COMPANY LAW REVIEW GROUP
an grúpa athbhreithnithe dlí cuideachtaí

# COMPANY LAW REVIEW GROUP

## REPORT ON THE REVIEW OF PARTS 17, 23 AND 24 OF THE COMPANIES ACT

## DECEMBER 2023

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## Chairperson's Letter to the Minister for Enterprise, Trade and Employment

Mr Simon Coveney, T.D.,
Minister for Enterprise, Trade and Employment
23 Kildare Street
Dublin 2
D02 TD30

Mr Dara Calleary, T.D.
Minister of State for Trade Promotion, Digital and Company Regulation
23 Kildare Street
Dublin 2
D02 TD30

21 December 2023

Dear Ministers,

I am pleased to present the Review Group's Report of its review of Parts 17, 23 and 24 of the Companies Act, being item number 3 on the Review Group's current work programme. The review set out to provide a rationale for the distinct responsibilities of the Minister for Enterprise, Trade and Employment and of the Minister for Finance which arise in particular under Parts 23 and 24 of the Act.

It became clear from the outset that the exercise of mapping the appropriate responsibilities between Ministers required very careful deliberation, being a complex area of law at the intersection of company law and financial services law. In this endeavour, the Review Group's Public Company Committee was greatly assisted by the research conducted by Shauna Keniry BL and by the key insights provided by Review Group member Tanya Holly of the Department of Enterprise, Trade and Employment.

I would like to acknowledge and thank each of the members of the PLC Committee for their diligence and input into the issues and Review Group Secretary Deirdre Morgan, and Dan O'Neill of the Department for their support and for preparation of the Report.

Yours sincerely,

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Paul Egan SC
Chairperson
Company Law Review Group

# 1. Introduction

## 1.1. The Company Law Review Group

The Company Law Review Group (**CLRG**) is an expert advisory body charged with advising the Minister for Enterprise, Trade and Employment ("**the Minister"**) on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under Section 958 of the Companies Act 2014. The CLRG operates on a two-year work programme which is determined by the Minister, in consultation with the CLRG.

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from Government Departments and Agencies including the Department of Enterprise, Trade and Employment ("**the Department"**), the Revenue Commissioners and the Central Bank. The Secretariat to the CLRG is provided by the Company Law Review Unit of the Department.

## 1.2. The Role of the CLRG

The CLRG is established to monitor, review and advise the Minister on matters pertaining to company law. In so doing, it is required to "seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity" as per section 959(2) of the Companies Act 2014.

## 1.3. Policy Development

The CLRG submits its recommendations on matters in its work programme to the Minister. The Minister, in turn, reviews the recommendations and determines the policy direction to be adopted.

## 1.4. Contact Information

The CLRG maintains a website at www.clrg.org. In line with the requirements of the Regulation on Lobbying Act and accompanying Transparency Code, all CLRG reports and the minutes of its meetings are routinely published on the website. It also lists the members and the current work programme.

The CLRG's Secretariat receives queries relating to the work of the Group and is happy to assist members of the public. Contact may be made either through the website or directly to:

Deirdre Morgan
Secretary to the Company Law Review Group
Department of Enterprise, Trade and Employment
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# 2. Company Law Review Group Membership

## 2.1. Membership of the Company Law Review Group

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|---|---|
| **Paul Egan SC** | Ministerial Nominee and Chairperson (Mason Hayes & Curran LLP) |
| **Prof Deirdre Ahern** | Ministerial Nominee (School of Law, Trinity College Dublin) |
| **Alan Carey** | Revenue Commissioners |
| **Barry Conway** | Ministerial Nominee (William Fry LLP) |
| **Dr Margaret Cullen** | Institute of Directors |
| **Richard Curran** | Ministerial Nominee (LK Shields LLP) |
| **Emma Doherty** | Ministerial Nominee (Matheson LLP) |
| **Ian Drennan** | Corporate Enforcement Authority (CEA) |
| **Bernice Evoy** | Banking and Payments Federation Ireland |
| **James Finn** | Courts Service |
| **Michael Halpenny** | Irish Congress of Trade Unions (ICTU) |
| **Rosemary Hickey** | Office of the Attorney General |
| **Tanya Holly** | Department Representative |
| **Neil Keenan** | Law Society of Ireland |
| **Eamonn Kennedy** | Irish Business and Employers Confederation (IBEC) |
| **Gillian Leeson** | Euronext Dublin |
| **Prof Irene Lynch Fannon** | Ministerial Nominee (Matheson LLP) |
| **Kathryn Maybury** | Small Firms Association (SFA) |
| **Neil McDonnell** | Irish Small and Medium Enterprises Association (ISME) |
| **Dr David McFadden** | Companies Registration Office (CRO) |
| **Salvador Nash** | The Chartered Governance Institute UK & Ireland (KPMG Law LLP) |
| **Fiona O'Dea** | Department Representative |
| **Gillian O'Shaughnessy** | Ministerial Nominee (ByrneWallace LLP) |
| **Maureen O'Sullivan** | Companies Registration Office (CRO) |
| **Kevin Prendergast** | Irish Auditing and Accounting Supervisory Authority (IAASA) |
| **Eadaoin Rock** | Central Bank of Ireland |
| **Niamh Ryan** | Irish Funds Industry Association |
| **Cathy Smith SC** | Bar Council of Ireland |
| **Doug Smith** | Restructuring & Insolvency Ireland (Addleshaw Goddard (Ireland) LLP) |
| **Tracey Sullivan** | Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) |

### 2.2. Membership of the Public Company Committee

| | |
|---|---|
| **Paul Egan SC** | Chairperson |
| **Fergus Bolster** | Matheson LLP |
| **Nadine Conlon** | The Chartered Governance Institute |
| **Margaret Cullen** | Institute of Directors and CLRG Member |
| **Maria Doyle** | Revenue Commissioners |
| **Kevin Fee** | Central Bank |
| **Tanya Holly** | Department Representative and CLRG Member |
| **Gillian Leeson** | Euronext Dublin and CLRG Member |
| **Liam McCormack** | Department of Enterprise, Trade and Employment |
| **Niamh Ryan** | Irish Funds Industry Association and CLRG Member |
| **Mark Talbot** | William Fry LLP |

## 3. The Work Programme

### 3.1. Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The current work programme began in 2022 and runs until 2024. The work programme is focused on continuing to refine and modernise Irish company law.

### 3.2. Work Programme 2022-2024

The Review Group's current Work Programme is as follows:

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|---|---|
| 1. | Respond to Department requests on an EU proposal of a Directive on harmonising certain aspects of substantive law on insolvency proceedings. |
| 2. | Review the obligations outlined in relation to the directors' compliance statement in the Companies Act 2014, and, if appropriate, make recommendations as to how these might be enhanced in the interest of good corporate governance. |
| 3. | Review appropriateness and utility of Parts 23 and 24 of the Companies Act 2014 in the context of how the financial markets and their regulation have developed. |
| 4. | On the issue of corporate purpose, participate in Departmental public consultations in respect of the Corporate Sustainability Reporting Directive and proposed Corporate Sustainability Due Diligence Directive and consider issues arising as requested. |
| 5. | Review examinership law in the context of applying the optional articles of the Preventive Restructuring Directive, having regard to developments at domestic, EU and international level. |

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| 6. | Engagement with Department on relevant legislative proposals concerning Limited Partnerships and Co-operative Societies. |
| 7. | Provide ongoing advice to the Department of Enterprise, Trade and Employment in relation to EU, Brexit and international proposals on company law. |
| 8. | Examine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014. |
| 9. | Review enforcement provisions of company law and, if appropriate, make recommendations for change. |

This Report is concerned with item 3 of the Work Programme.

### 3.3. Decision-making process of the Company Law Review Group

The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications.

### 3.4. Committees of the Company Law Review Group

The work of the CLRG is largely progressed by the work of its Committees. The Committees consider not only items determined by the work programme, but issues arising from the administration of the Companies Act 2014 and matters arising such as court judgements in relation to company law and developments at EU level. This Report is the product of work by the Public Company Committee, Chaired by Paul Egan, SC.

# 4. Report on the Review of Parts 17, 23, and 24 of the Companies Act

## 4.1. Introduction

Securities law originated as part of company law, with provisions in companies legislation setting out the obligation of companies to produce a prospectus in particular instances when raising finance by the issue of shares or debt securities. The law was largely an adjunct to that relating to the mechanics of issuing shares. In the last thirty years, the law relating to the issuance of securities has developed exponentially, with separate regimes regulating discrete and interrelated areas of securities law.

The Companies Act remains host to certain key measures underpinning the integrity of securities issuance and trading. Such measures are contained within Parts 17, 23 and 24 of the Act. However, policy responsibility for many of the measures relating to securities lies with the Minister for Finance rather than the Minister for Enterprise, Trade and Employment often because the ECOFIN Council (comprising economic and financial ministers from EU Member States with responsibility for economic policy, taxation issues and the regulation of financial services) dealt with the relevant EU proposals that underlie the company law provisions.

The Company Law Review Group ("CLRG") Work Programme 2022–2024 includes (under Item 3) the following work item:

"Review appropriateness and utility of Parts 23 and 24 of the Companies Act 2014 in the context of how the financial markets and their regulation have developed."

The Committee determined that its analysis should address the following:

Part 17:

- Provisions, so far as they relate to traded companies, as to the regulation of the transfer of securities, shareholders' rights and transparency;

Part 23:

- provisions as to civil and criminal liability for non-compliance with the law relating to prospectuses, where shares are offered to the public or admitted to a regulated market;
- provisions as to civil and criminal liability for non-compliance with the law relating to insider dealing, market manipulation, unlawful disclosure of inside information, and executives' dealings in shares;

These provisions in Part 23 sit alongside measures to do with corporate reporting and shareholder disclosure of shareholdings on regulated markets.

Part 24:

- provisions relating to a type of collective investment scheme (or investment fund), that of investment companies.

Other provisions of the Companies Act

- There are other provisions in the Companies Act where certain policy decisions under EU Regulations or Directives are a matter for the Minister for Finance whilst the consequences of those decisions have a bearing on parts of the Companies Act within the competence of the Minister for Enterprise Trade and Employment, or where the line of responsibilities between

the respective Ministers is not always clear, e.g. the Central Securities Depositories Regulation (EU) 909/2014 or the Consolidated Admissions and Reporting Directive 2001/34/EC.

### 4.2. Interpretation

In this Report:

"1996 Regulations" means the Companies Act, 1990 (Uncertificated Securities) Regulations 1996;

"2003 Market Abuse Directive" means Directive 2003/6/EC on insider dealing and market manipulation (market abuse);

"2003 Prospectus Directive" means Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading;

"2004 Transparency Directive" means Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market;

"2005 Prospectus Regulations" means the Prospectus (Directive 2003/71/EC) Regulations 2005;

"2007 Transparency Regulations" means the Transparency (Directive 2004/109/EC) Regulations 2007;

"2014 Market Abuse Regulation" means Regulation (EU) No 596/2014 on market abuse;

"2016 Market Abuse Regulations" means the European Union (Market Abuse) Regulations 2016;

"2017 MiFID Regulations" means the European Union (Markets in Financial Instruments) Regulations 2017;

"2017 Prospectus Regulation" means Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market;

"2020 SRD Regulations" means the European Union (Shareholders' Rights) Regulations 2020;

"AFFL" means the Advisory Forum on Financial Legislation;

"AIF" means an alternative investment fund;

"Central Bank" means the Central Bank of Ireland;

"CLRG" or "Review Group" means the Company Law Review Group;

"Commission Implementing Regulation" means Commission Implementing Regulation (EU) 2018/1212;

"Committee" means the Public Company Committee of the Review Group;

"Companies Act" or "2014 Act" means the Companies Act 2014;

"CRO" means the Companies Registration Office;

"CSD" means a Central Securities Depository;

"CSDR" means Central Securities Depositories Regulation (EU) No 909/2014;

"FSMA 2000" means the UK Financial Services and Markets Act 2000

"IAASA" means the Irish Auditing and Accounting Supervisory Authority;

"ICAV" means an Irish Collective Asset-management Vehicle;

"IFCMPA 2005" means the Investment Funds, Companies and Miscellaneous Provisions Act 2005;

"IFCMPA 2006" means the Investment Funds, Companies and Miscellaneous Provisions Act 2006;

"ILP" means an investment limited partnership;

"IMC Rules 2019" means the Central Bank (Investment Market Conduct) Rules 2019;

"MiFID II" means Directive 2014/65/EU on markets in financial instruments;

"Minister" means the Minister for Enterprise, Trade and Employment;

"Part 17" means Part 17 of the Companies Act;

"Part 23" means Part 23 of the Companies Act;

"Part 24" means Part 24 of the Companies Act;

"PLC" means a public limited company registered under Part 17;

"SRD1" means Shareholders Rights Directive (EU) 2007/36/EC;

"SRD2" means Directive (EU) 2017/828 amending SRD1;

"UCITS" means an undertaking for collective investment in transferable securities;

### 4.3. Overall Objective

The purpose of this review is to identify whether it is appropriate for certain provisions that straddle traditional company law and modern securities law to remain in the Companies Act or if certain provisions are best excised from the Companies Act and relocated with other compatible measures in another piece or pieces of legislation.

