Stricto Sensu

Investor Protection under MiFID II

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A Systematic Overview of Articles 24-30

By

Christos Gortsos

Cambridge Scholars Publishing

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INTRODUCTION

1. The main objective of this study is to marshal the vast range of rules, which, as of 3 January 2018, govern the core field of investor protection under Articles 24-30 of Directive 2014/65/EU of the European Parliament and of the Council “on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU” (MiFID II), by presenting them in a systematic manner. The author uses the term “*stricto sensu* investor protection” when discussing these Articles, in order to denote that the broader policy objective of investor protection of clients to whom credit institutions and investment firms provide investment and/or ancillary services is also pursued by other provisions of that legal act as well, notably those pertaining to conflicts of interest, which are nevertheless beyond the scope of this study.

This legislative act, together with its “twin”, Regulation (EU) No 600/2014 “on markets in financial instruments and amending Regulation (EU) No 648/2012” (MiFIR), repealed Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 “on markets in financial instruments (...)” (MiFID I), which was a key source of European Union (EU) capital markets law until recently. The need for an enhanced regulatory framework in this field was triggered by the weaknesses revealed in the wake of the recent (2007-2009) international financial crisis in terms of both prudential regulation in EU capital markets and supervision of the firms providing services therein, namely investment firms and credit institutions. If compared to MiFID I, MiFID II can be deemed, in respect of the investor protection framework, as a blend of elements of continuity and change, an aspect which this study seeks to highlight.

Nevertheless, the by-product of this initiative is an extremely technical and, in certain cases, unclear regulatory framework. This technicality is mainly due to the fact that the above-mentioned MiFID Articles, and in particular Articles 24-25, 27-28 and 30, are coupled by Delegated Regulations and one Delegated Directive (delegated acts) of the European Commission, which further specify, often in an extremely detailed manner, the rules contained in the legislative act. Further specifications, extremely detailed in certain cases as well, are provided in the Guidelines adopted by the European Securities and Markets Authority (ESMA) on the basis of Articles 24-25.

2. An assessment of the business implications arising from the implementation of the new regulatory framework is beyond the reach of this study. The same holds true for a cost-benefit analysis, i.e. of the expected gains in terms of investor protection *versus* the cost imposed on financial firms–ensuring a smooth implementation for investors and legal certainty for the financial sector.

3. The study is structured in four (4) Chapters:

(a) Chapter One approaches the general relevant provisions of MiFID II. In particular, it deals with:

- the primary sources governing the subject area (Section A),
- the investment services and activities, as well as the ancillary services that credit institutions and investment firms are allowed to provide under MiFiD II (Section B, under 1),
- the classification of clients into retail clients, professional clients and eligible counterparties (Section B, under 2),
- Article 26 on the provision of services by credit institutions and investment firms through the medium of another institution and Article 29 on tied agents (Section B, under 3), and
- public enforcement under Articles 70 and 71 (Section B, under 4).

(b) Chapter Two provides an analysis of the principles laid down in Article 24. In this respect:

- Section A examines the first three (3) general principles of that Article (duty to act honestly, fairly and professionally in accordance with the best interests of their clients, obligations when manufacturing and distributing financial instruments, as well as prohibitions and limitations on inducements), while
- the obligation imposed on credit institutions and investment firms to provide clients with information is analysed separately in Section B.

(c) Chapter Three is devoted to the principles stipulated in Article 25 as follows:

- Section A analyses the provisions pertaining to the assessment of suitability and appropriateness of persons employed by credit institutions and investment firms,
- Section B examines the provisions pertaining to the assessment of suitability and appropriateness of investment services and financial instruments, and
- Section C deals with the requirements imposed on credit institutions and investment firms for reporting to clients.

(d) Chapter Four addresses the rules laid down in Articles 27 and 28 MiFID. In particular:

- Section A analyses Article 27 on the obligation imposed on credit institutions and investment firms to execute orders on terms that are most favourable to the client, and
- Section B looks into Article 28 provisions on client order handling rules.

The analysis of all these Articles is carried out in conjunction with an examination, as appropriate, of the relevant Commission delegated acts (Regulations and Directive) and ESMA Guidelines.

