Control and responsibility of rating agencies in Switzerland

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I. Introduction

This article focuses on an analysis of the role and regulatory treatment of rating agencies in Switzerland, in particular with reference to control and responsibility aspects. It provides an overview of the legal framework under which rating agencies operate in Switzerland and possible regulatory issues.

A. Definition

The Oxford English Dictionary, defines the term ‘rating’ as:

"an assessment or measure (of a person's achievement, behaviour, skill, status, etc.); a grade, category or standing."1

Basically, the term 'rating' or also 'credit rating' is used in this same sense in Switzerland. A (credit) rating means:

"an assessment providing an indication of the level of the credit or financial standing of a debtor regarding its capability to fulfill its commitments timely towards creditors."2

Thus, credit ratings basically represent the result of a qualitative and quantitative analysis of the credit quality of a corporate issuer and his underlying obligations. A rating is also a forward-looking measure that is never static; the economic and competitive environment in which the rated companies and issuers operate evolves constantly. Thus, long- and short-term debts have separate scales representing their risks. A basic characteristic of ratings is that they represent independent opinions.3 A major distinction is made between solicited and unsolicited ratings. While solic-

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ighted ratings are based on an agreement between a rating agency and a corporate issuer, unsolicited ratings are produced without prior agreement of the issuer. Ratings should not be confused with rankings, however, which imply that elements of fact or factors are compared to each other and placed in an order of precedence.4

In Switzerland, there is no official definition of the terms of ‘rating’ or ‘rating agency’ nor of the persons allowed to establish ratings. These terms are not expressly described in the Swiss legal system or jurisdiction, although employed.5 In our view, the term of ‘rating agency’, ‘credit rating agency’ or ‘CRA’ can be considered to mean:

“A company that executes the assessment of third companies or debtors, of issues, bond issues, or of determined transactions.”

These agencies publish their assessments, which are important for creditors and investors as they provide information on the financial standing and creditworthiness of companies or issuers and could potentially influence decision-making, as creditors and investors rely on the accuracy of such classifications. Assessments could also balance a possible information discrepancy. However, rating agencies tend to raise their ratings in times of economic growth, and lower them during recessions, which can have a counter-productive effect on companies and investors.6

B. Facts

From the point of view of the market participants, the credit rating scene in Switzerland is similar to the one of other international financial centres. The main rating agencies operating in Switzerland are the important international rating agencies: Standard & Poor’s Corp. (S&P), Moody’s Investors Service and Fitch Ratings. They cover a whole range of companies and municipalities,7 which they rate on a regular basis. Fitch Ratings, for example, concentrates its rating activity in Switzerland on a limited number of insurance companies, banks, multinational companies and the state as a sovereign borrower. Physically, these agencies operate mainly from London with experts worldwide. There are also other international rating agencies present on the Swiss market, but they focus their activities on a number of determined issuers, mainly due to the fact that rating costs are very high.8 For exam-

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4 See BERTSCHINGER, supra note 2, p. 89.
5 See infra point C.
7 See for Standard & Poor’s the list for Switzerland at: <http://www2.standardandpoors.com/servlet/Satellite?pagename=sp_sp_product/ProductBodyTemplate&cid=1056724732165&l=DE&s=nb=11&f=1&c=4&ig-> (05.09.05); according to an information of 20 July 2005, Moody’s covers a whole range of companies, banks, the sovereign and a municipalities; for Fitch, see: Issuer List: Switzerland, as communicated on 21 July 2005.
8 See GSELL, supra note 2, pp. 880-881.
ple, Dominion Bond Rating Service (DBRS) limits its activities in Switzerland to the rating of Nestlé SA.9

Further to these international agencies, there are also Swiss actors operating on the national market. This market can be divided into two groups. The first is constituted by banks – mainly Credit Suisse Group, UBS AG and Zürcher Kantonalbank –, which establish ratings for Swiss companies, governmental issues and municipalities, cities or cantons.10 These ratings are primarily prepared for the own internal use of the banks. Although it is recognized that their ratings are professional and of good quality,11 these banks are considered not to be as independent as international rating agencies. In particular, the companies or issues they rate usually are their own clients. However, their ratings are not limited to those of their clients or companies of particular branches like banking or insurance. Nor do they consider the size of a company a decisive criterion for the rating of a corporate issuer.

In the second group there are a few, small, specialised agencies. E.g., the KMU Rating Agentur AG, which was incorporated in 2001 and is based in Zug. It is specialized in the rating of small and medium-size business companies and focuses on the assessment of their creditworthiness and future possible developments.12 Another one offers a single specific product. The Com Rating Swiss Public Financial Rating SA or ComRating with headquarters in Zurich, was incorporated as the first established Swiss rating agency in 1998.13 It rates public-sector borrowers – including territorial authorities, districts, municipalities, townships, municipal corporations, cantons, and entities such as public companies. It assesses the creditworthiness of the financial budgets of such borrowers and provides the results based on an internationally recognised scale, the i.e. by rating grades. The purpose of creating this rating agency was that in the past, public-sector borrowers were initially considered debtors with first-class creditworthiness. In the course of time, especially in the 1990s, accelerated deficit spending as well as individual occurrences of non-performing loans led to an altered assessment by the credit markets. Therefore, the assessment of a borrower’s creditworthiness by an independent and specialised rating agency appeared to be necessary for the market participants.14

To this date, there has been no extreme case of inaccurate rating in Switzerland comparable to those accompanying the spectacular collapse of the energy giant Enron or the telecommunications group Worldcom in the United States which

11 See GSell, supra note 2, p. 881.
12 See <http://www.kmunratingagentur.ch/> (05.09.05). Another example is Assetis: <http://www.assetis.ch/web/guest> (05.09.05).
13 See BERTSCHINGER, supra note 2, p. 91. Fedafin, Federalism and Finance AG also produces ratings for municipalities and cantons: <http://www.fedafin.ch/index.htm> (05.09.05).
highlighted the dangers involved in inaccurate estimates by credit investigators and rating agencies.\textsuperscript{15}

It should, however, not be ignored that ratings have an important influence on the valuation of companies by market participants.\textsuperscript{16} Although there is no debate as such on the role of rating agencies and their regulation in Switzerland, it can be considered that the market participants are certainly more critical in their judgment of ratings following the last years' events and the current international discussions. Public perception and the awareness of risks related to ratings certainly have increased.

C. Development of this Area of Law

1. Rating Agencies as Non-Regulated Entities

The fact that ratings are performed by external rating agencies is not considered to be a legal problem in Switzerland. Evaluations of issuers, issues or other financial products carried out by rating agencies—or other institutions such as banks—are not subject to any regulation, nor are the agencies themselves. Contrary to the United States,\textsuperscript{17} there is no duty to register and self-regulatory measures do not exist. Moreover, companies are not submitted to any de facto obligation to undergo credit ratings. However, they will most certainly want to be rated when planning to raise funds or when they are listed on a stock exchange. In these cases, it is important for listed companies to inform investors and for investors to have access to a third and recognized independent source of information, as the functioning of global financial markets mostly depends on the reliable assessment of investment risks.