Understanding where policy responsibility for decisions on these matters lies and aligning it with the appropriate Minister and regulatory body facilitates better navigation of the legislative and regulatory systems and promotes more prompt responses to legal issues that arise.

This exercise also brings to the fore that there are duplicative provisions in the Companies Act for public companies, particularly in the area of shareholder disclosure of holdings and rules on directors' share dealings and their disclosure.

We should say that we do not advocate that such a reorganisation of the law is immediately merited, acknowledging that the exercise will be complex. However, we believe that if there is in due course a consolidation of securities law or a restatement of company law, the opportunity could be taken to consider the recommendations of the Review Group. Although such consolidations or restatements are essentially once-in-a-generation affairs, we believe that this is an important exercise so as to provide a benchmark for legislative developments in due course.

This review has not discussed any change with regard to regulatory competences in respect of the relevant legislative provisions.

### 4.4. Method and approach

In the context of this review only, the Committee has worked on the following premise:

a) The Minister for Finance has overall responsibility for the development of domestic and EU/International financial services regulation, with the aim of supporting a well regulated, competitive and stable financial services sector. The Central Bank of Ireland is responsible for the oversight of the activities of financial institutions as regards financial services regulation, the authorisation and on-going supervision of regulated markets and of multilateral trading facilities. The legislation introduced by the Minister for Finance is relied on by the Central Bank of Ireland in its regulatory and supervisory role.

b) The responsibility of the Minister for Enterprise, Trade and Employment is to sponsor legislation that will provide appropriate corporate structures and procedures that will facilitate and promote business and commercial probity generally.

The Committee conducted a detailed analysis of the provisions in question with a view to developing advice to the Minister on the following:

- the provisions of the Act that might be removed from the Companies Act, to be located in distinct enactments where the Minister for Finance is the responsible Minister;
- the removal of unnecessarily duplicative provisions from the Companies Act;
- other general areas for streamlining provisions and procedures.

### 4.5. Previous analysis of the issues

A Government Decision in November 2006 approved the preparation of a Bill to provide for the consolidation of the existing legislation governing the regulation of the financial services sector. This included consideration of the transfer of legislation relating to investment funds from the Minister to the Minister for Finance.

Another block of legislation relating to the Financial Securities Markets was also identified for consideration for transfer to the Minister for Finance. As part of this consideration, the views of the Advisory Forum on Financial Legislation (AFFL) were sought – a group of stakeholders set up to assist the Department of Finance in the consolidation exercise.

The AFFL was set up by the Department of Finance in 2007 to assist with the preparation of a Bill to consolidate and, in so far as was possible within the timeframe envisaged, to modernise Irish financial services legislation. Set out in Appendix A to this Report is a letter from the Chairperson of the Securities Working Group to the Chairman of the AFFL dated 8 April 2008.

A decision was taken in March 2009 to defer the work of the Advisory Forum given the global financial crisis that was occurring at that time. But before the deferment, some scoping work was carried out to identify which sections of the Companies Acts should transfer to the Minister for Finance. Between 2010 and 2012, there was further intermittent engagement between the two Departments on the possible phased transfer of responsibility for legislating on areas relating to the Financial Securities Markets and the Investment Funds Industry, but the transfer did not take place.

# 5. Part 17 – Public Limited Companies

## 5.1. Introduction

The Committee conducted an analysis of certain Chapters of Part 17 where the provisions that were sourced from EU measures focused on companies with securities admitted to trading and where the other provisions that were sourced domestically appeared to duplicate or intersect with provisions in the Transparency (Directive 2004/109/EC) Regulations 2007 and Central Bank (Investment Market Conduct) Rules 2019 Parts 1 and 2.

## 5.2. Chapter 4: Interests in shares: disclosure of individual and group acquisitions

The Review Group analysed this Chapter, in light of its duplicating provisions in the Transparency (Directive 2004/109/EC) Regulations 2007 and Central Bank (Investment Market Conduct) Rules 2019 Parts 1 and 2.

In summary this Chapter gives rise to the following obligations:

- a person with a 3% or more interest in the voting shares of a PLC, whether or not listed, must notify the PLC of the interest held by the person, their spouse, civil partner, or minor children or any company in which they own or control 1⁄3 of the share capital, when they pass 3% or any whole percentage number;
- shares held by persons acting in concert to acquire those shares are aggregated for the purposes of the notification requirements;
- the PLC, on its own initiative may, or at the request of a 10% shareholder must, make an enquiry of a person as to their present or prior interest in a PLC's voting shares.

The law in this Chapter was drawn from the UK's Companies Act 1985 and originally enacted in Part IV of the Companies Act 1990. Since that time, the combination of EU measures, notably the Transparency Directive 2004/109/EC, Rules made under the Irish Takeover Panel Act 1997 and market rules have combined to make much of this Chapter redundant.

## 5.3. Chapter 4: Conclusion and recommendation

The Committee debated whether the Companies Act was the appropriate vehicle for disclosure of interests in shares and concluded that transparency of company ownership was a fundamental cornerstone of commercial probity. In the words of United States Supreme Court Justice Louis Brandeis "sunlight is the best disinfectant". Accordingly it is properly contained within the Companies Act. However, the Committee was of the view that the law regulating disclosure of interest that should apply to PLCs should not be this remnant of pre-2004 Transparency Directive law, but that it should be remodelled so as to be aligned with the disclosures mandated under the Transparency regime that apply to companies with voting securities admitted to a regulated market.

It is recognised that to realign the law in light of this analysis will, on the face of it, result in certain interests in shares which are at present notifiable under the Companies Act ceasing to be notifiable by persons holding those interests[1], summarised in this table:

[1] Companies Act 2014, ss 1054, 1055.

| Nature of interest | Extent of interest |
|---|---|
| Family interests | Shares held by a spouse, civil partner, or a child under 18 years of age or the person |
| Indirect interests | Shares held by a body corporate where one third or more of the voting capital is held or controlled by the person |
| Concerted interests | Shares acquired by persons acting in concert together pursuant to a share acquisition agreement |

That said, the 2007 Transparency Regulations[2] require notification of interests effectively controlled by the person concerned, which therefore operate to address the core intent of those more literal Companies Acts provisions.

| **The Review Group recommends:** |
|---|
| - **that Chapter 4 be retained as part of companies legislation.** |
| - **The Review Group also recommends that, as part of a future Work Programme, the Committee reviews Chapter 4 again in the context of the 2004 Transparency Directive regime with the intention of aligning the regimes where practical and optimal.** |

### 5.4. Chapter 7: Uncertificated securities

The title to shares in a PLC can be in certificated or uncertificated form:

- certificated shares will be evidenced by a paper share certificate; or
- uncertificated shares will be evidenced by electronic means and the title and transfer of the shares are registered on a computer based system.

The framework for regulation of uncertificated shares was originally set out in S.I. No. 68/1996 - Companies Act, 1990 (Uncertificated Securities) Regulations 1996, which enabled the title to securities in companies registered in Ireland to be evidenced otherwise than by a certificate and transferred without a written instrument. The 1996 Regulations were continued in force by section 5(7) and Schedule 6, para. 5(2) of the Companies Act, which provides that the 1996 Regulations "shall continue in force and may be amended or revoked under section 1086 accordingly." The 1996 Regulations were and are the responsibility of the Minister and remain in force.

In the 1996 Regulations:

- Chapter II provides for procedures for evidencing and transfer of uncertificated units of a security on a dematerialised, computer-based system without a written instrument, entry on registers of securities held in uncertificated form, and related matters.
- Chapter III provides for the approval and compliance of the approved operator of a "relevant system".

[2] Regulation 15, transposing art 10 of the 2004 Transparency Directive

- Chapter IV provides rules for provision to prevent persons sending "properly authenticated dematerialised instructions" from denying particular matters relating to them. It also makes provision for persons receiving such instructions to accept with, certain exceptions, that the information contained in them and matters relating to them are correct.
- Chapter V, VI and the Schedules to the 1996 Regulations provide for a number of incidental and related matters, and for the detailed rules and procedures applying to approved operators of a relevant system.

Section 1085 is expressed in similar terms to regulation 5 of the 1996 Regulations and provides that section 6 of the Statute of Frauds 1695, section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877, section 94(4) of the 2014 Act, and any other enactment or rule of law requiring the execution, under hand or seal, of a document in writing for the transfer of property, shall not apply (if they would otherwise do so) to any transfer of title to securities pursuant to section 12 of the Electronic Commerce Act 2000 or authorised or required pursuant to regulations made by the Minister under section 1086.

Section 1086 provides that the Minister may make provision by regulations for enabling or requiring title to securities or any class of securities to be evidenced and transferred without a written instrument. The "Minister" here means the Minister for Enterprise (see section 2(1) of the 2014 Act). Section 1087 provides for supplemental measures relating to section 1086 of the 2014 Act.

Sections 984, 1193, and 1256 in Parts 16, 18 and 19 apply Chapter 7 (sections 1085–1087) in Part 17 to the securities of a DAC, CLG, PUC and PULC as they apply to securities of a PLC.

The settlement of trades in securities is done by central securities depositories (CSDs), which operate settlement systems by maintaining records of securities of participating issuers and those entitled to them. CSDs hold the title to the securities by taking custody of securities, either by physical custody of certificated securities or by entry of the CSD or its nominee as registered holder of the securities. All Member States of the EU, other than Ireland, have a domestic CSD normally linked to its stock exchange. As a result of the close historic links between the Dublin and London stock exchanges, Ireland had traditionally relied on a CSD based in the United Kingdom, operated by Euroclear UK & Ireland (EUI) Ltd utilising a settlement system called CREST.

In December 2018, in preparation for the expected ultimate expiry of EUI's recognition as an authorised CSD, Euronext Dublin announced the conclusion of analysis it had carried out on options for long-term post-Brexit securities settlement. It decided that it would look at migrating the Irish securities market business from EUI's CREST system to a Belgium-based unit of Euroclear, one of the world's largest settlement houses. With Irish government and securities industry support, the Migration of Participating Securities Act 2019 was passed, enabling Irish issuers to use a special procedure, rather than a court-approved scheme of arrangement, to migrate their securities into this Euroclear-operated intermediated system.

The procedure for migration under the 2019 Act required the passing by the issuer of a special resolution approving the migration of its participating securities – securities the title to which was permitted to be transferred by means of a CSD's system (i.e. the securities in CREST) – to the new intermediated system. All Irish-registered PLCs with equity securities admitted to Euronext Dublin, Euronext Growth, the LSE official list and AIM had used this procedure to migrate their participating securities into the Euroclear system which went live on 15 March 2021.

The Migration of Participating Securities Act 2019 was an enactment under the responsibility of the Minister for Finance and was commenced on 29 January 2020. The procedure by which holders of securities of an Irish registered PLC were enabled to consent to migration of its participating securities by special resolution was set out in sections 4,5, and 6 of the 2019 Act.

