Securities World

Jurisdictional comparisons **Fourth edition 2014**

Foreword Willem J L Calkoen NautaDutilh NV

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THE EUROPEAN LAWYER REFERENCE

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Published in 2014 by
Thomson Reuters (Professional) UK Limited
trading as Sweet & Maxwell,
Friars House, 160 Blackfriars Road, London SE1 8EZ
(Registered in England & Wales, Company No 1679046.
Registered Office and address for service:
2nd floor, Aldgate House, 33 Aldgate High Street, London EC3N 1DL)

A CIP catalogue record for this book is available from the British Library.

ISBN: 9780414033498

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Foreword

Willem J L Calkoen NautaDutilh NV

Directors of issuers, investor relationship directors and enterprise risk directors work together with their financial advisers, accountants, lawyers, representatives of financial institutions, supervisors and governments to create trust in the securities market. At the same time, they all try to work on establishing cost effectiveness and efficiency to lower the cost of capital. While it is true that balance must be found between the creation and maintenance of trust on the one hand and cost effectiveness on the other, in the end it is trust that is the most important, because the point of capital markets is that the public is prepared to invest money in the activities of entrepreneurs, with the hope of success. The more trust that exists, the higher and more consistent the listed prices will be. We all know that trust must be built up carefully over many years, but its fragility is such that it can be shattered with one event like the failure of a large company. Modern history has known crises, of which one of the largest took place in September 2008.

Since then, stock exchanges have played an important role in the revival of economies. First by debt capital bonds guaranteed by governments, then in 2009 companies raised the capital they could not borrow from banks using rights issues and in 2010 they raised clean equity and initial public offerings started up again. The stock exchanges of the BRIC countries (Brazil, Russia, India and China) are gradually becoming more important, while the Western stock exchanges are being used increasingly by BRIC corporations. At the same time investors on stock exchanges are becoming increasingly international. For the convergence that is taking place it is useful to understand the differences. Regulations are being relaxed in some areas, where there are special arrangements for smaller start-ups and special acquisition companies. At the same time many more regulations are being added.

Unsolicited public tender offers are an important phenomenon that stimulate the market. Several countries have legal defence mechanisms. Even the British Financial Services Authority, in the aftermath of Kraft's acquisition of icon Cadbury, is proposing higher thresholds for tender offerors. Large takeovers stimulate the market and a rise in the market can stimulate takeovers.

The first edition of *Securities World* appeared in 2005 after the Internet bubble burst. The second edition appeared after the implementation of many European directives in 2007. The third edition came in 2011 after the financial crisis and now I am proud to present this fourth edition with more regulation and hope of trust. The idea of *Securities World* is to have a jurisdictional comparison of the key questions: how does one get a listing on the stock exchange and how does one take over a listed company.

Our aim has been to achieve a high quality of content, so that *Securities World* will be seen as an essential reference work in our field. We have had some very favourable comments from stock exchanges around the world that are very happy with this book.

To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of securities and takeover law from each jurisdiction. I am very grateful to them for all their unstinting work.

Without the efforts of the European Lawyer we would not have completed the book. I am very grateful to the European Lawyer Reference team at Thomson Reuters. I am also grateful to Inge Moerland and Kathy Vermeij (of NautaDutilh Rotterdam) who managed the extensive correspondence with our contributors with skill, good humour and patience.

If you as reader have any comments, I would be very grateful to hear from you. Future editions of this work will obviously benefit from your thoughts and suggestions.

Willem J L Calkoen, NautaDutilh NV
General Editor
Rotterdam, 2014

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** Authors' note – the law in this chapter is up to date as of July 2014. More recent developments will be included in the next edition.*

INTRODUCTION

Following the financial crisis, the European Union went to work on substantial reforms in the financial sector. An overview of the causes of the financial crisis and the actions that have been contemplated was provided in the report of the high-level group on financial supervision in the European Union chaired by Jacques de Larosière in Brussels on 25 February 2009 (the De Larosière Report).This contribution aims to provide an overview of the amendments to existing directives and regulations and new recent directives and regulations, including an overview of legislation which is currently being prepared, since the financial crisis.

