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STEFANO LOMBARDO
PROFESSORE ASSOCIATO

**Conflicts of Interest and (Retail) Investor Protection in EU IPOs.
An Analysis of the EU/Italian Regulatory Regime among Prospectus
Regulation, Market Abuse Regulation and MiFID II/CDR 2017/565**

SUMMARY: 1. Introduction. - 2. A primary on the economics of IPOs, bookbuilding for final offering price determination and allocation of shares. - 3. The European IPO regulatory framework: PR, MAR and MiFID II and CDR 2017/565. - 3.1. The Prospectus protection rules. - 3.2. The Market Abuse protection rules. - 3.3. The MiFID protection system. - 3.3.1 The CDR 2017/565 regulatory framework. - 4. The IPO European (retail) investor protection resulting from PR, MAR and MiFID II in the bookbuilding procedure. - 5. The Italian regulatory case and IPO (retail) investor protection. - 5.1. Market abuse and conflicts of interest management in final price setting between the old and new regulatory regime. - 6. Conclusions.

1. Introduction

Investor protection is historically and comparatively both in the U.S. and in EU the major mission of securities regulation in a functional and instrumental relation with capitalizing firms to finance investments.¹ Investor protection is also an important regulatory concern during the Initial Public Offering (IPO) of companies. The IPO is the complex procedure that makes a closed company a public, registered one, i.e. listed on what is commonly and not technically referred here as a Stock Exchange.

The European system of IPOs in a regulated market (thus excluding the more flexible possibility to list on a Multilateral Trading Facility or MTF), is mainly the result of three major pieces of financial legislation, which have evolved in the last decades and have been increasingly refined and mostly unified through the regulatory instrument of the regulation:² (i) the Prospectus Regulation (hereinafter PR),³ (ii) the Market Abuse Regulation (hereinafter MAR),⁴ and finally (iii) the Market in Financial Instruments Directive (hereinafter MiFID II).⁵

¹ See, in general Langevoort (2009) for the development in the U.S. between retail investor and institutional investors and Ferrarini and Ottolia (2013) between the costs and benefits of disclosure regulation for SMEs for the EU. See also Zingales (2009) and the seminal paper by La Porta, Lopez-de-Silanes, Shleifer, Vishny (1998). See Lombardo (2025) for a comparative analysis of the U.S. and EU disclosure systems.

² This Article does not consider Directive 2001/34 of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities.

Furthermore, this Article does not consider possible aspect of competition law in IPOs with respect to underwriters and/or institutional investors, on which for the U.S., where the “implied antitrust immunity” doctrine is applied also to IPO, see 551 US 264 (2007), *Credit Suisse Securities (USA) LLC, fka Credit Suisse First Boston LLC, et al. v. Billing et al.* In general, see Hovenkamp (2003), Kling (2011), Weinstein (2019). See Kwan (2024) for the U.S., UK, and other countries and Van Dijk, Jenkinson and Pham (2024) for the UK, as well as FCA (2019) for a case of competition law, for sharing information in IPOs among asset managers as institutional investors.

³ Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

⁴ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

⁵ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

The interplay between these three major components of European law on IPOs is complex not only in itself, but also with respect to the private/contract law elements of each Member State, which apply the unified or harmonized European regime to their civil/private law regulation of the public offering. It is with respect to this last element that Commission Delegated Regulation (EU) 2017/565 (hereinafter CDR 2017/565)⁶ sets some core principles that supplement the national civil law procedure of the public offering also for purposes of investor protection (and market integrity). These core principles are based on the provisions on conflicts of interests of MiFID II (mainly Articles 16(3), 16 (6) and 23, and also Recital 56).⁷ More specifically, while Articles 33 to 35 are dedicated to conflict of interests in general,⁸ basically replicating Articles 21 to 23 of Directive 2006/73/CE (the predecessor of CDR 2017/565),⁹ Articles 38 to 40 CDR 2017/565 set specific rules precisely on underwriting, placing and the (bookbuilding) procedure of final price setting. These rules are aimed at avoiding some common conflicts of interest for the proper determination of the IPO final offering price and allocation policy.¹⁰ To be sure, conflicts of interests are pervasive in financial intermediation,¹¹ and are present also in the IPO context,¹² also considering that the universal banking system, where commercial banks operate also in investment banking activities, amplifies the problem.¹³

⁶ Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive. For conflicts of interests see also ESMA (2014a), 79 and (2014b), 70.

⁷ But on the relationship between conflicts of interest, investor protection and market integrity (as well as market efficiency) as probably not clear in the MiFID context, see Grundmann and Hacker (2017), 170, 7.11 and 7.12.

⁸ Articles 36 and 37 are respectively dedicated to Investment research and marketing communications and Additional organizational requirements in relation to investment research or marketing communication.

⁹ For the Italian legal system, on conflicts of interests in the provision of financial services, see e.g. Enriques (1996); Sartori (2001); Annunziata (2004); Maffei (2008); Antonucci (2009); Presti and Rescigno (2008); Lener (2008); Perrone (2008); Maffei (2012); Di Amato (2019); De Poli (2020); Maffei (2020); Viti (2021).

¹⁰ Conflicts of interest in IPOs include more broadly Article 38-43 CDR 2017/565.

¹¹ See Geneva Reports (2003); Mehran and Stulz (2007).

¹² See IOSCO (2007); Accettella (2013), 132.

¹³ On universal banking see in general Benston (1994); on conflicts of interests in universal banking, Guiso (2004); Mehran and Stulz (2007), 272; Avci, Schipani and Seyun (2018).

This Article analyses the functioning of these specific CDR 2017/565 rules inside the complex system of the three mentioned major pieces of regulation to analyse their interrelation both from a legal and an economic perspective for the purposes of (retail) investor protection from a European perspective. It provides an analysis (with some elements of comparison with the U.S. system) based on the unified regulatory strategy at the level of PR, MAR and CDR 2017/565 but only harmonized at the level of MiFID II, concentrating on the several factors of its working. The Article then concentrates on the Italian IPOs system, analysing some practices that may be considered problematic also in the light of the CDR rules. In particular, the Article, without considering the complex issue of possible (national) remedies,¹⁴ argues that in “problematic” IPOs (i.e., overpriced IPOs), the practice to shift shares to retail investors (through so-called claw-back clauses) can be considered suspicious of market abuse (and, in particular, of market manipulation), also based on the conflict of law rules of 2017. In future, it should be possible to empirically test the extent to which the post-2017 regulatory regime (in force since 1. January 2018) has implied a reduction in the use of claw-back clauses to reduce the danger of enforcement for market abuse/market manipulation.

The Article is organized as follows. Section 2 explains the economics of the IPO procedure, concentrating on the economics of the bookbuilding system of price determination, which is an essential element also of the European regulatory regime of IPOs. Section 3 provides a picture of the European IPO regulatory system, concentrating on the main aspects of the three pieces of legislation to show how they converge toward (retail) investor protection (and market integrity). Section 4 describes the IPO European (retail) investor protection regime resulting from PR, MAR and MiFID II/CDR 2017/565 in the bookbuilding procedure in relation to the possible conflicts of interest arising among the relevant parties (i.e. underwriters, listing company, selling shareholders, institutional and retail investors), discussing the critical factors for its proper working. Section 5 analyses the Italian case, by specifying the national characteristics of the harmonized/unified European IPO regulatory system, to evaluate claw back clauses in the old regime (pre-2018) and new regime shaped by MiFID II/CDR 2017/565 (post-2018). Short conclusions follow in Section 6.

¹⁴ A topic that for its complexity is outside the scope of this Article.

2. A primary on the economics of IPOs, bookbuilding for final offering price determination and allocation of shares

An IPO is the most common procedure according to which a closed company becomes a public, registered one, listed on the Stock Exchange.¹⁵ Even if regulatory regimes can be different in some details, the “economics” of IPOs is quite standardized worldwide.¹⁶ Indeed, financial economists analyse the three main economic phenomena created by IPOs: (i) underpricing, (ii) cycles in the number of IPOs, and (iii) long-run underperformance.¹⁷

An IPO includes mainly the issuer (the listing company) and the investors accompanied by other actors (gatekeepers), the most important being the underwriters,¹⁸ which create consortia (underwriting syndicates) that can be organised mainly in three ways.¹⁹ The mechanisms used for pricing IPOs and allocating shares to investors are mainly three: (i) fixed price offering, where the offering price is set ex ante,²⁰ (ii) open price system, where the price is not fixed ex ante, and possibly determined according (a)

¹⁵ For more recent alternatives to the IPO, in form of direct listing and Special Purposes Acquisition Companies (SPAC) see Huang and Zhang (2022).

¹⁶ See Ritter (2007) for a general introduction to the economics of IPOs (and Seasoned Equity Offerings, SEO). See also the more recent surveys by Lowry, Michaely and Volkova (2017); Kesten (2019) and Hunag and Zahng (2022); Severini (2020).

¹⁷ See Ritter (2007), 279.

¹⁸ A consortium of underwriters (i.e. banks and investment firms) helps the listing company to organize the offer of shares that come (i) either from a capital increase of the listing company, or (ii) from the selling of relevant shareholders or (iii) a mix of the two. The capital increase is the most common understanding of IPO in the U.S., where the shares are first acquired by the underwriting syndicate with a firm commitment agreement and then sold to investors. In IPOs usually, pre-IPO shareholders do lock up their shares for a period after the IPO to signal to IPO investors their trust on the listed company, on lock up agreement Boreiko and Lombardo (2013).