S.I. No. 111/2021 - Migration of Participating Securities Act 2019 (Appointment of Live Date) (Section 12(5)) Order 2021 prescribed the live date of 15 March 2021 for migration of securities by Irish registered PLCs to Euroclear Bank NV/SA. Each of the PLCs to which the live date was to apply are listed in the Schedule to the Order. S.I. No. 609/2020 - Companies Act 1990 (Uncertificated Securities) (Amendment) Regulations 2020 amended the 1996 Regulations to alert the market to the fact of the EU Commission temporary UK equivalence decision for the purposes of the CSDR and European Securities and Markets Authority's recognition which legally provided for CREST to continue to operate until 30 June 2021.

### 5.5. Chapter 7: Conclusion and recommendation

As the rationale for Chapter 7 has been superseded by the migration of listed PLCs' securities into the Euroclear system, the Committee concluded that it was logical for the Minister to revoke this Chapter and the 1996 Regulations.

**The Review Group recommends that Chapter 7 and the 1996 Regulations be revoked, as they no longer serve any purpose for PLCs.**

### 5.6. Chapter 7A: Uncertificated securities of relevant issuers<br>Chapter 7B: Dematerialisation of applicable securities

The Companies Act was amended by section 12 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 to insert a new Chapter 7A into Part 17, which was commenced on 15 March 2021. The Explanatory Memorandum (while not relevant to the legal interpretation of Chapter 7A) indicated that the purpose of these amendments was to provide "for miscellaneous amendments to the Companies Act 2014 to facilitate the operation of a substitute securities settlement system, compatible with the law of the European Union after the transition period."

Central Securities Depositories Regulation (EU) No 909/2014 prescribes the rules that apply to settlement of securities and CSDs in the Member States of the EU. One of CSDR's key provisions is the obligation under Article 3 applying to issuers established in the EU that issues of, and transactions in, traded securities shall be represented or recorded in "book-entry form", that is, recorded in an electronic register, without any separate document.

Article 3(1) provides:

"1. Without prejudice to paragraph 2, any issuer established in the Union that issues or has issued transferable securities which are admitted to trading or traded on trading venues, shall arrange for such securities to be represented in book-entry form as immobilisation or subsequent to a direct issuance in dematerialised form."

"Immobilisation" means the act of concentrating the location of physical securities in a CSD in a way that enables subsequent transfers to be made by book entry, and "dematerialised form" means the fact that financial instruments exist only as book entry records.

Article 3(2) provides:

"2. Where a transaction in transferable securities takes place on a trading venue the relevant securities shall be recorded in book-entry form in a CSD on or before the intended settlement date, unless they have already been so recorded. …"

Chapter 7A contains provisions which give further effect to CSDR and enable PLCs registered in Ireland to participate in the settlement system operated by the CSD (now Euroclear Bank NV/SA) in respect of Irish-registered PLCs.

Chapter 7B was inserted in the Companies Act by SI No 353 of 2023 European Union (Dematerialised Securities) Regulations 2023, mirrored by similar provisions in the Act for companies other than PLCs. It contains provisions compelling PLCs to comply with the requirements as to dematerialisation of securities prescribed by Article 3 of CSDR, from 1 January 2023 in relation to new issues and from 1 January 2025 for existing issued securities.

Section 1087A (as amended) sets out relevant definitions for the purposes of the chapter.

- "relevant issuer" means a PLC that has issued securities that are relevant securities.
- "relevant securities" means securities that are (a) issued by a relevant issuer, and (b) registered in the name of a CSD, or a body as may from time to time be nominated by a CSD to hold securities represented in the CSD's securities settlement system.

S.I. No. 119/2021 - European Union (Central Securities Depositories) (CSD Nominee) (Amendment) Regulations 2021, made by the Minister for Enterprise, provided, with effect from 16 March 2021, that "[f]or the purposes of Chapter 7A of Part 17 of the Act of 2014, 'relevant securities' shall include securities registered in the name of a CSD nominee." That would appear to be to the same effect as the (now) amended definition of "relevant securities" in section 1087A, but the regulations remain in force.

Section 1087B provides that notwithstanding section 99(2) of the 2014 Act, a PLC (who is a relevant issuer) is not required to issue share certificates in respect of relevant securities that are registered in the name of a CSD or its nominee, and the title of same to the relevant securities shall be evidenced by a record in the register of members of the PLC.

Section 1087C provides, in overview, that a written instrument of transfer shall not be necessary to transfer title to relevant securities in a CSD.

Sections 1087D–1087H make provision for a number of supplementary and consequential matters.

### 5.7. Chapters 7A and 7B: Conclusion and recommendation

The Committee concluded that these Chapters are properly in the Companies Act, as they relate to the mechanics of share transfer and associated implications for certain corporate governance provisions arising from the manner in which listed securities must be dealt.

**The Review Group recommends that Chapters 7A and 7B be retained in companies legislation.**

### 5.8. Chapter 8: Corporate governance
### Chapter 8A: Rights of shareholders

Chapters 8 and 8A (sections 1088–1110E) set out corporate governance requirements that apply to PLCs. Of interest in this context are, in particular:

- Sections 1094–1096 which apply where a PLC is a "participating issuer" within the meaning of the 1996 Regulations, namely a PLC that has issued uncertificated units of security, the title to which can be transferred by a computer-based system, and
- Sections 1099–1110, which transpose SRD1;
- Sections 1110A–1110E, which transpose SRD2, being provisions inserted by S.I. No. 81 of 2020 – European Union (Shareholders' Rights) Regulations 2020.

Sections 1094–1096 provide rules by which a PLC that is a "participating issuer" shall determine how far in advance persons must be entered on a register of securities in order that they may be entitled to attend and vote at meetings, or receive notice of meetings.

Section 1099 provides that sections 1100 to 1110 have effect in relation to a notice of a general meeting given by a traded PLC, or otherwise in relation to a general meeting of a traded PLC. In this context, under section 1099(4), "traded PLC" means a PLC whose shares are admitted to trading on a regulated market in any Member State of the EU, but is not a UCITS, or a collective investment undertaking under Article 4(1) of Directive 2011/61/EU ("the AIFM Directive"). In summary:

- Section 1100 provides for equal treatment of members of a traded PLC regarding voting rights and participation in the general meeting of the company.
- Section 1101 provides that the directors of a traded PLC shall convene an EGM on the requisition of 5% of the paid up shareholders of the company.
- Sections 1102–1103 provide for matters relating to notice of general meetings of a PLC.
- Section 1104 provides that members holding at least 3% of the issued share capital representing 3% of the voting rights of all issued shares may put an item on the agenda of an AGM or EGM, subject to the conditions laid out the section.
- Section 1105 provides for rules for determining when a person must be registered in a register of securities in order to exercise rights of participation and voting in a general meeting.
- Section 1106 provides for a traded PLC to allow for participation in a general meeting by electronic means.
- Section 1107 provides that members of a traded PLC have the right to ask questions relating to items on the agenda of a general meeting of the traded PLC, etc.
- Section 1108 contains provisions relating to the appointment of proxies to attend and act on behalf of members at a general meeting of a traded PLC.
- Section 1109 provides that a traded PLC may permit, by appropriate arrangements, voting for the purpose of a poll that is to be taken at a general meeting to be cast in advance by correspondence.

- Section 1110 provides for traded PLCs to give full accounts of a vote on the request of a member before the declaration of a vote at a general meeting.
- Section 1110A(1) sets out key definitions for the purpose of Chapter 8A:
    - "intermediary" means "a person, whether situated in a Member State or elsewhere, that provides services, in relation to a traded PLC, of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or other persons". The definition includes an investment firm under the 2017 MiFID Regulations, a credit institution under Capital Requirements Regulation (EU) No 575/2013 and a CSD under the CSDR.
    - "traded PLC" has the meaning given in section 1099(4) of the 2014 Act, that is, a PLC whose shares are admitted to trading on a regulated market in any Member State, but is not a UCITS or a collective investment undertaking under Article 4(1) of the AIFM Directive.

The absence of a definition of "shareholder" in the Chapter 8A of Part 17 and in the 2020 SRD Regulations leads to a lack of clarity as to whether the intermediary is obliged to identify the 'real' or beneficial owner as appears intended by SRD2, or the registered holder of the shares. Under Article 2(b) of SRD1, "shareholder" means the natural or legal person that is recognised as a shareholder under the applicable law, and so does not give a uniform definition that will apply in all Member States of the EU.

Section 1110A(3) provides that Chapter 8A of Part 17 is to be read together with any applicable provision of European Union law adopted by the European Commission as an implementing act in accordance with SRD1, including the Commission Implementing Regulation (EU) 2018/1212. The Commission Implementing Regulation lays down a set of detailed rules standardising, inter alia, the format of the information that may be requested of and transmitted by intermediaries under SRD1 and SRD2.

Section 1110B(1)–(3) provides for intermediaries, on the request of a traded PLC, or its nominee, to provide information, or facilitate the provision of information, regarding shareholder identity that relates to shares held in the traded PLC, and the details of the next intermediary, if any, in the chain of intermediaries. Section 1110B(4)–(7) provides for a legal basis (to meet the requirements of data protection law) for the processing of personal data that is necessary for intermediaries and traded PLCs to operate section 1110B of the 2014 Act.

Section 1110C provides, in overview, for the provision by a traded PLC of information required by a shareholder in order to exercise rights attaching to his or her shares, to an intermediary that provides services in relation to that shareholder's shares, and which said intermediary shall transmit the information on to the shareholder as soon as practicable. The traded PLC may transmit the information to the shareholder directly, in which case the obligation on the intermediary will not be in play. The intermediary is required, in turn, to transmit an instruction relating to the exercise of rights attaching to the shareholder's shares as soon as practicable to the traded PLC, whether directly, or through the chain of intermediaries.

Section 1110D provides for obligations for intermediaries and traded PLCs to facilitate the exercise of shareholders' rights attaching to the shareholders' shares, including, inter alia, with regard to provision to the shareholder of confirmation that votes cast electronically are received, and were validly recorded and counted.

Section 1110E provides for fees charged by intermediaries for their services to be charged in a transparent way, and not to unjustifiably discriminate with regard to the fees charged for services provided cross-border to persons in other Member States of the EU.

### 5.9. Chapters 8 and 8A: Conclusion and recommendation

The Committee concluded that these Chapters are properly located in the Companies Act, as these are all matters that are intrinsic to the operation of general meetings and the participation of shareholders in the general meetings of a PLC.

**The Review Group recommends that Chapters 8 and 8A be retained in companies legislation.**

### 5.10. Chapter 8B: Transparency of institutional investors, asset managers and proxy advisors

Chapter 8B (sections 1110F–1110K) of Part 17 was inserted by regulation 7 of the 2020 SRD Regulations. It transposes Chapter Ib (Articles 3g–3j) of (the amended) SRD1, inserted by Article 1(3) of SRD2.

In summary, its innovations include:

- obligations for institutional investors and asset managers to develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy, or, otherwise, explain why they do not publish an engagement policy.
- obligations of transparency on institutional investors to publicly disclose matters relating to their investment strategy and arrangements with asset managers.
- obligations of transparency on asset managers to disclose to institutional investors matters relating to their investment strategy.
- obligations of transparency on proxy advisors to publicly disclose reference to a code of conduct which they apply and report on the application of that code of conduct, or, otherwise, explain why they do not apply, or depart from, a code of conduct.

### 5.11. Chapter 8B: Conclusion and recommendation

The Committee concluded that these provisions, although connected to the exercise of shareholder rights, do not relate to the relationship of shareholders i.e., registered members and their company. They concern the relationship between institutional shareholders and asset managers with their respective clients, and the duties of proxy advisory firms.

**The Review Group recommends that the provisions of Chapter 8B be detached from companies legislation and located in dedicated financial services regulation.**

## 5.12. Chapter 8C (sections 1110L–1110O) - Remuneration policy, remuneration report, related party transactions

### 5.12.1. Overview of Chapter 8C

Chapter 8C (sections 1110L–1110O) apply to "traded PLCs" defined in section 1099(4), i.e., PLCs with shares admitted to trading on a regulated market in any Member State, other than a UCITS or an AIF. The Chapter transposes Article 9a–9c of (the amended) SRD I, inserted by Article 1(4) of SRD II.

