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

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Abstract

The article starts with an introduction to the “economics” of Initial Public Offerings (IPOs), the “economics” of book-building and clarification of the important role played by institutional investors in determining the final offer price and the allocation of shares. The article then goes on to analyse the interrelation between the provisions of the CDR 2017/565 supplementing MiFID II (in particular Articles 38-40) and the complex system established by the PR (in particular under Article 17) and the MAR (especially with respect to market manipulation) during IPOs for the purposes of investor protection from a European perspective. The question addressed is the extent to which the IPO conflict of interest rules laid down by the CDR 2017/565, particularly where they may give rise to market abuse, can function as an ex ante preventive mechanism, as opposed to relying on ex post sanctions for market manipulation. The article then considers the Italian IPO system by analysing certain practices that may be considered to be problematic in the light of the CDR 2017/565 rules. In particular, the article argues that, even if the important role played by institutional investors in final price determination is accepted, in “problematic” IPOs the practice of shifting shares to retail investors (with clawback clauses) may be suspected as amounting to market abuse in terms of market manipulation also based on the CDR 2017/565 rules. As a further step, it should be possible to empirically analyse the extent to which the post-2018 regulatory regime has implied a reduction in the use of clawback clauses, thereby mitigating the risk of enforcement for market abuse.

Keywords: Initial Public Offering, IPO; Prospectus Regulation, Market Abuse Regulation, MiFID II; CDR 2017/565, investor protection, placing; book-building, laddering, spinning, price discovery, market integrity, allocations, conflicts of interest, vertical conflicts of interest, horizontal conflicts of interest, market manipulation, insider trading.

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15 April 2026

SUMMARY: 1. Introduction. - 2. A primer on the economics of IPOs, book-building for determining the final offer price and allocation of shares. - 3. The European IPO regulatory framework: the PR, the MAR and MiFID II-CDR 2017/565. - 3.1. Protection rules under the Prospectus Regulation. - 3.2. Protection rules under the Market Abuse Regulation. - 3.3. The MiFID II protection system. - 3.3.1. The CDR 2017/565 regulatory framework. - 4. The IPO European (retail) investor protection resulting from the PR, the MAR and MiFID II in the book-building process. - 5. The Italian regulatory regime and IPO (retail) investor protection. - 5.1. Market abuse and management of conflicts of interest in final price setting under the old and new regulatory regimes. - 6. Conclusions.

ABSTRACT: The article starts with an introduction to the "economics" of Initial Public Offerings (IPOs), the "economics" of book-building and clarification of the important role played by institutional investors in determining the final offer price and the allocation of shares. The article then goes on to analyse the interrelation between the provisions of the CDR 2017/565 supplementing MiFID II (in particular Articles 38-40) and the complex system established by the PR (in particular under Article 17) and the MAR (especially with respect to market manipulation) during IPOs for the purposes of investor protection from a European perspective. The question addressed is the extent to which the IPO conflict of interest rules laid down by the CDR 2017/565, particularly where they may give rise to market abuse, can function as an ex ante preventive mechanism, as opposed to relying on ex post sanctions for market manipulation. The article then considers the Italian IPO system by analysing certain practices that may be considered to be problematic in the light of the CDR 2017/565 rules. In particular, the article argues that, even if the important role played by institutional investors in final price determination is accepted, in "problematic" IPOs the practice of shifting shares to retail investors (with clawback clauses) may be suspected as amounting to market abuse in terms of market manipulation also based on the CDR 2017/565 rules. As a further step, it should be possible to empirically analyse the extent to which the post-2018 regulatory regime has implied a reduction in the use of clawback clauses, thereby mitigating the risk of enforcement for market abuse.

KEYWORDS: Initial Public Offering; IPO; Prospectus Regulation; Market Abuse Regulation; MiFID II; CDR 2017/565; investor protection; placing; book-building; laddering; spinning; price discovery; market integrity; allocations; conflicts of interest; vertical conflicts of interest; horizontal conflicts of interest; market manipulation; insider trading.

1. Introduction

Historically and comparatively, investor protection has been the primary objective of securities regulation in both the U.S. and the EU, consolidating firms' ability to raise capital for investment.[1] Investor protection is also an important regulatory concern during Initial Public Offerings (IPOs). An IPO is the complex procedure that transforms a privately-held company into a public, registered entity, i.e. listed on a stock exchange.

The European system of IPOs in a regulated market[2] is mainly the result of three major pieces of financial legislation. These have evolved over the last few decades and have been increasingly refined and largely unified through the legislative instrument of the regulation used also for secondary regulation:[3] (i) the Prospectus Regulation (hereinafter PR),[4] (ii) the Market Abuse Regulation (hereinafter MAR) as

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

[2] Thus excluding the more flexible possibility of listing on a Multilateral Trading Facility or MTF.

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

Moreover, this article does not consider potential competition law aspects of IPOs with respect to underwriters and/or institutional investors, on which for the U.S., where the "implied antitrust immunity" doctrine is applied also to IPOs, see 551 US 264 (2007), *Credit Suisse Securities (USA) LLC, fka Credit Suisse First Boston LLC, et al. v. Billing et al*. In general, see Hovenkamp (2003), Baronades (2005), 868, Kling (2011), Weinstein (2019). See Kwan (2024) for the U.S., UK, and other countries and Van Dijk, Jenkinson and Pham (2024) for the UK, as well as FCA (2019) for a discussion of competition law involving the sharing of information relating to IPOs among asset managers as institutional investors.

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

supplemented by MAD II,[5] and finally (iii) the Market in Financial Instruments Directive (hereinafter MiFID II).[6]

The interplay between these three major components of the European law on IPOs is complex not only in itself, but also with respect to the private law/contract law of each Member State. These elements apply the unified (or harmonised in the case of MiFID II) European regime to their civil/private law rules applicable to IPOs. It is with respect to this last element that Commission Delegated Regulation (EU) 2017/565 (hereinafter CDR 2017/565)[7] sets out some core principles and rules to supplement the national civil law framework for public offerings also for purposes of investor protection (and market integrity). These core principles and rules are based on the provisions on conflicts of interest laid down MiFID II (mainly Articles 16(3), 16 (6) and 23, but also Recital 56).[8] More specifically, while Articles 33 to 35 concern conflicts of interest in general,[9] essentially replicating Articles 21 to 23 of Directive 2006/73/CE (the predecessor of CDR 2017/565),[10] Articles 38 to 40 CDR 2017/565 set out specific rules specifically on underwriting, placing and the (book-building) process of final price setting.[11] These rules are intended to avoid some common conflicts of interest in order to ensure the proper determination of the final offer price and allocation policy for the IPO.[12] To be sure, conflicts of interest are pervasive in financial intermediation,[13] and are present also within the context of an IPO,[14]

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[5] 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; MAD II, Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive).

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

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

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

[9] Articles 36 and 37 are dedicated respectively to *Investment research and marketing communications* and *Additional organisational requirements in relation to investment research or marketing communication*.

[10] For the Italian legal system, on conflicts of interest in the provision of financial services, see e.g. Enriques (1996); Sartori (2001); Annunziata (2004); Maffeis (2008); Presti and Rescigno (2008); Lener (2008); Perrone (2008); Denozza (2009); Antonucci (2009); Lener (2011); Maffeis (2012); Di Amato (2019); De Poli (2020); Maffeis (2020); Viti (2021). For the UK see Band (2006) and (2007), while for Germany Buck-Heeb (2010).

[11] For a previous introduction to and treatment of conflicts of interest in securities offerings, see Kumpan and Leyens (2008); for the U.S. see Baronades (2005).

[12] Conflicts of interest in IPOs include more broadly Articles 38-43 CDR 2017/565. To be sure, (some of) the relevant Articles can be applied also to secondary offerings (seasoned offerings in U.S. English), which are not discussed in this article.

[13] See Geneva Reports (2003); see also the surveys by Mehran and Stulz (2007) and Burke *et al.* (2015).

[14] See IOSCO (2007); Accettella (2013), 132; Kumpan and Leyens (2008).

considering also that the universal banking system, where commercial banks also engage in investment banking activities, amplifies the problem.[15] The importance of conflicts of interest for (retail) investor protection can be derived also from the announcement by ESMA in December 2025 concerning the launch of a Common Supervisory Action (CSA) with National Competent Authorities (NCAs) on conflicts of interest in the distribution of financial instruments.[16]

This article analyses how the specific CDR 2017/565 rules inside the complex system created by the major pieces of legislation mentioned operate with a view to assessing their interrelation from both a legal and an economic perspective for the purposes of (retail) investor protection within a European perspective. The rules on conflicts laid down by the CDR 2017/565 regulate in part certain behaviours that could give rise to market manipulation; as such, their regulation may be considered to operate as a preventive mechanism against market abuse (in particular, against market manipulation). Given this preventive nature, the question addressed in this article from an European perspective can be framed in the following terms: how do the rules on conflicts of interest in relation to IPOs laid down by the CDR 2017/565 interact, within the broader context of the national IPO regulatory framework, with the PR and the MAR, in order to complement them and serve as an ex ante preventive mechanism as opposed to potential ex post sanctions for market manipulation?

To answer this question, this article presents an analysis (featuring some comparisons with the U.S. system) based on the unified regulatory strategy at the level of the PR, the MAR and CDR 2017/565, although only harmonised at the level of MiFID II, focusing on the various factors that affect its operation. The article then concentrates on the Italian IPO system, taken as an example among 27 IPO European national systems,[17] analysing some practices that may be considered to be problematic also in the light of the CDR 2017/565 rules, and asking a more specific question tailored to the Italian regime.[18] In particular, without considering the complex issue of potential (national) remedies,[19] it is argued that the practice of shifting shares to retail investors (through so-called clawback clauses) within "problematic" IPOs (i.e.,

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[15] On universal banking see in general Benston (1994); on conflicts of interest in universal banking, Guiso (2004); Mehran and Stulz (2007), 272; Avci, Schipani and Seyun (2018).
[16] See ESMA (2025).
[17] I stress that, given the potential peculiarities of the individual national IPO regimes and given the general terms in which conflicts of interest are regulated by the CDR 2017/565, the very general European research question can be adapted in order to analyse national problems and issues.
[18] For the Italian regime the question can be framed as follows: given the problem of clawback clauses typical of Italian IPOs that can lead to the selling/shifting to retail investors of overpriced shares (which institutional investors do not buy because they are too expensive) and provided that this behaviour can be sanctioned ex post in terms of market manipulation, to what extent do the specific rules on conflicts of interest operate as a preventive ex ante instrument in order to prevent the selling/shifting activity that could be sanctionable ex post under the MAR?
[19] Due to its complexity, this issue falls outside the scope of this article.

overpriced IPOs) may be suspected as amounting to market abuse (and, in particular, market manipulation), based also on the 2017 CDR rules.[20] In future, it should be possible to empirically test the extent to which the post-2017 regulatory regime (in force since 3 January 2018) has entailed a reduction in the use of clawback clauses to reduce the danger of enforcement for market abuse/market manipulation.

