
CHAPTER 9

Simplification:
Prospectuses and Public Offers

9.1 Introduction

9.1.1 The principal legislation governing public offers of securities and their admission to trading in Ireland ("public offers legislation") is as follows:

- (i) Parts III and XII of and the Third Schedule to the 1963 Act. This is the original Irish law imposing requirements to prepare and file a prospectus when shares or debentures are offered in writing to the public. This law largely follows Part III of the UK Companies Act 1948. Part III of the 1963 Act contains the law imposing criminal and civil liabilities for untrue or misleading statements in prospectuses. It also contains other provisions which regulate public offers of shares and debentures such as the timetable which must apply to allotments of shares and debentures.
- (ii) The 1984 Stock Exchange Regulations, as amended, which implement the Listing Particulars Directive,¹ the Admissions Directive² and the Interim Reports Directive.³ These Directives are now consolidated in Directive 2001/34/EC dated 28 May 2001. This law is not directly concerned with public offers per se, but regulates the procedures for admission of securities to official listing, including the contents of listing particulars, i.e. the prospectus-type document which must be prepared when securities are admitted to listing for the first time.
- (iii) The 1992 Prospectus Regulations which implement the Prospectus Directive.⁴ This law regulates when a prospectus must be issued, as well as the content of such a prospectus where securities (not just shares or debentures) are offered to the public (whether in writing or orally).
- (iv) The Investment Intermediaries Act 1995 and the advertising requirements imposed under that Act. This Act implements the Investment Services Directive and Capital Adequacy Directives (93/22/EEC of 10 May 1993 and 93/6/EEC of 15 March 1993). Amongst other things the Act and the advertising guidelines made under the Act regulate communications made with a view to inducing persons to enter into an "investment business contract", which includes the purchase of securities.
- (v) Collective investment scheme legislation such as the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 1989, the Unit Trusts Act 1990, Part XIII of the 1990 Act and the Investment Limited Partnerships Act 1994.

9.1.2 In this area there is also an abundance of further, non-legislative, regulation through the Listing Rules of the Irish Stock Exchange and, in relation to collective investment schemes, the requirements of the Central Bank of Ireland.

9.1.3 Submissions received by the Review Group indicated a widespread belief that there is a lack of cohesion between key aspects of these main bodies of legislation and that this can lead to confusion, uncertainty and inconsistency in the application of public offers legislation.⁵ Many of the difficulties arise from the fact that the 1992 Prospectus Regulations do not clearly fit with Parts III and XII of and the Third Schedule to the 1963 Act and the 1992 Prospectus Regulations are unclear as to their interaction with the 1984 Stock Exchange Regulations.

1 80/390/EEC of 17 March 1980, subsequently amended by Council Directives: 87/345/EEC of 22 June 1987; 90/211/EEC of 23 April 1990; and 94/18/EC of 30 May 1994.

2 79/279/EEC of 5 March 1979.

3 82/121/EEC of 15 February 1982.

4 89/298/EEC of 17 April 1989.

5 Views were expressed that one of the intentions behind the adoption of the Prospectus Directive, that of facilitating public offers both in Ireland and cross-border has not been achieved. This is due in part to the manner in which the Prospectus Directive was implemented into Irish law but the issue is by no means an Irish issue alone: the proposed reforms of public offers legislation at EU level is ample testimony to this

9.1.4 The circumstances in which a disclosure document, whether a prospectus or listing particulars, must be prepared vary depending on the status of the securities to be offered, the number of people to whom they are to be offered and where such a document might have been circulated. The position (subject to exceptions) is summarised in the following table.

Nature of securities ⁶ to be offered	No public offer		Public offer subject to 1992 Prospectus Regulations	Public offer exempt from 1992 Regulations	
	Issue is less than 10% of existing capital of that class ⁷	Issue is greater than 10% of existing capital of that class		Document first circulated in UK ⁸ or oral ⁹ offer	Other offers (i.e. other than UK or oral offers)
Shares, debentures or other debt securities, not to be listed	No document required	No document required	Prospectus in accordance with 1992 Regulations.	No document required	Prospectus in accordance with 1963 Act
Other securities, not to be listed	No document required	No document required	Prospectus in accordance with 1992 Regulations	No document required	No document required
Shares, debentures or other debt securities, to be listed	No document required	Listing Particulars	Prospectus in accordance with 1992 Regulations	No document other than Listing Particulars	No document other than Listing Particulars
Other securities, to be listed	No document required	Listing Particulars	Prospectus in accordance with 1992 Regulations	No document other than Listing Particulars	No document other than Listing Particulars
Shares, debentures or other debt securities, already¹⁰ listed	No document required	No document required	Not applicable to offers of already listed securities	No document required	Prospectus in accordance with 1963 Act
Other securities, already listed	No document required	No document required	Not applicable to offers of already listed securities	No document required	No document required

