Prospectus Liability and the Role of Gatekeepers as Informational Intermediaries: an Empirical Analysis of the Impact of the Statutory Provisions on Italian IPOs

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Abstract

This Article analyzes market reaction to the introduction into Italian legislation of a statutory system of (IPO) prospectus civil liability enacted in April 2007 on the basis of Directive 2003/71/EC. In particular, we study the effects of the new regulation on gatekeepers, such as underwriters and auditors who are commonly qualified as information intermediaries. We analyse the effects on average underpricing, fees charged by the underwriters, syndicate composition and reputation, and auditor participation. Although we find only weak statistical evidence that the level of underpricing has increased after April 2007, there is a statistically significant tendency to have one of the Big Four auditors in post-April 2007 IPOs, with lower participation of international banks in syndication and sharing of prospectus liability. Moreover, after April 2007 we observe an increase in the reputation of the underwriters acting as 'responsabile del collocamento' with lower underwriters' fees charged.

Keywords: Law and finance, IPO, prospectus liability, diligence, securities litigation risk, underpricing, responsabile del collocamento, gatekeepers, informational intermediaries, underwriters, reputation, auditors, lawsuit avoidance hypothesis, underwriting fees

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1. Introduction

Directive 2003/71/EC (hereinafter the Prospectus directive)[2] has introduced into the European Union a consistent system for the publication of a prospectus in case of public offering as well as admission to trading on a regulated market.[3] This regulatory regime covers also the Initial Public Offerings (hereinafter IPOs or IPO) of equity securities instrumental to the listing on a regulated market (Stock Exchange). Indeed, from an operational perspective the IPO is the moment when a company seeks to sell its shares to investors while at the same time representing the moment of admission to trading on a (regulated) market.

Article 6 of the Prospectus directive covers some issues related to prospectus liability. The content of the directive is quite detailed with respect to the prospectus system in its attempt to create a passport regime within an almost unified legislation. However, with respect to prospectus liability the directive limits itself to coordinating the rules based on a minimum level playing field.[4] Indeed, Article 6 sets out some general provisions, delegating the task of more detailed regulation to Member States according to the general and specific rules of their civil liability systems.[5]

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[2] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC**.** This directive and its regulatory system are to be replaced by a Prospectus Regulation, on which see https://ec.europa.eu/info/sites/info/files/mandate.pdf. We do not further refer to the forthcoming regulatory regime as it not relevant for the purposes of this Article.

[3] On the Prospectus directive, see Pierre Schammo, *EU Prospectus Law* (Cambridge, Cambridge University Press, 2011).

[4] See also Malte Wundenberg, 'Perspektiven der privaten Durchsetzung im europäischen Kapitalmarktrecht', 44 *Zeitschrift für das Unternhemens- und Gesellschaftsrecht* (2015) pp. 124-160, at p. 139. On the different levels of harmonization by way of directives in the securities regulation field, see Carsten Gerner-Beuerle, 'United in Diversity. Maximum vs. Minimum Harmonisation in EU securities regulation', 7 *Capital Markets Law Journal* (2012) pp. 317-342.

[5] For discussion of a case decided by the Dutch Supreme Court within the framework of the new Prospectus directive, with respect to the legal problem of causation, see the comparative

In Italy, the legislation implementing the Prospectus directive and in particular the prospectus civil liability regime entered into force on April 24, 2007. For the first time, the regime of prospectus liability was regulated by statutory law after two decades of doctrinarian debate and some judicial cases.

The implementation of the statutory regime of prospectus liability offers the opportunity to study empirically its impact on Italian IPOs. More in particular, the present Article attempts to measure the impact of the statutory regime on Italian IPOs across some relevant variables, being placed therefore in the field of empirical legal studies[6] and more particularly in the law and finance literature.[7] Indeed, according to the typical classification of this literature, Italy as a civil law jurisdiction does not display a comparatively high level of investor protection and thus has less developed capital markets. With this in mind, the

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analysis of Bas J. de Jong, 'Liability for Misrepresentation – European Lessons on Causation from the Netherlands', 8 *European Company and Financial Law Review* (2011) pp. 352-375.

[6] Even if this field of research is comparatively less developed in Europe than in the United States, the necessity to catch up and to measure the effects of law to have a better picture of its practical working has been recently advocated by Gerald Spindler and Simon Gerdemann, 'Rechtstatasachenforschung. Grundlagen, Entwicklung und Potentiale', 61 *Die Aktiengesellschaft* (2016) pp. 698-703. See also Hanyo Hamann, *Evidenzbasierte Jurisprudenz* (Tübingen, Mohr Siebeck, 2014) at pp. 40. Two contributions that analyze the impact of a change in legislation for jurisdictions outside the US are for instance, Ian M. Ramsay and Baljit K Sidhu, 'Underpricing of Initial Public Offerings and Due Diligence Costs: An Empirical Investigation, 13 *Company and Securities Law Journal* (1995) pp. 186-201 and John Armour, Audrey Hsu and Adrian Walters, 'Corporate Insolvency in the United Kingdom: The impact of the Enterprise Act 2002', 5 *European Company and Financial Law Review* (2008) pp. 148-171.

[7] See the seminal Articles by Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert V. Vishny, 'Legal Determinants of External Finance', 52 *Journal of Finance* (1997) pp. 1131-1150 and Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert V. Vishny, 'Law and Finance', 106 *Journal of Political Economy* (1998) pp. 1113-1155; See also Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins', 46 *Journal of Economic Literature* (2008) pp. 285-332 and Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What works in securities Law?' 61 *Journal of Finance* (2006) pp. 1-33. For a more recent discussion on the "leximetric" approach, see Dionysia Katelouzou nad Mathias Siems, 'Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990-2013' 15 *Journal of Corporate Law Studies* (2015) pp. 127-160.

implementation of the statutory regime of prospectus liability could be considered as an instrument designed by the Italian legislator for better investor protection in terms of ameliorated enforcement of law.[8] Indeed as it has been argued "the law can specify the liability standards facing issuers and intermediaries when investors seek to recover damages from companies that follow affirmative disclosure rules but fail to reveal potentially material information. The law can thereby reduce the uncertainties and the costs of private litigation, in turn benefiting markets".[9]

It has to be mentioned that with respect to the regulatory regime as a whole, legal doctrine has doubted that the implementation of statutory law has changed the substance of the regulatory regime.[10] According to this argument, the reconstruction of the issue of prospectus liability and its possible solutions by legal doctrine on the basis of general principles and general clauses of the Italian legal system had already provided a (consistent) system of implicit regulation. This implicit regulation system has not been altered in a substantial way by the introduction of statutory law. Indeed, evidence suggests that there has been no increase in prospectus liability-related litigation following the introduction of

[8] See Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What works in securities Law?' *supra* nt. 7, at p. 2 for literature on the point. The Italian statutory regime can so be considered as an attempt to clearly define the responsibilities for those involved in the prospectus elaboration, as pointed out by these authors for the case of the Netherlands (at p. 4). We do not discuss here the merits of the law and finance literature, but point out that enforcement of law is essential in securities regulation and that an *ex ante* better designed system of liability helps *ex post* in enforcing law; on enforcement in securities regulation see John C. Coffee Jr., 'Law and the Market: The Impact of Enforcement', 156 *University of Pennsylvania Law Review* (2007) pp. 230-311.

[9] We intentionally exclude from the analysis of this Article the criminal dimension of prospectus liability, considering this dimension as constant. Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What works in securities Law?' *supra* nt. 7, at p. 9, develop and index criminal sanctions for the distributor and the accountant. According to their results, Italy gets a value of 0.50 (for comparison: France 0.33, UK 0.42, Germany 0.50, Spain 0.50 and USA 0.50). In Italy the crime of *falso in prospetto* has been a constant in recent decades and the provision is now contained in Article 173*bis* TUF (on which, see Giacomo Lunghini, *Art. 173*-bis *Falso in prospetto*, in Marco Fratini and Giorgio Gasparri, *Il Testo Unico della Finanza*, Tomo II, (Utet, Torino, 2012), 2292-2302).

[10] Sabrina Bruno, 'La (nuova?) responsabilità da prospetto verso il pubblico', 61 *Banca borsa titoli di credito* (2008) pp. I/785-I/797.

statutory law. In other words, before and after the statutory regime, litigation remains a relatively rare phenomenon in Italy, which either confirms the hypothesis of substantial invariance of the regulatory system (neutrality of statutory law argument)[11] or suggests that the system works properly, or on the contrary that private enforcement in this area does not work properly and therefore changes in law in books do not really alter law in action.[12]

Following the argument of the neutrality of statutory law, it could also be argued that the introduction of statutory law has not modified the IPO regime with respect to some relevant variables closely related to the liability regime. Since this is empirically measurable, we here analyse the impact of the statutory law IPO civil liability regime on four variables related to the role of underwriters and auditors as informational intermediaries who lend their reputation to the issuing company.[13]

These variables can be considered as potentially subject to alteration after the introduction of the new statutory regime because of their direct impact on the civil liability of the intermediaries involved. The first variable relates to the willingness of underwriters to participate in the new offerings as *responsabile del collocamento*.[14] The second variable focuses on the willingness of international banks to act as *responsabile del collocamento.* The third variable relates to the involvement of major auditing firms in the IPO process. The fourth variable concerns the level of IPO underpricing. Finally, the fifth variable analyses the level of gross fees charged by underwriters.

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[11] Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What works in securities Law?' *supra nt.* 7, at p. 15-16 assign Italy 0.22 with respect to the liability standard (for comparison: France 0.22, UK 0.66, Germany 0.00, Spain 0.66 and USA 1.00).

[12] See Guido Ferrarini and Paolo Giudici, 'Financial Scandals and the Role of Private Enforcement: The Parmalat Case', ECGI working paper, available at ssrn.com.

[13] We acknowledge that the results of a recent paper have questioned the role of underwriters as reputational intermediaries (certification role) for Italian IPOs (in comparison to the US case), see Francesca Scribano, 'The Impact of Third-Party Certification on Italian Initial Public Offerings' (2015) working paper available at ssrn.com. We refer to this paper for an overview of several articles on the empirical results of the certification role for some jurisdictions and, in particular, for underwriters and auditors. In general, it seems that for the US the certification role is confirmed.

[14] We define the notion in Section 3.2.

As mentioned, the first three variables relate to the quality (in terms of reputation) of underwriters (and auditing firms) to serve as gatekeepers and to lend reputation to the listing company for certificatory purposes. Indeed, reputation can be considered as a proxy for the level of activity and the level of care the underwriter is going to invest, which are significant variables in a tort law regime to evaluate for liability purposes the behaviour of the parties involved. The fourth variable relates to the US debate about the correlation between civil liability and underpricing (so-called *lawsuit avoidance theory*), while the fifth variable implies the possibility of underwriters' increasing their fees as a premium against the higher risk of possible civil liability actions.

The Article is organised as follows. Section 2 for the sake of comparison provides a brief description of the system of prospectus liability in the US, introducing also the theory of the role of underwriters as gatekeepers who lend reputation serving as informational intermediaries. Section 3 analyses the (European and) Italian prospectus regime and offers some notions of law and economics to introduce the chosen variables. Section 4 identifies the empirical research agenda presenting the major hypotheses and their implications. Section 5 provides the empirical analysis and tests the hypotheses. Section 6 interprets the empirical results on the basis of the analysed theory while Section 7 briefly concludes.

2. The prospectus liability regime in the US

Before analysing the (European and) Italian legal regime, for comparative purposes it is useful to start with a short focus on the legal context of IPOs in the US in order to analyse this regulatory regime and the debate about the role of underwriters as gatekeepers who lend their reputation for certificatory purposes (informational intermediaries).[15]

In the US system, underwriters manage the IPO procedure by forming firm commitment agreement syndicates that buy the shares from the issuing company or the selling shareholders and later sell these shares to investors.[16] In such a way, underwriters

[15] For a very recent treatment of the legal and economic framework for the rationale justifying the system of disclosure in cases of IPOs and the related forms of liability, see Merrit B. Fox, 'Regulating Public Offerings of Truly New Securities: First Principles, 66 *Duke Law Journal* (2016) pp. 673-727.

[16] On the role of underwriters, see Ronald J. Gilson and Reinier H. Kraakman, 'The Mechanisms of Market Efficiency', 70 *Virginia Law Review* (1984) pp. 549- 644, at p. 613.

serve as intermediaries between the issuer and investors. They are said to perform a gatekeeper role,[17] particularly by supporting the IPO with their reputation that serves a certification role for the market.[18] To assist this certification role, underwriters' liability becomes the focal point for enforcing the efficient raising of capital in a securities market shaped by mandatory disclosure.[19] Indeed, the system of IPO prospectus liability in the US is structured in particular on Section 11 Securities Act.[20] In brief, this Section provides for a liability system structured on three levels. The first level is a rule of strict liability for the issuing company. Others (underwriters and other parties) may be either subject to a due diligence defence (second level) or to a reliance defence if somebody else certified the provided information (third level).[21]

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[17] See Reinier H. Kraakman, 'Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy', 2 *Journal of Law, Economics and Organization* (1986) pp. 53-104.

