

CHAPTER 7. THE RELEVANT STATUTORY PROVISIONS:

7.1 PART IV, CHAPTER 2 OF THE COMPANIES ACT 1990

Introduction:

7.1.1 Part IV of the Companies Act, 1990 (“the Act”) introduced extensive new provisions for the disclosure of interests in shares. Three basic considerations were stated as underlying Part IV. Firstly, a system of disclosure made for more efficient credit and investment decisions. The second consideration was that non-disclosure of beneficial ownership facilitated fraud and insider dealing; a related criticism of the non-disclosure of the true ownership of shares was that it facilitated corruption. Finally, a system of nominee holdings allowed directors, other officers or even public officials to channel contracts for firms in which they, or connected persons, had an interest. To deal with these concerns, Part IV makes provision for:-

- (i) Disclosure by directors and secretaries of a company of their interests in shares or debentures of the company and its associated companies and for the maintenance by such company of a register of these interests (Chapter 1);
- (ii) Disclosure of substantial interests in voting shares in a public limited company in order to make known who controls such companies and accordingly to anticipate ‘dawn raid’ type takeovers and for the maintenance by such a company of a register of such interests; the power of a public limited company to investigate interests in its voting shares and the power of shareholders to require the company to make such investigation the disclosure by a person having substantial interest in shares of a public limited company on the official list of certain changes in shareholdings to the Stock Exchange (Chapter 2); and,

- (iii) Imposition by the High Court of disclosure orders requiring information in relation to holdings of shares and debentures of certain companies that are not public limited companies (Chapter 3).

Overview

7.1.2 Chapter 2 of the Act contains provisions for securing the disclosure of substantial individual and group interests in the voting share capital of public limited companies. The object of these provisions is to make known those who control public companies and to forestall surreptitious take-overs. Chapter 2 is designed to ensure that the beneficial owner of a given percentage (5%) of the issued share capital of a public limited company should be required to disclose that fact to the company, and that such information should be available to directors, shareholders, employees and creditors of that company. These provisions are similar to those found in sections 198 – 220 of the UK Companies Act, 1985, which were explained in **In re Greers Gross plc** [1987] 1 WLR 1649 by Nourse LJ as having the clear purpose of giving a public company, and ultimately the public at large, a prima facie unqualified right to know who the real owners of its voting shares are.

7.1.3 Section 70 puts the reporting threshold at 5%, though the Minister is given authority to vary this by order. (If this occurs, a person affected by the reduced reporting threshold is given 10 days to meet the duty of disclosure that arises).

7.1.4 Chapter 2 also provides for offences for a person who does not comply with the obligations under the legislation, along with various criminal and civil sanctions. There is also provision for a plc to require a person who it knows or believes on reasonable grounds, to have or have had at any time during the previous three years an interest in shares comprised in the company's relevant share capital to confirm that fact. Failure to provide the information requested can result in either a criminal offence, or an application to court by the company to place certain restrictions (as set out in Section 16 of the Act) on the shares. Finally in Chapter 2, Sections 89 – 96 give effect in Irish law to the provisions of Council Directive 88/627/EEC of the 12th December, 1988, and require

disclosure whenever a large holding in a Stock Exchange listed public limited company is acquired or disposed of. The voting share threshold for disclosure to the Stock Exchange is 10%.

The Disclosure Obligation

7.1.5 Section 67 requires any person who has an interest in shares of a public limited company (which would include a non-resident person) which carry full voting rights to notify his interest, and any increase or decrease in his interest to the company, if the total number of such shares in which he has an interest equals or exceeds 5% of all such shares. This interest is extended to cover the interests of spouses, infant children and companies over which the person has control (Section 72) and also to interests of a person with whom he is acting in concert (Sections 73-74). Further, the company is obliged to keep a register of such notified interests that is open to inspection by members of the company and to the public.

