finanziario evoluto. Quali regole per le banche? (Riflessioni a margine della crisi causata dai mutui sub-prime)*, in *Banca borsa tit. cred.*, 2008, 53; SCARONI, *La responsabilità delle agenzie di rating nei confronti degli investitori*, in *Contr. impr.*, 2011, 767, nota 6.

[11] PARTNOY, *Rethinking Regulation of Credit-Rating Agencies: an Institutional Investor Perspective*, cit., 188; GILA, MISCALI, *I signori del rating. Conflitti di interesse*

The agencies provide a service that is primarily aimed at overcoming the information asymmetry between the issuer and the investor [12], making the latter aware of a whole series of information and news on the issuing body that otherwise could not have been found and, subsequently, to prepare a comparison between the various securities offered on the market, in order to simplify the choice of savers.

This task is particularly important for structured finance products and for the valuation of the assets underlying these products, which are not always easy to understand[13].

For these reasons, it is clear that it is of primary importance to define a new system of civil liability, which serves to contain and suppress any illegal conduct of rating agencies[14].

However, this system must be integrated and harmonized with the civil liability regimes designed for the other economic operators acting in the financial markets, such as the auditing

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e relazioni pericolose delle tre agenzie più temute dalla finanza globale, Torino, 2012, 120. L'orientamento giurisprudenziale che, con difficoltà, si è formato negli anni riconosce l'importanza del *rating* e la sua considerevole influenza sulle decisioni di investimento: al riguardo, si veda Trib. Firenze, 6 luglio 2007, in *www.ilcaso.it*. In dottrina, si vedano MARIANELLO, *La responsabilità dell'agenzia di rating nei confronti dei terzi risparmiatori*, cit., 639; SACCO GINEVRI, *Le società di rating nel regolamento CE n. 1060/2009: profili organizzativi dell'attività*, cit., 293; MACNEIL, *The Trajectory of Regulatory Reform in the UK in the Wake of the Financial Crisis*, in *European Business Organization Law Review*, 2010, 504. Si vedano, al riguardo, le prescrizioni contenute nel Regolamento della Banca d'Italia sulla gestione collettiva del risparmio, adottato con provvedimento del 14 aprile 2005 e modificato con i provvedimenti della Banca d'Italia del 21 giugno 2007 e del 27 febbraio 2008, con il provvedimeno della Banca d'Italia e della Consob del 29 ottobre 2007 e con il provvedimento della Banca d'Italia del 16 dicembre 2008.

[12] MCVEA, *Credit Rating Agencies, The Subprime Mortgage Debacle and Global Governance: The EU Strikes Back*, in *International and Comparative Law Quarterly*, 2010, 701 ss.

[13] COFFEE, *The Role and Impact of Credit Rating Agencies on the Subprime Credit Markets. Testimony Before the Senate Banking Committee on September 26, 2007*, disponibile su *http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=973eab2d-f498-412b-86f3-ae6a4b147f03&Witness_ID=e5bf16fd-8f5e-4077-a62d-907ec025536c,* pag. 2.

[14] PARTNOY, *Rethinking Regulation of Credit-Rating Agencies: an Institutional Investor Perspective*, cit., 188 ss.; FLOOD, *Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisations and Credit Rating Agencies*, in LIKOSKY (ed.), *Privatising Development*, Leiden, 2005, 161; PINTO, *Control and Responsibility of Credit Rating Agencies in the United States*, in *The American Journal of Comparative Law*, 2006, 351; CARBONE, *La responsabilità degli intermediari,* in *Danno e resp.*, 2002, 109; MARIANELLO*, La responsabilità dell'agenzia di rating nei confronti dei terzi risparmiatori*, cit., 649; LUCCHINI GUASTALLA, *Danno agli investitori e responsabilità delle autorità di vigilanza e degli intermediari finanziari*, in *Resp. civ. prev.*, 2005, 21 ss.

companies, or the subjects that issue the prospectuses, or financial analysts and financial journalists, since it appears to be correct and responsive to systematic needs to verify the type of responsibility that we want to attribute to the agencies in the light of those provided for the other operators and to distribute, in a balanced way within the same market, the responsibility among all those who participated in the production of the same damage.
This is due to the fact that the damages suffered by investors facing the financial markets is usually attributable to all those who, with different skills, perform the function of market controllers; and it is therefore appropriate that all the economic operators be called upon to respond to these prejudices, based on the respective causal contribution to the production of the damage.
Among them the rating agencies stand out, precisely because of their reputational value and the confidence they inspire in investors[15], which, in most cases, are induced to make a certain investment after having learned the positive judgment expressed, however, by an immediate and easily understandable language, by the rating companies.
From the comparison of the different types of responsibility we can see an incontrovertible datum, that is the relief that the guilt has in each of them: the guilt is intended, in a subjective sense, as

[15] DENNIS, *The Ratings Game: Explaining Rating Agency Failures in the Build up to the Financial Crisis*, cit., 1111 ss.; DEATS, *Talk That Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies from Regulation?*, in *Columbia Law Review*, 2010, 1818 ss.; VÉRON, *Rate Expectations: What Can and Cannot Be Done About Rating Agencies*, in *Bruegel Policy Contribution*, 2011, 7; MCVEA, *Credit Rating Agencies, The Subprime Mortgage Debacle and Global Governance: The EU Strikes Back*, cit., 701 ss.; BUSSANI, *Gli Agenti irresponsabili*, in *Limes*, 2011, 208; FLOOD, *Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisations and Credit Rating Agencies*, in LIKOSKY (ed.), *Privatising Development*, *cit.*, 162, il quale rileva peraltro che «raters also often have access to information denied to analysts and investors»; WHITEHEAD, *Reframing Financial Regulation*, in *Boston University Law Review*, 2010, 1 ss.; FACCI, *Le agenzie di rating e la responsabilità per informazioni inesatte,* in *Contr. impr.*, 2008 190; TONELLO, *Le agenzie di rating finanziario. Il dibattito su un modello economico esposto al rischio di conflitto d'interessi. Verso un sistema pubblico di controllo?*, cit., 932; MARIANELLO, *Insolvenza dell'emittente ed (ir)responsabilità dell'agenzia di rating*, in *Obbl. contr.*, 2012, 358. Per la giurisprudenza, il giudizio delle agenzie di *rating* ha tutta la possibilità di ingenerare un serio e ragionevole affidamento negli investitori e, per tale ragione, gli intermediari finanziari rispondono per non aver comunicato agli investitori il *rating* o le sue variazioni [si vedano *ex multis*: Trib. Prato, 4 novembre 2011, in *Foro it.*, 2012, 263; App. Torino, 2 dicembre 2009, in *Foro it.*, 2010, 1309; Trib. Ancona, 20 febbraio 2008, in *Il civilista*, 2012, 74; Trib. Milano, 1 luglio 2011, n. 8790, in *Obbl. contr.*, 2012, 347. Si veda, altresì, il primo *considerando* del regolamento CE n. 1060/2009.

