The implementation of the Prospectus Directive has, inter alia, altered the law on offers to the public and on civil liability for omissions from, and misstatements in, a prospectus. In this article the changes effected to those two aspects of the law governing flotations are outlined.

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Implementing the Prospectus Directive

The EU Prospectus Directive (Dir. 2003/71/EC) (“the Directive”) had to be implemented by Member States before 1st July 2005. In Ireland, implementation was by means of a combination of the Prospectus (Dir. 2003/71/EC) Regulations 2005¹ (“the Regulations”) and the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (“the Act of 2005”). These instruments revise the requirements to issue a prospectus or other offer document when making an offer to the public for sale of securities or seeking the admission of securities to listing. There are also amendments to the Companies Act 1963 (“the 1963 Act”) provisions on civil liability for misstatements in a prospectus².

While securities are defined to refer to shares and debentures, this article is concerned only with the changes insofar as they refer to shares, or equity securities.

A. AN OFFER TO THE PUBLIC

(i) The obligation to publish a prospectus

¹ Statutory Instrument number 324 of 2005
² Section 49 of the Companies Act 1963
There has been much scope in the past for opinion on what constitutes an offer to the public under Irish law and commensurate scope for penalties and litigation if one’s opinion was unique. The Directive recites the lack of an agreed definition as between Member States on what amounts to an offer of securities to the public and aims to resolve that situation.

While heretofore lawyers have looked, *inter alia*, at s.61\(^3\) of the 1963 Act for guidance as to what constitutes an offer to the public, it was hoped that the term would be defined clearly in the course of implementation of the Directive. Often s.61 was more helpful in providing that certain offers were not “offers to the public”. Section 61 provided that an offer intended to apply only to those who received it, or which was the “domestic concern” of those making and receiving it, was not an offer to the public. In *Sherwell v Combined Incandescent Mantles Syndicate*\(^4\) 1,000 copies of an offer document had been printed but only 200 copies were circulated. They were circulated to friends and acquaintances of the directors and the court held that there had been no offer to the public. The printing of the copies of the document was not sufficient to constitute an offer to the public, its issue was the relevant aspect and the issue was to people the directors wished to have as members of the company. Warrington J. stressed that an offer to the public was one “to anyone who should choose to come in”.\(^5\) However in *Re South of England Natural Gas and Petroleum Co Ltd*\(^6\) a document was circulated to three thousand members of certain gas companies and held to constitute an offer to the public. The uncertainties were many.

*Nash v Lynde*\(^7\) and *Governments Stock and Other Securities Investment Co. Ltd. v Christopher*\(^8\) saw the application of

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\(^3\) The section provides that an offer to the public includes “an offer to any section of the public”.

\(^4\) [1907] 23 T.L.R. 482

\(^5\) [1907] 23 T.L.R. at page 483

\(^6\) [1911] 1 Ch. 573

\(^7\) [1929] AC 158.

\(^8\) [1956] 1 All ER 490
Warrington J.’s more certain test. In those decisions the majority of the House of Lords and High Court respectively, considered who was eligible to apply for the securities and have their offer accepted, when deciding whether an offer to the public had been made. Section 61 was repealed by s.40 of the Act of 2005.

While the case law considered the question of an offer to the public on the basis of who could apply and actually be eligible to receive an allotment of securities, the Regulations exclude offers from the requirement to issue a prospectus on the basis of the identity, or number, of addressees of the offer and the financial value of the transactions. As the term “the public” is not used in the implementing legislation, it is hard to know to what extent the above mentioned and other precedents can be relied upon.

In fact the Regulations adopt the definition of “offer to the public” which appears in the Directive. That definition is extremely wide and renders the case law on “offer to the public” less helpful because the definition does not refer to the public at all. Rather, the definition of a “public offer” or “offer of securities to the public” is to “a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities”.\(^9\)

Regulation 2(6) defines “communication” to include an invitation to treat, thus formalising the treatment, for contract law purposes, of the application for shares as the offer and the prospectus as a mere invitation to treat.