[18] Gilson and Kraakman, *supra* nt. 16, at p. 620: "In essence, the investment banker rents the issuer its reputation". Apparently, the first Article in financial economics to formalize the certification role of underwriters was by James R. Booth and Richard L. Smith, 'Capital Raising, Underwriting and the Certification Hypothesis', 15 *Journal of Financial Economics* (1986) pp. 261-281. On the several levels of reputation of underwriters, see Stephen P. Ferres, Janine S. Hiller, Glenn A. Wolfe and Elisabeth S. Cooperman, 'An Analysis and Recommendation for Prestigious Underwriter Participation in IPOs', 17 *Journal of Corporation Law* (1992) pp. 581-603. For an overview of the empirical results about the certification role and reputation, see Scribano, *supra* nt. 13, *passim*.

[19] See Kraakman, *supra* nt. 17, *passim*; Fox, *supra* nt. 15, at p. 690.

[20] We do not consider here Section 12(a) Securities Act and Section 10(b) and Rule 10(b)-5 Securities Exchange Act. For an introduction see, Carsten Gerner-Beuerle, 'Underwriters, Auditors, and other Usual Suspects: Elements of Third Party Enforcement in US and European Securities Law', *European Company and Financial Law Review* (2009) pp. 476-515; more extensively, see Carsten Gerner-Beuerle, 'The Market for Securities and its Regulation Through Gatekeepers', 24 *Temple International & Comparative Law Journal* (2009) pp. 317-377; on Section 11 see also James D. Cox, Robert W. Hilmann and Donald C. Langewort, *Securities Regulation. Cases and Materials* (New York, Wolters Kluwer 2013, 7th ed.), at pp. 485; Marco Ventoruzzo, *La Responsabilità da prospetto negli Stati Uniti d'America tra regole di mercato e mercato delle regole* (Milano, Egea, 2003), at pp. 115.

[21] See Gerner-Beuerle, 'The Market' *supra* nt. 20, at p. 334; Paolo Giudici, *La responsabilità civile nel diritto dei mercati finanziari* (Milano, Giuffrè, 2008), at p. 218.

Underwriters' (IPO) prospectus liability in the USA has been object of intense debate about its current level of efficiency. In essence,[22] while some authors defend the current regime,[23] others doubt the efficiency of the current system of due diligence defences for underwriters' liability,[24] or propose a system of modified strict liability.[25] In the traditional context of asymmetric information, more recent literature has defended the regime of due diligence liability for underwriters on the assumption that the due diligence standard solves not (only) a problem of adverse selection between the issuing company's managers and the investors, but (also) a problem of moral hazard. The (lead) underwriter is hired in order to reduce this asymmetric information problem by lending his reputation. A due diligence liability rule is the best mechanism to align the different incentives thereby optimising the underwriter's control of the company.[26]

Apart from the qualification of the asymmetric information problem between an adverse selection or a moral hazard problem, as mentioned, the entire literature basically qualifies the role of the parties involved in the IPO as one of gatekeepers, lending reputation to the issuing company in order to reduce the asymmetric information problem between the issuing company and the investors. Their role becomes one of informational intermediaries. However, the involvement of gatekeepers and their reputation creates a second asymmetric information problem between gatekeepers and investors. Indeed, gatekeepers have to grant an efficient level of effort in ensuring proper diligence to investors, who are partially unable to evaluate this effort.

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[22] For an exhaustive overview of this debate over the last three decades, see Noam Sher 'Underwriters' Civil Liability for IPOs: An Economic Analysis', 27 *University of Pennsylvania Journal of International Economic Law* (2006) pp. 389-464, at p. 405; see also Noam Sher, 'Negligence Versus Strict Liability: The Case of Underwriters Liability in IPOs', 4 *DePaul Business and Commercial Law Journal* (2006) pp. 451-496, at p. 456.

[23] See e.g. Merrit B. Fox, 'Shelf Registration, Integrated Disclosure, and Underwriter Due Diligence: An Economic Analysis', 70 *Virginia Law Review* (1984) pp. 1005-1034, at p. 1025.

[24] See Stephen Choi, 'Market Lessons for Gatekeepers', 92 *Northwestern University Law Review* (1998) pp. 916-966

[25] See Frank Partony, 'Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime', 79 *Washington University Law Quarterly* (2001) pp. 491-547.

[26] See Sher*,* 'Negligence*' supra* nt*.* 22, at p. 467.

The attempt by the US literature to qualify the due diligence rule in terms of an efficient mechanism of aligning underwriters' and investors' incentives so as to reduce the asymmetric information problem related to the quality of the reputation they lend to the issuing companies, with the aim of creating an efficient liability system, is not discussed further in this Article.[27] This interpretation of the due diligence rule does however provide a theory that is capable of being tested in the Italian context with respect to some variables related to underwriters' reputation in IPOs under the old liability system and the statutory liability system.

3. The (European and) Italian prospectus liability regime

The Italian regime of prospectus liability in public offerings of securities was structured into statutory law only with legislative decree n. 51 of 28 March 2007, implementing the Prospectus directive with a modification of Article 94 TUF (*Testo Unico della Finanza*, legislative decree n. 58 of 24 February 1998), which entered into force on 24 April 2007.[28]

Since an IPO combines both the offering of securities to the public and the listing on a (regulated) market, Article 113 TUF provides the link between the listing of equity securities on a regulated market and the necessity to write a prospectus for the offering according to the relevant rules, i.e. also according to Article 94 TUF.

It is useful to describe the regulatory system on prospectus liability before and after the implementation of the Prospectus directive.[29]

3.1. The regulatory regime before statutory law

Before statutory law was introduced in April 2007, a system of prospectus liability in public offerings (also in IPOs) was deduced by legal doctrine and jurisprudence from the general clauses and general principles of the legal system on the basis of several Articles of

[27] A comparative empirical analysis is provided by Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What works in securities Law?' *supra* nt. 7, with respect to the liability standard specified at p. 7.

[28] The legislative decree was published on the *Gazzetta Ufficiale* n. 94 on 23 April 2007.

[29] This liability system includes several processes such as IPOs, secondary offerings, takeover bids, i.e. the cases where a prospectus is required.

the Italian Civil Code. It has to be stressed that the Italian legal debate was conducted taking into consideration foreign experiences (particularly the US and Germany).[30] It is possible to summarise some of the several approaches and solutions to the problem of underwriters' civil liability, which can be analysed, albeit with some differences, either in terms of contract law or in terms of tort law.[31]

Some authors justified prospectus liability for underwriters on the basis of an analogical application of Article 2339.1.3. of the Italian Civil Code that provides for liability of the promoters of a public company for the truthfulness of their communications to the public. Other authors used Article 1337 of the Italian Civil Code, which sets a general clause of good faith in pre-contractual situations, also extending it to underwriters. Both solutions referred to the realm of contract law, meaning in short, liability in *culpa in contrahendo* as a form of contractual liability.[32] On the contrary, other legal scholars viewed underwriters'

[30] The first Article that systematically deals with the issue of prospectus liability (of underwriters) in Italy, is (most probably) by Giuseppe B. Portale, 'Informazione societaria e responsabilità degli intermediari', 35 *Banca borsa titoli di credito* (1982) pp. I/3-I/31. For the first monograph on prospectus liability, see Guido Ferrarini, *La responsabilità da prospetto* (Milano, Giuffre, 1986). For underwriters' liability, see also, Guido Ferrarini, 'La Responsabilità da prospetto delle banche', 40 *Banca borsa titoli di credito* (1987) pp. I/437-I/483.

[31] For a complete overview of the literature on several approches and jurisprudence, see Andrea Perrone, *Informazione al mercato e tutele dell'investitore* (Milano, Giuffrè, 2003), pp. 65; Eugenia Macchiavello, 'La responsabilità da prospetto degli intermediari finanziari tra passato, presente e futuro', 25 *Contratto e impresa* (2009) pp. 911-942; Eugenia Macchiavello, *La responsabilità da prospetto degli intermediari finanziari*, in Giovanna Visentini, *Trattato della responsabilità Contrattuale. II, I singoli contratti*, (Padova, Cedam, 2009), pp. 793- 830; Giudici, 'La responsabilità' *supra* nt. 21, at pp. 221; Giovanni Facci, *Il danno da informazione finanziaria inesatta* (Bologna, Zanichelli, 2009) pp. 115-178; Alberto Anelli, 'La responsabilità da prospetto fra novità legislative e sentenze della Suprema Corte', 30 *Le Società* (2010) pp. 414-430; Paolo Giudici, *L'appello al pubblico risparmio e i contratti: IPO; contratto di collocamento; prospetto*, in Alberto M. Benedetti and Vincenzo Roppo, *Trattato dei contratti, V Mercati regolati* (Milano, Giuffrè, 2014) pp. 965-989, at p. 984; Pietro Fioruzzi, Eugenio S. De Nardis and Nicole B. Puppieni, *Art. 94 Prospetto d'offerta*, in Marco Fratini and Giorgio Gasparri, *Il Testo Unico della Finanza*, Tomo II, (Torino, Utet, 2012), 1057-1087.

[32] This is the case for the solutions proposed after the analyses by Portale, *supra* nt. 30 and Ferrarini, *supra* nt. 30.

liability in terms of tort law under the general principles set by Article 2043 of the Italian Civil Code.[33]

The system of contractual liability or tort liability was also the point of reference for the few past decisions on the issue.[34] A more recent judgment of Tribunale di Milano referred to the case of the IPO of *Freedomland* in 2000 and in reaching its decision viewed prospectus liability for underwriters, sponsor and auditors in terms of contractual liability.[35]

This contractual perspective has recently been strongly rejected by the Italian Supreme Court (*Corte di Cassazione*), which considers prospectus liability in public offerings (including IPOs) as something belonging to the realm of tort liability.[36] This judicial qualification is important to properly understand the statutory regime introduced after the implementation of the Prospectus directive. Indeed, the conceptualisation in terms of tort law instead of contractual law is not without consequences as it has several implications in

[33] See e.g. Pier Giusto Jaeger, 'Appunti sulla responsabilità da prospetto', *Quadrimestre* (1986) pp. 283-288.

[34] See e.g. Tribunale Milano, 11 gennaio, 1988, in *Giurisprudenza commerciale*, 1988, with a note by Ferrarini, 'Investment banking, prospetti falsi e culpa in contrahendo', 1988, pp. II/585 and Appello, Milano, 2 febbraio 1990, in *Giurisprudenza commerciale*, 1990, pp. II/795. For other cases see Anelli, *supra* nt. 31, at p. 421.

[35] Tribunale di Milano, 25 luglio 2008, in www.*ilcaso.it*.

[36] It is a form of liability with extra-contractual nature for all the involved parties, see Cassazione civile, 11 giugno 2010, n. 14056 available in *Rivista del Diritto Societario* 2014 pp. 213-216 with a note by Simone Chicchinelli, 'La fattispecie della responsabilità da prospetto informativo. Problemi e prospettive' pp. 2016-229; Anelli, *supra* nt. 31; Giorgio Afferni, 'Responsabilità da prospetto: natura, danno risarcibile e nesso di causalità', *Danno e responsabilità* (2011) pp. 625-632; Marco Rizzuti, 'Responsabilità da prospetti e *culpa in contraendo*', *Giurisprudenza italiana* (2011) pp. 289-291; Alessandra Zanardo, 'La Suprema Corte si pronuncia sulla responsabilità "da prospetto"', *La Responsabilità civile* (2012) pp. 804-810. This case relates to the prospectus of a secondary offering (capital increase) of an Italian bank in 1991 where the plaintiff asks for recovery for misleading information.

The inclusion of prospectus liability in the realm of tort law has been confirmed in an *obiter dictum* by Cassazione civile SU, 8 aprile 2011, n. 8034, in 64 *Banca borsa titoli di credito* (2011) pp. 698-706 with a note by Anna Gardella, 'La frode Madoff non sfugge alla giurisdizione italiana: responsabilità transfrontaliera prospetto e responsabilità della prima', 64 *Banca borsa titoli di credito* (2011) pp. 706-719.

particular with respect to the issues of burden of proof, action timing and recovery of damages.

3.2. The regulatory regime after statutory law: preliminary remarks

The Prospectus directive merges the rules to be applied to public offerings with those of admission to trading on a regulated market. Together with the Prospectus regulation (Commission Regulation EC 809/2004)[37], which contains detailed rules about the structure and content of the prospectus, the Prospectus directive provides a system of information to be disclosed also in the case of IPOs. The aim of this directive is to set a standard able to grant investor protection and market efficiency (recital 10).

Article 6 of the Prospectus directive sets some minimal requirements for prospectus liability. According to the directive, responsibility for the information provided in the prospectus attaches to at least one of the parties who do not necessarily respond jointly. Indeed, responsibility "attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be".