¹⁹ (i) Firm commitment syndicates, where the underwriters buy/subscribe ex ante at discount the shares to be offered to the investors; (ii) strict underwriting syndicate, where underwriters oblige themselves to buy/subscribe ex post the shares they are not able to allocate to investors; (iii) best efforts syndicates, where the underwriters oblige themselves to do their best to sell the shares to investors but not to buy/subscribe them. In general, see Hazen (2022), 15; for a survey on the economics of underwriting, see Deereper and Schwienbacher (2018). On underwriting syndicates, see Allen (1991); Dereeper and Schwimbacher (2018).

²⁰ Ritter (2003), 426: *offre à prix ferme*.

either to a bookbuilding procedure,²¹ or (b) through an auction.^{22,23} The open prices system with bookbuilding procedure is the worldwide most used mechanism for the determination of the final offering price and has replaced fixed price offering and is also generally preferred to auctions.²⁴ Bookbuilding permits underwriters to have complete discretion in the allocation of shares among investors,²⁵ and has developed rapidly worldwide also because permits a lower level of underpricing, particularly compared to fixed price offerings.²⁶

The U.S. IPO regulatory regime is (empirically) the most widely studied and has served as a term of reference for many other jurisdictions.²⁷ In the U.S. IPO system, basically the following procedure applies, based on Section 5 SA and its three main periods:²⁸ (i) pre-filing period, where a price range (according to item 501(b)(3) Regulation S-k)²⁹ is determined in the (preliminary) prospectus,³⁰ based on due diligence estimations and more

²¹ Ritter (2003), 426: *placement garanti*.

²² Ritter (2003), 426: *offre à prix minimal*; see also Ritter (2007), 281. There are also cases of mixed use of bookbuilding and auctions. For a study on the merits of bookbuilding vs auctions in the UK regime, see Myners *et al.* (2014) and on the diffusion of bookbuilding in the world Table 3, 89; on the Report of Myners *et al.* (2014), see critically Lim (2016). To be sure, there are also evolutions of the bookbuilding procedure in terms of decoupled bookbuilding.

²³ It useful to note that the offering price is usually (worldwide) a single one for all type of investors, even if exemptions are possible in form of discounts to this single price. On the economics of uniform price offering (a very residual area of analysis), see Benveniste and Wilhelm Jr. (1990) and Bennouri and Falconeri (2008). On the legal aspects see for the U.S. and for Europe Lombardo (2011), 52 and 255.

²⁴ Severini (2020); Myners *et al.* (2014), Table 3, 89 and 82.

²⁵ This point is essential and stressed by the economics literature.

²⁶ See Myners *et al.* (2014), 53 and Appendix 2. Apparently, according to Cham, Libosn and Mugeran (2025), the more recent increase in IPO underpricing is due to the participation of the Big Three Institutional Investors (BlackRock, Vanguard and Fidelity) in the U.S. IPO market.

²⁷ This is true not only with respect to the registration of approval of the prospectus, but also with respect to the diffusion of the U.S. IPO praxes, on which see Ritter (2003); Ljungqvist, Jenkinson and Wilhelm, Jr. (2003).

²⁸ Hazen (2022), 17. On the historical role of Section 5 SA and the more recent crisis, see Langevoort and Thomson (2013). See also Lowry, Michaely and Volkova (2017), 32.

²⁹ The instructions to paragraph 501(b)(3) requires a bona fide estimate of the range of the maximum offering price and the maximum number of securities offered.

³⁰ The “first price indication is disclosed in the form of an offer price range. It represents the minimum and the maximum achievable offer price, corresponding to the lowest acceptable price for the issuing firm and the highest price predicted by the underwriter to clear the market”, Severini (2020), 33 and “no formal theoretical model has been presented in the existing literature regarding the process by which underwriters choose the initial offer price range” (Chemmanur, Krishnan & Yu 2016, p.15). It is reasonable to think that

recently also on the contact with qualified institutional investors (QIBs) to “test the waters”,³¹ (ii) waiting period, where the registration statement is filed with the SEC, (iii) effective period, where the SEC declares the effectiveness of the registration statement, and a final prospectus with the final offering price is produced. During the waiting period, the “gun jumping” rules apply. This means that the lead underwriter presents the listing company to institutional investors through roadshows and collects their non-binding orders,³² which are mainly of three types: strike, limit and step bids.³³ Following the roadshow and the bookbuilding, the underwriters set the final price and allocation among investors.

Financial literature has developed (with respect to the U.S. system) mainly two explanations about final price setting and allocation strategies. The first is the so-called *quid pro quo* theory, while the second one is the information revelation theory.³⁴ The *quid pro quo* theory basically argues that the pricing and allocation strategy is shaped by conflicts of interest between the underwriter and the issuing firm.³⁵ This kind of literature points out conflicts of interest and problematic behaviours of underwriters, legally treatable both in terms of prospectus liability and anti-fraud and market manipulation, that were common under the IPO dot-com bubble of 2000.³⁶ They produced several suits,³⁷ and regulatory intervention in form of an interpretative release of the SEC in April 2005.³⁸ Indeed, IPO final

the existence of repeated interactions between the lead manager and the underwriter syndicate or regular investors could influence the IPO price range setting”, 36.

³¹ Indeed, starting December 2019, it is also possible for listing companies to testing-the-waters according to Rule 163B, i.e. to gauge institutional investors interest for the IPO, see Hazen (2022), 19.

³² Hazen (2022), 21.

³³ (i) Strike bid is a bid for a specified number of shares or amount of money regardless of the issue price, (ii) limit bid where the bidder specifies the maximum price that he is willing to pay for the shares (i.e., a limit price), (iii) step bid where the bidder submits a demand schedule as a step function (i.e., a step bid is a combination of limit bids). See Cornelli and Goldreich (2003), 1418.

³⁴ See Lowry, Michaely and Volkova (2017), respectively Section 5.2, 229 and Section 5.4, 238; see also FCA (2016) and Jenkinson, Jones and Suntheim (2018).

³⁵ See Lowry, Michaely and Volkova (2017), Section 5.4, 238. See also IOSCO (2007).

³⁶ See already SEC (2000). For the consequences in terms of increased underpricing of manipulative practices related to tie in arrangements, see Aggarwall, Purnanandam and Wu (2006). More recently for the effects of market manipulation on IPOs in several countries and in relation to quality of regulation, Duong, Goyal and Kallinterakis (2021).

³⁷ Consolidated into a single proceeding, *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 294 (S.D.N.Y. 2003), see Choi and Pritchard (2004), 181

³⁸ See SEC (2005). See also NYSE/NASD IPO Advisory Committee (2003).

offering price setting and the allocation strategy were accompanied by some behaviours of favouritism, among others the laddering and spinning phenomena.³⁹ Laddering, as a case of tie-in agreement, is an agreement between the underwriters and some investors, where IPO “initial investors would commit to buy additional shares of the offering company's stock in secondary market trading in return for allocations of shares in the IPO”.⁴⁰ Spinning refers to “the allocation by underwriters of the shares of hot initial public offerings (IPOs) to company executives in order to influence their decisions in the hiring of investment bankers and/or the pricing of their own company’s IPO”.⁴¹ The extent to which the *quid pro quo* theory has still an effective explanatory power for the U.S. IPO system is not evaluable in this Article. Indeed, the question is whether the regulatory regime (Regulation M and some specific FINRA rules),⁴² can efficiently deal with the conflicts of interest generated by final pricing setting and allocation strategy in U.S. IPOs after the provisions of 2005.⁴³

The second type of approach provided for explaining pricing and allocation strategy in IPOs is the “information revelation theory”.⁴⁴ It enhances the role of institutional investors as information providers and, ultimately, as essential actors for final price setting. The most important type of order for information revelation purposes is the limit bid, while the

³⁹ For the EU, see Section 3.3.1.

⁴⁰ Choi and Pritchard (2004), 179.

⁴¹ Liu and Ritter (2010), 2024, adding the “term “spinning” refers to the fact that the shares are often immediately sold in the aftermarket, or “spun,” for a quick profit, and an IPO is termed “hot” if it is expected to jump in price as soon as it starts trading.” On spinning, see Maynard (2002); Griffith (2004).

⁴² See FINRA Rules: 5110 on Corporate Financing Rule – Underwriting Terms and Arrangements; 5121 on Public Offerings of Securities With Conflicts of Interest; 5130 on Restrictions on the Purchase and Sale of Initial Equity Public Offerings. On the relationship between underwriters and IPO company, see U.S. system Tuch (2007). To be sure, the Dodd-Frank Act of 2010 provided for further regulation in the relationship between investment advisers and broker-dealers and (retail investors) which covers also the issue of conflicts of interest, a topic outside the scope of this Article but on which see Sartori (2001), 199; Mondini (2008); Guernsey Jr. (2019); SEC (2011); SEC (2019a) on Regulation Best Interest and Schadle (2020).

⁴³ The recent FIGMA IPO with an exceptional underpricing could be interpreted as preferential allocation to favor some institutional investors, see the Article by Craig Coben published online on Aug 4 2025 on the Financial Times, Figma’s IPO was fine, actually.