7.1.6 Section 67 (1) makes it clear that the amount of issued share capital which must be referred to throughout Part IV is the nominal value of the issued shares comprised in each of the classes carrying voting rights taken separately. The basic notification obligation applies to a person who:-

- (a) To his knowledge acquires any interest in shares comprised in a plc's 'relevant share capital' or who ceases to have such an interest (Section 67(1)(a)); or
- (b) Becomes aware that he has acquired an interest in shares so comprised or that he has ceased to be interested in shares so comprised in which he was previously interested (Section 67(1)(b)); or
- (c) Becomes aware at the time when it occurs of some other change of circumstances resulting in him having a notifiable interest after the change when he did not have such an interest before the change (Section 67(3)(a)); or

(d) Becomes aware of having a notifiable interest whether or not there has been such a change of circumstances (Section 67(3)(a)).

7.1.7 If a company's voting shares are divided into different classes the test is applied to each class of shares. Section 67(4) provides that the acquisition by any person of an interest in shares or debentures of a company registered in the State shall be deemed to be consent by that person to the disclosure by him, his agents or intermediaries of any information required to be disclosed in relation to shares or debentures by the companies Acts. Additionally, Section 79 (1) provides that where a person authorises any other person or agent to acquire or dispose of, on his behalf interests in the voting shares of a plc, he shall procure that the agent notifies him immediately of all acquisitions and disposals affected by the agent which would give rise to an obligation to disclose under Section 67. This provision prevents avoidance by the simple means of delegation to an agent who is instructed not to inform his principal.

7.1.8 Section 68 contains more detailed provisions as to when the obligation to notify arises. These are:-

- (a) Where a person has an interest subject to the notification requirement immediately after the relevant time, but did not have such an interest immediately before that time; or
- (b) He had an interest subject to the notification requirement immediately before the relevant time but did not have such an interest after that time; or
- (c) The person had a notifiable interest immediately before and after the relevant time, but the percentage level had varied.

Interests by Attribution

7.1.9 Section 72 provides that a person is to be taken to be interested in any shares in which his spouse or minor child is interested for the purposes of notification.

Subsections (2) – (4) bring interests held through a company or chain of companies within the disclosure umbrella spread by Section 67. This provision formed the basis for the legal advice of the companies' Solicitors in advising that notification was not required in 1995 and is a matter I will return to in greater detail later in the Report.

7.1.10 Where shares are held in the name of a company and that company is under the control or direction of another or he holds one-third of the voting power in it, then the shares in it are attributed to that person. Subsection (3) aims to catch an interest held by way of a chain of companies. Where a one-third shareholding link exists between two companies and either one is controlled by, or has one-third of the voting shares controlled by another person, then that person is deemed to have an interest in shares held by a company at the other end of the chain.

7.1.11 Subsection (4) provides for the attribution of interests held by a company to persons with any future entitlement to, or options on, the vote carrying shares in that company. The effect is that a person subject to a put option or a call option on shares, whether contingent or not, is deemed to be able to control the exercise of the voting rights attached to the shares of the company if the option would give him control of one-third or more of the voting power of a company or of a company which could control one-third of the voting power of that company.

7.1.12 Notification, in accordance with Section 67, must be made in writing (and specify the share capital to which it relates) to the company within a period of five days following the day on which the obligation arises.

7.1.13 Section 72 (family and corporate interests), along with Sections 73-74 (which relate to concert party interests), thus have the effect of attributing to a person the interests in shares of another so as to require the first person to notify the interests of the other. Section 76 makes it clear that the obligation to notify ceases to apply whenever (a) the other person is no longer a person whose interests in shares are attributable to the first

person, (b) the first person ceases to be a party to a concert agreement, or (c) the agreement no longer comes within the scope of the legislation.

7.1.14 Knowledge of interests arising by attribution occurs only when a person knows both the facts relevant to the other person's interest in the shares and also the facts by virtue of which the attribution mechanism is triggered. Subsections (4) and (5) of Section 76 also relates to the knowledge issue, a person is treated as having knowledge concerning another person's interest in shares if he knows either of the subsistence of that other person's interest in those shares at the material time, or of the fact that the other has become or ceased to be interested, in those shares at any such time. "Material time" is said to mean any time when that other person's interest falls to be treated as his by virtue of Sections 72 or 74. Moreover, in relation to concert parties a person is deemed to know facts of which he is informed by another pursuant to Section 75.