The directive furthermore requires the prospectus to clearly state the information needed to identify the persons potentially liable. Indeed, the "persons responsible shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices". Those who are indicated as responsible persons in the prospectus have to declare that "to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import". To be more precise, Regulation EC 809/2004 in Annex 1 already provides some indications of the persons responsible for the prospectus (registration document) but this provision, though directly applicable in all Member States because of its source, does not really provide a legal rule for liability, which is instead set according to the national law of the Member States.[38]

[37] Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements**.**

[38] The Regulation which was applicable starting the 1. July 2005 states:

Given this very general framework provided by the Prospectus directive, Member States are free to set their rules on prospectus liability according to their general principles and rules of liability (Article 6.2).[39] These include not only material rules on civil liability but also procedural rules. Given a potential divergence, the European regulatory strategy has been to set a minimum standard to be integrated by national rules. The extent to which this system provides a homogenous and sufficient standard of protection Europe-wide is, of course, outside the scope of this Article.[40]

After the implementation of the Prospectus directive, the Italian regime on prospectus liability is statutorily set in Article 94.8 and 94.9 of TUF. While the first refers to the various parties involved in the IPO procedure, the second refers in particular to the so-called *responsabile del collocamento*.[41]

"All persons responsible for the information given in the Registration Document and, as the case may be, for certain parts of it, with, in the latter case, an indication of such parts. In the case of natural persons including members of the issuer's administrative, management or supervisory bodies indicate the name and function of the person; in case of legal persons indicate the name and registered office".

"A declaration by those responsible for the registration document that, having taken all reasonable care to ensure that such is the case, the information contained in the registration document is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import. As the case may be, a declaration by those responsible for certain parts of the registration document that, having taken all reasonable care to ensure that such is the case, the information contained in the part of the registration document for which they are responsible is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import".

[39] For a conceptualization of prospectus liability and enforcement, see Wundenberg, *supra* nt. 4, *passim*.

[40] For comparative purposes, see an earlier book by Klaus J. Hopt and Hans-Christoph Voigt (hrsg.), *Prospekt-und Kapitalmarktinformationshaftung*, (Tübingen, Mohr Siebeck, 2005); more recently see also the Report by ESMA, ESMA, *Report. Comparison of liability regimes in Member States in relation to Prospectus Directive*, 30 May 2013, 2013/619.

[41] We prefer to leave the Italian name in the text and to attempt a translation in English in terms of the *party responsible for the distribution of the shares and which organizes the consortium of banks.* This translation puts emphasis of what this party (usually a bank) does.

Article 94.8 TUF includes the issuing company, the offeror and the possible guarantor as well as the persons responsible for the information of the prospectus (e.g. lawyers or auditors).[42] For the issuing company and the other parties, Article 94.8 TUF specifies the liability, limited to the parts of the prospectus they are competent for, for the losses incurred by the investor whose investment decision was made in the belief (reasonable confidence) that the information included in the prospectus was truthful and complete. The Article provides a due diligence rule (i.e. a form of liability for negligence) where the mentioned parties can demonstrate to have used proper diligence (*ogni diligenza*) to ensure that information was factually correct and did not present omissions to alter its sense.[43]

Article 94.9 TUF focuses only on the *responsabile del collocamento*. This party was originally defined in Consob Regulation 11971 of 14 May 1999 (Article 3) as "the subject who organises and sets up the shares placing consortium, the coordinator of the shares placing or the single shares placer".[44] The rules of Consob Regulation 11971 required the *responsabile del collocamento* to follow some obligations related to the offering though these were not completely clear (also because of their administrative nature) as to the possible liability of the *responsabile del collocamento*.[45] With the implementation of the Prospectus directive, this definition of *responsabile del collocamento* previously included in Consob Regulation 11971 has been introduced into TUF (Article 93-*bis*) and the *responsabile del collocamento* has been made responsible for prospectus liability, with statutory law going beyond the administrative provision. More in particular, the *responsabile del collocamento* is responsible for any false information or omissions able to influence investor decisions and is subject to

[42] Although auditors are not mentioned in Article 94.8 TUF, their liability in the IPO Italian context has been argued by Giudici, 'La responsabilità' *supra* nt. 21, at p. 375. This solution is not fully agreed on in the Italian doctrine, see Anelli, *supra* nt. 31, at p. 417. In general on auditors, see Paolo Giudici, 'Auditors' Multi-Layered Liability Regime', 13 *European Business Organization Law Review* (2012) pp. 501-555.

[43] See Bruno, *supra* nt. 10, at p. I/791; Giudici, 'La responsabilità' *supra* nt. 21, at p. 229; Facci, *supra* nt. 31, at p. 141.

[44] In Italian: *Il soggetto che organizza e costituisce il consorzio di collocamento, il coordinatore del collocamento o il collocatore unico*.

[45] See Carlo Comporti, 'La sollecitazione all'investimento', in Antonio Patroni Griffi, Michele Sandulli and Vittorio Santoro, *Intermediari finanziari mercati e società quotate* (Torino, Giappichelli, 1999) pp. 531-599, at p. 586; for a complete analysis of the issue, see Perrone, *supra* nt. 31, at pp. 70.

the same due diligence rule provided for in Article 94.8 TUF for the other parties. However, this liability is general and not limited to the parts of the prospectus prepared by the *responsabile del collocamento*. In this way, Article 94.9 TUF extends and concentrates prospectus liability also on the *responsabile del collocamento,* who becomes crucial for guaranteeing that the prospectus provides full and correct information.[46]

3.3. The interpretation of the prospectus liability regime in Italy

Even though legal doctrine still does not probably completely agree on the dogmatic interpretation of prospectus liability with reference to specific points, and the case law is not sufficiently developed to create a coherent system,[47] the recent jurisprudence of the Italian *Corte di Cassazione* helps to establish the general framework under which prospectus liability works for the limited purposes of this Article.[48] We simply take this dogmatic interpretation as the "true" one for our purposes.[49]

As mentioned, the Italian *Corte di Cassazione* decided the dogmatic re-construction of prospectus liability in terms of tort law. The argumentation is that the prospectus rules are aimed at protecting parties that are not determined *ex ante* (i.e. *ad incertam personam*), being therefore applicable the general principle of *neminem laedere* commonly referable to

[46] See Giudici, 'La responsabilità' *supra* nt. 21, at p. 387, also for the notation that the Italian legislator extended liability also to this actor not explicitly included in Article 6 of the prospectus directive. See also Facci, *supra* nt. 31, at pp. 142.

[47] We refer also to Article 98*ter*.3 TUF, which considers prospectus liability in collective investment undertakings as a form of pre-contractual liability. Given that pre-contractual liability can belong both to the realm of contract law and to the realm of tort law the issue about the nature of IPO liability is not simple.

[48] Indeed, it has to be stressed that the case law of the Italian *Corte di Cassazione* by *Sezioni Unite* has a "true interpretation" of the law function (*funzione nomofilattica*) and represents the point of reference for the dogmatic reconstruction aimed at the certainty of law. Even though the decision by the *Sezioni Unite* 8034/2011 (*supra* nt. 36) was not explicitly directed to resolving the problem about the nature of liability, the *obiter dictum* referring to *Cassazione* 14056/2010 serves as a point of reference for this Article. On the so-called *funzione nomofilattica*, see Arianna Alpini, 'La funzione "nomofilattica" della Corte di Cassazione', *Il Giusto processo civile* (2016) pp. 219-253.

[49] So being agnostic on the nature of the liability (contractual vs tort) and leaving the discussion open, we assume for the purposes of this paper the attitude of *Roma locuta causa finita*.

tort law.[50] This is actually true for all the involved parties that use the prospectus for the purposes of the offering and not only for those who were involved in its writing.[51]

On the basis of this case law, the regime of prospectus liability for public offerings and also for IPOs can be summarised as follows, also taking into consideration the variables proposed by the law and finance literature.[52]

The liability regime is set in terms of tort law[53] and in particular in terms of negligence for the issuing company as well as all parties involved even if only with respect to

[50] "Ove, quindi, vi sia stata violazione delle regole destinate a disciplinare il prospetto informativo che correda l'offerta, trattandosi di regole volte a tutelare un insieme ancora indeterminate di soggetti per consentire a ciascuno di essi la corretta percezione dei dati occorrenti al compimento di scelte consapevoli, si configure un'ipotesi di violazione del dovere di neminem laedere e, per ciò stesso, la possibilità che colui al quale tale violazione è imputabile sia chiamato a rispondere del danno da altri subito a cagione della violazione medesima secondo i principi della responsabilità aquliana" Cassazione 14056/2010, *supra* nt. 36.

[51] Cassazione SU 8034/2011, *supra* nt. 36.

[52] The taxonomy about liability standard proposed by Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What works in securities Law?' *supra* nt. 7, at p. 7, for Italy formally refers to the liability system before statutory law was introduced in 2007 and gives to Italy 0.22 (at p. 16). Their variable refers to a liability standard index that equals the arithmetic mean of (i) a liability standard for the issuer and its directors; (ii) a liability standard for distributors (i.e. in general underwriters); (iii) a liability standard for accountants. Each of these three factors is composed by an index of the procedural difficulty for investors in recovering losses against the four possible defendants, where point 1 is the most favorable situation for investors and point 0 the most negative. Indeed, for the three factors the liability standard equals: (i) 1 when investors have only to prove that the prospectus was misleading; (ii) 2/3 when investors have also to prove that they relied on the prospectus and/or that their loss was caused by the misleading prospectus; (iii) 1/3 when investors have also to proof negligence; (iv) 0 when restitution is unavailable or the liability standard is intentional fault (*dolo*) or gross negligence (*colpa grave*). These relate to the problem of causation, the problem of reliance and the problem of burden of proof and the Italian statutory provisions of 2007 includes these aspects.

[53] We use the term *tort law* as synonymous of *accident law* meaning the body of law which regulates *unintentional* harm between parties (injurers and victims); on these notions from a law and economics perspective, see Steven Shavell, *Economic Analysis of Accident Law* (Harvard, Harvard

the parts of the prospectus of their competence.[54] The *responsabile del collocamento* responds also for negligence but without limitation to the parts of his competence, jointly and severally with the other party (parties).[55] The standard of negligence is set in the following terms: those who are responsible respond for misrepresentation (in terms of misstatement or omission) if they cannot show that their behaviour was diligent enough to eliminate their liability.[56] The causal connection, i.e. the causation between misrepresentation and liability, is the investors' reasonable reliance on the correctness of the prospectus, which is presumed.[57] This element relates also to the burden of proof: the new system should improve the legal situation of investors as they do not have to provide any evidence whilst the defendant has to show the proper level of diligence, so reversing the usual rule of tort law that allocates the burden of proof of the tort (and on the level of care) on the plaintiff.[58] After the introduction of the statutory regime, the system appears more

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University Press, 2007), 1; Robert Cooter and Thomas Ulen, *Law and Economics* (Amsterdam, Addison Wesley Longman, 2000), 289.

[54] We do not take into consideration the possible liability of the directors of the company as done by Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What works in securities Law?' *supra* nt. 7, at p. 7, who includes not only the issuing company but also its directors. The possible liability of directors is a complex issue (also related to the possible distinction between primary and secondary markets), on which see Giudici, 'La responsabilità' *supra* nt. 21, at p. 233 and pp. 342; Carlo Angelici, 'Su mercato finanziario, amministratori e responsabilità', 108 *Rivista del diritto commerciale* (2010) pp. 1-65.

[55] The principle of recovery for victims among injurers in terms of their joint and several liability is a general rule under Italian civil law, see Violante, *La responsabilità parziaria* (Napoli, ESI 2004).

[56] Article 94.8 reports "ogni diligenza" and the interpretation of this notion has been treated by Italian authors on the basis of the US experience (due diligence vs strict liability) with different results in terms of strict liability (*responsabilità oggettiva*) and diligence (*responsabilità per colpa*), see Bruno, *supr*a nt. 10, at. p. I/791; Giudici, 'La responsabilità' *supra* nt. 21, at pp. 231; Facci, *supra* nt. 31, at p. 131. Before statutory law was introduced, an author qualified liability in terms of strict liability, see Perrone, *supra* nt. 31, *passim*.

[57] See Bruno, *supra* nt. 10, at p. I/794; Giudici, 'La responsabilità' *supra* nt. 21, at pp. 236; Facci, *supra* nt. 31, at p. 152.

[58] See Article 2697 Italian Civil Code and Article 1218 Italian Civil Code.

favourable (at least in terms of clarity) for investors in relation to burden of proof and causal connection, which can be seen as an improvement of the liability regime.

The period of recovery for investors is set up to five years (Article 94.11 TUF), which is the common time period in Italy for tort cases.[59]

Recent literature has pointed out the importance of private enforcement as an alternative or complementary way to enforce the law. As this enforcement consists in a multitude of private claims that cannot be spontaneously organized, a procedural mechanism, regulated by law, of aggregating private interests is required.[60] With respect to the possibility of using class actions as a procedural instrument of enforcement and recovery, it has to be mentioned that their permissibility under Article 140-bis *Codice del Consumo* is strongly doubted by some legal scholars.[61] This is of course something that can strongly influence the enforcement of securities regulation in Italy and leaving aside any

[59] See Article 2946 Italian Civil Code for the ordinary prescription of 10 years and Article 2947 Italian Civil Code for 10 years for torts.

[60] The extent to which class actions as private actions can be an alternative/complement to the public enforcement of securities regulation and other areas of law with dispersed claims is an issue which has gained interest in recent years also in Europe, see Ferrarini and Giudici, *supra* nt. 12; Coffee, *supra* nt. 8; Paolo Giudici, 'Il «private enforcement» nel diritto dei mercati finanziari', in Marisaria Maugeri and Andrea Zoppini (a cura di), *Funzioni del diritto private e tecniche di regolazione del mercato* (Bologna, Il Mulino, 2009) pp. 293-324; Dörte Poelzig, 'Private enforcement im deutschen und europäischen Kapitalmarktrecht', 44 *Zeitschrift für Unternehmns-und Gesellschaftsrecht*' (2015) pp. 801-848; Benedict Heil and Benjamin Lee, 'The Role of Private Litigation' 2016 University of Pennsylvania Law School, working paper available under www.ssrn.com.

