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# REGULATION OF THE EU FINANCIAL MARKETS

MiFID II and MiFIR

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EDITED BY  
DANNY BUSCH  
GUIDO FERRARINI

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OXFORD

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# REGULATION OF THE EU FINANCIAL MARKETS

MiFID II and MiFIR

## PREFACE

Investment firms and trading venues have been closely regulated by the EU Markets in Financial Instruments Directive (MiFID I), the MiFID I Implementing Directive, and the MiFID I Implementing Regulation since 1 November 2007. MiFID I aims to provide a high level of harmonized investor protection, financial market transparency, and greater competition between trading venues.

On 3 January 2018—some ten years later—the MiFID I regime will be replaced by MiFID II, which comprises, among other things, a directive (MiFID II), the Markets in Financial Instruments Regulation (MiFIR), and a truly impressive number of implementing measures, commonly referred to as Level 2 legislation. MiFID I may have the reputation of being strict, but MiFID II/MiFIR tightens the reins even more. It is not hard to guess the reason: the financial crisis has also revealed gaps in the MiFID I legislation, notably in investor protection, as well as shortcomings in the functioning and transparency of financial markets. The MiFID II/MiFIR regime will have a major impact on the financial sector in Europe.

This volume aims to analyse and discuss the main changes and new provisions introduced by MiFID II/MiFIR. Its chapters are grouped in a thematic way, covering the following areas: (i) general aspects, (ii) investment firms and investment services, (iii) trading, (iv) supervision and enforcement, and (v) the broader view and the future of MiFID.

Part I offers an overview of the developments leading to MiFID II and clarifies the central term ‘investment firm’. It also provides an overview of the volume’s contents.

Part II considers the main changes of MiFID II’s scope and exemptions in comparison with MiFID I, followed by a treatment of the governance rules for investment firms. It also analyses the duty to act in the client’s best interest, as well as the new product governance and product intervention rules. Moreover, the novel distinction between independent and non-independent advice is scrutinized, followed by an assessment of the conflicts of interest provisions and the inducement rules. It further discusses the regulatory relevance of the distinction between agency and principal dealing. This part concludes with an outline of the new rules for third-country investment firms.

Part III discusses the governance and organization of trading venues and outlines the main features of the extensive new transparency regime which will apply to

trading in a wide range of asset classes under MiFIR. It also contains a treatment of the new rules for SME growth markets, as well as an analysis of the concept of dark trading. Moreover, it outlines the new mandatory trading obligation for derivatives and the new commodity derivatives provisions. This part concludes with a treatment of the new rules for algorithmic and high-frequency trading, also from a US perspective.

Part IV analyses the MiFID II provisions on supervision, enforcement, and cooperation by competent authorities. It also examines to what extent the civil courts are bound by MiFID I and II under EU law.

Part V clarifies the relationship between MiFID II and several other closely related directives, such as the Insurance Distribution Directive, the PRIIPs Directive, and the UCITS Directive. It also analyses and discusses shadow banking and the functioning of financial markets. Finally, this part explores the policy and regulatory issues generated by investment-based crowdfunding in Europe.

The volume was preceded by a meeting on 28 and 29 January 2016 of the International Working Group on MiFID II, established as a joint initiative between the Institute for Financial Law within the Business & Law Research Centre of Radboud University, Nijmegen, the Netherlands, and the Genoa Centre for Law and Finance, University of Genoa, Italy. We thank the Business & Law Research Centre of Radboud University, Nijmegen for its sponsorship. We also thank NautaDutilh Amsterdam for hosting the meeting. We are grateful to the distinguished members of the Working Group for their dedication to the project and, in particular, for their contributions to this book as authors. We also thank the invitees to the meeting for providing the members of the Working Group with invaluable comments on their draft chapters.

Last, but not least, we acknowledge our gratitude to the editorial team at Oxford University Press, who successfully brought a lengthy and complex project to completion.

The law is stated as of 1 November 2016.