9.2 Approach of the Review Group

9.2.1 The Review Group decided to approach issues concerning public offers of securities with a view to addressing perceived anomalies only rather than seeking to amend and restate the entire law. The present law concerning public offers has to a large extent become a matter decided, and to be further decided upon, at EU level. Whilst an overhaul of the law in this area would be welcomed by many securities' market participants and professionals, such overhaul in an Irish context is unlikely to be a useful exercise in the long term. There have been significant proposals made during 2001, which, if implemented, would standardise the law applicable to public offers throughout the EU.¹¹ In addition, the Review Group decided not to include collective investment legislation in its review in this chapter.

6 The 1963 Act defines "share" as a "share in the share capital of a company, and includes stock except where a distinction between stock and shares is expressed or implied". "Debentures" are defined as "debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not". The definition of shares would not appear to extend to options over or derivatives of shares.

7 See Article 6.3 of the Listing Particulars Directive.

8 See 9.3.4.

9 Where no prospectus or letter of application is circulated.

10 i.e. where a holder sells the securities in question.

11 See *Proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading*, 30 May 2001 COM(2001) 280. See also Consultation Document of the Services of the Internal Market Directorate General, *Towards an EU regime on transparency obligations of issuers whose securities are admitted to trading on a regulated market*: Markt / 11 July 2001.

- 9.2.2 The central issue the Group identified is the existence of public offers legislation in addition to the legislation implementing the Prospectus Directive. The Group, therefore, examined the approach of some other EU Member States to the implementation of the Prospectus Directive and to public offers legislation in general. The European jurisdictions chosen were the UK, Germany, France and Italy as the largest countries and Austria, Denmark and Luxembourg as peer countries.
- 9.2.3 Arising from the submissions and the approach taken, the Group examined:
- (i) the interaction of Parts III and XII of and the Third Schedule to the 1963 Act with the 1992 Prospectus Regulations;
 - (ii) the application of law to prospectuses which are listing particulars;
 - (iii) the perceived effect of s 23 of the Investment Intermediaries Act 1995 and advertising requirements under that section;
 - (iv) the accommodation of sophisticated and/or derivative financial instruments under the law;
 - (v) the regulation of public offers via the Internet;
 - (vi) miscellaneous anomalies.

9.3 The interaction of Parts III and XII of and the Third Schedule to the 1963 Act with the 1992 Prospectus Regulations.

1992 Prospectus Regulations preserve 1963 Act prospectus contents requirements

- 9.3.1 The decision to implement the Prospectus Regulations by means of secondary legislation necessarily fettered the ability to synchronise the provisions of the Prospectus Directive with those of Part III of the 1963 Act. In this context Regulation 8(2) of the 1992 Prospectus Regulations preserves the prospectus contents requirements contained in the Third Schedule to the 1963 Act. It has been submitted to the Review Group that, the preservation of these requirements in their entirety is excessive¹² – the application of Articles 11.2 to 11.6 of the Prospectus Directive ought to be sufficient.
- 9.3.2 The objective of the 1992 Prospectus Directive is *complete* disclosure of *all* relevant information rather than *accurate* disclosure of *specified* information. Article 11 of the Prospectus Directive¹³ requires disclosure in a prospectus of:
- the information which, according to the particular nature of the issuer and of the transferable securities is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of the rights attaching to such securities.¹⁴
- 9.3.3 The 1963 Act does not require this level of disclosure – all that is required is the furnishing of specific information without "untrue statements".¹⁵ A statement included in a prospectus is deemed to be untrue if it is misleading in the form and context in which it is included.¹⁶ However, there is no requirement that there be complete or even adequate information. The Review Group accepts that it is possible to prepare a prospectus which complies with the 1963 Act but which in fact provides little information on the business of the company concerned.

Exemptions do not carry over from 1992 Prospectus Regulations to the 1963 Act

- 9.3.4 Compliance by an EU company with the prospectus preparation and filing requirements under the 1992 Prospectus Regulations excuses such a company from having to comply with the comparable law in Parts III and XII of the 1963 Act. However, if an offer of shares is exempted from the 1992 Prospectus Regulations such as not to trigger a requirement for a prospectus, that exemption operates to revive the requirements of the 1963 Act rather than to keep an exemption. This is illustrated by the example of employee share offers, which are

¹² e.g. the requirement for the full details of option holders or the inclusion of separate accounts for the company in addition to consolidated accounts.