THE DE LAROSIÈRE REPORT

The De Larosière Group was set up in 2008 as a result of the financial turmoil, to make recommendations to the Commission on strengthening European supervisory arrangements covering the financial sector, with the objective of establishing a more efficient, integrated and sustainable European system of supervision and also to reinforce the cooperation between European supervisors and their international counterparts. More specifically, the De Larosière Group was requested to examine the following:

- how the supervision of European financial institutions and markets would best be organised to ensure the prudential soundness of institutions, the orderly functioning of markets and thereby the protection of depositors, policy-holders and investors;
- how to strengthen European cooperation on financial stability oversight, early warning mechanisms and crisis management, including the management of cross-border and cross-sectoral risks; and
- how supervisors in the EU's competent authorities should cooperate with other major jurisdictions to help safeguard financial stability on a global level.

The study resulted in 31 recommendations published in the De Larosière Report. The recommendations can be subdivided into:

(i) recommendations regarding the correction of regulatory weaknesses;
(ii) recommendations with a view to the European system of financial supervision; and
(iii) recommendations on how the European Union should contribute to global financial stability.

In line with the recommendations by the De Larosière Group, three new financial supervisors were introduced. The Committee of European Banking Supervisors was replaced by the European Banking Authority (EBA); the Committee of European Insurance and Occupational Pensions Supervisors was replaced by the European Insurance and Occupational Pensions Authority (EIOPA); and the Committee of European Securities Regulators was replaced by the European Securities and Markets Authority (ESMA). These supervisory authorities will be working in tandem with the European System of Financial Supervisors, both facilitating micro-economic prudential supervision.

DEVELOPMENTS (AS AT JULY 2014)

The overview below provides a short description of both amendments to existing legislation and new legislation.

Prospectus Directive

On 24 September 2009, the Commission published a proposal for the review of Directive 2003/71/EC (Prospectus Directive) (Commission Proposal). The context of the Commission Proposal was formed by: (i) the striving of the Commission for a reduction of administrative burdens on companies within the EU; and (ii) Article 31 of the Prospectus Directive, which requires the Commission to assess the application of the Prospectus Directive five years after its entry into force and to present, where appropriate, proposals for its review.

The overarching goal of the Commission proposal was to simplify and improve the application of the Prospectus Directive, increasing its efficiency and enhancing the EU's international competitiveness, bearing in mind the importance of enhancing the level of investor protection envisaged in the Prospectus Directive and ensuring that the information provided is sufficient and adequate to cover the needs of retail investors, particularly in the context of the financial market turbulence that started in 2007. After months of discussion on the Commission Proposal between the Commission, the Council and the Parliament, a Directive 2010/73/EU which will amend the current Prospectus Directive was adopted on 17 June 2010 by the Council and on 24 November 2010 by the Parliament. The amending Directive came into effect on 1 July 2012. In addition to the Prospective Directive, three delegated directives (2012/486/EU, 2012/862/EU and 2013/759/EU) have made additional changes to the Prospective Directive and came into effect in respectively March 2012, June 2012 and April 2013.

Prospectus summary

The summary of a prospectus was a major focus point in the new Prospectus Regulation. The summary should be a separately readable document. As such, cross-references to other parts of the prospectus are not allowed. Pursuant to the amended Prospectus Directive the summary must include 'key information'. The key information should convey the essential characteristics of, and risks associated with the securities and the rights attached thereto as well as information in respect of the issuer, the potential guarantor, the reasons for and terms and proceeds of the offering and/ or listing. If the summary when read together with the other parts of the prospectus does not contain such key information, this may form an additional basis for potential (prospectus) liability.

The format and content of the summary in a prospectus are also standardised in the new Prospectus Regulation in order to simplify the comparison of different securities by an investor. A required sequence of sections applies which in turn contain required elements. The sections are the following:

A: introduction and warnings;
B: the issuer and any guarantor;
C: securities;
D: risks; and
E: offer.

ESMA expects that the issuer also includes in the summary the numbering of the elements as well as a heading above each element providing for a short introduction of the content of such element.

If and to the extent that information included in the required elements does not apply, this should be clearly indicated and, as recommended by ESMA, a short explanation should be included as well.