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## LIST OF ABBREVIATIONS

ABCP	Asset-Backed Commercial Paper
ABS	Asset-Backed Securities
ABSPP	Asset-Backed Securities Purchase Programme
ACER	Agency for the Cooperation of Energy Regulators
ACPR	<i>Autorité de contrôle prudentiel et de résolution</i>
ADT	Average Daily Turnover
AFM	Authority for the Financial Markets
AFME	Association for Financial Markets in Europe
AGR	Average Growth Rate
AIF	Alternative Investment Fund
AIFM	Alternative Investment Fund Manager
AIFMD	Alternative Investment Fund Managers Directive
AIM	Alternative Investment Market
AMF	<i>Autorité des Marchés Financiers</i>
APA	Approved Publication Arrangement
APM	Adverse Price Movement
ARM	Approved Reporting Mechanism
AT	Algorithmic Trading
ATS	Alternative Trading System
Banks RWD	Directive 2001/24/EC on the Reorganisation and Winding Up of Credit Institutions
BCBS	Basel Committee on Banking Supervision
BDCN	Broker/Dealer Crossing Network
BGB	<i>Bürgerliches Gesetzbuch</i> —German Civil Code
BIS	Bank for International Settlements
BRRD	Banking Recovery and Resolution Directive
BTSs	Binding Technical Standards
CB	Clearing Broker
CCP	Central Counterparties
CDS	Credit Default Swaps
CEA	Commodity Exchange Act
CEMA	Committee for Economic and Markets Analysis
CEO	Chief Executive Officer
CESR	Committee of European Securities Regulators
CFTC	Commodity Futures Trading Commission
CIP	<i>Conseiller en Investissement Participatif</i> —French crowdfunding investment advisor
CLOB	Central Limit Order Book

CMU	Capital Market Union
CN	Crossing Network
CNAV	Constant Net Asset Value
CNVM	Spanish Securities Commission
COBS	Conduct of Business Sourcebook
COFIA	Classes of Financial Instruments Approach
CP	Consultation Paper
CRA	Credit Rating Agency
CRD I	Capital Requirements Directive I
CRD IV	Capital Requirements Directive IV
CRR	Capital Requirements Regulation
CSD	Central Securities Depository
CSDR	Central Securities Depositories Regulation
CSMAD	Criminal Sanctions for Market Abuse Directive
CTP	Consolidated Tape Provider
DCB	Dutch Central Bank
DCC	Dutch Civil Code ( <i>Burgerlijk Wetboek</i> )
DEA	Direct Electronic Access
DFSA	Dutch Financial Supervision Act
DGS	Deposit Guarantee Scheme
DJIA	Dow Jones Industrial Average
DM	Dealer Market
DMA	Direct Market Access
DP	Discussion Paper
DVC	Double Volume Cap
DVP	Delivery versus Payment
EB	Executing Broker
EBA	European Banking Authority
EBBO	European Best Bid or Offer
ECB	European Central Bank
ECGI	European Corporate Governance Institute
ECJ	European Court of Justice
EEA	European Economic Area
EFAMA	European Fund and Asset Management Association
EIOPA	European Insurance and Occupational Pensions Authority
ELA	Emergency Liquidity Assistance
EMIR	European Market Infrastructure Regulation
EP	European Parliament
ESA	European Supervisory Authority
ESCB	European System of Central Banks
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
ETD	Exchange-Traded Derivative
ETF	Exchange Trade Fund
ETP	Exchange Traded Product
EU	European Union