¹³ By application of the Listing Particulars Directive 80/390/EEC of 17 March 1980. See also Article 7.

¹⁴ Comparable provisions are contained in the Listing Particulars Directive.

¹⁵ See ss 49 and 50 of the 1963 Act, dealing with civil and criminal liability respectively.

¹⁶ 1963 Act, s 52(b).

exempt from the 1992 Prospectus Regulations' prospectus requirements, but are not necessarily so under the 1963 Act.

- 9.3.5 One particular idiosyncrasy that arises is that an offer in Ireland to employees in the State of shares or debentures of a company first made in the UK (exempt from the requirement to prepare a prospectus under the 1992 Prospectus Regulations) would not appear to be subject to a requirement to prepare a prospectus, although it would be if the issue were only made in Ireland. This is because of the joint effect of s 367(3) of the 1963 Act and Article 2 of the Companies (Recognition of Countries) Order 1964. Section 367(3) states:

This Part¹⁷ shall not apply to a prospectus or to a form of application for shares or debentures first published or issued in a country recognised for the purpose of this section if the prospectus or form of application complies with the law for the time being in force in the country in which the prospectus or form of application was first published or issued.

- 9.3.6 Article 2 states:

Northern Ireland and Great Britain are hereby recognised for the purposes of s. 367...of the Companies Act, 1963.

Section 367 does not specify what law must be complied with. Therefore a situation exists where an offer of securities to employees may benefit from an exemption under UK law to prepare a prospectus, and under Irish law the form of application or document which is used to offer the securities to employees need not conform to Irish law.

Some European examples

- 9.3.7 In France, Italy, UK, Denmark and Luxembourg the law on public offers does not materially extend beyond the implementation of the Prospectus Directive. In Germany, the law extends for procedural aspects only. In all of these jurisdictions, however, the law is centred around the implementation (however subjective it might be in any particular case) of the Directive, rather than other law.
- 9.3.8 There are exemptions from the relevant legislative provisions for restricted circles in all of these countries. Restricted circles are variously defined but commonly include "sophisticated investors" who understand the risks (France, Italy, Germany, UK and Austria) and groups of offerees limited by size (France, Italy, UK, Denmark and Luxembourg). The ceiling on the number of persons exempted under the latter provision can range from 5 to 1,000.
- 9.3.9 Exemptions for share offers to employees apply to a greater or lesser extent in all seven of the countries considered.
- 9.3.10 In all seven countries - and in Ireland - the applicable rules for public issues apply to offers by shareholders as well as to companies making an offer of shares to the public. The only, partial, exception to this is Germany where this provision applies only to first time public offers.

1992 Prospectus Regulations preserve requirement for Third Schedule information

- 9.3.11 The provisions of the 1963 Act are such that they set out a schedule of matters that should be included in prospectuses and require that those matters be set out truthfully and accurately. The Prospectus Directive imposes a much more onerous requirement. Not only does it set out matters for inclusion in prospectuses, as stated above at 9.3.2, it imposes a requirement that the prospectus must contain "the information which, according to the particular nature of the issuer and the...securities...is necessary to enable investors...to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and of the rights attaching to the transferable securities". This imposes a legal duty upon the issuer to ensure that the information in the prospectus is complete. This, in the Group's view, is a much more onerous obligation and more likely to ensure that all information that investors will need will be included in the prospectus.

Conclusion as to interaction between the 1963 Act and the 1992 Prospectus Regulations

- 9.3.12 It appears to the Review Group that the main issue causing difficulties in the public offers area in Ireland is the retention of certain legislation in addition to the Prospectus Directive which is anomalous to the intent of that Directive. The most appropriate course of action is to repeal the provisions of the 1963 Act which are causing difficulty, and to amend or supplement the 1992 Prospectus Regulations appropriately so that they can be utilised as a competent regulatory framework for public offers pending the outcome of current deliberations in the EU.¹⁸

9.4 Proposed amendments to the 1992 Prospectus Regulations

- 9.4.1 Working on the basis of the integration of the prospectus obligations of the 1963 Act and the 1992 Prospectus Regulations, the Review Group recommends that the 1963 Act provisions as to when a prospectus must be prepared and filed be repealed and that the 1992 Regulations be utilised and amended so as to regulate this.¹⁹

Clarify that the 1992 Prospectus Regulations apply to all offers, written or oral

- 9.4.2 The Review Group recommends that Regulation 6 should be amended to state: "subject to Regulation 21 of these regulations it shall not be lawful to make a public offer of securities unless a prospectus is published which complies with the requirements of this Part and the issue of which does not contravene s 46 of the 1963 Act". The effect of this change is to remove reference to "a form of application for securities of a company" and places the focus squarely on whether a public offer is being deemed to be made or not. It also makes it clear that offers made by Irish registered companies are subject to the 1992 Prospectus Regulations even if the offer is not being made in Ireland.