the psychological state of the evaluators, or as a lack of diligence and expertise in the dissemination of data and news and, in an objective sense, as a violation of industry regulations.
Given that, at the moment, there are special provisions that circumscribe the responsibility of the subjects mentioned to the fault, for the rating agencies the system cannot conceive a more serious form of responsibility based on the presumed fault or on the business risk. Although most guaranteed for investors, these criteria, however, would compromise the balance between economic operators and the fair distribution of damages on the financial markets.
But let's proceed in order, first checking how the problem of defining the responsibility of the agencies has been solved by legislation; in this regard, we find two models that historically can be classified as the original model (the US model) and the most recent model (the Community model). And, then, what proposals come from the contributions of doctrine and jurisprudence.

3.1. The US regulation of rating activity. -

The solutions offered by the US legislator are recent, since for a long time the regulation of the activity of rating agencies has been left to market autonomy.
Only in the years 2006 and 2010 two relevant legislative reforms were approved, the Credit Rating Agency Reform Act [16] and the Dodd-Frank Wall Street Reform and Consumer Protection Act [17], that deal with different aspects of the rating activity and, specifically, the rights and obligations of the agencies, as well as the rating formation process, with particular regard to transparency, disclosure of information and investor protection[18].

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[16] *Public Law 109-291*, Sept. 29, 2006.
[17] *Public Law 111-203*, in particolare "*Subtitle C*", *Improvements to the Regulation of Credit Rating Agencies,* consultabile sul sito *http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf*.
[18] Si veda SEA, *section* 21D(b)(2)(B), così come modificata dalla *section* 933 del *Dodd-Frank Act* che, peraltro, ha inserito una nuova disposizione volta ad equiparare il regime di responsabilità delle agenzie per i giudizi espressi a quello prescritto per i revisori contabili e gli analisti finanziari (SEA, *section* 15E (m), così come modificata dalla *section* 933 del *Dodd-Frank Act*). In tal modo, il legislatore ha cercato di rimuovere quella barriera rappresentata dal diritto alla libera manifestazione del pensiero, che è sempre stata utilizzata dalle agenzie di *rating* come strumento di difesa e che, ancora oggi, è difficile da superare nella prassi.

A precise reference, in the Dodd-Frank Act, to the question of the civil liability of the agencies seems to bring the legislator closer to one of the major problems of the rating, even if, unfortunately, a model that is not very guaranteed for the rights of investors is followed; to these, in fact, a burdensome probative burden is imposed, consisting in the proof of the malice, or of the fault, of the agencies in having prepared, firstly, and published, then, an erroneous evaluation.
The formulation of the provision leaves, once again, to the interpreters the arduous task of tracing the boundaries of responsibility and, above all, of resolving that long-standing question, which afflicts the jurisprudence, on the relationship between the right of agencies to the free manifestation of thought, constitutionally guaranteed, and the right of investors to be compensated for damages suffered due to the imprudent, negligent or undue behavior of the agencies.

3.2. The European rating regulation. -

The approach of the community legislator is not particularly comforting and, indeed, the future prospects seem darker than the current conditions.
The concern to create a common, uniform and uniform framework of rating principles has led the European Union to issue a series of regulatory measures, which have a significant impact on the activity of rating agencies [19].
With specific regard to the profile of civil liability, no initiative of the Community legislator was particularly significant with regulation n. 1060/2009[20], which has confined itself to referring

[19] L'intervento dell'Unione europea è giustificato dal principio di sussidiarietà, prescritto dall'art. 5, paragrafo 3, del TUE, nonché dal principio di proporzionalità, previsto dall'art. 5, paragrafo 4, del TUE.
[20] Nella valutazione d'impatto relativa alla proposta della Commissione europea di regolamento del Parlamento europeo e del Consiglio, di modifica del regolamento n. 1060/2009, del 15 novembre 2011, sono approfondite le tematiche non trattate in maniera adeguata dal regolamento: il rischio di eccessivo affidamento nel giudizio delle agenzie da parte dei partecipanti ai mercati finanziari; l'elevato grado di concentrazione nel mercato del *rating* e le modalità di retribuzione delle agenzie di *rating* del credito. Inoltre, la Commissione ha sottolineato che vaste economie di scala nel settore e la reputazione delle agenzie di *rating* del credito, elemento di importanza fondamentale, limitano ancora l'accesso al mercato; le specificità di determinate categorie di *rating*, soprattutto quelle relative agli strumenti del debito sovrano, non sono sufficientemente esaminate; i conflitti di interessi legati alla struttura azionaria delle agenzie di *rating* e la responsabilità civile delle agenzie stesse non sono considerati in modo adeguato; la valutazione d'impatto è consultabile sul sito

the rules to individual Member States, with the obvious risk of favoring the establishment of rating companies in countries with less stringent regulations[21].

Only with the Commission's proposal of 15 November 2011[22], amending the 2009 regulation on rating agencies, and with art. 35 bis, it was possible to see a first concrete approach, at a community level, to the problem considered [23], as well as a first attempt to find plausible solutions [24].

Once again, however, the occasion has not been happily seized.

Too rigorous and unjustifiably oppressive for the injured are the assumptions that the rule lays at the basis of responsibility. It is permissible to act against a rating agency only if it has committed, intentionally or by gross negligence, one of the infringements referred to in Annex III of the regulation, which has affected the credit rating on which the investor has relied in 'buy the rated instrument.

The incidence of the rating infringement is deduced from the fact that the rating that the agency issued is different from the one it

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http://ec.europa.eu/internal_market/securities/docs/agencies/SEC_2011_1354_en.pdf.

[21] *Impact Assessment Accompanying the Document Proposal for a Regulation Amending Regulation (EC) No 1060/2009 on Credit Rating Agencies and a Proposal for a Directive Amending Directive 2009/65/EC on Coordination on Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS) and Directive 2011/61/EU on Alternative Investment Fund Managers*, consultabile sul sito *http://ec.europa.eu/internal_market/securities/docs/agencies/SEC_2011_1354_en.pdf*.

