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Università degli Studi
"Mediterranea" di Reggio Calabria

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F.Merusi, M. Passaro, *Autorità indipendenti*, in *Enc. dir.*, VI, Agg., Milano, 2002, 143 ss.;

S. Cassese, *Le basi costituzionali*, in Id. (a cura di), *Trattato di diritto amministrativo, Dir. amm. gen.*, I, Milano, 2003, 273 ss.;

F. Benvenuti, *Disegno dell'amministrazione italiana,* Padova, 1996.

Per le opere collettanee:

Aa.Vv., *Diritto amministrativo,* a cura di L. Mazzarolli, G. Pericu, A. Romano, F.A. Roversi Monaco, F.G. Scoca, Bologna, 1999; oppure

E. Paliero, A. Travi, *La sanzione amministrativa*, Milano, 1989.

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Corte cost., 15 gennaio 1999, n. 12, in *Foro it.*, 1999, I, 267 ss.;

Cass, ss.uu., 12 marzo 1998, n. 128, in *Giur. It.*, 1999, I, 2, 315 ss.;

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Indice n. 101 (1-2020)

ARTICOLI E SAGGI

Diritto ed emergenza sanitaria

Seconda parte

«Il diritto dell'economia» issn 1123-3036, anno 66, n. 101 (1 2020), pp. 369-386

Articoli e saggi

The International *P2P* Market System. American and Italian Context Compared

Brunella Russo

1. *Introduction: operational characteristics of* Peer to Peer *Lending*

In an increasingly complex context for the global financial scene, we hear much about alternative on-line finance that, through the use of digital channels, has started to provide services which were traditionally provided by the banking channel[1].

There does not appear to be a technical definition of "alternative finance" in literature or legislation, but this term has been recognized worldwide for some years now referring, as it does, to all methods of financing and investment that are not part of traditional finance characterized as the work of banks and regulated markets[2].

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[1] See, J. Egan, C. Neu, A. Mc Grath, *The investment case for online marketplace loans*, Evolution Capital Management Research, 2016, available at http://evocm.com/wp-content/uploads/2016/ 09/Evolution-Research-The-Investment-Case-for-Online-Marketplace-Loans-2016.09.20.pdf.

[2] See, Banca d'Italia, *FinTech in Italia. Indagine conoscitiva sull'adozione delle innovazioni tecnologiche applicate ai servizi finanziari*, Roma, 21 Dicembre 2017. See also M. Bofondi G. Gobbi, *The big promise of Fintech,* in *European Economy*, vol. 2, 2017, 107-119; G. Bruton, S. Khavul, D. Siegel, M. Wright, *New financial Alternative in seeding entrepreneurship: microfinance, crowdfunding, and peer to peer innovations*, Baylor University, 2015, available at http://doi.org/10.1111/etap.12143

With regard to P2P platforms, see N. Tomlinson, I. Foottit, M. Doyle, *A temporary phenomenon? Marketplace lending, an analysis of the UK Market*, Deloitte Center for Financial Services (edited by), 2016, according to which examples of alternative channels are *on line* "marketplaces" such as equity-and-reward crowdfunding, peer-to-peer/business lending and third-party payment platforms. Alternative instruments include SME

Therefore, it could be defined as the set of innovative, alternative financial products, channels and instruments developed thanks to the Internet, made available to a vast clientele (for instance, individuals and small-medium enterprises (SME), start-ups or social projects), disbursed outside the banking channel, to meet various financial needs.

Before addressing the more purely juridical aspects of this investigation, it is appropriate to provide some technical data relating to operations procedure, which usually begins with the assignment of a rating at the moment a loan application is made. Specifically, this rating represents a value that reflects the level of reliability of the applicant in terms of financial solvency and is released only after questioning a private central risk management company[3] similar to how banks and financial companies operate. Only afterwards does the platform then match the needs of the applicant with those of the lenders who offer credit.

This evaluation is usually indicated with a letter of the alphabet, but each platform has its own system, meaning that there is not a single standard, thus the degree of risk of the lenders between the various platforms is difficult to compare. Examples of this include the American platforms, which will be discussed later, such as *Lending Club* and *Prosper Marketplace*, founded in 2006 and considered the most important worldwide in terms of volumes supplied, number of investors and active applicants[4].

Generally, loans are disbursed after an analysis of the documentation provided by the applicant compared to an on-line declaration.

The now numerous platforms that operate in the market allow anyone looking for a loan to enter their data in a portal and, within a few hours, receive confirmation of approval or denial of a loan. This possibility is also open to institu-

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mini-bonds, private placements and other "*shadow banking*" mechanisms, social impact bonds and community shares used by *no profit* enterprises, and alternative currencies such as Bitcoin.

Again, Deloitte Center for Financial Services (edited by), *A temporary phenomenon? Marketplace lending. An analysis of the UK market*, 2016, 1-13.

Available at *https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/financial-services/ deloitte-uk-fs-marketplace-lending.pdf.*

[3] In Italy, these companies are, for example CRIF (Central Financial Risks) and CTC (Credit Protection Consortium).

In the USA, for example, the Prosper platform uses Experian while Lending Club uses TransUnion, Experian, and Equifax.

[4] See, *Manual Investing* available at the website https://www.lendingclub.com/browse/browse.action regarding the performance objectives or the determination of a risk-return objective, leaving the platform the task of constructing the portfolio.

On the topic, see https://help.lendingclub.com/hc/en-us/sections/ 203810597-Automated-Investing.

In doctrine, N. Buhayar, *Lending Club Wants to Broaden its Membership*, in *Bloomberg Businessweek,* 23 April 2015; S. Cunningham, *The Complete Guide to Investor Risks at Lending Club & Prosper*, in LendingMemo on line magazine, 2013, available at www.lendingmemo.com/lending-club-and-prosper-risks/.

tional investors who can then create their own on-line account on the platform website and start investing[5].