Identify those issues that are and are not considered to be public offers

- 9.4.3 The Review Group recommends that Regulation 6 should be further amended to identify what is and what is not considered, generally speaking, to be a public offer. The Group recommends that Regulation 6 should state that a public offer of securities is defined as:

- (i) an offer of transferable securities to the public in Ireland; or
- (ii) an offer of transferable securities to the public by a company.

This means that any offer (whether written or oral) to the public by any entity, Irish or overseas, of any securities (whether shares, debt securities or derivatives of either) in or to persons in Ireland would be an offer to the public. It would also mean that any offer by an Irish-incorporated and registered company, no matter where made, would be an offer to the public.

- 9.4.4 The integration of the law will mean that the exemptions which currently apply in the Prospectus Directive, such as offers to persons in the context of their professions or to a restricted circle (see 9.4.7), or offers where the total amount raised is less than €40,000, can now extend to all public offers. Similarly, offers to employees would not now be considered to be offers to the public.
- 9.4.5 Much time and money can be expended where issuers try to establish whether a particular offer is "to the public" in the first place. A number of submissions were received on this point and on the related issue of what a "restricted circle of persons" is.
- 9.4.6 Section 61 of the 1963 Act provides:

- (1) Any reference in this Act to offering shares or debentures to the public shall, subject to any provision to the contrary contained therein, be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person

¹⁸ See 9.2.1 and footnote 11.

¹⁹ This will require that an enabling section is inserted in the Act to amend the Regulations, as the amendments proposed would not be able to be effected under the European Communities Act 1972.

issuing the prospectus or in any other manner ...

- (2) Subsection (1) shall not be taken as requiring any offer or invitation to be treated as made to the public if it can properly be regarded, in all the circumstances, as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or otherwise as being a domestic concern of the persons making and receiving it...

- 9.4.7 There is no definition of a "restricted circle of persons". It can be argued that all the left-handed people in the world constitute a "restricted circle" as, try as they might, right-handed people cannot become part of it. More plausibly, a pre-emptive offer (such as a rights issue or open offer) to the existing shareholders of a company only would appear to be an offer to a restricted circle – there is a qualitative nature to the "circle" and the "restriction". As against that, Article 11.7 of the Prospectus Directive anticipates not a disapplication of the Directive but rather a lessening of the information to be set out in the prospectus in the case of a pre-emptive offer:

Where shares are offered on a pre-emptive basis to shareholders of the issuer on the occasion of their admission to dealing on a stock exchange market, the Member States or bodies designated by them may allow some of the information specified in paragraph 2 (d), (e) and (f) to be omitted, provided that investors already possess up-to-date information about the issuer equivalent to that required by Section III as a result of stock exchange disclosure requirements.²⁰

- 9.4.8 Alternatively, the word "restricted" might be construed as "limited in number" so as to suggest that for example 12, 30 or 50 persons constitute a restricted circle. The Group also noted that Irish legislation does not provide for exemptions for offers to sophisticated investors or in minimum tranche sizes in all relevant aspects.

- 9.4.9 The Review Group therefore recommends that Regulation 6 of the 1992 Prospectus Regulations should include a definition of "restricted circle" which to some extent follows the approach taken under UK legislation. Therefore an offer to a "restricted circle" would be defined as an offer to:

- (i) a limited number of persons which the Review Group suggests be 150 persons²¹(regardless of level of sophistication or affiliation or otherwise);
- (ii) persons whom the offeror reasonably believes to be sufficiently knowledgeable to understand the risks involved in accepting the offer subject to a minimum subscription of €40,000.²²

Provide for (i) mutual or similar recognition and (ii) exemptions from Irish law where the offer is not made in Ireland

- 9.4.10 There are situations which arise where securities of an Irish company or derived from securities of an Irish company are offered in another jurisdiction, for example in the USA with a quote for those securities on NASDAQ. In such circumstances the company will be obliged to comply with exacting disclosure requirements in the prospectus under US law and then face further Irish requirements. The 1992 Prospectus Directive applies only to the offer of securities in the EU, regardless of issuer rather than to offers of securities by EU companies regardless of where the offers are made. Where the location of the offer triggers a requirement for compliance with rigorous securities laws, the Review Group considers that there is no public purpose served by applying distinct Irish laws which may have modest, if any, additional value.