⁴⁴ Lowry, Michaely and Volkova (2017), respectively Section 5.2, 229. Bookbuilding is referred to as a mechanism to induce investors to reveal their price valuation to get preferred allocations, Benveniste and Spindt (1989); Spatt and Srivastava (1991).

less important is the strike bid.⁴⁵ The flow of information from institutional investors to the lead underwriter is essential in determining the final offering price and complements to some extent the information gained during the due diligence stage to set the final price range.⁴⁶ According to the information revelation theory, underwriters reward regular investors (particularly those with whom they have repeated interactions), who reveal their proprietary information about the quality of the listing company (based on their evaluation of it) with preferred allocation of shares.⁴⁷ This allocation strategy is efficient, because it possibly reduces underpricing, by remunerating the disclosure of information by institutional investors about the value of the listing company. At the same time, distinguishing between institutional, informed investors and retail investors, this allocation strategy rewarding informed investors for providing “material”, proprietary information can create tensions with retail investors. Indeed, retail investors on the one side cannot price the IPO and must rely (also in the IPO context as they do on the secondary market with ECFM and FOTM)⁴⁸ on the pricing skills of informed investors and on the other side can be (efficiently?) discriminated in allocations also on those of more underpriced IPOs.

Overall, the reduction in underpricing coming from bookbuilding can be considered positive from the perspective of the issuer and selling shareholders, because they lose less money (underpricing as “money left on the table”).⁴⁹ On the contrary, a lower level of underpricing is negative for IPO investors (both institutional and retail) who pay the shares relatively more than they would have with a higher level of underpricing. The consequences of a reduced underpricing for underwriters are difficult to assess, depending on the risk of the type of underwriting agreement and on the structure of the fees.⁵⁰

⁴⁵ Cornelli and Goldreich (2001), 2340.

⁴⁶ Severini (2020), 34; Crain, Parrino and Srinivason (2021), discussing also theories that stress the substitution between due diligence and bookbuilding.

⁴⁷ Cornelli and Goldreich (2001); Cornelli and Goldreich (2003); Jenkinson and Jones (2018). But see Lowry, Michaely and Volkova (2017), 45, for a relativization of the empirical proof of the information revelation theory.

⁴⁸ See Lombardo 2025.

⁴⁹ Ritter (2002), 427, the “money left on the table in an IPO is defined as the number of shares offered multiplied by the first day capital gain, measured from the offer price to the closing price”.

⁵⁰ And also on stabilization activity, on which see Lombardo (2007); Boreiko and Lombardo (2011).

In this context, the final price setting is a very delicate “mission” for the lead underwriter(s),⁵¹ which is *per se* structurally shaped also by (potential) conflicts of interest among the several parties.⁵² The financial literature has stressed the (potential) conflicts of interest arising from IPO pricing and allocations strategies, particularly those arising between the listing company and underwriters.⁵³ The recent tendency of European issuers to engage an independent IPO advisor with the duty to control the underwriting syndicate and the pricing activity has not led to a reduced underpricing,⁵⁴ but can be interpreted also as an attempt to avoid possible conflicts of interest between issuer and underwriting syndicate in the relevant issue of price setting.

3. The European IPO regulatory framework: PR, MAR and MiFID II and CDR 2017/565

The typical European company wishing to list itself and its shares in a regulated market with an IPO, must comply with national rules, mainly on company law, and with European rules. As mentioned, European rules include provisions related to investor protection in PR, MAR and MiFID II.

3.1. The Prospectus protection rules

For an IPO company the necessity to write a prospectus is justified because the disclosure of information in cases of offers of securities to the public or admission of securities in a regulated market to trading is vital to protect investors by removing information asymmetries between them and the issuer (Recital 3 PR),⁵⁵ as well as to ensure investor protection and market efficiency while enhancing the internal market for capital (Recital 7 PR). The disclosure includes information related to the offering and the listing company, as detailed in Commission Delegated Regulation 2019/980

⁵¹ Usually the final price “is not a market-clearing price, but a lower price which thereby generates excess demand. This in turn increases the sell side’s discretion to allocate shares to investors who have helped in the price discovery process or who are deemed to be attractive long-term shareholders for the company”, Van Dijk, Jenkinson and Pham (2024), 125.

⁵² As mentioned, potential competition law issues are not treated in the context of the bookbuilding procedure, see Van Dijk, Jenkinson and Pham (2024).

⁵³ See Lowry, Michaely and Volkova (2017), 52 for the conflict of interest between the listing company and the underwriters; see also Jenkinson, Jones and Suntheim (2018).

⁵⁴ See Jenkinson, Jones and Suntheim (2018).

⁵⁵ The literature on (mandatory) disclosure is very large, but see Enriques and Gilotta (2015) and Schammo (2025) for prospectus.

(hereinafter CDR 2019/980).⁵⁶ Information is provided which, according to the nature of the issuer and of the securities, is necessary to enable investors to make an informed investment decision. This information together with rules on the conduct of business (as provided by MiFID II and CDR 2017/565)⁵⁷ ensures the protection of investors.⁵⁸

Article 17 PR (on the final offering price and amount of securities) is topical for price (and final amount of shares to be offered) determination.⁵⁹ It includes the possibility that the offering price (and the amount of securities) is not *ex ante* determined (fixed price offering), but is *ex ante* open and *ex post* determined (by way also of a bookbuilding procedure or auction) at the end of the offering.⁶⁰ The construction of Article 17 PR is interesting and replicates in result the high degree of flexibility for final IPO price determination of the U.S. system. At the same time, Article 17 PR has worked and works in another more flexible institutional setting compared to the rigidity of the pre-filing period in the U.S., only recently relaxed with the possibility to “test the waters”.⁶¹ Indeed, in the European context there is the possibility for underwriters to contact institutional investors in the first stage of the IPO in order to set the formal (indicative) price range (pilot fish).⁶² Furthermore, the European system is flexible also with another

⁵⁶ Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004.

⁵⁷ On which, see Gilotta (2025).

⁵⁸ Furthermore, it provides an effective means of increasing confidence in securities and, thus, of contributing to the proper functioning and development of securities markets (Recital 7 PR).

⁵⁹ Article 17 PR is the more elaborate version of Article 8(1) Directive 2003/71 (Prospectus Directive, PD, Directive 2001/71 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC; on Article 8 PD, see Lucantoni (2019b)), which already permitted the open price system and in particular the bookbuilding procedure, which developed also in Europe already in the 1990s. On Article 8(1) PD, see also Lucantoni (2019a), 992, also with respect to Item 5.3. (Pricing) of Commission Regulation 809/2004. For the bookbuilding system in Europe, see Myners (2014), 52.

⁶⁰ The content of Article 17 is similar but not identical to items 501(b)(2) and (501)(b)(3) of Regulation S-K. On Article 17 PR, see Zivny and Mock (2021b), 149.

⁶¹ With Rule 163B. See Hazen (2022), 19; see also SEC (2019b).

⁶² See already Myners (2014), 56; Jenkinson, Morrison and Wilhelm Jr. (2006). Indeed, already in the pre-bookbuilding phase, called “Pre-Deal Investor Education” (PDIE), underwriters contact prospective institutional investors to gain feedback on the quality of the listing company and possible interest on the basis of the informal price range

aspect, than the U.S. one. It allows to write in the prospectus for the offer (to be approved by the competent authority) the price range and to simply communicate to the market by way of a communication the final price (and/or the final quantity), determined at the end of the offering, after evaluation of the order-book of the bookbuilding.⁶³ The only rigidity compared to the U.S. system appears the one related to the possibility to modify the initial price range (and/or the initial quantity range): in the European context a supplement to the prospectus must be published according to Article 23 PR (and Recitals 65 and 66) and approved by the competent authority (with withdrawn rights for initial investors).⁶⁴

Notwithstanding some (minor) differences with the U.S. price determination regime, Article 17 PR gives the possibility to modulate the price determination of the financial instrument/security (in this case the IPO share price) according to several variables, including the type of offering, the private law system of the single Member States and different price settings mechanisms.⁶⁵ Indeed, Article 17 PR (see also Recital 55 PR) provides that where the final offer price and/or amount of securities to be offered to the public, whether expressed in number of securities or as an aggregate nominal amount, cannot be included in the prospectus two alternatives, (a),⁶⁶ or (b) apply.⁶⁷ For the purpose of this Article, alternative (b) is relevant, because, interpreted according to Recital 55, signals that the European legislator is open to the evolution of financial markets and

(indicative valuation range), see the recent empirical study by Divakaruni, Jones and Pezier (2025), analysing how pre-bookbuilding contacts between underwriters and institutional investors influence the final price and allocations. On PDIE (pilot fishing or pre-sounding), see also Wohlgefahr, Johannson and Haberfellner (2025), 77, 2.48 and 2.49.

⁶³ The same was during the PD, Zivny and Mock (2022b), 194, 21.

⁶⁴ Listing companies and underwriters are reluctant to change this price range in order to avoid the risks possibly associated with a delay of the offer, also caused by the uncertainty of the withdrawn rights. The same was during the PD, for Article 23 PR see Zivny and Mock (2022b), 194, 22. See also Ritter (2003), 427; Jenkinson, Morrison and Wilhelm Jr. (2006). See Myners (2014), 59, discussing this rigidity.

⁶⁵ As already mentioned, the question of whether it is a single uniform price is complex, see *supra* ??.

⁶⁶ Alternative (a) is the classical instrument of withdrawn provided for by European legislation in many contractual relationships characterized by uncertainty for the protection of the party considered weaker (i.e. the investor), see Zivny and Mock (2021b), 151.