The key provisions are, in overview, the following:

- Under section 1110M, the obligation of a traded PLC to prepare a remuneration policy regarding the remuneration of its directors, and cause a remuneration vote to be held on the remuneration policy at a general meeting of the PLC at least every 4 years.
- Under section 1110N, the obligation of a traded PLC to prepare a remuneration report providing a comprehensive overview of the remuneration awarded or due, during the most recent financial year, to all of its directors in accordance with a remuneration policy prepared under section 1110M, and cause a vote to be held at a general meeting of the PLC on the remuneration report prepared in respect of the most recent financial year. It is relevant to note that section 1102A provides that, in the case of a traded PLC, a director's report prepared for each financial year under section 325 shall now include a remuneration report under section 1110N.
- Under section 1110O(1)–(3), the obligation of a traded PLC to publicly announce a "material transaction with a related party" no later than at the conclusion of the transaction, and not enter into such a transaction without the transaction being approved, prior to the conclusion of the transaction, by a resolution of the traded PLC in general meeting. These obligations under section 1110O(1)–(3) are subject to the exemptions in section 1110O(5), including, for example, the exemption for a transaction entered into in the ordinary course of business and concluded on normal market terms.

### 5.12.2. Material transactions

Under section 1110O(7) a traded PLC must also publicly announce the entry of its subsidiary into a material transaction with a related party. For this purpose:

- a "material transaction" is defined in section 1110O(11) to mean a transaction in which any percentage ratio, calculated in accordance with one or more class tests, is 5% or more;
- the "class tests" are set out in Schedule 21 of the 2014 Act;
- a "related party" is defined in Article 2(h) of (the amended) SRD1 to have the same meaning it has in the international accounting standards adopted in accordance with Regulation (EC) No 1606/2002 ("the IAS Regulation") (and set out in IAS 24 (Related Party Disclosures) in Commission Regulation (EC) No 1126/2008).

The purpose of the rules on "material party transactions" is outlined in recital 42 of SRD2, which explains that: "Transactions with related parties may cause prejudice to companies and their shareholders, as they may give the related party the opportunity to appropriate value belonging to the company. Thus, adequate safeguards for the protection of companies' and shareholders' interests are of importance. […]"

#### 5.12.3. Director remuneration

The Companies Act's corporate governance provisions relating to director remuneration require a traded PLC:

- to prepare a remuneration policy for directors and, if not already directors, the chief executive and (if any) deputy chief executive, addressing specified prescribed factors such as how the policy contributes to the traded PLC's business strategy and long-term interests and sustainability;
- to conduct a shareholder vote at a general meeting on the policy at least once every 4 years, which vote may be advisory or binding;
- where the policy is approved by shareholder vote on a binding basis, to pay remuneration to its directors only in accordance with that policy;
- where the policy is approved by shareholder vote on a non-binding advisory basis, to pay remuneration to its directors only in accordance with that policy subject to derogation from it:
  - where "necessary in exceptional circumstances, to serve the long-term interests and sustainability of the traded PLC as a whole or to assure its viability, and
  - the derogation is in accordance with the procedural conditions and other provisions on derogation set out in the remuneration policy";
- to prepare an annual remuneration report, providing a comprehensive overview of the remuneration awarded or due, during the most recent financial year, to all of its directors and former directors (and, if not already directors, the chief executive and (if any) deputy chief executive), in accordance with its remuneration policy; and
- to include the remuneration report in the report of the directors on the annual financial statements.

### 5.13. Chapter 8C: Conclusion and recommendation

The Committee concluded that the obligations of traded PLCs relating to transparency for shareholders on remuneration of directors and material related party transactions are key elements of corporate governance and appropriately located in the Companies Act.

**The Review Group recommends that Chapter 8C be retained in companies legislation.**

### 5.14. Chapter 8D: Offences and penalties

Chapter 8D (section 1110P) of Part 17 sets out a list of provisions of Chapters 8, 8A, 8B, and 8C, the infringement of which shall be a category 3 offence.

### 5.15. Chapter 8D: Conclusion and recommendation

The Committee concluded that these provisions were appropriately located in the Companies Act.

**The Review Group recommends that Chapter 8D be retained in companies legislation.**

# 6. Part 23 – Public Offers of Securities, Financial Reporting by Traded Companies, Prevention of Market Abuse, Etc.

## 6.1. Introduction

Part 23 (sections 1348–1384A) deals with offers of securities to the public, financial reporting by traded companies, market abuse (insider dealing, market manipulation, unlawful disclosure of inside information) and certain related matters. Nearly all of the provisions in Part 23 are as a consequence of the requirement to transpose EU directives and facilitate the implementation of EU Regulations. It is split into five chapters, titled, respectively:

- Chapter 1 (sections 1348–1364), 'Public offers of securities',
- Chapter 2 (sections 1365–1371), 'Market abuse',
- Chapter 3 (sections 1372–1378), 'Requirement for corporate governance statement and application of certain provisions of Parts 5 and 6 where company is a traded company',
- Chapter 4 (sections 1379–1384), 'Transparency requirements regarding issuers of securities admitted to trading on certain markets', and
- Chapter 5 (section 1384A), 'Application of section 393 to a company to which Part 23 applies'.

The provisions of Part 23 will apply, in general, to companies whose securities are offered to the public or listed or admitted to trading on a regulated market (such as a stock exchange).

In the Review Group's General Scheme of Companies Consolidation and Reform Bill 2007, these provisions appeared in Part B2 of Pillar B, relating to public limited companies. By the time the Companies Bill 2012 was initiated in the Oireachtas, these provisions had been grouped together in Part 23. The Explanatory Memorandum to the Companies Bill 2012 records that "*it was decided, for the sake of clarity, to house these provisions in a stand-alone Part rather than in Part 17 of the Bill on PLCs, as originally envisaged in the General Scheme.*"[3] This would appear to be in recognition that there was a need to apply many provisions of what is now Part 23 to all traded companies, and not just PLCs.[4]

The various provisions of the 2014 Act applying Chapters 1, 2 and 4 of Part 23 to different types of company are as follows:

- Chapter 8 of Part 16 (section 999) provides that Chapters 1, 2 and 4 of Part 23, so far as they are applicable to companies other than public limited companies, shall apply to a DAC,
- Chapter 18 of Part 17 (section 1171) provides that Chapters 1, 2 and 4 of Part 23 shall apply to a PLC,
- Chapter 9 of Part 18 (section 1226) provides Chapters 1, 2 and 4 of Part 23, so far as they are applicable to companies other than public limited companies, shall apply to a CLG,
- Chapter 9 of Part 19 (section 1282) provides that Chapters 1, 2 and 4 of Part 23, so far as they are applicable to companies other than public limited companies, shall apply to a PUC and a PULC,

[3] Explanatory Memorandum to Companies Bill 2012, p. 383.
[4] Conroy, *The Companies Act 2014: Annotated and Consolidated –2018 Edition* (Round Hall, 2018), p. 1536.

- Chapter 7 of Part 24 (section 1404) provides that Chapters 1, 2 and 4 of Part 23 (a) so far as they are applicable to companies other than public limited companies that fall within Part 17, and (b) with the exception, in particular, of sections 1358 to 1360, shall apply to an investment company.

There are also a number of provisions applying Chapter 3 of Part 23 to different types of company in the 2014 Act:

- Section 992 (in Chapter 5 of Part 16) provides that Chapter 3 of Part 23 has effect in relation to, amongst other companies, a DAC that has debentures admitted to trading on a regulated market in an EEA state,
- Section 1115 (in Chapter 10 of Part 17) provides that Chapter 3 of Part 23 has effect in relation to, amongst other companies, a PLC that has shares or debentures admitted to trading on a regulated market in an EEA state,
- Section 1212 (in Chapter 5 of Part 18) provides that Chapter 3 of Part 23 has effect in relation to, amongst other companies, a CLG that has debentures admitted to trading on a regulated market in an EEA state,
- Section 1266 (in Chapter 5 of Part 19) provides that Chapter 3 of Part 23 has effect in relation to, amongst other companies, a PUC and a PULC that have debentures admitted to trading on a regulated market in an EEA state.

A *"regulated market*" in the context of the 2014 Act is (having regard to section 1000 relating to PLCs) a regulated market within the meaning of point 21 of Article 4(1) of Directive 2014/65/EU on markets in financial instruments (**"the MiFID II Directive"**)**.** The sole regulated market in Ireland is the Main Securities Market operated by the Irish Stock Exchange plc, trading as Euronext Dublin.

The Minister responsible for matters falling within Part 23 in general is the Minister for Finance. This appears from section 2(1) of the 2014 Act, where "*prescribed*" is defined, for the purpose of Parts 23 and 24 of the 2014 Act, to mean prescribed by regulations made by the Minister for Finance, and sections 1348, 1365, and 1379 (in Chapters 1, 2 and 4 of Part 23, respectively) state that "Minister" means the Minister for Finance.

It has been observed that *"[t]here has been a steady migration of responsibility for financial services legislation to the Minister for Finance […] the transfer of political responsibility to the Minister for Finance has been matched by the transfer of supervisory responsibility to the Central Bank"*.[5] This is because the EU measures which underlie these provisions were, over time, brought under the ECOFIN Council, and the Minister for Finance has policy responsibility for the financial services area.

## 6.2. Chapter 1: Public offers of securities

### 6.2.1. Legislative history

Chapter 1 largely reflects, in its design, Part 5 (sections 38–55) of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. Part 5 had been enacted to transpose Prospectus Directive 2003/71/EC into Irish law in time for the transposition date of 1 July 2005 and to give further effect to Commission Regulation (EC) No. 809/2004.

[5] Murphy, Financial Services Law in Ireland, (1st edn., Round Hall, 2018), §[3–115].

IFCMPA 2005 was amended soon after its coming into force by the Investment Funds, Companies and Miscellaneous Provisions Act 2006 to provide for the limitation of liability of a guarantor for the content of a prospectus only as far as it relates to the guarantor or the guarantee given by the guarantor and for the requirement for an expert to give consent for his or her expert opinion to be included in a prospectus.

The Minister responsible in general for the IFCMPA 2005 was, by virtue of section 3(1) of the 2005 Act, the Minister, rather than the Minister for Finance, as at this time the Prospectus Directive was a company law measure. In particular, the ICFMPA 2005 contained, in section 46 thereof, a power for the Minister to make regulations giving effect to the 2003 Prospectus Directive, and supplementing and making consequential provision in respect of the 2004 Implementing Regulation. That power was exercised for the making of S.I. No. 324/2005 - Prospectus (Directive 2003/71/EC) Regulations 2005. The 2005 Prospectus Regulations were substantially amended in the years subsequent to their entry into effect, and were revoked by regulation S.I. No. 380/2019 - European Union (Prospectus) Regulations 2019, with a saver for enforcement procedures by the Central Bank and legal proceedings relating to matters in existence at, or before, the time of the revocation.[6]

The general approach in Part 5 of the IFCMPA 2005 was to provide, in primary legislation, for matters relating to civil liability and criminal penalties for infringement of prospectus law, and provide in secondary legislation (that is, the 2005 Prospectus Regulations) for the detailed transposition of the 2003 Prospectus Directive and commission measures made under that Directive.[7]

### 6.2.2. Outline of Chapter 1

Chapter 1 replicates the approach taken by Part 5 IFCMPA 2005, setting out provisions relating to civil liability and criminal penalties for infringement of prospectus law, with further detailed rules laid out in secondary legislation.

Sections 1349 and 1350 provide, respectively, for civil liability for misstatements in prospectuses and for the conditions for exemption from civil liability. Section 1356 provides, without prejudice to any penalties provided by law in respect of a summary conviction, that a person may be liable, on conviction on indictment for an offence under Irish prospectus law, to a fine not exceeding €1,000,000 or imprisonment for a term not exceeding 5 years or both.

The 2014 Act, as initially enacted, referenced the 2003 Prospectus Directive and was amended in 2019 to reflect the updated prospectus regime in EU law, now based in Prospectus Regulation (EU) 2017/1129.

Section 1348 provides that:

- "Irish prospectus law" means (in summary for present purposes) the law of the State giving further effect to Regulation (EU) 2017/1129 or a delegated act, for the time being in force, adopted by the European Commission in accordance with Article 44 of the 2017 Prospectus Regulation, and

[6] Somewhat unusually, though the 2005 Regulations were revoked with effect from 21 July 2019, they have amendments up to and including amendments made by S.I. No. 711/2020 - European Union (Capital Requirements) (No. 2) (Amendment) Regulations 2020.