The article is organised as follows. Section 2 explains the economics of the IPO procedure, concentrating on the economics of the book-building system for price determination, which is an essential element also of the European regulatory regime for IPOs. Section 3 presents a picture of the European IPO regulatory system, concentrating on the main aspects of the three legislative instruments with the objective of demonstrating how they converge on (retail) investor protection (and market integrity). Section 4 describes the IPO European (retail) investor protection regime resulting from the PR, the MAR and MiFID II-CDR 2017/565 in the book-building process in relation to the various potential conflicts of interest liable to arise among the relevant parties (i.e. underwriters, listing company, selling shareholders, institutional and retail investors), discussing the factors that are critical for its proper operation. Section 5 analyses the Italian regime, setting out the national characteristics of the harmonised/unified European IPO regulatory system with the aim of assessing clawback clauses under the old regime (pre-2018) and under new regime influenced by MiFID II-CDR 2017/565 (post-2018). Some brief conclusions are set out in Section 6.

2. A primer on the economics of IPOs, book-building for determining the final offer price and allocation of shares

An IPO is the most common procedure according to which a privately-held company is transformed into a public, registered entity that is listed on the stock exchange.[21] While regulatory regimes can differ in terms of some details, the "economics" of IPOs is quite standardised worldwide.[22] Indeed, financial economists analyse the three

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[20] The article does not provide an analysis of the Italian national rules with the objective of providing an exhaustive answer to the question posed with reference to Italy. While this falls outside its primary scope, such an analysis could be developed by building on the broader European framework and key considerations that the article briefly outlines.

[21] For more recent alternatives to the IPO such as direct listing and Special Purpose Acquisition Companies (SPAC), see Huang and Zhang (2022); for Seasoned Equity Offerings (SEO), see Bortolotti, Meggison and Smart (2025).

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

main economic phenomena arising in relation to IPOs: (i) underpricing, (ii) cycles in the number of IPOs, and (iii) long-term underperformance.[23]

An IPO involves mainly the issuer (the listing company and possibly also the offerors) and the investors accompanied by other actors (gatekeepers). The most important actors include the underwriters,[24] which create consortia (underwriting syndicates) that can be organised mainly in three ways.[25] There are essentially three mechanisms for pricing IPOs and allocating shares to investors: (i) fixed-price offering, where the offer price is set ex ante,[26] (ii) open-price system, where the price is not fixed ex ante, and is potentially determined according (a) either to a book-building process,[27] or (b) through an auction.[28,29] The open prices system with book-building process is the most commonly used mechanism worldwide for determining the final offer price and has replaced fixed price offerings. It is also generally preferred to auctions.[30] Book-building enables underwriters to have complete discretion in the allocation of shares among investors,[31] and has developed rapidly throughout the world also because it permits a lower level of underpricing, particularly compared to fixed price offerings.[32]

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[23] See Ritter (2007), 279. On underpricing see the survey by Jones and Yeoman (2019).

[24] A consortium of underwriters (i.e. banks and investment firms) helps the listing company to organise the offer of shares that come (i) either from a capital increase of the listing company, or (ii) from sales by major shareholders or (iii) a mix of the two. The capital increase is the most common form of IPO in the U.S., where shares are first acquired by the underwriting syndicate according to a firm commitment agreement and then sold on to investors. In most cases, pre-IPO shareholders do lock up their shares for a period after the IPO in order to signal to IPO investors their confidence in the listed company; on lock-up agreements see Boreiko and Lombardo (2013).

[25] (i) Firm commitment syndicates, where the underwriters buy/subscribe to ex ante at a discount the shares to be offered to investors; (ii) strict underwriting syndicate, where underwriters undertake to buy/subscribe to ex post the shares they are not able to allocate/sell to investors; (iii) best efforts syndicates, where the underwriters undertake to do their best to allocate/sell the shares to investors but not to buy/subscribe to them. In general, see Hazen (2022), 15; for a survey on the economics of underwriting, see Deereper and Schwienbacher (2019). On underwriting syndicates, see Allen (1991).

[26] Ritter (2003), 426: *offre à prix ferme*.

[27] Ritter (2003), 426: *placement garanti.*

[28] Ritter (2003), 426: *offre à prix minimal*; see also Ritter (2007), 281. There are also instances of mixed use of book-building and auctions. For a study on the merits of book-building as opposed to auctions under the UK regime, see Myners *et al.* (2014) and on the dissemination of book-building through the world, Table 3, 89; on the Report of Myners *et al.* (2014), see critically Lim (2016).

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

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

[31] This point is essential and is stressed within the economics literature.

[32] See Myners *et al.* (2014), 53 and Appendix 2. Apparently, according to Cham, Libson and Mugerman (2025), the more recent increase in IPO underpricing has been caused by the involvement of the Big Three Institutional Investors (BlackRock, Vanguard and Fidelty) in the U.S. IPO market.

The U.S. IPO regulatory regime is (empirically) the most widely studied and has served as a paradigm for many other jurisdictions.[33] In the U.S. IPO system, according to Section 5 of the Securities Act (SA), essentially the following process applies, which is divided into three main periods:[34] (i) the pre-filing period, where a price range (according to item 501(b)(3) of Regulation S-K)[35] is determined in the (preliminary) prospectus,[36] based on due diligence estimations and more recently also on contacts with qualified institutional investors (QIBs) in order to "test the waters";[37] (ii) the waiting period, where the registration statement is filed with the SEC; and (iii) the effective period, where the SEC confirms the effectiveness of the registration statement, and the final prospectus with the final offer price is produced. "Gun jumping" rules apply during the waiting period. This means that the lead underwriter presents the listing company to institutional investors through roadshows and collects their non-binding orders, [38] which are mainly of three types: strike, limit and step bids.[39] Following the roadshow and the book-building process, the underwriters (the lead underwriter(s)) set the final price and allocation among investors.

The financial literature has developed (with respect to the U.S. system) mainly two explanations for final price setting and allocation strategies within IPOs. The first is the so-called *quid pro quo* theory, while the second is the "information revelation theory".[40] The *quid pro quo* theory essentially argues that the IPO pricing and allocation strategy is shaped by conflicts of interest between the underwriter and the issuing

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

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

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

[36] The "first price indication is disclosed in the form of an offer price range. It represents the minimum and the maximum achievable offer price, corresponding to the lowest acceptable price for the issuing firm and the highest price predicted by the underwriter to clear the market", Severini (2020), 33 and "no formal theoretical model has been presented in the existing literature regarding the process by which underwriters choose the initial offer price range" (Chemmanur, Krishnan & Yu 2016, p.15). It is reasonable to think that the existence of repeated interactions between the lead manager and the underwriter syndicate or regular investors could influence the IPO price range setting", 36.

[37] Indeed, since December 2019, it has also been possible for listing companies to engage in testing-the-waters according to Rule 163B, i.e. to gauge institutional investors interest for the IPO, see Hazen (2022), 19.

[38] Hazen (2022), 21.

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

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

To be sure, for a very recent survey on theories about retail vs institutional investors participation to IPOs, see Maury and Kumar (2026), while Corrigan (2019) for a behavioural theory of IPO pricing.

firm.[41] This kind of literature points to conflicts of interest and problematic behaviours involving underwriters, which can be regulated by law both in terms of prospectus liability as well as anti-fraud and market manipulation rules, such as those common under the IPO dot-com bubble of 2000.[42] This resulted in a number of law suits[43] and regulatory intervention in form of an interpretative release by the SEC in April 2005.[44] Indeed, the IPO final offer price setting and the allocation strategy were affected by certain instances of favouritism, including among others laddering and spinning.[45] Laddering, as a form of tie-in agreement, is an agreement between the underwriters and some investors, where IPO "initial investors would commit to buy additional shares of the offering company's stock in secondary market trading in return for allocations of shares in the IPO".[46] Spinning refers to "the allocation by underwriters of the shares of hot initial public offerings (IPOs) to company executives in order to influence their decisions in the hiring of investment bankers and/or the pricing of their own company's IPO".[47]

The SEC interpretative release of 2005 was issued based on the anti-manipulative rules laid down in Regulation M. It defined a set of prohibited behaviours related to pricing and allocation which, even if not explicitly classified also as potential conflicts of interest in IPOs, are functionally related to possible IPO conflicts of interest with potential manipulative effect. These rules are preventive in nature and are intended to inform underwriters about possible anti-manipulative sanctions. The extent to which the *quid pro quo* theory still has effective explanatory power for the U.S. IPO system cannot be assessed in this article.[48] Indeed, the question is whether the regulatory regime (Regulation M and some specific FINRA rules also

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

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

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

[44] See SEC (2005). See also NYSE/NASD IPO Advisory Committee (2003).

[45] For the EU, see Section 3.3.1.

[46] Choi and Pritchard (2004), 179.