- 9.4.11 The Review Group therefore recommends that the Minister may by order from time to time exempt types of offer of securities from the requirement of publication of a prospectus, subject to:

- (i) the offer not being made in the State, and residents of the State being precluded from accepting or procuring or assisting the acceptance of that offer;
- (ii) a prospectus being published which complies with the regulatory requirements of the territory in which the offer is primarily made and such prospectus being filed with the Registrar;

²⁰ This is similar to the existing disapplication of the Third Schedule where a prospectus is not issued generally, i.e. where it is issued to existing members or debenture holders of the company: see ss 44(7) and 361(8) of the 1963 Act.

²¹ To be aligned with the proposals in the draft EU proposals discussed at 9.2.1.

²² This figure is aligned with that in Article 2.2(a) of the Prospectus Directive which suggests an exemption for offers in amounts in excess of €40,000 only where all offerees of the securities acquire such minimum value of securities.

- (iii) it appearing to the Minister that the regulatory requirements governing the offer in that territory provide substantially comparable information with that which would otherwise be required under Irish law.

9.4.12 The effect of the above amendments will be to provide that offers which are properly and reputably regulated overseas will be able to avail of mutual recognition-type exemptions.

Provide for a unified registration regime for prospectuses and listing particulars

9.4.13 The filing requirements under ss 47 and 364 of the 1963 Act impose onerous and inconsistent obligations on those conducting public offers other than where an application for listing is made. For example, depending on the circumstances, the prospectus must be signed by each of the directors or their attorneys (or in the case of non-Irish companies, by the chairman and two other directors or their attorneys) and copies of all material contracts must be lodged with the CRO along with, perhaps, already-filed accounts. This can cause delays and is regarded as unduly inconvenient by some issuers. It is also unclear as to whether the filing requirements of s 47 as applied by the 1992 Prospectus Regulations can apply to prospectuses of non-Irish incorporated companies, as it is s 364 of the 1963 Act which applies to non-Irish companies. If a filed document is a listing particulars and a prospectus, it is not clear whether it should be signed by all directors (as per s 47), the chairman and two other directors (as per s 364) or by none (as is the case with listing particulars).

9.4.14 The various bodies of legislation vary in their requirement for filing of material contracts. They are not required in the case of listing particulars or a pre-emptive offer but are required in the case of other offers.

9.4.15 The Group considers that the key matter to be addressed in this area is lack of clarity. The Review Group therefore recommends:

- (i) that the current requirement for the filed prospectus to be signed by all directors for Irish issuers be retained but, in order to facilitate non-Irish offerors, it should be sufficient that the filed prospectus be signed by an authorised officer certifying that the prospectus is being issued with the unanimous approval of the board of the issuer; and
- (ii) that the present requirement to file material contracts with the CRO in certain circumstances be dispensed with for all offers, on the basis that all material information is required to be included in the prospectus.

Provide for a unified publication regime for prospectuses

9.4.16 As a corollary to the rationalisation of when a disclosure document (i.e. prospectus or listing particulars) must be published, the Review Group recommends that Regulation 12 should be amended to regulate and specify the publication requirements for all prospectuses and listing particulars, so as to align the obligations.

Remove the requirement for Third Schedule information, subject to retention of some specific requirements

9.4.17 Whilst accepting that the key guiding principle is that the Prospectus Directive imposes a requirement that all necessary information be included in the prospectus, the Review Group considered whether there were any matters of such importance that they should be specifically included in prospectuses and should survive the repeal of the Third Schedule. For this, the Group examined the implementing provisions of the Prospectus Directive in the UK, i.e. the Public Offers of Securities Regulations 1995 (SI 1995 No 1537) ("the POS Regulations"). The Group found that there were a number of matters which the UK authorities found desirable to impose in addition to the matters set out in the Prospectus Directive and in a number of cases the Group found that it would be hard to argue that such requirements should not be imposed under Irish legislation also. The Group recommends that only essential extra specific requirements should be imposed and these are as follows:

- (i) Audited accounts for the three years prior to the public offer.