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\textsuperscript{15} See “Exclusion Zone: Regulators Promise a Related Review of the Ratings Oligopoly”, in: The Economist, February 8, 2003, p. 65; to the problems of ratings, see also “Who rates the raters?”, in: The Economist, March 26, 2005.

\textsuperscript{16} See for example in the context of corporate governance: Larcker D./ Richardson S./ Tuna I., “Ratings add fire to the governance debate”, in: Financial Times, Mastering Corporate Governance, 26 May 2005.

The main particularity of the Swiss rating market is that there is only a very small number of Swiss agencies at the moment, covering specific markets. The other agencies that are internationally recognized would not be submitted to national rules anyway. It would therefore not make sense to intervene on a regulatory basis. Furthermore, companies have as yet not complained about supposedly unjustified ratings. To date, neither the supervisory authority, nor the SWX Swiss Exchange—the main stock exchange in Switzerland—nor civil courts have received complaints, and ratings are not considered arbitrary.

Rating agencies are free in the assessment of the information they receive from companies. However, their ratings will not be more reliable than the underlying information. De facto, an agency’s position depends on two factors: its credibility and its reputation. These elements exercise a self-disciplinary function on their operations. The adherence to the ratings by market participants is determinant for them and competition with other agencies obliges them to maintain a high quality level of performance. Consequently, no precise legislative proposals to regulate these agencies are currently being discussed in Switzerland. Furthermore, no special attention is being paid to this issue in the legal literature and there is no academic debate as such regarding the situation in Switzerland in particular. The topic has been discussed in order to present legislative developments and proposals taking place on an international scale, in particular within IOSCO and in the context of the new Capital Accord, Basel II.

IOSCO decided to focus on an analysis of rating agencies, as it was unclear whether self-regulation and compliance with specific standards of quality were sufficient and could be left to the discretion of the industry or whether it was preferable to establish a mandatory legal framework. The SFBC participated to the elaboration of the Report on the Activities of Credit Rating Agencies and the Code of Conduct Fundamentals for Credit Rating Agencies of IOSCO. Taking position for Switzerland, it approved and supported the principles laid down in this Code of Conduct, namely:

- the quality and integrity of the rating process,
- CRA independence and the avoidance of conflicts of interest, and
- CRA responsibilities to the investing public and issuers.

These represent high-level objectives. As they are recommendations, they are not binding and the SFBC has no authority to enforce them.

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18 See Senn, supra note 17.
19 See Schwarcz, supra note 3.
20 International Organization of Securities Commissions. Switzerland, respectively the Swiss Federal Banking Commission (SFBC) as responsible supervisory authority acts as member of IOSCO.
21 See hereinafter point 2.
22 Report on the Activities of Credit Rating Agencies, supra note 2.
24 Ibid., p. 3; see also Senn, supra note 17.
2. Rating Agencies as Regulatory Instruments

While ratings are mostly used by regulators, they are, in specific cases, also considered by courts. As such, they are part of the supervisory process.\(^{25}\)

As regards investment funds authorized according to the Federal Act on Investment Funds,\(^{26}\) the rules require minimum ratings based on articles 7, 28 and 35 of the Investment Funds Ordinance of the SFBC regarding the application of the investment policy.\(^{27}\)

Art. 7 'Creditworthiness' requires that:

1. With regard to OTC transactions the counterparty or its guarantor must possess the following current minimum rating from a rating agency recognized by the SFBC:
   a. the highest short-term rating (e.g. 'P1' or equivalent) for commitments up to one year;
   b. a long-term rating of at least 'A-', 'A3' or equivalent for commitments over one year.

2. If a counterparty or a guarantor is rated by several rating agencies recognized by the FBC, then the lowest rating shall apply.

3. If the rating of a counterparty or a guarantor falls below the acceptable minimum rating, then the remaining open positions shall be closed out within a reasonable time while safeguarding the interests of the investor.

Further, art. 28 'Collateral' states that:

1. The following are permissible as collateral:
   a. fixed or variable interest bearing securities which have a long-term current rating of at least 'A', 'A3' or equivalent from one of the FBC recognized rating agencies;
   b. irrevocable letters of credit from third-party banks which show a long-term, current rating of at least 'A-', 'A3' or equivalent from a rating agency recognized by the FBC.

2. If an issuer or guarantor or a third-party bank is rated by several of the rating agencies recognized by the FBC, then the lowest rating shall apply.

3. If the rating of an issuer or guarantor or third-party bank falls below the required minimum rating, then additional collateral which fulfills the requirements shall be provided, or the respective transaction shall be immediately terminated.

Finally, art. 35 'Permissibility of reverse repos' states that:

1. A Fund Management Company may purchase within the framework of reverse repos only the following securities:

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\(^{25}\) This is also the case of the SEC where ratings are used since 1975 for supervisory matters. See Concept Release: Rating Agencies and the Use of Credit Ratings under the Federal Securities Laws, supra note 17, I. Introduction.


\(^{27}\) Investment Funds Ordinance of the Swiss Federal Banking Commission of 24 January 2001 (IFO-FBC) SR 951.311.1.
b. fixed or variable interest-bearing securities which have a long-term current rating of at least 'A-', 'A3' or equivalent from one of the FBC recognised rating agencies.

2 If an issuer or guarantor is rated by several of the rating agencies recognised by the FBC, then the lowest rating shall apply.

3 If the rating of an issuer or guarantor falls below the required minimum rating, then the reverse repo shall be terminated within an appropriate term, while safeguarding the interests of the investor. [...]"

With regard to the enforcement of these rules, the SFBC established a list of recognised rating agencies in a Circular. These are:

- Dominion Bond Rating Service (DBRS), Limited, Toronto;
- Mikuni & Co., Limited, Tokyo;
- Moody’s Investors Service, Inc., New York;
- Standard & Poor’s Ratings Services (S & P), New York;

In the past, the SFBC based the choice of these agencies on a practical approach. It simply selected the generally well-known and internationally established agencies. These were not notified of their selection and do not need to register with the SFBC. The SFBC was free to modify its practice at any time. Following Basel II, the whole situation is in the process of being reviewed.

Ratings are also used for equity or capital adequacy requirements, in particular for market risks and interest rate instruments. Art. 14 BankO states that the following definitions shall apply in relation to equity:

" [...]"

f. Qualified interest-rate instruments

Interest-rate instruments which meet one of the following criteria:

1. investment-grade rating or higher of at least two rating agencies recognized by the Banking Commission; or

2. investment-grade rating or higher of one rating agency recognized by the Banking Commission without the availability of a lower rating agency recognized by the Banking Commission; or

3. without rating but with a yield to maturity and remaining duration which are comparable with of instruments with investment-grade rating and trading of one instrument of this issuers on a recognized exchange or a representative market as defined in Art. 14 lit. d.

g. High-yield interest-rate instruments

Interest-rate instruments which meet one of the following criteria:

1. rating such as ‘Caa’, ‘CCC’ or lower for long-term or an equivalent rating for short-term interest-rate instruments of a rating agency recognized by the Banking Commission; or
2. without rating, but with a yield to maturity and remaining duration which is comparable to those with a rating such as 'Caa' or 'CCC' or lower for long-term or an equivalent rating for short-term interest-rate instruments. [...]"