4. Finally, the concluding remarks follow at the end.
5. The study contains six (6) Appendixes:

- a Table of Contents of MiFID II,
- a Table of Contents of MiFIR,
- the provisions of Articles 24-30 MiFID II applying specifically to retail clients,
- a summary table of correlation between Articles 24-30 MiFID II and Articles 19-24 MiFID I, offering the reader an overview of the new provisions, which are fully detailed in the text,
- a table summarising the legal acts of (the new) EU capital markets law, and
- a list of abbreviations.

The primary (international and EU) and the secondary sources, to which reference is made in the text are provided at the end hereof.

The author wishes to thank Professor Christina Livada for her particularly useful comments, remarks and suggestions. Any errors or omissions are the author's sole responsibility.

The cut-off date for information included in this study is 31 March 2018.

CHAPTER ONE

GENERAL PROVISIONS

A. The primary sources

1. The "twin legal acts": MiFID II and MiFIR

1.1 Introductory remarks

1.1.1 MiFID II and MiFIR as successors to MiFID I

(a) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 "on markets in financial instruments (...)" (MiFID I),[1] was until 31 December 2017 a key source of European Union (EU) capital markets law.[2] It repealed Council Directive 93/22/EEC "on investment services in the securities field" (ISD),[3] which was the first EU legal act laying down the conditions for the establishment of a single EU capital market. In turn, MiFID I was repealed, as of 3 January 2018,[4] by two legal acts (the "twin legal acts") of the same institutions of 15 May 2014, adopted in accordance with the ordinary legislative procedure laid down in Article 289(1) of the Treaty on the Functioning of the European Union[5] (TFEU):

[1] OJ L 145, 30.4.2004, pp. 1-44. On this legal act, see by mere indication Moloney (2005), the various contributions in Ferrarini and Wymeersch (2006, editors), Moloney (2008), pp. 337-571 and the various contributions in Avgouleas (2008, general editor).
[2] On the sources of EU capital markets law, see below, under 1.2.
[3] OJ L 141, 11.6.1993, pp. 27-46.
[4] MiFID II, Article 94, first sub-paragraph, as amended by Article 1, point (8) of Directive (EU) 2016/1034 of the European Parliament and of the Council of 23 June 2016.
[5] OJ C 202, 7.6.2016, pp. 47-200.

(i) The first is Directive 2014/65/EU “on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU”[6] (MiFID II), which contains 97 Articles.
(ii) The second legal act is Regulation (EU) No 600/2014 “on markets in financial instruments and amending Regulation (EU) No 648/2012”[7] (MiFIR), which contains 55 Articles.

On the structure of these legal acts, see respectively Appendixes I-II to this study.

They both entered into force on 2 July 2014.[8] The transposition of the Directive’s provisions into national legislation should have been completed by 3 July 2017.[9]

(b) The vast majority of the provisions of MiFID II and MiFIR (commonly referred to in this study as “twin legal acts”) apply from 3 January 2018.[10] MiFID II is addressed to all EU Member States and MiFIR is directly applicable therein.[11] They both are also of relevance to the three of the four member states of the European Free Trade Association (EFTA, i.e. Iceland, Liechtenstein, and Norway, excluding Switzerland), which together with the EU Member States constitute the European Economic Area (the EEA).[12]

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[6] OJ L 173, 12.6.2014, pp. 349-496. On Directive 2002/92/EC, see further below, under 1.2.1 (a) and on Directive 2011/61/EU in Section II, under B 3.2.1.
[7] OJ L 173, 12.6.2014, pp. 84-148. On Regulation 648/2012, see further just below, under 1.2.1 (c).
[8] MiFID II, Article 96, and MiFIR, Article 55, first sub-paragraph.
[9] MiFID II, Article 93(1), first sub-paragraph, first sentence, as amended by Article 1, point (7) of Directive (EU) 2016/1034.
[10] MiFID II, Article 93(1), second sub-paragraph, as amended by Article 1, point (7) of Directive (EU) 2016/1034, and MiFIR, Article 55, second to fourth sub-paragraphs, the second and fourth sub-paragraphs having been amended by Article 1, point (14) of Regulation (EU) 2016/1033.
[11] MiFID II, Article 97, and MiFIR, Article 55, last sub-paragraph, respectively.
[12] More details on the EFTA can be found at: https://www.efta.int. On the EEA and the position of Switzerland, see Breitenmoser and Weyeneth (2017), pp. 456-461. On various aspects of the twin legal acts (those of 2011-2013 based on the respective legislative proposals), and notwithstanding the secondary sources referring specifically to Articles 24-30 MiFID II (presented below), see Francotte, Valiante and Lanoo (2011), Clausen and Sørensen (2012), Ferrarini and Saguato (2013), Gomber and Nassauer (2014), Mellenbergh (2014), Panagopoulos et al. (2014), Sethe (2014), Vandenbroucke (2014), Willemaers (2014), Section 3, Möllers (2015), and the contributions in Busch and Ferrarini (2017) (including Busch (2017b) on the private law effects).