[22] *COM(2011) 747 definitivo*.

[23] Un quadro generico delle risposte al documento è reperibile sul sito *http://ec.europa.eu/internal_market/securities/docs/agencies/summary-responses-cra-consultation-20110704_en.pdf*; si veda altresì la Risoluzione del Parlamento europeo dell'8 giugno 2011 sulle agenzie di *rating* del credito: prospettive future [*2010/2302(INI)*].

[24] Il testo recita: «1. Se un'agenzia di *rating* del credito ha commesso intenzionalmente o per negligenza grave una delle infrazioni di cui all'allegato III che hanno inciso sul *rating* del credito sul quale un investitore si è basato nell'acquistare uno strumento valutato, l'investitore può promuovere un ricorso contro l'agenzia per i danni subiti. 2. Un'infrazione è considerata tale da incidere sul *rating* del credito se il *rating* che l'agenzia ha emesso è diverso da quello che avrebbe emesso se non avesse commesso l'infrazione. 3. Un'agenzia di *rating* del credito commette una negligenza grave se disattende gravemente i doveri che il presente regolamento le impone. 4. Se l'investitore accerta fatti dai quali si può dedurre che un'agenzia di *rating* del credito ha commesso una delle infrazioni di cui all'allegato III, spetta all'agenzia dimostrare di non aver commesso l'infrazione o che l'infrazione non ha avuto un impatto sul *rating* emesso. 5. La responsabilità civile di cui al paragrafo 1 non può essere esclusa o limitata a priori grazie ad un accordo. Eventuali clausole in tali accordi che escludono o limitano la responsabilità civile a priori sono nulle e prive di effetto».

would have issued if it had not committed the infringement; while the gross negligence of the agency exists if it has seriously disregarded the duties imposed by the regulation.
The tenor of these conditions is evident only if one considers that the injured investor must demonstrate not only the violation of one of the regulatory provisions, but also the fraud or gross negligence with which the violation was committed, as well as of course prove the link causal: the violation must have influenced the rating formation procedure and, therefore, the final judgment, in the sense that if there had not been the infringement the rating would have been different and the investor would have operated in another way.
These forecasts completely distort even the most basic rules, so the sanction of the order derives from the simple non-fulfillment of obligations provided for by law, regardless of the fact that the violation is characterized by the psychological element of fraud or gross negligence.
These criteria for determining the civil liability of rating agencies, and the evidentiary charges for the investor, are confirmed by Regulation (EU) n. 462/2013, cited above and, in particular, the new art. 35 bis, paragraph 1[25].
Moreover, according to the new regulation, the proof of the reasonable reliance placed by the investor in the judgment of the agency, to take the decision to invest, hold or sell the evaluated financial instrument, is conditio sine qua non to give legal basis to the request for compensation [26], and rating agencies are permitted to limit their liability in advance, when the limitation is reasonable, proportionate and permitted by the applicable national law [27]. A series of burdensome measures for investors, which certainly are not facilitated in protecting their own interests and rights, which appear to be a real privilege reserved for rating agencies.

3.3. The constituent elements of the unlawful act performed by rating agencies. -

[25] Al riguardo si vedano ALPA, *La responsabilità civile delle agenzie di rating. Alcuni rilievi sistematici*, in *Riv. trim. dir. econ.*, 2013, 74 ss.; TROISI, ROMANO, *Rating, accuratezza delle valutazioni e responsabilità oggettiva*, in *Riv. trim. dir. econ.*, 2013, 123 ss.
[26] Art. 35 *bis*, comma 1.
[27] Art. 35 *bis*, comma 3.

The position of the US and EU legislators is still quite uncertain and the future scenarios do not seem particularly comforting; therefore, it is appropriate to use, once again, the help of doctrine and jurisprudence.

It is therefore necessary to draw a clear line between the right of investors to be compensated for damages suffered due to rating activity and the right of agencies to freedom of private economic initiative and, above all, to freedom of expression of thought.

As is known, the relationship established between the investor and the rating agency is not contractual, nor derives from a social contact, as in the case of medical liability, since the rating is a widespread assessment to an audience indistinct that is achieved through the usual means of mass communication, or through financial intermediaries.

Consequently, from the erroneousness and deceptiveness of the rating judgment, which betrayed the trust placed in it by the investor, convincing him to carry out an economic operation that turned out to be prejudicial, the only form of responsibility that may arise is that having an Aquilian nature [28].

And the compensation of the damage, closely connected with the bankruptcy or, in any case, with the aggravation of the economic situation of the subject positively evaluated, or with its improvement in the case in which the erroneous rating was instead negative, and consisting in the loss of the value of the securities held, must necessarily follow the rules of civil liability, prescribed by the articles 2043 ss.[29]

Therefore, it is necessary to identify and outline the constituent elements of the unlawful act and, first of all, the psychological

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[28] DRIGO, *La responsabilità delle agenzie di rating per il danno all'informato. L'esperienza statunitense*, cit., 505 ss.; PINTO, *Control and Responsibility of Credit Rating Agencies in the United States*, cit., 351.

[29] CAPRIGLIONE, *I "prodotti" di un sistema finanziario evoluto. Quali regole per le banche? (Riflessioni a margine della crisi causata dai mutui sub-prime)*, cit., 55; ID., *Intermediari finanziari investitori mercati. Il recepimento della MiFID. Profili sistematici,* Padova, 2008, 143-144; INFRICCIOLI, *La responsabilità delle società di rating nelle operazioni di cartolarizzazione*, cit., 46; FACCI, *Le agenzie di rating e la responsabilità per informazioni inesatte*, cit., 175; PERRONE, *Le società di rating,* in *La società per azioni oggi. Tradizione, attualità e prospettive. Atti del Convegno internazionale di studi (Venezia, 10-11 novembre 2006)*, Milano, 2007, 1023 ss.; AR. FUSARO, *Rating finanziario e responsabilità nei confronti dell'emittente*, in *Contr. impr.*, 2012, 188; ENRIQUES, GARGANTINI, *Regolamentazione dei mercati finanziari, rating e regolamentazione del rating*, cit., 492-493. Con riguardo alle società di revisione si vedano, *ex multis*, BUSSOLETTI, voce *Società di revisione*, in *Enc. dir.*, XLII, Milano, 1990, 1080 ss.; PARTESOTTI, voce *Società di revisione*, in *Enc. giur.*, XXIX, Roma, 1993, 1 ss.

element, the fault or the intent, considering that the objective attribution of the responsibility must be excluded for the aforementioned reasons.