Participation in the loan is allowed to a large number of subjects since the savings of a lender are never all destined to the same applicant; they are, rather, fragmented between different subjects, to diversify and minimize the risk of possible losses.

The company that offers the platform, the actual website, does not directly hold the money of the lenders; it is entrusted to a third party, typically a custodian bank, and protected by the Interbank *Deposit Protection Fund*[6]. The applicant repays the loan by monthly installments even if in some cases a longer, quarterly installment is granted, normally by means of a direct bank debit which is paid to the lenders according to the principal and the share due to each of them[7].

Comparison between the different operating models of the Peer to Peer (P2P) lending platforms underlines a heterogeneity of contents both because of the use of processes in continuous evolution – often each platform develops particularities within the same country and different characteristics depending on the legislation – and because of the lack of information that the platforms provide, platforms that are usually not homogeneous.

For example, there is no uniformity between the various platforms in the number of operations and amount of money to be lent, the total number of requests that can be presented, loan duration, methods of diversification, risk assessment criteria, and in loan disbursement. It emerges that Italian platforms offer low-volume loans both for private individuals and for companies; this choice of small loans may be related to the needs of the market, i.e. the purpose of loan applications[8]; while compared to Italian platforms, some American platforms, in

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[5] See, A. Milne, P. Parboteeah, *The business models and economics of peer to peer lending*, European Credit Research Institute, 2016.

Https://www.ceps.eu/system/files/ECRI%20RR17%20 P2P%20Lending.pdf.

See also, A. Haislip, M. Lund, *The Future of P2P Finance*, in *Media EU*, 2015, 1-11, according to which "Peer-to-Peer finance" is one of the fastest growing and most dynamic fields in modern banking, powered by the Internet and made possible through ubiquitous social networking. *Lenders* prefer it because it promises both higher rates of return and a lower number of defaults. *Borrowers* prefer it because it makes a loan easier to obtain and less expensive. Yet it is far from a panacea and there are many challenges ahead.

[6] On the role of the Fund internationally, see M. De Cesare, *Report on deposit insurance: an international outlook*, in *Working Paper* No. 8, January 2005.

[7] This is usually the case in practice, but today there is no provision in the Italian legal system that obliges a company or a Social Lending entity to offer the payment service, thus installment payments can also be made by direct payments from the debtor to creditors, without intermediate steps.

[8] However, the question of data retrieval remains: there is no system for collecting and publishing relevant data, which, in turn, does not allow a comparison between one operational reality and another in terms of use of the electronic platform, nor is there the possibility of high level monitoring of credit risk, as well as operational risk management, and transparency by providing clear and fair information to all customers.

addition to dealing with both consumer credit and loans to SMEs[9] have specialized in the provision of loans for the purchase of immovable property guaranteed by the property itself, still absent on the Italian market[10].

A unifying effort in classifying the Peer to Peer lending market at an international level was carried out through a recent International Organization of Securities Commissions (IOSCO) research which led to categorizing this type of market into three different types of business models.

In the first model, the *Client Segregated Account Model*, the investor is put into direct contact with the applicant through the platform, which performs the sole function of connection, drawing up a contract between the two individuals[11].

Lenders and applicants pay commission to the platform; specifically, the applicant pays at the time of issuance of the loan as a percentage of the loan volume and according to its risk category while the investor pays administrative fees and if he/she wants to resell his/her loan portfolio on secondary markets is free to do so.

The structure of the second model, the *Notary Model,* is part of the typical American model, whereby investors make offers on the loans they intend to include in their portfolio and, when the requested amount is reached, the loan is issued. The lenders select the *notes* (fractions of the loan) in which they intend to invest based on their return objectives, their risk aversion and the rating assigned by the platform. The commission payment system is similar to the first model[12].

The third model identified is called the *Guaranteed Return Model*. It differs from the previous two as the interest rate that applicants pay is fixed and established by the platform for each level of risk. This is the most widely used model in China and Italy. One disadvantage of this system is that it may lead to an imbalance between the number of applicants and the number of investors.

With regard to liquidity of investments through Peer to Peer lending platforms, in some platforms there is a secondary market where it is possible to sell the loans before maturity on payment of a commission to the platform. The size

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[9] See, C. De Roure, L. Pelizzon, P. Tasca, *How does P2P Lending fit into the consumer credit market?*, Bundesbank Discussion, Paper No. 30, 2016; G. Wehinger, *SMEs and the Credit Crunch, Current Financing Difficulties, Policy Measure and a review of Literatur*e, in OECD Journal Financial Markets Trends, 2013, 2, 115-148.

[10] See, L. Einav, M. Jeckins, J. Levin, *The Impact of Credit Scoring on Consumer Lending*, in *Rand Journal of Economics*, vol. 44, No.2, 2013, 249-274; A. Morse, *Peer-to-Peer Crowdfunding: Information and the Potential for Disruption in Consumer Lending*, Nber Working Paper No. 20899, 2016, available at *http://www.nber.com.*

[11] In this case, investments and loans are separated from the platform's balance sheet and the debtor's obligation remains even in the event of platform failure.

[12] Interest rates are determined by on-line auctions; applicants indicate the maximum interest rate they are willing to pay and investors the minimum return they want to receive for a certain level of risk. The platform then progressively increases the rate of return up to the point where it manages to cover the entire volume of the loan, considering the necessary diversification of the portfolio of each investor and the maximum interest rate that the applicant is willing to pay.

of the secondary market is still rather reduced in proportion to the volume of total loans disbursed by each platform.

On the secondary market, there is a *modus operandi* of *Lending Club*, which uses an independent platform with respect to the "*Direct Lending*" platform, called "*Note Trading Platform*"[13]. Specifically, the secondary market in *Lending Club* works according to a scheme where the seller decides which fractions of loans to sell (notes) and at what price; these are listed in the "*Note Trading Platform*" and other investors buy them after considering risks and returns, at the price set by the seller[14].

It can therefore be seen that the liquidity factor is an element to be taken into account in the investment allocation choices since Peer to Peer loans are not particularly liquid.