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

[48] With reference to spinning Liu and Ritter (2010), 2054, comment that it "is worth noting that the spinning of corporate executives has largely ceased since 2000 in the United States. This cessation is due to both a regulatory crackdown and a dearth of hot IPOs to allocate. Although spinning has largely disappeared in the United States, other countries have not prohibited it. As long as rents are present in the form of hot IPOs, rent-seeking behavior will arise. Consequently, we predict that there will be future scandals associated with IPOs as long as there is discretion in the allocation of underpriced shares, as is the case with book-building. If auctions were used for pricing and allocating IPOs, many of the controversial practices associated with IPO allocations would not be present."

explicitly adopted in relation to the prevention and management of conflicts of interest and the prevention of market manipulation),[49] can deal effectively with the conflicts of interest generated by final pricing setting and allocation strategy in U.S. IPOs following the provisions adopted in 2005.[50]

The second type of approach adopted to explain pricing and allocation strategy in IPOs is the "information revelation theory".[51] It enhances the role of institutional investors as information providers and, ultimately, as essential actors within final price setting. The most important type of order for information revelation purposes is the limit bid, while the strike bid is less important.[52] The flow of information from institutional investors to the lead underwriter(s) is essential in determining the final offer price and complements to some extent the information gained during the due diligence stage in setting the final price range.[53] According to the information revelation theory, underwriters reward regular investors (particularly those with whom they have repeated interactions), who reveal their proprietary information about the quality of the listing company (based on their evaluation of it) and the preferred allocation of shares.[54] This allocation strategy is efficient because it has the potential to reduce underpricing by remunerating the disclosure by institutional

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[49] Inside FINRA Rules 5000. SECURITIES OFFERING AND TRADING STANDARDS AND PRACTICES, see FINRA Rules: 5110 on Corporate Financing Rule — Underwriting Terms and Arrangements; 5121 on Public Offerings of Securities With Conflicts of Interest; 5130 on Restrictions on the Purchase and Sale of Initial Equity Public Offerings; and the important rule 5131 introduced in 2011 on New Issue Allocations and Distributions, including rules on (a) Quid Pro Quo Allocations, (b) Spinning, (c) Policies Concerning Flipping and (d) New Issue Pricing and Trading Practices, including rules on (1) Reports of Indications of Interest and Final Allocations and (2) Lock-Up Agreements, on which see SEC (2010) as well as De Falco *et al.* (2011) and LaVigne *et al.* (2011); and finally, see Rule 5190 setting forth the notice requirements applicable to all members participating in offerings of securities for purposes of monitoring compliance with the provisions of SEC Regulation M on market manipulation in securities offerings. On conflicts of interest, see also FINRA (2013) and Tuch (2014), for providing a critical analysis of FINRA enforcement system. On the relationship between underwriters and the IPO company, see for the U.S. system Tuch (2007). To be sure, the Dodd-Frank Act of 2010 provided for further regulation of the relationship between investment advisers and broker-dealers and (retail investors), which covers also the issue of conflicts of interest, a topic beyond the scope of this article but on which see Sartori (2001), 199; Mondini (2008); Hazen (2010); Tuch (2015), 547; Guernsey Jr. (2019); SEC (2011); SEC (2019a) on Regulation Best Interest and Schadle (2020); on advisors, including investment advisors and broker-dealers, as fiduciaries, see also Laby (2020).

[50] The recent FIGMA IPO, which saw exceptional underpricing, could be interpreted as preferential allocation in order to favour certain institutional investors; see the Article by Craig Coben published online on Aug 4 2025 on the Financial Times, Figma's IPO was fine, actually.

[51] Lowry, Michaely and Volkova (2017), respectively Section 5.2, 229. Book-building is referred to as a mechanism to induce investors to reveal their price valuation in order to obtain preferred allocations, Benveniste and Spindt (1989); Spatt and Srivastava (1991).

[52] Cornelli and Goldreich (2001), 2340.

[53] Severini (2020), 34; Crain, Parrino and Srinivason (2021), discussing also theories that stress the substitution between due diligence and book-building.

[54] Cornelli and Goldreich (2001); Cornelli and Goldreich (2003); Jenkinson, Jones and Suntheim (2018). However, see Lowry, Michaely and Volkova (2017), 45, for a relativisation of the empirical evidence in support of the information revelation theory; see also Jenkinson and Jones (2004).

investors of information about the value of the listing company. At the same time, by distinguishing between institutional, informed investors and retail investors, this allocation strategy that rewards informed investors for providing "material", proprietary information can create tensions with retail investors. Indeed, retail investors: (i) on the one side, cannot price the IPO and must rely on the pricing skills of informed investors,[55] and (ii) on the other side, can be (efficiently?) discriminated against in allocations, particularly for more underpriced IPOs.[56]

Overall, the reduction in underpricing resulting from book-building may be welcomed from the perspective of the issuer and selling shareholders because they lose less money (underpricing as "money left on the table").[57] On the contrary, a lower level of underpricing is negative for IPO investors (both institutional and retail investors), who pay relatively more for the shares than they would have with a higher level of underpricing. The consequences of reduced underpricing for underwriters are difficult to assess, depending on the risk of the type of underwriting agreement as well as the fee structure.[58]

In this context, final price setting is a very delicate "mission" for the lead underwriter(s),[59] which is *per se* structurally shaped also by (potential) conflicts of interest among the various parties involved.[60] The financial literature has stressed the (potential) conflicts of interest arising from IPO pricing and allocation strategies, particularly those arising between the listing company and underwriters (as stressed by the *quid pro quo* theory).[61] The recent tendency of European issuers to engage an independent IPO advisor that is under a duty to control the underwriting syndicate and pricing activity has not led to a reduction in underpricing.[62] However, it can be

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[55] This is also the case for IPOs as it is on the secondary market with ECFM and FOTM, see Lombardo (2025).
[56] Meaning that institutional investors are more rewarded within more underpriced IPOs for their role in terms of information revelation theory.
[57] Ritter (2002), 427, the "money left on the table in an IPO is defined as the number of shares offered multiplied by the first day capital gain, measured from the offer price to the closing price".
[58] And also on stabilisation activity, on which see Lombardo (2007); Boreiko and Lombardo (2011a).
[59] Usually the final price "is not a market-clearing price, but a lower price which thereby generates excess demand. This in turn increases the sell side's discretion to allocate shares to investors who have helped in the price discovery process or who are deemed to be attractive long-term shareholders for the company", Van Dijk, Jenkinson and Pham (2024), 125.
[60] Baronades (2005), 862: "The federal regulatory framework governing offerings presenting conflicts of interest is atypical: however: it seeks to assure directly that securities sold in these public offerings are properly placed" … 870: "An investment bank underwriting an IPO may consider both the issuer and the IPO investors to be the bank's clients".
As mentioned, potential competition law issues are not treated in the context of the book-building procedure, see Van Dijk, Jenkinson and Pham (2024).
[61] See Lowry, Michaely and Volkova (2017), 52, for the conflict of interest between the listing company and the underwriters; see also Jenkinson, Jones and Suntheim (2018).
[59] See Jenkinson, Jones and Suntheim (2018); see already Jenkinson and Jones (2009) and for a very recent study Jenkinson, Jones and Pezier (2026).

interpreted also as an attempt to avoid potential conflicts of interest between issuer and underwriting syndicate on the relevant issue of price setting.[63]

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

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

3.1. Protection rules under the Prospectus Regulation

For an IPO company, the need to publish a prospectus is justified because the disclosure of information in cases of offer of securities to the public or admission to trading of securities in a regulated market is vital to protect investors by removing information asymmetries between them and the issuer (Recital 3 PR),[64] as well as to ensure investor protection and market efficiency while enhancing the internal market for capital (Recital 7 PR). The disclosure includes information related to the offering and the listing company, as detailed in Commission Delegated Regulation 2019/980 (hereinafter CDR 2019/980).[65] The information provided is that which, according to the nature of the issuer and of the securities, is necessary to enable investors to make an informed investment decision. This information, together with rules on the conduct of business (as provided by MiFID II and CDR 2017/565),[66] ensures that investors are protected.[67]

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[63] In the IPO of eToys (or EBC I, Inc.) of 1999, in 2005 "the New York Court of Appeals held that an underwriting agreement for an initial public offering (IPO) typically would not create a fiduciary duty for the underwriter. ... However, an advisory relationship between an underwriter and issuer, marked by trust and confidence, would give rise to a fiduciary duty. … In the 1990s, eToys, Inc. decided to go public to obtain additional financing and retained Goldman as lead underwriter. … After eToys entered bankruptcy, unsecured creditors sued Goldman on behalf of the company. … The complaint alleged that eToys relied on Goldman's advice, which Goldman provided without disclosing a conflict of interest", Laby (2020), 976. See also Band (2006), 680.

[64] The literature on (mandatory) disclosure is very broad, although see Enriques and Gilotta (2015); Lombardo (2025); Schammo (2025) for prospectuses.

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

[66] On which, see Gilotta (2025).

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

Article 17 PR (on the final offer price and amount of securities) is relevant for price determination (and the final amount of shares to be offered).[68] It includes the possibility that the offer price (and the amount of securities) may not be ex ante determined (as in fixed price offerings), but is rather ex ante open and ex post determined (by way also of a book-building process or auction) at the end of the offering process.[69] The construction of Article 17 PR is interesting and replicates in terms of its outcome the high degree of flexibility for final IPO price determination within the U.S. system. At the same time, Article 17 PR has operated—and continues to operate—within a more flexible institutional framework than the rigid pre-filing regime in the U.S., which has only recently been relaxed through the introduction of "testing-the-waters" communications.[70] Indeed, in Europe it is possible for underwriters to contact institutional investors during the first stage of the IPO in order to set the formal (indicative) price range (pilot fish).[71] Furthermore, the European system is flexible also with regard to another aspect, in comparison to the U.S. system. It allows the prospectus for the offer (which must be approved by the competent authority) to state the price range and to simply communicate to the market by way of a communication the final price (and/or the final quantity) determined at the end of the offering, after assessment of the book-building order book.[72] The only rigidity compared to the U.S. system appears to be that related to the possibility of modifying the initial price range (and/or the initial quantity range): in Europe a supplement to the prospectus must be published according to Article 23 PR (and Recitals 65 and 66) and approved by the competent authority (with a right of withdrawal for initial investors).[73]

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

[69] The content of Article 17 PR is similar but not identical to items 501(b)(2) and (501)(b)(3) of Regulation S-K. On Article 17 PR, see Zivny and Mock (2022b), 149.

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

[71] See previously Myners *et al.* (2014), 56; Jenkinson, Morrison and Wilhelm Jr. (2006). Indeed, during the pre-book-building phase, called "Pre-Deal Investor Education" (PDIE), underwriters already contact prospective institutional investors to gain feedback on the quality of the listing company and potential interest on the basis of the informal price range (indicative valuation range); see the recent empirical study by Divakaruni, Jones and Pezier (2025), analysing how pre-book-building contacts between underwriters and institutional investors influence the final price and allocations. On PDIE (pilot fishing or pre-sounding), see also Wohlgefahrt, Johannson and Haberfellner (2025), 77, 2.48 and 2.49.

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

[73] Listing companies and underwriters are reluctant to change this price range in order to avoid risks potentially associated with a delay of the offer, which may also be caused by uncertainty surrounding withdrawal rights. The same was during the PD, for Article 23 PR see Zivny and Mock (2022c), 194, 22.

