

International and European Business Law
by Schulze / Lehmann

European Financial Services Law

Article-by-Article Commentary

Lehmann / Kumpan



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edited by

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Foreword

European regulation in the area of financial services has become increasingly voluminous and complex. Finding its way through the jungle of directives and regulations, regulatory and implementing technical standards and guidelines presents formidable challenges for the legal practitioner. Yet locating the relevant provision is insufficient; it is also necessary to be familiar with its background, interpretation and role in the broader context of EU law.

Therefore, we have decided to provide the reader with a tool to master European financial services law. This volume assembles the most important acts of the EU in this area. It contains such pivotal texts as MiFID II and MiFIR, MAR and MAD, EMIR, the UCITS-Directive and the AIFMD, to name a few. The acts have been divided into six distinct areas: (1) securities markets and services, (2) market behaviour, (3) market transparency, (4) funds, (5) securities clearing and settlement, and (6) payments. Each act is commented on article by article, explaining the provision's function, history, context and interpretation. Level 2 and Level 3 acts are listed at the beginning of each article and discussed in the context in which they are relevant. The pertinent recitals are reflected in the comments. Examples and existing case law are provided, and bibliographies invite further reading.

The method of explaining a legal act article by article may be unfamiliar to some readers, yet it has already proven its virtues in many areas. There are major advantages in explaining the law through its black letters. Understanding the relevant provision, its background, interpretation and the surrounding debate is indispensable for lawyers, who must be able to comprehend the rule's implications for concrete and often unknown problems in order to evaluate and state their case. The high level of technicality and the abundance of details in European financial services regulation makes this task particularly difficult. By making pinpointed comments for each article, we hope to provide essential assistance to regulators, counsels, judges and academics. We would like to contribute to a well-informed debate on EU regulation, which matches the sophistication of the existing texts.

Of paramount importance for our commentary has been the principle of autonomous interpretation, which is firmly established in the case law of the CJEU and requires EU law to be constructed in a uniform way, independent from the legal systems of the Member States. Bearing this principle in mind, the authors have been asked to provide a truly European view of the articles on which they comment. They had to abstain from opinions tainted by the doctrine of a particular Member State. References to national legislation or case law are made only where it is necessary and helpful to elucidate the problems and issues raised by the EU provision that is the subject of the comment.

The breadth of EU regulation in the area of financial services prevented us from including each and every act of the Union. Therefore, we have decided to omit all matters that are specific to credit institutions (banks), e.g. the Capital Requirements Directive (CRD) IV and the Capital Requirements Regulation (CRR). Furthermore, we have not commented on directives and regulations that are specific to certain actors and not of general importance, e.g. the Central Securities Depositories Regulation (CSDR). Finally, some provisions within the selected acts that are merely of a technical nature and unlikely to create issues in private litigation have been left aside, e.g. the provisions on the co-operation of Member State authorities among themselves and with ESMA.

The writing of this commentary has been a daunting task. Accomplishing such a monumental work would not have been possible without the help of others. Our first thanks go to the authors, who have worked incessantly and made great strides under

Foreword

considerable time pressure. Furthermore, we are indebted to our assistants, in particular Eric Arbizo and Brian Thompson for reviewing the language, as well as Jannik Becker, Lena Daams, Nicolas Deising, Ronny Grütze, Karl Kulike and Finn Schmidt for their assistance in finalising the manuscripts. We would also like to thank Stefan Simonis and Matthias Knopik from Nomos for their tireless efforts in completing this book.