These rules are explained in detail in the Guidelines on capital-adequacy of the SFBC issued to support market risks\textsuperscript{31} which apply to banks and brokers-dealers.\textsuperscript{32} The recognized rating agencies are the same as in the case of investment funds.\textsuperscript{33} The use of external ratings for supervisory matters will become even more important with the introduction of the new Capital Accord, Basel II.\textsuperscript{34} With Basel II, banks will apply a risk-oriented approach when valuating the pricing of credits, and will use external ratings. The national supervisors will be responsible for determining whether an ECAI\textsuperscript{35} may be recognised on a limited basis. The following criteria will apply: objectivity of the rating, independence of the agency, international access to individual assessments and transparency, disclosure of information, resources and credibility of the agency.\textsuperscript{36}

3. Use of Ratings by the Federal High Court

The Federal High Court has already taken position in a specific case by making use of an assessment established by a rating agency. In the particular case, the former Credit Suisse Group, in order to save equity capital, did not want to consolidate all the companies belonging to the group.\textsuperscript{37} Credit Suisse argued that rating agencies were not all defining and assessing Credit Suisse, Credit Suisse First Boston and the other companies of the group in the same manner. Therefore, it had to be concluded that there was no de facto duty of assistance among the different companies of the group. The Federal High Court rejected this point and argued, based on the report of Moody's, that there were sound reasons for accrediting different ratings to the companies of the group. This, however, could not exclude any duty of assistance among them, to which Moody's admitted. Thus, the Federal High Court concluded that there did exist a duty of assistance.\textsuperscript{38}

\textsuperscript{31} Circular of the Swiss Federal Banking Commission: Guidelines Governing Capital Adequacy Requirements to Support Market Risks of art. 121-122 REM-SFBC of 22 October 1997 with amendments of 1\textsuperscript{st} October 1999, SFBC-Circ. 97/1 REM-SFBC, at notes: 31-35, 122, 124, 131-132 and 137. The recognized rating agencies are the same as in the case of investment funds.

\textsuperscript{32} Art. 29 Ordinance of the Federal Council on Securities Exchanges and Securities Trading, (Securities Exchange Ordinance, SESTO) SR 954.11.

\textsuperscript{33} See list of agencies, \textit{supra} in the text; SFBC-Circ. 97/1 REM-SFBC, \textit{supra} note 31, at note 32.


\textsuperscript{35} External Credit assessment institution (ECAI) or rating agency.

\textsuperscript{36} See \textit{supra} note 34, pp. 23-24. The SFBC plans to introduce these criteria in its future Ordinance on Capital Adequacy and Repartition of Risk for Banks and Securities Dealers, art. 36 on Recognized Rating Agencies, Draft of September 2005.

\textsuperscript{37} Case 116 lb 331 of 11 December 1990.

\textsuperscript{38} Ibid., consideration E.3.b), see also Moody's Bank Credit Report, Crédit Suisse, October 1989, p. 4 and Moody's Corporate Credit Report, CS First Boston, Inc., Financière Crédit Suisse – First Boston, April 1990.
II. Legal Classification of Rating Agencies under Current Law

Although rating agencies’ activities are not expressly codified under Swiss law, they are however subject to the general rules and principles of law. Such activities are protected by fundamental rights. The activities of rating agencies are governed by the principle of freedom of economic activity. Moreover, the publication of ratings is covered by the freedom of opinion and information. Although no legal opinion or case exists, it can be admitted that ratings represent a value judgement and not an expression of fact.

In addition to the fundamental rights, derived from the Constitution, the rules of private law apply to rating agencies. In the case of solicited rating, the agreement between the rating agency and the rated company is subject to private contract law. Credit ratings firstly aim at evaluating either the rated company as the rating agency’s customer itself, or its specific issues or products. The agreement is qualified as an ‘order’ of the rated company to the rating agency. In the case of ongoing ratings or up- and down-gradings on an ongoing basis, the relationship will take the form of a ‘continuing order’. The classification of the relationship as ‘order’ implies that the rating agency executes the order with care and loyalty.

A rating agreement represents neither a work nor a brief contract. Nor is the rating a physical product, but it expresses the opinion of the rating agency. Such opinion is the product of its work. It is a service, the result of which is not guaranteed. The rating agreement can be terminated at any time, contrary to a brief. Basically, the rating belongs to the agency. In the case of solicited rating, the result of the assessment is property of the corporate issuer.

Ratings are established with the purpose of assisting investors to assess the issuer’s creditworthiness and are therefore meant for publication. Once published, they are considered to be public property. In the case of a solicited rating, the publication should be part of the agreement. In the case of an unsolicited rating, the rating agency unilaterally decides on its publication.

III. Competition Law and Equal Opportunities

The market for rating agencies is characterized by the fact that only a few international agencies cover a majority of the markets in different countries. According to the “Report on the Activities of Credit Rating Agencies”, in some jurisdictions...
only the three largest international rating agencies – Moody’s, S&P and Fitch – are operative. These agencies constitute an oligopoly.48 This situation raises questions in the field of competition law as well as in relation to equal opportunities issues and conditions prevailing for participation in the market.

As far as Switzerland is concerned, it cannot be stated that there are competition deficits as such. On the contrary, the situation can be described as being rather in a state of status quo. In addition to the international agencies, banks produce ratings in their role as creditors. Contrary to the international agencies, their ratings are based on their thorough knowledge of the local market and do not cover the same categories of issuers. Thus they compete with as well as complete each other.

In Switzerland, there has so far been no case of abuse of a dominant position by a rating agency, which is forbidden by Competition law.49 To date, the Competition Commission did not have to intervene in this matter. The risk of such an abuse is actually not very serious nor imminent. The international rating agencies and national companies operating in the country all have to defend their reputation and the objectivity of their ratings and are therefore expected to take necessary measures to avoid such a situation.

There are no restrictions for ratings agencies willing to enter the market. The small, specialized Swiss agencies show that there is room for newcomers. These agencies need not register or fulfill any authorization requirements. However, it may be difficult for them to get positioned, not at least because the Swiss market is not very large. For corporate issuers, equal opportunities exist, although the access to ratings may not be the same. In particular, issuers and potential issuing companies are thoroughly scrutinized and some rating agencies will concentrate their activity on them exclusively. Small and medium-sized enterprises can also obtain credit ratings. However, the costs may represent a high burden for them. It should also be noted that international agencies limit their activities only to selected corporate issuers and the state.50

It is not known whether anti-competitive behaviour among the corporate issuers exists. The use of rating reports for advertising purposes is not considered as (potential) unfair competition under Swiss law. The media immediately report published ratings and up- and downgrades are widely discussed.

