Informational Obsession, Opinion Control and Freedom of Expression in Financial Regulation – Some Critical Perspectives

RÉGIS BISMUTH*

Abstract

The theoretical underpinnings of financial regulation have led to an obsessive quest for transparency. This has not only led to a gradual increase in disclosure requirements, but has also generated some other unintended consequences, such as structural conflicts of interests, which affect the modes of information (and opinion) production of influential actors. Credit rating agencies, for example, have also in their own right raised new regulatory concerns. Within this wider context, this article explores whether regulatory initiatives to stringently discipline credit rating agencies' activities (particularly with a view to issuing sovereign ratings), or other initiatives which reflect an increasing willingness to control speech in financial markets (for instance those targeting activist shareholder strategies), are in line with relevant principles guaranteeing the freedom of expression which have seemingly remained a blind spot of financial regulators.

Keywords

Financial regulation, transparency, disclosure, information, opinion, freedom of expression, financial disintermediation, credit rating agencies, shareholder activism, financial evaluation

1. Introduction

Information is often considered, rightly or wrongly, to be the raw material of finance. It is therefore unsurprising that financial regulation reforms following each financial crisis concern, to a large extent, informational requirements.[1] This seems to be part of a more general trend that goes beyond financial regulation and also applies to con-

* Régis Bismuth is Professor at Sciences Po Law School, Paris, France. The author thanks Mathieu Oppermann and Marianne Purru, students at Sciences Po, for their useful assistance in the preparation of this article. Call-off date for all hyperlinks, unless stated otherwise: 25 September 2021.

[1] Archon Fung, Mary Graham & David Weil, *Full Disclosure – The Perils and Promise of Transparency*, 107 (Cambridge: Cambridge University Press, 2007).

Bismuth, Régis, 'Informational Obsession, Opinion Control and Freedom of Expression in Financial Regulation – Some Critical Perspectives'. *European Business Law Review* 33, no. 3 (2022): 375-396.
©2022 Kluwer Law International BV, The Netherlands

sumer protection, patient consent and, more broadly, contract formation.[2] The critical approach with which we will inquire into this informational obsession, as well as its unintended consequences on opinion control in financial regulation, deserves to be preceded by three more preliminary general considerations that will allow us to better identify the issues at stake.

First, leaving informational regulatory requirements aside, it should be noted that information and the ability to access information are also key vectors of power and influence in the production of financial regulation. The opacity of certain activities is likely to render regulatory interventions complex. This became particularly obvious in the context of the 2008 global financial crisis (GFC), which originated *inter alia* in financial activities that had gone unnoticed by the regulators. We can recall the words of Brooksley Born, former director of the Commodity Futures Trading Commission (CFTC), who noted about derivative products he had to oversee that "the market was totally opaque; we now call it the dark market" and that "nobody really knew what was going on in the market".[3] In this respect, regulators faced "a structural, widening, epistemic gap between what they are able to know and what they need to know in order to administer the statutory mandates for their agencies".[4] Furthermore, beyond the challenge of accessing the information, lay the challenge of understanding it.[5] The technical expertise was, in this case, the ability to analyse the difficulties arising in regulatory processes. Indeed, there is an asymmetry between the resources deployed by economic operators and those deployed by regulators. This asymmetry of power, which poses "a danger to democracy",[6] has led several members of the European Parliament to publish their "Call for a Finance Watch" and an NGO named "Finance Watch" has meanwhile been established, which would be "capable of developing a counter-expertise on activities carried out in financial markets by the major operators".[7] In the United States, the GFC created an incentive for authorities to install an Office of Financial Research, an independent agency whose mission is to produce technical analyses for federal authorities.[8]

The second point worth mentioning at the outset of our study is the connection that can be established between informational requirements and transparency requirements. Indeed, in the financial field, "transparency" is a term that usually refers to

---

[2] Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure* 159 University of Pennsylvania Law Review 647 (2011).

[3] Quoted in Eva Becker, *Knowledge Capture in Financial – Regulation Data-, Information- and Knowledge- Asymmetries in the US Financial Crisis*, 24 (Wiesbaden: Springer VS, 2016).

[4] Robert F. Weber, *Structural Regulation as Antidote to Complexity Capture* 49 American Business Law Journal 644 (2012).

[5] Becker (n 3), 25.

[6] Finance Watch, *The Call for a Finance Watch* (June 2010) available at: <http://www.finance-watch.org/ifile/FW%20governance%20docs/Text-of-the-Initial-Call-for-a-Finance-Watch1.pdf>.

[7] *Ibid*.

[8] Becker (n 3), 26-27.

"information"[9] and the two terms are often used interchangeably.[10] Beyond this semantic association, the term transparency reflects more subtly the underlying dynamics and mechanisms relating to informational processes in financial activities. The Latin verb *transpareo* indeed reflects two dynamics: one passive (appearing through) and the other active (showing through). Transparency requires making visible what is not visible and implies the existence of a screen between the observer and the observed. These aspects are found in the financial field since operators are required to communicate information which generally allows making transparent the characteristics of a financial product or a financial service. The term "transparency" itself is also symbolically charged and conveys "imaginaries" reflecting a double semantic archaeology.[11] One can identify an "economic archaeology" of transparency that underlies the legal rules relating to the proper functioning of the market and its supposed efficiency. These rules imply that all participants in the marketplace have equal access to information.[12] There is also a "political archaeology" of transparency which is linked to the legitimization of the exercise of power.[13] Therefore, a distinction is to be made between transparency with an economic (or private law) dimension manifested by information requirements tending to obtain the manifestation of the truth or a link with reality, and a transparency with a political (or public law) dimension seeking to promote confidence in the authorities and, more broadly, decision-making processes. It may be that a form of porosity exists between these two types of transparency, specifically when the political and economic logics overlap. This is, for example, the case in relation to the responsibility of multinational companies which exercise a form of transnational private power.[14] Such an overlap is also obvious in financial regulation given, *inter alia,* the negative externalities arising from the systemic risk in the financial sector.

A third aspect relating to the question of information in financial regulation is that of the relative docility with which economic operators comply with new disclosure requirements. They often complain about the excessive cost of producing information and the consequences of such rules on the competitiveness of a financial hub.[15] However, the most criticised disclosure obligations are not transparency obligations mainly intended to inform investors, but more those concerning corporate social responsibility which reflect the aforementioned political or "public law" dimension of transparency. One relevant example is the regulatory framework on transparency for

---

[9] Thierry Bonneau, *Régulation bancaire et financière européenne et internationale*, 302 (2nd ed., Bruxelles: Bruylant, 2014).

[10] *Ibid.* See also, Fung, Graham & Weil (n 1) who use the terms *transparency* and *disclosure* indiscriminately.

[11] Jean-François Kerléo, *La transparence en droit – Recherche sur la formation d'une culture juridique* (Paris: Mare & Martin, 2015).