[61] See Giudici, 'La responsabilità' *supra* nt. 21, at p. 149 and the preceding pages also for a comparison with the US system. On the applicability of the instrument of the class action, see Paolo Giudici, 'L'azione di classe e la responsabilità civile nel diritto dei mercati finanziari', in AAVV, Class action: *il nuovo volto della tutela collettiva in Italia* (Milano, Giuffrè, 2011) p. 191; Giorgio Afferni, 'Recenti sviluppi nell'azione di classe', 29 *Contratto e impresa*, pp. 1275-1292, at p. 1282. For instance, a recent decision of the Corte d'Appello di Firenze has rejected the possibility of using class actions, see the note by Iacumin Luca, 'Azione di classe e tutela degli azionisti' *Giurisprudenza Italiana* (2015) pp. 91-95.

evaluation of the efficiency of the public enforcement instrument,[62] can adversely shape the Italian enforcement system, so providing a less efficient system of investor protection.

Given the described liability system, basic law and economics states that the goal of tort law is to minimize the sum of the costs of care (or costs of precaution) and the costs of expected losses for all the involved parties (i.e. injurers and victims).[63] In this way, this sum represents the social costs of accident, i.e. the costs borne by all the involved parties which have to be minimized.[64] In order to reveal the connections existing in the (Italian IPOs) liability regime between the legal dimension on the one hand, and the law and economics dimension on the other, the next three subsections focus on an analysis (i) of the nature of the accident in terms of unilateral or bilateral (3.4.) and (ii) of the relative efficiency of a rule of strict liability vs negligence (3.5.) as well as (iii) of the issue of joint and several liability and insolvency (3.6).

3.4. Unilateral or bilateral accident?

A first step in analysing the liability regime as contained in Article 94 TUF is to ask the (law and economics) question regarding the nature of these tort provisions in terms of unilateral or bilateral accident types between injurer and victim and the possibility of prevention. A unilateral accident is where the victim's behaviour cannot influence the risk of accident and cannot take precautions to prevent it (i.e., the victim does not cause the accident).[65] A bilateral accident refers to the situation where the victim's behaviour can

[62] Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What works in securities Law?' *supra* nt. 7, give Italy 0.48, see at p. 16, though in general they stress the relatively low importance of this instrument to support financial markets, at p. 20.

[63] Shavell, *supra* nt. 53, at p. 7 for the simple model for unilateral accidents; Cooter and Ulen, *supra* nt. 53, at p. 300.

[64] We do not cover here the complex issue of the nature of tort law in terms of compensatory scope or deterrence scope; for a complete comparative analysis, see Giudici, 'La responsabilità' *supra* nt. 21, *passim*.

[65] Shavell, *supra* nt. 53, at p. 178. See also Fox, *supra* nt. 15, at p. 694 for the application in the context of offering of new securities.

influence the risk of accident and he/she can take precautions to prevent it (i.e., the victim causes the accident together with the injurer).[66]

This question is not trivial because the possible bilateral nature of the caused accident would alter the legal dimension of the problem, with a possible reduction in the damages arising from the recognised liability of the investor (victim).[67] This point was considered as a possible working hypothesis by the Italian *Corte di Cassazione* in a decision of 2001.[68]

After the introduction of statutory law and the criterion of reasonability contained in Article 94.8 and 94.9 TUF, the unilateral nature of the accident is assumed to be the natural working hypothesis for prospectus liability. In terms of a criterion of reasonability, the literal wording of the provisions contained in Article 94.8 and 94.9 TUF differs from the provision contained in Section 11 Securities Act. Indeed, Section 11 Securities Act refers to *any person acquiring such security (unless it is proved that at the time of such acquisition he knew of*

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[66] Shavell, *supra* nt. 53, at p. 182. One should properly distinguish between unilateral harm and bilateral harm and unilateral precaution and bilateral precaution to reduce the risk of accident, see Cooter and Ulen, *supra* nt. 53, at p. 311. We assume that in the context of IPOs the problem is regards solely possible unilateral harm (on the side of the investor) and possible bilateral precaution to reduce risk of harm (the injurers on one side and the investors on the other). Undoubtedly, possible considerations can be made also in terms of reputational harm for the issuer and gatekeepers who lend reputation.

[67] The question is asked also by Anelli, *supra* nt. 31, at p. 428 in terms of *concorso di colpa* (the typical Italian legal notion) of the investor.

[68] Corte di Cassazione, sez. I, 3132 of 3 March 2001, in 55 *Banca borsa titoli di credito* (2002) pp. 10/II-19 with a note by Andrea Perrone, 'Falsità da prospetto e responsabilità civile della Consob', 55 *Banca borsa titoli di credito* (2002) pp. II/10-29. The Court's reasoning refers to a regulatory regime without an explicit reference to the notion of reasonability, such as Articles 94.8 and 94.9 TUF. However, the argument is interesting for the possibility to use the bilateral accident model also in the case of a prospectus whose accuracy was doubted by a newspaper: "Di contro, le notizie in discorso avrebbero potuto essere considerate come originanti una situazione – per vero caratterizzata, dall'ampio dispiegamento cronologico delle sottoscrizioni (iniziate all'indomani della pubblicazione del prospetto e continuate anche nell'anno 1984) nella quale, semmai, il comportamento dei sottoscrittori (o di parte di essi) avrebbe potuto ricevere una valutazione alla stregua degli artt. 2056 comma 1 e 1227 c.c.".

such untruth or omission). This provision does not qualify the attitude of the person to prevent the harm (in terms of reasonability) and it is normally interpreted as not requiring a form of reliance on the part of the investor with the exception of her knowledge of the untruth or omission.[69] The versions of the provisions contained in Article 94 TUF are different. Article 94.8 TUF refers to *the investitore che abbia fatto ragionevole affidamento sulla veridicità e completezza delle informazioni contenute nel prospetto* (the investor who has made a reasonable reliance about the truthfulness and completeness of the information contained in the prospectus) while Article 94.9 TUF refers to the *informazioni false o … omissioni idonee ad influenzare le decisioni di un investitore ragionevole* (false information or omissions capable of influencing the decisions of a reasonable investor). Both provisions refer to a relationship between information and reasonability. The difference is that while the first provision refers to the behaviour of the investor (*ragionevole affidamento*, reasonable reliance), the second provision refers to the status of the investor (*investitore ragionevole*, reasonable investor). This slight difference in the terms of reference of the reasonability criterion (behaviour versus status) should not be enough to alter the shared sense of the two provisions. Both of them refer to a *reasonable* investor who is confronted with the quality (in terms of misrepresentation, i.e. misstatement or omission) of the information provided in the prospectus.[70] On the other hand, the reasonability criterion has been used in the US system to qualify the materiality of the information disclosed in the secondary market in order to obtain damages on the basis of the fraud-on-the-market-theory where a form of reliance is present vis-à-vis the aspect of materiality used to protect the investor for the purpose of SEC Rule 10b-5 (§10(b) Securities Exchange Act).[71]

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[69] See on this point de Jong, *supra* nt. 5, at p. 357; Giudici, 'La responsabilità' *supra* nt. 21, at p. 218; Ventoruzzo, *supra* nt. 20, at p. 10

[70] On the shared sense of the two provisions see also Facci, *supra* nt. 31, at p. 147, who refers to the notion in the first case to the damages of the investor while in the second case to the reliance of the investor.

[71] See Giudici, 'La responsabilità' *supra* nt. 21, at pp. 254; Angelici, *supra* nt. 54, at pp. 25; Ventoruzzo, *supra* nt. 20, at pp. 81; de Jong, *supra* nt. 5, at pp. 357 and 367. For the US see Allen Ferrell and Andrew Roper, 'Price impact, materiality and *Halliburton II*', 93 *Washington University Law Review* (2015) pp. 553-582.

The reference to the reasonable investor in Article 94 TUF has a direct connection to the reasonable investor of the insider trading regime (which is European-wide)[72] and in particular to Article 184.4 TUF, where the Italian legislator codifies the content of Article 1.1 of Commission Directive 2003/124/EC (*un'informazione che presumibilmente un investititore ragionevole utilizzerebbe come uno degli elementi su cui fondare le proprie decisioni di investimento*, information a reasonable investor would be likely to use as part of the basis of his investment decisions).[73] The European legislator uses the notion of reasonable investor with respect to the need for information disclosure in relation to its impact on prices.[74] The connection between the reasonable investor of the Italian prospectus regime and the (European) insider trading regime is also reinforced by the fact that there is a direct and linear connection between the transparency regime of the prospectus directive and the information disclosure of the insider trading regime.

From this legal perspective, it has to be argued that the nature of the accident is (assumed to be) unilateral.[75] From an economic perspective, this is also justified because of

[72] For a description of the European/German (and US) notion of reasonable investor, which proposes a solution in terms of *Informationshändler* pointing to the professional actor/investor, see Lars Klöhn, 'Wertpapierhandelsrecht diesseits und jenseits des Informationsparadigmas. – Am Beispiel des ,,verständigen Anlegers'' im Sinne des deutschen und europäischen Insiderrechts – ', 177 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* (2013) pp. 349-387

[73] It is not possible here to answer the question of whether the reasonability criterion of Article 94.8 and 94.9 TUF comes from European insider trading regulation or whether it comes from the US-American debate. Both solutions are plausible also considering that the European insider trading regulation was codified on the basis of the US discussion. For an analysis of the reasonability criterion of Article 94.8 TUF and 94.9 TUF as a standard (*clausola generale*) see Facci, *supra* nt. 31, at pp. 147.

[74] Article 1.2 of Directive 2003/124/EC states "For the purposes of applying point 1 of Article 1 of Directive 2003/6/EC, 'information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments' shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions".

[75] Giudici, 'La responsabilità' *supra* nt. 21, at p. 219; Anelli, *supra* nt. 31, at p. 428 also with the argument that Consob is the actor in charge of controlling the prospectus. In Italy there were a series of decisions by the Corte di Cassazione affirming the importance of the control of Consob and

the costs an investor would incur in ascertaining the truthfulness of the information provided in the prospectus.[76] Indeed, the core of the economic problem is that the negative externality issue related to the tort case (first market failure) is linked to a problem of asymmetric information (second market failure) between the parties: issuer and investors. This second market failure in terms of asymmetric information has been studied in particular in terms of the mandatory nature of the disclosure system and the incentive parties have to disclose and obtain (true) information.[77] The standard answer to justify mandatory (true) information is that the investor (victim) is not able to obtain and to evaluate at reasonable costs true information provided in the prospectus elaborated by the issuer (the possible injurer(s)) also given the public good nature of information.[78] Verification costs to reduce asymmetric information are too high and investors cannot afford them because they face a collective action problem.[79] Intermediaries such as underwriters, accountants and others are

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its possible liability. See Cassazione civile 2001, 3132, *supra* nt. 68; Cassazione civile, sez. I, 4587 of 25 February 2009 with a note by Poto Margherita, 'Responsabilità della Consob: ancora irrisolto il problema relativo all'elemento soggettivo', *Responsabilità civile e previdenza* (2009) pp. 1798-1807 and last Cassazione civile, I, 23418 of 17 November 2016.

[76] See also Giudici, 'La responsabilità' *supra* nt. 21, at p. 219.

[77] For early arguments analyzing the reasons for the need for a mandatory disclosure system, see Frank H. Easterbrook and Daniel R. Fischel, 'Mandatory Disclosure and the Protection of Invetsors', 70 *Virgiania Law Review* (1984) pp. 669-715; John C. Coffee Jr., 'Market Failure and the Economic Case for a Mandatory Disclosure System', 70 *Virginia Law Review* (1984) pp. 717-753; for the debate on regulatory competition on securities regulation disclosure, see Roberta Romano, 'Empowering Investors: A Market Approach to Securities Regulation', 107 *Yale Law Journal* (1998) pp. 2359-2430; Merrit B. Fox, 'Retaining Mandatory Securities Disclosure: Why Issuer Choice is not Investor Empowerment', 85 *Virginia Law Review* (1999) pp. 1335-1419. For a recent complete survey on mandatory disclosure, see Luca Enriques and Sergio Gilotta, 'Disclosure and Financial Market Regulation' (2014) ECGI working paper, available at www.ssrn.com. For a useful reference to the basic economic literature on the reasons of mandatory regulation, see Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What works in securities Law?' *supra* nt. 7, at p. 1.

[78] This result is also reached from a legal perspective by the Corte di Cassazione with reference to the cases referred to *supra* nt. 75, so accepting a reasoning that shifts the liability to Consob as public authority.

[79] The extent the liability system can be qualified as an unilateral accident can be analyzed and questioned on the grounds that some investors (institutional investors with their financial

those who are in charge of certifying and verifying the content of the disclosed information by lending their reputation to the deal (as informational intermediaries), thus reducing the asymmetric information between investors and issuers.