1.1.2 Legal basis

The legal basis of MiFID II is Article 53(1) TFEU on the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the *taking-up and pursuit of activities as self-employed persons*.[13] On the other hand, the legal basis of MiFIR is the general provision of Article 114(1), second sentence TFEU on the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the *establishment and functioning of the internal market* (in accordance with Article 26 TFEU).[14]

1.1.3 Subject matter and field of application

(a) MiFID II mainly applies to investment firms and to credit institutions when providing investment services and/or performing investment activities.[15] It is noteworthy that, according to Article 15(3) ISD, Member States were prohibited, since 1996, to impose on EU credit institutions limitations with regard to the direct provision of investment services,[16] a rule that was maintained in both MiFID I and MiFID II. Thus, the "universal banking model" became (and in principle still remains) the rule under EU financial law.[17]

It also applies to market operators, "data reporting services providers" (i.e. approved publication arrangements (APAs), consolidated tape providers (CTPs), approved reporting mechanisms (ARMs)[18]), and third-country firms providing investment services or performing investment activities through the establishment of branches in the EU.[19]

In terms of definitions:[20]

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[13] On this TFEU Article, see Schlag (2012).

[14] On this Article, see Herrnfeld (2012) and Craig and de Búrca (2015), pp. 93-94 and 614-620.

[15] See on this just below, under 2.1.1.

[16] See Mauerhofer (1998), p. 92.

[17] On this model, see by mere indication the seminal works of Benston (1994) and Saunders and Walter (1994), pp. 3-9 and 84-126, as well as Rheinholdson and Olsson (2012), Lang and Schroder (2012) and Goodhart (2013).

[18] MiFID II, Article 4(1), point (63). These providers are further defined in Article 4(1), points (52)-(54) MiFID II (on CTPs and APAs, see further below in Chapter Four, under A 3.2.2 (c)).

[19] The field of application of MiFID II is laid down in Article 1(1). The persons exempted are laid down in Articles 2-3 (see below, under 2.1.3).

[20] *Ibid*., Article 4(1), points (18), (57) and (30), respectively.

(1) The term "market operator" is defined as meaning a person or persons managing and/or operating the business of a regulated market and may be the regulated market itself.
(2) The term "third-country firm" is defined as meaning a firm which, if its head office or registered office were located within the EU, would be an investment firm or a credit institution providing investment services or performing investment activities.
(3) The term "branch" is defined as meaning a place of business other than the head office which is a part of an investment firm, has no legal personality and provides investment services and/or activities and which may also perform ancillary services for which the investment firm has been authorised; all the places of business set up in the same Member State by an investment firm with headquarters in another Member State are regarded as a single branch.

MiFID II establishes requirements in relation to the following aspects:

(i) the authorisation and operating conditions for investment firms,
(ii) the provision of investment services or activities by branches of third-country firms,
(iii) the authorisation and operation of regulated markets[21] and of data reporting services providers, as well as
(iv) the supervision, cooperation and enforcement by the "competent authorities" designated by Member States.[22]

(b) On the other hand, MiFIR *fully* applies to both investment firms and credit institutions when providing investment services and/or performing investment activities, as well as to market operators (including the trading venues they operate).[23] It establishes *uniform* requirements in relation to the following aspects:

- disclosure of trade data to the public, and reporting of transactions to the competent authorities,
- trading of derivatives on organised venues,

[21] On the definition of the term "regulated markets", see below, under B 1.1.3.
[22] MiFID II, Article 1(2). On the scope of MiFID II, see also details in Lieverse (2017).
[23] MIFIR, Article 1(2). As to its further field of application see Article 1(3)-1(7).

