

# CONTENTS

<i>Table of Cases</i>	xv
<i>Table of Legislation</i>	xvii
<i>List of Abbreviations</i>	xlili
<i>Author Biographies</i>	xliv

## I GENERAL ASPECTS

### 1. Who's Afraid of MiFID II?: An Introduction

*Danny Busch and Guido Ferrarini*

I. Introduction	1.01
II. Investment Firms and Investment Services	1.14
III. Trading	1.29
IV. Supervision and Enforcement	1.45
V. The Broader View and the Future of MiFID	1.48
VI. Final Remarks	1.52

## II INVESTMENT FIRMS AND INVESTMENT SERVICES

### 2. The Scope of MiFID II

*Kitty Lieverse*

I. Introduction	2.01
II. Investment Firms under MiFID II	2.02
III. Credit Institutions	2.15
IV. Investment Firms under the CRR	2.16
V. Structured Deposits	2.26
VI. General Exemptions to MiFID II Applicability	2.29
VII. Trading on Own Account	2.37
VIII. Dealings in Emission Allowances	2.42
IX. Financial Instruments	2.43
X. Insurance Companies and Insurance Intermediaries	2.51
XI. Managers of Collective Investment Undertakings	2.55

XII. Data-Reporting Service Providers	2.57
XIII. Market Operators	2.60
XIV. Conclusion	2.61
<b>3. Governance of Investment Firms under MiFID II</b>	
<i>Jens-Hinrich Binder</i>	
I. Introduction	3.01
II. Governance-related Regulation of Investment Firms between Prudential and Conduct-of-Business Regulation	3.04
III. The Technical Framework under MiFID II	3.21
IV. Conclusions	3.65
<b>4. The Overarching Duty to Act in the Best Interest of the Client in MiFID II</b>	
<i>Luca Enriques and Matteo Gargantini</i>	
I. Introduction	4.01
II. Antecedents of the Investment Firm's Duty to Act in the Best Interest of the Client	4.04
III. The Duty to Act in the Best Interest of the Client in MiFID II	4.07
IV. The Duty's Functions and Contents	4.16
V. The Articulation of the Duty with Respect to Individual Services and Activities	4.32
VI. A Look Across the Atlantic	4.73
VII. Assessment	4.82
<b>5. Product Governance and Product Intervention under MiFID II/MiFIR</b>	
<i>Danny Busch</i>	
I. Introduction	5.01
II. Product Governance	5.02
III. Product Intervention	5.41
IV. Conclusion	5.74
<b>6. Independent Financial Advice</b>	
<i>Paolo Giudici</i>	
I. Introduction	6.01
II. Economic Background	6.03
III. MiFID I	6.15

IV. MiFID II	6.20
V. Conclusions	6.45
<b>7. Conflicts of Interest</b>	
<i>Stefan Grundmann and Philipp Hacker</i>	
I. Foundations of the Regime	7.01
II. The Regime by Single Stages and Examples	7.31
III. Conclusion	7.87
<b>8. Inducements</b>	
<i>Larissa Silverentand, Jasha Sprecher, and Lisette Simons</i>	
I. Introduction	8.01
II. Current Legislation	8.04
III. The Dutch Inducement Ban	8.18
IV. The UK Inducement Rules	8.30
V. MiFID II	8.37
VI. Research as an Inducement	8.60
VII. Conclusion	8.67
<b>9. Agency and Principal Dealing under MiFID I and MiFID II</b>	
<i>Danny Busch</i>	
I. Introduction	9.01
II. Four Transaction Types	9.04
III. Investor Protection	9.19
IV. Acting as Agent or as Principal: Not a Justified Distinction to Serve as a Basis for Determining the Degree of Investor Protection	9.23
V. Conclusion	9.55
<b>10. MiFID II/MiFIR's Regime for Third-Country Firms</b>	
<i>Danny Busch and Marije Louisse</i>	
I. General	10.01
II. Scope of MiFID II/MiFIR's Regime for Third-Country Firms	10.04
III. Eligible Counterparties and Per Se Professional Clients	10.17
IV. Retail Clients and <i>Opt Up</i> Professional Clients	10.45
V. Retail Clients, Professional Clients, and Eligible Counterparties	10.57

VI. Initiative Test	10.65
VII. Conclusion	10.76

### III TRADING

<b>11. Governance and Organization of Trading Venues: The Role of Financial Market Infrastructure Groups</b> <i>Guido Ferrarini and Paolo Saguto</i>	
I. Introduction	11.01
II. Trading Facilities: Concept and Regulatory Framework	11.03
III. The EU Scenario of Trading Venues	11.32
IV. FMI Groups in an MiFID II World	11.58
V. Conclusion	11.86
<b>12. EU Financial Governance and Transparency Regulation: A Test for the Effectiveness of Post-Crisis Administrative Governance</b> <i>Niamh Moloney</i>	
I. Transparency Regulation and EU Financial Governance: Why It Matters	12.01
II. Transparency Regulation and EU Financial Governance	12.10
III. MiFIR, Transparency, and Supervisory Administrative Governance	12.34
IV. MiFIR, Transparency, and Administrative Regulatory Governance	12.45
V. Conclusion	12.56
<b>13. SME Growth Markets</b> <i>Rüdiger Veil and Carmine Di Noia</i>	
I. Introduction	13.01
II. Existing Alternative Markets for SMEs in Europe	13.04
III. SME Growth Markets under MiFID II	13.15
IV. Alternative Disclosure Obligations?	13.34
V. What Role for the 'SME Growth Market' Label? Some Reflections on Alternative Scenarios	13.47
VI. Conclusion	13.54