The Prospectus Directive requires that accounts be included in the prospectus but does not specify the period which the accounts should cover. Regulation 45 of the POS Regulations specifies a three year accounts' requirement (if the company has been in existence for three years) or gives the alternative of an accountant's report;

- (ii) Minimum amount to be raised.

The Prospectus Directive does not specifically require that the prospectus contain information on the minimum amount which is required to be raised before the offer can proceed. Regulation 21 of the POS Regulations imposes this requirement.

- (iii) Expenses of the issue.

The Prospectus Directive does not specifically require that the prospectus contain information on the commissions and expenses relating to the offer. Regulation 23 of the POS Regulations imposes this requirement.

- (iv) Major shareholdings.

There is no requirement in the Prospectus Directive for disclosure of major shareholdings in the issuer. Regulation 47(2) of the POS Regulations imposes such a requirement.

Items (i), (ii) and (iii) are at present included in the Third Schedule.

- 9.4.18 In the case of pre-emptive offers, at least some of which at present benefit from the requirement to include Third Schedule information,²³ the Review Group recommends that there be an exemption from the requirement for accounting information, subject to its having been published to shareholders already.²⁴

9.5 The application of law to prospectuses which are listing particulars

1992 Prospectus Regulations may duplicate prospectus contents requirements

- 9.5.1 Submissions received by the Review Group indicated that some concern exists in relation to whether or not the obligations set out in the 1992 Prospectus Regulations are applied to listing particulars. Some issuers are of the view that Regulations 4 (which applies the Prospectus Directive) and 8 (which applies the Prospectus Directive contents requirements) of the 1992 Prospectus Regulations can be interpreted to mean that companies issuing listing particulars may still be required to comply with the requirements of the 1992 Prospectus Regulations in addition to the 1984 Stock Exchange Regulations. There is no carve-out from the application of these Regulations for documents which comply with the contents requirements of listing particulars set out in the 1992 Stock Exchange Regulations. The changes proposed at 9.4 ought to address this issue.
- 9.5.2 A nuance in the drafting of Regulation 21, and in particular the interaction between paragraphs (2) and (3) of that Regulation, was brought to the Review Group's attention. Regulation 21 relieves companies from the provisions of ss 44(3) and 361(4) of the 1963 Act (which prohibit the issue of a form of application for securities or debentures by an Irish or overseas company without attaching a prospectus which complies with the Third Schedule) but does not, in the absence of a form of application, appear to relieve them from the provisions of ss 44(1) and 361(1) which require every prospectus (as opposed to application form) issued by or on behalf of a company to comply with the Third Schedule. The reference to an application form has, in particular, led to varying

²³ Sections 44(7) and 361(8) of the 1963 Act.

²⁴ This would implement Article 11.7 of the Prospectus Directive.

interpretations of what this means and, occasionally, the use of forms of application for compliance purposes rather than as a part of the application process. The changes proposed at 9.4 ought to address this issue.

9.6 The perceived effect of s 23 of the Investment Intermediaries Act 1995 and advertising requirements under that section

9.6.1 In the UK, prospectuses are exempt from the provisions of the Financial Services Act 1995 regulating the content and issue of advertising materials. In Ireland, there is no comparable exemption, and this can cause confusion as to whether those issuing prospectuses must also comply with all of the relevant provisions of the Investment Intermediaries Act 1995. This is particularly the case as the Advertising Guidelines made under s 23 of the Act, most recently published in September 2000, specifically include "prospectus" as an investment advertisement. Where a document is issued by an intermediary rather than by a principal the Act applies. Where a document is issued by the company a principal view is sometimes expressed by advisers that the Act might still apply.

9.6.2 The Group recommends, for the avoidance of any doubt, that the following documents ought to be excluded from the definition of investment advertisement and consequent regulation under the Investment Intermediaries Act 1995 and the advertising guidelines issued by the Central Bank made under the Act:

- (i) a listing particulars;
- (ii) a prospectus which complies with the law as to prospectuses, issued by the company, a seller of shares or a merchant bank on behalf of the company or a seller of shares;
- (iii) a mini-prospectus approved for issue (without approval of its contents) by the Irish Stock Exchange under its Listing Rules, issued by the company, a seller of shares or a merchant bank on behalf of the company or a seller of shares.

The rationale for this recommendation is that investment advertising legislation and regulation exists as a safety net for documents not regulated as above and not as a primary regulatory regime. Subject to these documents being prepared in compliance with the applicable prospectus law, they ought not require to be treated as though they were documents unregulated by any other law.

