# INTRODUCTION TO BELGIAN LAW

EDITED BY
HUBERT BOCKEN AND WALTER DE BONDT

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Hubert Bocken and Walter De Bondt

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## INTRODUCTION TO BELGIAN LAW

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European Insider Dealing (ed. with K.J. Hopt) (London 1992), European Takeovers – Law and Practice (ed. with K.J. Hopt) (London 1992), European Company and Financial Law 2nd edn. (ed. with K.J. Hopt) (Berlin 1997); 'Elements of Comparative Corporate Governance' in: Isakssen Mats and Rolf Skog (eds.) Aspects of Corporate Governance (Stockholm 1994); 'Corporate Governance after the Investment Service Directive European Legal Systems' in: Ferrarini, Guide (ed.). European Securities Markets. The Investment Service Directive and Beyond (London 1998).

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