*List of Abbreviations*

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FATF	Financial Action Task Force
FC	Financial Counterparty
FCA	Financial Conduct Authority
FINRA	Financial Industry Regulatory Authority
FMI	Financial Markets Infrastructure
FR	Final Report
FSA	Financial Services Authority
FSB	Financial Stability Board
FSMA	Financial Services and Markets Authority
FSMA 2000	Financial Services and Markets Act 2000
FVC	Financial Vehicle Corporation
GDP	Gross Domestic Product
GEL	Grant Estates Limited
<i>GewO</i>	<i>Gewerbeordnung</i> —German Trade, Commerce, and Industry Regulation Act
GOICA	Gross Omnibus Indirect Client Account
HFT	High-Frequency Trading/Trader
<i>HGB</i>	<i>Handelsgesetzbuch</i> —German Commercial Code
IDD	Insurance Distribution Directive
IEX	Investors Exchange
IF	Investment Firm
<i>IFP</i>	<i>intermédiaire en financement participative</i> — French crowd-lending investment advisor
IFRS	International Financial Reporting Standards
IM	Initial Margin
IMD	Insurance Mediation Directive
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
IPO	Initial Public Offering
IRSA	Interest Rate Swap Agreement
ISA	Individually Segregated Account
ISD 1993	Investment Services Directive 1993
ISDA	International Swap and Derivatives Association
ISICA	Individually Segregated Indirect Client Account
ITS	Implementing Technical Standards
KID	Key Investor Document
KII	Key Investor Information
KOM	Key Operating Milestone
<i>KwG</i>	<i>Kreditwesengesetz</i> —German Banking Act
KYC	Know Your Customer
LIS	Large-in-Scale
LSE	London Stock Exchange
LP	Liquidity Premium

*List of Abbreviations*

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MAC	Mercato Alternativo del Capitale
MAD	Market Abuse Directive
MAR	Market Abuse Regulation
MCD	Mortgage Credit Directive
MI	Market Impact
MiFID	Markets in Financial Instruments Directive
MiFIR	Markets in Financial Instruments Regulation
MMF	Money Market Funds
MRM	Market Risk Measure
MTF	Multilateral Trading Facility
NASD	National Association of Securities Dealers
NBB	National Best Bid
NBO	National Best Offer
NCA	National Competent Authority
NFC	Non-Financial Counterparty
NMS	Normal Market Size
NMS	National Market System
NT	Negotiated Trade / Negotiated Transaction
OAM	Officially Appointed Mechanism
OICA	Omnibus Indirect Client Account
OFI	Other Financial Institutions
OMF	Order-Management Facility
OSA	Omnibus Segregated Account
OTC	Over the Counter
OTF	Organized Trading Facility
OTR	Order-to-Transaction Ratio
P2B	Person-to-Business
P2P	Peer-to-Peer
PAD	Payment Accounts Directive
PBBO	Primary Best Bid and Offer
PD	Prospectus Directive
PRA	Prudential Regulation Authority
PRIIP	Packaged Retail and Insurance-based Investment Product
PSI	<i>Prestataire en Services d'investissement</i> —French investment firms
RBS	Royal Bank of Scotland
RDR	Retail Distribution Review
REMIT	Regulation on Wholesale Energy Markets Integrity and Transparency
RFQ	Request for Quote
RIE	Recognized Investment Exchange
RMs	Regulated Markets
RP	Reference Price
RTS	Regulatory Technical Standard

*List of Abbreviations*

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SA	Sponsored Access
SDP	Single-Dealer Platform
SFTs	Securities Financing Transactions
SEC	Securities and Exchange Commission
SEF	Swap Execution Facility
SFD	Settlement Finality Directive
SFT	Securities Financing Transactions
SI	Systematic Internalizer
SIB	Securities and Investments Board
<i>SIM</i>	<i>Società di investimento mobiliare</i> —Italian banks and investment firms
SMEs	Small and Medium-Sized Enterprises
MSG	Securities and Markets Stakeholder Group
SPV	Special Purpose Vehicle
SRM	Single Resolution Mechanism
SRRI	Synthetic Risk and Reward Indicator
SSM	Single Supervisory Mechanism
SSS	Systems of Settlement of Securities
STP	Straight-Through-Processing
STS	Simple, Transparent and Standardized Securitization
T2S	Target 2 Securities
TD	Transparency Directive
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TR	Trade Repository
UCITS	Units for Collective Investment in Transferable Securities
US	United States
VC	Venture Capitalist
VDO	Volume Discovery Order
VM	Variation Margin
VNAV	Variable Net Asset Value
<i>Wft</i>	<i>Wet op het financieel toezicht</i> (Dutch Act on Financial Supervision)
<i>WpHG</i>	<i>Wertpapierhandelsgesetz</i> (German Securities Trading Act)
WSS	Written Statement on Suitability

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