At this point, we cannot doubt the gravity of the burden of proof on the injured party, especially where it is called to demonstrate the will of the rating agency to mislead it, assigning the issuer or the security a completely false assessment, and the tricks and deceptions made by it to pursue the illicit purpose.

Similarly, the satisfaction of the compensation claim is compromised by the difficulty of proving the rating agency's fault, namely the fact that the assessment is the result of a procedure that did not follow the rules of prudence, expertise and diligence, because, for example, the analysts did not consider all the news they could have, or considered the ones they had received wrong, or that was held in contempt of the provisions that, at the community level and / or at national level, govern so more or less completed the rating[30].

A minimum facilitation on the evidentiary level can be recognized to the investor also with regard to the professional diligence of the rating agencies, which, due to the provisions of the art. 1176, paragraph 2, of the Italian Civil Code, is much more rigorous than that of a good family man, being related to the nature of the activity carried out and to the professional status of the agencies[31].

Moreover, another element that must exist for the configuration of the tort is the causal link between the behavior of the injuring party who published the rating and the damage suffered by the investor[32].

It is very complex to prove that a given damage is derived from the evaluation of a certain agency and to exclude, a priori, its traceability to other factors and other causes, concomitant or exclusive, or to the conduct of other economic operators, such as failure to or unfaithful certification of audit firms, or to the misleading intervention of financial intermediaries, or to the erroneous or lying content of the prospectus, or even to the wrong

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[30] SCARONI, *La responsabilità delle agenzie di rating nei confronti degli investitori*, cit., 819 ss.

[31] MARIANELLO, *Cartolarizzazione e responsabilità della società di rating*, cit., 144; ID., *Insolvenza dell'emittente ed (ir)responsabilità dell'agenzia di rating*, cit., 354-355.

[32] MAZZONI, *Osservazioni in tema di responsabilità civile degli analisti finanziari*, in *An. giur. econ.*, 2002, 248; FACCI, *Il rating e la circolazione del prodotto finanziario: profili di responsabilità*, in *Resp. civ. prev.*, 2007, 684; MARIANELLO, *Cartolarizzazione e responsabilità della società di rating*, cit., 164; AR. FUSARO, *Rating finanziario e responsabilità nei confronti dell'emittente*, cit., 185-186.

judgment of an analyst or financial journalist. The ratings could be of the same tenor, despite being issued by different agencies, as happens in the case of smoking products.
To overcome this impasse, some authors suggested to establish the existence of the causal link with the help of presumption[33], when the bankruptcy of an issuer or the loss of value of a security, or the increase in value, occurred immediately after the publication of the favorable rating or, in the latter case, a negative one; in this case, in fact, there is a reasonable probability that the rating has influenced the decision to invest or not to disinvest the injured party, causing the alleged injury.
With regard to the latter, we cannot overlook the fact that not every damage is compensable, but only that which obviously has the character of an illegality and is then immediate and direct, even if not predictable.
The damage, represented by the loss of the annuity of the invested capital, or the loss of the capital itself (emerging damage), or the loss of the possibility of concluding the transaction that would have been economically advantageous (loss of profits), is realized because the investor, after learning the rating agency's rating, it has no longer invested, or has invested in different ways, or has or has not divested[34]; in all these cases, the investor suffered the damage that he had in the agency's evaluation and the fundamental right to correct, complete and adequate information, recognized by the Community legislator and the national legislator, as well as by the Nice Charter of fundamental rights of the European Union, as well as the right to patrimonial integrity and, therefore, has received unfair damage[35].

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[33] MARIANELLO, *Cartolarizzazione e responsabilità della società di rating*, cit., 146; SANNA, *La responsabilità civile delle società di rating nei confronti degli investitori*, Napoli, 2011, 160; FACCI, *Il rating e la circolazione del prodotto finanziario: profili di responsabilità*, cit., 684-685; ID., *Il danno da informazione finanziaria inesatta*, Bologna, 2009, 338.

[34] Il danno subito per aver perso occasioni più propizie sul piano economico deve essere risarcito ai sensi dell'art. 2056 c.c. e le conseguenze patrimoniali che discendono dalla perdita di occasioni maggiormente remunerative devono essere esaminate sulla base di una valutazione prognostica; al riguardo si veda MARIANELLO, *La responsabilità dell'agenzia di rating nei confronti dei terzi risparmiatori*, cit., 653; ID., *Cartolarizzazione e responsabilità della società di rating*, cit., 160. In giurisprudenza, si veda Cass. civ., 22 febbraio 1991, n. 1908.

[35] BRUNO, *L'azione di risarcimento per danni da informazione non corretta sul mercato finanziario,* Napoli, 2000; MARIANELLO, *Cartolarizzazione e responsabilità della società di rating*, cit., 152. Con riguardo al danno ingiusto causato dalla società di revisione si veda, *ex multis*, COZZI, *Tutela dei mercati finanziari e responsabilità della società di revisione,* Napoli, 2001, 97-98.

The proof of these three constituent elements, as stated above, is not easy but, once completed, reverses the evidentiary burden and requires the rating agency to provide, to justify its behavior, that the unlawful event occurred. for reasons not attributable to it, such as for example the incorrect communication of information by the rated issuer[36], or the erroneous certification issued by the auditors and, in any case, to have used all the professional diligence that is required by the type of activity exercised.

One of the most frequent arguments used by rating agencies, to absolve their onus probands and get rid of responsibility, is that which tends to diminish the role and effects of the rating, degrading it to a mere point of view, a simple and relative opinion which is added to a whole series of factors that affect the investor's determination to invest[37].

This rating qualification prevents us from seeing this judgment as an investment advice, or as a recommendation to buy, sell or store securities, or as a guarantee on credit quality or future credit risk[38], subtracting it from the category of exact sciences [39], based on the fact that the rating can always be influenced by future events and unpredictable developments.

This discourse is, in itself, questionable, as the agencies' judgment, as mentioned above, produces significant effects on the markets, to the point of influencing their performance and growth; however, it could have a minimum of sense if applied to the figure

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[36] SCHWARCZ, *Private Ordering of Public Markets: The Rating Agency Paradox*, in *University of Illinois Law Review*, 2002, 6; ROBERTS, *Credit Rating Agencies: Is Additional Regulation Inevitable?*, in *Journal of International Banking and Financial Law*, 2004, 178 ss.