Disclosure of Significant Shareholdings in Fully Listed Companies

7.1.15 Sections 90 – 96 of the Act provide for the implementation of Council Directive 88/627/EEC of the 12th December, 1988, on the information to be published when a major holding in a listed company is acquired or disposed of. The object of the Directive is to inform an investor or a potential investor of significant changes in the shareholdings of a plc officially listed on a community Stock Exchange and governed by the law of a member state. Its general theme is the same one of disclosure of information as underlies Part IV of the Act, although it is not as strict. The Directive only mandates disclosures where certain specified thresholds are passed, namely 10%, 25%, 50% and 75%, and applies only to disclosure of interests in companies which had a full official listing on the Stock Exchange. The Directive requires that certain supervisory functions be given to a competent authority in order to ensure that the provisions of the Directive are complied with. Section 90 of the Act designates the Stock Exchange for this purpose. In addition to notifying the company of his interest, the Directive obliges the shareholder concerned to notify the competent authority directly.

7.1.16 Section 91 of the Act translates this notification obligation into Irish law. The notification obligation arises whenever a person knowingly acquires or disposes of shares and following such acquisition or disposal his shareholding exceeds or falls below the 10%, 25%, 50% or 75% disclosure threshold.

7.1.17 The provisions of Chapter 2 apply as regards the interests to be notified to the Exchange and the manner in which they are to be notified per Section 91(4). The Exchange is required to publish the information within three days of receipt, but it may decide not to publish on the grounds that disclosure would be seriously detrimental either to the public interest or the company or companies concerned, under section 91(5).

7.1.18 The presumption is in favour of publication. Section 91(6) (b) reinforces this. This sets out that a non-publication decision on the basis of serious detriment to the company is only justified if non-disclosure would be unlikely to mislead the public with regard to the facts and circumstances, knowledge of which is necessary for the assessment of the interests in question.

7.1.19 Moreover, if material comes to light after the three-day period has elapsed and its publication would not be detrimental, the Exchange may then publish. The relevant authority of the Stock Exchange is under a duty, according to Section 92, to report suspected contraventions of Section 91 to the Director of Public Prosecutions (DPP) and to co-operate with the DPP thereafter. Where a contravention of Section 91 becomes apparent to a member of the Exchange he is subject to report the matter to a relevant authority. Generally the Stock Exchange has the same powers and duties in this context as it has in relation to investigation of suspected cases of insider dealing. Information obtained by reason of the exercise of these functions is subject to an obligation of professional secrecy, and may not be disclosed, except in accordance with law, per Section 94 of the Act. However, the material may be disclosed to a competent authority in another Member State under Section 96.

7.1.20 Section 95 grants the Stock Exchange immunity from suit in these matters, except in cases of bad faith for anything done or omitted to be done in exercise of its functions under Sections 91 to 96.

7.2 PART V OF THE COMPANIES ACT 1990

Introduction

7.2.1 On the 13th November, 1989, the European Council adopted a Directive (89/592) designed to co-ordinate the regulation of insider dealing in the member states. This was contained in Sections 107 – 121 (Part V) of the Companies Act, 1990 (“the Act”), which came into force on the 27th December, 1990. Insider dealing, in general terms, means a dealing (or transaction) in shares (or certain other types of securities) for the purpose of making a profit on the basis of confidential information which is not generally available to the public arising from a confidential relationship with a company either as director, employee, shareholder, adviser, liquidator or similar officer, or in certain cases, acting on the basis of a tip off from persons in such confidential relationships.

7.2.2 The arguments for the implementation of these provisions were, firstly, it ran contrary to the principle of an efficient and fair shares market involving equal access to information, and secondly, it jeopardised the achievement of the aim of promoting wider share ownership among the general public.

7.2.3 There was an assumption that the smooth operation of the market depends to a large extent on investor confidence and that investors should feel that they are dealing on an equal footing with each other. It was argued that the improper use of insider information benefits certain investors to the detriment of others which would undermine investor confidence and thereby adversely affect the smoother operation of the market.

