

CONTENTS

| | |
|--|--|
| <i>Preface and acknowledgments</i> | page xiii |
| <i>Table of cases</i> | xvii |
| <i>Table of treaties and legislation</i> | xviii |
| <i>List of abbreviations</i> | xxv |
| 1 | The retail investor and the EC 1 |
| I. | The importance of the retail markets 1 |
| II. | The retail markets and the EC 5 |
| | 1. The development of a retail market agenda 5 |
| | 2. Scope: the reach of EC investor protection law and policy 13 |
| | 3. Beyond the cross-border context 18 |
| | 4. But room for local ‘law on the books’ and for ‘law in action’: the UK example 22 |
| | 5. Examining retail investor protection through the EC lens 29 |
| III. | Who is the EC investor? 30 |
| | 1. Characterizing the target of investor protection 30 |
| | 2. The average EC investor: an elusive target? 31 |
| | 3. Investors or consumers? 39 |
| IV. | The financial crisis and EC retail market policy 41 |
| 2 | Designing a retail investor protection regime 45 |
| I. | Why intervene in the retail markets? Encouraging the empowered investor, shielding the irrational investor or supporting the trusting investor? 45 |
| | 1. Characterizing investor protection 45 |
| | 2. The retail investor as an agent of public policy and the empowered investor 47 |
| | 3. The irrational and uninformed investor 67 |
| | 4. The trusting investor 81 |
| II. | The risks of retail market intervention 92 |
| | 1. Regulatory and retail market agenda risks 92 |

| | |
|------|--|
| viii | CONTENTS |
| | 2. Regulation and the retail markets: ‘laws on the books’ and ‘laws in action’ 95 |
| | 3. Responding to the drivers of retail market engagement 97 |
| | 4. Centralization risks 100 |
| III. | How to intervene on the retail markets? 102 |
| | 1. The regulatory toolbox and self-regulation 102 |
| | 2. Achieving retail market outcomes 106 |
| | 3. Principles-based regulation and the retail markets 108 |
| | 4. Evidence-based policy formation and rule-making 114 |
| | 5. Controlling risk-taking and segmentation techniques 118 |
| | 6. Diversification 122 |
| 3 | Product regulation 134 |
| I. | Product regulation and the retail markets 134 |
| | 1. The EC and product regulation 134 |
| | 2. The benefits of CIS product regulation 137 |
| | 3. The risks of CIS product regulation 142 |
| | 4. An integrated model 151 |
| II. | The UCITS investor protection regime and product regulation 152 |
| | 1. Inbuilt diversification and liquidity 152 |
| | 2. Inbuilt governance: the depositary and the management company 153 |
| III. | The UCITS III product and design risks 157 |
| | 1. The UCITS III regime 157 |
| | 2. UCITS III and the risks of facilitative product design 162 |
| | 3. Beyond UCITS III: alternative investments and product design risks 168 |
| | 4. Beyond product regulation: the product provider and the provider/distributor relationship 176 |
| IV. | Structured and substitute products 179 |
| | 1. The substitute product market and structured products 179 |
| | 2. A segmented product regime and its risks 184 |
| | 3. Developing a response 187 |
| 4 | Investment advice and product distribution 192 |
| I. | Intermediation, its risks and regulation 192 |
| | 1. The benefits of advice 192 |
| | 2. The risks 193 |
| | 3. Regulating advice 196 |
| II. | Scope of the advice and product distribution regime 200 |
| | 1. The advice and distribution regime 200 |
| | 2. MiFID’s scope: a wide range of instruments and services 202 |