- non-discriminatory access to clearing and non-discriminatory access to trading in "benchmarks",
- the "product intervention powers" of competent authorities, the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA),[24] as well as the powers of ESMA on position management controls and position limits, and
- the provision of investment services or activities by third-country firms following an applicable equivalence decision by the Commission with or without a branch.[25]

The term "benchmark" is defined[26] as meaning any rate, index or figure, made available to the public or published, that is periodically or regularly determined by the application of a formula to, or on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates or other values, or surveys and by reference to which the amount payable under a financial instrument or the value of a financial instrument is determined.

(c) Article 67 MiFID II provides that each Member State should designate the competent authorities to carry out the duties provided for under the twin legal acts (hereinafter the "competent authorities"), which must be public authorities (without prejudice to the possibility of delegating tasks to other entities in accordance with Article 29(4) on tied agents[27]). It should inform the Commission, the ESMA and the other Member States' competent authorities of the identity of the competent authorities responsible for the enforcement of these duties and of any division thereof.[28]

1.2 MiFID II and MiFIR in the context of EU capital markets law

1.2.1 EU capital markets law as a branch of EU financial law

(a) The twin legal acts are an integral part of EU capital markets law, which is one of the branches of EU financial law. Other branches include

[24] On this aspect, see further below in Chapter Two, under A 2.3. On the ESMA and the EBA, see just below, under 1.2.1 (c).

[25] MiFIR, Article 1(1). On the regime governing third-country firms under the twin legal acts, see Busch and Louisse (2017) and Armour, Bengtzen and Enriques (2017), pp. 59-60.

[26] *Ibid.*, Article 2(1), point (39).

[27] On Article 29(4), see below, under B 3.2.2, *in finem*.

[28] MiFID II, Article 67(1) and 67(2), first sub-paragraph.

EU banking law,[29] EU (private) insurance law and EU financial conglomerates law.[30]

The main sources of EU insurance law (further referred to below in this study) are two:

(1) The first is Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 "on the taking-up and pursuit of the business of Insurance and Reinsurance" (Solvency II Directive).[31]
(2) The second source is Directive (EU) 2016/97 of the same institutions of 20 January 2016 "on insurance distribution (recast)"[32] (IDD), which repealed Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 "on insurance mediation"[33] (IMD).

Partially, another source of EU insurance law is also the so-called "PRIIPs Regulation" (on this legal act, which is also a source of EU capital markets law, see details below in Chapter Two, under 2.2.4.1 (c)).

(b) The objective of the legal acts adopted in the field of EU capital markets law (as in capital markets law in general) is the achievement of four (4) policy objectives (which constitutes the core of its definition): ensuring financial stability (including capital markets stability), ensuring the protection of investors (on a collective and on an individual basis), safeguarding the integrity, efficiency and transparency of capital markets, and providing for the compensation, up to a certain level and under specific conditions, investors transacting with investment firms (and credit institutions), which have been exposed to insolvency. It is worth noting that the policy objective of ensuring the protection of investors (on a collective basis) is closely connected to that of safeguarding the integrity, efficiency and transparency of capital markets; the "closeness" of the connection between these two financial policy objectives can be evidenced

[29] See on this Gortsos (2016a).
[30] See on this Gortsos (2017d).
[31] OJ L 335, 17.12.2009, pp. 1-155. On this legal act, see indicatively Lechkar, Meerten and Nijenhuis (2009) and Everson (2015), pp. 433-438
[32] OJ L 26, 2.2.2016, p. 19-59. On the IDD and its relationship with the MiFID II, see Willemaers (2014), Section 4, Colaert (2017), Section II, and Weber and Baisch (2017), pp. 257-259.
[33] OJ L 9, 15.1.2003, pp. 3-10.

by the fact that they share, to a large extent, the same financial policy instruments, making their distinction often difficult.[34]

(c) Sources of EU capital markets law are Regulations and Directives in the form of "legislative acts" of the European Parliament and of Council, as defined in Article 289 TFEU, "delegated acts" of the Commission, as defined in Article 290 and "implementing acts" of the Commission as well, as defined in Article 291.[35] A significant part of the delegated and implementing acts in the field of EU financial law are being adopted according to a specific procedure,[36] the so-called called "Lamfalussy process".[37]

EU capital markets law is also composed of Guidelines[38] of the European Securities and Markets Authority (ESMA), an agency established by virtue of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010[39] (ESMA Regulation).