[12] *Ibid.*, 233.

[13] *Ibid.*, 99.

[14] *See*, Jean-Philippe Robé, Antoine Lyon-Caen & Stéphane Vernac (eds.), *Multinationals and the Constitutionalisation of the World Power System* (Abingdon: Routledge, 2016).

[15] Paul Latimer & Philipp Maume, *Promoting Information in the Marketplace for Financial Services – Financial Market Regulation and International Standards*, 35 (Heidelberg: Springer, 2015).

companies operating in the extractive industries, such as that provided in the EU Directives 2013/34[16] and 2013/50[17] requiring the publication of the sums paid to governments in connection with these activities ("publish what you pay").[18] While this solution was developed within international bodies to fight corruption, the preamble of the directive indicates that it was adopted "for the purposes of transparency and investor protection",[19] which is reasonably doubtful. A similar regulation adopted in the United States has been challenged before US federal courts. The Dodd-Frank Act required the Securities and Exchange Commission (SEC) to adopt new rules imposing these disclosure requirements on issuers.[20] Immediately after its publication, the new regulation was challenged by the American Petroleum Institute (API), a trade association representing the interests of companies in the hydrocarbon sector.[21] The API pointed out that the SEC regulation was likely to affect the competitiveness of companies and to violate the First Amendment in that such disclosure requirements constituted compelled speech, i.e., a measure requiring it to engage in specific speech. This argument was not examined by the court as it had already repealed the regulation on two other grounds: first, the SEC infringed the Dodd-Frank Act by requiring the disclosure to be public (whereas the actual requirement was only that the information be provided to the SEC) and second, the SEC regulation did not provide an exemption in case the communication of information was prohibited by the law of the foreign state whose natural resources are exploited.[22] Such an attack on disclosure obligations is particularly rare and, to our knowledge, none has been pursued in such an aggressive way before domestic courts when dealing with information primarily intended for investors.

---

[16] Directive 2013/34/EU of the European Parliament and the Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ EU L 182, 29 June 2013, 19.

[17] Directive 2013/50/EU of the European Parliament and the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC, OJ EU L 294, 6 November 2013, 13.

[18] On the initiative that has led to this standard, see Daniel Dommel, *La transparence pour conjurer la corruption: Le cas du pétrole*, in *Rapport moral sur l'argent dans le monde*, 189 (Paris: Association d'Economie Financière, 2005) and Extrative Industrie Transparency Initiative (EITI), *The EITI Standard* (2019) available at: <https://eiti.org/files/documents/eiti_standard_2019_en_a4_web.pdf>.

[19] Directive 2013/50/EU (n 17), Preamble, para. 8.

[20] *Dodd-Frank Wall Street Reform and Consumer Protection Act (2010)* (Sec. 1502 (*Conflict Minerals*); Sec. 1503 (*Reporting Requirements Regarding Coal or Other MineSafety*); Sec. 1504. (*Disclosure of Payments by Resource Extraction Issuers*)).

[21] US District Court for the District of Columbia, *American Petroleum Institute v. Securities & Exchange Commission and Oxfam America*, No. 12-1668 (JDB) (2 July 2013).

[22] See also, Celia R. Taylor, *The Unsettled State of Compelled Corporate Disclosure Regulation After the Conflict Mineral Rule Cases* 21 Lewis & Clark Law Review 427 (2017).

These preliminary observations lead us to the following analyses which inform the structure of this article. First, it appears that informational logic as a structural element of financial regulation is based on a questionable theory of market efficiency (see section 2). Second, it is necessary to examine some structural problems relating to the modes of information production that have emerged in the broader context of financial disintermediation (see section 3). Third, this reflection will lead us, relying on the precedent of credit rating agencies, to examine the situations where information requirements as such can generate flaws in regulation and fuel financial crises. In other words, does the obsession with regulation by disclosure of information generate "informational Frankenstein monsters" which thereby become even more challenging to regulate? (see section 4). Fourth, some concerns need to be raised about the other facet of the informational obsession in financial regulation when regulatory authorities not only expand disclosure requirements, but also attempt to restrict or censor the information or opinions disseminated by intermediaries and other actors. In our view, such initiatives are likely to raise serious questions of legality in light of the fundamental right to freedom of expression as protected under European law (see section 5). The article then concludes (see section 6).

2. An Informational Logic of Financial Regulation Based on a Questionable Theory

The development of information requirements in financial regulation stems from the "efficient market hypothesis" (EMH), according to which the price of financial instruments incorporates the entirety of available information on the basis of which investors make their decisions.[23] This hypothesis presupposes a sufficiently liquid market, a certain homogeneity among products, relevant information available to all agents, agents able to analyse and use such information to determine if it has been incorporated into the price of the financial instruments, and finally, that investors make, on the whole, rational decisions, i.e., they only take into account available information, untouched by unreliable data (for instance rumours) or by unthinking behaviour (sheep-like behaviour, mimetic strategy, etc.).[24] The EMH "does not assume perfect rationality among all market participants"[25] to the extent that irrational decisions "will cancel each other out"[26] and that, "on average, the market will behave as if all participants approximate rationality".[27] It should also be noted that, according to a behavioural science perspective, we cannot assume the unlimited cognitive capacity of

---

[23] Carlo Lombardini, *La protection de l'investisseur sur le marché financier*, 17 (Geneva/Paris: Schulthess/LGDJ, 2012)

[24] *Ibid.*, 18.

[25] Eyal Zamir & Doron Teichman, *Behvioral Law and Economics*, 356 (New York: Oxford University Press, 2018).

[26] *Ibid.*

[27] *Ibid.*

economic agents[28] and, in this light, disclosure and transparency requirements should not be aimed at achieving the perfect information of investors, but rather at closing the cognitive capacity gaps between them.[29]

A substantial part of the regulation of financial activities is based on the EMH in that it seeks to ensure that the conditions for efficiency are met. The question of information is crucial, as it aims to correct possible information asymmetries that may exist between different operators,[30] and which are ultimately quite common, as the seller of a product generally knows his product better than a buyer.[31] In the financial sector, the existence of information asymmetry between issuers and investors has led authorities to require the communication of information from the former to the latter on a permanent or periodic basis. Such regulatory requirements have the advantage of not directly incurring public expenditure and placing the costs on operators.[32] It is also in line with the EMH in that the aim is to place the various actors on an equal footing regarding information access. This equal access also justifies the rules relating to insider trading or to the dissemination of false market information.

One may nevertheless wonder whether this approach, upon which most financial regulation is based, does not generate more problems than it solves.[33] Without claiming to be exhaustive, several elements showing the limits of the informational logic of regulation deserve to be mentioned.