The length of the summary does no longer need to be limited to 2500 words. The length of the summary shall take into account the complexity of the transaction but shall not exceed the longer alternative of either (i) 7 per cent of the total length of the prospectus or (ii) 15 pages. It should be noted that no guidelines for lay-out, font or minimal font size are prescribed as yet.

Threshold for 'wholesale' securities

Another important amendment following from the Amending Directive was that the threshold for 'wholesale' securities was set at EUR 100,000 instead of EUR 50,000. This means that while issues of securities with a denomination of EUR 50,000 or more were prior to the amendment exempted from the obligation to publish a prospectus, from the date of the implementation of the Amending Directive, only issues of securities with a denomination of EUR 100,000 or more are exempted from the requirement to publish a prospectus. In the recital to the Amending Directive, it is explained that the current threshold of EUR 50,000 no longer reflects the distinction between retail investors and professional investors in terms of investor capacity, since it appears that even retail investors have recently made investments of more than EUR 50,000 in one single transaction. On the other hand, the Amending Directive broadens the exemption for offers addressed to natural or legal persons, other than qualified investors, from 100 to 150 persons per member state.

MIFID, MIFID II & MIFIR

General – MiFID

EU Directive 2004/39/EC (Markets in Financial Instruments Directive, or

MiFID), is the successor to the Directive 93/22/EEC (Investment Services Directive, or ISD), which was adopted in 1993. The ISD introduced the European passport for investment firms, which allowed these firms to offer their services in each of the countries of the European Union based upon a licence obtained in their home country. However, as a result of the fact that the ISD was implemented in different manners across the different member states of the EU, investment firms were confronted with local differences when offering their services in the European Union. MiFID was introduced in order to produce an effective 'single passport' regime allowing investment firms and regulated markets to operate across Europe under a common set of rules which enhances the protection of European investors.

The MiFID has been developed in accordance with the Lamfalussy legislative process, which was introduced in 2001 in order to accelerate the development of new European legislation in the field of financial services. According to the Lamfalussy process, the level 1 measures – MiFID – consist of a framework directive which sets forth the central principles. These principles are worked out in more detail in the level 2 measures. With respect to the MiFID, the principles set forth in the MiFID are further elaborated upon in Directive 2006/73/EC (Implementation Directive) and Regulation No. 1287/2006 (Implementation Regulation). These implementing measures add technical detail to the framework provided by MiFID. Both the MiFID and the Implementation Directive had to be implemented in the national laws of the EU member states. The Implementation Regulation did not need to be implemented – it is directly applicable in each EU member state.

MIFID II & MIFIR

In October 2011, the European Commission published its proposals for MIFID II and MIFIR for amending MIFID to further the integration, competitiveness, and efficiency of EU financial markets. The proposals include amendments to MIFID itself on several points, as well as a proposal for a new directive 2004/39/EC: Markets in Financial Instruments Directive or MIFIR. The Council and the Parliament reached consensus on the final draft of both proposals on 14 January 2014. Publication in the Journal of the European Union took place on 12 June 2014 and MiFID II has to be implemented by 1 January 2017. MIFIR, however, will be directly applicable in each EU member state. The main changes applied to MIFID as a result of MIFID II and MIFIR are the following.

Scope

An important part of the MIFID rules will, as a result of MIFID II, also apply to the advised and non-advised sale of structured deposits (for example savings accounts tracking a certain investment index). In addition, the MIFID rules will apply to all transactions (including spot-transactions) in emission allowances. So far only certain derivatives transactions in emission allowances were regulated by the MIFID. Furthermore, it is clarified that the MiFID-rules also apply to investment firms and credit institutions selling their own securities at the moment of their issuance, also when not simultaneously providing advice. Furthermore, the scope of the existing exceptions for investment firms dealing on their own account and for entities active in commodity derivatives-trading will be narrowed. Investment insurances will not fall under the scope of the MiFID, but will be included in the revision of the Insurance Mediation Directive (IMD2).