In this respect, the following additional institutional aspects are also worth noting:

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[34] On these policy objectives and the instruments employed to achieve them, see International Organization of Securities Commissions (2017a) and in particular (2017b). See also, by mere indication from a vast related literature, Goodhart et. al. (1998), Chapter 1, Hopt (2000), Thiele (2014), pp. 91-102, Veil (2017), Chapter 2, pp. 23-27, and Zetzsche (2017), pp. 22-27 (in his words *"the traditional dualism of investor and market protection"*).

[35] On Articles 289-291 TFEU, see Craig (2010), pp. 252-254, Schoo (2012), pp. 2332-2344, and Craig and de Búrca (2015), pp. 114-120 and 126-133 (see also below, under (d)).

[36] On the distinction between delegated acts not adopted under this specific procedure and those adopted under it, see below, under 3.1 and 3.2, respectively.

[37] This procedure was adopted on the basis of the "Final Report of the Committee of Wise Men on the Regulation of European Securities Markets" (the "Lamfalussy Report" and the "Lamfalussy Committee", respectively) of 15 February 2001 (available at: https://ec.europa.eu/internal_market/securities/lamfalussy/index_en.htm), and is still in force. The Committee was named after its chairman, Baron Alexandre Lamfalussy who, along all his other capacities in the global financial system, served as Chairman of the European Monetary Institute (the predecessor of the European Central Bank (ECB)) throughout its operation (1994-1998). On the Lamfalussy Committee, Report and process (at its initial stage), see Ferran (2004), pp. 61-74 and 99-107, Lastra (2006), pp. 334-341, Hadjiemmanuil (2006), pp. 815-818, and Moloney (2014), pp. 861-880.

[38] See below, under 4.

[39] OJ L 331, 15.12.2010, pp. 84-119.

(1) The ESMA is one of the three so-called "European Supervisory Authorities" (ESAs), along with the European Banking Authority (EBA), established by virtue of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010, and the European Insurance and Occupational Pensions Authority (EIOPA), established by virtue of Regulation (EU) No 1094/2010 of the same institutions and of the same date.[40] The Regulations governing the ESAs were adopted on the basis of Article 114 TFEU.

(2) The ESAs are *mainly* regulatory authorities composed of national supervisory authorities. According to Article 8 of their founding Regulations, the main task is the contribution to the "establishment of high-quality common regulatory and supervisory standards and practices" (further specified in Articles 10-16 and 34), i.e contribution to the development of the "single rulebook". Nevertheless, they have also been endowed with some specifically designated supervisory powers, laid down in Articles 17-19 of their founding Regulations.[41] In addition, and by way of exception, the ESMA has *direct* supervisory powers over credit rating agencies in accordance with Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 (as in force),[42] and trade repositories in accordance with Regulation (EU) No 648/2012 of the same institutions of 4 July 2012 (the so-called EMIR).[43]

(3) Together with the European Systemic Risk Board (ESRB), established by virtue of Regulation (EU) No 1092/2010 of the

[40] OJ L 331, 15.12.2010, pp. 12-47 and 48-83, respectively.

[41] On the role of the ESMA within the ESFS and its powers as a regulatory and supervisory agency, see Wymeersch (2012), Moloney (2014), pp. 907-941, Thiele (2014), pp. 494-519, Haar (2015), Chiu (2016), Deipenbrock (2016), Walla (2017b), pp. 153-167, and Schemmel (2018). On Articles 10-16 ESMA Regulation, in particular, see indicatively Wymeersch (2012), pp. 249-255 and 276-277.

[42] OJ L 302, 17.11.2009, pp. 1-31. On this legal act, see by mere indication Moloney (2014), pp. 637-682, and Veil (2017), Chapter 27, pp. 551-573 (both with extensive further references).