The informational logic of disclosure-based regulation rests on a liberal dynamic that has the effect of transferring the responsibility for decision-making entirely to the investor, who is supposed to be fully informed of the risks to which he is exposed (*caveat emptor*). Unlike merit-based regulation, it does not focus on the quality of the financial instruments made available to investors[34] or, in a very broad sense of the concept, on their social usefulness – that is, whether they are useful for financing the real economy. A merit-based regulation of financial instruments would be a paternalistic option more complex and cumbersome to implement since it would require authorities to define which products are economically and socially acceptable. Such regulation, however, exists in the United States in the narrow and specific context of

---

[28] Mads Andenas & Iris H-Y Chiu, *The Foundations and Future of Financial Regulation – Governance for Responsibility*, 22 (Abingdon/New York: Routledge, 2014).

[29] Kerléo (n 11), 246.

[30] Andenas & Chiu (n 28), 22.

[31] Régis Lanneau, *Asymétries d'information* in Michel Bazex *et al.*, *Dictionnaire des régulations*, 50 (Paris: LexisNexis, 2016).

[32] Ben-Shahar & Schneider (n 2), 682. Such an argument, however, does not take into account the downstream costs incurred by the regulator in monitoring compliance with this regulation.

[33] Luca Enriques & Sergio Gilotta, *Disclosure and Financial Market Regulation* in Niamh Moloney, Eilis Ferran & Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation*, 525 (Oxford: Oxford University Press, 2015).

[34] Merit-based regulation can be defined as "a regulatory system that authorizes [the regulator] to deny registration to a securities offering unless the substantive terms of the offering and the associated transactions (i) ensure a fair relation between promoters and public investors, and (ii) provide public investors with a reasonable relation of risk to return" (Mark A. Sargent, *Reports of State Merit Regulation of Securities Offerings* 41 The Business Lawyer 785, 829 (1986)).

"blue sky laws" which can be adopted by state authorities to limit the offering of securities for the purpose of investor protection. When Apple went public in the early 1980s, the prospectus was approved by the SEC at the federal level, but the offering of shares was deemed too risky for investors and was therefore prohibited in the state of Massachusetts.[35]

As a result of disclosure-based regulation, issuers can offer extremely risky investments if the required information is disclosed to the market. The first major securities legislation on disclosure, the Securities Act, adopted in 1933 in the United States, was called the "rotten-egg statute", reflecting the idea that it is possible to sell "rotten eggs" to investors, as long as they receive the required information.[36] The information acts as a shield for the issuer or the intermediary who cannot be held responsible due to poor financial performance once these formalities have been completed (except for fraud, misrepresentation, etc.). It is not coincidental that the reflection around merit-based regulation received renewed interest after the GFC.[37]

The GFC also led to an increase in the level and intensity of voices critical of the EMH. Among the critics were not only academics, practitioners, or journalists.[38] Questioning of the myth of market efficiency also occurred within regulatory authorities, as shown by the study published in 2009 by Lord Turner under the auspices of the British Financial Services Authority (FSA), of which he was the then chairman.[39] The study pointed out that each of the hypotheses of the EMH "is now subject to extensive challenge on both theoretical and empirical grounds, with potential implications for the appropriate design of regulation and the role of regulatory authorities".[40] The critique of the EMH is multifaceted and concerns both the hypotheses on which it is based and the processes of knowledge transmission relating to financial techniques.

It is legitimate to question the relevance of the information made available, the reality of the equal access of investors to this information, and their ability to process it and allegedly make rational decisions based thereon. The wide range of available information, resulting from legal obligations or produced by various actors (press, financial analysts, etc.), as well as its complexity, imply that it is difficult, if not impossible, for certain actors to process it[41] while others have their own research capacity[42] (e.g., human resources, IT capacity, and possibly artificial intelligence

---

[35] Paul S. Atkins, *Is Excessive Regulation and Litigation Eroding U.S. Financial Competitiveness?* (20 April 2007) available at: <https://www.sec.gov/news/speech/2007/spch042007psa.htm>.

[36] Alphonse A. Sommer *et al.*, *New Approaches to Disclosure in Registered Security Offerings* 28 The Business Lawyer 505 (1973).

[37] Ronald J. Colombo, *Merit Regulation via the Suitability Rules* 12 Journal of International Business and Law 1 (2013).

[38] See the very instructive publication by Justin Fox, *The Myth of the Rational Market – A History of Risk, Reward, and Delusion on Wall Street* (New York City: Harper Business, 2009).

[39] FSA, *The Turner Review – A Regulatory Response to the Global Banking Crisis* (March 2009).

[40] *Ibid.*, 39.

[41] Lombardini (n 23), 21.

[42] Andenas & Chiu (n 28), 23; Claire H. Hill, *A Personality Theory of Sophisticated Investor Decision-Making (in the 2008 Financial Crisis), with Some Policy Implications* 2 International Journal for Financial Services 7 (2017).

systems). The EMH has also been challenged by work in behavioural finance and to a larger extent by the idea that the individual behaviour of investors is not necessarily based on strict economic rationality, but is influenced by multiple factors and stimuli.[43] The latter include suggestions or opinions made by financial intermediaries, decisions taken by other investors triggering conforming sheep-like behaviour (which may in fact aggravate the procyclical nature of certain financial crises), and advertising or other forms of commercial propaganda which can be required from issuers.

Disclosure-based regulation has thus developed on a rather fragile theory of EMH. The main objective of providing exhaustive information to investors, who are mainly unable to process it, cannot therefore constitute the only satisfactory horizon for financial regulation. Moreover, there is not only the problem of exhaustiveness and utility of the information provided, but also the broader issue of conflicts of interests that affect the production of information.

3. A System of Information Production Biased by Conflicts of Interests

As pointed out above, one of the essential objectives of financial regulation is to correct the asymmetry of information existing between investors and issuers in order to reach an ideal market efficiency. Beyond the dimension of disclosure on the part of the issuers which we have already discussed, it is necessary to bear in mind more generally the structure of informational processes at work in financial markets. In this context, it seems important to address the problems stemming from the activities of market "gatekeepers",[44] i.e., intermediaries whose mission is, *inter alia*, to ensure the transmission as well as the quality of information and to secure the relationship between the issuer and investor.[45] They include, *inter alia*, auditors and credit rating agencies.

It is useful to briefly review the evolution of financing techniques over the past forty years in order to better understand the informational problems related to the activities of gatekeepers, which were particularly evident in the GFC. An economic operator has two main sources of financing: bank credit and capital markets in the broader sense. First, the banking system falls under the financial intermediary model insofar as the bank as the "middleman of funding"[46] constitutes a "buffer" between

---

[43] See, for example, the very detailed report commissioned by the European Commission, *Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective* (November 2010).

[44] See John C. Coffee Jr, *The Gatekeepers – The Professions and Corporate Governance* (Oxford: Oxford University Press, 2006); Yasuyuki Fuchita & Robert E. Litan (eds), *Financial Gatekeepers: Can They Protect Investors?* (Washington DC: Brookings Institution Press, 2006).