[7] That framework was replicated in Part 4 of the IFCMPA 2005 and Part 3 of the IFCMPA 2006 relating to market abuse law and transparency (regulated markets) law respectively.

- "EU prospectus law" means (in summary for present purposes) the 2017 Prospectus Regulation or a delegated act, for the time being in force, adopted by the European Commission in accordance with Article 44 of that Regulation.

The Minister responsible for matters falling within Chapter 1 of Part 23 in general is the Minister for Finance, by virtue of section 2(1) of the 2014 Act, representing a change from the position under IFCMPA 2005.

Under section 1354(1) of the 2014 Act, the Minister for Finance is conferred with a power to make regulations for the purposes of giving further effect to the 2017 Prospectus Regulation or supplementing and making consequential provision in respect of delegated acts adopted by the European Commission under Article 44 thereof.

The regulations presently in force giving further effect to the 2017 Prospectus Regulation are:

- S.I. No. 380/2019 - European Union (Prospectus) Regulations 2019,
- S.I. No. 670/2019 - European Union (Prospectus) (Amendment) Regulations 2019, and
- S.I. No. 702/2021 - European Union (Crowdfunding) Regulations 2021.

All of the above are made by the Minister for Finance in the exercise of the powers conferred by section 3 of the European Communities Act 1972.

The Central Bank was designated as the authority responsible for carrying out the functions of a competent authority under the 2017 Prospectus Regulation. Section 1363 empowers the competent authority, i.e. the Central Bank, to make certain rules and issue guidelines. It has done so on one occasion, via S.I. No. 366 of 2019 – Central Bank (Investment Market Conduct) Rules 2019, Part 4 of which contains certain further requirements of the Central Bank relating to prospectuses.

#### 6.2.3. Legacy provisions from the Prior Companies Acts

A small number of provisions that had been in the prior Companies Acts relating to prospectuses were carried over into the 2014 Act. This can be traced to the urgency with which the transposition of the 2003 Prospectus Directive was addressed in early 2005, when IFCMPA 2005 was being progressed through the Oireachtas. At the time a decision was taken to retain these provisions rather than to analyse their relevance in the context of the then new prospectus regime.

Sections 1358 to 1360 contain provisions relating to minimum subscriptions in a public offer of shares. Section 1358(2) provides that where there is a minimum amount to be raised on a public issue, no allotment of shares can occur until that minimum amount has been subscribed. Section 1359 provides for the repayment to subscribers of their subscription moneys if within 40 days, the minimum amount has not been raised. Section 1360 provides that an allotment made in breach of the requirement for the minimum amount to have been raised is voidable at the option of the allottee within 30 days of allotment.

Section 1361 relates to "local offers", offers of securities that are outside the scope of EU prospectus law. For reasons to those that underpinned the inclusion of sections 1358-1360, section 1361 is included, having originated in section 49 of IFCMPA 2005, as it was perceived in 2005 that the exclusion of public offers without any regulation might be to the prejudice of investors. Section 1361 requires the document offering securities to contain a number of rubrics, e.g., "Investments may fall as well as rise in value". These rubrics originated in the then appliable Central Bank

advertising requirements made under the Investments Intermediaries Act. Somewhat ironically, section 1362 disapplies the Investment Intermediaries Act 1995 to any prospectus, but that was to disapply the then cooling-off period for investments provided for under that Act.

#### 6.2.4. Chapter 1: Conclusions and recommendations

The Committee concluded that the provisions of this Chapter relate primarily to investor protection and would more appropriately be contained in dedicated financial services legislation.

The Committee observed that sections 1358 to 1360 deal with a narrow area of default under broader prospectus law and consideration might be given to their being repealed. The Committee observed that the rubrics to be included appeared to be largely a tick-the-box exercise. These are however matters for the Minister for Finance (in consultation with the Central Bank where relevant), rather than the Minister for Enterprise, Trade and Employment.

**The Review Group recommends that the provisions of Chapter 1 be detached from the Companies Act and relocated in dedicated financial services legislation.**

### 6.3. Chapter 2: Market Abuse

#### 6.3.1. Legislative history

Chapter 2 deals with market abuse law, largely reflecting Part 4 (sections 29–37) of the IFCMPA 2005. The purpose of Part 4 of IFCMPA 2005 was to give effect to Market Abuse Directive 2003/6/EC together with related measures. Part 4 of IFCMPA 2005 had, in relation to companies with securities admitted to a regulated market, repealed Part V of the Companies Act 1990 which had contained provisions on insider dealing in Irish law, and the Companies (Amendment) Act 1999 which amended Parts IV and V of the 1990 Act to enable the operation of rules on stabilising or maintaining the market price of securities if it is done in conformity with the Stabilisation Rules set out in the Schedule to the 1999 Act.

Part 4 of IFCMPA 2005 also provided for civil liability and criminal penalties for infringements of Irish market abuse law, and provided for regulations to be made for the detailed transposition of the 2003 Market Abuse Directive and related measures. The relevant powers in this regard were:

- the power of the Minister for Enterprise, Trade and Employment under section 30 to make regulations giving effect to the 2003 Market Abuse Directive and related measures;
- the power of the Central Bank under section 34 to make rules for the application and enforcement of Irish market abuse law, and
- the power of the Minister for Enterprise, Trade and Employment, after consultation with the Central Bank, under section 37 to extend the application of the 2003 Market Abuse Directive, with appropriate modifications if necessary, to markets other than regulated markets, subject to Oireachtas confirmation.

The power under section 30 was exercised by the Minister for Enterprise, Trade and Employment to make S.I. No. 342 of 2005 - Market Abuse (Directive 2003/6/EC) Regulations 2005 which have since been revoked.

### 6.3.2. Outline of Chapter 2

Chapter 2 has on the whole replicated the manner in which Part 4 of the ICFMPA 2005 gave effect to the 2003 Market Abuse Directive and related measures. The 2014 Act, as enacted, referenced the 2003 regime although earlier in 2014 the EU market abuse regime had been changed with the enactment of the 2014 Market Abuse Regulation. Chapter 2 was amended in 2016 to reflect that development.

Section 1365 now provides (in summary for present purposes) that "Irish market abuse law" means measures implementing or giving further effect to the 2014 Market Abuse Regulation and related measures.

Section 1368 and 1369 provide for civil liability and criminal penalties for infringement of Irish market abuse law. In particular, section 1368(2) of the 2014 Act provides, without prejudice to the penalties provided by law on summary conviction, for a maximum penalties for conviction on indictment of €10 million and imprisonment for up to 10 years.

Previously, the Minister responsible for market abuse law had been the Minister for Enterprise, Trade and Employment by virtue of section 3(1) of IFCMPA 2005. Currently, it is the ECOFIN Council that deals with the EU Proposals relating to Prospectus, Market Abuse and Transparency Directives.

Rules transposing the Market Abuse Regulation and related measures are now contained in S.I. No. 349 of 2016 - European Union (Market Abuse) Regulations 2016, made by the Minister for Finance under section 3 of the European Communities Act 1972.

The Minister for Finance may also exercise the power under section 1371 of the 2014 Act, after consultation with the Central Bank, to extend, by provisional order, the application of the one or more provisions of Irish market abuse law, with appropriate modifications if necessary, to further markets, which provisional order can then be confirmed by an Act of the Oireachtas.

The Central Bank is designated as the competent authority for the Market Abuse Regulation. It has the power, under section 1370 to make supplementary rules for the application and enforcement of Irish market abuse law.

The Central Bank has exercised the power under section 1370 to provide for matters falling within the scope of Chapter 2 of Part 23 in S.I. No. 366/2019 - Central Bank (Investment Market Conduct) Rules 2019.

### 6.3.3. Chapter 2: Conclusion and recommendation

The Committee concluded that all of Chapter 2 is concerned with investor protection and properly under the responsibility of the Minister for Finance.

The Committee observed that the 2014 Market Abuse Regulation and Commission delegated Regulation (EU) 2016/522 contain a comprehensive regime regulating and requiring disclosure of dealings in shares of companies by "persons discharging managerial responsibilities" – in practice, directors and, if not directors, chief executive officers and chief financial officers. This regime intersects with and duplicates the obligations of directors under Chapter 5 of Part 5 of the Companies Act to disclose interests in shares and other securities of a company.

**The Review Group recommends:**

- **that the provisions of Chapter 2 be detached from the Companies Act and relocated in dedicated financial services legislation; and**
- **that in due course an examination of the alignment of the Companies Act provisions as to disclosure of interests in shares and those of the 2014 Market Abuse Regulation be conducted, with a view to removing unnecessary duplication between the two. The Review Group could undertake this work as part of a future Work Programme.**

## 6.4. Chapter 3: Requirement for corporate governance statement and application of certain provisions of Parts 5 and 6 where company is a traded company

### 6.4.1. Outline of Chapter 3

Chapter 3 requires "traded companies" to include corporate governance statements in their directors' reports, and applies certain provisions of Parts 5 and 6 of the 2014 Act to traded companies. A "traded company" is a defined term in section 1372 as a PLC, DAC, CLG, PUC or PULC that, in the case of a PLC has shares or debentures, or in the case of the other types of company has debentures, admitted to trading on a regulated market in an EEA state.

Section 1373(1) provides for an obligation on traded companies to include in their directors' report (provided for in section 325) a corporate governance statement for the financial year concerned. Section 1373(2)(a) to (f) specifies in detail the information the statement is to contain, and section 1373(7) provides for the statement to be audited by the company's statutory auditor. Section 1373(8) provides that more limited information in the statement may be given by traded companies which has only issued securities, other than shares, admitted to trading on a regulated market, unless it has also issued shares which are traded in a multilateral trading facility.

Section 1373 has its origins in section 158(6C)–(6J) of the Companies Act 1963. Those provisions were inserted by regulation 13 of S.I. No. 450/2009 - European Communities (Directive 2006/46/EC) Regulations 2009 and regulation 5 of S.I. No. 83/2010 - European Communities (Directive 2006/46/EC) (Amendment) Regulations 2010. The latter regulations transposed Directive 2006/46/EC in Irish law, which in turn amended the Fourth Council Directive 78/660/EEC on the annual accounts of certain types of companies and the Seventh Council Directive 83/349/EEC on consolidated accounts. The Directives are part of a group of measures termed the "Accounting Directives". The more recent Consolidated Accounting Directive 2013/34/EU was transposed by, inter alia, the Companies (Accounting Act) 2017, which amended the 2014 Act in various respects.

Section 1374 applies section 225 (relating to directors' compliance statements) to traded companies.

Section 1375 excludes holding companies that are traded companies from the definition of "relevant holding company" in section 279(1) of the 2014 Act. That provision allowed US accounting standards to be availed of, in limited circumstances, for the purpose of the relevant financial statements of a relevant holding company for the years it is incorporated in the State until the end of 2030.

That section also excludes holding companies that are traded companies from being made the subject of regulations under section 280 of the 2014 Act, which enabled regulations to be made for the use of other internationally recognised accounting standards for the relevant financial statements of specified categories of holding company for a particular transitional period.

Sections 1376–1378 contain a number of other provisions relating to the financial statements of traded companies.

#### 6.4.2. Chapter 3: Conclusion and recommendation

The Committee concluded that, although the obligations in the Chapter were triggered by the companies in scope having securities admitted to trading, they related to the internal governance of those companies and it was appropriate that they continue to be included in the Companies Act.

**The Review Group recommends that Chapter 3 be retained in companies legislation with the Minister for Enterprise Trade and Employment as the responsible minister.**

### 6.5. Chapter 4: Transparency requirements regarding issuers of securities admitted to trading on certain markets

#### 6.5.1. Legislative history

Chapter 4 (sections 1379–1384) relates to the implementation of Transparency Directive 2004/109/EC. The previous legislation dealing with the matters now falling within Chapter 4 of Part 23 was contained in Part 3 (sections 19–24) of the Investment Funds, Companies and Miscellaneous Provisions Act 2006. Part 3 of IFCMA 2006 made provision for transposing the 2004 Transparency Directive in a largely similar way to how Parts 4 and 5 of IFCMA 2005 had transposed the EU legislation on prospectuses and market abuse, discussed in the previous sections above. Section 3 of IFCMA 2006 Act made clear that the Minister responsible for matters within the scope of that Act was the Minister for Enterprise, Trade and Employment.