[37] Gli investitori, per valutare l'opportunità e la praticabilità di un investimento, dovrebbero considerare, oltre alla qualità del credito, la costituzione del proprio portafoglio, la strategia dei propri investimenti, l'orizzonte temporale, la propria tolleranza per il rischio, e dovrebbero confrontare il valore relativo dei titoli che stanno acquistando con quello dei titoli che avrebbero potuto scegliere e a cui hanno rinunciato.

[38] DE BELLIS, *La nuova disciplina europea delle agenzie di rating*, cit., 454-455; *Role of Credit Rating Agencies*, *Esme's Report to the European Commission*, giugno 2008, in *http://ec.europa.eu/internal_market/securities/docs/esme/report_040608_en.pdf*, 4; PIVATO (a cura di), *Il rating. La valutazione del debito e la stabilità dei mercati finanziari in Italia*, Milano, 1995, 9; MCVEA, *Credit Rating Agencies, The Subprime Mortgage Debacle and Global Governance: The EU Strikes Back*, cit., 701 ss. *Contra* GOMMELLINI, *Gli scandali dei mercati finanziari, l'attività di rating e i Modelli di prevenzione dei reati (a margine del recente intervento legislativo di «salvataggio» del rating dei titoli risultanti da operazioni di cartolarizzazione di canoni di leasing e della prossima attuazione del Nuovo Accordo di «Basilea 2»)*, in *Dir. banca merc. fin.*, 2004, 599.

[39] BUFACCHI, *L'enigma dei bond senza rating*, in *Sole24Ore*, 11 aprile 2002, 34.

of the institutional or professional investor, that is to say the expert and technically prepared person, who is able to adopt the investment decisions regardless of the evaluations expressed by the rating agencies[40].
In this case, the rating agency's fraudulent or negligent liability can be tempered, from the point of view of the compensation amount, by the negligent behavior of the expert investor, in accordance with the provisions of art. 1227 c.c.[41].
The case of the retail investor is certainly different, that is of the subject that is devoid of any experience and technical competence, for which the agency's judgment represents the only point of reference in the evaluation of the feasibility of a given economic operation[42].
This time, the rating acquires a more incisive value and rises to the rank of an opinion or a council, if not a targeted and reliable indication, with considerable effects on the opportunity to consider a certain issuer or a particular security.
For these reasons, it does not seem reasonable to exclude the possibility that the rating may affect investors' conviction and it is increasingly necessary to promote a policy of greater protection for the weak subjects operating on the financial markets, resorting to the use of all the possible remedies, not only those of a contractual or administrative nature, but also those based on the protection of compensation.

3.4. The jurisprudential orientation of the US Courts. -

The decisions issued by US judges highlight the conflict, already mentioned, between the right of the investor to obtain compensation for damages suffered by the rating and the right of

[40] Trib. Milano, 26 aprile 2006, n. 4882, in *Danno e resp.*, 2006, 874; il comma 1 dell'art. 35, del Regolamento della Consob n. 16190, del 29 ottobre 2007, distingue tra clientela al dettaglio, clientela professionale e controparte qualificata.
[41] Con riguardo al concorso di colpa del danneggiato nella produzione del danno si vedano, *ex multis*, ALPA, *La responsabilità civile. Parte generale*, Torino, 2010, 331-333; VIOLANTE, *Principio causalistico e declino del principio di autoresponsabilità,* in *Danno e resp.*, 2010, 794; ROSSELLO, *Il danno evitabile. La misura della responsabilità fra diligenza ed efficienza*, Padova, 1990.
[42] L'investitore ha diritto a ricevere le informazioni che sono necessarie ad assumere una decisione consapevole innanzitutto dall'intermediario finanziario, ossia dal soggetto che *in primis* propone e spesso caldeggia l'acquisto o la vendita di titoli; al riguardo, si veda la comunicazione della Consob del 21 aprile 2000, n. DI/30396.

the agencies to freely express the thought[43], which bases its protection on the First Amendment of the Constitution [44].
The majority orientation of the jurisprudence is in the sense of recognizing the prevalence of the right of rating agencies, unless their behavior is marked by the psychological element of malice (or actual malice) [45]; evidently this is a choice that affects investors, who are almost never able to warn at the time of investment, and to demonstrate in court, the fraudulent intent of rating companies.
The cases decided on matters of rating can be counted on the fingers of one hand, but some, in particular, are emblematic of the more traditional approach which identifies the single and unavoidable justification of imputation of responsibility in the malice.

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[43] TONELLO, *Le agenzie di rating finanziario. Il dibattito su un modello economico esposto al rischio di conflitto d'interessi. Verso un sistema pubblico di controllo?*, cit., 940; SANNA, *La responsabilità civile delle società di rating nei confronti degli investitori*, cit., 68; DUFF, *The Credit Ratings Agencies and Stakeholder Relations: Issues for Regulators*, cit., 11 ss.

[44] Il Primo Emendamento della Costituzione degli Stati Uniti prevede che «Congress all make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances». Al riguardo, si veda PINTO, *Control and Responsibility of Credit Rating Agencies in the United States*, cit., 351. Una delle prime pronunce contrarie all'equiparazione del *rating* alle opinioni espresse dalla stampa è stata emessa nel giudizio *Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Inc.*, n. *08-CV-7508*, 2009 *WL 2828018*, in 9 *S.D.N.Y.* 2009. Al riguardo, si vedano COSKUN, *Credit-Rating Agencies in the Basel II Framework: Why the Standardised Approach is Inadequate for Regulatory Capital Purposes*, in *Journal of International Banking Law and Regulation*, 2010, 157 ss.; ID., *Supervision of Credit Rating Agencies: The Role of Credit Rating Agencies in Finance Decisions*, in *Journal of International Banking Law and Regulation*, 2009, 254 ss.; DEATS, *Talk That Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies from Regulation?*, cit., 1818 ss.; Ó SÚILLEABHÁIN, *Who Will Watch the Watchmen? Rating-Agency Liability in Securities Litigation*, cit., 7.

[45] FLOOD, *Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisations and Credit Rating Agencies*, in LIKOSKY (ed.), *Privatising Development*, cit., 162; AMADOU, *The Systemic Regulation of Credit Rating Agencies and Rated Markets*, in *International Monetary Fund*, 2009, 5; BUSSANI, *Gli Agenti irresponsabili*, cit., 216; PARTNOY, *Rethinking Regulation of Credit-Rating Agencies: an Institutional Investor Perspective*, cit., 188 ss.; La possibilità delle agenzie di *rating* di evitare l'imputazione della responsabilità è direttamente proporzionale alla difficoltà per il danneggiato di dimostrare il dolo, la volontà di emettere valutazioni false o fuorvianti; si vedano al riguardo le sentenze pronunciate all'esito dei giudizi *Jefferson County School District v. Moody's Investor's Services, Inc.*, 175 *F.3d* 848 (*10th Cir.* 1999) e *County of Orange v. McGraw-Hill Cos., Inc.*, 203 *B.R.* 983, 988 (*C.D. Cal.* 1996).

