

CEDAM LEGAL STUDIES

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# EU FINANCIAL LAW

AN INTRODUCTION

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*To Vesna and Tancredi*

*To Violeta, Fernando and Miguel*

*“This is preeminently the time to speak the truth, the whole truth,  
frankly and boldly.  
Nor need we shrink from honestly facing conditions in our country today.  
This great Nation will endure as it has endured, will revive and will prosper.  
(...) The measure of the restoration lies in the extent to which we apply social  
values more noble than mere monetary profit”.*

F. D. ROOSEVELT, First Inaugural Address, 4 March 1933



## ACKNOWLEDGMENTS

This book has grown in parallel with our two families. Conceived in its original structure in 2006 - after a few years of teaching of European securities law, as a complementary reading for our lectures and as an exercise of simplification of what we perceived as an overly complex and quite unsatisfactory set of European rules - it has proved an Homeric journey. We set to work at a fatal date, when the years of exuberance were doomed, and most of the legal framework was bound to change. Once the financial crisis of 2008 unfolded and global financial industry was teetering on the brink of collapse, we thought that times were finally conducive to a sensible reconsideration of the law of finance; we started to test whether initial reforms featured what to our minds was the most desirable course of action. Soon Europe went through a sovereign crisis and an unprecedented and very long economic recession, that severely hit, among others, also our countries. This proved highly consequential and impressed a remarkable acceleration to the reform of European financial architecture. While almost everything was changing in the environment around us at remarkable speed (especially if measured against the “petrified” original framework and its traditional resistance to change), we realized that we needed more time than originally expected to interiorise change, to understand the new rules and their underpinnings, organise (as simply as we could) their linkages and test the overall consistency of the system. Meanwhile our families grew. Tancredi joined Marco and Vesna in 2007, Fernando and Miguel joined David and Violeta in 2008 and 2010. There is always a “family toll” in a work like this. There were hard times when we would have rather followed our kids, who were, of course, playing around us, while we sat long days at our desk trying to keep pace with events and struggling to make sense of the ensemble. Season after season, whilst kids’ games changed, ours remained very much the same. At some time, we even felt our work was less than that of Achilles or Ulysses, and more like Penelope’s, with our shroud being weaved in the morning only to be unwoven during the night. At those moments, it was our families’ unflagging support, and Vesna’s and Violeta’s blessing smile (an humorous smile signalling “tough-love-cum-compassion”) that helped us continue the journey. As for our children, they were the best antidote against the omnipresent mammoth (an elephant does not even begin to describe it) in the room. Try to explain to a kid that his dad’s occasional sense of dread is due to an attempt to draw a chart to help navigating an open and stormy ocean, yet without any of the

## Acknowledgments

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fun of sailing, for it is an imaginary ocean! One where the Scyllas, Charybdis, and even the Sirens' songs are all inside their dads' minds. Their bemusement at our futile attempts at rationalization acted as a wake-up call more than once, when we had charted way off course. We are immensely grateful for this. Once Banking Union and Capital Markets Union were finally there to stay, we thought time had come to offer to the reader(s) this quite imperfect fruit of our efforts. With only a note of caution. This book is just an introduction to a complex topic that we endeavoured to get as comprehensive and as simple as possible; it is incomplete by definition, for it is designed to be constantly revisited (and updated) in the years to come. We hope that it will develop and grow as our kids and families hopefully will. Any criticism and challenge it will receive shall help it (and us) grow. Finally, a special thank to our research assistant Francesca Pellegrini for her superb researching and editing. Her dedication to this project was admirable. She made this book much better. We can only hope to help her guide her future research as she has helped us straighten ours. The views expressed in this book are in personal capacity and do not necessarily reflect those of the institutions or agencies to which we are affiliated. Usual disclaimers apply.

Bologna-Madrid-Berkeley, August 2016

M.L. D.R.M.



## FOREWORD

by Sir William Blair, Judge in charge  
of the Financial List and Chairman of the Board of  
Appeal of the European System of Financial Supervisors

As the European Commission has noted, since the financial crisis came to a head in September/October of 2008, the stabilisation of financial markets has been a priority for policy makers, and financial sector reform has been a crucial instrument to achieve it. The Commission identifies two main strands of work: the first is the “filling in of the gaps” in financial sector regulation. The second is the strengthening of the supervision of the financial sector in Europe.