Despite some (minor) differences with the U.S. price determination regime, Article 17 PR provides for the possibility of tailoring price determination for the financial instrument/security (in this case the IPO share price) according to several variables, including the type of offering, the private law system of the individual Member States and different price setting mechanisms.[74] Indeed, Article 17 PR (see also Recital 55 PR) provides that where the final offer price and/or amount of securities to be offered to the public, whether expressed in number of securities or as an aggregate nominal amount, cannot be included in the prospectus, two alternatives (a)[75] or (b) apply.[76] Alternative (b) is relevant for the purposes of this article because, when interpreted according to Recital 55, it signals that the European legislator is open to the evolution of financial markets. Indeed, it provides, subject to some constraints for investor protection purposes, for a mix of possible combinations for final price determination, which include the open price system with the book-building process.[77] Article 11 PR (Article 6 PD) lays down general rules on prospectus liability in order to protect prospectus content and in particular also the determination of the initial price range (according to Article 17) and to safeguard the interests of investors. In the EU, in contrast with the U.S. (mainly Section 11 SA),[78] the issue of prospectus liability is left under Member State competence and falls outside the scope of this article.[79] Finally, the PR imposes duties to disclose potential conflicts of interest, not all of which need to be specified in detail.[80]

See also Ritter (2003), 427; Jenkinson, Morrison and Wilhelm Jr. (2006). See Myners *et al.* (2014), 59, discussing this rigidity.

[74] As mentioned above, the question as to whether it is a single uniform price is complex, see *supra* fn. 29.

[75] Alternative (a) is the classical instrument for withdrawal provided for by European legislation in many contractual relationships characterised by uncertainty regarding the protection of the party considered to be weaker (i.e. the investor), see Zivny and Mock (2022b), 151.

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

[77] See Zivny and Mock (2022b), 153. For comparative purposes, Item 501(b)(3) (offering price of the securities) of Regulation S-K provides for the option of making the offering on a minimum/maximum basis, providing 1. a bona fide estimate of the range of the maximum offering price and the maximum number of securities offered … and 2. if it is impracticable to state the price to the public, by explaining the method by which the price is to be determined, or instead of explaining the method on the outside front cover page of the prospectus, by stating that the offering price will be determined by a particular method or formula that is described in the prospectus and including a cross-reference to the location of such disclosure in the prospectus, including the page number … *Instructions to paragraph 501(b)(3).*

[78] See Hazen (2022), 48.

[79] On Article 11 PR, see Zivny and Mock (2022a) while on Article 6 PD, see Lucantoni (2019a). On European Prospectus liability, see Busch (2021); Busch and Lehmann (2023) and for several (national) contributions Busch and Lehmann (2025); on Italian prospectus liability, see Boreiko and Lombardo (2019).

[80] See for instance Article 7(8)(c)(iii) on the Prospectus Summary requiring *an indication of the most material conflicts of interest pertaining to the offer or the admission to trading*. To be sure, Section 5 (TERMS AND CONDITIONS OF THE OFFER OF SECURITIES TO THE PUBLIC) of Annex 11 of CDR 2019/980

3.2. Protection rules under the Market Abuse Regulation

Subject to some minor distinctions, the philosophy underpinning the rules on continuous and periodic disclosures by listed companies in the secondary market in both in the U.S. and the EU are designed to support the proper functioning of the price mechanism according to the Efficient Capital Market Hypothesis (ECMH):[81] new information originating from the listed company (corporate information) and from the market (market information) is processed by institutional investor (informed investors as professional traders) and instantly incorporated into prices.[82] Retail investors can free-ride on the pricing activity of institutional investors and continuously refer to a price that is always (a proxy for) the efficient one, also for them. Furthermore, this transmission mechanism also ensures the operation of the Fraud On the Market Theory (FOMT) mechanism according to which, based on Rule 10b-5,[83] investors can rely on the market price at any given moment to claim damages in case of fraudulent material misstatements by the company.[84]

By contrast, there is no formal structure for the primary market (i.e. during IPOs). In the U.S., the FOMT is not applicable to IPOs because the "fraud-on-the-market 'presumption cannot logically apply when plaintiffs allege fraud in connection with an IPO, because in an IPO there is no well-developed market in offered securities'."[85] Moreover, the developed Fraud Created the Market Theory (FCMT), according to which "fraud is so material that without it the securities never would have made to the market",[86] is not recognised for investor protection purposes in IPOs.[87] With respect to market abuse, prohibitions on insider trading and market

does not contain any reference to potential conflicts of interests, which is by contrast present elsewhere. It is not possible to evaluate here the extent to which this absence is intentional or is due to a lack of coordination between the CDR 2017/565 and the CDR 2019/980.

[81] Fama (1970). According to the semi-strong market efficiency level. With some distinctions, the transmission of non-public information (strong level of market efficiency) is limited by insider trading regulations in both the U.S. and Europe, Ventoruzzo (2022).

[82] For the role of institutional investors Kraakman and Gilson (1984); Goshen and Parchomovsky (2006); Klöhn (2013).

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

[84] Goshen and Parchomovsky (2006), 766.

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

[86] Kaufmann and Wunderlich (2012), 278.

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

manipulation apply during IPOs,[88] and Regulation M permits only stabilisation as a form of permitted market manipulation.[89] Nevertheless, probably also due to the fact that, under the U.S. IPO system, the "when issued market" (grey market) does not exist and short selling is prohibited,[90] insider trading liability (which is also prohibited under Regulation M)[91] is covered under the prospectus liability regime (usually, Section 11 SA).[92,93]

The regulatory regime is in some respects different in Europe. According to Article 2(1)(a) MAR, the MAR applies to financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made. The second head means that a European IPO (as is the case for a U.S. IPO) will potentially be covered from the date of the request of admission to trading both by the PR and the MAR. Unfortunately, neither the MAR nor the PR states that the MAR must apply to IPOs, and this is dependent on national law;[94] however, the application of MiFID II and Articles 38-40 of CDR 565/2017 is provided for. Aside from the (unfortunate) failure to provide for the mandatory application of MAR during IPOs, under the European regulatory regime insider trading and market manipulation are normally also enforced during an IPO.[95] Furthermore, in contrast with the U.S. IPO system, European legislation does not prevent the existence at national level of "when issued markets" (i.e. grey markets), where a (weak) form of FOMT could be conceivable, depending on the conditions deemed necessary and sufficient to characterise an efficient market.[96]

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[88] Regulation M (a) preliminary note: *any transaction or series of transactions, whether or not effected pursuant to the provisions of Regulation M …, remain subject to the antifraud and antimanipulation provisions of the securities laws, including, without limitation, Section 17(a) of the Securities Act of 1933 … and Sections 9, 10(b), and 15(c) of the Securities Exchange Act of 1934 …*; Hazen (2022), 24.
[89] Lombardo (2007); Boreiko and Lombardo (2011a). Today, market manipulation in the form of stabilisation does not occur during distribution but only in the after-market phase, i.e. 30 days after the first day of trading.
[90] By Regulation M Rule 105.
[91] See letter (a) Preliminary note in Rule 100.
[92] See Langevoort and Thompson (2013) for prospectus liability; Hazen (2022), 48.
[93] Possible issues of market manipulation are covered by Regulation M.
[94] There may be cases in which the MAR is not applied during IPOs because the MAR does not specify the date at which is applicable, leaving this determination to national (company) law. See ECJ Case C-910/19 of 3 June 2021, *Bankia SA v Unión Mutua Asistencial de Seguros* (UMAS), on which see Lombardo (2022a).
[95] Subject to the exemption under Article 5 MAR on stabilisation activity, which has a narrower scope than its U.S. model, on which see Boreiko and Lombardo (2011); Lombardo (2022b).
[96] See Ritter (2003), 427; Cornelli, Goldreich and A. Lungqvist (2006); Khurshed *et al.* (2018).

3.3. The MiFID II protection system

The MiFID II investor protection system is quite complex and is primarily structured around the distinction between professional and retail investors.[97] For the purposes of this article, the main elements of the regulatory framework under the MiFID II protection system are essentially (i) conduct rules that shape the contractual relationship between the investment firm and the investor, as well as the contractual relationship between the investment firm and the IPO company (and/or the selling shareholders as offerors),[98] and (ii) conflict of interest rules.[99]

Rules of conduct apply to the provision of investment services and a taxonomy of the relevant services provided under MiFID II by an IPO includes both (i) those arising from the relationship between the investment firm and the investor(s), which may take different forms,[100] and (ii) those arising from the relationship between the investment firm (underwriter) and the IPO company which may also take different forms.[101] The system of investor protection (cf. Section 2 on provisions to ensure investor protection) starts with Article 24 on general principles and information to clients and aims to structure a fair contractual relationship between the investment firm and clients/investors.[102]

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

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

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

[100] (a) Reception and transmission of orders in relation to one or more financial instruments; (b) execution of orders on behalf of clients; (c) dealing on own account; (d) investment advice (see Annex I Section A MiFID II). To be sure, portfolio management could also be included. The provision of a different level of protection in relation to the services provided and the type of client (Article 29a) is reflected essentially by (i) suitability for investment advice and portfolio management and (ii) appropriateness for other services (Article 25 MiFID II in Section II on provisions to ensure investor protection).

[101] In (a) underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis; (b) placing of financial instruments without a firm commitment basis, on the other side (see Annex I Section A MiFID II). Furthermore, also ancillary services under Section B MiFID II can be relevant for IPOs, in particular number 3, 5 and 6, see also Article 38(1) CDR 2017/565.

[102] Article 24 is complex and is applicable both to the relationship with retail investors as well as that with institutional investors because, at the core, it provides that investment firms offering services or, where appropriate, ancillary services to clients, must act honestly, fairly and professionally in accordance with the best interests of their clients and comply, in particular, with the detailed principles and rules (specified also in Articles 44-54 CDR 2017/565, where the reference to investment firms includes also credit institutions ex Art. 1.2). On Article 24 MiFID II, see Brenncke (2019b).

Conflicts of interest in MiFID II are organised on two levels: organisational duties and contract/disclosure duties,[103] and Recital 56 establishes the order of priority between the two levels.[104] Article 9(3),[105] as well as Article 16(3) and 16(6) and Article 23[106] lay down principles designed to ensure the management of conflicts of interest. These can arise between the investment firm and the client (vertical conflict of interest), but also between different clients (horizontal conflicts of interest).[107] In particular, while Article 16(3) lays down general principles, Article 16(6) specifically refers to the MAR and to the integrity of the market, establishing a regulatory (and enforcement) link between the management of conflicts of interest in IPOs and the market abuse provisions of the MAR. This means that the management of conflicts of interest in IPOs can be assessed also from the perspective of and for the purpose of enforcing market abuse rules.[108]

3.3.1. The CDR 2017/565 regulatory framework

The CDR 2017/565 is a complex delegated act specifying in detail the principles and rules laid down by the MiFID II in relation to certain relevant aspects. Conflicts of interest are subject to the general provisions laid down in Articles 33 to 37 (see also Recitals from 45 to 60).[109] These provisions apply to investment firms as well as credit

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[103] For the development of the regulatory strategy between MiFID I and MiFID II, see Grundmann and Hacker (2017); for MiFID I see also Kumpan and Leyens (2008).