⁶⁷ In any case, according to Article 17(2) requires the final offer price and amount of securities is filed with the competent authority of the home Member State and made available to the public in accordance with the arrangements set out in Article 21(2).

provides a mix of possible combinations, subject to some constraint for investors protection purposes, for final price determination, which include the open price system with the bookbuilding procedure.⁶⁸ Finally, to protect the content of the prospectus and in particular also the determination of the initial price range (according to Article 17) and safeguard the interests of investors, Article 11 PR (Article 6 PD) sets general rules on prospectus liability, a topic, which contrary to the U.S. (mainly Section 11 SA)⁶⁹ is left to the competence of the Member States and is outside the scope of this Article.⁷⁰

3.2. The Market Abuse protection rules

With some minor element of distinction, both in the U.S. and in the EU the philosophy of the rules on continuous and periodic disclosure of listed companies in the secondary market are aimed at valorising the complete functioning of the price mechanism, according to the Efficient Capital Market Hypothesis (ECMH):⁷¹ new information coming from the listed company (corporate information) and from the market (market information) is elaborated by institutional investor (informed investors) and instantly incorporated in prices.⁷² Retail investors can free-ride on the pricing activity of institutional investors and continuously refer to a price which is always (a proxy of) the efficient one, also for them. Furthermore, this transmission mechanism ensures also the working of the Fraud On the

⁶⁸ See Zivny and Mock (2021b), 153. For comparative purposes, Item 501(b)(3) (offering price of the securities) of Regulation S-K provides the possibility to make the offering on a minimum/maximum basis, providing 1. a bona fide estimate of the range of the maximum offering price and the maximum number of securities offered ... and 2. if it is impracticable to state the price to the public, by explaining the method by which the price is to be determined, or instead of explaining the method on the outside front cover page of the prospectus, by stating that the offering price will be determined by a particular method or formula that is described in the prospectus and including a cross-reference to the location of such disclosure in the prospectus, including the page number ... *Instructions to paragraph 501(b)(3)*.

⁶⁹ See Hazen (2022), 48.

⁷⁰ On Article 17 PR, see Zivny/Mock (2019b) while on the PD, see Lucantoni (2019b). On European Prospectus liability, see Busch (2021) and Busch and Lehmann (2023), while on Italian prospectus liability see, Boreiko and Lombardo (2019).

⁷¹ Fama (1970). According to the semi-strong market efficiency level. Both in the U.S. and Europe with some elements of distinctions the transmission of non-public information (strong level of market efficiency) is limited by insider trading regulation, Ventoruzzo (2022).

⁷² For the role of institutional investors Kraakman and Gilson (1984); Goshen and Parchomovsky (2006).

Market Theory (FOMT) mechanism, according to which, based on Rule 10b-5,⁷³ investors can rely on the market price at a given moment to ask for damages in case of material statements of the company that are fraudulent.⁷⁴

On the contrary, for the primary market (i.e. during IPOs), a formal market is not in place. In the U.S., the FOMT is not applicable to IPOs, because the “fraud-on-the-market” presumption cannot logically apply when plaintiffs allege fraud in connection with an IPO, because in an IPO there is no well-developed market in offered securities.⁷⁵ Also the developed Fraud Created the Market Theory (FCMT), according to which “fraud is so material that without it the securities never would have made to the market”,⁷⁶ is not recognized for investor protection purposes in IPOs.⁷⁷ With respect to market abuse, prohibitions of insider trading and market manipulation are present during IPOs,⁷⁸ and Regulation M permits only stabilisation as a form of permitted market manipulation.⁷⁹ Nevertheless, probably also due to the fact that in the U.S. IPO system the “when issued market” (grey market) is not possible and short selling is forbidden,⁸⁰ insider trading liability (forbidden also under Regulation M),⁸¹

⁷³ “Rule 10b-5 prohibits any fraudulent statement or omission in connection with the purchase or sale of any security ... and remains one of the broadest bases for bringing an action alleging fraud in a securities transaction. ... The fraud-on-the-market theory facilitates Rule 10b-5 class actions by stating that individual plaintiffs need not be personally aware of the defendant's fraudulent statements or omissions”, Groot (2009), 1146.

⁷⁴ Goshen and Parchomovsky (2006), 766.

⁷⁵ *In re Initial Pub. Offerings*, 471 F.3d, quoting *Berwecky v. Bear, Stearns & Co.*, 197 F.R.D. 65, 68 n. 5 (S.D.N.Y. 2000) and following *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990).

⁷⁶ Kaufmann and Wunderlich (2012), 278.

⁷⁷ On the Fraud Created the Market Theory (FCMT), see Silvermann (2011); Kaufman and Wunderlich (2012).

⁷⁸ Regulation M (a) preliminary note: *any transaction or series of transactions, whether or not effected pursuant to the provisions of Regulation M ..., remain subject to the antifraud and antimanipulation provisions of the securities laws, including, without limitation, Section 17(a) of the Securities Act of 1933 ... and Sections 9, 10(b), and 15(c) of the Securities Exchange Act of 1934 ...*; Hazen (2022), 24.

⁷⁹ Lombardo (2007); Boreiko and Lombardo (2011a). Today, market manipulation in forms of stabilization is not done during distribution but only in the aftermarket, i.e. 30 days after the first day of trading.

⁸⁰ By Regulation M Rule 105.

⁸¹ See letter (a) Preliminary note in Rule 100.

apart possible issues of market manipulation,⁸² is covered under the liability regime of the prospectus (usually, Section 11 SA).⁸³

The regulatory regime is partially different in Europe. According to Article 2(1)(a) MAR applies to financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made. The last specification means that a European IPO (as the U.S. one) is potentially covered from the date of the request of admission to trading both by the PR and the MAR. Unfortunately, neither MAR nor PR mandate the necessary application of MAR to IPOs, something which depends on national law,⁸⁴ but the application of MiFID II and Articles 38-40 of CDR 565/2017 is granted. Apart from the (unfortunate) missed specification of the mandatory application of MAR during IPOs, in the European regulatory regime insider trading and market manipulation are normally enforced also during an IPO.⁸⁵ Furthermore, contrary to the U.S. IPO system, European legislation does not prevent the existence at national level of “when issued markets” (i.e. grey markets), where a (weak) form of FOMT could be conceivable, depending on the requirements necessary and sufficient to define an efficient market.⁸⁶

3.3. The MiFID protection system

The MiFID investor protection system is quite complex and provides firstly a declination based on the distinction between professional and retail investors.⁸⁷ For the purposes of this Article, the main elements of the

⁸² Related to Regulation M.

⁸³ See Langevoort and Thompson (2013) for prospectus liability; Hazen (2022), 48.

⁸⁴ There may be cases in which MAR is not applied during IPOs because MAR does not specify the date at which is applicable, leaving the merit to national (company) law. See ECJ Case C-910/19 of 3 June 2021, *Bankia SA v Unión Mutua Asistencial de Seguros (UMAS)*, on which see Lombardo (2022).

⁸⁵ With the exemption of Article 5 MAR on stabilization activity, which has a narrower scope of application than its U.S. model, on which see Boreiko and Lombardo (2011).

⁸⁶ See Ritter (2003), 427; Cornelli, Goldreich and A. Lungqvist (2006); Khurshed, Kostas, Mohamed *et al.* (2018).

⁸⁷ For a general introduction to MiFID II see Busch (2017). Professional clients are institutional investors for the purposes of this Article, i.e. clients who possess the experience, knowledge and expertise to make their own investment decisions and properly assess the risks that it incurs and further specified in Annex II of MiFID II and (ii) retail clients, i.e. retail investors for the purposes of this Article) who are not professional clients (Article 4(1)(11) MiFID II).

regulatory framework of the MiFID II protection system basically are (i) conduct rules that shape the contractual relationship between the investment firm and the investor, as well as the contractual relationship between the investment firm and the IPO company (and/or selling shareholders),⁸⁸ and (ii) conflicts of interest rules.⁸⁹

Conduct rules apply to the provision of investment services and a taxonomy of the relevant services provided under MiFID II by an IPO includes both (i) the relationship between the investment firm and the investor which can concretize in different services,⁹⁰ on the one side, and (ii) the relationship between the investment firm (underwriter) and the IPO company which can differently concretize.⁹¹ The system of investor protection (in Section 2 on provisions to ensure investor protection) starts with Article 24 on general principles and information to clients and aims at shaping the fairness of the contractual relationship between the investment firm and the clients/investors.⁹²

Conflicts of interest in MiFID II are organized on a double stage: organizational duties and contract/disclosure duties,⁹³ and Recital 56 sets

⁸⁸ On conduct of rules, see Enriques and Gargantini (2017a) and for Italy (2017b).

⁸⁹ It has been noted that the provisions on conflicts of interest are an expression of the general duty to safeguard the interests of the client (i.e. through the conduct of business rules) and that the “regime of conflicts of interest constitutes a preventive measure which is aimed at a better compliance with the obligation to strictly observe the client’s interests”, Grundmann and Hacker (2017), 179-180, 7.27.

⁹⁰ (a) Reception and transmission of orders in relation to one or more financial instruments; (b) execution of orders on behalf of clients; (c) dealing on own account; (d) investment advice (see Annex I Section A MiFID II). To be sure also portfolio management could be included but is not considered for simplicity reasons. The provision of a different level of protection in relation to the services provided and the type of client (Article 29a) which concretizes basically in (i) suitability for investment advice and portfolio management and (ii) appropriateness for the other services (Article 25 MiFID II in Section II on provision to ensure investor protection).

⁹¹ In (a) underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis; (b) placing of financial instruments without a firm commitment basis, on the other side (see Annex I Section A MiFID II).

⁹² Article 24 is complex and is applicable both to the relationship with retail investors and the one with institutional investors because at the core provides that investment firms offering services or, where appropriate, ancillary services to clients, act honestly, fairly and professionally in accordance with the best interests of their clients and comply, in particular, with the detailed principles and rules (specified also in Articles 44-54 CDR 2017/565, where the reference to investment firms includes also credit institutions ex Art. 1.2).