As will be explained in greater detail below, despite the fact that the Peer-to-Peer lending market is growing in both Europe and the United States in a relatively uniform manner, with some differences, there are significant disparities in the business models adopted by the main market players due to different regulatory frameworks and the differences in supply and demand.

2. *The American market: the experience of Prosper Marketplace and Lending Club*

A comparative analysis of P2P models immediately highlights the potential of the American *Marketplace Lending*, which developed in a vigorous manner almost at the same time as the English system, supported by a functional regulatory scheme based on a mandatory system of constant management of information disclosure[15]. However, it is a relatively young sector with less government supervision than banks.

Consumer sites also have acted as market leaders in using the Internet to sell *pass-through notes* representing fractional interests in individual loans to retail inves-

[13] Information available at the website of the platform https://www.lendingclub.com/foliofn/ howTradingWorks.action.

[14] Usually the transactions take place in one day and the seller pays *Lending Club* a commission equal to 1% of the sale price.

See, S. Cunningham, *"The Complete Guide to Investor Risks at Lending Club & Prosper"*, in LendingMemo on line magazine, 2013, available at www.lendingmemo.com/lending-club-and-prosper-risks/.

[15] Internet lenders have grown rapidly in recent years and are becoming increasing important participants in the United States financial services markets. These lenders operate in many market segments, including consumer loans, small business loans, student loans, real estate loans, and micro-finance (small loans directed to individual third-world entrepreneurs). In particular, consumer sites have created a marketplace in which consumers can not only lower their financing costs but can also, in some instances, obtain credit when bank financing would have been denied.

tors (so called "peer-to- peer", or "P2P", programs). These programs have made new investment opportunities available to the public by enabling investors to purchase indirect interests in specific consumer loans[16]. Although most marketplace lenders now fund themselves principally from other sources, P2P programs continue to fund a significant amount of loans. Certainly, these programs have attracted and continue to attract a great deal of media attention and public interest[17].

The first to operate on the US market was Prosper Marketplace, a platform founded in 2006, which grants loans to US residents, in possession of a bank account, calculating the expected loss rate which is obtained by matching a credit score processed internally on the basis of past performance of the loans granted on the platform, and another credit score provided by the risk center, consumer credit reporting company, *Experian*[18]. Lenders invest in certificates issued for the purchase of loans from the *WebBank bank*, which are sold by them to a Special Purpose Vehicle (SPV) created by the *Prosper* platform[19].

The funds deposited at the time of the offer can be found at a depository bank, *Wells Fargo*, in an account that does not produce interest, linked to the user's account on the *Prosper* platform. These funds are used to purchase the certificates that allow the bank to grant the loan and credit the debtor's account.

Given that this is an activity linked to the solicitation of investment from the public, since 2009 *Prosper* must comply with the regulatory requirements established by the *Securities Exchange Commission* (SEC) and the *Consumer Financial Protection Bureau* (CFPB), bodies aimed at protecting investors, maintaining fair, orderly and efficient markets and facilitating capital formation[20].

For investors, the portal offers an investment method, defined as "*Quick Invest*", which allows the investor to set investment criteria on the basis of which

[16] Lenders participate buying notes that correspond to a specific loan, or share of a loan, with the goal of being repaid principal and receiving interest.

[17] Most marketplace lenders are not currently offering to sell pass-through notes to retail investors but are funding themselves principally through lines of credit, whole-loan sales to institutional investors, securitizations, and/or other arrangements that do not entail an Internet-based securities offering.

[18] The loss rate thus determined defines the rating class to which it belongs, identified by the letters AA, A, B, C, D, E, HR, to which the platform associates an annual percentage rate (APR), which, in Prosper, ranges from 5.99% (AA rating, low risk) to 35.99% (HR rating, high risk).

[19] For more information on industrial loan corporations, see US GAO (edited by), *Industrial Loan Corporations: Recent Asset Growth and Commercial Interest Highlight Differences in Regulatory Authority*, September 15, 2005, 1-98 (in particular page 21-27).

[20] The Federal Trade Commission (FTC) was responsible for enforcing many federal consumer protection laws until July 21, 2011 (FTC was the primary guarantor of federal consumer financial laws for non-bank financial service providers). After that date, FTC has shared responsibility for this application with the Consumer Financial Protection Bureau (CFPB).

SEC is the primary federal agency responsible for investor protection. Like the FTC, it does not comprehensively regulate and examine companies that issue securities. CFPB acts as the chief supervisor of federal consumer protection laws over many of the banks and other financial institutions that offer financial products and services to consumers and is one of the executors of those laws.

the operator can quickly and automatically select loan requests currently available. Another investment method is "*Browse Listings*" where the creditor can manually and individually select loan requests that satisfy his/her preferences.

Unlike European platforms (especially the United Kingdom), American platforms do not provide for the creation of guarantee funds to mitigate the risk. If a debtor is 15 days late in paying, a penalty is applied which is distributed pro rata to the creditors, if instead it is 30 days late *Prosper* requests the intervention of a debt collection agency, with costs borne by the investor up to 40% of the amount recovered[21].

It is important to underline how *Prosper* greatly encourages the formation of groups of debtors within the platform precisely to reduce the risk of default, exploiting the emotional leverage of the group's reputation. If all the members of the group are able to repay the loan in the times and ways established, the reputation of the group increases thus contributing to better the assigned credit score and increasing the probability of obtaining future loans at better rates[22].

Finally, debtors have the possibility to close the loan early without penalties by returning the funds early, through a trading platform, paying a commission of 1% in favor of an external brokerage company that manages the platform.

The other player who joined *Prosper* in the market in 2007 is *Lending Club*[23], today the world's leading operator having funded 28 billion dollars to more than 1.5 million customers, both consumers and SMEs[24]. *Lending Club* offers its users a very wide variety of loans, including not only personal loans and super prime loans (financed exclusively by professional investors), but also loans for SMEs and for training and personal/health care, and finally, a recent novelty, loans of up to $50,000 for the restructuring of the leasing for the purchase of a car. Furthermore, *Lending Club* has established two important business partnerships with two web giants, *Google* and *Alibaba*[25].