The reference goes to some decisions that were published between the seventies and the end of the nineties, such as that of 1975, pronounced as a result of the judgment In Re Republic National Life Insurance Company and Realty Equities Corporation of New York and alii[46], with which the compensation claim proposed by the investor was rejected, since the unlawful act had not been sufficiently proven.

Again, twice the American judges have ruled out that the rating agencies were responsible for the damages deriving from the information received from the evaluated subjects, since they are not obliged to verify the reliability of the source; it is, more specifically of the cases Mallinckrodt v. Goldman, Sach[47], decided in 1976 and In Re Towers Financial Corporation [48], decided in 1996.

Finally, the 1999 decision, issued in the Quinn judgment v. McGraw-Hill Companies Inc. [49], is tranchant, since it has established the unreasonableness of the trust placed by the investor in the judgment of the agency.

However, we must acknowledge an important, yet still subdued, orientation in favor of the recognition of a more onerous form of responsibility, which developed better after the approval of the Dodd-Frank Act [50] and that tries to ignore the fraud [51], thus relieving the investor's evidentiary burden.

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[46] 387 *F. Supp.* 902, (*S.D.N.Y.* 1975).

[47] *Mallinckrodt Chemical Works v. Goldman, Sachs & Co., et alii.*, 420 *F. Supp.* 231 (*S.D.N.Y.* 1976).

[48] *In Re Towers Financial Corporation Noteholders Litigation*, 936 *F. Supp.* 126 (*S.D.N.Y.*, 1996).

[49] 168 *F.3d* 331, 336, *7th Cir.* 1999. Si veda, altresì, il caso *Cassa di Risparmio della Repubblica di San Marino S.p.a. v. Barclays Bank Ltd*, deciso, in data 9 marzo 2011, dalla *High Court of Justice Queen's Bench Division Commercial Court*, (2011) *EWHC* 484 (*Comm*).

[50] Questo provvedimento ha abrogato la *Rule 436 (g)* del *Securities Act* del 1933 ed ha, quindi, eliminato l'esenzione di responsabilità che era prevista a favore delle NRSROs.; PARTNOY, *Rethinking Regulation of Credit-Rating Agencies: an Institutional Investor Perspective*, cit., 188; DENNIS, *The Ratings Game: Explaining Rating Agency Failures in the Build up to the Financial Crisis*, cit., 1111 ss.

[51] DRIGO, *La responsabilità delle agenzie di rating per il danno all'informato. L'esperienza statunitense*, cit., 519 ss.; PINTO, *Control and Responsibility of Credit Rating Agencies in the United States*, cit., 351. Nel caso *Jaillet v. Cashman* del 1921 (189 *N.Y.S.* 743 (*Sup. Ct.* 1921), *affd* 194 *N.Y.S.* 947 (*App. Div.*); *affd* 130 *N.E.* 714 (*N.Y.* 1923) è stato espresso il principio della mancanza di *fiduciary relationship* tra agenzia di *rating* e investitori, con conseguente impossibilità di attribuire alla prima alcuna forma di responsabilità. SHORTER, SEITZINGER, *Credit Rating Agencies and their Regulation*, in BILSON, DELACOUR (eds.), *Credit Rating Agencies. Regulation and Reform Act Review*, cit., 10, riportano che «the case Lowe v. Securities and Exchange Commission [472 U.S. 181 (1985)], which concerned an exception to the definition

In this regard, some cases that have introduced key principles in assessing the behavior of rating companies are significant; among these, it is worth remembering the judgment Mill-Hall Textile Co. v. Dun & Bradstreet[52], decided in 1958, in which compensation for injury was recognized in the form of libelous defamation [53], to the economic reputation of the issuer, which had been assessed by the rating agency without having given it any assignment and, therefore, based on the information that the agency had collected on the market, according to the unsolicited rating system.
While, with the sentence pronounced, in 1996, at the end of the judgment La Salle National Bank v. Duff & Phelps[54], the principle of the protection of the trust generated in the investor by the rating agency's evaluation, which is able to influence the investment choices, was reaffirmed. In the present case, the fraudulent conduct of the rating agency has always emerged, aimed at misleading investors, but, what is more important, the reputational value of the rating agencies' judgment was highlighted.
And so, lastly, with the decision issued, in 2004, the outcome of the Commercial Financial Services v. Arthur Andersen, who was exceeded the limit represented by the First Amendment of the American Constitution, since it was stated that the rating agency, assuming the obligation, towards a consideration, to issue the rating, is required to perform the promised performance on time

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of "investment adviser" as stated in the Investment Advisers Act, stated that the publications containing factual information about financial transactions, market trends, and general market conditions were entitled to First Amendment protections (...). In a more recent case involving Enron litigation, in which CRAs were widely criticized for giving Enron a solid *rating* until close to the time of the declaration of bankruptcy, a federal district court concluded that, although there is no absolute First Amendment protection for credit *rating* reports, the courts in general have not precluded First Amendment protection for negligence» e precisano che «if a credit *rating* agency issued an opinion with actual malice, the qualified First Amendment protection would likely not be applicable».

[52] *Mill-Hall Textile Co. v. Dun & Bradstreet, Inc.*, 160 *F. Supp.* 778, (*S.D.N.Y.* 1958).

[53] Nel sistema giuridico nord-americano, la diffamazione deriva dalla emissione di una falsa dichiarazione relativamente ad un'altra persona, a cui deriva un danno e si distingue in *slander*, se la dichiarazione diffamatoria viene fatta oralmente, e in *libel*, se la dichiarazione diffamatoria è contenuta in uno scritto, come ad esempio una rivista o un giornale.

[54] *La Salle National Bank, et alii v. Duff & Phelps Credit Rating Co. and Shawmut Bank Connecticut*, 951 *F. Supp.* 1071, (*S.S.N.Y.* 1996). Al riguardo, si veda Ó SÚILLEABHÁIN, *Who Will Watch the Watchmen? Rating-Agency Liability in Securities Litigation*, cit., 8.

, with all the consequences that derive from this also in terms of liability for the damage caused[55].