[45] "Generally, gatekeepers are regarded as financial intermediaries that operate between issuers and investors, and include auditors, underwriters, lawyers, securities analysts, and credit rating agencies" (Jennifer Payne, *The Role of Gatekeepers* in Niamh Moloney, Eilis Ferran & Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation*, 254 (Oxford: Oxford University Press, 2015).

[46] Steven L. Schwarcz, *Banking and Financial Regulation*, in Francesco Parisi (ed), *The Oxford Handbook of Law and Economic*, 424 (Oxford: Oxford University Press, 2017).

the supply and the demand for financing and ensures the transformation of maturities and risks between its assets and its liabilities. For the bank, this model amounts to an internal evaluation and control of the risks to which it is exposed. Second, capital markets, which have developed concurrently with a movement towards the financialisation of the economy, are at least a priori, a model of disintermediated finance (or "direct" finance) insofar as there is an immediate relationship between the supply and the demand for financing.[47]

However, "direct finance" is only disintermediated in theory. Indeed, it has itself generated processes of re-intermediation of a different nature than that of the banking sector, because, in order to be active on the markets, "the investor needs financial intermediaries".[48] The essential activities carried out by banks in the context of a "debt economy" could not vanish just through the gradual shift to a "capital market economy". Not using the banking interface has not resulted in the disappearance of all mediation and the necessity to evaluate and control risks related to financial instruments. These internal banking activities relating to risk assessment have been fragmented, redefined, and redistributed, or reallocated to a plethora of actors, institutions and structures, not only to ensure a match between supply and demand for financing, but also to guarantee the integrity of transactions and the proper functioning of the market.

Thus, many of the financial risk assessment and control functions to be performed by banks have been performed *de jure* or *de facto* by multiple satellite actors, that is, the market *gatekeepers* (audit firms, credit rating agencies, financial analysts, etc.). Some participate in the production of "descriptive" information (for instance, auditors when they certify the accuracy of accounts), others produce "predictive" information (for instance, analysts or credit rating agencies)[49] which rather constitutes an "opinion". Some of these professions were already highly exposed during the financial scandals of the early 2000s (Enron, Worldcom, Parmalat, etc.) and were subject to several reforms. This was notably the case for audit firms and financial analysts. The GFC highlighted the flaws affecting the regulation of the other types of actors such as credit rating agencies, investment advisors, or investment banks.

The dissemination of these different functions, now carried out by distinct actors, has generated a dangerous dissociation between those who, on the one hand, evaluate or control the risks and investors who, on the other hand, assume the financial consequences of those risks. This is unlike banks, which have usually to directly assess the risk to which they are exposed. The former, moreover, trade in and profit from

---

[47] The phenomena of financialisation and liberalisation of financial activities that developed in the 1980s were symbolised by the so-called "3 Ds" theory: deregulation, decompartmentalisation and disintermediation. The latter referred to the phenomenon whereby financing needs and capacities could be met directly on the financial markets through the issuance and acquisition of securities without the intermediation of a bank. *See,* Carlo Lombardini (n 23), 104 (where the author makes a distinction between "investor" and "user of the banking system").

[48] Lombardini (n 23), 166. (Translation from the author).

[49] On the distinction between descriptive and predictive information, *see* Jérôme Chacornac, *Essai sur les fonctions de l'information en droit des instruments financiers* (Paris: Dalloz, 2014).

the risks to which the latter are exposed. This fragmentation of functions and the resulting asymmetry of information and expertise bear the seeds of conflicts of interests to which these different actors are exposed, and which are likely to affect investors directly. At the heart of these conflicts lies the question of the remuneration of intermediaries. The remuneration may be paid directly by the audited or rated entity, as is the case for auditors and credit rating agencies, for solicited ratings. This is likely to generate an incentive to reduce the severity of the audit or to issue an inflated rating.

Thus, the transition from intermediate finance to direct finance, somehow idealised and perceived as a triumph of modernity,[50] has also generated a structural problem in the production of financial information. The critique can even go further when we consider the possibility that the information produced by these intermediaries may itself generate new types of financial risks. The problems surrounding the regulation of credit rating agencies are particularly instructive.

4. Financial Regulation Generating "Informational Frankenstein Monsters": The Case of Credit Rating Agencies

Has the need for information resulting from financial disintermediation generated "informational Frankenstein monsters" which have become almost impossible to regulate? The GFC has lifted the veil on some of the shortcomings of credit rating agencies. It is important to expose these shortcomings in order to better understand the regulatory risks stemming from a *de facto* and *de jure* empowerment of financial intermediaries.

A credit rating can be defined as an assessment of the credit quality of an issuer or a financial instrument, according to a simplified classification system.[51] This credit rating agency's evaluation is carried out pursuant to its very own methodology. The credit rating is not based on scientific knowledge but on techniques, which have been tested, corrected, and progressively perfected by the credit rating agencies. Therefore, a credit rating can only be qualified as an opinion and not as information that can be proven. Credit rating agencies frequently underline this position. Fitch, for instance, states that credit ratings "are opinions based on established criteria and methodologies. [They] are not facts, and therefore cannot be described as being 'accurate' or 'inaccurate'".[52] This qualification of a credit rating as an opinion, and not as information, is of particular importance as the dissemination of an opinion (for

---

[50] Andenas & Chiu (n 28), 25 (recalling that for some authors "the rise of the financial intermediary" represents "an advanced stage of capitalism in the … development of modern capitalist civilization").

[51] See Article 3(1)(a) of Regulation (EC) 1060/2009 of the European Parliament and the Council of 16 September 2009 on Credit Rating Agencies, OJ EU L 302, 17 November 2009, 1 (defining a "credit rating" as "an opinion regarding the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, or of an issuer of such a debt or financial obligation, debt security, preferred share or other financial instrument").

[52] FitchRatings, *Rating Definitions* (September 2021) available at: <https://www.fitchratings.com/products/rating-definitions#about-rating-definitions>.

instance, dissemination to the market when the credit rating agency issues a credit rating unsolicited by the issuer) enjoys in general specific protection under the right to freedom of expression.[53]

These opinions can have a particularly significant influence on markets, with some investors ("rating-based buyers") basing their decisions on credit rating agencies' evaluations (which are presented in the form of extremely easy-to-understand grades), without necessarily absorbing the information resulting from the issuers' disclosure obligations (which, in turn, are complex and too detailed).[54] Governments also bear some responsibility for this situation as they required the use of credit rating agencies for securitisation transactions and allowed the use of credit ratings in the framework of prudential regulation of financial institutions.[55] The result, as the De Larosière report pointed out, is that credit rating agencies played a "pivotal and quasi-regulatory role"[56] without being subject to a framework commensurate with their responsibilities. Credit rating agencies constitute a textbook example of how overreliance on and the *de jure* empowerment of a type of financial intermediary reinforce their authority as well as power resources. This, *de facto,* affects the regulator's direct regulatory capacity to control them.[57]