Bonn/London/Halle, January 2019

The editors

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Abbreviations

ACER	Agency for the Cooperation of Energy Regulators
ADR	American Depository Receipts
AIF	Alternative Investment Funds
AIFMD	Alternative Investment Fund Managers Directive (2011/61)
AMF	Autorité des marchés financiers (Financial Markets Regulator, France)
AML	Anti-Money Laundering
AMP	Accepted Market Practices
APA	Approved Publication Arrangement
ARM	Approved Reporting Mechanism
Art	Article
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Financial Supervisory Authority, Germany)
BBAN	Basic Bank Account Number
BGBl.	Bundesgesetzblatt (German Federal Law Gazette)
BGHSt	Entscheidungen des Bundesgerichtshofes in Strafsachen (Decisions of the German Federal Court of Justice in criminal matters)
BIC	Bank Identifier Code
BKR	Zeitschrift für Bank- und Kapitalmarktrecht (Journal)
BörsG	Börsengesetz (German Stock Exchange Act)
BRRD	Bank Recovery and Resolution Directive (2014/59)
BT-Drs	Bundestags-Drucksache (German Parliament Document)
CARD	Consolidated Admissions and Reporting Directive (2001/34)
CCP	Central Counterparty
CCZ	Corporate Compliance Zeitschrift
CDS	Credit Default Swap
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisors
CESR	Committee of European Securities Regulators
CET	Central European Time
CfD	Contracts for Difference
CFREU	Charter of Fundamental Rights of the European Union
CFS	Condensed Financial Statements
CFTC	Commodity Futures Trading Commission
CISE	Channel Islands Securities Exchange
CJEU	Court of Justice of the European Union
CMLJ	Capital Markets Law Journal
CMLR	Common Market Law Review
CORE	Compensation Retail
CPV	Common Procurement Vocabulary
CR	Computer und Recht (Journal)
CRA	Credit Rating Agency
CRD	Capital Requirements Directive (2013/36)
CRR	Capital Requirements Regulation (575/2013)
CSD	Central Securities Depository
CSDR	Central Securities Depository Regulation (909/2014)
CSES	Comparative Study of Electoral Systems
CTP	Consolidated Tape Provider

Abbreviations

DAX	Deutscher Aktienindex (German Stock Index)
DB	Der Betrieb (Journal)
DEA	Direct Electronic Access
DLT	Distributed Ledger Technology
DR	Depository Receipts
DTR	Disclosure and Transparency Rules
DvP	Delivery versus Payment
EAMP	Emission Allowance Market Participant
EBA	European Banking Authority
EBOR	European Business Organization Law Review
ECB	European Central Bank
ECFR	European Company and Financial Law Review
ECJ	European Court of Justice
ECLI	European Case Law Identifier
EDR	European Depository Receipts
EEA	European Economic Area
EIOPA	European Insurance and Occupational Pension Authority
EITI	Extractive Industry Transparency Initiative
ELRev.	European Law Review
ELTIFR	European Long-term Investment Funds Regulation (2015/760)
ELV	Elektronisches Lastschriftverfahren (electronic direct debit)
EMMI	European Money Markets Institute
EPC	European Payments Council
ERCL	European Review of Contract Law
ESEF	European Single Electronic Format
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
ETD	Exchange Traded Derivative
ETF	Exchange-Traded Fund
ETS	Emissions Trading Scheme
EUR	Euro(s)
EURIBOR	Euro Interbank Offered Rate
EuSEFR	European social entrepreneurship funds Regulation (346/2013)
EuVeCaR	European venture capital funds Regulation (345/2013)
FATF	Financial Action Task Force (on Money Laundering)
FIRDS	Financial Instrument Reference Data System
FLEGT	Forest Law Enforcement, Governance and Trade Action Plan
FSA	Financial Services Authority (Great Britain)
FSAP	Financial Services Action Plan
GAAP	Generally Accepted Accounting Principles
GDR	Global Depository Receipts
HMS	Home Member States
IAS	International Accounting Standard
IASR	International Accounting Standards Regulation (1606/2002)