In this mandatory disclosure system, the reasonability test is used in Italy to implement the presumption of reliance in the causal connection, i.e. the causation between misrepresentation and liability. The investor's reasonable reliance on prospectus correctness is hence presumed and this is based on the premise that the nature of the accident is unilateral which in turn is based on the assumption that mandatory (true) disclosure is necessary to allow the market to work properly.[80]

3.5. Strict liability vs. negligence

As mentioned, Article 94.8 TUF provides for liability for the issuer, the offeror and the possible guarantor as well as for those who are responsible for the information contained in the prospectus for the part of their competence (*responsabilità parziaria*, partial liability).[81]

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analysts) would probably be able (at least in theory) to afford the costs of verification of the information provided in the prospectus and to profit from this knowledge so reducing the problem of the public good nature of information. This point has been also made by Perrone, *supra* nt. 68, at p. II/27, who in the case of a bilateral accident (*concorso di colpa*) distinguishes between retail investors and institutional investors. For discussion on the issue from a more doubtful perspective, see also Facci, *supra* nt. 31, at p. 149. In this case, the system could be qualified either in terms of bilateral accident, where both parties can take precautions and share liability or in terms of the cheapest cost avoider paradigm, where either the injurer or the victim can take precautions: liability is attached to the subject who can prevent the accident with the least cost (for the cheapest cost-avoider paradigm see e.g. Shavell, *supra* nt. 53, at p. 189); Italian literature has sometimes argued liability of the issuing company on the basis of the cheapest cost avoider theory (see e.g. Ferrarini, *supra* nt. 30, at p. I/453); this is actually the symmetric argument of the lowest cost provider for information as argued by Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What works in securities Law?', *supra* nt. 7, at p. 5.

[80] See Bruno, *supra* nt. 10, at p. I/792; Giudici, 'La responsabilità' *supra* nt. 21, at p. 236; Facci, *supra* nt. 31, at pp. 151.

[81] According to Giudici, 'La responsabilità' *supra* nt. 21, at p. 227, business practice is such that the issuer voluntarily takes liability for the entire prospectus as a consequence of the particular liability regime of the *responsabile del collocamento*. The partial liability case mentioned in the text is

Article 94.9 TUF imposes the same negligence rule on the intermediary responsible for the allocation (*responsabile del collocamento*) for the content of the entire prospectus.[82]

Liability occurs if the party is not able to show that it has adopted due diligence to ensure proper disclosure (i.e. disclosure without omissions or mistakes). While in the United States according to Section 11 Securities Act, the issuer is subject to a form of strict liability, in Italy it is apparently subject to a negligence rule.[83] Law and economics states that the negligence rule and the strict liability rule are both efficient under normal conditions.[84] Strict liability on the other hand results to be the efficient rule where courts are not able to evaluate the due standard of diligence to be held by the injurer.[85] In general, the injurer can influence her level of activity and her level of care.[86] In the IPO context, with respect to the issuer (and/or the offeror) the IPO is a one-shot game, meaning that the level of activity is limited just to the IPO: by definition, there is just one IPO (possibly followed by secondary offerings, which requires a new prospectus). This is also the reason why issuers ask intermediaries to serve as gatekeepers with their reputational capital.[87] Courts can infer the proper standard level of disclosure by comparing different IPOs and examining in the individual IPO whether the issuer has disclosed information properly (level of care). With respect to the other parties involved in the writing of the prospectus, being professional gatekeepers, their level of activity is substantial because they are repeated players,[88] while their level of care has to be evaluated with respect to the individual case.[89] For all the

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actually not universally shared in legal doctrine. Indeed, according to Bruno, *supra* nt. 10, at p. I/787, the wording of Article 94.8 TUF supports an interpretation in favour of a joint liability among at least two parties for whatever part of the prospectus. Against joint liability see, Anelli, *supra* nt. 31, at p. 416 and Facci, *supra* nt. 31, at p. 128.

[82] For the qualification of this statement referring the rule to negligence, see nt. 56.

[83] Again, for the qualification of this statement, see nt. 56.

[84] Shavell, *supra* nt. 53, at p. 181;

[85] Shavel, *supra* nt. 53, at p. 181;

[86] Shavell, *supra* nt. 53, at p. 193;

[87] See also Ferrarini, *supra* nt. 30, at p. I/462.

[88] See also Ferrarini, *supra* nt. 30, at p. I/462.

[89] Assuming the level of care as sufficient to escape legal liability, the interesting Article by Kathleen Weiss Hanley and Gerard Hoberg, 'The Information Content of IPO Prospectus', 23 *Review of Financial Studies* (2010) pp. 2821-2864, shows that investment in information production in the

involved parties, the rule set by Article 94.8 (and 94.9) TUF seems to be a negligence rule. As mentioned, in Italy there have not been many cases of prospectus liability for the IPO context and it is difficult to assess whether Italian courts are able to properly identify the due diligence standard for the issuing company and the different gatekeepers ultimately to create a coherent system.

3.6. Joint and several liability and insolvency

Article 94.8 and 94.9 TUF provides for a system where the *responsabile del collocamento* is jointly and severally liable with other possible parties for the damages incurred by investors. This liability regime should encourage this particular gatekeeper to supervise the correctness of the entire prospectus. As mentioned, the liability regime is set in terms of a negligence rule. This liability rule should implement a regime where the *responsabile del collocamento* has the proper incentive to reduce the asymmetric information problem between issuing company and investors. A good (i.e. reputationally and financially solid) *responsabile del collocamento* can signal to the market a credible commitment to act as a proper informational intermediary. In this context, the jointly and several liability rule has also advantages in terms of the chances of recovery for the victim, who can proceed against the defendant or defendants that have "deep pockets".[90] On the other hand, it has to be mentioned that joint and several liability at the same time presents the possible inconvenience of insolvency of (one of the) defendants.[91] Accompanied by a rule of regression by the other defendants (which is typical in Italy) this system can distort the incentive each of them has on the proper level of activity and of care, in terms of increasing the level of activity and decreasing the level of care. For this reason, the proper choice of the *responsabile del collocamento* is an essential element of IPO strategy and becomes interesting for certification effects.

4. Major hypotheses and their implications

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pre-marketing stages reduces the level of underpricing and the necessity to discover information in the bookbuilding period.

[90] Cooter and Ulen, *supra* nt. 53, at p. 340.

[91] Namely, the problem of judgment-proof injurers, i.e. potential insolvent injurers, Shavell, *supra* nt. 53, at p. 230.

The brief reference to the US debate on the prospectus liability system and the basic legal and law and economics analysis of the Italian system serve to identify the major hypotheses we want to empirically test, and their implications. Starting point is the consideration that the Italian IPO system presents some characteristics that diverge from the US system and that these can also have consequences on gatekeepers' prospectus liability. Indeed, the typical Italian IPO is structured in a global offering divided into a public retail offering for retail investors according to Italian rules and regulations, and a private placement for institutional investors according to Regulation S, Rule 144A Securities Act.[92] The open price system with the bookbuilding mechanism of price determination is the one usually adopted. The major difference with the US system is that while share allotment to retail investors in the public offering is subject to strict rules to avoid discrimination and ensure the general principle of equal treatment among retail investors, distribution to institutional investors in the private placement is completely free, as in the US system. The underwriting syndicate is typically divided in two consortia with different characteristics. The consortium for the public offering is a strict underwriting agreement while the consortium for the private placement is a firm commitment agreement. This division in two consortia highlights some problems because the typical Italian IPO presents, together with the *responsabile del collocamento* as defined by the TUF, also other actors who are not defined in legal terms by statutory law but find their qualification in the contractual arrangements set by the IPO procedure. These other actors are the *global coordinator* who coordinates the two offerings, the *lead manager* (who is accompanied by the possible joint-lead manager(s)), the *(joint) bookrunner* and the *sponsor*. Two questions arise.

Firstly, the extent to which the explicit inclusion in April 2007 of the *responsabile del collocamento* as a party (jointly and severally) liable for the prospectus represented from this date on a shift towards underwriters of minor importance assuming this particular role.

[92] For the Italian IPO regime, see Dmitri Boreiko and Stefano Lombardo, 'Italian IPOs: Allocations and claw back clauses', 21 *Journal of International Financial Markets, Institutions and Money* (2011) pp. 127-143; Paolo Giudici and Stefano Lombardo, 'La tutela degli investitori nelle IPO con prezzo di vendita aperto', 57 *Rivista delle Società* (2012) pp. 907-942; Paolo Giudici, *Le offerte degli emittenti: determinazione dei prezzi e altre clausole contrattuali. I contratti con i gatekeepers*, in Alberto M. Benedetti and Vincenzo Roppo, *Trattato dei contratti, V Mercati regolati* (Milano, Giuffrè, 2014) pp. 991-1018.

These are underwriters that are less solid from an economic perspective and less reputable with the consequence that they are less potentially liable in terms of compensatory damages. This point we raise was already identified as potentially problematic for the proper functioning of the statutory regime.[93]

A second point refers to the extent the proper liability of the *responsabile del collocamento* can be extended not only to the party explicitly mentioned in the prospectus as such, but also to other parties, such as the global coordinator, the lead manager, the (joint) bookrunner and even the sponsor.[94] The problem is that from a legal perspective the notion of *responsabile del collocamento* seems to refer (only) to the party expressly mentioned as responsible for the public offering (*responsabile del collocamento*), which is for retail investors and not for the entire global offering, which includes also the private placement for institutional investors. Although we cannot provide in this work further analysis of this complex legal issue, apparently, a solution that includes also the other actors is better in line with the systematic interpretation of the liability regime which aims at investor protection and market integrity.[95] Furthermore, one has also to consider that the economic dimension of the (global) offering is concentrated in the private placement:

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[93] See Giudici, 'La responsabilità' *supra* nt. 21, at p. 389. In the old regime without statutory law the problem of a possibile elusion of liability by using a less solid underwriter was already raised by Ferrarini, *supra* nt. 30, at p. I/450.

[94] The sponsor finds its definition in Article 51 of Regolamento Emittenti and then in the Regulation of Borsa Italiana S.p.a. It is the financial firm that collaborates with the company in the offering procedure. For an analysis of its possible liability, see Antonio Nuzzo, 2002, 'Note sulla responsabilità dello sponsor, 1 *Analisi giuridica dell'economia* (2002) pp. 269-293.

[95] For a discussion of the topic, see Giudici, 'La responsabilità' *supra* nt. 21, 387, concluding for a preference for an extensive interpretation. See also Macchiavello, 'La responsabilità da prospetto degli intermediari finanziari', *supra* nt. 31, at p. 816; Anelli, *supra* nt. 31, at p. 417.

This interpretation could also be the one preferable according to the wording of the decision of the Corte di Cassazione SU 8034/2011, *supra* nt. 36, which seems to bring together the public offering with the possible private placement: "La responsabilità da prospetto è, difatti, conseguenza di un illecito aquiliano autonomo, che accumuna, in via solidale, non soltanto tutti I soggetti che abbiano materialmente provveduto alla sua redazione, ma anche quelli che ne abbiano successivamente fatto utilizzazione in sede di offerta pubblica o privato collocamento dei titoli in esso rappresentati".

institutional investors are those who signal the final offering price by way of the bookbuilding mechanism based on institutional investors' demand, and the role of the lead manager and global coordinator for the determination of the offering price is crucial.[96] Indeed, the offering price is the synthesis of the information provided in the prospectus and this is why the legal system protects the mechanism of price formation. It follows that splitting the position of the party responsible for determining the offering price from the liability regime can weaken the system of protection the regulatory regime aims to pursue. The empirical issue in this case is to analyse the effects of the statutory regulation of 2007 on the roles assumed by more solid and reputable underwriters. Furthermore, in order to test for any effect of the new regulation we take a closer look at the participation of the underwriters in Italian IPOs as *responsabile del collocamento*. In addition, our research aims to identify any substantial variations in the IPO syndicates' composition after April 2007 and to identify the IPO characteristics that are most likely to be affected by the new regulation on prospectus liability. With this in mind, we formulate several hypotheses and try to find statistical evidence in favour or against them.

H1. Our first hypothesis is connected with the willingness of underwriters to participate in the new offerings as *responsabile del collocamento* taking place after the introduction of the statutory prospectus liability. Faced with the threat of being held responsible in the future for the misrepresentation of the listing company, investment banks with higher reputations might decide not to participate in future offerings, thus leaving the market to less reputable underwriters. Apart from underpricing the issue, charging a higher fee or placing restrictions on the companies to be underwritten, the investment banks might at the end quit this business, fearing high potential losses due to litigation. As an alternative, it is also possible that smaller, less experienced banks, which are more likely to misprice the issue, will be the ones to quit, leaving in the game more respected and experienced peers. With this in mind we posit our first hypothesis as:

H1-a. *The IPOs since introduction of the statutory prospectus liability in Italy in April 2007 have seen investment banks with lower reputation assuming the task of 'responsabile del collocamento'.*

[96] On this point, see Giudici and Lombardo, *supra* nt. 92, *passim*.