Overreliance on credit ratings has not only increased the influence of the credit rating agencies on markets, it has also amplified the self-fulfilling dimension of their credit ratings. All a credit rating agency has to do is say that an issuer risks becoming insolvent and the issuer risks becoming insolvent. This is not because the issuer is insolvent in the first place, but rather because the credit rating will generate individual decisions (disinvestment, withdrawal of financing, etc.) which, in aggregate, will rapidly worsen the issuer's financial situation. As was emphasised during the hearings conducted before the House of Representatives in the United States, "while the credit ratings … are intended to be opinions … and of course protected as opinions by the First Amendment, it appears that the treatment of these ratings by market

---

[53] For instance, in the United States, see *Compuware Corp. v. Moody's Investors Services, Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (noting that "[a] Moody's credit rating is a predictive opinion, dependent on a subjective and discretionary weighing of complex factors. We find no basis upon which we could conclude that the credit rating itself communicates any provably false factual connotation. Even if we could draw any fact-based inferences from this rating, such inferences could not be proven false because of the inherently subjective nature of Moody's ratings calculation"). See also *infra* section 5 of this article.

[54] Hill (n 42), 8.

[55] On these aspects, *see* Kern Alexander, *The Risks of Ratings in Bank Capital Regulation* 25(2) European Business Law Review 295 (2014); Régis Bismuth, *La réforme de l'encadrement prudentiel des banques par le Comité de Bâle, reflet des tensions entre les différents espaces de régulation financière* in Alain Delion & Laurent Vidal (eds), *Les réformes des régulations financières*, 181 (Paris: IRJS Editions, 2013).

[56] High-Level Group on Financial Supervision in the EU, *Report* 23, para. 66 (25 February 2009).

[57] Andreas Kruck, *Asymmetry in Empowering and Disempowering Private Intermediaries: The Case of Credit Rating Agencies* 670 ANNALS of the American Academy of Political and Social Science 133 (2017).

participants is way beyond opinions".[58] Originally understood as opinions, credit ratings have been perceived as sensitive information by the market.

But is it possible for governments to regulate this informational Frankenstein's monster, for whose creation they are partly responsible?[59] The EU's objective, for example, has been to work to "detoxify"[60] the market from credit rating agencies while regulating their activities to ensure the quality of credit ratings – an initiative which has sparked some controversies.[61] How European authorities have regulated unsolicited sovereign ratings (the rating of a public entity's debt without the entity's request) is particularly instructive.

The EU Regulation 462/2013[62] provides a very stringent framework for the timing and frequency of unsolicited sovereign ratings to reduce the risk of volatility generated by erratic and unpredictable credit ratings.[63] Every year at the end of December, credit rating agencies must publish a schedule for the following year, setting a maximum of three dates for the publication of unsolicited sovereign ratings and corresponding rating outlooks.[64] These publications may only be made after the markets close and at least one hour before they open.[65] Finally, credit rating agencies must inform the rated entity at least one full business day prior to the publication of the rating or rating outlook, and this information "shall include the principal grounds on which the credit rating or rating outlook is based in order to give the rated entity an opportunity to draw attention of the credit rating agency to any factual errors".[66] This *ex ante* proceduralisation, tantamount to the rights of the defence, is a completely new development. It reveals a recognition of the *de facto* power that credit rating agencies have exercised and denotes the willingness of the authorities to strictly regulate their speech, which has become significantly influential because of regulations almost sanctifying their privileged position.

More surprisingly, the regulation prohibits credit rating agencies from making policy recommendations in their credit ratings. It states that "when announcing a credit rating, a credit rating agency is to explain in its press releases or reports the key

---

[58] US House of Representatives, *Approaches to Improving Credit Rating Agency Regulation*, No. 111–33 *Hearing Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the Committee on Financial Services* 43 (19 May 2009).

[59] For an overall study on the EU regulatory response, see Gudula Deipenbrock, *Trying or Failing Better Next Time? – The European Legal Framework for Credit Rating Agencies after Its Second Reform* 25(2) European Business Law Review 207 (2014).

[60] Senate of the French Republic, *Rapport d'information fait au nom de la mission commune d'information sur le fonctionnement, la méthodologie et la crédibilité des agences de notation* 68- 86 (No. 598, 18 June 2012).

[61] Andenas & Chiu (n 28), 193.

[62] Regulation (EU) 462/2013 of the European Parliament and the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ EU L 146, 31 May 2013, 1.

[63] Regulation 462/2013 (n 62), Preamble, para. 42.

[64] Article 8a (3) of EU Regulation 1060/2009 as modified by EU Regulation 462/2013 (n 62).

[65] Annex I, Section D, III(3) of EU Regulation 1060/2009 as modified by EU Regulation 462/2013 (n 62).

[66] Annex I, Section D, I(3) of EU Regulation 1060/2009 as modified by EU Regulation 462/2013 (n 62).

elements underlying the credit rating and although national policies may serve as an element underlying a sovereign rating, policy recommendations, prescriptions or guidelines".[67] This obligation, which is also unprecedented, seems to contradict the imperative of transparency that regulation imposes. One needs to only look at some of the reports published after the new regulation came into force, in which credit rating agencies indicated that a slow-down in growth was a result of the labour market, but without being able to say explicitly that it should be made more flexible.[68] In fact, by having to publish "a detailed research report explaining all the assumptions, parameters, limits and uncertainties and any other information taken into account",[69] credit rating agencies can only indirectly make policy recommendations.

This is where a new question arises, one that has been manifestly ignored by the European legislator when designing the regime for credit rating agencies: Is it possible, for the purpose of ensuring market stability (or another objective of financial regulation such as market integrity), to limit the freedom of expression of a regulated actor (or even of a random investor), when their opinions are perceived as sensitive information by the market?

5. Regulating Information and Controlling Opinions in Financial Markets: The Forgotten Issue of Freedom of Expression

The aforementioned case of regulation of credit rating agencies – here concerning sovereign ratings – highlights the fact that financial regulation can lead to possible restrictions on the freedom of expression of certain market operators when they disseminate information and opinions about issuers. Such restrictions may also arise in other areas where the behaviour of certain influential investors, who bet on the price evolution of financial instruments of certain issuers (for instance short selling) while making their transactions public, might be considered as constituting market abuse and more specifically price manipulation.[70] "Voice" is indeed "one of the most

---

[67] Annex I, Section D, III(3) of EU Regulation 1060/2009 as modified by EU Regulation 462/2013 (n 62).