The platform, during the assessment of the riskiness of a profile, collects, in addition to the *FICO score* (formerly) Fair, Isaac, and Company), a large amount of additional information, relating to the individual transactions held by the

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[21] A loan is considered in default after 121 days, with simultaneous communication to the consumer credit reporting company and the inability of the debtor to operate again on the platform.

Cfr. C. Serrano-Cinca, B. Gutiérrez-Nieto, L.L. Palacios, *Determinants of Default in p2p lending*, in *Journal Plus One*, 1 October 2015.

[22] We note, however, that, in November 2017, the Federal Reserve Bank of Cleveland published a study of peer-to-peer lending that claimed the perceived benefits of this type of lending were overrated and that it resembled predatory lending. The study was widely discredited as using flawed methodology and within days of its posting, the Reserve Bank removed the study from its website.

[23] In virtue of excellent results, in 2014 it was listed on the New York Stock Exchange.

[24] Data obtained directly from the site *https://www.lendingclub.com.*

[25] See, N. BUHAYAR, *Lending Club Wants to Broaden its Membership*, in *Bloomberg Businessweek*, 23 April 2015.

debtor and to his/her position or work activity. These data are also extrapolated from social media and from service companies and the result obtained is a summary assessment of the debtor who is assigned an initial risk sub-class, which is then completed with data relating to the duration and amount requested by the debtor, thus determining the class and the definitive rating subclass[26].

Each rating class corresponds to a range of rates, which are constructed by adding to the "*Lending Club Base Rate*" a spread based on credit risk and market risk. Once the debtor has identified the conditions that best satisfy him, the platform fine-tunes the preliminary assessment of the information provided using a data provider, meanwhile investors can already view the project and book.

In *Lending Club*, as in *Prosper*, creditors take on the characteristics of investors who buy financial products, while *Web Bank* and *Cross River Bank* are the only two banks delegated to physically make money by way of mortgages.

Retail investors, unlike institutional investors, are obliged to purchase certificates and to do this they must open an account, also possibly a joint account, on the platform. The resources to be invested must instead be deposited with *Horizon Bank*, after which the investor has the right to diversify his/her portfolio, distributing the money over several projects independently or using a tool made available by the platform manager[27].

Neither in *Lending Club* do investors enjoy the protection of a credit risk mitigation fund but can liquidate their position through the *Note Trading Platform Folio*[28].

According to the *data provider Altfi.com*[29], which operates in the alternative finance sector, the American P2P lending platforms are receiving more and more resources from institutional investors such as local banks that see *Lending Club* as a means to offer access to their loan customers, to remain competitive with the largest national banks.

The legal environment in America is not particularly developed: there is talk of notoriously market-centric legislation and the national legislator is focusing mainly on transparency and on protecting the efficiency of the market[30].

Ensuring adequate consumer protection is one of the broad goals of the financial regulatory system in the United States, together with ensuring the integ-

[26] The range of subclasses goes from 1 to 5 and each corresponds to certain financing conditions regarding maturity, rate and fees.

[27] In the event that payments are delayed, investors must pay a commission of 1% if they cash the money within 15 days of expiration, from the 16th day the rate rises sharply to 18% but may increase even more.

[28] More, U. Filotto, *Peer-to-peer lending: mito o realtà?,* in *Bancaria Ed.,* 2016, 37 ss.

[29] AltFi.com provides market-leading news, opinion, insights and events for the rapidly-growing alternative finance and fintech community.

For more details, see, *http:// www.altfi.com*

[30] On this topic, S. Lustman.

rity and fairness of markets, monitoring the safety and soundness of institutions, and acting to ensure the stability of the financial system. US regulators take steps to address information disadvantages that consumers of and investors in financial products may face, ensure that consumers and investors have sufficient information to make appropriate decisions, and oversee business conduct and sales practices to prevent fraud and abuse.

Responsibilities for helping ensure consumer financial protection and otherwise overseeing the financial services industry, including peer-to-peer lending, are shared among various federal and state regulatory agencies and numerous self-regulatory organizations. The manner in which these regulators oversee institutions, markets, or products varies depending upon, among other things, the regulatory approach Congress has fashioned for different sectors of the financial industry[31]. Thus, there is no single standard, but much support for a more uniform nationwide regulatory structure which is deemed crucial[32].

Hence, companies are required to update their prospectuses, filed with the SEC, with supplements containing information about the notes and their corresponding loans as they are offered and sold.

From the fiscal point of view, the notes issued by the American platforms are treated as capital assets, like shares and bonds, due to their speculative nature[33].

They do not enjoy privileged tax treatment, so interest is taxed but, despite this, both *Prosper* and *Lending Club* offer investors the opportunity to open a tax deferred account such as the Individual Retirement Account (IRA).

3. *The Italian market: size and structure of the national platforms*

The alternative finance sector in Italy is still in an embryonic stage[34], compared to that of the United States.

However, it is enjoying an excellent growth rate and shows that it has ample room for improvement, given that the potential for the development of Peer to Peer lending is attributable to an economic fabric based mainly on small and micro businesses that could benefit greatly from this alternative financing channel.

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[31] Federal banking regulators subject banks to comprehensive regulation and examination to ensure safety and soundness.

[32] In this sense, see www.marketplacelendingassociation.org/policy-and-issues.

[33] See, Lending Club, *Tax Guide for Retail Investors 2014*, February 2nd, 2015*,* 1-11.

[34] For more details, G.B. Donato, *Regolamentazione del peer to peer lending in Italia*", in *Riv. Dir. Banc. on line*, maggio 2015, 1-9.

Available at the http://www.dirittobancario.it/approfondimenti/credito/regolamentazione-del-peer-peer-lending-italia.