#### 6.5.2. Outline of Chapter 4

Chapter 4 substantially re-enacts Part 3 of IFCMA 2006. Section 1379(1) defines "transparency (regulated markets) law" as (in broad overview, for present purposes) Irish law giving effect to the 2004 Transparency Directive.

Section 1382 provides for penalties for conviction on indictment under transparency (regulated markets) law as defined in section 1379(1) of the 2014 Act, stating that, without prejudice to any penalties provided by that law in respect of a summary conviction for the offence, be liable, on conviction on indictment, to a fine not exceeding €1,000,000 or imprisonment for a term not exceeding 5 years or both.

There is no provision in the 2014 Act for civil liability for infringement of transparency (regulated markets) law in primary law, but section 1380(3) envisages that civil liability may be imposed by ministerial regulations, although only in relation to certain specified matters (untrue or misleading statements, or omissions from statements purporting to comply with transparency (regulated markets) law or causing a loss to a person who relied on the statement when acquiring securities).

The relevant regulations giving effect to the 2004 Transparency Directive in Ireland are the Transparency (Directive 2004/109/EC) Regulations 2007, as amended. The regulations were initially made by the Minister for Enterprise, Trade and Employment under section 20 of IFCMPA 2006. Regulations under Chapter 4 of Part 23 are now made by the Minister for Finance in the exercise of the power conferred by section 1380.

The Central Bank has made rules for the purpose of section 1383 in Part 2 of the 2019 IMC Rules, which revoke the Transparency Rules that had previously issued by the Central Bank. The Central Bank has also issued guidance on the transparency regulatory framework in accordance with the provisions of Section 1383(7) of the Companies Act 2014.

Under section 1384 of the 2014 Act, the Minister for Finance may, after consultation with the Central Bank, extend, by provisional order, the application of the one or more provisions of transparency (regulated markets) law, with appropriate modifications if necessary, to further markets, which provisional order can then be confirmed by an Act of the Oireachtas. At present, the transparency (regulated markets) regime applies only to regulated markets rather than to multilateral trading facilities.

The substantial law under the 2004 Transparency Directive is contained in the 2007 Transparency Regulations. Those regulations cover the following principal obligations:

- Part 2 – periodic financial reporting obligations of companies;
- Part 2A – reporting of payments to governments;
- Part 4 – liability for false and misleading statements in certain publications by companies;
- Part 5 – obligations of major shareholders to disclose interests in voting shares and disclosure obligations of companies;
- Part 6 – continuing obligations of companies and access to information.

There are two competent authorities under this regime – the Central Bank and the Irish Auditing and Accounting Supervisory Authority.

#### 6.5.3. Chapter 4: Conclusion and recommendation

The Committee concluded that, although the obligations in the Chapter were triggered by the companies in scope having securities admitted to trading, they relate to the internal governance of those companies and relationship of a company with its shareholders. It was therefore appropriate that they continue to be included in the Companies Act.

**The Review Group recommends that Chapter 4 be retained in companies legislation but that in due course an examination of the Companies Act provisions that overlap with the requirements of the 2007 Transparency Regulations be undertaken with a view to aligning the obligations of all PLCs where practicable and where appropriate. The Review Group could undertake this work as part of a future work programme.**

### 6.6. Chapter 5: Application of section 393 to a company to which Part 23 applies

#### 6.6.1. Outline of Chapter 5

Chapter 5 (section 1384A) applies a modified version of section 393 to a statutory auditor of a traded company, so that the statutory auditor is obliged to make a report to the Corporate Enforcement Authority where he or she has reasonable grounds to suspect the commission of an offence contrary to market abuse law, prospectus law, or transparency (regulated markets) law.

### 6.6.2. Chapter 5: Conclusion and recommendation

The Committee concluded that this provision relates to corporate governance.

**The Review Group recommends that Chapter 5 be retained in companies legislation.**

# 7. Part 24 – Investment Companies

## 7.1. Introduction

Investment companies as provided for by Part 24 are a discrete form of public limited company. They are, by a complex series of internally referring provisions, subject to the provisions of Parts 1 to 14, save to the extent disapplied by sections 1002 and 1387(3), and Part 17, save to the extent disapplied by section 1388(3) or (4). A key benefit of Part 24 is that it collects all of the various referring provisions relating to investment companies in one place.

Although situated in the Companies Act 2014, for which the Minister has overall responsibility, all relevant regulation-making powers concerning investment companies under Part 24 are conferred on the Minister for Finance, and all relevant authorisation, regulatory and supervisory powers reside with the Central Bank. Save that they are companies incorporated and subject to the provisions of the Companies Act 2014, the role of the Minister for Enterprise, Trade and Employment relating to investment companies under Part 24 is relatively limited.

Investment companies under Part 24 are generally those investment companies which are not authorised as UCITS (pursuant to the UCITS Regulations) may be viewed as alternatives to UCITS, but for those investment companies which are also authorised as UCITS, they are still subject to certain provisions of the UCITS Regulations for which the Minister for Finance has overall responsibility. They are also subject to the prospectus law, market abuse law, and transparency (regulated markets) law provisions of Part 23 which come within the general responsibility of the Minister for Finance.

## 7.2. Legislative history

Investment companies, as regulated by Part 24, originated in Part XIII of the Companies Act 1990, under which the responsible Minister was the Minister for Industry and Commerce, now the Minister for Enterprise, Trade and Employment. It was originally intended that what ultimately became Part 24 would eventually be moved to a separate legislative code for all existing forms of investment funds (whether UCITS or non-UCITS) in the form of a Collective Investment Schemes Bill. It appears clear, in that regard, that the location of investment companies in Part 24 was intended to be a temporary measure.

However, as investment companies are a type of company, it would seem likely that situating them within any alternative piece of legislation would require that legislation to cross-refer extensively to the provisions of the Companies Act 2014.

## 7.3. Mix of Ministerial roles and responsibilities with respect to investment funds.

The Minister for Finance has responsibility for legislation relating to a number of similar types of collective investment scheme, including UCITS, ICAVs and ILPs. The ILP legislation in particular is an example of the recent transfer of ministerial responsibility for legislation relating to collective investment schemes from the Minister for Enterprise, Trade and Employment to the Minister for Finance. Similarly, the ICAV was created by recent legislation within the remit of the Minister for Finance and is expressly envisaged as an alternative to the investment company under Part 24 of the 2014 Act.

The Minister for Enterprise, Trade and Employment continues to have ministerial responsibility for two other main types of legislation on collective investment schemes other than the investment

company under Part 24, namely the legislation on unit trusts and common contractual funds. Its role in relation to them is relatively limited however and, in the manner typical of all legislation relating to collective investment schemes, is more minor than that of the regulator, the Central Bank.

This is illustrated in the below table

| | **Type of Investment Fund** | **Legislation governing formation** | **Where registered** | **Responsible Minister** |
|---|---|---|---|---|
| | AIF Unit Trust | Unit Trusts Act 1990 | Central Bank | ETE |
| | UCITS Unit Trust | Unit Trusts Act 1990<br>S.I. No 352 of 2011 (as amended) | Central Bank | ETE + Finance |
| | Fixed capital UCITS PLC | Companies Act 2014 Part 17<br>S.I. No 352 of 2011 (as amended) | CRO | ETE + Finance |
| | Variable capital UCITS PLC | Companies Act 2014 Part 17<br>S.I. No 352 of 2011 (as amended) | CRO | ETE + Finance |
| | AIF Common Contractual Fund | Investment Funds, Companies and Miscellaneous Provisions Act 2005, Part 2 | Central Bank | ETE + Finance |
| | UCITS Common Contractual Fund | Investment Funds, Companies and Miscellaneous Provisions Act 2005, Part 2<br>S.I. No 352 of 2011 (as amended) | Central Bank | Finance |
| | AIF fixed or variable capital investment company | Companies Act 2014 Part 24 | CRO | Finance |
| | AIF ICAV | Irish Collective Asset-management Vehicles Act 2015 | Central Bank | Finance |

| | Type of Investment Fund | Legislation governing formation | Where registered | Responsible Minister |
|---|---|---|---|---|
| | UCITS ICAV | Irish Collective Asset-management Vehicles Act 2015<br>S.I. No 352 of 2011 (as amended) | Central Bank | Finance |
| | AIF Investment Limited Partnership | Investment Limited Partnerships Act, 1994 and Investment Limited Partnerships (Amendment) Act 2020 | Central Bank | Finance |

### 7.4. Relevant comparisons from other jurisdictions

In the United Kingdom, His Majesty's Treasury (the UK's finance ministry) has overall responsibility for the UK's financial system and the institutional structure of financial regulation.[8] Several key regulators have responsibility of the enforcement of financial services legislation, including the Bank of England, the Financial Policy Committee, the Prudential Regulatory Authority, the Financial Conduct Authority, and the Payment Systems Regulator. The Financial Services and Markets Act 2000 is an significant piece of legislation in the framework of financial services legislation in the United Kingdom. Most matters relating to prospectus law, market abuse, and transparency (regulated markets law are dealt with in this Act and the statutory instruments made under its provisions, rather than in the UK's Companies Act 2006.

Prior to Brexit, the Treasury was the ministry designated for the purposes of section 2(2) of the European Communities Act 1972 to make regulations for the implementation of EU law in relation to financial services,[9] including EU law on prospectus law, market abuse and transparency. In the context of the UK's withdrawal from the EU, the Treasury has been the ministry responsible for making regulations concerning retained EU law in the area of prospectus law, market abuse and transparency, including regulations relating to the United Kingdom version of Prospectus Regulation (EU) 2017/1129,[10] regulations relating to the United Kingdom version of Market Abuse Regulation (EU) No. 596/2014,[11] regulations relating to the United Kingdom law deriving from Transparency Directive 2004/109/ EC.[12] These and similar regulations are made by the Treasury under section 2(1) of the UK's European Communities Act 1972 and section 8(2) of the UK's European Union (Withdrawal) Act 2018.

[8] See generally Morris, *Financial Services Regulation in Practice* (1st edn, Oxford, 2016), §§[4–01]–[4–03] and §§[4–97]–[4–98].
[9] S.I. No. 2012 / 1759 - The European Communities (Designation) Order 2012.
[10] S.I. No. 1235 / 2019 - Prospectus (Amendment etc.) (EU Exit) Regulations 2019 and Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019.
[11] S.I. No. 310 of 2019 - Market Abuse (Amendment) (EU Exit) Regulations 2019.
[12] S.I. No. 707 / 2019 - Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019.

The Financial Conduct Authority is the main regulator for matters falling within the scope of Parts VI and VIII of FSMA 2000, and the statutory instruments made thereunder.

Part 17 of FSMA 2000 contains provisions relating to collective investment schemes. There are a number of different types of collective investment scheme in the United Kingdom, including unit trust schemes, contractual schemes (co-ownership schemes and partnership schemes), UCITS funds and open ended investment companies. Responsibility for regulating collective investment schemes appears to be mainly shared by the Treasury and the Financial Conduct Authority.

### 7.5. Conclusion and recommendation

The Committee noted the history of Part 24 and concluded that Part 24 would sit more comfortably within financial services legislation, in particular legislation relating to collective investment schemes.

**The Review Group recommends that the provisions of Part 24 and the legislation on unit trusts and common contractual funds be detached from companies legislation and located in financial services legislation.**

## Appendix A - Letter from the Chairperson of the Securities Working Group to the Chairman of the AFFL dated 8 April 2008

Mr Pádraig Ó Ríordáin
Chairman
Advisory Forum on Financial Legislation
Arthur Cox
Earlsfort Centre
Earlsfort Terrace
Dublin 2

8 April 2008

Dear Pádraig

Re: Report of the Securities Working Group of the Advisory Forum on Financial Legislation

The Securities Working Group (the 'Group') of the Advisory Forum on Financial Legislation has concluded the first part of its work outlining the scope of securities legislation which might form part of financial services legislation in the future. In particular, the Group has considered which securities legislation could be included within financial services legislation and the benefits of its inclusion to the securities industry in Ireland.

The purpose of this letter is to outline the findings of the Group.