[68] For example, the downgrade of Italian debt in July 2013 by Standard & Poor's was accompanied by a report stating that "the low growth stems in large part from rigidities in Italy's labor and product markets", the primary budget surplus "stems from a budgetary composition that deters growth", the "current expenditure is disproportionately high compared with capital expenditure" and that "tax levels on capital and labor are higher than those on property and consumption" (Standard & Poor's, *Long-Term Ratings On Italy Lowered To 'BBB' – Outlook Negative (Key Elements Underlying the Credit Rating* (9 July 2013) available at: <www.standardandpoors.com>.

[69] Annex I, Section D, III(1) of EU Regulation 1060/2009 as modified by EU Regulation 462/2013 (n 62).

[70] In a widely reported case, the French financial regulator, the *Autorité des Marchés Financiers* (AMF) opened an investigation into the hedge fund Muddy Waters Capital's statements targeting the supermarket group Casino as the AMF considered that Muddy Waters was possibly disseminating misleading and untrue investment recommendations as well as responsible of price manipulation. The AMF eventually closed the investigation due to the "relative gravity" of the charges. See the AMF's

common methods of shareholder activism".[71] Interestingly, the International Organization of Securities Commissions (IOSCO) has considered that short selling in the context of activist strategies plays "an important role in the market for a variety of reasons, such as providing more efficient price discovery",[72] thereby correcting a deficient disclosure-based regulation unable to reach its objective of market equilibrium.

These various initiatives raise a more structural question for financial regulation: is it possible in light of the applicable standards on freedom of expression, to restrict the dissemination of information or opinions in order to ensure proper market functioning, market integrity, or financial stability? Is this possible even where the information or opinions on the issuers concerned (governments, listed companies, etc.) can also be matters of general interest? The broader question of the relationship between financial regulation and freedom of expression has received little attention in the European scholarship,[73] in contrast to that in the US context.[74]

The principles applicable to freedom of expression derive from Article 10 of the European Convention on Human Rights (ECHR) as well as from Article 11 of the Charter of Fundamental Rights of the European Union (CFREU), insofar as the CFREU is binding on EU Member States "when they are implementing Union law".[75] We will focus mainly on the standards developed in the case law of the European Court of Human Rights (ECtHR) because there have been more relevant precedents than in the context of the CJEU and because the level of protection guaranteed by the ECHR constitutes a basic threshold with regards to the CFREU.[76]

Among the questions the ECtHR explores when considering whether an interference with the right to freedom of expression is justified, is whether the interference pursues one or more of the legitimate aims set out in ECHR Article 10 and, in addition, whether the interference is necessary in a democratic society.[77] In light of these

---

statement (17 December 2019) available at: <https://www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf/lautorite-des-marches-financiers-amf-cloture-lenquete-ouverte-le-12-fevrier-2016-portant-sur>. See also, AMF, *Report by the AMF on Shareholder Activism* (April 2020) available at: <https://www.amf-france.org/sites/default/files/2020-04/report-by-the-autorite-des-marches-financiers-on-shareholder-activism_5.pdf>.

[71] Wolf-Georg Ringe, *Shareholder Activism: A Renaissance* in Jeffrey N. Gordon & Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance*, 407 (2018).

[72] IOSCO, *Regulation of Short Selling – Final Report* 4 (June 2009) available at: <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD292.pdf>.

[73] See however, Chiara Mosca, *Director–Shareholder Dialogues Behind the Scenes: Searching for a Balance Between Freedom of Expression and Market Fairness* 15(4) European Company and Financial Law Review 805 (2018).

[74] See, for instance, Karl M. F. Lockhart, *A 'Corporate Democracy'?: Freedom of Speech and the SEC* 104 Virginia Law Review 1593 (2018); Michael R. Siebecker, C*orporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment Approach to the First Amendment* 48 William & Mary Law Review 613 (2006).

[75] CFREU, Article 51(1).

[76] Treaty on the European Union (TEU), Article 6(3).

[77] See ECtHR, *Axel Springer AG v. Germany*, Appl. No. 39954/08, Judgment of 7 February 2012, para. 76.

two criteria, we can assess the extent to which a restriction on freedom of expression is likely to be justified by financial regulation imperatives such as, *inter alia*, the regulation of sovereign ratings or the fight against a certain form of shareholder activism.

The "proper functioning of financial markets" has not, to our knowledge, been recognised as a legitimate aim in the case law of the Court when applying ECHR Article 10. The Court has so far refrained from considering the regulation of an economic market as a legitimate aim as this would consecrate a public economic order. This can also be observed in competition regulation, which the Court has always preferred to consider under the angle of the "protection of the 'rights of others'".[78] The Court might not, for example, enshrine the "proper functioning of markets" as a "pressing social need", but it might nonetheless consider the objectives of protecting investors and other market participants to be legitimate aims. This would be consistent with the objective of consumer protection which the Court has repeatedly recognized as legitimate.[79]

The same analysis can be made regarding the objective of "market integrity". The Court has considered that imperatives such as the global fight against corruption, money laundering, or the financing of terrorism could be considered legitimate aims.[80] When it comes to the dissemination of information, investment recommendations, financial analysis and price manipulation, the objective of "market integrity" is linked to the protection of the rights of others.

The case of the restructuring of the Greek sovereign debt before the ECtHR was, however, an opportunity to specify in what way investors in financial markets are to be distinguished from consumers in general. In referring to a case before the CJEU concerning the same sovereign debt restructuring,[81] the ECtHR noted that "the investors concerned could not claim to have acted as prudent and informed economic actors who could rely on the existence of legitimate expectations"[82] because "such transactions took place in particularly volatile markets, often subject to uncontrollable hazards and risks regarding the fall or increase in value of such securities, which could lead to speculation to obtain high returns in a very short period of time".[83] It added that "even if all claimants were not engaged in transactions of a speculative nature,

---

[78] ECtHR, *Barthold v. Germany*, Appl. No. 8734/79, Judgment of 25 March 1985, para. 5; ECtHR, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, Appl. No. 10572/83, Judgment of 20 November 1989, para. 3.

[79] ECtHR, *Bergens Tidende and others v. Norway*, Appl. No. 26132/95, Judgment of 2 May 2000, para. 51.

[80] See for example concerning Article 8 (Right to respect for private and family life): ECtHR, *Michaud v. France,* Appl. No. 12323/11, Judgment of 6 December 2012, para. 99.

[81] CJEU, *Alessandro Accorinti and Others. v. European Central Bank (ECB)*, Case T-79/13, Judgment of 7 October 2015.

[82] ECtHR, *Mamatas and others v. Greece,* Appl. Nos. 63066/14, 64297/14 and 66106/1421, Judgment of 21 July 2016, para. 118 (There is no English version of this judgment available – Translation by the author from the French version).

[83] *Ibid*.

they must have been aware of the aforementioned hazards and risks as to a possible considerable loss in the values of the securities".[84]

It follows from the Court's case law that it would certainly accept the protection of investors as a legitimate aim under the heading of "protection of the rights of others", but that it would nevertheless take into account the risky nature of financial markets where investors would voluntarily expose themselves to financial losses.