An alternative view on the topic implies that it is very likely that smaller, less experienced banks, which are more likely to misprice the issue, will be the ones to quit, leaving in the game more respected and experienced peers. With this in mind we posit a second version of our first hypothesis as:

H1-b. *The IPOs since introduction of the statutory prospectus liability in Italy in April 2007 have seen the investment banks with higher reputation assuming the task of 'responsabile del collocamento'.*

H2. Following similar arguments, it is likely that underwriters that fear the biggest reputational losses due to prospectus liability, namely, the international banks that previously participated in underwriting Italian IPOs, might decide to shun the Italian IPO business altogether, in order to avoid blows to their reputation. Our second hypothesis is therefore formulated as follows:

H2. *The Italian IPOs listed since April 2007 have shown significantly lower presence of international investment banks acting as 'responsabile del collocamento' or assuming any prospectus responsibility.*

H3. Apart from personally scrutinizing the financial statements, the underwriter may require that the financial documents of the firm to be listed be audited by a renowned international firm. In line with accumulated research on underwriters' and auditors' reputation, we assume that the auditors from the Big Four audit firms have higher reputation than other auditing firms, and therefore put forward the fourth hypothesis:[97]

H3. *More IPOs with accounts audited by one of the Big Four audit firms have been observed since April 2007.*

[97] Reconta Ernst & Young S.p.A., PricewaterhouseCoopers S.p.A., Deloitte & Touche S.p.A., and KPMG S.p.A.

H4. Next we look at the relationship between underpricing and prospectus liability. It is often argued that underwriters use underpricing to avoid prospectus liability and so to decrease the probability of costly litigation (the so-called *lawsuit avoidance theory*). The theory in a nutshell claims that underwriters might deliberately underprice the offering to obtain a price rise during the first day of trading and so avoid (the risk of) prospectus litigation. In other words, the risk of litigation influences the level of underpricing. This theory has also been empirically tested.[98] Notwithstanding its intuitive appeal, this theory has been strongly criticized for the US from a legal perspective both from a substantive standpoint and a procedural standpoint.[99] In brief, we limit the analysis to the following major legal points of criticism of the (economic) lawsuit avoidance theory, (i) it is possible to bring suits and cumulate damages under the Securities Act of 1933 (Section 11 and 12) and the Securities and Exchange Act of 1934 (Rule 10b-5), so reducing the incentive to underprice because of the different calculation of the damages,[100] (ii) there are selection problems in the sample,[101] and (iii) the system of insurance and settlements noticeably decrease the risks of litigation.[102]

[98] In the past there have been several articles on underpricing and prospectus liability. In favour of this hypothesis see e.g., Shea M. Tiniç, 'Anatomy of Initial Public Offering of Common Stock', 43 *Journal of Finance* (1988) pp. 798-822, studying in particular the level of underpricing before and after the introduction of the liability regime of the Securities Act of 1933; for a formal model, see Patricia J. Hughes and Anjan V. Thakor, 'Litigation Risk, Intermediation, and the Underpricing of Initial Public Offerings', 5 *Review of Financial Studies* (1992) pp. 709-742.

[99] See Janet Cooper Alexander, 'The Lawsuit Avoidance Theory of Why Initial Public Offerings Are Underpriced', 41 *University of California Law Review* (1993) pp. 17-73.

For more recent (economic) scholarship on this theory, see Kathleen Weiss Hanley and Gerard Hoberg, 'Litigation Risk, Strategic Disclosure and the Underpricing of Initial Public Offerings', 2009 *working paper* at disposal at ssrn.com; Hui Ling Lin, Kuntara Pukthuanthong and Thomas John Walker, 'An international look at the lawsuit avoidance hypothesis of IPO underpricing', 19 *Journal of Corporate Finance* (2013) pp. 56-77.

[100] Alexander, *supra* nt. 99, at p. 33.

[101] Alexander, *supra* nt. 99, at p. 44.

[102] Alexander, *supra* nt. 99, at p. 46.

With respect to the Italian system,[103] the legal framework for testing the validity of this theory is slightly different from the US one, for at least two institutional differences.[104]

First, since, as mentioned, Italian IPOs are characterised by a global offering divided into a public offering for retail investors and a private offering for institutional investors, possible claims by institutional investors are brought under Section 12(a)(2) Securities Act and not Section 11 because the offering is not registered according to Section 5 Securities Act.[105] Indeed, the offering is a private placement made according to a prospectus called offering circular.[106] Section 12(a)(2) is structured on the same philosophy of Section 11 but with a lower standard of care.[107] The extent to which Section 10.5, Rule 5-b is also possible is questionable, because institutional investors cannot sell shares on the market in the US, according to Regulation S, Rule 144A.[108]

Second, in the US it is possible for the underwriter intentionally to overprice shares in an IPO provided the underwriter respected the material information test in the registration statement/prospectus.[109] This behaviour in Europe would be more problematic because European legislation provides a stricter link between the market abuse prohibitions (market manipulation and insider trading) given by Directive 2003/6/EC (MAD, the Market Abuse

[103] We are not aware of any study in Italy analyzing this issue from an empirical perspective. For other countries, see the literature provided by Lin, Pukthuanthong and Walker, *supra* nt. 99.

[104] We do not cover here the issue of the amount of damages, for which see, Bruno, *supra* nt. 10, at p. I/795; Giudici, 'La responsabilità' *supra* nt. 21, at p. 239.

[105] See Gerner-Beuerle, 'Underwriters' *supra* nt. 20, at p. 491.

[106] According to Coffee, *supra* nt. 8, at p. 287, the listing premium paid by foreign issuers not registering on the basis of Section 5 SA but just using Rule 144A is less pronounced than issuers cross-listing by registering also in the US so becoming subjects to US securities regulation and enforcement.

[107] See Gerner-Beuerle, 'Underwriters' *supra* nt. 20, at p. 489-491.

[108] According to Alexander, *supra* nt. 99, at p. 33, in the US system it is possible to cumulate the suits according to the Securities Act of 1933 and the Securities and Exchange Act of 1934.

[109] Alexander, *supra* nt. 99, at p. 37, after discussing a case states, "In such a case, there would be no liability for the price decline even if the underwriter knowingly overpriced the stock, as long as the underwriter did not conceal any material information".

Directive)[110] (now replaced by Regulation EU 596/2014, MAR the Market Abuse Regulation)[111] and the prospectus rules given by Directive 2003/71/EC. Indeed, according to Article 9 MAD (now Article 21.(a) MAR) the prohibition of market manipulation (and insider trading) starts already when admission on a regulated market is asked for. This is usually some time before the offering period begins and includes the time the prospectus is written (pre-marketing stage) and presented to the national authority for permission to publish. Legislation in Europe is aimed to protect the integrity (efficiency) of price formation also during the offering period of an IPO. It follows that the leading underwriter that intentionally overprices the issue even though respecting the material information standard of the prospectus directive could be charged in Europe for a form of market manipulation.[112]

To sum up, being (at least) agnostic on the validity of the *lawsuit avoidance theory*, we formulate our fifth hypothesis, taking the introduction of the Italian statutory regime as an event to be studied on the same lines as the introduction of the Securities Act in 1933 for the US with its (supposed) higher level of liability:[113]

H4. *The average level of underpricing has increased since introduction of the statutory prospectus liability in Italy in April 2007.*

Apart from increasing the underpricing level, underwriters might also ask for a higher fee for their services, pricing in the likely increased costs of future litigation, and therefore, on average, one might expect to see the higher gross spread charged by the underwriters

[110] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse directive).

[111] 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.

[112] On this point with respect to an Italian case, see Giudici and Lombardo, *supra* nt. 96, at p. 922.

[113] This is the event studied by Tiniç, *supra* nt. 98.

after April 2007 to respond to the higher level of litigation risk,[114] leading us to the formulation of the last hypothesis:

H5. *The gross fee charged by the underwriter for listing a company has increased since introduction of the statutory prospectus liability in Italy in April 2007.*

In the next section we describe our sample and try to find statistical evidence to prove or to reject the above formulated hypotheses.

5. The empirical analysis

Sample construction and data description

The Article analyses 199 IPOs listed on all segments of the Italian Stock Exchange (regulated market) (*Borsa Italiana Spa*) from January 1999 to September 2016, excluding listings of foreign firms on the Italian market, transfers from other market segments, and the listings on "*AIM-Italia MAC*"[115], which is not a regulated market. We eliminate 6 IPOs with missing IPO prospectuses, obtaining the final sample of 193 IPOs. The sample is homogeneous because it encompasses the IPOs carried out according to the regulatory regime established by TUF (1998) and IPOs created almost exclusively with the bookbuilding system.[116] The details of the offerings and information on the underwriters assisting in the IPO process are sourced from IPO prospectuses and supplements. All market data comes from DataStream.

Table 1 shows the distribution of the IPOs across years along with some general statistics. The data shows that IPO activity is a cyclical phenomenon with very few listings after the year 2007. An average Italian IPO features a company in business for 31 years, with total assets of around 1.812 million Euros, although these characteristics vary dramatically across firms. The first day underpricing is positive on average and is 8.4%; this data is in line with international observations on IPOs' first-day performance across the globe.

[114] The extent to which the Italian market for underwriting is more or less open to competition would also have an impact on the increase in the increase in fees.

[115] Active in Italy from May 2009.

[116] Except for the IPO of Credito Artigiano in 1999 offered for retail investors only.

[Insert Table 1 about here]

On average the underwriters charged 3.9% gross fee (or spread as it is usually called) for their services. This is much lower than the usual 7% spread in the US.[117] Only one IPO in our sample had a different remuneration schedule for the underwriter – in 2008 Enervit struck an agreement with Mediobanca - Banca di Credito Finanziario S.p.A. (Mediobanca hereafter) to pay a fixed amount for the underwriting services, 550 thousand Euros (or 15.3% of the total proceeds from the IPO).[118]

The event studied in our Article is the introduction in the Italian system of a statutory regime of prospectus liability in April 2007 with respect to some variables related to the reputation of underwriters and their prospectus liability. In order to study the potential effects of such an "exogenous shock" we divided the sample into 2 groups – IPOs with the prospectuses officially published before and after this date (24 April 2007). Adoption of the new legislation preceded the financial crisis that led to an abrupt halt of IPO activity in Italy and worldwide, which is quite similar to the Dot-com collapse in 2001. This has led to rather uneven sizes of the subsamples - we observe 144 IPOs listed from 1999 to 24 April 2007 and only 49 IPOs listed thereafter.

We decided to use the first group of pre-2007 IPOs as the controls for the post-directive IPO group, attempting to infer if group-differences are statistically significant, thus providing some empirical tests of our hypotheses. We acknowledge that a more rigorous test would be to form the control group of IPOs coming from countries with similar legislation but without implementing the prospectus directive. However, in our case this is impossible for two reasons. First, although the ideal control group would be formed by IPOs in similar EU Member States, the Prospectus directive had to be implemented by Member States by 1 July 2005 (according to Article 29, whereas Italy adopted the directive only in 2007) so that the national legislations were aligned with respect to the directive in different times. Furthermore, the Member States were differently affected by the directive because of

[117] See Hsuan-Chi Chen and Jay R. Ritter, 'The Seven Percent Solution', 55 *Journal of Finance* (2000) pp. 1105-1131.

[118] It should be stressed that not all the IPOs disclose in the prospectus underwriters' remuneration, so this number might be somewhat higher.

its minimum standard requirements and national IPOs cannot be taken as controls. Second, even if the first argument were rejected, the proxies we used to test our hypotheses are data-mining intensive with no general database existing so far (except for underpricing), which would contain cross-country data. This makes it impossible to construct the control sample from non-Italian IPOs.

Taking a closer look at the two subsamples, we see that the first group of IPOs is more heterogeneous than the later one, which encompasses the IPOs listed in the initial stage of stock market downturn. First, it contains the IPOs that were listed on the New Market (Nuovo Mercato, NM) up to January 2001. This stock market segment was specially created for younger, riskier technology companies with less stringent listing requirements that were listed during the Dot-com bubble and often showed spectacular first-day underpricing.[119] Following the burst of the Dot-com bubble, this segment was closed.

Second, our first subsample, apart from New Market IPOs, contains the listings in the 1999-2000 period, with general investors' hype and frequent spectacular performances even of IPOs listed on conventional segments.[120] Therefore, apart from testing the differences between two main subsamples, we also decided to perform several robustness checks removing either the NM IPOs or IPOs listed before 2001.

Underwriters' roles in Italian IPOs

Given that the focus of the Article is prospectus liability, we now turn our attention to the underwriting banks that organized the Italian IPOs throughout these years. It must be stressed that the Italian listing system is rather bureaucratized, with underwriters having to adopt many more different formal functions and roles than, say, underwriters for US offerings. As mentioned, apart from the usual roles present in the underwriting language of financial product issuance, underwriters in Italian IPOs can assume several additional functions (Italian official term is given in parentheses):

- *Responsible for prospectus (Responsabile del collocamento)* – the bank that manages the syndicate and keeps full prospectus liability under a negligence rule after introduction of the statutory regime.

[119] For example, Finmatica with 692%, I.NET with 170% or Gandalf with 131% underpricing, which went public in November 1999 – March 2000.

[120] For example, CHL with 139% or Italdesign-Giugiaro with 56%.