9.7 The inadequate provision for sophisticated and/or derivative financial instruments

9.7.1 The public offers legislation in Ireland was framed before many of the current sophisticated investment products, currently in issue, were developed. As these securities can have very different characteristics and be issued in very different circumstances than straightforward equities or bonds, a number of submissions argued that special provision should be made in Irish legislation to facilitate their different needs. The implementation of the recommendation at 9.4.9 may prove to be of assistance to sophisticated investors.

9.7.2 It is the view of the Group that it is outside the Group's simplification remit to make specific recommendations for sophisticated instruments. In any event, the Group considers that the simplification measures now being suggested will be of considerable assistance in respect of public offers of all instruments, including those of sophisticated instruments.

9.8 The regulation of public offers via the Internet

9.8.1 Offers via the Internet are becoming an increasing reality worldwide and they are not provided for specifically in Irish legislation. The Group noted that most of the issues under this heading relate to difficulties that issuers

meet under the laws of jurisdictions other than Ireland. This issue is more appropriate for investment supervision and the investment services sector. Regard should also be had to the Group's recommendations in relation to the definition of public offers at 9.4.3.

9.9 Other anomalies

Timing of allotments

9.9.1 Section 56 of the 1963 Act provides that allotment of shares or debentures cannot take place until the fourth day after publication of the relevant prospectus. This can be very difficult to comply with for most companies because the current practice is that often firm placings of securities take place almost immediately after the document issues. This rule is particularly problematic for international bond issues. The Group recommends the repeal of s 56 of the 1963 Act.

Secondary offerings

9.9.2 Secondary offers are offers of securities made by a seller of securities other than by the company which issued them in the first place. Section 51 of the 1963 Act at present can impute the public issue of shares or debentures to the company where the shares or debentures are offered to the public within two years of their first being allotted. There is a presumption, subject to proof otherwise, that where they are so allotted and subsequently offered, that they were allotted with a view to being offered to the public. This section therefore catches offers for sale where securities are allotted to a merchant bank and then sold immediately by that bank. In those circumstances the company is deemed to be the offeror and it and its directors undertake liability accordingly.

9.9.3 The Group considers that the two-year presumption period is excessive and although there was considerable support for a drawing back of the period to six months, as in the UK, The Group recommends at this stage that it be reduced to one year.

9.9.4 In circumstances where s 51 does not apply, whether by rebuttal of the presumption or by falling outside the section altogether, the law is inconsistent. For example, a secondary offering of unlisted shares is regulated as though it were an issue of unlisted securities by a company and hence, the 1992 Prospectus Regulations apply. This triggers an obligation for a prospectus to be issued with "the information which, according to the particular nature of the issuer and of the transferable authorities offered to the public, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and of the rights attaching to the transferable securities". Filing of material contracts is also required. This is notwithstanding that the seller may not itself have information (or copies of the material contracts) to facilitate compliance with this requirement.²⁵

9.9.5 A secondary offering of already-listed securities is exempt from the Prospectus Directive, and therefore one is sent back to compliance with the Companies Acts. If, however, the secondary offering is of shares or debentures and is made pursuant to a prospectus first issued in Great Britain or Northern Ireland, then there is no Irish law to comply with.²⁶

9.9.6 Finally, if there is a form of application for shares or debentures issued to effect a secondary offer (other than an issue first made in the UK), then there is an obligation to prepare a prospectus, with five (not three) years accounts, but not to file either it or any other documents in the CRO.

9.9.7 As to secondary offers generally, it appears that in Europe there is little if any differentiation between offers of shares made by a company or by a shareholder. They all trigger a requirement to prepare, publish and file a prospectus. It was argued that where shares are already listed and the listed company is complying with the law

²⁵ There is scope for administrative exemption of information where it is unavailable to the seller of shares. Article 13.2 of the Directive provides that where "where the initiator of an offer is neither the issuer than a third party acting on the issuer's behalf, the Member States or the bodies designated by them may authorise omission from the prospectus of certain information which would not normally be in the initiator's possession".

²⁶ See s 367(3) of the 1963 Act referred to at 9.3.4.

and Listing Rules, there ought to be sufficient information on the market and generally available to investors. As against that there is a clear difference between, on the one hand, selling shares through a broker without documentation and or a marketing campaign and, on the other, embarking on a marketing campaign of shares to the public.

- 9.9.8 For consistency and simplicity therefore, the Group recommends that public offers as redefined of securities *by shareholders* be regulated by the Regulations as amended, alone, subject to an exemption from the law to the extent that information has been omitted which was unavailable to the seller of the shares after reasonable enquiry made. The five-year accounting disclosure period which currently applies should be reduced to three years.