In Italy, the first to invest in the potential of P2P lending was *Zopa Italia*, launched in 2009 after reaching a franchise agreement with the homonymous UK platform. After a few months, however, the activity of *Zopa Italia*, which had been authorized to perform payment services, was abruptly interrupted by a provision issued by the Ministry of Finance which, through the inspection division of the Bank of Italy, had identified conditions for the violation of Article 131 TUB (Consolidated Law on Banking), governing abusive collection of savings among the public[35].

Three years later *Smartika* was founded[36], which is currently the leader in Italy. This new platform operates as a payment institution and is therefore an authorized financial operator duly registered, in accordance with Article 114-*septies* of the TUB, to provide payment services on the instruction of lenders and borrowers of loans[37].

Smartika is required to maintain a regulatory capital, to have a complete control system (risk, compliance, internal audit and accounting auditors) in addition to being subject to supervision by the Bank of Italy.

It can be said that *Smartika* is the first social lending company in Europe to be regulated by public authorities. It is therefore required to comply with legal obligations because not only is it subject to the supervision of the Bank of Italy, but also due to the fact that operating as a Payment Institution it must offer further protection and guarantee for its customers.

The road map that leads to the approval of a loan request initially involves the identification of the user and, secondly, the joint verification of his/her level of debt and credit history, taking advantage of the databases provided by the company partner *Experian*[38]. Once the profiling procedure has been completed, the platform assigns the appropriate merit class and communicates the contrac-

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[35] The company was challenged for having opened a lenders account in its name with Intesa San Paolo, in which funds for around €1 million were waiting to be disbursed to borrowers or to be returned to lenders, which could potentially have been attacked by possible future creditors of *Zopa Ltd.*

Furthermore, the TAR of Lazio, called to decide in the second instance, considered that a deposit account relationship had been established between the company and the lenders due to the numerous activities that they would have been able to carry out with the money deposited, even after the conclusion of the agreement with the applicant and therefore regardless of the payment mandate.

See, E. Macchiavello, *Una nuova frontiera del settore finanziario solidale: microfinanza e peer-to-peer lending*, in *Banca Impr. e Soc.*, 2013, 2.

[36] The group company Banca Sella Holding, through a capital increase, acquired a controlling stake of approximately 85% of Smartika Spa. Website www.smartika.it.

[37] Since 2018, there have been over 6,400 lenders on the *Smartika* platform and since 2008, more than 5,400 loans have been disbursed, for a total of around €30 million.

For further details, E.M. Giannetto, *P2P lending: the new times of finance*, in *Banking*, vol. 72, May 2016, 5.

[38] *Smartika* probes these data as it allows each accepted debtor to use a credit facility of €150 to be used in the event of illiquidity on the part of the debtor. In the first half of 2016, approval rate was 8%.

tual conditions to the debtor, proposing an interest rate that varies according to the assigned rating and the offer available[39].

Unlike P2P in the USA, in Italy, both lenders and borrowers utilize banking channels. Repayment installments are paid to payment accounts opened with three of the biggest Italian banks, Intesa San Paolo, UniCredit and Banca Popolare di Milano (now Banco BPM), registered in the name of the lenders and therefore not attackable by the platform's creditors; *Smartika* adopts the client segregated account operating model, as happens for all other Italian operators[40].

All funds to and from lenders must pass through a free payment account at *Smartika* before being transferred to a personal account. The lender has the freedom to choose the amount, the maximum duration of the loan and the return he/she wishes to obtain, but if the latter is not indicated, the offer is formulated for all classes of merit.

Smartika adopts an internal policy aimed at minimizing risk (lenders, in turn, can invest their capital by choosing from the various risk categories) for which the platform divides the amount invested by allocating small amounts of capital to different borrowers[41].

In a specular way to *Zopa* UK, the user can decide to reinvest the repaid capital or transfer it to his/her personal account. Furthermore, through the "*Rapid Return*" function, the investor can assign his credit to other users registered in the platform, provided that there are no outstanding or late installments, paying a fixed commission of €15 and a variable one equal to 1% of the amount paid[42].

In 2015, the platform board approved the resolution to set up a fund to protect lenders, called *Smartika Lender Protection*, which is supported through small amounts withheld on repayment installments. The fund intervenes after

[39] The sum is first paid into the *Smartika* payment account, after which it is transferred to the individual's bank/post office current account in 2-3 working days.

[40] The applicants must pay, in addition to the interest payable, also a fixed commission, which includes both the instructor services and the management of the money transfer, which can reach a maximum of 3% of the sum paid. The average TAEG on *Smartika* is 25% lower than the average for banks and financial institutions, reported by the Bank of Italy for usury purposes.

[41] The loans are divided into 50 tranches to be allocated to as many debtors, ensuring that the individual contribution is not less than €10. The yield obviously depends on the structure of the loan portfolio, however, on average it is between 5-6%, net of commissions but before taxes.

See G.G. FEDI, *Per gli investitori ritorni più generosi rispetto ai bond*, in *Il Sole 24ore,* 11 July 2016.

[42] The "*Rapid Return*" chargeback service is completely free if the money has not yet been committed in any way.

To be able to get back this money, it is sufficient to give a sales order and the loans, or a part of them to be chosen, will be transferred in real time and automatically to other lenders. The value of the sale is equal to the residual capital of each individual loan. Or a part of the loan offer may be used for the purchase of existing loans that other lenders sell with "Rapid Return" for a sudden liquidity urgency. These are loans on which some installments have already been repaid, thus already proven to be of quality.

one year from non-payment and nullifies the recovery actions, taking over the insolvent debtor in the reimbursement procedure[43].

Since September 2017, *Smartika* has made important changes to the way the guarantee fund intervenes, so as to give greater certainty about the time frame within which repayments take place (specifically, the fund is activated every half of the month starting from 15 September).