- *Global Coordinator (Coordinatore globale)* – the bank responsible for overseeing the global public offering. Underwriters for respective offerings report back to the global coordinator who is also responsible for coordinating the activities of all the lead managers and underwriters. There can be separate global coordinators for public and institutional offerings.
- *Sponsor* – the bank that guarantees the viability of the company's business and takes care of compliance with IPO listing rules as well as promoting the firm among investors and analysts.
- *Listing partner* – the bank that liaises with regulating bodies and stock exchange authorities, takes care of the IPO prospectus and in general assists the firm in the whole process of going public.
- *Specialist (Specialista)* - the bank that conducts the market-making activities for the IPO's stock.
- *Financial advisor (Advisor finanziario)* – the bank that advises the listing firm on all stages of IPO preparation, such as assisting in underwriters' selection, acting as a consultant to the listing firm in negotiations with chosen underwriters and so on.
- *Lead manager or lead underwriter (Lead manager)* - the bank which has primary responsibility for organizing an IPO issue. Such a bank is responsible for creating the syndicate, negotiating terms with the issuer, and assessing market conditions.
- *Book-runner (Book-runner)* - The primary underwriter in the IPO. The book-runner works with other firms who will also take part in the deal, allowing for the sharing of risks but is the only party responsible for "running" or handling the books.

Table 2 shows the top 10 underwriters sorted by the total number of various functions assumed in all Italian IPOs.[121] We observe a clear domination of the Italian underwriting business by two large Italian investment banks – Mediobanca and Banca IMI. Surprisingly, one international bank (Merrill Lynch) makes it to 8th position in this classification, although most of the time it takes up the role of the global coordinator or institutional offering book-runner. Italian underwriting business seems to be highly

[121] One bank can conduct more than one role in any single IPO. To keep the table manageable we drop two infrequent functions of the underwriters – Coordinator of public or institutional offering where the two are coordinated by different banks (4 and 9 cases in all IPOs).

concentrated, with the top ten players carrying out 57% of all the underwriting tasks (given that in total 113 financial institutions took up at least one of the roles in one of the IPOs in our sample).

Chart 1, which shows the top player per each underwriter function, further confirms the predominance of two Italian investment banks, Banca IMI S.p.a. and Mediobanca S.p.a., in the underwriting business of Italian IPOs. Apart from Listing partner and Financial Advisor, the other functions are most often performed by either of the banks, taking 15-20 per cent of the overall business activity in the corresponding role.

[Insert Chart 1 about here]

Prospectus liability

As regards the parties charged with prospectus responsibility, even before the introduction of the new regulation in April 2007, the prospectuses routinely contained a section on the parties responsible for the information contained in the IPO prospectus according to the European rules. This clause is present in all IPO prospectuses in our sample. Prior to July 2005 this section was placed at the end of the prospectus, with subsequent IPOs having this clause directly at the beginning of the prospectus. Only from April 2006 did the prospectuses start to disclose the exact section references, for which each of the disclosed parties was held liable. Before that date, the clause just listed the parties (the firm, selling shareholders, and underwriters) with a statement of joint responsibility.

In virtually all the prospectuses, the responsibility section states that the listing firm is held liable for all the information in the prospectus, the selling shareholders only for the information related to their identity, and underwriters for information in the specific sections, which are explicitly identified.[122] Without exceptions, the underwriters responsible are those that assume one of the functions of Listing Partner, Sponsor, Global Coordinator or Responsible for Share Allocations.

Hypotheses testing

In this section we run empirical tests on the hypotheses formulated in Section 3.

[122] Enervit, Ferragamo and Brunello Cucinelli do not report any liability for underwriters who are not 'responsabile del collocamento'.

H1-a. *The IPOs since introduction of the statutory prospectus liability in Italy have been underwritten by the lower-reputation investment banks, which assume the task of responsible for prospectus (responsabile del collocamento),*

against the hypothesis

H1-b. *The IPOs since introduction of the statutory prospectus liability in Italy have seen investment banks with higher reputation assuming the task of responsible for prospectus (responsabile del collocamento).*

In order to test these two alternative hypotheses, one has to assign a reputation rank to each underwriter that assumed one of the leading roles in any Italian offerings during the period under study. This is a trivial task for the big international investment banks that have conducted underwriting business in the US, but a more complicated issue in our case. For example, the IPO Underwriter Reputation Rankings (1980 - 2011) database of Jay R. Ritter,[123] which is considered one of the most ubiquitous and complete, includes only two Italian underwriters with rank assigned to them only in one small sub-period.[124] Therefore, in order to identify the underwriters' ranking, we have to use a proxy, similar to the one used by J.R. Ritter and other similar databases.

We decided to proxy the underwriter's reputation by the percentage of total volume of the IPO deals it underwrote as global coordinator from 1999 up to April 24th, 2007, excluding the IPOs listed under the new regulatory regime as regards prospectus liability.[125] As an alternative, we took the percentage of total value of all the offerings underwritten by a particular underwriter.[126]

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[123] http://bear.warrington.ufl.edu/ritter/ipodata.htm

[124] Banca Commerciale Italiana and Mediabanca.

[125] We already used this methodology in Dmitri Boreiko and Stefano Lombardo, 2013, 'Lockup clauses in Italian IPOs' 23 *Applied Financial Economics* (2013) pp. 221-232.

[126] In the case of several global coordinators, we took only the corresponding proportion of the global offering value. Moreover, we proxy the underwriters' reputation by the total value of the shares sold in the IPOs that were underwritten by the particular underwriter and not by the market

As a result, we obtained similar classifications using both methods with the Top 5 underwriters including Banca IMI, Mediabanca, Unicredit Banca Mobiliare, Merryl Lynch by both classifications and Abaxbank in the Top 5 by volume and JP Morgan in the Top 5 by value. Interestingly, the Italian IPO market features a relatively high number of the participating underwriting banks with the Top 5 taking up only 39% of the total volume of the deals. Nevertheless, the Top 5 banks have underwritten 65% of the total value of all offerings, indicating that they obtain most of the large lucrative IPO deals.

Our test of hypotheses H1-a and H1-b consists of comparing the average underwriter rank of the *responsabile del collocamento* in all the IPOs conducted before and after the introduction of the statutory prospectus liability. In Table 3 we observe a clear increase in the underwriters' reputation following the introduction of the statutory prospectus liability. Both proxies for reputations indicate a statistically significant increase in average underwriter's rank of *responsabile del collocamento*, with average increase in rank by volume and value at less than 1% level.

[Insert Table 3 about here]

As a robustness check we looked at the mean differences of the reputations for the investment banks that were named explicitly in the prospectus responsibility section. The results are identical to the main test of hypotheses **H1-a** and **H1-b** showing a clear and unequivocal increase in underwriters' rank following the regulatory regime change. This leads us to conclude that:

Following the introduction of the statutory prospectus liability in April 2007, the listing market has been dominated by more reputable underwriters assuming the role of 'responsabile del collocamento' with smaller banks squeezed out of the lucrative IPO market.

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value of the IPOs after listing, arguing that the reputation of an underwriter is correlated more with his ability to market the IPO shares and not with his ability to sell a very small portion of the share capital of large firms to be listed.

H2. *The Italian IPOs listed since April 2007 have shown a significantly lower presence of international investment banks acting as 'responsabile del collocamento' or assuming any prospectus responsibility.*

Looking at the list of the banks assuming the role of *responsabile del collocamento* we see that across all the period only 2 international banks took this role and for 2 IPOs taking place in 2000 and 2001. After that, no international bank was ever appointed to the position under study. Such a lack of data does not allow us to reach any meaningful conclusion regarding the international banks' participation pattern. Therefore, we decided to look at the proportion of the international investment banks assuming prospectus responsibility as disclosed in the relevant section of the listing document before and after April 2007. The relevant statistics are given in Table 3. Indeed, we observe that the international banks stopped participating in underwriting of Italian IPOs after introduction of statutory regulation, with only 2 international banks participating in two IPOs out of 49 (and these two IPOs went public in late 2007). This has led us to conclude that:

There is strong statistical evidence that the IPOs since April 2007 more often have had a national underwriter assuming prospectus responsibility. However, it must be noted that international banks infrequently played the role of the 'responsabile del collocamento' even before the introduction of the statutory regulation.

H3. *More IPOs with accounts audited by one of the Big Four audit firms have been observed since April 2007.*

We tested this hypothesis by comparing the frequencies of IPOs with financial statements audited by Big Four auditing firms before and after the introduction of statutory prospectus liability. Table 3 shows the results. What we observe is the clear tendency to have a Big Four auditing firm after April 2007. On average, the proportion of such IPOs have increased by almost 20 percentage points, significant at 1% level. The finding is further stressed by the observation that in one IPO after 2007, the company changed the local auditor for one from the Big Four immediately prior to starting the IPO process. Therefore, we reach the conclusion that:

There is strong statistical evidence that the IPOs since April 2007 more often have had an auditor from the Big Four. However, whether it is a specific request of the underwriter fearing potential litigation costs or just a general tendency towards listing of higher quality firms is not clear and needs further investigation.

H4. *The average level of underpricing has increased since introduction of the statutory prospectus liability in April 2007 in Italy.*

To test the H4 hypothesis positing that the level of underpricing has increased following the adoption of statutory prospectus liability in Italy, we split the sample into two groups and have ran tests for differences in group means. Given that the series exhibits large and frequent positive outliers we also compared the groups' medians and run corresponding tests for their differences. Table 4 reports the preliminary results.

Comparing the post-April 2007 IPOs with those before, we observe that the mean underpricing has in fact decreased since the introduction of the statutory prospectus liability, whereas we observe a not statistically significant 1.1% increase in median. Given these conflicting results we decided to run several additional tests looking at the subgroups of pre-April 2007 IPOs. First, these IPOs encompass the listings on the New Market from 1999-2001. These frequently showed spectacular levels of first day underpricing that were not justifiable by financial theory and most probably explained by investors' over-optimism. Since the New Market segment was shut down in 2001 and subsequently not reopened, we tested for mean- and median-differences against the IPOs listed on all but New Market stock exchange segments before the introduction of the new regulation. The results are qualitatively similar to the previous ones, although with higher mean- and median-differences.

As the last step, we removed all the IPOs that went public before year 2001, i.e. excluding the ones listed during the dot-com bubble. Notwithstanding the absence of any increase in mean, we observe that post-April 2007 IPOs are underpriced by 1.4% more in median. With the evidence above, we reach the conclusion regarding H4 hypothesis that:

Given the small sample sizes and cross-sectional variability of underpricing, there is only very weak statistical evidence that the level of underpricing has increased since April 2007.

H5. *The gross fee charged by the underwriter for listing a company has increased since introduction of the statutory prospectus liability in 2007 in Italy.*

We tested this hypothesis with the same statistical tools used for H1 tests. Table 4 reports the results. Surprisingly, we observe a clear and statistically significant reduction of the underwriters' spread charged after the introduction of the prospectus liability – the reduction is of 15% (0.7% down from 4.1% spread). This finding is robust, both across means and medians, and remains after removing the *Nuovo Mercato* IPOs or limiting the subsample to 2001-2007 IPO period only. With the evidence above, we reach the conclusion regarding H5 hypothesis that:

The gross spread charged by underwriters has substantially decreased since April 2007. Whether this is explained by the introduction of prospectus liability or some other unaccounted for factor or tendency remains a topic for future research.

6. Interpretation of results

The scope of this Article was to analyze IPO prospectus liability foreseen by the statutory regime introduced in April 2007 in Italy. We studied several variables related to gatekeepers liability as informational intermediaries that lend their reputation to listing companies thus certifying the quality of the IPO. Indeed, the literature considers the (efficiency of the) liability regime to be an essential element of the alignment of possible conflicting interests and incentives between investors/company/gatekeepers in the standard regime of the mandatory disclosure system typical of securities regulation both in the USA and in the EU. In this Section we attempt to interpret the results. The starting point was the argument of the neutrality of the statutory regime, i.e. the hypothesis maintained by some legal scholars that the statutory regime did not substantially modify the implicit regulatory system in force until April 2007. Furthermore, it should be pointed out that Italy does not have a legal system with a high level of (IPO) prospectus liability litigation.

In particular, with respect to the first variable we studied (H1-a and H1-b), the results show that the market after the introduction of the statutory regime has been dominated by more reputable underwriters assuming the role of *responsabile del collocamento*. As mentioned, this party is (supposed and expected to be) crucial for the efficient allocation of liability according to Article 94.9 TUF. Considering the legal debate about a possible move of the market towards less reputable *responsabile del collocamento* this result shows that the liability issue has been taken seriously by the market and more solid underwriters are now dominating it.

The second variable we studied (H2) confirms a general absence of international underwriters taking up the role of *responsible del collocamento* in the Italian IPO market. Furthermore, after the introduction of the statutory regime in April 2007 the presence of these actors actually decreased. We think that these results are not to be interpreted as only related to liability issues but more probably related to the structure of this industry in Italy. Of course this intuition requires further research.[127]

The third variable we studied relates to the role of auditors as informational intermediaries (H3). Since Italy was adversely affected by major financial scandals at the beginning of the new millennium,[128] the evidence from the results supporting the hypothesis that more reputable auditors have been involved in IPOs since April 2007 should lead to the conclusion that the statutory regime has been taken seriously and/or has increased the quality of these gatekeepers.[129] Nevertheless, we are not able to reach a solid conclusion owing to a problem of causal connection. We are not able to rebut the possible alternative hypothesis that only more reputable listing companies come to the IPO market during a period of financial and economic crisis.