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

[105] This Article applies also to credit institutions providing investment services (Article 1(3)(a) MiFID II). On Article 9 MiFID II se Zetzsche (2019a).

[106] Which is very complex but essentially requires investment firms to take all appropriate steps to identify and prevent or manage conflicts of interest and also to disclose them. Note that Articles 16 and 23 also apply to credit institutions under point (a) of Article 1(3) MiFID II. On Article 16 MiFID II see Zetzsche (2019b), while on Article 23 MiFID II see Brenncke (2019a).

[107] See Grundmann and Hacker (2017), 168, 7.07; Rothenhöfer (2025), 1528, 13.9. To be sure, it could be objected that it is possible to have a situation involving a horizontal conflict of interest because, if qualified in terms of an agency relationship (see e.g. Kumpan and Leyens (2008), 79; Viti (2021)), the conflict of interest cannot ontologically be consistent with a relationship among three parties, i.e. it is not possible to be the servant (the investment firm) of two masters (the IPO company and investors). This objection is potentially so strong that, based on it, the *ratio legis* for the rules on horizontal conflicts of interest can be doubted. Nevertheless, since Article 23(1) MiFID II explicitly refers to horizontal conflicts of interest, the intention of European lawmakers in this sense is clear.

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

[109] These Articles resemble the provisions of Directive 2006/73/EC: in particular, Article 33 (on conflicts of interest potentially detrimental to a client resembles Article 21, Article 34 (on conflicts of interest policy) resembles Article 22, Article 35 (on record of services or activities giving rise to detrimental conflict of interest) replicates Article 23, Article 36 (on record of services or activities giving rise to

institutions, which are usually underwriters in (European) IPOs.[110] In principle, the management of conflicts of interest is not dependent on the status of the client to whom the service is provided.[111]

As they apply also to IPOs,[112] the provisions of Article 38,[113] Article 39,[114] Article 40,[115] and Article 43 are of particular interest for this article.[116] These provisions (see also Recital 57) are new and were not included in Directive 2006/73/EC which supplemented MiFID I.[117,118] They are set out in Section 3 on conflicts of interest and enhance the concern that European regulator place on the correctness of the IPO procedure with respect to the offering, final price determination rules (including also the book-building process) and the distribution and placement of shares among investors (allocation). In the U.S., the relevant conduct amounting to potential conflicts of interest in IPOs is set out inside a SEC securities release of 2005 supplementing the anti-manipulation rules of Regulation M.[119] It is interesting to note that, in Europe, lawmakers have not supplemented the provisions of the MAR but have rather incorporated the relevant conduct indicative of conflicts of interest that could potentially result in market abuse into CDR 2017/565, which supplements MiFID II. It is not possible here to assess the nature of and reason for this legal transplant;[120] however, it should be stressed that (some of the) the IPO conflict of

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detrimental conflict of interest) resembles Article 24 and finally Article 37 (on additional organisational requirements in relation to investment research or marketing communications) replicates Article 25.

[110] See Article 1.1 CDR 2017/565.

[111] See Recital 46 CDR 2017/565 and Recital 25 Directive 2006/7/EC.

[112] As well as to a potential capital increase, by way of a seasoned/secondary offering.

[113] On additional general requirements in relation to underwriting or placing.

[114] On additional requirements in relation to pricing of offerings in relation to issuance of financial instruments.

[115] On additional requirements in relation to placing.

[116] On record keeping in relation to underwriting or placing. Article 41 (on additional requirements in relation to advice, distribution and self-placement) and Article 42 (on additional requirements in relation to lending or provision of credit in the context of underwriting or placement) are not relevant here. To be sure, the interpretation of Article 41 is not simple. While by referring to a *new* issue Article 41(1) seems to refer to a secondary/seasoned offering of a listed company, where the investment firm receives commissions, fees or any monetary or non-monetary benefits in relation to arranging the issuance, Article 41(2) explicitly refers to the placing of financial instruments issued by the same investment firm.

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

[118] They were not included potentially because the improper conduct and regulatory answers provided by the SEC release from 2005 were not fully understood at that time in Europe and the IOSCO Report of 2007 on conflicts of interest in public offerings had not yet been published. See IOSCO (2007); see Kumpan and Leyens (2008).

[119] See SEC (2005), but see also *supra* fn. 49.

[120] The fact that these IPO conflicts of interest were included in the CDR 2017/565 has probably to do with the fact the predecessor act (Directive 2006/73/EC), already regulated conflicts of interests from Article 21 and also for financial analysts. Financial analysts were also regulated for conflicts of interest

interest rules laid down in the CDR 2017/565 are functionally linked to potentially manipulative conduct, as are linked to market abuse some behaviours regulated under Article 20 MAR on investment recommendations and statistics, including also the management of possible conflicts of interests, as supplemented by CDR 2016/958. These means that, from a regulatory perspective, the rules of CDR 2017/565 can be interpreted as rules that ex ante preventively regulate certain conduct indicative of conflicts of interest that can give rise to market abuse, which may potentially be sanctioned ex post by the MAR. In this way, the CDR 2017/565 operating preventively ex ante and the MAR operating ex post are two regulatory instruments that deal with potential market abuse.[121]

To be sure, IPO conflicts of interest covered by the CDR 2017/565 can arise in relation to various stages of the IPO process, starting from the initial project of the IPO, including the determination of the (indicative) price range, through finally to the determination of the final price and allocation policy. For the purposes of this article, the conflicts of interest arising in relation to the writing of the prospectus and the definition of the (indicative) price range are of limited interest, as failure to comply with them (in terms of the indication of an incorrect price range) will (also) potentially be covered by prospectus liability.[122] As mentioned above, prospectus liability is provided for under Article 11 PR (Article 6 PD) and is essentially left to the competence of Member States.[123]

It is useful to analyse briefly the individual articles, which apply to investment firms (and credit institutions) and impose specific obligations on them.

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and market abuse purposes under the former Market Abuse Directive, i.e. Directive 2003/6/EC, see in particular Article 6(5) and 6(10) sixth indent MAD, as supplemented for the detailed rules by Commission Directive of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest. Today the relevant rules are in Article 20 MAR, as supplemented by CDR 2016/958, i.e. Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest, on which see Dell'Erba (2022).

[121] As already mentioned, Article 16(6) MiFID II specifically refers to the MAR and to the integrity of the market, establishing a regulatory (and enforcement) link between the management of conflicts of interest in IPOs and the market abuse provisions of the MAR.

[122] An indicative price range could also be covered by the MAR because of market manipulation concerns in setting it.

[123] In other words, a price range that is not reasonable and that is based on erroneous methods of valuation can be protected by prospectus liability. To be sure, market manipulation could also potentially occur in the identification of the price range, but also this scenario falls outside the scope of this article.

Article 38 lays down provisions for managing conflicts of interest in the relationship between the investment firm and the issuer company,[124] i.e. the client (the IPO company and/or the selling shareholders)[125] during the initial stage of the IPO (see also Recital 57).[126] Whereas Article 38(1) sets out certain conduct rules,[127] Article 38(2) tries to prevent potential conflicts of interest arising due to simultaneous IPOs where the investment firms could potentially manage multiple IPOs, sacrificing one IPO with respect to another (see also Recital 57).[128] For these kinds of conflict of interest, a prohibition on involvement is provided for as a last resort. Finally, Article 38(3) regulates execution orders and research services.[129]

Article 39[130] is also intended to regulate the contractual relationship between the investment firm and the IPO company (and/or the selling shareholders) (i.e. the client), although when the IPO has already started and is approaching the final pricing

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

[125] See also Meyer and Rath (2025), 324, 8.16. Indeed, the IPO can include a capital increase and/or selling by certain shareholders.

[126] See also Meyer and Rath (2025), 324, 8.16.

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

[128] See already Kumpan and Leyens (2008), 81.

[129] Article 38(3) is interesting from a comparative perspective because, in the EU IPO context, the simultaneous provision of the underwriting/placing and research services by financial analysts (covered, as mentioned, in Europe for conflicts of interest purposes also by Article 20 MAR and CDR 2016/958) is treated more favourably than in the U.S., an issue which is outside the scope of this article, but see Wohlgefahrt, Johannson and Haberfellner (2025), 77, 2.47. "In the U.S., affiliated analysts do not publish research reports until the end of the quiet period. Although the quiet period restrictions were lifted or relaxed in 2012 and 2015, industry practice continues to be that unaffiliated analysts generally do not initiate coverage of an IPO, and affiliated analysts wait 25 calendar days before initiating coverage. From a regulation perspective, there are benefits and concerns regarding pre-IPO communications from analysts. For investors, more pre-IPO communications such as pre-IPO analyst research help reduce information asymmetry and improve transparency. On the other hand, pre-IPO communications can also be used to condition the market and hype an IPO, increasing the demand" Ritter *et al.* (2018); see also Boissin, Madureira and Singh (2023).

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

and allocation stage (see also Recital 58). While Article 39 is relevant for conflicts of interest in price setting, Article 40 applies in relation to allocation strategies.[131] Considering that price and quantity (and allocation) are the two variables available to underwriters in the book-building process, these two articles play an essential role.

Although Article 39(1) is framed in very general terms, it appears to establish a behavioural standard (free from conflicts of interest) for price setting and seems to require some reasonable level of underpricing (to avoid conflicts of interest and to keep all parties happy). To the extent that the term "relevant parties" includes the various IPO actors, the provision is sufficiently flexible to include also (retail and institutional) investors. This general provision is then specified as a minimum requirement. This means that other requirements to ensure the proper enforcement of the general duty to avoid conflicts of interest in relation to the potential under-pricing or over-pricing of an issue or involvement of relevant parties in the process could conceivably apply. Letter (a) is intended to protect the IPO company and, to the extent that "other clients" includes not only companies' clients but also IPO investment clients, it can be interpreted as aiming to prevent an excessively high level of underpricing, which would run contrary to the interests of the issuing company (and/or selling shareholders).[132] On the other hand, letter (b) is meant to protect the interests of IPO investors that would appreciate a high level of underpricing (contrary to the IPO company and/or selling shareholders) while also wishing to avoid overpricing.[133] Letter (b) provides for the creation of a Chinese walls to separate the personnel involved in final price determination from those involved in selling to final IPO investors.[134]

Article 39(2) sets out principles governing both the determination of the final offer price as well as stabilisation activities under Article 5 MAR, which in any case must be disclosed in the IPO prospectus.[135]

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[131] See already Kumpan and Leyens (2008), 81.