<b>14. Dark Trading under MiFID II</b>	
<i>Peter Gomber and Ilya Gvozdevskiy</i>	
I. Introduction	14.01
II. Dark Pools: Motivation, Classification, and Related Literature	14.10
III. Dark Pools under MiFID I	14.39
IV. Dark Pool Regulation under MiFID II/MiFIR	14.59
V. Summary	14.101
<b>15. Derivatives: Trading, Clearing, STP, Indirect Clearing, and Portfolio Compression</b>	
<i>Rezah Stegeman and Aron Berket</i>	
I. Introduction	15.01
II. The Trading Obligation	15.06
III. The Clearing Obligation	15.32
IV. The Straight-Through-Processing Obligations	15.49
V. The Obligations in Respect of Indirect Clearing	15.76
VI. The Obligations in Respect of Portfolio Compression	15.105
VII. A Few Final Remarks	15.128
<b>16. Commodity Derivatives</b>	
<i>Antonella Sciarrone Alibrandi and Edoardo Grossule</i>	
I. Introduction	16.01
II. Features of the Commodity Derivatives Markets and Its Relation to the Crisis	16.08
III. Overview of the Most Important EU Provisions on Commodity Derivatives	16.17
IV. The Regulatory Perimeter of the MiFID II/MiFIR Package	16.42
V. The New Position Limits Regime	16.63
VI. A New Set of Intervention Powers for Authorities and Trading Venues	16.83
VII. Conclusion	16.90
<b>17. Algorithmic Trading and High-Frequency Trading (HFT)</b>	
<i>Pierre-Henri Conac</i>	
I. Introduction	17.01
II. Algorithmic Trading	17.22

III. High-Frequency Trading	17.42
IV. Conclusion	17.61
<b>18. MiFID II and Equity Trading: A US View</b>	
<i>Merritt B. Fox</i>	
I. Basic Building Blocks	18.04
II. High-Frequency Trading	18.40
III. Dark Pools and Internalization	18.94
IV. Conclusions: Reflections on Issues Raised by MiFID II	18.105

#### IV SUPERVISION AND ENFORCEMENT

<b>19. Public Enforcement of MiFID II</b>	
<i>Christos V. Gortsos</i>	
I. Introductory Remarks	19.01
II. Structure of the Study	19.07
III. Competent Authorities: General Aspects, Powers, and Redress Procedures	19.11
IV. Cooperation Arrangements	19.83
V. Concluding Remarks and Assessment	19.127
<b>20. The Private Law Effect of MiFID I and MiFID II: The <i>Genil</i> Case and Beyond</b>	
<i>Danny Busch</i>	
I. General	20.01
II. May Civil Courts Be Less Strict Than MiFID I and MiFID II?	20.03
III. May Civil Courts Be Stricter Than MiFID I and MiFID II?	20.05
IV. May Contracting Parties Be Less Strict Than MiFID I and MiFID II?	20.21
V. May Contracting Parties Be Stricter Than MiFID I and MiFID II?	20.22
VI. Influence of MiFID I and MiFID II on the Principle of Relativity	20.28
VII. Influence of MiFID I and MiFID II on Proof of Causation	20.30
VIII. Influence of MiFID I and MiFID II on a Contractual Limitation or Exclusion of Liability	20.36

IX. MiFID I and MiFID II Assessments by the Courts of Their Own Motion in Relation to Private Investors?	20.39
X. Conclusion	20.40

## V THE BROADER VIEW AND THE FUTURE OF MIFID

<b>21. MiFID II in Relation to Other Investor Protection Regulation: Picking Up the Crumbs of a Piecemeal Approach</b> <i>Veerle Colaert</i>	
I. Introduction	21.01
II. MiFID II <i>versus</i> IDD	21.04
III. MiFID II and IDD <i>versus</i> UCITS KII and PRIIPs KID	21.27
IV. Cross-Selling Practices	21.52
V. Conclusion	21.57
<b>22. Shadow Banking and the Functioning of Financial Markets</b> <i>Eddy Wymeersch</i>	
I. Introduction	22.01
II. Shadow Banking: Concept and Terminology	22.10
III. Non-Regulated Activity According to the FSB Approach	22.17
IV. What Financial Activity is not Subject to Banking Supervision?	22.27
V. The European Response to Shadow Banking	22.35
VI. Conclusion	22.132
<b>23. Investment-Based Crowdfunding: Is MiFID II Enough?</b> <i>Guido Ferrarini and Eugenia Macchiavello</i>	
I. Introduction	23.01
II. Benefits, Risks, and Challenges	23.04
III. MiFID I	23.12
IV. National Approaches to Crowdfunding	23.18
V. MiFID II	23.34
VI. Concluding Remarks	23.55