⁹³ For the development of the regulatory strategy between MiFID I and MiFID II, see Grundmann and Hacker (2017).

the ranking between the two stages.⁹⁴ Article 9(3),⁹⁵ as well as Article 16(3) and 16(6) and Article 23⁹⁶ fix the principles designed to grant the management of conflicts of interest. These can arise between the investment firm and the client (vertical conflict of interest), but also between clients (horizontal conflicts of interest).⁹⁷ In particular, while Article 16(3) fixes general principles, Article 16(6) specifically refers to MAR and to the integrity of the market, granting a regulatory (and enforcement) link between the management of conflicts of interest in IPOs and the market abuse provisions of MAR. This means that the management of conflicts of interest in IPOs can be evaluated also from the perspective and for the enforcement of market abuse.⁹⁸

3.3.1 The CDR 2017/565 regulatory framework

CDR 2017/565 is a complex delegated act specifying in detail the principles and rules of MiFID II on some relevant aspects. For conflicts of interest there are the general provisions laid down in Articles 33 to 37 (see also Recitals from 45 to 60).⁹⁹ These provisions apply to investment firms as well as credit institutions, which are usually underwriters in (European) IPOs,¹⁰⁰ and in

⁹⁴ The ranking of the two stages (reaffirmed by Recital 48 CDR 2017/565 and by Recital 27 Directive 2006/73/CE) has been stressed by the literature, see Grundmann and Hacker (2017), 179, 7.26 and 180, 7.28.

⁹⁵ This Article applies also to credit institutions providing investment services (Article 1(3)(a) MiFID II).

⁹⁶ Which is very complex but basically requires investment firms to take all appropriate steps to identify and to prevent or manage conflicts of interest and to disclose them. Note that Article 16 and 23 applies also to credit institutions ex art. 1(3)(a) MiFID II.

⁹⁷ See, Grundmann and Hacker (2017), 168, 7.07; Rothenhöfer (2025), 1528, 13.9.

⁹⁸ On the notion of market integrity on which MAR is based on (Recital 2 MAR and Article 1 MAR refer to market integrity and investor confidence to enhance investor protection), see McVea (2015) and Austin (2017). Indeed, also for the U.S. regulatory regime, the problems arising from e.g. spinning or laddering were dealt with mainly based on Regulation M (anti-fraud and anti-manipulation rules during public offerings), see SEC (2005).

⁹⁹ The Articles resemble the ones of Directive 2006/73/CE: in particular, Article 33 (on conflicts of interest potentially detrimental to a client resembles Article 21, Article 34 (on conflicts of interest policy) resembles Article 22, Article 35 (on record of services or activities giving rise to detrimental conflict of interest) replicates Article 23, Article 36 (on record of services or activities giving rise to detrimental conflict of interest) resembles Article 24 and finally Article 37 (on additional organisational requirements in relation to investment research or marketing communications) replicates Article 25.

¹⁰⁰ See Article 1.1 CDR 2017/565.

principle, the management of conflicts of interest is irrelevant from the status of the client to whom the service is provided.¹⁰¹

Of particular interest for this Article, because dedicated also to IPOs,¹⁰² are the provisions of Article 38,¹⁰³ Article 39,¹⁰⁴ Article 40,¹⁰⁵ and Article 43.¹⁰⁶ These provisions (see also Recital 57) are new and were not included in Directive 2006/73/EC which supplemented MiFID I.^{107,108} They are in Section 3 related to conflicts of interest and enhance the concern the European regulator (as the U.S. one) puts on the correctness of the IPO procedure with respect to the offering, the final price determination rules (including also the bookbuilding procedure) and the distribution and placement of shares among investors (allocation). To be sure, the conflicts of interest covered are related to several stages of the IPO process, starting from the project of the IPO, including the determination of the (indicative) price range and finally the determination of the final price and allocation policy. For the purposes of this Article, the conflicts of interest arising for the writing of the prospectus and the definition of the (indicative) price range are of limited interest, because their non-compliance (in terms of a non-correct price range) will be possibly (also) covered by prospectus liability.¹⁰⁹ As already mentioned, prospectus liability is provided by Article

¹⁰¹ See Recital 46 CDR 2017/565 and Recital 25 Directive 2006/7/EC.

¹⁰² As well as to a possible capital increase, by way of a seasoned offering.

¹⁰³ On additional general requirements in relation to underwriting or placing.

¹⁰⁴ On additional requirements in relation to pricing of offerings in relation to issuance of financial instruments.

¹⁰⁵ On additional requirements in relation to placing.

¹⁰⁶ On record keeping in relation to underwriting or placing. Article 41 (on additional requirements in relation to advice, distribution and self-placement) and Article 42 (on additional requirements in relation to lending or provision of credit in the context of underwriting or placement) are not relevant here.

¹⁰⁷ Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive. The only reference to securities offering is in Recital 26.

¹⁰⁸ They were not included possibly because the improper behaviors and regulatory answers of the SEC of 2005 were not fully understood at that time in Europe and the IOSCO Report of 2007 on conflicts of interest in public offering was not yet published. See IOSCO (2007).

¹⁰⁹ An indicative price range could be also covered by MAR, because of market manipulation concerns in setting it.

11 PR (article 6 PD) and is basically left to the competence of Member States.¹¹⁰

It is useful to shortly analyse the single Articles, which are addressed to the investment firms (and credit institutions) and create precise obligations for them.

Article 38 sets provisions for managing conflicts of interest in the relationship between the investment firm and the issuer company,¹¹¹ i.e. the client (i.e. the IPO company and/or the selling shareholders),¹¹² at the initial stage of the IPO (see also Recital 57).¹¹³ While Article 38(1) sets some behavioural duties,¹¹⁴ Article 38(2) tries to prevent possible conflicts of interest deriving from simultaneous IPOs, where the investment firms could potentially manage several IPOs, sacrificing one IPO with respect to another (see also Recital 57). For these kinds of conflicts of interest, the ban

¹¹⁰ In other words, a price range that is not reasonable and based on erroneous methods of valuation can be protected by prospectus liability. To be sure, there could be also the hypothesis of market manipulation in the identification of the price range but also this element is outside the scope of this Article.

¹¹¹ Article 38 supplements Articles 16(3), 23 and 24 MiFID II. On the relationship between the IPO company and the underwriters, and in general on banking syndicates in Italy, see Accettella (2013), 51-100 for Italy and Tuch (2007) for the U.S. On banking syndicates in Germany, see Schücking (2025); Meyer and Roth (2025), 324.

¹¹² See also Meyer and Rath (2025), 324, 8.16. Indeed, the IPO can include a capital increase and/or a selling from some shareholders.

¹¹³ See also Meyer and Rath (2025), 324, 8.16.

¹¹⁴ The notions of service of underwriting or placing of financial instruments (respectively *servizio di assunzione a fermo o collocamento di strumenti finanziari*, *Emissions- oder Platzierungsdienstleistungen im Zusammenhang mit Finanzinstrumenten*, *services de prise ferme ou de placement d'instruments financiers*), are not defined in CDR 2017/565. It is necessary to refer to MiFID II, where unfortunately the notions of underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis and placing of financial instruments without a firm commitment basis, respectively point (6) and (7) of Annex A of MiFID II are also not defined, see also Accettella (2015), 86, with respect to MiFID I. For the purposes of this Article, the notions of (6) and (7) include both (i) a relationship between the IPO company (and/or the selling shareholders) and the investment firm and (ii) a relationship between the investment firm and the final IPO investors, i.e. the investment firm acts to sell the shares to final investors, institutional and retail investors. Indeed, the description of the content of the relevant Articles includes not only the possible conflicts of interests arising between the investment firms and IPO company (and/or the selling shareholders) but also the possible conflicts of interest between the IPO company (and/or the selling shareholders) and investors, so that the notions of underwriting and placing include both relationships.

of activity as last solution is provided for. Finally, Article 38(3) regulates executions orders and research services.¹¹⁵

Article 39¹¹⁶ is also intended to shape the contractual relationship between the investment firm and the IPO company (and/or the selling shareholders) (i.e. the client), but when the IPO has already started and is approaching the final stage of pricing and allocation (see also Recital 58). While Article 39 is topical for conflicts of interest in price setting, Article 40 is topical for allocation strategies. Considering, that price and quantity (and allocations) are the two variables at disposal for the underwriters in the bookbuilding procedure, these two Articles play an essential role. Even if Article 39(1) is written in a very general way, it seems to provide a standard of behaviour (exempted from conflicts of interest) in price setting and it seems to mandate a kind of reasonable level of underpricing (to avoid conflicts of interest and to make everyone happy). To the extent that “relevant parties” includes the several IPO actors, the provision is flexible enough to include also (retail and institutional) investors. This general provision is then specified by a minimum requirement. This means that there could also be other potential requirements to ensure the proper enforcement of the general duty to avoid conflicts of interest to possible under-pricing or over-pricing of an issue or involvement of relevant parties in the process. Letter (a) is intended to protect the IPO company and to the extent that “other clients” includes not only companies’ clients but also IPO investment clients, can be interpreted to avoid a too high level of underpricing which would be against the interest of the issuing company

¹¹⁵ Article 38(3) is interesting from a comparative perspective because in the EU IPO context the contemporaneous provision of the underwriting/placing and research services are more favourable than in the U.S, a topic which is outside the scope of this Article, but see Wohlgefahr, Johannson and Haberfellner (2025), 77, 2.47. “In the U.S., affiliated analysts do not publish research reports until the end of the quiet period. Although the quiet period restrictions were lifted or relaxed in 2012 and 2015, industry practice continues to be that unaffiliated analysts generally do not initiate coverage of an IPO, and affiliated analysts wait 25 calendar days before initiating coverage. From a regulation perspective, there are benefits and concerns regarding pre-IPO communications from analysts. For investors, more pre-IPO communications such as pre-IPO analyst research help reduce information asymmetry and improve transparency. On the other hand, pre-IPO communications can also be used to condition the market and hype an IPO, increasing the demand” Ritter et al (2018); see also Boissin, Madureira and Singh (2023).