[132] This provision essentially sets a standard of conduct for investment firms in the determination of the final offer price, which has to be immune from improper influence in terms of the investment firm's interest or the investment firm's other clients, which may cover a potentially large group of subjects, depending on the business organisation of the investment firm, including other IPO companies and final investors.

[133] Meyer (2018), 326; Meyer and Rath (2025), 340, 8.41a.

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

[135] According to Meyer (2018), 327, under the book-building process this means that the investment firm informs the company and the shareholders about the order book. See also Meyer and Rath (2025), 340, 8.41a.

Article 40 governs two particularly sensitive stages of the offering,[136] i.e. placing and allocation, and aims to prevent problematic conduct with respect to fairness, anti-manipulation, and non-discrimination (equal treatment) of investors (see also Recital 59). Article 40 is interesting in that, even though it is framed in terms of conflicts of interest principles and rules, it also includes prohibitions on behaviour that, also under the European market abuse regime, can involve manipulative behaviour.[137] Its impact must be assessed according to the civil/contractual law structure of the offering, which is something that is still regulated at Member State level and is disclosed in the prospectus for the IPO.[138] While Article 40(1) concerns future relationships with clients,[139] Article 40(2) draws a distinction between personnel/staff related to different clients (investors and company).[140] Article 40(3) prohibits (a) laddering, (b) spinning, and (c) and other improper allocation, all of which are typically directly indicative of market manipulation. Both EU and U.S. regulators are critical of allocations based on business relationships, which may distort the fairness of the allocation policy and potentially the efficiency of the book-building process and, also in Europe, can be construed in terms of market manipulation. Article 40(4) requires that the allocation policy must be formally documented and disclosed to the IPO company, which must be actively involved also in accordance with Article 40(5).[141] Finally, Article 43 (record keeping in relation to underwriting or placing) provides for record keeping that is useful for an ex post control of underwriting and placing activities, which must occur not only for the purpose of MiFID II compliance but also for Prospectus and MAR purposes (Article 16(6) MiFID II).[142]

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

The analysis of interconnections among the PR, the MAR and MiFID II-CDR 2017/565 has shown how complex the European IPO regulatory system is. Further analysis of the Italian IPO regulatory regime requires a preliminary assessment of the regime

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

[137] This manipulative conduct justified the action taken by the SEC (2005) in order to protect IPOs against allocation strategies (e.g. tie-in agreements, laddering and spinning), which ran contrary to Regulation M, a piece of legislation not explicitly related to conflicts of interests but to market manipulation.

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

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

[140] See Meyer (2018), 334.

[141] See Meyer (2018), 335; see also Wohlgefahrt, Johannson and Haberfellner (2025), 79, 2.55.

[142] Article 43 supplements Articles 16(3), 23 and 24 MiFID II.

described in order to assess its ability to ensure investor protection, and in particular retail investor protection, within the book-building process for the price determination and allocation strategy.[143]

The assessment starts with the observation that the open price system with book-building reduces underpricing in comparison to fixed pricing because the information flow from informed institutional investors to underwriters grants underwriters access to "material" and "proprietary" information about the value of the listing company.[144] Since information is a valuable good, this information flow must be remunerated by the underwriters. Given the constraint imposed by a fixed price for all investors,[145] the only way the lead underwriter(s) can reward those investors that provide the most valuable information is either (i) through favourable allocations (this is the solution in a one-shot game), or (ii) through favourable allocations depending on the level of underpricing in a repeated game, where the lead underwriter(s) interact(s) with some more valuable institutional/informed investors for numerous IPOs.

This "information game", which essentially includes three actors (i) the IPO company and/or selling shareholders, (ii) the underwriters and (iii) the (retail and institutional) investors, is conducive to and essential for the book-building process and the setting of an (optimal) final price and allocation strategy.[146] This information game (with its structure of economic incentives) must operate within a regulatory system, which is provided by the PR regime requiring full disclosure of relevant information about the IPO company, as well as the MAR and the MiFID II-CDR 2017/565 regime.

With respect to the MAR,[147] manipulation in the book-building process can occur not only during a potential grey market (which, as mentioned above, is possible in Europe but not in the U.S.) but also during a normal book-building process, where a market does not really exist during the offering period, but where the lead underwriter(s) accepts orders, thereby constructing the order-book. The kind of manipulation that the lead underwriter(s) can engage in may relate to the

[143] Which is the most common system of price determination in the E.U.

[144] This material/proprietary information is not the material information typical of the insider trading regime, because both in the U.S. and the EU the regulatory regime ensures equal information for all investors via the published prospectus. Institutional/informed investors can assess the information provided in the prospectus against other proprietary information available to them and assess the value of the listing company (information revelation theory), which is essential for final price setting.

[145] Institutional/informed investors and retail investors, where retail investors free-ride on the pricing ability of the former.

[146] Indeed, efficient pricing and allocation are almost a science, and underwriters have to take into consideration a variety of factors.

[147] As mentioned above, the MAR does not explicitly cover IPOs, depending the issue also on national company law.

determination of the final offer price (operative market manipulation), but may also concern the information that the lead underwriter(s) send(s) to investors during the roadshows forming part of the book-building process (informational market manipulation). The European manipulation regime distinguishes between operative manipulation (Article 12(1)(a) and (b) MAR) and informational manipulation (Article 12(1)(c) and 12(1)(d) MAR) and frames both in terms of prices and quantities: it is flexible enough to include manipulative conduct by any operator (including also the lead underwriter(s) and the listing company) affecting not only the secondary market but also the primary market. Within an IPO context, this means that the anti-manipulation regime can operate against both an improper (i.e. manipulative) (i) final price setting and (ii) allocation strategy among investors if (i) and (ii), considered either individually or in conjunction, constitute/result in a manipulative behaviour with a manipulative effect.[148]

With respect to the MiFID II-CDR 2017/565 regime, the conflicts of interest arising within an IPO (with book-building) procedure can be of different types:[149] (i) between the lead underwriter(s) and the listing company (and/or selling shareholders), (ii) between the listing company (and/or the selling shareholders) and investors, (iii) between the (lead) underwriter(s) and investors, (iv) between investors, and in particular between institutional/informed investors. Furthermore, a conflict of interest may also arise between the IPO company and the underwriters as a result of the simultaneous management by underwriters of two or more IPOs. The provisions of CDR 2017/565 set out some conduct rules for underwriters related to the prevention and management of these conflicts of interest, some of which may manifest in ways that raise concerns under market abuse regulations (in particular market manipulation). Indeed, the financial services involved,[150] inherently include the intermediation role performed by underwriters between the IPO company (and/or selling shareholders) and (institutional and retail) investors.[151] This means that underwriters (and their individual consortia/syndicate organisational structure, which is functionally optimised to deal with the individual IPO),[152] have to manage both vertical conflicts of interest as well as horizontal conflicts of interest. In particular, vertical conflicts of interest between the IPO company (and/or selling shareholders)

[148] A related topic, which is not covered in the European literature and is not addressed here, is the issue of insider trading, because under the European regime any flow of information from the lead underwriter(s) to some institutional investors concerning the state of the order book could be considered to be more problematic from a market abuse perspective than under the U.S. system. For anecdotal evidence about this flow, see Van Dijk, Jenkinson and Pham (2024), 120.
[149] See e.g. ISCO 2007; Kumpann and Leyen (2008), 81; Accettella (2013), 133; Meyer and Rath (2025), 347, 8.53.
[150] I.e. (6) underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis and (7) placing of financial instruments without a firm commitment basis.
[151] Accettella (2015), 86; IOSCO (2007).
[152] Which, has mentioned, can be of different types and have different characteristics.

and the underwriters are also influenced by the nature and terms of underwriting/placing contracts. On the other hand, vertical conflicts of interest (i.e. between underwriters and investors) and horizontal conflicts of interest (i.e. between the IPO company and/or selling shareholders and retail and institutional investors) are also influenced by the type of financial service[153] used to execute the allocation or placing of shares for each individual investor.[154] From this perspective, it is useful to remember that Articles 38 to 40 of the CDR 2017/565 refer not only to 16(3) and 23 of MiFID II, but also to Article 24 on general principles and the provision information to clients to ensure investor protection and market integrity (Section II MiFID II), which serves as the cornerstone of MiFID's client best-interest policy.[155] Indeed, as already pointed out, conflicts of interest serve as a key safeguard for the enforcement of conduct rules.[156]

Given the potential variety of conflicts of interest within IPOs, a question arises as to whether the generic rules laid down by Articles 33 and 34, as supplemented by the more specific rules in Article 38 to 40 (and 43), can cover all potential conflicts of interest. Indeed, while the literal wording of the relevant articles and recitals could be interpreted narrowly, an interpretation based on the *ratio legis* (protection of multiple clients in close connection with conduct rules to ensure market integrity) could potentially encompass all conceivable cases. For the purposes of this Article, it is important to note that, even though the complex relationship among (a) underwriters, (b) listing company (and/or selling shareholders) and (c) (retail and institutional) investors does not explicitly highlight potential conflicts of interest between the listing company (and/or selling shareholders) and the investors (aside some minor but important reference), such conflicts can nevertheless be inferred indirectly from the general principles of the regulatory framework. Indeed, the absence of an explicit reference will come as no surprise, considering that the provisions have been constructed primarily based on the relationship between the investment firm and its clients, i.e. the listing company (and/or selling shareholders) and investors. However, the general principles applicable to conflicts of interest (Articles 33 and 34) allow for the identification and management of horizontal conflicts, where underwriters must also manage conflicts of interest between the IPO company (and/or selling

[153] I.e. possibly financial advice, portfolio management, reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients, dealing on own account. For instance, in case of financial advice Article 41(1) CDR 2017/565 also provides that the investment firm that receives commissions, fees or any monetary or non-monetary benefits in relation to arranging the issuance must manage conflicts of interest. According to ESMA to the extent that inducements are included they must comply with the requirements on inducements laid down by Article 24(9) MiFID II, see ESMA (2014a), 90, 17.
[154] Indeed, the relationship with the underwriting syndicate under which the investor can buy/subscribe to shares may be different.
[155] Enriques and Gargantini (2017).
[156] Grundmann and Hacker (2017).

shareholders) and (retail and institutional) investors.[157] In other words, MiFID II and the CDR 2017/565 enable us to identify several potential conflicts of interest in relation to an IPO. This means a conflict of interest could also potentially arise within IPO pricing and allocation strategy where retail investors are sacrificed in favour of the interests of the IPO company and/or selling shareholders, while institutional investors are not (see Section 5 on the Italian case).