4. (Continued). *The* Prestiamoci Spa *platform*

The second platform operating in Italy is *Prestiamoci Spa*, a spin-off of Banca Sella[44] that since 2009 has been operating as a financing company since it obtained authorization from the Bank of Italy to carry out the activity of financial intermediary, in accordance with Article 106 TUB[45]. It manages payment services through its subsidiary *PituPay*, authorized to carry out the activity of Payment Institution[46].

The admission criteria for applicants, which may also be natural persons with VAT numbers, are more stringent than those used by *Smartika*[47]: once the required documentation has been attached to the application, *Prestiamoci* reserves 24 hours to communicate the outcome of the evaluation[48].

The *Prestiamoci* model is similar to the *Smartika* model, but with some basic differences. On the applicant's side, it differs in that it adopts the "*All or nothing*"

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[43] The debt collection process on the platform starts when there are 2-3 late installments. The files are passed to companies specialized in recovery of credit, from the fourth to eighth installment not cleared; the objective is to negotiate a repayment plan so that the debtor can resume payments, even at the cost of reviewing the monthly payments and facilitating return.

After the eighth unpaid installment, if the debtor has not responded to previous requests, a letter of forfeiture of time-limit is sent and the applicant can no longer request restructuring of the debt.

Finally, after the twelfth unpaid installment has expired, there is transfer of the debt for recovery in court and it is only at this time that the coverage of the guarantee fund acts.

[44] *Prestiamoci Spa* is managed by the company *Agata Spa*. At the beginning of 2019 it planned a new capital increase of about €10-15 million (after 2 million in 2015 and 1.5 million in 2017).

[45] The article establishes a reserve of assets in favor of the financial intermediaries authorized by the Bank of Italy for loan granting activity with the public, in any form.

For more details, see F. Capriglione, *Manuale di diritto bancario e finanziario*, Padova, 2015, 362 ss.

[46] As far as the Italian market system is concerned, the data was obtained through *P2P Lending Italia* which, since April 2016, has been tracking the growth of Italian platforms.

The platforms listed on the P2P website *Lending Italia Smartika*, *Prestiamoci*, *WorkInvoice*, *Soidy, BorsadelCredito, YounitedCredit, Ibondisanche,* and the most recent *Cash m*e, *YBondis* and *Credimi*.

[47] In addition to minimum income, age and current account requirements, the following are required: at least 6 months' work for employees or 24 months if a freelancer, a registry approved by CRIF and Experian, no complaints or other prejudicial typology, maximum number of new loans in the last 6 months equal to 2 and finally the monthly payment must not exceed 35% of the available gross income.

[48] This assessment carried out through internal and external models is preparatory to the formulation of an appropriate risk rating.

clause for which the loan contract is subscribed exclusively on achieving 100% of the amount, to which *Prestiamoci* also contributes with its share. In addition, the management of *Prestiamoci* invests a portion of its capital in the loans; in this way, the platform participates together with the investors in the risk of default of the loan. This suggests that upstream there may be a more careful selection phase of the applicants and if at the end of the offer period at least 50% of the coverage is reached, the debtor can accept a partial loan.

On the investor side, in *Prestiamoci* you can choose whether to use the automatic investment mode – through which the investor delegates the choice of how to allocate his/her money to loans based on an expected return (base, medium and high) to the platform – or, use the manual investment method which consists of the investor choosing the loans directly through the information that is reported in the portal, such as quotas, rate, *rating* class, purpose of the loan, duration, amount of the loan, coverage percentage and residual amount[49].

In the wake of an apparent lack of direct government regulation in the US and other countries, *Prestiamoci* has recently launched a securitization of personal loans (with a portion relating to the current portfolio and one that instead refers to loans that will be disbursed in the near future) for a value of €50 million in two years. This is a choice made primarily to support growth by also bringing institutional investors to its platform who are able to support the development of the company, thanks to their size[50].

In addition, the choice was made to overcome one of the major problems related to the operation of social lending platforms, that is the presence in the portfolio of loans that are difficult to recover if granted to unreliable parties.

As regards the offer on the corporate side, the platform that to date in Italy has provided greater credit to Italian companies is *BorsadelCredito.it*[51].

The interesting aspect for companies is that the platform does not require any real guarantee, although personal guarantees may sometimes be required. Furthermore, the opening of a new current account is not required.

It should be emphasized, however, that *BorsadelCredito.it* too pays great attention to the evaluation phase of credit applications, as the successful formula for the platform is based on the timeliness of response and access to credit for

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[49] Recently *Prestiamoci* has expanded the category of loans to which to grant funds, starting a collaboration with the "*Evolvere Company*", for the financing of photovoltaic systems installed in private homes.

[50] Banca Valsabbina and other institutional shareholders in *Prestiamoci Spa* have already joined.

[51] *BorsadelCredito.it* is a platform managed by a corporate group, with *Business Innovation Lab Srl* as a holding company controlling 100% of two companies: *Crenway Srl* (credit broker) and *Mo.Net Spa*, a company of the group registered in the register of payment institutions authorized by the Bank of Italy.

The maturity of the loan is generally between 1 and 5 years. The nominal average annual rate varies between 3.4% and 7.4%, to which is added a commission for the guarantee fund that goes from 0.4% to 9% depending on the risk of the applicant and finally there are preliminary costs of between 2% and 4%.

small and micro businesses and on a low risk investment with an above market average return for the investor. This evaluation process is semi-automatic since the first phase takes place automatically through a series of objective parameters, which are transmitted via the web by the entrepreneur, while a second evaluation is subsequently carried out by the platform personnel, drawing on various databases offered by the consumer credit reporting company (*Experian*), external rating agencies (*Crif* or *Cerverd*) and Social Big Data[52]. Thanks to the use of *Big Data*, the platform measures the company's positioning in the reference market, the image among the public and its reputation on the web. In the end, companies are given a score that determines the rate at which the loan will be disbursed.

To access the platform, the lender must declare and guarantee not to carry out financial and credit activities professionally towards the public and can lend any sum starting from €100, be it to a natural or legal person.