(ii) Excluded Offers

\(^9\) Lord Sumner in *Nash v. Lynde* and Wynn-Parry J. in *Government Stocks v. Christopher*

\(^10\) Directive 2003/71/EC, Art. 2(1)(d)
Regulation 9 provides that it shall not be mandatory to publish a prospectus where the offer of securities is addressed to fewer than 100 natural or legal persons, other than qualified investors. Qualified investors are defined to include authorised or regulated financial services companies and other professional investors.\(^{11}\) Some of these persons must be registered as such with the Central Bank and Financial Services Authority of Ireland before an issuer can rely on this status.\(^{12}\) An offer solely to qualified investors is also excluded. The Directive describes one of its objectives as investor protection and states that it is therefore appropriate to take account of the differing needs for protection, depending on the category of investor.

An offer of securities whose denomination amounts to at least €50,000 per unit is also excluded. And offers where the minimum consideration payable by each investor is €50,000, for each separate offer, are also excluded. Finally, reg.9 excludes an offer of securities which expressly limits the total consideration for the offer to less than €100,000. However, for the purposes of this exclusion, all offers for the same type of security, by the same issuer, made during the previous twelve months must be taken into account in calculating whether the financial threshold is met. If a placement through financial intermediaries does not fall within the terms of any of those exclusions, the requirement to publish a prospectus will apply.

Exclusions also apply for shares issued in substitution for existing shares, shares issued in the context of takeovers or mergers where documents containing information equivalent to a prospectus are available, and shares issued to employees in certain circumstances.

**(iii) Local Offers**

\(^{11}\) Regulation 2  
\(^{12}\) Regulation 3
The consequences of triggering the prospectus requirement would be onerous for many businesses but the Act of 2005 also provides for a “local offer”. That term is defined to include an offer of securities to the public in the State where the total consideration for the offer is less than €2,500,000. It seems the benefit of the local offer provision would be lost if one of the addressees of an offer document was resident overseas.

Section 49 of the Act of 2005 governs local offers and provides a range of lesser protections where local offers are concerned. There is a requirement to issue an “offering document”, rather then a prospectus. The protections take the form mainly of including “health warnings” on literature.

For all other offers of shares to the public, a prospectus which has been approved by the Central Bank and Financial Services Authority of Ireland must be published. That is also a prerequisite to the admission of any shares to trading. Failure to comply with these regulations is an offence.

(iv) Contents of a Prospectus

Other amendments have been made as a result of the Directive. The format, contents and publication methods of a prospectus are now governed in detail by a Commission Regulation. Regulations 19 to 30 inclusive of the Regulations provide only basic information on the requirements for drawing up the prospectus. Regulation 19 provides that a prospectus shall contain

“all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading, is necessary to enable investors to make an informed assessment of the assets and liabilities,

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13 Regulation 12
14 Regulation 13
15 Regulations 14 to 16
financial position, profit and losses, and prospects of the issuer and of any guarantor, and the rights attaching to such securities”.

The regulation also stipulates that the information shall be consistent and presented in an easily analysable and comprehensible form. Regulation 20 states that the minimum information to be included will be as set out in the Commission Regulation referred to above. Section 44 of the 1963 Act was also repealed by the Act of 2005. However that aspect is beyond the scope of this article.

B. CIVIL LIABILITY FOR MISSTATEMENT IN A PROSPECTUS

(i) The issuing company and the statutory cause of action

Professor Ellis makes the point that s.49 of the 1963 Act grounded a cause of action for loss arising from misstatement in a prospectus against a number of possible defendants but not against the issuing company itself. Historically the appropriate causes of action against the issuing company have been the remedies of rescission, perhaps an action in deceit where there has been fraudulent misrepresentation or an action in damages for the tort of negligent misrepresentation. Section 49 of the 1963 Act provided that “the following persons shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement included therein”. The section then listed, inter alia, directors of the company at the time of issue of the prospectus and promoters. The company was however excluded.