¹¹⁶ Article 39 supplements Articles 16(3), 23 and 24 MiFID II. On Article 39, see Meyer (2018), 326.

(and/or selling shareholders).¹¹⁷ On the other hand, letter (b) is meant to protect the interests of IPO investors which would appreciate a high level of underpricing (contrary to the IPO company and/or selling shareholders) but would like to avoid an overpricing.¹¹⁸ Letter (b) provides for the creation of a Chinese walls that separate the personnel stage of the final price determination with the selling activity to final IPO investors.¹¹⁹

Article 39(2) sets principles related to the determination of the final offering price and stabilization activity of Article 5 MAR (in any case to be reported in the prospectus for the IPO offering).¹²⁰

Article 40 shapes two very delicate stages of the offering,¹²¹ i.e. placing and allocation and is aimed at avoiding problematic behaviours in terms of fairness principles, antimanipulation principles and discrimination (equal treatment) of investors (see also Recital 59). Article 40 is interesting, because even if shaped in terms of conflicts of interest principles and provisions, includes also the prohibitions of behaviours which can consist, also in the European market abuse regime, in manipulatory behaviours.¹²² Its impact must be assessed according to the civil/contract law structure of the offering, which is something that is still regulated at Member State level and is disclosed in the prospectus for the IPO.¹²³ While Article 40(1) relates

¹¹⁷ This provision basically sets a standard of behavior for the investment firms in the determination of the offer final price, which has to be immune from improper influence in terms of the investment firm interest or investment firms other clients, including a large possible group of subjects, depending on the business organization of the investment firm, but including in result other IPO companies and final investors.

¹¹⁸ Meyer (2018), 326; Meyer and Rath (2025), 340, 8.41a.

¹¹⁹ The Chinese wall solution is one of the classic solutions to conflicts of interests, see Grundmann and Hacker (2017). The extent to which this separation effectively works in terms of proper incentives is problematic, due also to the structure of the offering system and structures of the (different types of) underwriting syndicate (consortia) in the different Member States, On the complexity of the underwriting syndicates, see Meyer and Rath (2025), 324, 8.17 to 8.20.

¹²⁰ According to Meyer (2018), 327, with the bookbuilding procedure this means that the investment firm informs the company and the shareholders about the order book. See also Meyer and Rath (2025), 340, 8.41a.

¹²¹ Article 40 supplements Articles 16(3), 23 and 24 MiFID II. See Meyer (2018), 334; Meyer and Rath (2025), 348, 8.53a and b.

¹²² These manipulatory behaviours justified the SEC (2005) intervention for protecting IPO against allocation strategies (e.g. tie-in agreements, laddering and spinning), which were against Regulation M, a piece of legislation not mainly related to conflicts of interests but to market manipulation.

¹²³ For the debate in Germany see Meyer (2018), 327; Meyer and Rath (2025), 346, 8.52. For Italy, see Section 5.

to future relationships with clients,¹²⁴ Article 40(2) separates personnel/staff related to different clients.¹²⁵ Article 40(3) prohibits (a) laddering, (b) spinning, and (c) and other improper allocation. The EU regulator, as the U.S. one, is critical with allocations being decided based on some business relationships that can distort the fairness of the allocation policy and possibly the efficiency of the bookbuilding procedure and can also in Europe be analysed in terms of market manipulation. Article 40(4) sets a protocolization of the allocation policy and its disclosure to the IPO company, which has to be actively involved, also in accordance with Article 40(5).¹²⁶ Finally, Article 43 (record keeping in relation to underwriting or placing) provides for recordkeeping which is useful for an ex post control over underwriting and placing to be actioned not only for the purpose of MiFID II compliance but also for Prospectus and MAR purposes (Article 16(6) MiFID).¹²⁷

4. The IPO European (retail) investor protection resulting from PR, MAR and MiFID II/CDR 2017/565 in the bookbuilding procedure

The analysis of the interconnections among the three main regulatory provisions, i.e. PR, MAR and MiFID II/CDR 2017/565, has shown the complexity of the European IPO regulatory system. The further analysis of the Italian regulatory regime requires a preliminary assessment of the described regime to evaluate its ability to grant investor protection, and in particular retail investor protection, inside the bookbuilding procedure of price determination and allocation strategy.¹²⁸

The assessment starts with the observation that the open price system with bookbuilding reduces underpricing in comparison to fixed price, because the information flow from informed institutional investors to the underwriters, grants to underwriters the availability of “material”, “proprietary” information about the value of the listing company.¹²⁹ Since

¹²⁴ Article 40(1) limits the possibility to influence recommendations on placing (particularly, shares allocations to investors) based on existing or future relationships with the investors, particularly, but not only, those with institutional investors. See Meyer (2018), 334.

¹²⁵ See, Meyer (2018), 334.

¹²⁶ See Meyer (2018), 335; see also Wohlgefahr, Johansson and Haberfellner (2025), 79, 2.55.

¹²⁷ Article 43 supplements Articles 16(3), 23 and 24 MiFID II.

¹²⁸ Which is the most common system of price determination in the E.U.

¹²⁹ This material/proprietary information is not the material information typical of the insider trading regime, because both in the U.S. and the EU the regulatory regime ensures

information is a good with its value, this information flow has to be remunerated by the underwriters. Given the constraint of the fixed price for all investors (institutional/informed investors and retail investors, where retail investors free-ride on the pricing ability of the former), the only way the lead underwriter(s) has/have to reward those investors providing the most valuable information is either (i) through allocations (this is the solution in a one shot game) or (ii) through allocations depending on the level of underpricing in a repeated game, where the lead underwriter(s) interact with some more valuable institutional/informed investors in many IPOs.

This “information game”, which includes basically three actors (i) the IPO company and/or selling shareholders, (ii) the underwriters and (iii) the (retail and institutional) investors, is functional to and essential for the bookbuilding procedure and the setting of an (optimal) finale price and allocation strategy.¹³⁰ This informational game (with its economic incentives structure) has to operate inside a regulatory system, provided by the PR regime of full disclosure of relevant information about the IPO company, and by the MAR and the MiFID II/CDR 2017/565 regime.

With respect to MAR,¹³¹ manipulation in the bookbuilding procedure can occur not only during a possible grey market (as mentioned, possible in Europe but not in the U.S.) but also in a normal bookbuilding procedure, where there is not really a market during the offering period, but where the lead underwriter(s) accepts orders, so constructing the order-book. The kind of manipulation the lead underwriter(s) can perform can be related to the fixing of the final offering price (operative market manipulation) but also to the information that the lead underwriter(s) sends to investors during the roadshows functional to the bookbuilding procedure (informational market manipulation). The European manipulation regime distinguishes between operative manipulation (Article 12(1)(a) and (b) MAR) and informational manipulation (Article

equal information among investors via the published prospectus. Institutional/informed investors can assess the information provided in the prospectus with other proprietary information at their disposal and elaborate an estimation about the value of the listing company (information revelation theory) which is essential for final price setting.

¹³⁰ Indeed, efficient pricing and allocation are almost a science, and underwriters have to take into consideration several factors.

¹³¹ As mentioned, the coverage of IPOs by MAR is not provided for but depends on national company law.

12(1)(c) MAR) and relates both to prices and to quantities and is flexible enough to include behaviour of every operator (and also of the lead underwriter(s) and the listing company) related not only to the secondary market but also to the primary market. In the IPO context, this means that the antimanipulation regime can operate against both an improper (i.e. manipulative) (i) final price setting and (ii) allocation strategy among investors, if (i) and (ii) alone or in combination among them, are/result in a manipulative behaviour with a manipulative effect.¹³²

With respect to the MiFID II/CDR 2017/565 regime, conflicts of interest in a IPO (with bookbuilding) procedure can be of different types:¹³³ (i) between the lead underwriter(s) and the listing company (and/or selling shareholders), (ii) between the listing company (and/or the selling shareholders) and investors, (iii) between the (lead) underwriter(s) and investors, (iv) between investors, and in particular between institutional/informed investors. Furthermore, there could be also a conflict of interest between the IPO company and the underwriters, deriving from the simultaneous management of underwriters of two or more IPOs. The provisions of CDR 2017/565 set some behavioural rules for underwriters related to the prevention and management of these conflicts of interests, based on the fact that the involved financial services,¹³⁴ structurally include the intermediation function of the underwriters between the IPO company (and/or selling shareholders) and the investors.¹³⁵ This means that underwriters (and their single consortia/syndicate organizational structure, functionally optimized to deal with the single IPO),¹³⁶ have to manage both vertical conflicts of interest and horizontal conflicts of interest. In particular, the vertical conflicts of interest between the IPO company (and/or selling shareholders)

¹³² A related topic, not covered in the European literature and not problematized here, is the issue of insider trading, because in the European regime a possible informational flow from the lead underwriter(s) to some institutional investors about the state of the order book, could be considered more problematic from a market abuse perspective than in the U.S. system. For anecdotal evidence about this flow, see Van Dijk, Jenkinson and Pham (2024), 120.

¹³³ See e.g. ISCO 2007; Kumpmann and Leyen (2008), 81; Accettella (2013), 133; Meyer and Rath (2025), 347, 8.53.

¹³⁴ I.e. (6) underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis and (7) placing of financial instruments without a firm commitment basis.