Securities Legislation

The Group identified the following securities legislation as possibly being included within financial services legislation:

- Prospectus (Directive 2003/71/EC) Regulations 2005 (SI 324/2005) plus Part 5 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and Sections 13, 14 and 15 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006, as well as existing provisions (sections 53, 55 and 57) relating to prospectuses in the Companies Act 1963;
- Market Abuse (Directive 2003/6/EC) Regulations (SI 342/2005) plus Part 4 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005;
- Transparency (Directive 2004/109/EC) Regulations (SI 277/2007) plus Part 3 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006; and
- European Communities (Admissions to Listing and Miscellaneous Provisions) Regulations 2007 (SI 286/2007)[13] (together the 'Securities Legislation').

In addition, the Group identified the following related legislation as requiring examination:

[13] SI 286/2007 replaced the remainder of SI 282/1984.

- Part V of the Companies Act 1990 (relating to insider dealing in the securities of Irish-incorporated companies admitted to the Irish Enterprise Exchange and the Alternative Securities Market of the Irish Stock Exchange)[14];
- Part IV of the Companies Act 1990 (relating to the disclosure of interests in shares by directors, secretaries, substantial holders and concert parties)[15].

Benefits of including Securities Legislation within financial services legislation

Securities Legislation currently resides within the scope of the Companies Acts. Whereas company law is concerned with the corporate entity (e.g. form, governance, accounting, winding-up etc.) financial services law is concerned with certain economic activities that an entity engages in. In this context, Securities Legislation more comfortably fits within financial services law.

As the securities industry in Ireland has become increasingly international in its focus, the requirement for securities legislation in Ireland to meet best practice international standards, be transparent and as user friendly as possible is critical to the international reputation and competitiveness of the securities industry going forward. Incorporation of Securities Legislation within financial services legislation would give rise to a number of benefits for the securities industry in Ireland:

1. Securities Legislation is largely derived from EU requirements under the Financial Services Action Plan ('FSAP') and its inclusion within financial services legislation would be consistent with the FSAP approach and contribute to greater coherence and efficiency in legislative responsibilities imposed by the FSAP Directives.
2. Inclusion of Securities Legislation within financial services legislation is consistent with the approach adopted in other EU jurisdictions and meets best practice international standards. The quality and effectiveness of the legislative framework for financial regulation in Ireland, including securities regulation, is central to the reputation of Ireland's regulatory regime and the competitiveness of its securities industry internationally.
3. Inclusion of Securities Legislation within financial services legislation would lead to a more cohesive policy approach being adopted in relation to financial services law in Ireland. In addition, it would enable a more consistent, coordinated and timely response to the opportunities and challenges arising from legislative changes and market developments.
4. The integration of Securities Legislation into financial services legislation would assist in rendering Irish financial services law less opaque and more accessible, providing greater certainty and legal clarity for market participants (domestic and international) through a single, coherent and unified legal framework for financial services.

[14] The Department of Enterprise, Trade and Employment is currently considering bringing the Irish Enterprise Exchange and the Alternative Securities Market within the scope of the provisions of the Market Abuse (Directive 2003/6/EC) Regulations 2005 which, if effected, would result in the repeal of Part V of the Companies Act 1990.

[15] While these provisions have been disapplied for shareholders in companies with securities admitted to the Main Market of the Irish Stock Exchange, they continue to apply to shareholders in IEX companies. The power exists in Part 3 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006 to extend the major shareholding requirements to other markets, such as IEX, and the Department of Enterprise, Trade and Employment intends to examine this as well.

5. The Financial Regulator is competent authority in Ireland for the purposes of the Prospectus Directive, Transparency Directive (except Article 24(4)(h)), Market Abuse Directive and the Markets in Financial Instruments Directive, all of which have been transposed into Irish law. As the arrangements that apply nationally or operate under EU mechanisms are serviced by the Financial Regulator and/or the Department of Finance, inclusion of securities legislation within financial services law would provide for a more cohesive approach to dealing with these directives on an ongoing basis. Appendix 1 elaborates on the arrangements that apply nationally or operate under EU mechanisms.

Methodology

The Group highlighted that consideration needs to be given to the method of incorporating Securities Legislation into the proposed Financial Services Regulation Bill (the 'Bill') and, in particular, whether it should be consolidated into the broader provisions of the Bill or form a distinct section within the Bill. The Group also pointed out that consolidation of Securities Legislation may give rise to benefits in its own right[16].

Conclusion

The Group recommends that, similar to other EU jurisdictions, Securities Legislation should form part of financial services legislation in Ireland. The Group highlighted that a cohesive, consistent and clear legislative framework for financial services in Ireland, including Securities Legislation, is essential to the promotion and reputation of Ireland internationally as having a flexible and sound regulatory environment.

Should you wish to discuss any aspect of this letter, please contact me.

Yours sincerely

Deirdre Somers

Chairperson

**Appendix 1** [to the letter from the Chairperson of the Securities Working Group to the Chairman of the AFFL dated 8 April 2008]

Securities Legislation

In the case of Securities Legislation, historically, at national level, the areas identified in this letter for possible inclusion within financial services legislation were dealt with in Company Law, for example the requirement to publish a prospectus when making an offer of securities of a company to the public, or the provisions relating to insider dealing which are now encompassed by market abuse.

At European level, these were dealt with as part of the Financial Services Action Plan - a series of 42 specific measures designed to commence the process of integrating the European Financial Services Industry. The grand design for most of these measures falls within the so-called 'Lamfalussy Process' – a four tier process under which the main EU Directive dealing with a particular subject contains the

[16] For example, there may be an opportunity to consolidate the administrative sanctions provisions of the Prospectus Regulations, Market Abuse Regulations and Transparency Regulations given their similarity.

general principles which are then fleshed out as necessary in second "implementation tier" Commission Regulations or Directives, while the third level involves co-operation between relevant authorities and the fourth level involves review by the Commission to ensure all Member States properly apply the laws.

The arrangements that apply nationally or operate under EU mechanisms are serviced by the Department of Finance and/or the Financial Regulator – such as –

- It is the ECOFIN Council that deals with the EU Proposals relating to Prospectus (PD), Market Abuse (MAD) and Transparency (TD) Directives;
- MAD, PD, TD all deal with securities law/regulation of financial markets;
- This area is dealt with by Finance/Treasury Departments in all other Member States;
- The Department of Finance also services the EU forum which will deal with ongoing issues relating to much of this legislation as has been the subject of EU intervention, namely European Securities Committee (ESC) working group/membership of ESC committee;
- CESR, which is serviced exclusively by the Financial Regulator, will continue to have an important role to play in advising/helping to resolve ongoing issues;
- The Department of Finance deals with all other financial services directives which have links to MAD, PD and TD; and
- When transposing the PD, MAD and TD, the Financial Regulator was appointed central competent authority (whereas the Stock Exchange had discharged such functions under earlier EU Directives).

With the transposition in June 2007 of the Transparency Directive, and the replacement of the remainder of the 1984 Regulation to now deal solely with Admissions to Listing, all of the necessary transposing measures for the financial markets are now in place.

Going forward, the focus will be on ensuring compliance, or resolving issues arising, and this is a matter that is and will remain the sole responsibility of the central Competent Authority - the Financial Regulator - either directly or in co-operation with the Department of Finance.

## Appendix B - Table of Provisions under Review

| PART 17 - PUBLIC LIMITED COMPANIES | | Relevant Minister | CLRG Recommendation | Proposed Responsible Minister |
|---|---|---|---|---|
| **CHAPTER 4** | **Interests in shares: disclosure of individual and group acquisitions** | Minister for Enterprise Trade and Employment | Retain in the Companies Act<br>CLRG to review Chapter 4 again in the context of the 2004 Transparency Directive regime with the intention of aligning the regimes where practical and optimal. To be part of a future Work Programme | Minister for Enterprise Trade and Employment |
| | 1046. Purpose of Chapter | | | |
| | 1047. Interpretation and supplemental (Chapter 4) | | | |
| | 1048. Duty of disclosure — first class of case in which duty arises | | | |
| | 1049. Notifiable interest | | | |
| | 1050. Duty of disclosure — second class of case in which duty arises | | | |
| | 1051. "Percentage level" in relation to notifiable interests | | | |
| | 1052. The notifiable percentage | | | |
| | 1053. Particulars to be contained in notification | | | |
| | 1054. Notification of family and corporate interests | | | |
| | 1055. "Share acquisition agreement"— meaning | | | |
| | 1056. Duties of disclosure arising in consequence of section 1055 | | | |
| | 1057. Duty of persons acting together to keep each other informed | | | |
| | 1058. Interest in shares by attribution | | | |
| | 1059. Interest in shares that are notifiable interests for purposes of Chapter | | | |
| | 1060. Enforcement of notification obligation | | | |
| | 1061. Individual and group acquisitions register | | | |
| | 1062. Company investigations concerning interests in shares | | | |
| | 1063. Registration of interest disclosed under section 1062 | | | |
| | 1064. Company investigations on requisition by members | | | |

| PART 17 - PUBLIC LIMITED COMPANIES | | Relevant Minister | CLRG Recommendation | Proposed Responsible Minister |
|---|---|---|---|---|
| | 1065. Company reports on investigation | | | |
| | 1066. Penalty for failure to provide information | | | |
| | 1067. Removal of entries from register | | | |
| | 1068. Entries, when not to be removed | | | |
| | 1069. Where register to be kept, inspection of register, inspection of reports, etc. | | | |
| | 1070. Duty of PLC to notify authorised market operator | | | |
| **CHAPTER 7** | **Uncertificated securities** | Minister for Enterprise Trade and Employment | Revoke Chapter 7 and the 1996 Regulations | N/A |
| | 1085. Transfer in writing | | | |
| | 1086. Power to make regulations for the transfer of securities | | | |
| | 1087. Supplemental provisions in relation to section 1086 | | | |
| **CHAPTER 7A** | **Uncertificated securities of relevant issuers** | Minister for Enterprise Trade and Employment | Retain in the Companies Act | Minister for Enterprise Trade and Employment |
| | 1087A. Interpretation | | | |
| | 1087B. Share certificates | | | |
| | 1087C. Written instrument of transfer | | | |
| | 1087D. Alternative special majority for Schemes of Arrangement | | | |
| | 1087E. Disapplication of additional requirement | | | |
| | 1087F. Irrevocable power of attorney | | | |
| | 1087G. Record date for participation and voting in general meeting | | | |
| | 1087H. Definition of subsidiary | | | |
| **CHAPTER 7B** | **Dematerialisation of applicable securities** | Minister for Enterprise Trade and Employment | Retain in the Companies Act | Minister for Enterprise Trade and Employment |
| | 1087I. Interpretation | | | |
| | 1087J. Application of Chapter | | | |

| PART 17 - PUBLIC LIMITED COMPANIES | | Relevant Minister | CLRG Recommendation | Proposed Responsible Minister |
|---|---|---|---|---|
| | 1087K. Abolition of certificates in respect of applicable securities | | | |
| | 1087L. Transfer of applicable securities | | | |
| | 1087M. Restrictions on transfer of applicable securities | | | |
| | 1087N. Disapplication of certain provisions to applicable securities | | | |
| | 1087O. Disapplication of requirement for certificate in respect of applicable securities | | | |
| | 1087P. Representation of applicable securities | | | |
| **CHAPTER 8** | **Corporate governance** | Minister for Enterprise Trade and Employment | Retain in the Companies Act | Minister for Enterprise Trade and Employment |
| | 1088. Number of directors of a PLC | | | |
| | 1089. PLC, with 2 or more members, may not dispense with holding of a.g.m. | | | |
| | 1090. Rotation of directors | | | |
| | 1091. Modification of section 149(8)'s operation where public or local offer coincides with change among directors | | | |
| | 1092. Remuneration of directors | | | |
| | 1093. Application of section 193 in relation to PLC | | | |
| | 1094. Provisions consequent on participation by PLC in system for uncertificated transfer of securities | | | |
| | 1095. Attendance and voting at meetings | | | |
| | 1096. Notice of meetings | | | |
| | 1097. Application of section 167 to PLC that is not a public-interest entity under S.I. No. 220 of 2010 | | | |
| | 1098. Length of notice of general meetings to be given | | | |