To be sure, as is the case on the secondary market also in the IPO game, institutional investors are the only ones that are able to participate to the information game, and retail investors must rely (i.e. must free-ride) on their pricing ability. Retail investors are the weakest actor in IPOs in both the U.S. and the EU, and the legal system has the aim of protecting them as well as market integrity. There are some differences between the U.S. and EU investor protection regimes, although both strongly rely on prospectus disclosure and market abuse, and to a lesser extent on conflicts of interest provisions. In Europe, investor protection under the MiFID II conflicts of interest regime complements the PR and the MAR (both of which provide a high degree of harmonisation, with some exceptions), particularly with regard to the protection of retail investors. As already argued, the CDR 2017/565 can be understood in functional terms as an ex ante preventive instrument for regulating potential conflicts of interest that can give rise to manipulative behaviour also subject to ex post sanctions under the MAR. The MiFID II conflicts of interest regime is nevertheless complex and the extent to which IPO retail investors are effectively protected depends also on Member State law.[158]

First of all, while Articles 33 and 34 and 38, 39 and 40 are established by a regulation, the relevant MiFID II provisions are contained in a directive, the implementation of which is delegated to the Member States not only with respect to conflict of interest rules but also to conduct rules.[159] This impinges on the quality (regulatory quality) of the financial service by which retail investors effectively participate in the IPO. In other words, a key question is whether the conflict of interest regime for protecting (retail) investors is the same or rather depends on the nature of the relationship with the investment firm, i.e. the type of financial service provided.[160] Within this perspective, the fact that enforcement of MiFID II rules is delegated to national competent authorities also plays a role in that they may, or may not, facilitate

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[157] Which were always present in the legal debate.

[158] The "European" question posed by this article has been asked in the following terms: how do the rules on conflicts of interest in relation to IPS laid down by the CDR 2017/565 interact, within the broader context of the national IPO regulatory framework, with the PR and the MAR, in order to complement them and serve as an ex ante preventive mechanism as opposed to potential ex post sanctions for market manipulation?

[159] On the complex relationship between Article 23 and 24 MiFID II and national legal systems with their private law standards, see Brenneke (2019a), 153 and Brenneke (2019b), 156.

[160] E.g. portfolio management, financial advice or simple order execution.

a flexible interpretation of the relevant conflict of interest rules to include behaviours that can be sanctioned ex post as market manipulation.[161]

Furthermore, the contractual terms of the offering can significantly affect investor protection. In Member States where also retail investors can initially submit non-binding orders (as institutional investors in the book-building process typically do), which are later confirmed or not confirmed when the final price is set, the position of retail investors is stronger in cases involving possible over-pricing. By contrast, in Member States (such as in Italy, see Section 5) where retail investors submit binding orders, they are obliged to buy the IPO shares at whatever price is ultimately set within the (indicative) price range.[162]

Finally, the complexity of (different types of) IPO syndicates/consortia of underwriters also plays a role in determining the quality of the effective protection system for retail investors.[163] While the relevant provisions generally describe an underwriting firm organised as a single group entity, syndicates or consortia can be highly complex, particularly when private international law aspects are considered. Retail investors are less protected in Member States where it is possible to organise the IPO syndicate/consortium in such a way to effectively prevent the relevant conflict of interest rules from being effective and enforced (based on a single investment firm dealing with multiple clients).[164]

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

The Italian IPO market experienced a relative acceleration starting with the privatisation of large former state-owned conglomerates in the 1990s and has since been predominantly based on the U.S. style IPO book-building process.[165] With respect to the regulatory regime over the around 20 years between the Investment Services Directive of 1995 (ISD, and MiFID I of 2007) and MiFID II (which entered into force on January 2018), the Italian IPO system can be schematised as follows.[166]

[161] The ESMA could also include a section on conflicts of interest in IPOs in its announced (2 December 2025) consultation. The role and enforcement of/by courts is intentionally not addressed here because of its complexity.
[162] This topic falls outside the scope of this article, but for a comparison between Italy and Germany, see Lombardo (2009).
[163] For a very recent treatment from a German perspective, see Kindt (2025), discussing the international standardisation of underwriting contracts, 464, and the issue of applicable law, also from a European perspective, 467. See also Lener (1995).
[164] Due to its complexity, this topic falls outside the scope of this article.
[165] See Lener (1995).
[166] For a more detailed analysis, see Lombardo (2011); Giudici and Lombardo (2012); Giudici (2014a) and (2014b); more recently, see Vella and Corrente (2020).

In Italian book-built IPOs, shares may be offered through a capital increase (*offerta pubblica in sottoscrizione*, o.p.s.), through a sale by major shareholders (usually the controlling family, *offerta pubblica di vendita*, o.p.v) or a mix of the two. IPOs are generally structured as a global offering (*offerta globale*), coordinated by the global coordinator(s) and divided into two offerings: (a) the Italian public offering (*offerta pubblica*), governed by the *Testo Unico della Finanza* (TUF) and based on the Prospectus regulated by the PD or the PR. This offer is managed by a domestic underwriting consortium (*consorzio di collocamento*), which is structured as a strict underwriting syndicate (*consorzio di garanzia*).[167] The retail tranche is an *offerta al pubblico* in contractual terms and includes ex ante around 30% of the shares falling under the *offerta globale*. Under this system, retail investors submit *binding* orders for a given fixed quantity of shares (*lotto minimo*, e.g. 1,000 shares) or multiples thereof (although limitations on the quantity a retail investor can buy are stipulated)[168] within the price range, with the maximum price being the contractual limit. The institutional offer (ex-ante around 70% of the shares offered under the *offerta globale*) is addressed to Italian and foreign institutional investors according to Regulation S, Rule 144A on the basis of an offering circular (in English) basically replicating the content of the Prospectus. Institutional investors submit *non-binding* orders, i.e. an expression of interest to buy according to the normal book-building process within the price range. The consortium operates as a strict underwriting syndicate (*assunzione a fermo*)[169] and its contractual arrangements are governed by U.S.-UK law.[170]

Prospectuses prepared under the PD and more recently on the PR typically include sections outlining the criteria for determining both the price range and the final offering price. The core feature of the Italian book-building system is that the final price is determined based on the *quantity* and the *quality* of the expressions of interest in the Regulation S, Rule 144A offering (i.e. non-binding orders) by institutional investors and the *quantity* of the binding orders submitted by retail investors in the *offerta pubblica*. The final price is determined by the lead underwriter(s) together with the listing company and/or the selling shareholders based on the *quantity* of demand expressed by retail investors and the *quality* and *quantity* of demand originating from institutional investors.[171]

Italian IPOs, which are formally divided into two separate offerings within the global offer (*offerta globale*), contain an explicit reference in the IPO Prospectus (in the

[167] This means that the *consorzio* obliges itself to buy ex post the amount of shares it is unable to sell ex ante; on Italian *consorzi di collocamento*, see Vitali (2012); Giudici (2014b).
[168] In the event of over-subscription there are non-discriminatory allocation mechanisms (e.g. also lottery).
[169] This means that the *consorzio* buys/subscribes to the shares ex ante and sells them to investors.
[170] The topic is not treated within the Italian literature. However, see Lener (1995).
[171] This is the usual formulation of Italian IPO prospectuses.

Section, price determination and allocation strategy) to clawback clauses.[172] These clauses allow the lead underwriter(s) to shift shares form the *offerta pubblica* to the *offerta istituzionale* and *vice versa* on an ex post basis (i.e. when the final price has to be determined and when actually fixing it).[173] While clawback mechanisms may contribute to efficient pricing, they can also be abused in ways that disadvantage retail investors. Indeed, retail investors who cannot price the offering and are allocated ex ante only 30% of the global offering submit binding orders up to a maximum price (strikes bid in finance terms), which are useless in terms of information revelation theory. As mentioned above, the prospectus published refers to the use of retail investor orders for final price setting in terms of only *quantity*, but refers to institutional investors' non-binding orders in terms of *quality* and *quantity*, thereby enhancing their information revelation function. In other words, from a contractual perspective, the Italian public offering is structured such that retail investors submit binding orders up to the maximum price, and once the final price has been set, they must buy at that price and cannot refuse to execute the contract. In this respect, the mechanism for an Italian *offerta al publico* differs from that of an *invitation ad offerendum*, where the investor first submits a non-binding order and then, once the final price has been set, can either confirm or refuse finalisation of the contract.[174]

Within such a contractual framework, the potential abuse of clawback clauses may arise particularly in IPOs that are only weakly underpriced or even (more critically) overpriced. This risk is especially pronounced where the *offerta globale* is predominantly or exclusively comprised of a *offerta pubblica di vendita*, where the selling shareholders seek to maximise their investment, realising the maximum profit at the expenses of other investors. In these situations, the selling shareholders have an incentive to be aggressive, i.e. to press the lead underwriter(s) to set a final price (within the determined price range determined ex ante) that is high and will most likely collapse during the first day of trading (overpricing), leaving retail investors (to whom shares have been shifted ex post through clawback clauses, if there is sufficient retail investor demand) to bear the loss. Indeed, the typical alignment of interests between institutional investors and retail investors that operates on the secondary market, where retail investors free-ride and profit from the pricing activity of institutional/informed investors, is already limited in the book-building process with preferential allocation. While this system may be efficient for standard underpriced

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

173 Regulation 809/2004 referred to clawback clauses in Item 5.2.3.8B). CDR 2019/980 refers to clawback clauses in Annex 11 Item 5.2.3, Pre-allotment Disclosure, … (b) *the conditions under which the claw-back may be used, the maximum size of such claw-back and any applicable minimum percentages for individual tranches.*

174 They could so by reading publications from the specialist press that argue that the final price is excessively high.

IPOs (where both types of investor benefit),[175] it can be problematic in bad IPOs, i.e. those that are overpriced, and shares are shifted ex post to retail investors (who must buy them), precisely because institutional investors prefer to stay away. In such cases the alignment of interests between the two types of investors (which is present but weak in the book-building process) essentially disappears, leaving retail investors without market protection. The only protection available to retail investors lies in the proper functioning of the regulatory regime, which since 3 January 2018 has also been based on the conflict of interest rules laid down by the MiFID II-CDR 2017/565 , which ex ante (on a preventive basis) supplements the MAR regime enforceable on an ex post basis.[176] Indeed, overpriced IPO shares that are reallocated to retail investors under clawback clauses can be regarded as shares the price of which has been manipulated by an "aggressive" selling shareholder with the complicity of the accommodating lead underwriter(s).[177]

[175] Both investors profit, although institutional investors could profit more because they obtain more shares in more underpriced IPOs.