IV. Supervision of Rating Agencies

As already mentioned, no specific rules apply to rating agencies and there are no authorization requirements. Thus, the agencies are not supervised by any competent authority.51 The agreements concluded between rating agencies and issuers are gov-

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48 See The Economist, February 8, 2003, supra note 15, p. 65; see also Senn, supra note 17.
49 Art. 7 ‘Unlawful practices of enterprises having a dominant position’ of the Federal Act on Cartels and Other Restraints of Competition (Cartel Act; LCart) of 6 October 1995 (text as of 23 March 2004) SR 251.
50 See supra point I.B., GSELL, supra note 2, pp. 880-881.
51 See supra point I.C.1.
erned by private law and no self-regulatory association exists. The risk of erroneous trends developing and of market failure is not considered dependent on the fact that the activities of rating agencies are non-regulated. The introduction of authorization requirements for only a few, small and specialised agencies would also be questionable. Banks are authorized as such, and their rating activities constitute only a small part of their business. No regulatory proposal is under discussion and no measure is planned for a comprehensive legislative standardisation of the rights and obligations of rating agencies vis-à-vis their contractual partners and the general public.52

At the international level, the reports elaborated and discussions which took place within IOSCO,53 CESR for the European Union54 and in the United States led to the conclusion that rating agencies should not be regulated and supervised, although it was at first considered necessary to strive towards regulation in view of attaining a sustainable degree of quality assurance. The Code of Conduct of IOSCO should serve as guideline and self-regulation is favoured. CESR respectively the European Union considers it important to ensure convergence of principles at the international level.55 In the United States, the efforts made to regulate rating agencies happened to meet considerable opposition.56

V. Assuring the Quality and Integrity of Credit Ratings

Rating agencies largely depend on their reputation and the transparency of the ratings produced. They must publish high quality ratings and ensure their integrity to gain the trust of the investors and creditors. They receive a certain feedback from the latter and their credibility is at stake if they do not respect basic fairness rules.57

The rating process implies a detailed analysis of the credit risk concerning a debtor or issuer, thus requiring the evaluation of an entire range of specific information. Rating agencies are not obliged as such to analyse the information they receive, which is provided by the corporate issuer. However, although they do not act as professional auditors, it is in their own interest to check the plausibility of the information they receive. Every rating agency is responsible of guaranteeing the quality and authenticity of its external ratings. As the reliability of their ratings is essen-

52 See supra point I.C.2.
53 See supra point I.C.1.
54 Committee of European Securities Regulators. CESR’s technical advice to the European Commission on possible measures concerning credit rating agencies, CESR/05-139b, March 2005; CESR favours Self-Regulation of Credit Rating Agencies established around an Internationally agreed code for the time being, CESR/05-198, 30 March 2005; CESR’s dialogue with Credit Rating Agencies to review how the IOSCO code of conduct is being implemented, CESR/Ref05/751, 13 December 2005; Update on CESR’s dialogue with Credit Rating Agencies to review how the IOSCO code of conduct is being implemented, CESR 06-107, 9 March 2006.
55 Communication from the Commission on Credit Rating Agencies, Commission of the European Communities, 23 December 2005; Press release: Internal Market: Commission sets out its policy on credit rating agencies, IP/06/8, 9 January 2006.
56 See “Problematische Rating-Agenturen-Aufsicht, Der Kongress will der SEC mehr Kompetenzen einräumen”, in: Neue Zürcher Zeitung, no 87, 15 April 2005. See also the proposed rules now being discussed, supra note 17.
57 See also GSELL, supra note 2, p. 881.
tial, they should study the situation more thoroughly in case of doubt. If necessary, they could also contact the auditors. However, it is not mandatory for a rating agency to indicate the origin of the information received and its completeness. Factors such as the employees’ qualifications, precautions against conflicts of interest or insider trading, and measures to guarantee the independence of the agencies are important contributions to the quality and seriousness of a rating agency’s work.

The IOSCO report on rating agencies showed that external ratings present different inherent conflicts of interest. These are normally due to the fact that the issuers pay an agency in case of solicited ratings. They can also arise as a result of simultaneous advisory activities performed for a corporate issuer.

Rating agencies are free to define their own rating process and nomenclature. Normally, the agencies develop and delimit rating criteria and their grading correspond to the nomenclature and render them transparent. Rating agencies and issuing companies can agree upon their own assessment criteria. However, in practice the process should be the same for all issuers.

Rating agencies are not obliged to continuously monitor and update their ratings. However, as the situation of rated corporate issuers changes continuously, ratings need to be updated on a regular basis to be useful. It should be the inherent interest of rating agencies to regularly monitor and update their ratings. ‘Point in time ratings’ are also possible. Such ratings could be ordered by issuers from a different agency, when, for example, they do not agree with a rating. This fact should then be made transparent.

VI. Rights and Obligations of Rating Agencies in the Case of Solicited Rating

A. Client Relationship

The standard activity of rating agencies consists in providing solicited ratings. The issuer concludes an agreement with a rating agency to establish ratings. The contractual relationship between the corporate issuer, the government body or municipality and the rating agency is based on private law and governed by the contractual autonomy of the parties. Possible disputes between a rating agency and its clients would be submitted to a civil court.

In general, such contractual relationship must be understood to be a mandate (CO 394 ff.). The agency providing a service does not guarantee to obtain a result; it engages to evaluate the creditworthiness of the corporate issuer, the government

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59 Ibid.
60 The case of unsolicited rating or rating without agreement between the rating agency and a company is discussed hereinafter at point X.
61 See BERTSCHINGER, supra note 2, pp. 97-102.
62 BERTSCHINGER, supra note 2, p. 97.
body or municipality with respect to the state-of-the-art rules. The main consequence of this assumption is that the contractual relationship may be terminated at any time by either party (CO 404). This rule is mandatory and binding for both parties. With the exception of this restriction, the parties are free to provide that the rating will be made at a specific time or to otherwise agree to continued evaluations.

The main obligations of a rating agency are those of due diligence and loyalty (CO 398 par. 2). Due diligence encompasses two factors: on the one hand, the rating agency must make its evaluation carefully, i.e. in the manner that any reasonable agency would do under the same circumstances; on the other, it must provide the rated entity with the results of the rating, as these are in fact property of that entity.

The first factor obliges the rating agency to be professional. The agency is expected to apply state of the art rules. The existing codes of conduct serve as reference for determining these rules. This applies not only to those agencies that have expressly adhered to such codes of conduct, but also — when these codes are the result of a certain consensus — to agencies that are not formally submitted to such rules. The fact that there are no Swiss rules applying to the matter does not rule out consequences — if one or the other conditions previously mentioned are fulfilled — as state of the art rules may also result from foreign regulations. To the extent that some of the IOSCO regulations contain commonly admitted principles, it is likely that in a particular case one would refer to one or the other of these rules to assess whether an agency applies state of the art rules.