3.5. The jurisprudential orientation of the national courts. -

If there are few cases decided in the North American continent, the number of those brought to the attention of the Italian judges is even smaller; the decisions published to date have confirmed the difficulty of bringing back the damages suffered by the investors, due to the ratings, in the channel of the agencies that issued them.
Two judgments are exemplary in this regard, one defined by the Court of Rome and the other by the Judge of first aid of Catanzaro. Both highlighted the typical problems of the recognition of damages linked to the rating, that is the nature of the agencies' judgment, which had to be qualified in the abstract as advice and recommendation, or as a mere subjective opinion which, however, would remain irrelevant and irrelevant, and the problems of the assessment of the causal link and, therefore, of the imputation of the damage to the conduct of the agencies, rather than to the behavior of other economic operators or still to external, unforeseeable or unexpected causes.
The first of them, promoted by an investor in respect of two rating agencies, Moody's Italia S.r.l. and Standard & Poor's The McGraw Hill Companies S.r.l., in addition to the financial intermediary, the Banca Monte dei Paschi di Siena and the Patti Chiari Consortium, was decided by the Court of Rome with sentence published on 7 January 2012[56].
The investor asked for compensation for the damage suffered due to the depreciation of the Lehman Brothers securities, which he had purchased through Banca Monte dei Paschi di Siena and which had obtained positive ratings up to the day following the bankruptcy of the issuer.
In this case, the rating was assigned the qualification desired by the agencies, of a simple opinion or opinion on the creditworthiness of an issuer or a security, which has no value and does not affect investment choices and, therefore, the Judge rejected the request for compensation against the agreed agencies.

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[55] In 94 *P.3d* 106 (*Okla Civ. App.* 2004), citato da PATE, *Triple-A Ratings Stench: May the Credit Rating Agencies Be Held Accountable?*, cit., 25 ss.
[56] Trib. Roma, 7 gennaio 2012, inedita.

The second judgment, decided by the Court of Catanzaro, was introduced by some investors who complained, in addition to the damages suffered by the financial intermediary, also the damages caused by the agreed rating agency for having purchased Lehman Brothers securities which, up to a few days before the request for admission to Chapter 11, they had a favorable rating, marked with the letter "A +".
The actors contested, in particular, the conflict of interests between the rating agency and the issuer, because, in their opinion, the first knew the disastrous economic-financial situation of the second one and avoided lowering the rating in order not to aggravate the rating the fortunes, thus incurring the liability provided for in Articles 164 of the T.U.F. and 2409 sexies of the Italian Civil Code, as well as of Directive 2003/6 / EC, for having disseminated and released incorrect, false and misleading information.
The Court ordered the financial intermediary to pay damages, by way of contractual liability for non-fulfillment of the information obligations required by law, but excluded the responsibility of the rating agency[57].
The reason for this exclusion does not lie in the same reasons adopted in the case decided by the Court of Rome, since there are different premises from which the Judge of Catanzaro started and different is the qualification that the rating received in this second judgment.
The evaluation of the agencies was, in fact, considered as an irreplaceable and relevant parameter in the formation of the conviction of the investor, without which it would not be possible to orient, consciously and rationally, to the promotion of a specific economic operation instead of a other.
The rating was therefore defined as an absorbing factor that guides the parties acting on the financial markets, which stands independently and independently of the valuations expressed by other economic operators and which gives investors a reasonable expectation, the whose injury legitimizes the imposition of civil liability on the companies that issued it.
That said, investors have, however, encountered some obstacles to satisfying their claims for damages, primarily for failing to demonstrate the alleged conflict of interest and, more specifically, the bad faith of the agency for deliberately keeping judgment high. in order not to adversely affect the bankruptcy fate of the

[57] Trib. Catanzaro, 2 marzo 2012, n. 685, inedita.

issuer and, subsequently, due to the difficulty of proving the existence of the constituent elements of the unlawful act.
In this regard, investors should have demonstrated the subjective element in the meantime, namely the lack of diligence, or imprudence or inexperience, of the agency in the rating formation or revision procedure, or the violation of rules of sector or international practice, thus reversing the burden of proof on the agency, which should have proved that the erroneous rating was not attributable to such violations, but to the erroneous, lying or misleading information that had been communicated by the issuer and that he could not verify.
Moreover, it would have been necessary to prove the causal link between the wrong or misleading rating and the alleged injury, with particular regard to the fact that the investors would not have bought the securities, or would not have taken into consideration a particular issuer, or would have sold the securities in their possession, if they had learned a truthful and / or complete judgment.
In this regard, the problem has been posed of the burden of investors to contribute to containing the detrimental effects of the rating agency's conduct, informing itself and monitoring the rating trend, under penalty of the application of the creditor's fault competition rule; the matter was settled by the Court, recognizing this obligation of the investors only to the extent that it does not force them to carry out particularly burdensome or extraordinary activities and can be fulfilled by applying ordinary diligence.
Finally, investors should have proved, in the opinion of the judge, the existence of unjust damage and, more specifically, of the financial loss resulting from the breach of contractual freedom, due to the fact that the erroneous, or incomplete, or false judgment of the agency prompted investors to buy securities they would not have invested in, or that they would have bought on different terms; they should have linked the unlawfulness of the damage to the damage of reliance on the reputational value of the agencies - inherent to the particular professional role they play - and, therefore, on the correctness and completeness of their information, as recognized, in similar cases, by the legitimacy jurisprudence, which imposes on the persons who carry out professionally or institutionally an activity of gathering and

disseminating information the obligation to provide exact information[58].
Recently, the Court of Rome, with sentence of 7 February 2014[59], has returned to take care of rating agencies, even if only to decide on the preliminary exceptions and, in particular, the exception of jurisdiction defect raised by the agencies agreed in relation to the action of contractual liability by social contact and action of non-contractual liability promoted by damaged investors.
These, in fact, had sued Standard & Poors Corporation, Moodys Corporation, Moodys Investors Service and Fitch Rating Ltd so that they would be sentenced to repay, as compensation, the sums paid by the actors for the purchase of the Lehman Brothers bonds; the requirement of the request resided in the fact that the defendant companies had spread and advertised incorrect information on the issuer's solvency and, therefore, had incurred liability from a social contact and / or extra-contractual liability for an unlawful act pursuant to art. 2043 c.c.
The actors complained that the rating agencies had always assigned to the bonds issued by the Lehamn Brothers group a positive rating, fluctuating between the A and the triple AAA, even though the group had undertaken a downward trend since 2007, which ended with the financial collapse of 9 September 2008 and with the request to use Chapter 11, that is the piloted bankruptcy procedure provided for by US law.
In other words, the agencies, despite knowing the real economic-financial situation of the group, would have continued to spread erroneous information on the security of Lehman Brothers bonds on the market and, therefore, would have betrayed the reasonable expectation placed by investors on the soundness of the issuer the titles, that is, they would have negligently continued to consider the group reliable and to publicize their solvency.
The agencies had defended themselves on the merits and, at the outset, had raised the objection of lack of jurisdiction.
The Court examined the preliminary objection in the light of the two questions raised by the plaintiffs, the contractual liability and the liability liability and it came to the conclusion that the exception was based on the first question and groundless if it refers to the second question.