The investor can define his/her offer, indicating in which market and at what rate he is willing to lend money and has the right to request at any time, before maturity, the liquidity lent, as there is a secondary market among the lenders where those loans for which at least one installment has expired (therefore not those just contracted) are transferable and for which there has never been any delay in the payment of the installments.

Recently *BorsadelCredito.it* has opened *Colombo,* an alternative Italian investment fund that will allow to finance SMEs, buying loans in *Marketplace Lending*[53].

Still in Italy, Banca Prossima – a credit institution controlled by Intesa San Paolo Spa – launched the "*Terzo Valore*"[54] portal some years ago, which provides funding exclusively to *non-profit* organizations through the *PrestoBene* channel. Phisical and legal person can therefore support third sector projects that aim to improve and increase the services offered to local communities, even simply donating.

In the "*Terzo Valore*" project interest comes from non-profit activities and for the financiers the tax advantages are of considerable importance: people res-

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[52] On the characteristics of this technology, see M. Van Otterlo, *A Machine Learning View on Profiling,* in *Privacy, Two Process and the Computational Turn: Philosophers of Law Meet Philosophers of Technology*, 2013, 41-64 , for which «*Machine learning is a branch of AI that seeks to develop computer systems that improve their performance automatically with experience*»; B.D. Mittelstadt *et al.*, *The ethics of algorithms: Mapping the debate*, in *Big Data & Society*, 2016, 3-20; J.M. Balkin, *The Three Laws of Robotics in the Age of Big Data*, in *78 Ohio State Law Journal*, 2017, when he says «*Collection and processing of data produces ever more data, which in turn, is used by algorithms to improve themselves*».

Again, Joint Committee discussion paper on the *Use of Big Data by Financial Institutions*, 19 December 2016, 86 ss.

[53] The fund authorized by the Bank of Italy is a "closed fund" which aims to raise €100 million to invest in 5 years.

[54] Can be visited on the website *www.terzovalore.com.*

ident in Italy for tax purposes are subject to a withholding tax of 26%[55] and are obliged to report the interest received in the IRPEF (income tax) declaration.

Non-residents are also subject to the application of the withholding tax which, however, in this case is interpreted as a tax.

5. *Some concluding remarks*

Another extremely interesting topic for future research derives from the observation that financial technology (FinTech), despite having brought with it a phenomenon that is invading the entire financial services market at a global level, is at present strongly characterized by disparities in terms of size and development legislation between the various countries, with some critical reference to the Italian legal system[56].

Nevertheless, a number of potentialities have been highlighted that can certainly put the national legal system in condition to reach and go beyond more advanced markets since the Italian economic fabric is mainly made up of small and micro enterprises, which need to resort to debt capital mainly in the form of loans.

These enterprises, often left out of traditional bank financing, have ended up abandoning this traditional market by turning to the more profitable Peer to Peer lending platforms. Indeed, their relationship at the moment is strictly inter-

[55] The Italian budget law 2018 introduced a specific tax regime for proceeds deriving from peer to peer lending activities, providing for their qualification in terms of capital income and the application of a withholding tax of 26%.

See Law No.205 of 2017 (in particular Article 1, subsection 43 and 44).

[56] See, in particular, European Commission, Consultation document - *FinTech: A more competitive and innovative financial sector*, Brussel, 23 March 2017; Id., *Study on the role of digitalisation and innovation,* 2017*;* C. Van Nieuwenhuizen, Report on *FinTech*: *the influence of technology on the future of the financial sector*, committee on *Economic and Monetary Affairs*, 28 April 2017; Id., *Financial Technology (FinTech): prospects and challenges for the EU*, March 2017; Id., *Discussion paper on the EBA'S approach to financial technology* (*FinTech*), 4 August 2017; Comitato di Basilea, *Sound Practices: Implications of FinTech developments for bank and supervisors*, August 2017; Comunicazione della Commissione sulla revisione intermedia dell'attuazione della strategia per il mercato unico digitale dal titolo *Un mercato unico digitale per tutti*, 10 May 2017; EIOPA InsurTech Roundtable, *How technology and data are reshaping the insurance landscape*, Summary from the roundtable organised by EIOPA on 28 April 2017; ESMA, response to the Commission Consultation Paper on FinTech*: A more competitive and innovative financial sector*, 7 June 2017; FINANCIAL STABILITY BOARD (FSB), FinTech credit: *Market structure, business models and financial stability implications*, 22 May 2017.

For the doctrine in question, T. Berg, V. Burg, A. Gombović, M. PuriM., *On the rise of fintechs-credit scoring using digital footprints, NBER Working Papers* No.24551, April 2018; G. Buchak, G. Matvos, T. Piskorski, A. Seru, *FinTech, regulatory arbitrage, and the rise of shadow banks*, *NBER Working Papers* No.23288, March 2017; D. Blankenship, *FinTech Adoption Index 2017: the rapid emergence of FinTech, Report 17,* Ernst and Young Corporation (edited by), 2017; H. Hau, Y. Huan, H. Shan, Z. Sheng, *Fintech credit, financial inclusion and entrepreneurial growth,* 2018*;* R. Ferrari, *L'era del FinTech. La rivoluzione digitale dei servizi finanziari*, Franco Angeli, 2017, 85 ss.; M. Maggiore, *BlackRock, quel potere occulto che domina tutta la finanza europea*, in *il Fatto Quotidiano*, 29 May 2017; E. Malverti, D. Bulgarelli, G. Villa, *FinTech - La finanza digitale, Strategie di investimento con i roboadvisor*, 2018, 1-192.

dependent in that, for example, to subscribe securities, an investor is obliged to open a current account with the partner bank with the operator of the platform that will complete the subscription orders for the financial instruments offered through the portal.

This is a provision that often discourages small investors who, intending to invest relatively small sums, are forced to open a current account and bear the related charges[57].

As one can well guess, the role of the banks still remains crucial since without their intervention operations cannot be completed. Most of the banks involved, albeit with different intensity, have started to develop on their own platforms or to collaborate with suppliers, but the exploitation of possible synergies with FinTech companies, even within incubators or accelerators, is still limited. The predominantly in-house development of projects demonstrates the limited current synergy with FinTech companies.