7.2.4 The function of the Stock Exchange was to reflect accurately the share price of a company by bringing to bear on that equation all relevant information. If this desideratum was achieved capital would be allocated in an economically efficient manner and not squandered on companies, which were descending into decline. If price-sensitive information was available to guide the market judgment of some but not of all, then the prices at which shares are traded were artificial. Upon the general public becoming apprised of this fact, the stock of public confidence would be lowered. The ordinary investor would feel that the dice were loaded against him and he would put his money into ventures where everybody stood on a more equal footing.

7.2.5 The refined approach adopted in Part V created a criminal offence carrying the possibility of a fine of IR£200,000 on conviction on indictment and/or ten years' imprisonment. It also created a policing function for the Stock Exchange, and prohibited any person convicted of insider dealing from any further Stock Exchange dealing for the next twelve months. Finally, it created a new duty on intermediaries not to deal on behalf of a client if they have reasonable cause to believe, or ought to conclude, that the deal involved would be unlawful.

7.2.6 It should be noted that Part V of the Act of 1990 has since been repealed and replaced by Section 31 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005, which came into effect on the 6th July, 2005.

Definitions

7.2.7 One of the most important definitions is that of "dealing" which is contained in Section 107. The definition is cast in very wide terms and essentially means acquiring, disposing of, subscribing for or underwriting securities (as defined) or inducing another person to do so. It also covers the making of agreements relating to the acquiring of, disposing of, subscribing or underwriting such securities. It also includes dealing whether as principal or as an agent. The wide nature of the definition catches many areas

of activity; for example a company launching a rights issue which attempts to sound the attitude of major shareholders in advance may be attempting to ‘induce a subscription’.

7.2.8 “Securities” is given a specific and wide meaning by Section 107 of the Act. It means shares, debentures or other debt securities issued or proposed to be issued (whether in Ireland or outside) for which dealing facilities are (or are to be) provided by a recognised Stock Exchange in Ireland. Also coming within the definition are options, rights or obligations in respect of any index relating to such shares, debentures or other debt securities. Government securities and futures contracts would be covered. There is also provision to include such interests as may be prescribed by the Minister at a future date.

7.2.9 Whether a person is “connected with a company” depends on whether he falls within the statutory definition set out in Section 108(11). This provides that a person is connected with a company if, being a natural person, he is:-

- (a) An officer of that company or of a related company;
- (b) A shareholder in that company or a related company; or
- (c) He occupies a position (including a public office) that might reasonably be expected to give him access to price-sensitive information by virtue of a professional, business or other relationship. This would include lawyers, consultants, accountants, or other professional advisers who are in a business or other relationship with that company or a “related company” by which the price-sensitive information is obtained and government employees who become aware of matters in discharging their duties; or
- (d) Where the person involved obtains the information by virtue of his position as “an officer of a substantial shareholder” in that company or in a related company.

7.2.10 The definition of connected persons is based on a person being a natural person that seems to exclude companies. However, if an officer of a company is in possession of price-sensitive information, the company itself is generally prohibited from dealing per Section 108(6).

7.2.11 An “officer” is defined widely in Section 107 and includes a director (which includes a shadow director as defined in Section 27), secretary, employee, liquidator, and any person administering a compromise, examiner, auditor and receiver.

7.2.12 A “related company” is defined and means any body corporate which is that company’s subsidiary, parent company or sister subsidiary. (It should be noted that the meaning of a “company” under Irish law refers to a company incorporated under the Companies Acts.) As the securities involved must have dealing facilities on a recognised Stock Exchange in Ireland, in practice the Irish provisions will only apply to public limited companies whose securities are listed and to government securities.

7.2.13 Shareholders are now potentially involved as possible insiders by virtue of their inclusion in the definition of “connected with the company”. A “substantial shareholder” is a person who holds shares above the notifiable percentage contained in Section 70 of the Act (currently 5%).

7.2.14 The price-sensitive information must be information that is “not generally available” but if it were, would be likely materially to affect the price of those securities. The Directive refers to “inside information” which is not necessarily information from within the company but information not made public of a “precise nature” relating to one or several issues of transferable securities themselves which if it were made public would be likely to have a significant effect on the price of such securities.