In substance, the professionalism of a rating agency requires first of all that it establishes whether or not it has a conflict of interest in certain circumstances that would impede upon an objective evaluation of the corporate issuer, governmental body or municipality, or that would, in the eyes of the public, shed distrust on the objectiveness of its analysis and thus render it useless for its client. If the agency should discover any such conflicts that hinder its independence in appearance, it has to draw the attention of its contractual partner to this fact. It is furthermore in its own interest to refuse mandates that would harm its credibility and reputation.

In general, state of the art rules require that the agency must prove its objectivity in every manner. This notably implies that the agency should not let anyone dictate its methods or criteria of evaluation. Similarly, the agency should exclusively identify the information necessary for evaluation and ensure to obtain it, if necessary, by interviewing the rated entity. Accommodating ratings are not only harmful to the reputation of the agency; they also violate its obligation of diligence as long as it may cause serious damage to the reputation of the issuing company. It must be noted, however, that the regulation on due diligence is not mandatory and that the

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63 See the jurisprudence regarding art. 404 CO: Case 98 II 307; 109 II 467; 115 III 466.
65 Werro, supra note 64, CO 399, N 13 and in particular N 15.
66 Bertschinger, supra note 2, p. 98.
67 For an overview of this question, see Bertschinger, pp. 100-101.
68 Bertschinger, supra note 2, pp. 98-99.
69 Bertschinger, supra note 2, p. 98.
parties are free to agree on the degree of diligence required from the agent. It is however difficult to conceive an agency agreement whereby the agent owes no diligence level to its client.

Among others, the agency’s loyalty obligation towards the entity analyzed includes confidentiality. In principle, all information relating to their agreement is confidential. Confidentiality obviously extends to all confidential or privileged information brought to the knowledge of the rating agency while making its analysis. Disclosure of such information – which constitutes a criminal offence\textsuperscript{70} – may be sanctioned by a claim for damages,\textsuperscript{71} but it is often difficult to establish what are the damages involved in the case of such violation of contract, the parties often provide for liquidated damages.\textsuperscript{72} The information that a company is being rated and the results of such rating are also covered by the confidentiality obligation, even though the final objective of that entity is to publish its rating. Thus, the rating agency will not be authorized to publish the information without prior authorization, unless otherwise agreed by the parties (as they are obviously entitled to do).

\section*{B. Investor Relationship}

There is no rule that forces agencies to publish their ratings and disclose them publicly. In this case, one needs to distinguish the position of an agency in relation to investors in general and with regard to the subscribers of its publications.

Concerning investors in general, the unique legal obligation of agencies is that of bona fide (CC 2) which is required from any specialist that accepts to provide gathered data or advice outside any contractual relationship.\textsuperscript{73} Otherwise, agencies are free to exercise their activities. However, as their ratings lists and policies are published, agencies are dependent on their reputation and recognition by investors. They should also update their ratings on a regular basis. In the absence of any formal requirements to their activity, their existence mainly depends on their ability to regularly publish good quality ratings.

The obligations of an agency towards its subscribers largely depend on their agreement, which should be qualified as a sales contract.\textsuperscript{74}

\begin{footnotesize}
\begin{enumerate}
\item Art. 161 and 162 of the Swiss Penal Code (CP).
\item WEBER R.H., Basler Kommentar zum schweizerischen Privatrecht, OR I, 2\textsuperscript{nd} ed., art. 1-529 OR, ad C0 398, N 10.
\item Art. 160 CO. In this respect, see SCHALLER J.-M., Finanzanalysten-Recht, Die Berufstätigkeit der Finanzanalysten im Rahmen des Privat-, Straf- und Aufsichtsrechts, Zurich, 2004, p. 98; GAUCH P./ SCHLUEP W.R./ SCHMID J./ REY H., Schweizerisches Obligationenrecht. Allgemeiner Teil, 7\textsuperscript{th} ed., Zurich, 1999, N 3999 ff.
\item BERTSCHINGER, supra note 2, p. 104-105; see Case 57 II 85 and 116 II 695.
\item BERTSCHINGER, supra note 2, p. 97-98.
\end{enumerate}
\end{footnotesize}
VII. Obligations of the Issuing Company and Other Users of Credit Rating Reports

Contractual law provides only few obligations for the client: he must pay the agreed fee\(^{75}\) and reimburse all costs incurred by his representative (CO 399). The parties can mutually recognize the obligation for the rated entity to provide the agency with precise and complete reports. It must even be admitted that such an obligation already derives from the bona fide obligation, given that the evaluated company knows that the result of the analysis is intended for publication.\(^{76}\)

Issuers are generally not obliged to make their ratings known. There is however one exception concerning the issuing prospectus, as its publication is subject to the demands of transparency and comprehensiveness provided by law.\(^{77}\) To the extent that ratings are essential criteria in the decision-making process of investors, it must be considered that the issuing company is required to include any ratings in its prospectus that are available at the time of publication.\(^{78}\)

Companies traded on the SWX Swiss Exchange and thus subject to brokerage regulations also have special reporting obligations. On the one hand, the issuer wishing to obtain the quotation of securities must publish in his listing prospectus all information allowing investors to make a sound judgment of the capital, financial situation, results and issuers’ prospects.\(^{79}\) The former Annex I of the Listing Rules of the SWX Swiss Exchange\(^{80}\) (RCot) stipulated the obligation to communicate all ratings carried out and the names of the agencies involved.\(^{81}\) Although this obligation is no longer explicitly mentioned in the present regulations, one might reasonably assume that this requirement is maintained, at least as far as ratings published by internationally recognized agencies are concerned.

Moreover, regarding ad-hoc publicity, the issuer is at all times required to inform the market of any price-sensitive facts which are capable of triggering a significant price change and that are not of public knowledge. Although ratings do not represent facts in the legal sense, it is not excluded that according to circumstances they must be considered information that is liable to affect the rate of a quotation on the stock market and must therefore be communicated to the Admission Board of the SWX Swiss Exchange.\(^{82}\)

In principle, issuers need not to supply additional information once their rating has been publicized, except when they have specifically committed themselves towards a particular group to do so (in the situation of a ‘rating trigger’). To the extent

\(^{75}\) Art. 394 par. 3 CO.


\(^{77}\) Art. 752 CO.

\(^{78}\) BERTSCHINGER, *supra* note 2, p. 112.

\(^{79}\) Art. 32 RCot.


\(^{81}\) Section 1.1.7 and 2.11.4 of the Annex I to the Listing Rules of the SWX Swiss Exchange (Repealed).