¹³⁵ Accettella (2015), 86; IOSCO (2007).

¹³⁶ Which, has mentioned, can be of different types and characteristics.

and the underwriters are also shaped by the characteristics of the types/contents of underwriting/placing contracts. On the other hand, the vertical (between underwriters and investors) and horizontal (between IPO company/and or selling shareholders) and investors (retail and institutional investors) will be shaped also by the type of financial service,¹³⁷ the allocation of shares include in the single investor case.¹³⁸ From this perspective, it is useful to remember that Articles 38 to 40 of CDR 2017/565 refer not only to 16(3) and 23 of MiFID II, but also to Article 24 on general principles and information to clients to ensure investors protection and market integrity (Section II MiFID II), which is the core Article of the clients' best interest MIFID policy.¹³⁹ Indeed, as already pointed out, conflicts of interest are a presidium for the enforcement of conduct rules.¹⁴⁰

Given a potential plurality of conflicts of interest in IPOs, the question becomes whether the generic rules of Article 33 and 34, as integrated by the more specific rules of Article 38 to 40 (and 43) can cover all the potential conflicts of interest. Indeed, while the literal wording of the relevant Articles and Recitals could be interpreted in a restrictive way an interpretation based on the *ratio legis* (protection of the several clients in a strict link with conduct rules) could potentially include all possible cases. Indeed, what is relevant for the purpose of this Article is that even if in the complex relationship among (a) underwriters, (b) listing company (and/or selling shareholders) and (c) (retail and institutional) investors, the potential conflicts of interest between the listing company (and/or selling shareholders) and the investors are not explicitly problematized (apart some minor but important reference), they can nevertheless can be indirectly extracted from the general principles deriving from the regulatory regime. Indeed, the absence of an explicit reference has not to

¹³⁷ I.e. possibly financial advice, portfolio management, reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients, dealing on own account. For instance, in case of financial advice Article 41(1) CDR 2017/565 further provides that the investment firm that receives commissions, fees or any monetary or non-monetary benefits in relation to arranging the issuance has to manage conflicts of interest. According to ESMA to the extent that inducement are included they have to comply with requirements on inducements of Article 24(9) of MiFID II, see ESMA (), 90, 17.

¹³⁸ Indeed, the relationship with the underwriting syndicate under which the investor can buy/subscribe shares can be different.

¹³⁹ Enriques and Gargantini (2017).

¹⁴⁰ Grundmann and Hacker (2017).

surprise, considering that the provisions are constructed primarily based on the relationship between the investment firm and its clients, i.e. the listing company (and/or selling shareholders) and the investors. But the general principles of conflicts of interest (Articles 33 and 34) allow a problematization also of horizontal conflicts of interest, where underwriters must also manage conflicts of interest between the IPO company (and/or selling shareholders) and (retail and institutional) investors.¹⁴¹ In other words, MiFID II and CDR 2017/565 allow us to identify several possible conflicts of interest in the IPO context. This means that it is possible to identify also a possible conflict of interest in IPO pricing and allocation strategy, where retail investors are sacrificed for the interests of the IPO company and/or selling shareholders, while institutional investors are not (Section 5 on the Italian case).

To be sure, as in the secondary market also in the IPO game, institutional investors are the only one able to perform the information game, and retail investors must rely (i.e., must free-ride) on their pricing ability. Both in the U.S. and EU, retail investors are the weakest actor in IPOs, and the legal system has the aim of protecting them and market integrity. There are some differences between the U.S. and EU protection regulatory regime, but both strongly rely on prospectus and market abuse, and to a lesser extent to a conflicts of interest regime.¹⁴² In Europe, the protection through the MiFID II conflicts of interest regime integrates the PR and MAR (both regulation which ensures a high degree of unification apart some aspects) retail investors protection system. This MiFID II conflicts of interest regime is nevertheless complex and the extent to which IPO retail investors are effectively protected depends also on Member States law.

To begin with, while Articles 33 and 34 and 38, 39 and 40 are provided for in a regulation, the relevant MiFID II Articles are provided for in a directive, whose implementation is delegated to Member States not only with respect to conflicts of interest rules but also to conduct rules. This impacts on the quality (regulatory quality) of the financial service through which retail investors effectively participate to the IPO (e.g. portfolio management, financial advice or simple execution of order). Furthermore, also the contract law characteristic of the offer makes a difference. In

¹⁴¹ Which were always present in the legal debate.

¹⁴² For the U.S.

Member States where also retail investors can initially express non-binding orders (as institutional investors in the bookbuilding procedure typically do), to be confirmed or not confirmed when the final price is set, the position of retail investors is stronger in cases of possible over-pricing. On the contrary in Member States (as is the case in Italy, see Section 5), where retail investors express binding orders they are obliged to buy the IPO shares at whatever price inside the (indicative) price range.¹⁴³ Finally, also the complexity of the IPO (different types of) syndicate/consortium of underwriters plays a role in defining the quality of the effective protection system for retail investors.¹⁴⁴ The relevant Articles seem to describe a underwriting firm organised by a group entity, but the complexity of syndicates/consortia can be very high also in relation to a private international law dimension. In Member States where it is possible to organize the IPO syndicate/consortium in such a way to effectively avoid the effectiveness and enforcement of the relevant conflicts of interest rules (based on the single investment firm dealing with several clients), retail investors are less protected.¹⁴⁵

5. The Italian regulatory case and IPO (retail) investor protection

The Italian IPO market has known a relative acceleration starting with the privatization of big former state companies in the 1990 and has been based mainly on the U.S. style IPO bookbuilding procedure.

With respect to the time regulatory regime in the horizon of about 20 years between the Investment Directive of 1995 (ID, and MiFID I of 2007) and MiFID II (which entered into force on January 2018), it is possible to schematize the IPO system in the following terms.¹⁴⁶ In Italian book-built IPOs the shares can come from a capital increase (*offerta pubblica in sottoscrizione*, o.p.s.), from a selling of relevant shareholders (usually the controlling family, *offerta pubblica di vendita*, o.p.v) or a mix of the two. IPOs are usually done according to one global offering (*offerta globale*),

¹⁴³ This topic is outside the scope of this Article, but for a comparison between Italy and Germany, see Lombardo (2009).

¹⁴⁴ For a very recent treatment from a German perspective, see Kindt (2025), discussing the international standardization of underwriting contracts 464 and the issue of applicable law, also from a European perspective, 467.

¹⁴⁵ This is a topic outside the scope of this Article for its complexity.

¹⁴⁶ For a more detailed analysis, see Lombardo (2011); Giudici and Lombardo (2012); Giudici (2014a) and (2014b); more recently, see Vella and Corrente (2020).

coordinated by a global coordinator and divided into two offerings: (a) the Italian public offering (*offerta pubblica*), which is organised according to *Testo Unico della Finanza* (TUF) and based on the Prospectus regulated by the PD or the PR. This offer is organised by an Italian national underwriting consortium (*consorzio di collocamento*) which is structured as a strict underwriting syndicate (*consorzio di garanzia*).¹⁴⁷ The retail offer is an *offerta al pubblico* in contract terms and includes ex ante about 30% of the shares of the *offerta globale*. In this system, retail investors submit *binding* orders for a given fixed quantum of shares (*lotto minimo*, e.g. 1.000 shares) or its multiplex (but limitations on the quantum a retail investor can buy are present)¹⁴⁸ within the price range, with the maximum price being the contractual limit. (Italian and foreign) institutional investors are addressed with the institutional offer (ex-ante about 70% of the offered shares of the *offerta globale*), done according to Regulation S, Rule 144A, on the basis of an offering circular (in English). Institutional investors express *non-binding* orders, i.e. a manifestation of interest to buy according to the normal bookbuilding procedure, provided the price range. The consortium is a strict underwriting syndicate (*assunzione a fermo*) and its contract follows US-UK law.¹⁴⁹

Prospectuses, based on the PD and the PR, dedicate some pages to the determination criteria for the price range and the final price setting. The core of Italian bookbuilding system is that the final price is determined based on the *quantity* and the *quality* of the manifestation of interest in the Regulation S, Rule 144A offering (i.e. non-binding orders) of institutional investors and the *quantity* of the binding orders of retail investors in the *offerta pubblica*. The final price is determined by the lead underwriter(s) together with the listing company and/or the selling shareholders based on the *quantity* of demand expressed by retail investors and the *quality* and *quantity* of demand provided by institutional investors.¹⁵⁰

Italian IPOs, being formally divided into two separate offerings inside the global offer (*offerta globale*) contain the explicit reference in the IPO Prospectus (in the Section price determination and allocation strategy)

¹⁴⁷ On Italian *consorzi di collocamento*, see Vitali (2012); Giudici (2014b).

¹⁴⁸ In case of oversubscription there are non-discriminatory mechanisms of allocation (e.g. also lottery).

¹⁴⁹ The topic is not treated by Italian doctrine. But see Lener (1995).