The Prohibited Transactions

7.2.15 Section 108 is the key section on insider dealing. It is the section that describes the offence of insider dealing. Section 108(1) states:-

“It shall not be lawful for a person who is, or at any time in the preceding 6 months has been, connected with a company to deal in any securities of that company if by reason of his so being, or having been connected with that company he is in possession of information that is not generally available, but, if it were, would be likely materially to affect the price of those securities.”

7.2.16 For convenience of reference throughout the section, such information is referred to as “price-sensitive information”.

7.2.17 Sub-section (2) of Section 108 covers a bid situation and analogous transactions. It is unlawful for a person in possession of price-sensitive information who is or was “connected with the company” at any time during the preceding six months to deal in any securities of any other company if by reason of his connection with the first company, he is in possession of price sensitive information involving any transaction (actual or contemplated) involving one or both of those companies and securities of the other or even the fact that any such transaction is no longer contemplated. For example, a takeover bid by the first company (with which the insider is connected) for the second company falls within this sub-section and such a person would be restrained from dealing in the securities of the second company until the information was made public.

7.2.18 Liability is attached to a person who receives information from an insider and such a person is known as a “tippee”. Sub-section (3) of Section 108 imposes liability on such persons who now commit a criminal offence if they deal in securities acting on price sensitive information received (directly or indirectly) from an insider and they are aware or ought reasonably to be aware that such a person is an insider and is himself precluded from dealing in those securities. The persons referred to in sub-sections (1) and (2) are

sometimes termed 'primary or direct insiders' in contrast to 'secondary insiders or tippees' who are caught by this sub-section. It is important to note that the tippee must be aware that the person from whom he receives the information is a primary insider and is precluded from dealing although he need not know the precise identity of such a person. The word 'received' in this sub-section also covers situations of voluntary and involuntary receipt of such information.

7.2.19 Sub-section (4) of Section 108 makes it an offence for a primary insider or a tippee to procure or cause any other person to deal in securities that they cannot deal in. In certain situations, this offence could potentially catch the company whose shares are being dealt in.

7.2.20 Sub-section (5) of Section 108 extends the net even wider and makes it unlawful for a person who is in possession of price sensitive information whether a primary insider or a tippee, to communicate such information to any other person if he knows or ought reasonably to know that the receiver of such information will make use of that information for the purpose of dealing or causing anybody else to deal in those securities. It is noteworthy that under sub-section (5) the offence is one of communication. The tippee does not have to deal in the securities for the offence to arise.

7.2.21 The thrust of the insider dealing legislation is aimed at individuals or natural persons and the substantial offences are drafted on that basis. Sub-sections (6), (7) and (8) of Section 108 deal with transactions entered into by companies. It is unlawful for companies to deal in any securities at a time when any officer of the company is precluded from dealing in the securities because of possession of price sensitive information. However, an exemption arises for the company if:-

- (a) The decision to enter into the transaction was taken on behalf of the company by someone other than the relevant officer;

- (b) The company had written arrangements in place to ensure that the officer in possession of the information did not communicate with the person dealing and gave no advice to that person (commonly known as ‘Chinese Walls’);
- (c) The information was not communicated to the person dealing and such advice was not given.

7.2.22 A further exemption is given to a company for dealing in securities of another company if the only reason for prohibition is that its officer was in possession of such information in the course of his duties and the information is only that the first company proposes to deal in securities of the second company (Section 108(8)).

7.2.23 Under sub-section (9) of Section 108, if an individual deals in securities (or rights or interests in securities) of a company as agent for another person and in accordance with a specific instruction of that other person to effect that transaction and he has not given any advice to his principal in relation to such dealings he does not commit an offence. A person should not deal as agent on behalf of another person if he has reasonable cause to believe or ought to believe that the transaction would be a prohibited transaction on the basis of insider information (Section 113).

7.2.24 The prohibition on insider dealing extends to securities issued by the State by virtue of sub-section (13) of Section 108. However, in sub-section (3) of Section 110 transactions and dealings entered into by the State or Central Bank (or other authorised person on behalf of the State) in pursuance of monetary, exchange rate, national debt management or foreign exchange reserve policies are specifically excluded from the prohibitions.