| PART 17 - PUBLIC LIMITED COMPANIES | | Relevant Minister | CLRG Recommendation | Proposed Responsible Minister |
|---|---|---|---|---|
| | 1099. Additional rights of shareholders in certain PLCs (provisions implementing Shareholders' Rights Directive 2007/36/EC) | | | |
| | 1100. Equality of treatment of shareholders | | | |
| | 1101. Requisitioning of general meeting by members — modification of section 178(3) | | | |
| | 1102. Length of notice of general meetings to be given by traded PLC | | | |
| | 1102A. Modification of application of section 325(1) to traded PLC | | | |
| | 1103. Additional provisions concerning notice under section 181 by a traded PLC | | | |
| | 1104. Right to put items on the agenda of the general meeting and to table draft resolutions | | | |
| | 1105. Requirements for participation and voting in general meeting | | | |
| | 1106. Participation in general meeting by electronic means | | | |
| | 1107. Right to ask questions | | | |
| | 1108. Provisions concerning appointment of proxies | | | |
| | 1109. Traded PLC may permit vote to be cast in advance by correspondence | | | |
| | 1110. Voting results | | | |
| **CHAPTER 8A** | **Rights of shareholders** | Minister for Enterprise Trade and Employment | Retain in the Companies Act | Minister for Enterprise Trade and Employment |
| | 1110A. Interpretation, application and commencement (Chapter 8A) | | | |
| | 1110B. Identification of shareholders | | | |
| | 1110C. Transmission of information | | | |

| PART 17 - PUBLIC LIMITED COMPANIES | | Relevant Minister | CLRG Recommendation | Proposed Responsible Minister |
|---|---|---|---|---|
| | 1110D. Facilitation of exercise of shareholder rights | | | |
| | 1110E. Non-discrimination, proportionality and transparency of costs | | | |
| **CHAPTER 8B** | **Transparency of institutional investors, asset managers and proxy Advisors** | Minister for Enterprise Trade and Employment | Detach from Companies Act and relocate in dedicated financial services legislation | Minister for Finance |
| | 1110F. Interpretation and application (Chapter 8B) | | | |
| | 1110G. Engagement policy - institutional investors | | | |
| | 1110H. Engagement policy - asset managers | | | |
| | 1110I. Investment strategy of institutional investors and arrangements with asset managers | | | |
| | 1110J. Transparency of asset managers | | | |
| | 1110K. Transparency of proxy advisors | | | |
| **CHAPTER 8C** | **Remuneration policy, remuneration report and transparency and approval of related party transactions** | Minister for Enterprise Trade and Employment | Retain in the Companies Act | Minister for Enterprise Trade and Employment |
| | 1110L. Interpretation and application (Chapter 8C) | | | |
| | 1110M. Right to vote on remuneration policy | | | |
| | 1110N. Remuneration report | | | |
| | 1110O. Transparency and approval of related party transactions | | | |
| **CHAPTER 8D** | **Offences and penalties** | Minister for Enterprise Trade and Employment | Retain in the Companies Act | Minister for Enterprise Trade and Employment |
| | 1110P. Offences and penalties | | | |

| PART 23 - PUBLIC OFFERS OF SECURITIES, FINANCIAL REPORTING BY TRADED COMPANIES, PREVENTION OF MARKET ABUSE, ETC. | | Relevant Minister | CLRG Recommendation | Proposed Responsible Minister |
|---|---|---|---|---|
| **CHAPTER 1** | **Public offers of securities** | Minister for Finance | Detach from the Companies Act and relocate in dedicated financial services legislation | Minister for Finance |
| | 1348. Interpretation (Chapter 1) | | | |
| | 1349. Civil liability for misstatements in prospectus | | | |
| | 1350. Exceptions and exemptions | | | |
| | 1351. Restriction of liability where non-equity securities solely involved | | | |
| | 1352. Indemnification of certain persons | | | |
| | 1353. Expert's consent to issue of prospectus containing statement by him or her | | | |
| | 1354. Regulations (Chapter 1) | | | |
| | 1355. Saver for existing Prospectus Regulations | | | |
| | 1356. Penalties on conviction on indictment and defences in respect of certain offences | | | |
| | 1357. Untrue statements and omissions in prospectus: criminal liability | | | |
| | 1358. Requirements about minimum subscriptions, matters to be stated in offer documentation in that regard, etc. | | | |
| | 1359. Supplemental provisions in relation to section 1358 | | | |
| | 1360. Further supplemental provisions in relation to section 1358: effect of irregular allotment | | | |
| | 1361. Local offers | | | |
| | 1362. Exclusion of Investment Intermediaries Act 1995 | | | |
| | 1363. Power to make certain rules and issue guidelines | | | |
| | 1364. Certain agreements void | | | |
| **CHAPTER 2** | **Market abuse** | Minister for Finance | | Minister for Finance |

| PART 23 - PUBLIC OFFERS OF SECURITIES, FINANCIAL REPORTING BY TRADED COMPANIES, PREVENTION OF MARKET ABUSE, ETC. | | Relevant Minister | CLRG Recommendation | Proposed Responsible Minister |
|---|---|---|---|---|
| | 1365. Interpretation (Chapter 2) | | Detach from the Companies Act and relocate in dedicated financial services legislation<br>CLRG to review relevant Companies Act provisions and 2014 Market Abuse Regulation to avoid duplication. To be part of a future Work Programme | |
| | 1366. Regulations (Chapter 2) (repealed) | | | |
| | 1367. Saver for existing Market Abuse Regulations (repealed) | | | |
| | 1368. Conviction on indictment of offences under Irish market abuse law: penalties | | | |
| | 1369. Civil liability for certain breaches of Irish market abuse law | | | |
| | 1370. Supplementary rules, etc., by competent authority | | | |
| | 1371. Application of Irish market abuse law to certain markets | | | |
| **CHAPTER 3** | **Requirement for corporate governance statement and application of certain provisions of Parts 5 and 6 where company is a traded company** | Minister for Enterprise, Trade and Employment | Retain in the Companies Act | Minister for Enterprise Trade and Employment |
| | 1372. Definition (Chapter 3) | | | |
| | 1373. Corporate governance statement in the case of a traded company | | | |
| | 1374. Application of section 225 to a traded company | | | |
| | 1375. Application of sections 279 and 280 to a traded company excluded | | | |
| | 1376. Application of sections 290(7)(b), 293 and 362 to a traded company | | | |
| | 1377. Certain exemptions from consolidation of financial statements not available to traded company | | | |
| | 1378. DAC or CLG that is a traded company may not file abridged financial statements | | | |
| **CHAPTER 4** | **Transparency requirements regarding issuers of securities admitted to trading on certain markets** | Minister for Finance | Retain in the Companies Act | Minister for Finance |

| PART 23 - PUBLIC OFFERS OF SECURITIES, FINANCIAL REPORTING BY TRADED COMPANIES, PREVENTION OF MARKET ABUSE, ETC. | | Relevant Minister | CLRG Recommendation | Proposed Responsible Minister |
|---|---|---|---|---|
| | 1379. Interpretation (Chapter 4) | | CLRG to review Companies Act provisions that overlap with the requirements of the 2007 Transparency Regulations with a view to aligning the obligations of all PLCs where practicable and where appropriate. To be part of a future Work Programme | |
| | 1380. Power to make certain regulations (Chapter 4) | | | |
| | 1381. Saver for existing Transparency Regulations | | | |
| | 1382. Conviction on indictment of offences under transparency (regulated markets) law | | | |
| | 1383. Supplementary rules, etc. by competent authority | | | |
| | 1384. Application of transparency (regulated markets) law to certain markets | | | |
| **CHAPTER 5** | **Application of section 393 to a company to which Part 23 applies** | Minister for Enterprise Trade and Employment | Retain in the Companies Act | Minister for Enterprise Trade and Employment |
| | 1384A. Application of section 393 to a company to which Part 23 applies | | | |

| Part 24 - Investment Companies | | Relevant Minister | CLRG Recommendation | Proposed Responsible Minister |
|---|---|---|---|---|
| **CHAPTER 1** | **Preliminary and interpretation** | Minister for Finance | Detach from the Companies Act and relocate in financial services legislation | Minister for Finance |
| | 1385. Interpretation (Part 24) | | | |
| | 1386. Definition of "investment company" and construction of references to nominal value of shares, etc. | | | |
| | 1387. Application of Parts 1 to 14 to investment companies | | | |
| | 1388. Application of Part 17 to investment companies | | | |
| | 1389. Adaptation of certain provisions of UCITS Regulations | | | |
| **CHAPTER 2** | **Incorporation and registration** | Minister for Finance | Detach from the Companies Act and relocate in financial services legislation | Minister for Finance |
| | 1390. Way of forming an investment company | | | |
| | 1391. Investment company to carry on activity in the State | | | |
| | 1392. The form of an investment company's constitution | | | |
| | 1393. Supplemental provisions in relation to constitution and continuance in force of existing memorandum and articles | | | |
| | 1394. Status of existing investment company | | | |
| | 1395. Authorisation by Central Bank | | | |
| | 1396. Powers of Central Bank | | | |
| | 1397. Default of investment company or failure in performance of its investments | | | |
| **CHAPTER 3** | **Share capital** | Minister for Finance | Detach from the Companies Act and relocate in financial services legislation | Minister for Finance |
| | 1398. Power of company to purchase own shares | | | |
| | 1399. Treatment of purchased shares | | | |
| **CHAPTER 4** | **Financial statements** | Minister for Finance | Detach from the Companies Act and relocate in financial services legislation | Minister for Finance |
| | 1400. Statutory financial statements | | | |

| Part 24 - Investment Companies | | Relevant Minister | CLRG Recommendation | Proposed Responsible Minister |
|---|---|---|---|---|
| | 1400A. Modification of definition of "ineligible entities" in case of investment companies | | | |
| | 1401. Requirement for corporate governance statement and modification of certain provisions of Parts 5 and 6 as they apply to investment companies | | | |
| | 1401A. Filing of financial statements by investment company | | | |
| **CHAPTER 5** | **Winding up** | Minister for Finance | Detach from the Companies Act and relocate in financial services legislation | Minister for Finance |
| | 1402. Circumstances in which company may be wound up by the court | | | |
| **CHAPTER 6** | **Restoration** | Minister for Finance | Detach from the Companies Act and relocate in financial services legislation | Minister for Finance |
| | 1403. Restoration by the court | | | |
| **CHAPTER 7** | **Public offers of securities, prevention of market abuse, etc.** | Minister for Finance | Detach from the Companies Act and relocate in financial services legislation | Minister for Finance |
| | 1404. Application of Chapters 1, 2 and 4 of Part 23 to investment companies | | | |
| **CHAPTER 8** | **Umbrella funds and sub-funds** | Minister for Finance | Detach from the Companies Act and relocate in financial services legislation | Minister for Finance |
| | 1405. Segregated liability of investment company sub-funds | | | |
| | 1406. Requirements to be complied with by, and other matters respecting, an umbrella fund to which section 1405(1) applies | | | |
| | 1407. Further matters respecting an umbrella fund to which section 1405(1) applies | | | |
| **CHAPTER 9** | **Migration of funds** | Minister for Finance | Detach from the Companies Act and relocate in financial services legislation | Minister for Finance |
| | 1408. Definitions (Chapter 9) | | | |
| | 1409. "Registration documents"— meaning | | | |
| | 1410. Continuation of foreign investment company | | | |
| | 1411. Supplemental provisions in relation to section 1410 | | | |

| Part 24 - Investment Companies | | Relevant Minister | CLRG Recommendation | Proposed Responsible Minister |
|---|---|---|---|---|
| | 1412. Definitions for the purposes of de-registration provisions contained in sections 1413 and 1414 | | | |
| | 1413. De-registration of companies when continued under the law of place outside the State | | | |
| | 1414. Supplemental provisions in relation to section 1413 | | | |
| | 1415. Statutory declaration as to solvency | | | |
| **UNIT TRUSTS** – relevant provisions | | Minister for Enterprise Trade and Employment | Relocate in financial services legislation | Minister for Finance |
| **COMMON CONTRACTUAL FUNDS** – relevant provisions | | Minister for Enterprise Trade and Employment | Relocate in financial services legislation | Minister for Finance |