\(^{82}\) See DE BEER A.I., “Fairness und Transparenz durch Ad hoc-Publizität”, in: *Der Schweizer Treuhänder* 1-2/1989, p. 34.
that there is no general non-written obligation to breach the silence and to call the
attention of third parties to the mistake they are making, the analysed entities are
also not required to correct a markedly inaccurate impression produced by a rating
that was publicized without its consent. Such an obligation could however exist if
the company convinced third parties that it is liable for the publication of the rating
and thus provided warrants for its conformity.83

Swiss law provides no regulation on the matter of ‘rating triggers’: issuers are
therefore free to agree on such rating triggers; there is no general obligation to pub­
licize these clauses. One might however envisage that in the case of a company
quoted on the stock exchange, the company could be required to bring this informa­
tion to the attention of the public when the joint consequences of such rating triggers
are likely to notably influence the market value of the company in the case of down­
grading.84

Investment counsellors and portfolio managers are held to their investors to
good and loyal execution of the contract. When a rating is publicized for a company
whose stock is coveted, they are obliged to be aware that this rating exists and to
take it into account when making their evaluation or decision to invest, particularly
when the rating was established by an internationally recognized rating agency.
They must furthermore be informed of and communicate to their clients any down­
grading or variations of recently occurred ratings. When the client has no particular
experience of financial matters, the counsellor or portfolio manager is bound to a
strict obligation to provide him with understandable and complete information.

However, the obligation to refer to or to take into account a published rating is
not mandatory. When an investment opportunity can be evaluated by other quality
criteria and appears to be in conformity with the interests of the client, counsellors
or portfolio managers have no obligation to take this rating into consideration, even
if it could have allowed them to check the accuracy of their market analysis.85 Con­
trary to portfolio managers, investment counsellors have no obligation to call the
attention of their client to a variation of the rating once the stock transaction has
been completed.

Under certain circumstances it might be considered that the agency publishing
the rating is the auxiliary of the investor’s counsellor or of his portfolio manager and
that the latter are responsible for any damage caused by the agency in the perform­
ance of its contractual obligations.86

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83 See Case 120 III 331 and 121 III 350.
84 In application of art. 72 ff. R.Cot.
85 BERTSCHINGER, supra note 2, pp. 107-108.
86 Art. 101 par. 1 CO; BERTSCHINGER, supra note 2, p. 108.
VIII. Sanctions for Breach of Duty by Rating Agencies in Case of Solicited Rating

A. Civil Liability

Under Swiss law, there are neither specific prescriptions ruling the civil liability of credit rating agencies, nor any particular rules governing their implementation. Therefore, the general standards of the Swiss code of obligations apply when it is necessary to determine if in a particular case a rating agency is liable to pay damages resulting from its negligence. The ordinary courts are in charge of ruling litigations between agencies and injured parties, unless the parties decide to submit their litigation to an arbitral tribunal or any other mediatory body, as they are entitled to do.

1. Concerning the Issuing Party

a) General

The rating agency is bound to the issuing party that solicits the rating by a mandate contract under which it is held towards its client to due diligence and loyalty duties.\(^8\) If in the course of the rating procedure the agency does not fulfil its mandate according to its obligations, it may be held for any damages caused by negligence to the issuing company provided that there is a causal link between the violation and the damage.\(^8\)

In the action for liability in tort, the company claiming damages must prove that the legal conditions are actually met. However, the assumption is made that the rating agency acted negligently. The latter must therefore provide reasonable proof that it has performed the due diligence required by the circumstances in the fulfillment of its contractual obligations.

When, in breach of its contractual obligations, the agency has published an excessively unfavourable rating, it is relatively easy to prove that the rating entailed higher financing costs and consequently caused damage to the company. Damage represents the difference between the actual costs of raising the capital following the publication of an insufficient and inaccurate rating and the costs that would have been incurred if a higher and economically more realistic rating had been published alternatively.

Conversely, it is much more difficult to establish a causal link between an exceedingly unfavourable rating and the fact that its clients withdraw from the issuer. In any case, it must be taken into account that the harm to the reputation of a company caused by the mistaken rating publicized does not per se constitute a damage in the legal sense as it does not automatically lead to a decrease of the company’s capital.\(^8\) Should the agency produce an exceedingly favourable rating, there is no

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\(^8\) See *supra* point VI. A. regarding the level of due diligence required from the agency and the role of the codes of conduct.

\(^8\) Art. 398 par. 2, 321 e and 97 CO.

\(^8\) SCHALLER, *supra* note 72, p. 94.
doubt that it breaches its contractual duties; nonetheless it is rather unlikely that the company would suffer damages, unless it has itself contributed to the inaccuracy of the rating by supplying incorrect information to the agency, in which case it is not excluded that it might be sought by third parties that were misled by the rating.\textsuperscript{50} In such a case, the company that takes legal action against the rating agency would be confronted with its concomitant fault and would not be able to claim full indemnity.

It would also be possible to claim for damages (such as higher financing costs) resulting from the unauthorized publication of the rating, even if that rating was materially accurate and justified.\textsuperscript{91}

\hspace{1cm}b) Contractual limitations of liability

The responsibility of the rating agency may be subject to contractual limitations as long as mandatory provisions of law are not violated. Such limitations or exclusion of responsibility clauses may be inserted in the general terms and conditions belonging to the contract with the issuer. In this case, the rating agency is obliged to draw the attention of the latter to the waiver clause in question; otherwise, the contractual limitation or exclusion shall not have any juridical effect and be considered contrary to the bona fide principle (unusual clause theory).\textsuperscript{92}

It is therefore possible for the parties to release the rating agency from any liability for simple negligence. On the other hand, any agreement entered into in advance, according to which liability for unlawful intent or gross negligence would be excluded, is null and void.\textsuperscript{93} Simple negligence occurs when the breach of duty has been committed inadvertently and results from a minor violation of the obligation of due diligence.\textsuperscript{94} There are no decisive criteria for distinguishing simple negligence from gross negligence. This judgement must be made in the light of all the relevant circumstances of the case.

The responsibility of the rating agency for the acts of auxiliaries may also be limited or excluded by prior agreement. In general, the agency which performs an obligation arising out of a contract through an auxiliary person has to compensate the issuer for any damages caused by the acts of the latter, unless it is able to prove that the auxiliary acted with all the diligence required by the circumstances.\textsuperscript{95} However, as long as the rating agency is a private body, which does not carry on any business under an official license, the liability of the agency for the acts of its auxiliaries may be waived in full by agreement of the parties.

Moreover, the Federal High Court states in its jurisprudence that the clauses limiting or excluding the contractual liability automatically induce the limitation or

\textsuperscript{90} See infra point IX.
\textsuperscript{91} BERTSCHINGER, supra note 2, p. 102.
\textsuperscript{92} See Case 119 II 443 ; 108 II 452 ; 100 II 200.
\textsuperscript{93} Art. 100 par. 1 CO.
\textsuperscript{95} Art. 101 par. 1 CO.
exclusion of any extra-contractual liability, which would arise from the same factual context.  

2. Investor and Other Third Party Relationships  
   a) Contractual liability  
The liability of rating agencies towards subscribers of their publications should normally be governed by the provisions regarding the warranty against defects in the sales contract. However, part of the Swiss doctrine considers that these rules are not compatible with the subjective nature of credit ratings and that the liability of the rating agency should therefore be determined in the light of the provisions regarding the mandate contract. 