¹⁵⁰ This is the usual formulation of Italian IPOs prospectuses.

to claw back clauses.¹⁵¹ These clauses allow the lead underwriter(s) to shift ex post (i.e. when the final price has to be determined and in order to fix it) shares from the *offerta pubblica* to the *offerta istituzionale* and *vice versa*. The claw back clauses can be considered as a useful instrument for reaching a more efficient pricing, but in some cases can be used to abuse of retail investors. Indeed, retail investors who are not able to price the offering and are allocated ex ante only 30% of the global offering, express binding orders up to a maximum price (a strike bid in finance terms), which are useless in terms of information revelation theory. As mentioned, the published prospectus refers to the use of retail investors orders for final price setting in terms of only *quantity*, while refers to institutional investors non-binding orders in terms of *quality* and *quantity*, so enhancing their information revelation role. In other words, the contract law dimension of the Italian public offer is such that retail investors express binding orders up to the maximum price, and once the final price has been set, they must buy at such price and cannot refuse the execution of the contract. The mechanism of an Italian *offerta al pubblico* is in this way different from the one of an *invitation ad offerendum*, where the investor first expresses a non-binding order and then, once the final price has been set, can confirm or refuse the finalising of the contract.¹⁵²

In such a contractual system, the abuse of claw back clauses can be potentially found in less underpriced or even (more dramatically) overpriced IPOs, possibly characterized by the fact that the *offerta globale* is mainly or only constituted by a *offerta pubblica di vendita*, where the selling shareholders want to capitalise their investment, realizing the maximum profit at the expenses of some investors. In this case the incentive of the selling shareholders is to be aggressive, i.e. to press the lead underwriter(s) to set a final price (inside the ex-ante determined price range), which is high and is probably going to collapse in the first day of trading (overpricing) leaving retail investors (to whom shares have been ex post shifted through claw back clauses) bearing the loss. Indeed, the usual alignment of interests between institutional investors and retail investors that works in the secondary market, where retail investors free-ride and profit from the pricing activity of institutional/informed investors, is already limited in the bookbuilding procedure with preferential allocation. It can be considered

¹⁵¹ See Boreiko and Lombardo (2011b); Bertoni and Giudici (2014).

¹⁵² They could so by reading specializing press telling that the final price is exaggerated.

efficient in normal underpriced IPOs (where both kind of investors profit), but it can be problematic in bad IPOs, i.e. those IPOs which are overpriced, and shares are ex post shifted to retail investors (who must buy them), precisely because institutional investors prefer to stay away. In this case the alignment of interests between the two types of investors (present but weak in the bookbuilding procedure) basically disappears, leaving retail investor without market protection. The only protection retail investors have, is a proper functioning of the regulatory regime, which starting 2018 is also based on conflicts of interest rules of the MiFID II/CDR 2017/565 regime, which (prophylactically) supplements the MAR regime.¹⁵³

5.1. Market abuse and conflicts of interest management in final price setting between the old and new regulatory regime

From a regulatory perspective the problematic behaviour in price setting of Italian IPOs has been potentially covered under MAD (i.e. starting 2004) and MAR (from 2014), but only recently starting from 2018 under the new MiFID II/CDR 2017/565 on conflicts of interest rules.

Under the European antimanipulation rules the bookbuilding procedure is protected against behaviours that manipulate the price also in its final determination (while, as mentioned, the price range is almost protected by prospectus liability). The collection of non-binding order from institutional investors (in the institutional offering ex Rule 144A, Regulation S) and of binding orders from retail investors (*ex offerta pubblica* within TUF) and the determination of the final offer price and quantity of shares, as well as their allocation among types of investors, are covered by Article 12(1)(a) and (b) MAR.¹⁵⁴

Only recently with MiFID II/CDR 2017/565, the IPO price determination (both the price range and the final price) and allocation strategy among investors is explicitly regulated also as a possible conflict of interest issue at European level. From the perspective of this Article, the questions are basically two. Firstly, the extent to which in the complex relationship among (a) the underwriters, (b) the listing company and (c) the investors (both institutional investors and retail investors), the regulatory regime is able to shape also the possible conflicts of interest between the

¹⁵³ As mentioned, unfortunately, the MAR regime is not automatic in IPOs and depends on national (company) law.

¹⁵⁴ Article 1.2) MAD.

selling shareholders and the retail investors in order to minimize the risk of abuse use of claw back clauses. Secondly, provided a positive answer about the first question, the second question is the extent to which the new regulatory regime has and will be able to arginase and minimize the abuse of claw back clauses in final price setting, supplementing the antimanipulation MAR rules. The answer to this second question can be found only by way of empirical analysis, which requires the time necessary to build a sample of IPOs (new IPOS from 2018) large enough to be compared to the old regime (pre-2018) and for this reason is outside the scope of this Article.

With respect to the first question (whether Articles 38-43 CDR 2017/565 are able to shape the conflicts of interest among selling shareholders and retail investors via the lead-underwriter(s) to minimize the abuse of claw back clauses) the answer is positive. Indeed, the major object of the conflicts of interest of Articles 38-43 is the one between the listing company and the investment firm. The conflict of interest between selling shareholders and retail investors, problematized in this Article as exacerbated by a possible abusive use of claw back clauses, is not directly dealt with in the mentioned Articles. Nevertheless, there are some general provisions that can be indirectly referred also to the conflicts of interest between selling shareholders and retail investors.¹⁵⁵ In terms of pricing, in Article 39(1) the reference is to investment firms that have in place systems, controls and procedures to identify and prevent or manage conflicts of interest that arise in relation to possible under-pricing or over-pricing of an issue or involvement of relevant parties in the process. The terms *involvement of relevant parties* could be read also to include selling shareholders, who press the lead underwriter(s) to increase the final price and abuse of claw back clauses in relation to a result in terms of possible over-pricing. This first provision is supplemented by the placing provisions (also in terms of abuse of claw back clauses) of Article 40(1), Article 40(2), Article 40(4) on allocation policy, and Article 40(5) on allocation policy distinguishing between type of client in connection with Article 41(1) stating that investment firms shall have in place systems, controls and

¹⁵⁵ To be sure, the over-priced IPO because of a not managed conflict of interest between selling shareholders and retail investors, can imply also a direct conflict of interest in pricing between underwriters and retail investors, because (i) underwriters profit in terms of fees from an over-priced IPO and (ii) underwriters can profit from stabilization activity, on which see Boreiko and Lombardo (2011).

procedures to identify and manage the conflicts of interest that arise when providing investment service to an investment client (i.e. also retail investor) to participate in a new issue, where the investment firm receives commissions, fees as in the case of an IPO ... in relation to arranging the issuance. This interpretation, which valorises some textual elements to attribute to the lead underwriter(s) a duty (in terms of management of conflicts of interest) to limit the possible incentive of selling shareholders to abuse of claw back clauses at the expenses of retail investors, is reinforced by the notation that Articles 38 to 43 CDR 2017/565 are not only referred to Article 16 and 23 MiFID II on conflict of interests but covers also Article 24 MiFID II,¹⁵⁶ which is the core Article defining the rules on general principles and information to clients (in Section on provisions to ensure investor protection) (see also Articles) with an explicit reference also to Article 25 MiFID II, on assessment of suitability and appropriateness and reporting to clients (see also Articles 44 CDR 72017/565, in the Chapter operating conditions for investment firms). This means that the special rules on conflicts of interests on pricing and allocation of CDR 2017/565, are linked in an instrumental way to the conduct of business rules of Article 24 and 25 MiFID II, which apply to clients (listing company) but also to institutional investors and retail investors. This reconstruction permits to include the conflict of interest between selling shareholders and retail investors deriving from an abusive use of claw back clauses not only in the conflicts of interest rules but also in the conduct of business rules of MiFID II, so that the lead underwriter(s) can potentially stop “aggressive” IPO selling shareholders.¹⁵⁷

¹⁵⁶ On which see Enriques and Gargantini (2017).

¹⁵⁷ The reconstruction proposed in the text implies that a big national bank (as it is normally the case in Italy) is at the same time co-global coordinator (together with a U.S. investment bank) of the global offering, so that it keeps relationships with both the IPO company/selling shareholders and investors (both institutional and retail). The question becomes, weather a more complex case, where the underwriter fixing the price and the allocation is an U.S. one, dealing only with the institution offering inside Regulation S, Rule 144A but with clear effects on the Italian public offering, would jeopardise the application of MiFID II conflicts of interest rules. Indeed, conflicts of interest rules are provided for and work inside the several relationships an investment firm/bank (also as a group) has with different clients, in this case the selling shareholders and retail investors. To the extent that the underwriting syndicate is organised among different independent investment firms/banks (on Italian *consorzi di collocamento*, see Vitali (2012), the conflicts of interest could be considered to be materially present, but the rules of Articles 33-43 could be more problematic based on the fact that are constructed on a single investment firm/bank. In the

The proposed reconstruction of the regulatory regime as able to deal also with the possible conflict of interest between IPO selling shareholders and retail investors, must be supplemented with the Italian instruments of the enforcement system and its remedies, which is a topic outside the scope of this Article.

6. Conclusion

This Article has provided a picture of the European system of investor protection in a book-built IPO, deriving from the combination of the PR, the MAR and the MiFID II/CDR 2017/565. The Article has showed that while the alignment of interests between institutional/informed investors and retail investor in the secondary market is properly working (ECMH and FOMT), in the IPO context this mechanism is also working but with some elements of diversity. Indeed, it is the nature of the bookbuilding procedure that institutional/informed investors are rewarded in terms of allocations/underpricing in order to reveal to the lead underwriter(s) their proprietary material information about the value of the listing company, and the possibility of retail investors to free-ride on the pricing activity of institutional/informed investors is efficiently limited by their remuneration. The complex of IPO European regulatory regime gives enough flexibility for permitting a proper functioning of the bookbuilding procedure, trying to correct some improper behaviours. With respect to the Italian IPO regime the possible abuse of claw back clauses can be analysed with the new regulatory regime provided by MiFID II/CDR 2017/565 to check whether the rules on conflicts of interest can be applied also to the relationship between underwriters and retail investors, making possible for the underwriters to use the new rules as an instrument of defence for the interests of retail investors.

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case of complex consortia the rules on inducements (Articles 33(e), 40(3), 41(1)) could be used to manage conflicts of interest.

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