Expenses associated with a PLC's securities being traded

- 9.9.9 The Review Group makes a number of recommendations at Chapter 5, (5.4 *et seq.*) to remove prohibitions on companies with listed securities incurring expenses in connection with capital markets activities at present inhibited by the rules on financial assistance contained in s 60 of the 1963 Act.



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9.10 Summary of Recommendations

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9.10 Summary of recommendations

- The 1963 Act provisions as to when a prospectus must be prepared and filed should be repealed and the 1992 Prospectus Regulations utilised and amended so as to regulate this. **(9.4.1)**
- Regulation 6 of the 1992 Prospectus Regulations should be amended to state: "subject to Regulation 21 of these regulations it shall not be lawful to make a public offer of securities unless a prospectus is published which complies with the requirements of this part and the issue of which does not contravene s 46 of the 1963 Act". **(9.4.2)**
- Regulation 6 of the 1992 Prospectus Regulations should state that a public offer of securities is defined as:
 - (i) an offer of transferable securities to the public in Ireland; or
 - (ii) an offer of transferable securities to the public (anywhere) by an Irish company. **(9.4.3)**
- Regulation 6 of the 1992 Prospectus Regulations should include an exemption for a "restricted circle" which would be defined as:
 - (i) a limited number of persons which the Review Group suggests be 150 persons (regardless of level of sophistication or affiliation or otherwise); and
 - (ii) persons whom the offeror reasonably believes to be sufficiently knowledgeable to understand the risks involved in accepting the offer subject to a minimum subscription of €40,000. **(9.4.9)**
- The Minister should be authorised to exempt types of offer of securities from the requirement of publication of a prospectus, subject to:
 - (i) the offer not being made in the State, and residents of the State being precluded from accepting or procuring or assisting the acceptance of that offer;
 - (ii) a prospectus being published which complies with the regulatory requirements of the territory in which the offer is primarily made and such prospectus being filed with the Registrar;
 - (iii) it appearing to the Minister that the regulatory requirements governing the offer in that territory provide substantially comparable information with that which would otherwise be required under Irish law; **(9.4.11)**
- The current requirement for the filed prospectus to be signed by all directors for Irish issuers should be retained, but in order to facilitate non-Irish offerors, it should be sufficient that the filed prospectus be signed by an authorised officer certifying that the prospectus is being issued with the unanimous approval of the board of the issuer. **(9.4.15(i))**
- The present requirement to file material contracts with the CRO in certain circumstances should be dispensed with for all offers, on the basis that all material information is required to be included in the prospectus. **(9.4.15(ii))**
- Regulation 12 should be amended to regulate and specify the publication requirements for all prospectuses and listing particulars, so as to align the obligations. **(9.4.16)**

- Only essential extra specific requirements as to content of prospectuses beyond the Prospectus Directive should be imposed, these being:
 - (i) Audited accounts for the three years prior to the public offer.
 - (ii) Minimum amount to be raised.
 - (iii) Expenses of the issue.
 - (iv) Major shareholdings. **(9.4.17)**
- In the case of pre-emptive offers, the Review Group recommends that there be an exemption from the requirement for accounting information, subject to its having been published to shareholders already. **(9.4.18)**
- The following documents ought to be excluded from the definition of investment advertisement and consequent regulation under the Investment Intermediaries Act 1995 and the advertising guidelines issued by the Central Bank made under the Act:
 - (i) a listing particulars;
 - (ii) a prospectus which complies with the law as to prospectuses, issued by the company, a seller of shares or a merchant bank on behalf of the company or a seller of shares;
 - (iii) a mini-prospectus approved for issue (without approval of its contents) by the Irish Stock Exchange under its Listing Rules, issued by the company, a seller of shares or a merchant bank on behalf of the company or a seller of shares. **(9.6.2)**
- Section 56 of the 1963 Act should be repealed. **(9.9.1).**
- The two-year presumption period in s 51 of the 1963 Act should be reduced to one year. **(9.9.3)**
- Public offers as redefined of securities by shareholders should be regulated by the 1992 Prospectus Regulations as amended, alone, subject to an exemption from the law to the extent that information has been omitted which was unavailable to the seller of the shares after reasonable enquiry made. **(9.9.8)**
- The five-year accounting disclosure period which currently applies to prospectuses for secondary offers should be reduced to three years. **(9.9.8)**