It should also be noted that the Court has dealt with questions of financial regulation in the context of cases involving infringements of property rights in a systemic crisis. In the context of the nationalisation of Northern Rock, the Court recognised that the United Kingdom had a wider margin of appreciation in terms of compensation, given the situation of a financial and systemic crisis and the "exceptional circumstances prevailing in the financial sector, both domestically and internationally".[85] The Court took a similar approach in the case of the Greek debt restructuring, where the emphasis was placed on the macroeconomic context. The Court recognised that Greece "could legitimately take measures to achieve these aims, namely the maintenance of economic stability and debt restructuring, in the general interest of the community".[86] This could allow the regulation of sovereign ratings to be considered as pursuing a "legitimate aim", but only when exceptional circumstances exist – and probably not to justify a permanent regulation that would apply even in the absence of a risk to financial stability, as Regulation 462/2013 does.

Concerning the question of whether the interference is necessary in a democratic society, it must be emphasised that, as the Court has consistently pointed out in its jurisprudence, "freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment"[87] and that "it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb".[88] Such are the demands of "pluralism, tolerance and broadmindedness without which there is no 'democratic society'".[89] This is why "this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly".[90] When it comes to assessing the necessity of the interference, the State party must not only demonstrate a "pressing social need" for which it has a certain margin of appreciation, but the ECtHR has a duty to "look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the

---

[84] *Ibid*.

[85] ECtHR, *Dennis Grainger and others v. United Kingdom* Appl. No. 34940/10, Decision of 10 July 2012, para. 39.

[86] ECtHR, *Mamatas and others v. Greece* (n 82), para. 103.

[87] ECtHR, *Éditions Plon v. France*, Appl. No. 58148/00, Judgment of 18 May 2004, para. 42.

[88] *Ibid.*

[89] *Ibid.*

[90] ECtHR, *Chauvy and others v. France*, Appl. No. 64915/01, Judgment of 29 June 2004, para. 63; ECtHR, *Perna v. Italy*, Appl. No. 48898/99, Judgment of 6 May 2003, para. 39.

national authorities to justify it are 'relevant and sufficient'".[91] It indeed considers that "the dangers which restrictions of that kind pose for a democratic society are such that they call for the most careful scrutiny on the part of the Court".[92]

Not all information and opinions enjoy the same level of protection under ECHR Article 10. The ECtHR considers that information and opinions that are of interest for the public debate deserve specific protection, unlike those which are of private interest only. This includes "information and ideas on political issues just as on those in other areas of public interest"[93] if they are likely to be of interest to the public. There is no doubt that the information and opinions relating to the economic situation of public actors – such as the ones that fall under the scope of Regulation 462/2013 – are protected in this context by Article 10. The Court has also had the opportunity to clarify its position in numerous cases regarding the dissemination of information and opinions of an economic nature concerning the situation of private companies, an issue that could concern credit rating agencies, but also investors or financial analysts.

The Court has recognised "the more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities"[94] and that information and opinions about them can play a "legitimate and important role … in stimulating public discussion".[95] They can be, for example, practices of private economic operators,[96] information on a particular economic sector[97] even if it concerns only a limited circle of people,[98] the remuneration of leaders of large companies, and compliance with their tax obligations.[99] The Court has also had to emphasise that the protection of journalists' sources under Article 10 was intended to benefit the financial press when it disclosed information about listed companies in the context of a takeover.[100] As an interesting precedent in a foreign jurisdiction, a defamation action was brought in Canada by the CEO of a listed company against a hedge fund manager engaged in short selling activities and who issued critical reports against the company in question. In that case, the Ontario Superior Court of Justice

---

[91] ECtHR, *Perna v. Italy* (n 90), para. 39; ECtHR, *Éditions Plon v. France* (n 87), para. 42; See also, ECtHR, *Barthold v. Germany* (n 78), para. 55.

[92] ECtHR, *Éditions Plon v. France*, (n 87), para. 42.

[93] ECtHR, *Lingens v. Austria*, Appl. No. 9815/82, Judgment of 7 July 1986, para. 41.

[94] ECtHR, *Steel et Morris v. United Kingdom*, Appl. No. 68416/01, Judgment of 15 February 2005, para. 95.

[95] *Ibid.*

[96] ECtHR, *Hertel v. Switzerland*, Appl. No. 25181/94, para. 47 (25 August 1998); ECtHR, *Bergens Tidende and others v. Norway*, (n 79), para. 51.

[97] For example, the automotive sector, ECtHR, *Demuth v. Switzerland*, Appl. No. 38743/97, Judgment of 5 November 2002, para. 41.

[98] ECtHR, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, (n 78), para. 26.

[99] ECtHR, *Fressoz et Roire v. France*, Appl. No. 29183/95, Judgment of 21 January 1999, para. 46.

[100] ECtHR, *Financial Times Ltd and others v. United Kingdom*, Appl. No. 821/03, Judgment of 15 December 2009, para. 6.

considered that "the management of a publicly traded corporation is a matter of public interest".[101]

The protection afforded to the person or entity that is the subject of information and opinions is much broader for a natural person than for a legal person conducting economic activity. As the Strasbourg Court pointed out, "there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Whereas the latter might have repercussions on one's dignity, for the Court interests of commercial reputation are devoid of that moral dimension".[102] Indeed, the actions of economic actors and their managers enjoy less protection because they are comparable to public persons. The Court had to specify in this respect that "it is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies".[103] In this case, criticising certain aspects of the management of listed companies – something some short sellers would likely do – remains an expression protected by the ECtHR.

In a recent case involving a dispute between minority shareholders and the management of a company, where the former blamed the latter for their poor as well as opaque management, the ECtHR has set a very high threshold for possibly limiting free expression about the management and economic situation of large corporations. In a decision that seems particularly relevant for activist shareholders or credit rating agencies, the Court noted that the information and opinions shared about the financial situation of the company (debt management, lack of transparency of the management, risk of bankruptcy, need for restructuring, etc.)[104] "were not without factual foundation"[105] and that there was "nothing to suggest that it deliberately or recklessly disclosed incorrect information"[106] or intention to cause "a state of panic".[107]

The activities, including economic activities, of the person disseminating the information and opinions – credit rating agencies, financial analysts, activist investors, etc. – do not affect the applicability of ECHR Article 10. It is the content of the information and opinions communicated and their interest for the public that constitute the most important elements. As the Court has indeed pointed out, "neither [its] legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive [the company] of the protection of Article 10". [Article 10] applies to 'everyone', whether natural or legal persons".[108]

---

[101] Ontario Superior Court of Justice, *Thompson v. Cohodes*, 2017 ONSC 2590, para. 12.

[102] ECtHR, *Uj v. Hungary*, Appl. No. 23954/10, Judgment of 19 July 2011, para. 22.