   The doctrine, along the lines of German policy, has also raised the question whether – in the absence of an agreement between the rating agency and the investor – the contract between the agency and the corporate issuer might contain protection effects for investors that would justify that the latter apply these against the agency. In Switzerland, this conclusion is rejected. If an issuer generally aims to make his rating available to investors, he has obviously no intention to protect them. Therefore, no reasons were found for allowing a misled investor to invoke a breach of due diligence committed to the detriment of the issuer relying on the contract (to which he is not a party and which is not intended to protect him) between the rating agency and this issuer.

   b) Liability in tort  
   Whoever unlawfully causes damage to another, whether wilfully or negligently, shall be liable for damages. According to the doctrine and jurisprudence, this rule endorses the theory of 'objective illegality': a conduct shall be considered as unlawful when it violates orders or prohibitions of written or unwritten federal or cantonal law protecting the legitimate property that was damaged. In the case of purely capital damage, the illegality must furthermore arise from the violation of a standard of conduct that is aimed at protecting the injured party against such damage.

   In this regard, the Federal High Court has ruled that whoever has particular expertise in a field and accepts to provide information or counsel outside a contrac-
tual relationship must act in bona fide (good faith). Thus, whoever intentionally or without due consideration, provides incorrect information or does not communicate additional facts of which he must recognize the importance for the other party, commits an unlawful act. The illegality results from the fact that the inaccurate information or incorrect advice has motivated the other party to a trust which was subsequently deceived. A rating agency that publicizes a rating provides, outside any contractual relationship, information for investors on the creditworthiness of the issuing company and the value of its stock. Its responsibility to investors and the issuer can thus be acknowledged when it commits professional inaccuracies in gathering or analysing the data regarding the issuing company.

The legal ground for action for liability in tort is also found in the provision of art. 152 of the Swiss Penal Code\(^\text{107}\) (CP) that represses the communication of false or incomplete information on commercial companies aimed at inducing another to dispose of its property in a manner contrary to its interests. Intentional publication of a false notation based on inaccurate or incomplete information falls under the scope of this provision. As far as its purpose is to protect public property, it can be called upon by investors in the action for liability in tort brought against the rating agency,\(^\text{108}\) but not by the issuer, whose assets are not protected by art. 152 CP. It must however be noted that art. 152 CP punishes intentional offence and cannot serve as a basis in an action for civil liability in the case of simple negligence of the agency.

c) **Liability for prospectus**

The question of the liability for tort of rating agencies is also relevant within the specific framework of the prospectus issuing procedure.

If, upon the founding of a company, or upon the issue of shares, bonds or other securities, statements have been disseminated which are incorrect, misleading or do not comply with the legal requirements in issue prospectuses or similar instruments, anyone having intentionally or negligently contributed thereto is liable to the acquirers of the security for any damage caused thereby.\(^\text{109}\) The passive legitimisation belongs to any person having collaborated to the drawing up of the prospectus, as long as his contribution may be considered important.\(^\text{110}\)

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\(^\text{104}\) Case 111 II 471 sec. 3a.

\(^\text{105}\) Case 116 II 695 sec. 4; 111 II 471 sec. 3a.

\(^\text{106}\) Non publicized judgment from the Federal High Court of 13 December 1990 in matter 4C.211/1989 sec. 4b/cc. The Federal High Court linked the liability for incorrect information with the notion of liability “based on trust” (“Vertrauenshaftung”) that consists in attributing the liability deriving from the application of the bona fide principle to anyone who creates a context of confidence on which another can rely.

\(^\text{107}\) Swiss Penal Code of 21 December 1937 (CP) SR 311.0.

\(^\text{108}\) As BERTSCHINGER, supra note 2, p. 104, notices, the corporate issuer cannot rely on this provision of law as long as its purpose is not to protect its property.

\(^\text{109}\) Art. 752 CO.

To the extent that the rating agency undertakes an evaluation of the creditworthiness intended for the issue of securities and thus is aware, or should be aware, that the result of the evaluation will be published in the issue prospectus, it can be considered that the rating agency has contributed to the conception of such prospectus within the meaning of law. The fact that ratings are preponderant indicators for the investors to evaluate their interest to an acquisition make the agency qualify as a major participant in the conception of the prospectus and the agency shall therefore have the passive legitimisation in the proceedings initiated by the investors. However, the mere fact of a rating agency being aware that a rating publicized on the market could be inserted in an issue prospectus cannot be considered an important contribution to such conception. In this case, the agency has no passive legitimisation and therefore cannot be held responsible on these grounds.

B. Insurance Cover

Given that at present only one Swiss rating agency is active in Switzerland, the question of the insurance cover against risk of liability of credit rating agencies is rather academic. There is no current discussion at the legislative level regarding the legal obligation for rating agencies to be insured against such risk. Moreover, we are not aware of any common practice by Swiss insurance or reinsurance companies in that field. The conclusion of an insurance agreement would be a case subject to private law, notably to the Federal Law on Insurance Contract. The parties would then be free, subject to mandatory provisions of law, to agree on the kind and importance of the risks covered by the policy as well as on the amount of the corresponding insurance premiums.

C. Administrative or Criminal Sanctions

As the activity of rating agencies is not specifically regulated in Switzerland, no provisions of law regarding the enforcement of their administrative obligations exist. In particular, the rules of conduct enacted by professional bodies or other private organizations do not have any legal force and cannot therefore be enforced by the administrative authorities.

At the penal level, Swiss criminal law punishes with imprisonment or a fine whoever divulges a manufacturing or business secret that he is bound to keep pursuant to a legal or contractual obligation for his or another’s profit. Further, the Swiss penal code qualifies as criminal offences the divulgation of false statements about commercial enterprises, the undue exploitation of knowledge of confidential information and the market price manipulation. Thus, whoever as the agent or member of management of a commercial company, in public notice or in

113 Art. 162 CP.
reports or proposals to the entirety of the participants or members of a cooperative or a commercial company, makes false or incomplete statements of considerable importance, or has such statements made that may lead another to make damaging dispositions regarding his property, shall be punished with imprisonment or a fine.\textsuperscript{114}

Shall also be punished with imprisonment or a fine whoever as a member of the board of directors, management, auditors, or as mandatory of a company, or as an auxiliary to one of the persons mentioned above, secures for himself or another a pecuniary benefit, by exploiting his knowledge or a confidential fact, whose will most probably considerably influence the price on an exchange, of shares, other securities, or of corresponding ledger securities of the company, or of options of such securities, or by informing a third party of such fact.\textsuperscript{115}

Finally, shall be punishable in the same manner whoever, with the intent to considerably influence the price of securities traded on a Swiss stock exchange to secure for him or others an unlawful pecuniary benefit, disseminates misleading information in bad faith.\textsuperscript{116}

As the rating agency is not, by definition, punishable with imprisonment measures, the above-mentioned penal sanctions shall apply by substitution to each person who acts as a body or member of a body of the rating agency, as an employee entrusted with independent decision-making power within the scope of his activity or without being one of the above persons, as actual manager of the rating agency.\textsuperscript{117}

\section*{IX. Sanctioning the Issuing Company's Breach of Duty}

There is no particular provision that applies to the liability of the issuing company if it communicates false information to the financial markets through inaccurate ratings. The company’s liability (either civil or criminal) is furthermore presumed only if it has contributed to establishing and/or publishing an inaccurate rating, either by providing the rating agency with incorrect information or by convincing it to arrange an inflated rating.