Abbreviations

IBAN	International Bank Account Number
ICOs	Initial Coin Offerings
IDD	Insurance Distribution Directive (2016/97)
IFLR	International Financial Law Review
IFRS	International Financial Reporting Standards
IIP	Insurance-based Investment Product
IMD	Insurance Mediation Directive (2002/92)
IORP	Occupational Retirement Provision
IOSCO	International Organization of Securities Commissions
IRD	Interim Reporting Directive (79/279)
ISDA	International Swaps and Derivatives Association
ISIN	International Securities Identification Number
ITS	Implementing Technical Standards
JCLS	Journal of Corporate Law Studies
JIBLR	Journal of International Banking Law & Regulation
JODI	Joint Organisations Database Initiative
JRF	Journal of Risk Finance
JZ	JuristenZeitung (Journal)
KID	Key Information Document
KIID	Key Investor Information Document
KWG	Kreditwesengesetz (German Banking Act)
LCD	Listing Conditions Directive (79/279)
LCIA	London Court of International Arbitration
LEI	Legal Entity Identifier
LME	London Metal Exchange
→ mn	margin number (within this Commentary)
MAR	Market Abuse Regulation (596/2014)
MIC	Market Identifier Code
MiFID I	Markets in Financial Instruments Directive (2004/39)
MiFID II	Markets in Financial Instruments Directive II (2014/65)
MiFIR	Markets in Financial Instruments Regulation (600/2014)
MMFR	Money Market Funds Regulation (2017/1131)
MMR	MultiMedia und Recht (Journal)
MREL	Minimum Requirement for Own Funds and Eligible Liabilities
MTF	Multilateral Trading Facilities
NA	Notification Authority
NAV	Net Asset Value
NCA	National Competent Authority
NJW	Neue Juristische Wochenschrift (Journal)
NZG	Neue Zeitschrift für Gesellschaftsrecht (Journal)
OAM	Officially Appointed Mechanism
OGH	Offene Handelsgesellschaft (commercial partnership under German law)
OJ	Official Journal
OLG	Oberlandesgericht (Higher Regional Court)
OTC	Over the Counter
OTF	Organised Trading Facilities
OUP	Oxford University Press

Abbreviations

Palandt-BGB	Palandt, Bürgerliches Gesetzbuch: BGB (77 th edn, Munich 2018)
PFMI	Principles for Financial Market Infrastructures
PRIIPR	PRIIP Regulation (1286/2014)
PRIMA	Place of the Relevant Intermediary Approach
RdF	Recht der Finanzinstrumente (Journal)
REMIT	Regulation on Energy Market Integrity and Transparency (1227/2011)
RIS	Regulated Information Services
RM	Regulated Markets
RPS	Retail Payment Systems
RPT	Related Party Transactions
RTS	Regulatory Technical Standards
SDD	SEPA Direct Debit
SE Regulation	Regulation on the Statute for a European Company (SE) (2157/2001)
SEPA	Single Euro Payments Area
SFC	Small Financial Counterparties
SFD	Settlement Finality Directive (98/26)
SPV	Special Purpose Vehicles
SSR	Short Selling Regulation (236/2012)
STOR	Suspicious Transaction and Order Reporting
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TARGET	Trans-European Automated Real-time Gross Settlement Express Transfer
TD	Transparency Directive (2004/109)
TFEU	Treaty on the Functioning of the European Union
TISE	The International Stock Exchange
TOTV	Traded on a Trading Venue
TR	Trade Repositories
UCITS	Undertakings for Collective Investments in Transferable Securities
UCITSD	UCITS Directive (2009/65)
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
UNIFI	Universal Financial Industry message scheme
UPI	Unique Product Identifier
URD	Universal Registration Document
UTC	Coordinated Universal Time
UTI	Unique Trade Identifier
WM	Wertpapier-Mitteilungen (Journal)
WpHG	Wertpapierhandelsgesetz (German Securities Trading Act)
ZBB/JBB	Zeitschrift für Bankrecht und Bankwirtschaft / Journal for Banking Law and Banking
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht (Journal)
ZHR	Zeitschrift für Handels- und Unternehmensrecht (Journal)
ZIP	Zeitschrift für Wirtschaftsrecht (Journal)
ZVertriebsR	Zeitschrift für Vertriebsrecht (Journal)