[58] Cass. civ., 6 gennaio 1984, n. 94.
[59] In *www.ilcaso.it*.

With regard to social contact responsibility, the Judge started from art. 5, n. 1, lett. a, of Regulation n. 44/2001 - which provides that the person domiciled in the territory of a Member State may be sued in another Member State, in contractual matters, before the judge of the place where the obligation in question was or must be performed - to exclude that in the context of the "contractual subject" concept envisaged by this provision it is possible to include the contractual liability as a social contact.
Indeed, according to the interpretative reconstruction of the Judge, the rule certainly applies, in addition to the case in which a contract has actually been concluded, also in the case in which an obligation has been freely assumed by one party towards another; however, the rating agencies operate in an "international" context, do not establish a specific relationship with the investors and do not assume any particular obligation towards the investors.
For these reasons and, in particular, due to the fact that the present case was outside the scope of the aforementioned regulation, the Court did not recognize the conditions for affirming the jurisdiction of the Italian court.
Diametrically opposed, on the other hand, are the conclusions reached by the sentence through the verification of the jurisdictional exception in relation to the claim of liability brought by the actors.
It affirms the application of the provision in the art. 5, n. 3, of Regulation n. 44/2001, according to which the person domiciled in the territory of a Member State may be sued in another Member State, in the matter of tort, delict or negligence, before the judge of the place where the harmful event occurred or may occur.
This place is identified by the sentence with the place where the injury of the victim's right occurred, and not with the place where the future consequences of this injury occurred or could occur.
In other words, for the purposes of determining the jurisdiction what is relevant is not the cd. they give the consequence, that is the prejudice deriving from the decrease of the patrimony of the victim with respect to the status quo ante - which would lead to the identification of the place of verification of the damage with the place where the property is located of the damaged and, therefore, with his domicile, with consequent application of the forum actoris - but the cd. give event.

The damage event consists in the breach of the contractual freedom of the investor who bought or sold a security, caused by the spread of the rating[60].
This solution is conceivable also in the case in which the erroneous rating has discouraged the sale of a security and has, therefore, caused loss of chance to the investor, who can request protection from the Judge of the State in which the market on which the security was originally traded and purchased.
Therefore, applying this connection criterion, the Court was able to state, in the case in question, the jurisdiction of the Italian judge, since the actors had shown that they had purchased the Lehman Brothers titles in Italy.

4. Conclusions. -

Charging the rating agencies with civil liability for the damage caused by their behavior contrary to the rules of diligence, prudence, expertise, or the rules that regulate their activity, is neither simple nor obvious, since, as we have seen, there are too many limits that stand in the way of this operation and that come, above all, from the context in which the agencies find themselves operating daily.
Indeed, it cannot be overlooked that the circulation of economic information on the market is favored by various subjects who, in most cases, have a greater chance, compared to rating companies, of selecting the news and conditioning its content.
The issuer, when preparing a prospectus, the auditing companies, when they certify a financial statement, the financial intermediaries, when they advise investors, are just some examples of operators who have, ab origine, the material availability of information and who can manipulate the news at the source, more than the rating agencies can do, that instead draw the information, on the basis of which they issue the judgment, from the market or, in any case, from third parties.

[60] In tal senso si veda Cass. civ., 22 maggio 2012, n. 8076, secondo cui «l'art. 5 n. 3, del regolamento Ce n. 44 del 2001 – il quale stabilisce il criterio di collegamento per individuare la giurisdizione in materia di delitti e quasi delitti nel "luogo in cui l'evento dannoso è avvenuto o può avvenire" – va interpretato nel senso che per tale luogo deve intendersi quello in cui è avvenuta la lesione del diritto della vittima, senza avere riguardo al luogo dove si sono verificate o potranno verificarsi le conseguenze future di tale lesione; ne consegue che l'azione proposta contro una società di *rating*, che non ha sede e non opera in Italia, per il risarcimento del danno conseguente all'ipotizzato errore nella valutazione di titoli finanziari acquistati fuori dal territorio nazionale è sottratta alla giurisdizione del giudice italiano».

However, it cannot be denied that the rating companies are on the highest point of this ideal information pyramid and are, by their nature, assigned to the evaluation of all the information they receive from other economic operators who, on the contrary, place themselves on the lower steps of the pyramid.
They, therefore, have the technical competence necessary to discern the news worthy of acceptance by the less reliable ones and can count on a rating formation procedure conducted by qualified analysts, who are able to screen, with all the diligence that is required by the their professional status, the data they have.
This is the reason why the responsibility of these important market operators cannot be excluded, at least according to the rule of the causal competition, which covers the agencies with the compensation obligation to the extent of their contribution and in a merely solidarity manner, where it is recognized the responsibility of the other subjects who, before them, have laid the conditions for the production of the damage.
Notwithstanding that it is not possible, even, to exclude the exclusive attribution of responsibility to the agencies, if it appears that all the subjects of the chain have behaved diligently, according to the provisions of the second paragraph of the art. 1176 of the Italian Civil Code, and that the damage claimed by the investors is causally connected only to the conduct of the rating agencies, or for having incorrectly used the data and information correctly processed by the other operators, or for having artificially manipulated the information, being indifferent to the consequences of their behavior that has ended up misleading investors and causing them financial loss.
The economic crisis has caused disastrous effects for investors, in particular for non-institutional ones, but has allowed us to see with greater clarity within the tangles of interests of operators and has exalted, among them, precisely those that appeared marginal and less implicated in the banking and financial system.
In fact, the mistakes made by the rating agencies to highlight their role (not exactly random) in the choices of investors and, therefore, in the production of the negative effects mentioned above.
The jurisprudence that has just appeared in our experience seems to be the harbinger of a dispute that promises to be conspicuous.