[43] OJ L 201, 27.7.2012, pp. 1-59. On this legal act (further discussed in the study), see Aditya (2013), Ferarini and Saguato (2013), Cates (2014), Heber and Sternberg (2014), and Provino (2015) See also the Commentary by Sethe, Favre, Hess, Kramer, and Schott (2017, Hrsg.) on the equivalent Swiss law (Finanzmarkt-infrastrukturgesetz, FinfraG), at the beginning of the analysis of several Articles of which there is a short description of the relevant EMIR provisions.

European Parliament and of the Council of 24 November 2010 as well "on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board",[44] the ESAs constitute since 1 January 2011 the European System of Financial Supervision (ESFS), which is a by-product of the "de Larosière Report" of 25 February 2009.[45] 3

That Regulation was also adopted on the basis of Article 114 TFEU.

(4) The ECB has also become a part of the ESFS with regard to the specific (supervisory) tasks conferred on it under Council Regulation (EU) No 1024/2013 of 15 October 2013 "conferring specific tasks on the [ECB] concerning policies relating to the (micro-) prudential supervision of credit institutions"[46] by virtue of Regulation (EU) No 1022/2013 of 22 October 2013 of the European Parliament and of the Council "amending Regulation (EU) No 1093/2010 establishing the [EBA] (…) as regards the conferral of specific tasks on the [ECB] pursuant to Council Regulation (EU) No 1024/2013".[47] In connection to the operation of the ESRB specific tasks had also been conferred on the ECB under Council Regulation (EU) No 1096/2010 of 17 November 2010 "conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board".[48] Hence, the ECB became a part of the ESFS from the time of its establishment.

It is noted that the legal basis for both the above-mentioned Regulations conferring specific tasks on the ECB was the enabling clause of Article 127(6) TFEU.

(5) Finally, it is noted that the Commission has recently submitted three Proposals for Regulations of the European Parliament and of the Council concerning the amendment of the Regulations

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[44] OJ L 331, 15.12.2010, pp. 1-11.

[45] The High-Level Group on Financial Supervision in the EU, Chaired by Jacques de Larosière, *Report*, Brussels, 25 February 2009 (available at: wttps://.ec.europa.eu/commission_barroso/president/pdf/statement_20090225_en.pdf). This report is analysed in Louis (2010).

[46] OJ L 287, 29.10.2013, pp. 63-89.

[47] OJ L 287, 29.10.2013, pp. 5-14. See on this Schammo (2014), Wymeersch (2014) and Gortsos (2015), pp. 64-71.

[48] OJ L 331, 15.12.2010, pp. 1-11.

governing the ESAs.[49] This initiative aims to ensure stronger and more integrated financial supervision across the EU by improving their mandates, governance and funding.

(d) In the terminology of the Lamfalussy process (widely used among policymakers), legislative acts are labelled as “level 1” measures, delegated and implementing acts as “level 2” measures (in the adoption of which the role of the ESMA is typically very important[50]), and ESMA Guidelines (and Recommendations) as “level 3” measures.[51]

1.2.2 MiFID II and MiFIR as “children” of the recent (2007-2009) international financial crisis

(a) Despite the existence of an extensive international financial framework, which was established gradually since the 1970ies,[52] a major international financial crisis erupted recently (2007-2009), which was triggered by events in the financial system of the United States and spilled over to the world economy seriously affecting the stability of the financial system in several other states around the globe.[53]

As a response to that crisis, which had a serious negative impact on the real economy worldwide and in the EU, and negatively affected confidence in the financial system at a large scale, the European Parliament and the Council, in the majority of the cases on the basis of international regulatory developments and mainly under the influence of the work of the International Organisation of Securities Commissions (IOSCO),[54] took bold regulatory initiatives, which led to the adoption of

[49] These Proposals are available at: https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-536_en.
[50] See below, under 3.2.
[51] On the Lamfalussy process and these three levels, as currently applied, see Walla (2017a), pp. 45-50 (in his terminology the “Lamfalussy II Process”).
[52] See on this Gortsos (2012), pp. 118-127.
[53] For an overview of the causes of that crisis, see Gortsos (2012), pp. 127-129, with extensive further references to the vast amount of official reports and secondary sources.
[54] On the establishment, membership, legal nature and objectives of the IOSCO, see Gortsos (2012), pp. 162-164, Wandel (2014), pp. 79-81, Conac (2015) and Armour, Bengtzen and Enriques (2017), pp. 24-26. On the current work of this international standard-setting forum, see at:
https://www.iosco.org/publications/?subsection=public_reports.