[176] As mentioned unfortunately, the MAR regime is not automatically applicable to IPOs and depends on national (company) law. To be sure, an aggressively overpriced final price may be caused by the use of clawback clauses, meaning that it can be manipulated also without using clawback clauses. The extent to which the final price has been manipulated (overpriced) can only be evaluated ex post by an analysis of the order-book and the conduct of the various actors within the MAR and MAD II enforcement system. The factors that may be considered in assessing whether an IPO price is abusively inflated (for the purposes of market abuse) are numerous. Among them is whether any subsequent price decline falls outside a statistically expected range based on historical data from comparable IPOs, taking into account the specific characteristics of the offering—such as market segment, size, sector and the mix between capital increase and selling shareholders—as well as the prevailing market conditions at the time of the IPO. In assessing whether the final offer price has been manipulated, elements relating to the marketing of the offering may also be taken into account. In particular, aggressive promotion or overly optimistic narratives capable of influencing (retail) investor demand may be relevant and could, in certain circumstances, qualify as a form of informational manipulation under Article 12(1)(c) MAR. As mentioned, Article 43 CDR 2017/565 (to be read in conjunction with Article 16(6) MiFID II which explicitly refers to the MAR) requires that registers on underwriting or placement must be kept, which must be provided to the competent authorities.

[177] The selling shareholders can ask the lead underwriter(s) to price the shares up to the maximum limit of the price range where institutional demand is weak (i.e. not justified in terms of information revelation theory), but retail demand is sufficient to absorb this missing institutional demand. To be sure, since the underwriting fee is a percentage of the offering price, also the incentives of the lead underwriter(s) are more aligned with those of the selling shareholders, because the amount of fees increases in line with the maximum price within the price range. This case also involves a vertical conflict of interest between the investment firm and retail investors. Considering also the possibility of stabilisation under Article 5 MAR and Commission Delegated Regulation (EU) 2016/1052 of 8 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures, the incentives of lead underwriter(s) are more aligned with those of the selling shareholders, because an overpriced final price enables the overalloted shares to be purchased directly on the market at a lower price than the selling price, thereby enabling the lead underwriter(s) to profit; on stabilisation see Lombardo (2022b) and Boreiko and Lombardo (2011a).

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

From a regulatory perspective, problematic conduct in the price setting of Italian IPOs has been potentially covered under the MAD (i.e. since 2004) and the MAR (since 2014), although only recently since 3 January 2018 also (explicitly) under the new MiFID II/CDR 2017/565 setting out conflict of interest rules.

Under European anti-manipulation rules the book-building process is protected against conduct that manipulates the price, including at the stage of final price determination (while, as mentioned, the price range is primarily safeguarded through prospectus liability). The collection of non-binding orders from institutional investors (in the institutional offering under Regulation S, Rule 144A) and of binding orders from retail investors (according to an *offerta pubblica* under the TUF) along with the determination of the final offer price and quantity of shares, as well as their allocation among types of investors, are covered by Article 12 MAR.[178]

It has only been recently, following the adoption of the MiFID II-CDR 2017/565, that the IPO price determination (both the price range and the final price) and allocation strategy among investors has been explicitly regulated at European level due to their potential to generate conflicts of interest. From the perspective of this article, there are essentially two questions. Firstly, in the complex relationship among (a) underwriters, (b) the listing company/the selling shareholders and (c) investors (both institutional investors and retail investors), to what extent is the regulatory regime able to regulate also potential conflicts of interest between the selling shareholders and the retail investors in order to minimise the risk of the abuse recourse to clawback clauses? Secondly, assuming that the first question is answered in the affirmative, to what extent has the (new) regulatory regime been able, and will be able, to limit and minimise the abuse of clawback clauses within final price setting, supplementing ex ante the anti-manipulation MAR rules that can be enforced ex post? The answer to this second question can be found only through empirical analysis, which means that the time necessary to build a sample of IPOs (new IPOs since 3 January 2018) must be sufficiently long in order to be compared to the old regime (pre-2018) and for this reason falls outside the scope of this article.

The first question (whether Articles 38-43 CDR 2017/565 are able to regulate conflicts of interest among selling shareholders and retail investors via the lead-underwriter(s) to minimise the abuse of clawback clauses) can be answered in the affirmative. The major objectives of the rules on conflicts of interest laid down by Articles 38-43 are those between the listing company and the investment firm. The conflict of interest between selling shareholders and retail investors highlighted in this

[178] Article 1(2) MAD.

article, which may be exacerbated by a potential abuse of clawback clauses, is not directly addressed by these provisions. Nevertheless, certain general provisions can be interpreted as applying indirectly to conflicts of interest between selling shareholders and retail investors.[179] In terms of pricing, Article 39(1) refers to investment firms that have put in place systems, controls and procedures to identify and prevent or manage conflicts of interest arising in relation to the potential under-pricing or over-pricing of an issue or involvement of relevant parties in the process. The terms *involvement of relevant parties* could be read as also covering selling shareholders, who may pressure the lead underwriter(s) to increase the final price and potentially abuse clawback clauses, resulting in potential over-pricing. This provision is complemented by the placing rules (also in terms of abuse of clawback clauses) laid down by Article 40(1), Article 40(2), Article 40(4) and Article 40(5) on allocation policy, which draw a distinction based on the type of investor client.[180]

This interpretation, which highlights certain textual elements to attribute to the lead underwriter(s) a duty (in terms of management of conflicts of interest) to limit the possible incentive of selling shareholders to abuse of clawback clauses at the expenses of retail investors, is reinforced by the systematic reading of Articles 38 to 43 CDR 2017/565. These provisions not only refer to Article 16 and 23 MiFID II on conflict of interests but also cover Article 24 MiFID II,[181] which is the core Article defining the rules on general principles and the provision of information to clients (in the Section on provisions to ensure investor protection), with explicit reference also to Article 25 MiFID II on assessment of suitability and appropriateness and reporting to clients.[182] This means that the special rules on conflicts of interest with regard to pricing and allocation laid down by the CDR 2017/565 are functionally linked to the conduct of business rules under Article 24 and 25 MiFID II, which apply not only to clients (listing company) but also to institutional investors and retail investors. Under this perspective, the conflict of interest between selling shareholders and retail investors resulting from an abuse of clawback clauses can be addressed not only by conflict of interest rules but also the conduct of business rules in MiFID II, with the result that

[179] As already noted, an overpriced IPO resulting from an unmanaged conflict of interest between selling shareholders and retail investors may also entail a direct conflict of interest in pricing between underwriters and retail investors. This arises because (i) underwriters profit in terms of fees from an over-priced IPO and (ii) underwriters can profit from stabilisation activity, on which see Boreiko and Lombardo (2011a).
[180] For Germany, see Meyer and Rath (2025), 346, 5.53 to 8.53b.
[181] On which see Enriques and Gargantini (2017).
[182] See also Articles 44 *et seqq.* CDR 2017/565, in the Chapter on operating conditions for investment firms.

the lead underwriter(s) can potentially stop "aggressive" IPO selling shareholders[183] by applying conflict of interest rules.

The proposed account of the Italian regulatory regime as being capable of potentially dealing also with potential conflicts of interest between IPO selling shareholders and retail investors must be supplemented by the Italian instruments under the enforcement system in relation to the issues already treated at the end of Section 4 in terms of: (i) the dual nature of the regulatory framework, comprising directly applicable regulations and directives requiring implementation, in particular with respect to the nature of the national contractual relationship with investors and the attitude of the Italian Consob as enforcement authority, (ii) contract law considerations such as the distinction between *invitatio ad offerendum* and *offerta al pubblico* and finally, (iii) the organisation of the consortium, including private international law aspects and the effectiveness of associated remedies.[184] These are topics fall outside the scope of this article, which is intended to provide a general introduction at European level to the rules on conflicts of interest under the CDR 2017/565.

6. Conclusion

This Article has provided an overview of the European system of investor protection in book-built IPOs arising from the interaction of the PR, the MAR and the MiFID II-CDR 2017/565, the last-mentioned operating also as a preventive supplement to the MAR. This article has argued that, while the interests between institutional/informed investors and retail investors in the secondary market are properly aligned (ECMH and FOMT), this mechanism also operates in the context of an IPO, albeit with some differences. Indeed, the nature of the book-building process is to reward

[183] The account proposed in the text implies that a major national bank (as is normally the case in Italy) is at the same time a co-global coordinator (together with a U.S. investment bank) of the global offering, so that it maintains relationships with both the IPO company/selling shareholders and with investors (both institutional and retail). The question arises as to whether a more complex scenario, under which the underwriter fixing the price and the allocation is a U.S. one, dealing only with the institution offering under Regulation S, Rule 144A but where there are clear effects on the Italian public offering, would jeopardise the application of MiFID II conflict of interest rules. Indeed, conflict of interest rules are provided for and operate within the various relationships that an investment firm/bank (also as a group) has with different clients, in this case the selling shareholders and retail investors. To the extent that the underwriting syndicate is organised among different independent investment firms/banks (on Italian *consorzi di collocamento*, see Vitali (2012), conflicts of interest could be considered to be materially present. However, the rules laid down by Articles 33-43 could be more problematic due to the fact that they are premised on the assumption of one single investment firm or bank. In the case of complex consortia, the rules on inducements (Articles 33(e), 40(3), 41(1)) could be used to manage conflicts of interest.

[184] On remedies, see in general, although not specifically on IPOs conflicts of interest, Di Amato (2019) and De Poli (2020).

institutional/informed investors in terms of allocations/underpricing in order to reveal to the lead underwriter(s) their proprietary material information about the value of the listing company. At the same time, the ability of retail investors to free-ride on the pricing activity of institutional/informed investors is effectively limited by their remuneration. The IPO European regulatory framework provides sufficient flexibility to enable the proper functioning of the book-building process, while also seeking to correct certain improper conduct also through the conflict of interest rules laid down by the CDR 2017/565. With respect to the Italian IPO regime the potential abuse of clawback clauses can be analysed under the new regulatory regime provided for under MiFID II-CDR 2017/565 in order to assess whether the rules on conflicts of interest can be applied also to the relationship between underwriters and retail investors. This moreover would enable underwriters to use the new rules as an instrument for upholding the interests of retail investors.

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