In practical terms, the study conducted on the *P2P* platform *Lending Italia*, founded in April 2016, presented a particularly detailed picture of the Italian situation since it collected data on the Italian platforms to enhance the culture and dissemination of information on this market and favor the entry of institutional investors. Much has emerged also through the consultation of many websites of the platforms and consultation of the Loan Books, which some platforms publish spontaneously.

This has allowed us to collect enough data to be able to compare the American situation with the Italian one, which is the premise for arriving at an estimate of the potential of the national market and understanding how to overcome the gap between the number of lenders and the number of applicants that constitutes one of the main problems of the platforms.

The growth of the platforms that will probably take place over the coming years will bring many positive elements but at the same time will generate a series of critical issues. One of these concerns the risks linked to the development of the secondary market. While the "business model" seems to work also in the Italian market – both for loans to individuals and for loans to SMEs, as the examples of *Smartika, Prestiamoci* and *Borsa del Credito* show – on the other hand the so-called "risk of illiquidity" is particularly felt due to the lack of a secondary market. Hence the impossibility of selling off securities quickly and gaining advantages from an economic point of view, which, in effect, can be a deterrent

[57] See more appropriately, E. Bani, *Le piattaforme di peer to peer lending: la nuova frontiera dell'intermediazione creditizia*, in *FinTech: introduzione ai profili giuridici di un mercato unico tecnologico dei servizi finanziari* di M.T. Paracampo (edited by), 2017, 164 ss.

Still on the subject, U. Filotto, *Peer-to-peer lending: mito o realtà?*, in *Bancaria Ed.,* 2016, 19 ss.; T. Philippon, *The FinTech Opportunity*, *Working Paper* No. 22476, 2016.

to investment[58]. Secondly, there is also a lack of propensity towards FinTech due above all to the lack of knowledge of the alternative on-line finance tool; this lack of culture leads to significant distrust of the phenomenon which, together with a scarce diffusion of digital tools – especially tools for on-line payments – amplifies the problems in the development of FinTech. It is therefore necessary, first of all, to divulge and promote digital culture, undertaking to specify which risks and objectives can be achieved through the use of these new financial channels.

Furthermore, there is a combination of factors attributable to computer security problems, the complex integration with existing IT infrastructures, the difficulty of adapting organizational structures and consolidated operating processes which are all to be considered further and significant limitations to the potential development of new technologies.

With particular regard to computer security problems, the internet-based model, mainly used in the offer of FinTech services, accentuates the exposure of companies towards cyber and compliance risks; the massive use of data (data learning and big data) and outsourced services, more and more often "in cloud", requires to adequately assess technological risks by ensuring the necessary controls.

Finally, it could be said that from the above analysis the US P2P market appears to be quite diffused with apparently less regulations, while the less developed, though rapidly growing Italian market, is oriented toward a more regulated framework.

Thus, to ensure adequate levels of protection for the consumer, it is necessary to market services that have already been adequately tested and controlled and to establish a regulatory framework of reference regarding the protection of both privacy and personal data, combating money laundering and financing to terrorism, to transparency and correct behavior towards customers, the use of digital tools and taxation[59].

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[58] On these issues see, F. Fiordiponti, *Peer to Peer Lending,* in *FCHUB,* 11 June 2017, 3 ss.; M. Bofondi, *Il lending-based crowdfunding: opportunità e rischi*, in *Questioni di economia e finanza della Banca d'Italia*, n. 375/2017; S. Zanetti, *Peer to Peer Lending: Intermediazione Finanziaria Online,* Università Cà Foscari di Venezia, 2016.

[59] For an overview and critical evaluations of these phenomena, see BANCA D'ITALIA, *op. cit.*, December 2017.

Brunella Russo - Abstract

L'ecosistema del mercato internazionale del P2P*: contesto americano e italiano a confronto*

Già da tempo diverse economie e settori, in particolare negli Stati Uniti, in Europa e nei mercati emergenti, stanno assistendo all'emergere di canali e strumenti di finanziamento alternativi, al di fuori del tradizionale sistema finanziario delle banche e dei mercati finanziari.
Negli ultimi anni il P2P Lending ha fatto registrare a livello mondiale una crescita davvero esponenziale anche grazie all'affermarsi delle piattaforme online, mentre in Italia il mercato è ancora agli albori, motivo per cui è stato creato nell'aprile del 2016 il P2P Lending Italia, un ente che svolge la funzione di raccogliere dati sulle piattaforme italiane con il fine di monitorarne la crescita ed espandere la cultura del Peer to Peer Lending.
Nella prospettiva di analizzare gli aspetti evolutivi di dette piattaforme e le tendenze giuridiche che questo fenomeno ha a livello internazionale, la presente analisi si è concentrata sul mercato americano ed italiano, con brevi riferimenti al mercato inglese, tra i più evoluti in Europa.
Tale ambito d'indagine si è basato, sia su un approccio storico rispetto alla nascita delle iniziative di P2P Lending, sia sulle caratteristiche operative che regolamentari.

The international P2P market system: the American and Italian contexts compared

For some time, many economies and industries, particularly in the US, Europe and emerging markets, have been witnessing the emergence of alternative financing channels and instruments, outside the traditional financial system of the regulated banking and capital markets.
In recent years, P2P lending has seen a truly exponential growth worldwide thanks to the rise of online platforms. In Italy, the market is still in its infancy, which is why in April 2016 P2P Lending Italia was created: a body that serves to collect data on Italian platforms to monitor its growth and promote the culture of Peer-to-Peer Lending.
With a view to analysing the evolutionary aspects of online platforms and the legal trends that this phenomenon has at an international level, this analysis focuses on the American and Italian markets.
This area of investigation was based both on a historical approach with respect to the birth of P2P lending initiatives and on operational and regulatory characteristics.

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