If anything, this understates the huge changes that have taken place since 2008. A swathe of new regulations and directives have been promulgated. Gaps have indeed been filled, including in areas previously outside European regulatory reach, such as hedge funds, and credit rating agencies. But it goes far beyond this. In a sometimes difficult but often productive discourse, carried on with widely differing parties from international finance houses to consumers of on-line financial products, European financial regulation has been significantly rewritten, with the aim of balancing the markets and the public good.

The same is true of supervision. The overall vision embraced by the distinguished French financier Jacques de Larosière has been given institutional form. But it has also been fundamentally enhanced by Banking Union within the euro area, including the Single Supervisory Mechanism and the Single Resolution Mechanism, and more to come. There has never been a more ambitious programme of reform.

To adequately describe EU financial law, therefore, is an immense task, requiring among other things judgments to be made as to what to include (and what to omit). Professor Marco Lamandini and Professor David Ramos Muñoz are highly respected in the field, and their collaboration in the writing of *EU Financial Law: An Introduction* has been a remarkable success.

The first point to note about the book is its scope. It is concerned to give an overall perspective of the subject. This gives the work both structure and strength, because without such a perspective financial regulation is apt to appear as a mass of rules with little sense of purpose. The authors also set out to examine the fundamentals and basic philosophies of the rules. This serves both as a means of navigation – important in itself – and also to address the question, how does this

make public welfare better off? In that regard, the authors adopt a format which tables much needed proposals for simplification, and sometimes policy changes.

The book begins with a historical narrative. This also sets the scene for the valuable comparative approach adopted throughout. By way of comparison to the position in the EU, and also in its Member States where the treatment of (for example) fiduciary principles is widely different, the reader is taken to the law as it applies in the United States. This enables the European rules to be put into context, but also shows that financial regulation is on a path of global convergence.

Importantly, the book recognises what is described as the “multi-faceted nature of financial rules”, explaining the array of hard and soft law, and codes of practice and the like that fall under the umbrella of financial regulation. This unique composite structure presents a challenge to those within institutions responsible for compliance. The book provides an overview that will be of great use to them.

The composite structure also presents a challenge to those outside institutions who are responsible for administering the law, including sometimes the courts. How does this mass of material fit together? This can best be answered by an understanding of what the regulatory regime is seeking to achieve. Applying insights from legal philosophy, the authors point out that, “Disagreements about what the law *is* usually turn on what the law *means*, and will often arise as a result of resorting to different premises about the law’s policies and principles that are used for purposes of such constructive interpretation”.

True to this approach, the book includes a wide range of subject areas. Some of these are classic hard law subjects such as corporate law as it applies in this field, but others are rarely touched on in legal text books: for example monetary policy and systemic risk. Looking at financial law not only from a micro-economic (firm specific) but also from a macro-economic (systemic) perspective is a key to the contribution made by this book. Readers will also find that subjects that are of growing importance such as shadow banking and Fintech are given their proper place, along with the growing maturity of the law applicable to bank resolution.

Professor Lamandini and Professor Ramos Muñoz admirably convey a sense of the new centrality of financial law. This is demonstrated by the extensive treatment of the *OMT* case, which must rank as one of the most important constitutional challenges of recent times. Here the law comes face to face with basic macro-economic policy. Such policy in the unique body that is the EU is of necessity played out within a set of rules. President Draghi’s famous line “believe me, it will be enough”, was not a throw-away remark. *Within our mandate*, was how he began – and a mandate is subject to interpretation.

*EU Financial Law: An Introduction* provides a valuable tool for the judges and others who have to apply the law. As the authors explain, this includes the

specialist bodies that have been created to provide an independent recourse by way of review or appeal for parties affected by certain supervisory decisions. This extends into the field of private law, where an understanding of the financial regulatory background in which transactions are carried out is increasingly necessary in deciding disputes.

In summary, this ground-breaking book will take its place among the leading works on the difficult but indispensable subject of financial law. Within its pages Professor Lamandini and Professor Ramos Muñoz have illuminated the evolving structure of financial law in a way which will serve Europe well, now, and into the future.

Sir William Blair  
Commercial Court, Royal Courts of Justice, London  
September 2016