That section is repealed by s.40 of the Act of 2005. Section 41 of the Act of 2005 now provides for civil liability in respect of

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17 Henry Ellis, Modern Irish Company Law (Jordans, Bristol, 2001) p.124
loss or damage sustained by reason of any untrue statement in a
prospectus or “any omission of information required by EU
prospectus law to be contained in the prospectus”. The persons
liable to pay compensation include “the issuer who has issued
the prospectus or on whose behalf the prospectus has been
issued”. Issuer is defined as the legal entity issuing or proposing
to issue securities.18 There is now therefore a statutory cause of
action against the company itself. Another possible defendant to
such an action is “the offeror of securities” to which the
prospectus relates and the term offeror is defined to include a
natural or legal person who offers securities to the public.19

Statutory causes of action are also created against persons who
sought the admission of the securities to trading on a regulated
market and guarantors of the issue to which the prospectus
relates.

Interestingly, while s.49 of the 1963 Act created a cause of
action for “persons who subscribe for any shares or debentures
on the faith of the prospectus”, s.41 of the Act of 2005 refers to
“persons who acquire” any securities on the basis of the
prospectus. This drafting provides certainty on a point raised by
Dermot Cahill as to whether the potential plaintiff class under
s.49 was confined to the addressees of the invitation to subscribe
or extended to any person who subscribed in reliance on that
prospectus.20

In s.38 (3) of the Act of 2005 it is stated that a statement shall be
deemed untrue if it is misleading in the form and context in
which it is included. A statement is deemed included in the
prospectus if it appears in any report or memorandum referred to
therein or incorporated by reference.

(ii) Experts and Professional Advisers

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18 Regulation 2 (1)
19 Section 38 of the Act of 2005
20 Dermot Cahill, Corporate Finance Law (Round Hall, Dublin, 2000) p.156
Section 42 of the Act of 2005 stipulates that an expert can only be liable under s.41 in respect of an untrue statement purporting to be made by him as an expert.

While s.41 of the Act of 2005 lists a number of potential defendants, s.38 (5) expressly excludes their professional advisers and excludes any underwriter and its professional advisers.

(iii) Omissions

Previous case law considered the circumstances in which omissions could amount to misstatement. In *R v Kylsant*[^21] the Court of Criminal Appeal confirmed, relying on a test stated by Lord Halsbury in *Aaron’s Reefs v Twiss*,[^22] that a “document as a whole may be false, not because of what it states, but because of what it does not state, because of what it implies”. The test in *New Brunswick and Canada Railway and Land Co v Muggeridge*[^23] was whether the omission of a fact altered the nature, extent or quality of what was actually stated. While s.41 of the Act of 2005 refers expressly to loss or damage sustained by reason of an untrue statement or “any omission of information required by EU prospectus law to be contained in the prospectus”, the case law is still relevant to the analysis of whether an omission renders a statement “untrue”. In *Components Tube Co v Naylor*[^24] the court equated the omission of a material fact with misrepresentation. Such an omission can also cause a statement to be “untrue” for the purposes of s.41.

(iv) Defences

The defences formerly set out in s.49 (3) of the 1963 Act remain largely unchanged save that withdrawals of consent to act as a director and withdrawals of consent to the prospectus must now

[^21]: [1931] All ER 179
[^22]: [1896] AC 273
[^23]: (1860) 1 Drew & Sm 363
[^24]: [1900] 2 IR 1
be in writing. Section 49 has been repealed and the defences are set out in s.42 (3) of the Act of 2005.

C. CONCLUSION

The practitioner faces a major change in the analysis of offers to the public but the likely benefit of increased certainty. It seems probable that the combination of the concepts of “excluded” and “local offers”, based as they are, on numbers and characteristics of addressees will lead to greater certainty as to requirements for a prospectus. The level of investor protection is also improved by the extension of the statutory cause of action to the issuing company.