The fourth variable we studied is the possible increase of the underpricing level as a consequence of the increased level of liability after April 2007 (H4). This issue refers to the so-called lawsuit avoidance theory. Being at least agnostic about the validity of this theory

[127] We are not aware of (recent) literature on the industry of underwriters in Italy. In any case see Scribano, *supra* nt. 13, *passim*.

[128] See Ferrarini and Giudici, *supra* nt. 12, *passim*.

[129] For the role of auditors as important gatekeepers in Italy see also, Francesca Sribano, 'The Impact of Third-Party Certification on Italian Initial Public Offerings' (2015) working paper available at www.ssrn.com.

from a legal perspective (considering also the market abuse implications of European legislation) but recognizing also the absence of an Italian study on this topic, we reach the conclusion that the level of underpricing has not been significantly modified by statutory law. In other words, in Italy underwriters do not use the level of underpricing as a possible instrument to avoid litigation.

Finally, our fifth variable looked at the hypothesis that underwriters increased gross fees as a reaction to the increased level of liability, so implicitly shifting to listing companies (and to investors) the increased risk of litigation (H5). Indeed, the gross fees can be considered as an implicit price that includes also the risk of litigation. Our results suggest that the contrary is true. The level of gross fees decreased after 2007. We are not able to provide explanations for such a phenomenon but it could be related to industry factors and to the financial and economic crisis that made the market more difficult so determining a general decrease of fees to make an IPO more attractive for companies. Nevertheless, we note that this result has also to be seen in connection with the other result of an increase of the quality of the underwriters as *responsabile del collocamento* (H1). The overall conclusion is that since April 2007 the IPO market has been characterized by more reputable underwriters that charge lower gross fees.

7. Conclusions

In April 2007 a statutory regime of prospectus liability for IPOs entered into force in Italy. We ran several hypotheses tests in order to find the statistical evidence in favour of the existing effect of prospectus liability regulation. Our preliminary results are as follows. There is only weak statistical evidence that the level of underpricing has increased since April 2007, although we do observe increases in medians and partially in means as well. There is a clear statistically significant tendency to have one of the Big Four auditors for post-April 2007 IPOs, and our results indicate lower participation of international banks in Italian IPOs as judged from the statistics on the identity of the parties responsible for the prospectus. Surprisingly, the fee charged by underwriters went down after the introduction of new legislation, contrary to what might have been expected.

TABLE 1

IPOs distribution by years

The sample consists of 193 IPOs listed in Italy from January 1999 to September 2016. *Age* refers to the average age of the company at the IPO date. *Total assets* to the latest accounting data on total assets prior to the IPO. *Spread* is the gross spread charged by the underwriter for his services. *IPOs with spread* gives the number of IPOs per year with available information on spread's size. *IPOs with Top Auditor* shows the number of IPOs with financial statements audited by the Big Four auditors (Reconta Ernst & Young S.p.A., PricewaterhouseCoopers S.p.A., Deloitte & Touche S.p.A., KPMG S.p.A.). *1st day underpricing* measures the difference between the offering price and the closing price on the first day of shares' trading.

Year	All IPOs, N	Age, years	Total assets, €m.	Spread, %	IPOs with spread, N	IPOs with Top auditor, N	1st day underpricing
1999	22	26	2,493	4.6%	10	9	16.0%
2000	43	25	449	4.4%	43	29	14.4%
2001	18	43	823	4.3%	18	16	-1.0%
2002	6	66	722	3.7%	5	5	-0.5%
2003	4	11	654	3.2%	4	3	-2.2%
2004	8	16	770	3.7%	8	7	3.4%
2005	15	36	1,607	3.6%	14	13	11.5%
2006	21	30	572	3.6%	19	17	9.4%
2007	28	42	387	3.8%	28	22	3.6%
2008	5	13	19	4.6%	4	4	7.4%
2009	1	9	73	4.5%	1	1	8.4%
2010	2	11	61	3.4%	2	2	-10.0%
2011	1	17	610	2.5%	1	1	10.6%
2012	1	34	185	4.5%	1	1	49.7%
2013	2	14	427	2.9%	2	2	22.9%
2014	5	30	5,144	2.4%	5	5	1.5%
2015	8	38	21,282	3.0%	8	8	6%
2016*	3	17	967	2.2%	3	3	2.7%
Total / Averag	**193**	**31**	**858**	**4.0%**	**158**	**130**	**8.7%**

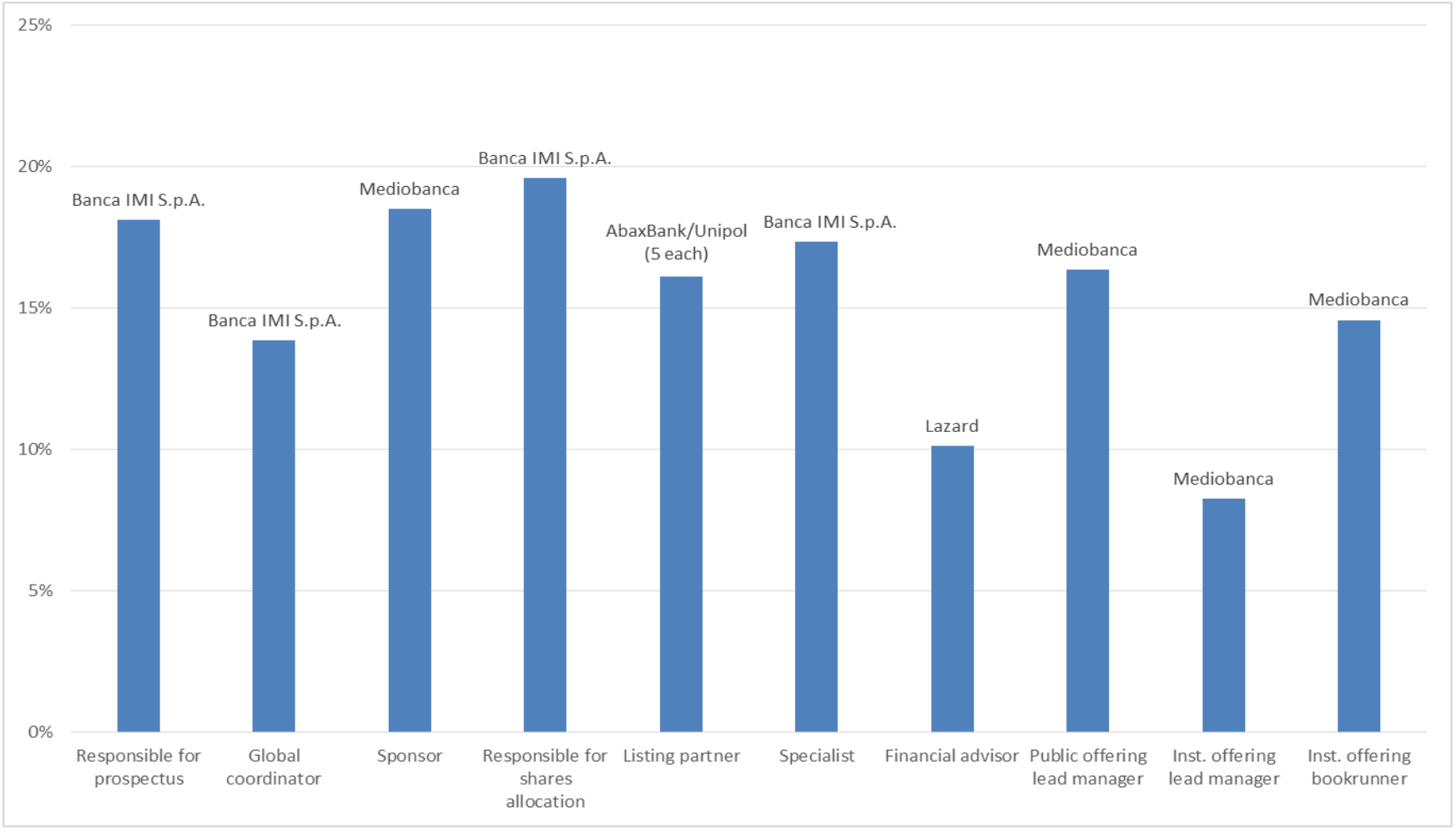
*- the data is up to 30/09/2016 only.

TABLE 2
Underwriters' role and functions

The table shows the statistics of various roles assumed by the top 10 underwriters of 193 Italian IPOs listed from January 1999 to September 2016. The underwriters were ranked by the total number of functions performed across all IPOs. The totals exceed the number of all IPOs in the sample as one bank can conduct more than one role in any single IPO. For the purposes of simplification sole-, joint-, co- global coordinators, lead managers and book-runners were counted as global coordinators, lead managers and book-runners correspondingly. To keep the table manageable we dropped from the table two infrequent functions of the underwriters – *Coordinator of public* or *institutional offering* (4 and 9 cases in all IPOs).

Underwriter	Responsible for prospectus	Global coordi-nator	Spon-sor	Responsible for shares allocation	Listing partner	Specialist	Financial advisor	Public offering lead manager	Inst. offering lead manager	Inst. offering book-runner	**Total functions**
Mediobanca	30	43	37	35	4	14	1	9	16	35	**224**
Banca IMI S.p.A.	31	46	34	39	2	17	1	4	15	23	**212**
UniCredito Italiano S.p.A.	18	25	19	23	0	6	0	3	13	19	**126**
AbaxBank	11	10	6	11	5	9	0	3	13	6	**74**
Banca Caboto S.p.A.	10	9	5	11	2	4	0	4	8	9	**62**
Intermonte Securities	2	9	9	3	3	6	0	0	11	9	**52**
Banca Akros	3	6	5	6	2	6	1	2	5	6	**42**
Merrill Lynch	0	15	2	0	0	0	0	0	8	16	**41**
Banca Commerciale Italiana	7	8	8	7	0	4	0	2	3	0	**39**
Unipol Banca S.p.A.	4	6	1	5	5	0	1	1	8	6	**37**
Total top 10 Banks	**116**	**177**	**126**	**140**	**23**	**66**	**4**	**28**	**100**	**129**	**909**
In % to total	*67.8*	*53.3*	*63.0*	*70.4*	*74.2*	*67.3*	*5.1*	*50.9*	*51.5*	*53.8*	*56.8*
Overall Total	**171**	**332**	**200**	**199**	**31**	**98**	**79**	**55**	**194**	**240**	**1599**

Chart 1
Top underwriter in each IPO function



The chart displays the market share by volume of the top bank in each of the categories of IPO underwriter functions. *Data source*: authors' calculations.

TABLE 3
Underwriters' ranks, auditing firm and international underwriters

The table shows underwriters ranking tests, numbers and percentages of the big four auditing firms (Reconta Ernst & Young S.p.A., PricewaterhouseCoopers S.p.A., Deloitte & Touche S.p.A., and KPMG S.p.A.) and international underwriter acting as the responsible for prospectus in IPOs before and after 24 April 2007. Significance of differences in means is tested with t-test. *** and * - denotes 1% and 10% significance level of the tests.

	2007-2016 Period		1999-2007 Period		Diff. in means
	N	Average	N	Average	
Responsabile del collocamento					
Average rank by volume	45	7.8%	144	5.6%	2.2%***
Average rank by value	45	11.9%	144	6.1%	5.8%***
Banks assuming prospectus responsibility					
Average rank by volume	28	6.5%	144	5.1%	1.4%*
Average rank by value	28	11.4%	144	5.8%	5.6%***
Auditors and international banks participation					
		% of total IPOs (N = 49)		% of total IPOs (N = 144)	
Top 4 Auditor	46	93.9%	102	70.8%	23.1%***
International bank responsible for prospectus	2	4.1%	27	19.4%	-15.3%***

TABLE 4
Underpricing and gross spread across periods

The table shows the statistics for underpricing and gross spread across various groups of IPOs against the IPOs conducted after 24th April 2007 (called *2007-2016 Period*). *1999-2007 Period* group consists of IPOs conducted from 1999 up to 24th April 2007. *No NM IPOs* stands for IPOs conducted before 24th April 2007 on all segments of the Italian stock exchange except for Nuovo Mercato. *2001-2007 Period* group consists of IPOs conducted from 2001 up to 24th April 2007. Difference in means/medians columns measure the difference in means and medians of the various groups of IPOs against the IPOs conducted after 24th April 2007. Significance of difference in means is tested with t-test (both with equal and unequal variances across subsamples), difference in medians – using Wilcoxon/Mann-Whitney test. *, **, *** - denotes 10%, 5%, and 1% significance level of the test.

	2007-2016 Period, N=49	1999-2007 Period, N=144	*Diff. in means/medians*	No NM IPOs, N=103	*Diff. in means/medians*	2001-2007 Period, N=115	*Diff. in means/medians*
1st day underpricing, %							
N of obs.	49	143		103		79	
Mean	5.1	9.6	*-4.5*	6.8	*-1.7*	5.2	*0.1*
Median	2.4	1.3	*1.1*	0.9	*1.5*	1.0	*1.4*
Gross spread, %							
N of obs.	48	129		90		76	
Mean	3.4	4.1	*-0.7****	3.8	*-0.4***	3.8	*-0.3**
Median	3.5	4.1	*-0.6****	3.8	*-0.3**	3.8	*-0.3*

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