Non-EU/EEA Investment Firms

A new regime for investment firms based in non-EU/EEA-countries is introduced. MiFID II allows member states to require non-EU/EEA investment firms to perform their investment services through a branch (instead of cross-border). In addition, the authorisation requirements are harmonised among the member states and a simplified authorisation procedure will be introduced for non-EU/EEA investment firms that offer investment services on a cross-border basis to eligible counterparties (ECPs) and/or professional investors only. Such investment firms should register with ESMA before they can provide their services throughout the European Union.

Client categorisation

Rules concerning client categorisation will be adjusted. MIFID II confirms that municipalities and other local authorities do not qualify as professional investors. Additional obligations will apply with respect to services offered to eligible counterparties.

Investor protection

Firms giving investment advice will be required to disclose whether the advice is provided on an independent basis, whether it is based on a broad or on a more restricted analysis of the market, whether the range is limited to financial instruments issued or provided by entities having close links with the investment firm and whether the firm will provide the client with the on-going assessment of the suitability of the financial instruments recommended. In order to qualify as 'advice provided on an independent basis', the firm must meet certain requirements.

In addition, investment firms providing advice on an independent basis or providing asset management services may not receive fees, commissions or other monetary benefits from a third party in relation to the provision of the service to clients. Minor non-monetary benefits that are capable of enhancing the quality of services provided to a client and which are of a scale and nature that they could not be judged to impair compliance with the investment firm's duty to act in the best interest of the client, should be clearly disclosed and are excluded from this provision.

MiFID II also narrows the exception with respect to the know-your-customer requirement for execution-only business by limiting the categories of financial instruments for which this is permissible and excluding the granting of specific credits or loans that do not compromise of existing credit limits of loans, current accounts and overdraft facilities of clients.

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Corporate governance

The existing requirement to have sufficiently experienced board members is expanded. Additional rules concerning corporate governance will be imposed on investment firms, including requirements with respect to the members of the management board and the supervisory board. In principle, members of the management bodies need to comply with the expertise requirements of CRD IV that see both to the person and the performance of duties. Members will be required to commit sufficient time to discharge their duties and therefore, performing a limited number of directorships at the same time are allowed.

Recording and saving telephone and electronic communications

The proposals provide that investment firms must record and save certain telephone conversations and electronic communications (for instance email). This includes all communications relating to transactions concluded when dealing on own account as well as relating to the reception, transmission and execution of client orders. Communications that did not lead to such transaction or the provision of client order services will also have to be recorded and saved. The retention period for these recordings is in principle five years.

Infrastructure of trading venues

The proposals also introduce new rules with respect to the infrastructure of trading venues. These rules include a new trading venue: the Organized Trading Facility (OTF). This is a trading venue other than a regulated market or MTF that brings together multiple third party buying and selling interests in bonds, structured finance products, emission allowances or derivatives. Amongst other products, shares fall outside the scope of OTFs. OTF's need to apply for a license and in addition, they must meet certain ongoing requirements that also apply to regulated markets and MTFs. In addition, OTFs will be subject to certain investor protection rules and are subject to restrictions in the execution of orders on own account.

The regime for systematic internalisers will no longer be limited to shares, but will also be extended to other financial instruments. In addition thereto, the proposals contain additional rules for systematic internalisers. In addition, additional requirements will apply with respect to regulated markets, MTFs (and OTFs), including the requirement to provide annual information on the execution quality, more extensive transparency- and reporting obligations.

Algorithmic trading

MIFID II introduces specific rules with respect to algorithmic trading as well as further regulations with respect to high frequency trading and market making activities.

Mandatory exchange trading

In line with EMIR, MiFIR requires that transactions in derivatives that have been identified by ESMA, may in principle occur only on a regulated market, MTF, OTF or equivalent third country trading venue. In addition, MiFIR requires that transactions in shares that have been listed on a regulated market or trading platform may in principle only occur on a regulated market, OTF, through systematic internalisation or on an equivalent third country trading venue.

Regulators

Under MiFID II, regulators will receive additional powers. Regulators will have the power to require any person to reduce its derivatives position, or with respect to commodity derivatives, to limit the ability of any person from entering into a commodity derivative. In addition, regulators will have the power to prohibit or restrict the marketing, distribution or sale of particular financial instruments or a type of financial activity.