| CONTENTS | | ix |
|----------|---|-----|
| | 3. MiFID's scope: the pivotal investment advice definition | 203 |
| | 4. MiFID's scope: supporting access to advice? | 204 |
| | 5. MiFID's scope: the nature of investor protection 'on the books' | 207 |
| III. | Regulatory design choices | 209 |
| | 1. Regulatory design choice (1): maximum harmonization | 209 |
| | 2. Regulatory design choice (2): principles-based regulation | 212 |
| | 3. Regulatory design choice (3): shaping firm conduct and the eclipsing of disclosure | 213 |
| IV. | Regulatory technique (1): the fairness principle and 'law in action' | 215 |
| | 1. The fair treatment principle | 215 |
| | 2. The risks of 'fairness' | 217 |
| | 3. Fairness and the TCF model: 'law in action' | 219 |
| | 4. The implications of the TCF model | 223 |
| V. | Regulatory technique (2): marketing risks | 224 |
| | 1. Marketing risks | 224 |
| | 2. Delivery-specific protection: online and distance contacts | 226 |
| | 3. Horizontal protection: consumer protection directives | 227 |
| | 4. Investment-specific protections: MiFID | 231 |
| VI. | Regulatory technique (3): quality of advice and suitability | 235 |
| | 1. Suitability and objective advice | 235 |
| | 2. The suitability regime: suitability and appropriateness | 237 |
| | 3. Suitability 'in action' | 240 |
| VII. | Regulatory technique (4): conflict-of-interest management | 244 |
| | 1. Conflict-of-interest risks | 244 |
| | 2. MiFID and retail market conflict-of-interest risk | 245 |
| VIII. | Regulatory technique (5): the investment firm/investor contract | 247 |
| IX. | Segmentation risks | 250 |
| | 1. The UCITS regime | 250 |
| | 2. Structured and substitute products | 252 |
| X. | Advice or sales? Addressing the 'right risks' | 256 |
| | 1. Delivering high-quality investment advice | 256 |
| | 2. Incentive and commission risks: advice or sales? | 257 |
| | 3. MiFID and commission risk | 263 |
| XI. | Fee-based investment advice: segmenting regulated advice | 266 |
| | 1. Delivering independent investment advice: the UK Retail Distribution Review and other international experience | 266 |
| | 2. An EC model? | 273 |
| XII. | Access to mass market advice and the sales problem | 278 |
| | 1. Access to advice | 278 |
| | 2. A mass market advice regime and MiFID: generic advice | 279 |
| | 3. Access to advice and the UK experience | 279 |
| | 4. The EC and access to advice | 285 |

| | | |
|------|--|-----|
| x | CONTENTS | |
| 5 | Disclosure | 288 |
| I. | Disclosure and EC investor protection | 288 |
| 1. | The retail market disclosure regime | 288 |
| 2. | The investor understanding problem | 290 |
| 3. | The risks of disclosure | 296 |
| 4. | Disclosure ‘in action’ | 300 |
| II. | Investment product disclosure (1): the UCITS regime | 304 |
| 1. | Designing CIS disclosure: the challenge | 304 |
| 2. | The EC laboratory | 312 |
| III. | Investment product disclosure (2): the substitute products challenge | 322 |
| 1. | A fragmented regime | 322 |
| 2. | Developing a response | 330 |
| IV. | Disclosure in the distribution and advice context | 333 |
| 1. | Marketing communications | 333 |
| 2. | General investment firm and services disclosure: MiFID Article 19(2) and (3) | 334 |
| 3. | Conflicts of interest and commissions | 337 |
| 6 | The trading process | 345 |
| I. | Promoting access to trading | 345 |
| 1. | Better diversification and lower trading costs | 345 |
| 2. | The risks and execution-only services | 350 |
| II. | Investor protection in the trading process | 354 |
| 1. | A matrix of rules | 354 |
| 2. | Best execution | 355 |
| 3. | Trading and issuer disclosure | 363 |
| 7 | Education and governance | 374 |
| I. | Investor education | 374 |
| 1. | Investor education | 374 |
| 2. | Building an investor education strategy: the UK example | 384 |
| 3. | Investor education and EC retail market policy | 389 |
| II. | Retail investor involvement in policy formation and law-making | 398 |
| 1. | Retail investor involvement | 398 |
| 2. | Retail governance and the EC | 399 |
| 3. | Improving investor governance | 413 |
| 4. | CESR and the retail markets | 419 |
| 8 | Supervision, enforcement and redress | 426 |
| I. | Public supervision and enforcement in the retail markets | 426 |
| 1. | Public supervision and enforcement in the retail markets | 426 |

CONTENTS xi

| | | |
|---|-----|-----|
| 2. The EC regime | 426 | |
| 3. Risks to the retail markets | 429 | |
| 4. CCSR, the retail markets and supervisory convergence | | 436 |
| 5. Investor compensation schemes | 440 | |
| II. Investor redress | 442 | |
| 1. Access to justice and the retail investor | 442 | |
| 2. Direct retail investor action | 444 | |
| 3. Collective action | 458 | |
| <i>Index</i> | 464 | |