[103] ECtHR, *Steel et Morris v. United Kingdom*, (n 94), para. 94.

[104] ECtHR, *Petro Carbo Chem S.E. v. Romania*, Appl. No. 21768/12, Judgment of 30 June 2020, para. 47 (There is no English version of this judgment available – Translation by the author from the French version).

[105] *Ibid.*, para. 47.

[106] *Ibid*.

[107] *Ibid*., para. 52.

[108] ECtHR, *Autronic AG v. Switzerland*, Appl. No. 12726/87, Judgment of 25 May 1990, para. 47.

It has also held "that it is applicable to profit-making corporate bodies".[109] It may also be added that nothing in the ECtHR's jurisprudence suggests that the real or supposed influence of the person disseminating the information and opinions affects their freedom of expression. Moreover, as an expert on the First Amendment pointed out in the context of the hearings conducted before the House of Representatives in the United States on the activities of credit rating agencies, "rating agencies are particularly, or at least were particularly respected, and their speech was found particularly valuable, but the fact that speech is especially valuable generally does not diminish the scope of First Amendment protection that is offered it, and the fact that people rely on that speech, generally speaking, does not diminish the scope of First Amendment protection".[110] A contrary position would indeed make it possible to censor respected and influential media outlets (for instance, the Financial Times) or influential investors (for instance, Warren Buffet).

As to the dissemination of opinions, it must also be noted that the ECtHR has adopted a very liberal stance, especially when it comes to freedom of the press. Indeed, the Court distinguishes between information and opinions insofar as the materiality of facts can be proven: "the existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof".[111] The US Supreme Court adopted a similar approach when it stated that "under the First Amendment, there is no such thing as a false idea".[112] Assessment of financial securities, like credit ratings of debt securities, are opinions subjective in nature insofar as they are projections based on quantitative and qualitative data according to the assessor's criteria and methodology. It is in this sense that the case law on credit ratings evaluating the creditworthiness of issuers is interesting. In the US, these credit ratings have been able to benefit from the protection conferred by the applicable principles guarantying freedom of expression. In a case involving Moody's, the credit rating agency noted in its report assigning an unfavourable credit rating that "the outlook on the [issuer]'s general obligation debt is negative, reflecting the [issuer]'s ongoing financial pressures … as well as legal uncertainties and fiscal constraints".[113] The federal court finally held that "a statement regarding the creditworthiness of a bond issuer could well depend on a myriad of factors, many of them not provably true or false"[114] and concluded that the issuer "has failed to demonstrate that Moody's implied statement about its creditworthiness is provably false".[115]

---

[109] *Ibid.*

[110] US House of Representatives, *Statement of Eugene Volokh*, in *Approaches to Improving Credit Rating Agency Regulation*, Hearing Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the Committee on Financial Services, No. 111–33, 16 (19 May 2009).

[111] ECtHR, *Lingens v. Austria* (n 93), para. 46.

[112] *Gertz v. Robert Welch*, 418 U.S. 323, 339 (1974).

[113] *Jefferson Co. School v. Moody's Investors*, 175 F.3d 848, 850 (10th Cir. 1999).

[114] *Ibid.*, para. 31.

[115] *Ibid.*

According to the ECtHR, the dissemination of opinions on matters of public interest is free as long as these opinions are based "on a sufficiently accurate and reliable factual basis which could be considered proportionate to the nature and degree of their allegation, given that the more serious the allegation, the more solid the factual basis has to be".[116] On issues of public interest, such as those concerning the solvency of public entities or large listed companies, this freedom of expression "covers possible recourse to a degree of exaggeration, or even provocation" as well as "strong, polemical, sarcastic language[117] including with "a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements".[118] This position is inspired by that of the US Supreme Court, which has had occasion to note that freedom of expression is to be understood "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks".[119]

It would be complex to establish that sanctioning the polemical tone of a credit rating agency, analyst, or, more probably, an activist shareholder would pursue the objective of protecting financial stability or the rights of other investors. A decision along such lines would impose a sanitised expression on those actors who disseminate information and opinions on issuers of securities. It would also eventually constitute a restriction equivalent to those that the ECtHR has recognised as legitimate but in very specific cases concerning the limitation of the expression of civil servants owing a duty of loyalty and reserve to the State.[120]

6. Concluding Remarks

The theoretical underpinnings of financial regulation have paved the way for an obsessive quest for transparency. In the broader context of financial disintermediation, this has also led to other unintended consequences. Disclosure requirements involving exhaustive and complex information to process have been insufficient for investor protection. As a result, market participants, as well as regulators, have progressively relied on several types of intermediaries to certify the information disclosed (for instance, by auditors) or to provide an external (and often simplified) evaluation of risks arising from financial instruments (for instance, credit rating agencies).

Some of these (allegedly independent) external evaluators, on which even regulators have overly relied, have progressively been vested with some form of *de facto* and *de jure* authority. The example of credit rating agencies has proven to be extremely

---

[116] ECtHR, *Pedersen and Baadsgaard v. Denmark*, Appl. No. 49017/99, Judgment of 17 December 2004, para. 78; See also ECtHR, *Ukrainian Media Group v. Ukraine,* Appl. No. 72713/01, Judgment of 29 March 2005, para. 42.

[117] ECtHR, *Ukrainian Media Group v. Ukraine,* (n 116) para. 67.

[118] ECtHR, *Długołęcki v. Poland*, Appl. No. 23806/03, Judgment of 24 February 2009, para. 37.

[119] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[120] ECtHR, *Catalan v. Romania*, Appl. No. 13003/04, Judgment of 9 January 2018, para. 56.

instructive as market participants have become significantly rating-dependent and -sensitive. This has, in turn, amplified the phenomena of procyclicality, and possibly threatened financial stability. As an attempt to reverse this path-dependent power shift to the benefit of credit rating agencies, new regulations have been developed to better control and ensure the legitimacy of credit rating processes. They have also to a certain extent stringently restricted the credit rating agencies' ability to assess the creditworthiness of some issuers. This is particularly the case with respect to sovereign ratings, where the new regulatory framework is tainted by censorship.

However, financial regulation does not operate in a legal vacuum and it must comply with applicable principles guaranteeing the freedom of expression. When they intend to put limits on the influential evaluations of credit rating agencies or target activist shareholder strategies which often aim to influence the price of financial instruments, regulators should bear in mind that, in light of the standards developed by the ECtHR, it is not possible to restrict the publication of opinions about the creditworthiness of states or of large companies to the extent that they are based on a sufficiently accurate and reliable factual basis and are not disclosed with the intention of causing a state of panic on financial markets. While financial markets face more and more informational challenges due to the emergence of new platforms of expression (social media, etc.) or new fields of disclosure (corporate sustainability reporting, etc.), regulators should duly bear in mind such fundamental rights requirements and avoid what has seemed to be, at some point, an invasive willingness to control speech on financial markets.