Sanctions

New rules with respect to sanctions are introduced. There will be minimum requirements that the Member States must implement, including the provision that the maximum penalty must be at least 10 per cent of the total annual turnover in case of a legal entity and the penalty will be EUR 5 million in case of a natural person or twice the amount of benefit derived from the violation.

ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE (AIFMD)

On 30 April 2009, the EC published the AIFMD, its proposal for a Directive on Alternative Investment Fund Managers. After 26 months of intense discussions and negotiations between the EC, the European Parliament, the European Council of Ministers and various market parties and lobbying groups, the final agreed text of AIFM was published in the Official Journal of the European Union on 1 July 2011.

Although Directive 2011/61/EU (Alternative Investment Fund Managers Directive, or AIFMD) is intended to regulate hedge funds and private equity funds, its scope is significantly broader. It provides for far-reaching changes to the supervision of, in principle, all investment funds that do not qualify as undertakings for collective investment in transferable securities (UCITS). This concerns not only hedge funds and private equity funds but also real estate funds, equity and bond funds, Fund of funds and other non-UCITS investment funds. AIFM refers to these investment funds as Alternative Investment Funds (AIFs), a rather confusing term in view of its broad scope.

The AIFMD introduces a harmonised European framework that aims to create a comprehensive and effective regulatory and supervisory framework for managers of alternative investment funds (AIFMs) within the EU. The AIFMD creates a passport for EU AIFMs authorised under this directive to market units or shares in their EU AIFs and to professional investors in all EU member states, without the need to comply with any further local requirements. It contains a license requirement for managers. As part of the license application, managers need to include a description of the investment strategy and a clear description of the business operation. Day-to-day policy makers and co-policymakers, such as managing directors of the board, need to be tested by the national authorities. In addition, the directive includes additional requirements, such as preventing conflicts of interest, the conduct of an appropriate risk and liquidity management, an independent depositary, ensuring an independent valuation of assets and other transparency requirements.

CAPITAL REQUIREMENTS DIRECTIVE IV (CRD IV)/CAPITAL REQUIREMENTS REGULATION (CRR)

In July 2011, the European Commission proposed a legislative package to strengthen the regulation of the banking sector replacing Directives 2006/48 and 2006/49 (Capital Requirements Directives). This package consisted of Directive 2013/36/EU (CRD IV) and Regulation (EU) No. 575/2013 (CRR). The main important changes to the earlier Capital Requirement Directives are the implementation of the Basel III agreement at European level, stricter provisions regarding governance and broader and more precise competences for regulators. CRD IV had to be implemented in the Member States by 1 January 2014; CRR is directly applicable since 1 January 2014.

SINGLE SUPERVISORY MECHANISM (SSM)

On 12 September 2012, the European Commission adopted two regulations (1024/2013 and 1022/2013) that set out the Single Supervisory Mechanism. With the SSM, the ECB will have direct supervisory powers on significant banks and will also monitor the national supervisors on their supervision of non-significant banks. These regulations came into force 4 November 2013 but the ECB will start to take over the tasks resulting from the regulations from 4 November 2014, when the AQR and the stress tests have been completed. The rules set out in the SSM will only apply to banks within the Eurozone.

SINGLE RESOLUTION MECHANISM (SRM)

On 10 July 2013, the European Commission published a proposal for a Regulation which aims to ensure an orderly resolution of failing banks with minimal costs for taxpayers and the real economy. In addition to the resolution mechanism, a Single Bank Resolution Fund was set which will be financed by the banking sector. The proposal was approved by the European Parliament on 15 April 2014 and is expected to be directly applicable by 1 January 2015. However, the provisions concerning bail-in and resolution will be applicable from 1 January 2016. The rules set out in the SRM will only apply to banks within the Eurozone.

BANK RECOVERY AND RESOLUTION DIRECTIVE (BRRD)

An agreement was reached on 12 December 2013 between the European Parliament, the Council and the Commission on the Bank Recovery and Resolution Directive. The Directive has been adopted on 15 April 2014 by the European Parliament. The BRRD sets new rules for all Member States to put an end to the old paradigm of bank bail-outs, where the taxpayers bear all losses. The BRRD aims to prepare for and prevent against financial problems, early intervention and efficient unwinding of banks and investment firms. It also contains an obligation to develop recovery and resolution plans and each Member State shall designate a 'resolution authority'. The BRRD has to be implemented by the Member States on 1 January 2015, but the provisions regarding the bail-in have to be applied by 1 January 2016.