several new legislative acts.[55] *Inter alia*, some of these acts reshaped are the sources of EU capital markets law, as in force today. These can be divided in two groups:

(i) The first group contains those legal acts which amended (or even repealed) existing ones on the same field. The twin legal acts, which (as already mentioned) repealed MiFID I, belong to this group and are thus "children" of the recent international financial crisis. Other legal acts in this group include those on market abuse (i.e. insider trading and market manipulation), on the prudential regulation and supervision of undertakings for collective investment in transferable securities (UCITS) and their management companies, as well as on the prospectus and transparency requirements regimes.

(ii) The second group contains new legal acts on issue areas which were not covered before, the regulation of which was nevertheless deemed to be important in view of the weaknesses revealed in capital markets in the aftermath of the crisis. This group includes the legal acts governing the following aspects: the resolution of investment firms, the prudential regulation and supervision of credit rating agencies, the prudential regulation and supervision of alternative investment fund managers (AIFMs) (including managers of hedge funds), the drawing up of key information documents (KIDs) by investment product manufacturers and its provision to retail investors, as well as the regulation of short selling and of certain aspects of credit default swaps, indices (such as EURIBOR) used as benchmarks in financial instruments and contracts or to measure the performance of investment funds and the transparency of securities financing transaction (SFTs).

It is interesting to note that it is only during that period that EU institutions resorted to the adoption of Regulations in the form of legislative acts in the field of EU capital markets law, on the basis of Article 114 TFEU, with a view to achieving the highest possible degree of harmonised application of the relevant rules.[56] The Directives of the European Parliament and of the Council which constitute sources of EU capital markets law have been adopted on the basis of Articles 50 and 53(1) TFEU. As an exception, Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 "on criminal sanctions for

[55] On EU capital markets law before the recent international financial crisis, see Moloney (2008).

[56] For a detailed overview of EU capital markets law after the recent crisis, see Moloney (2014) and (with an update of sources as of September 2016) Veil (2017, editor).

market abuse (market abuse directive)" (MAD II)[57] was adopted on the basis of Article 83(2) TFEU.[58]

(b) Several of all these acts, apart from the twin legal acts, are further briefly presented and discussed in this study, nevertheless only to the extent that aspects thereof are related to the main subject area of the study. For an overview of the entire range of the sources of EU capital markets law (in terms of legislative acts), see Appendix below.

2. Articles 24-30 MiFID II

2.1 Field of application

2.1.1 Application to investment firms and credit institutions in general

(a) Articles 24-30 MiFID II are contained in Section 2 of its Chapter II (Operating conditions for investment firms) entitled "Provisions to ensure investor protection". The Articles of MiFID II apply fully both to investment firms authorised under Articles 5-9 and 14-15 MiFID II, *and* to credit institutions[59] authorised under Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 "on access to the activity of credit institutions and prudential supervision of credit institutions and investment firms (…)"[60] (CRD IV),[61] to the extent that their operating license covers the provision of investment and ancillary services and the performance of investment activities.[62]

Hereinafter, investment firms and credit institutions are commonly referred to as "institutions".

As a sole exception, Article 29(2), second sub-paragraph applies only to investment firms.[63]

In terms of definitions:

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[57] On this legal act, see further below, under B 3.2.1 (b)(i).

[58] On this TFEU Article, see Böse (2012), pp. 1080-1084.

[59] MiFID II, Article 1(3), point (b).

[60] OJ L 176, 27.6.2013, pp. 338-436.

[61] This legal act is a source of both EU banking and EU capital markets law. OJ L 176, 27.6.2013, pp. 338-436.

[62] Apart from the other specific secondary sources mentioned below, for a Commentary on Articles 24-30 (also covering Articles 21-23), see Brenncke (2018). See also Pfisterer (2016). OJ L 176, 27.6.2013, pp. 338-436.

[63] On this Article, see below, under B 3.2.1 (b).