From the civil point of view, it is conceivable that an agency that carried out an erroneous rating on the basis of inaccurate reports and is subsequently held responsible would turn against the issuing company on the basis of the contract between the parties. The corporate issuer could be contractually liable towards the investors only when it expressly agreed to keep them informed of ratings it requests from external agencies or in case of ‘rating triggers’. Furthermore, the provisions regarding the liability for tort are applicable to sanction the conduct of a company that has contributed to mislead investors about its creditworthiness. In this regard, the injured parties are primarily able to rely on the violation of the bona fide obliga-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{114} Art. 152 CP.
\item \textsuperscript{115} Art. 161 CP.
\item \textsuperscript{116} Art. 161\textsuperscript{bis} CP.
\item \textsuperscript{117} Art. 172 CP.
\end{enumerate}
\end{footnotesize}
tation (possibly as responsibility 'based on confidence'),\textsuperscript{118} the violation of prospectus regulations,\textsuperscript{119} the violation of rules on ad hoc publicity\textsuperscript{120} and the violation of criminal provisions regarding price manipulations.\textsuperscript{121}

It cannot be excluded that the dissemination of an inaccurate rating involves the criminal liability of the company's bodies or the company itself. It is as a matter of fact possible that such propagation qualifies as price manipulation\textsuperscript{122} or constitutes 'false statements about commercial companies'\textsuperscript{123} because it includes 'considerably important false or incomplete information' that may lead another to make damaging dispositions regarding his property.

On the administrative side, it is mainly sanctions provided for by securities exchange law that would apply to the issuer that contributes to the publicizing of incorrect information through an issue prospectus or in relation with ad hoc publicity.\textsuperscript{124}

To the best of our knowledge, no company has to this day been sanctioned for providing inaccurate information to a rating agency and/or for having in any other way encouraged inaccurate ratings.

X. The Case of Unsolicited Rating

Unsolicited rating – which is generally defined as a rating publicized by an agency at its own initiative outside any contractual context\textsuperscript{125} – has not been the object of special regulation under Swiss law and it is not planned to adopt such rules.

There is nothing opposed to a rating agency taking the initiative of carrying out a rating without the consent of the analyzed company; furthermore it is neither forced to inform the latter of its intention, nor to furnish information about the reporting model applied or the result of the evaluation. Rating agencies are under no obligation to disclose in the rating report that their rating was carried out without any contractual engagement and without access to restricted insider information. If the rating agency fails to do so, it runs the risk of being sued – in the case of a possible action for violation of bona fide rules – for having created the impression that it had access to such information.

Issuing companies are not efficiently protected against the publication of unsolicited ratings. If a company should deem that its reputation has suffered or might suffer due to the publication of the rating, it has the possibility to file a request for provisional measures aiming at forbidding the publication or at withdrawing it from publicly accessible sources. This request could rely on the relevant provisions of

\textsuperscript{118} Art. 2 CC; Case 124 III 297; 121 III 350; 120 II 331.
\textsuperscript{119} Art. 652a and 752 CO.
\textsuperscript{120} Art. 72 ff. RCot.
\textsuperscript{121} Art. 161\textsuperscript{16} CP.
\textsuperscript{122} Art. 161\textsuperscript{16} CP.
\textsuperscript{123} Art. 152 CP.
\textsuperscript{124} Art. 81 and 82. RCot.
\textsuperscript{125} BERTSCHINGER, \textit{supra} note 2, p. 105.
personality rights. The efficiency of this legal solution remains rather theoretical in view of the conditions for its admissibility and the small quantity of information that the issuing company generally has before the rating's publication.

The question of the rating agency's responsibility is even more acute in the case of unsolicited rating, because the agency will generally carry out its credit evaluation on the basis of a limited amount of information that is already publicly available. The risk of an incorrect rating will be greater. Without being forewarned of the spontaneous character of the rating, investors will trust it as they would rely on a rating conducted on the basis of a contract with the issuing company. The agency's liability for the violation of bona fide rules can thus be engaged if the investors suffer damages from the publication of an inaccurate rating. Conversely, if the published rating should be accurate, the latter have no means of taking action against the agency on the mere grounds that it was spontaneously carried out and publicized.

Special problems arise in various regards as a result of unsolicited rating. All external ratings, which are conducted without being formally engaged by the issuer, belong to this category. As in this case the issuing company does not initiate the rating, the interests between the agency and the issuing company are different to those associated with solicited rating. Additionally, it is questionable whether the provision of such a rating without access to privileged documents can be carried out with sufficient data to make the rating meaningful. Furthermore, the dilemma arises for the issuing company that an unsolicited rating may serve as a potential means of pressure for pushing it into concluding a contract with an agency. On the one hand, in fear of an inadequate rating due to insufficient public data, an issuing company could feel compelled to enter into a contract with the agency and end up paying for an interactive rating. On the other hand, it needs to be borne in mind that unsolicited ratings provide a means for rating agencies, which are new on the market, try to establish their business and to build up their reputation.

XI. Conclusion

Although ratings have an important influence on the valuation of corporate issuers for the Swiss financial market participants, the phenomenon of external credit ratings conducted by rating agencies is not considered a legal problem in Switzerland. This is mainly due to the fact that only a few, small and specialized rating agencies are at the time incorporated under our laws and that there is no de facto obligation for issuers to undergo credit ratings.

Thus, the rating agencies are not required to register with any supervisory body and there is no self-regulatory measures governing their activity. Furthermore, no special regulations exist with regard to the control and responsibility of rating

126 Art. 28a par. 3 and 28c CO.
127 BERTSCHINGER, supra note 2, p. 105.
agencies. The applicable rules in that field derive from general fundamental principles and standards of the Swiss code of obligations.

A rating agency has due diligence and loyalty duties towards its clients. If in the course of a rating procedure the agency does not fulfil its mandate according to its obligations, it may be held for any damages caused by negligence to the other party. The responsibility of the rating agency may be subject to contractual limitations as long as mandatory provisions of law are not violated.

The question of liability for tort of rating agencies is also relevant within the framework of the prospectus issuing procedure and the listing procedure on the SWX Swiss Exchange, where the obligations of the market participants are subject to specific requirements. Under certain circumstances, a rating agency publicizing a rating may be held liable for the damage caused to investors when it commits professional inaccuracies in gathering or analysing the data regarding the issuing company.

To date, no criminal, administrative or judicial decision has been rendered in this field. The application of general principles of law to the liability of credit rating agencies remains uncertain.