SOLVENCY II

Directive 2009/139/EC (Solvency II Directive), which was adopted on 10 November 2009, sets new solvency requirements for insurance and reinsurance companies. This Directive recasts 14 existing insurance directives into one single legal text and it intends to reflect the latest developments in prudential supervision, actuarial science and risk management, and to allow for updates in the future. The Solvency II Directive consists of three pillars, being: (i) the quantitative capital requirements; (ii) the own risk and solvency assessment and supervisory review process; and (iii) reporting obligations and disclosure. The implementation deadline for most of the provisions of the Solvency II Directive has been postponed multiple times but is now set for 1 January 2016.

OMNIBUS II

Directive 2014/51/EU (Omnibus II Directive) makes changes to the Solvency II Directive and was adopted on 14 April 2014. This directive will regulate the role of EIOPA, transitional measures with the introduction of Solvency II and the treatment of long-term insurers regulated products. Implementation will take place in phases, starting on 31 March 2015.

INSURANCE MEDIATION DIRECTIVE II

The proposal for IMD II provides for a revision of IMD I and proposes changes with respect to the regulation of offering and mediating in insurance products within the EU. It aims to contribute to further harmonisation, where the current IMD I is based on minimum harmonisation. IMD II aims to increase consumer protection by providing for stricter conduct rules for insurers and intermediaries and additional conduct rules for insurance with an investment component. The proposal has not yet been adopted, but is expected to be adopted in 2014. Implementation by Member States is therefore expected in 2016.

Belgium

NautaDutilh BVBA Elke Janssens, Philippine De Wolf, Virginie Ciers & Dorothée Vanderhofstadt

1. GENERAL DESCRIPTION OF THE CAPITAL MARKETS

1.1 General description of the capital markets

NYSE Euronext is the European regulated market of the NYSE Euronext Group, the world's leading equities marketplace. NYSE Euronext, the holding company created by the NYSE Group, Inc and Euronext NV (created from the merger of the Amsterdam, Brussels, Lisbon and Paris exchanges in 2000), was launched on 4 April 2007. As of October 2012, NYSE Euronext Brussels had a total of 148 company listed (excluding investment funds and real estate certificates), including 118 domestic companies with combined market capitalisation of EUR 219 billion (a 24.1 per cent increase from 31 December 2011) and 30 foreign companies with market capitalisation of EUR 177 billion. The BEL 20 is the real-time basket index which reflects the continuous price evolution of the 20 most liquid Belgian shares listed on NYSE Euronext Brussels and the blue-chip index for the Brussels stock market.

Since the start of the ongoing financial crisis, the number of new listings on all NYSE Euronext markets (Euronext, Alternext Brussels and the Free Market of Euronext Brussels (*Marché Libre/Vrije Markt*), it being understood that the last two are deemed multilateral trading facilities (MTFs)) has declined (in 2013, only two new Belgian companies were listed on Euronext, ie, Bpost and Cardio3 BioSciences) and more and more Belgian companies have been delisted following inter alia takeover bids by (foreign) companies.

2. REGULATORY STRUCTURE

2.1 Prohibition on the offering of securities

Directive 2003/71/EC (Prospectus Directive) has been implemented in Belgium by the Act of 16 June 2006 on the public offering of investment instruments and the admission of investment instruments to a regulated market (the Prospectus Act). The Prospectus Directive has been amended by Directive 2010/73/EU. Regulation (EC) No. 809/2004 of 29 April 2004 implementing the Prospectus Directive as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (the Prospectus Regulation) has been amended by Regulation (EC) Nos 311/2012, 486/2012 and 862/2012. On 6 August 2013, an act implementing Directive 2010/73/EU into Belgian law was published in the *Belgian State Gazette*. This act modified the Prospectus Act effective 16 August 2013.

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