7.2.25 In summary under Section 108 therefore, a person who is “connected with the company” or is a tippee and who is in possession of price sensitive information cannot:-

- (a) Deal in shares of that company or a recognised Stock Exchange;

- (b) Deal in shares of any other company involved in a transaction with the first company with which the person is connected if the price sensitive information involves the other company i.e. takeover bid situations;
- (c) Recommend another person to buy or sell these securities or procure a transaction in these securities;
- (d) Communicate the information to a third party if they think or ought reasonably to think that the other person is likely to use the information for dealings in those securities.

Exemptions

7.2.26 Section 110 sets out what transactions are exempt from the insider dealing provisions. The exemptions are dealings where:-

- (a) Securities are acquired under a will or intestacy;
- (b) Securities re acquired by an employee in his company under an employee profit sharing scheme which is approved by the Revenue Commissioners and the shareholders in general meeting and under which all permanent employees are offered an opportunity to participate on equal terms. (Executive share option schemes are not excluded.)
- (c) A transaction is entered into in good faith in the following cases:-
 - (i) To obtain a share qualification for directors under Section 180 of the Companies Act, 1963;
 - (ii) By a person in accordance with his obligations under an underwriting agreement;
 - (iii) By personal representatives of deceased persons, trustees, liquidators, receivers or examiners in performance of their office;

- (iv) By way of a mortgage or charge on securities or a mortgage, charge, pledge or lien on documents of title to securities.

Civil Liability for Insider Dealing

7.2.27 Section 109 provides for civil liability where a person has dealt in securities in a manner declared unlawful by Section 108. Section 109 provides for compensation to an injured party to the transaction and for account of profits to the company which issued the securities concerned. Under the compensation provisions the person found liable must compensate any other party to the transaction who is not in possession of the relevant price sensitive information for any loss sustained by that party by reason of any difference between the price at which the securities were dealt in and the price which would have been obtained if the information had been generally available. The person found liable must also pay over the profit accruing to him from such dealings to the issuing company. There is a two-year statutory limitation period on bringing civil liability actions. Time runs from the date on which the relevant dealing transaction, in which the loss/profit has occurred, was completed. The basis upon which the compensation is measured is set out in sub-section (2) of Section 109 and is the amount of loss sustained by a person claiming the compensation less any amount which the guilty party might have to pay to any other person for the same act. The burden of proof that the defendant has a liability to another person arising from the same illegal transaction lies on the defendant.

Criminal Liability for Insider Dealing

7.2.28 Section 111 states that any person who deals in securities in a manner declared unlawful by Section 108 shall be guilty of this offence. Section 114 sets out the maximum penalties for offences under this Part, which are:-

- (a) On summary conviction imprisonment for a maximum term of 12 months and/or a maximum fine of IR£1,000; or

(b) On conviction on indictment, imprisonment for a maximum term of 10 years and/or a maximum fine of IR£200,000.

7.2.29 A person who is convicted of the offence of insider dealing is prohibited from dealing within a period of 12 months from the date of conviction. However, Section 112 provides for a saver for partially completed transactions.

7.2.30 Section 115 and succeeding sections create a kind of enforcement role for the Stock Exchange in relation to suspected cases of insider dealing, including referring suspected cases to the DPP. Section 240 provides that summary proceedings may be brought and prosecuted by the DPP or the Minister. There is a statutory duty placed on the “relevant authority” of the “recognised Stock Exchange” (i.e. the Irish Stock Exchange) to send the file to the DPP in the event that, arising from their investigation of a transaction they have concluded that sufficient evidence exists for a criminal prosecution under Section 115. A member of the recognised Stock Exchange, under Section 115, is also obliged to report to the relevant authority of the Stock Exchange any prohibited transactions which come to his knowledge. If the recognised Stock Exchange fails to send a report to the DPP and it later appears in court proceedings that it should have done so, the court may direct the authority of the recognised Stock Exchange to make the report. The Minister also has similar powers. However, there is an exclusion for liability in damages by the relevant authority of the recognised Stock Exchange in respect of anything done or omitted to be done by such an authority in connection with the exercise of its functions under this Section other than for acts or omissions done in bad faith. The furnishing of false information either deliberately or recklessly constitutes a separate offence under Section 242 of the 1990 Act.

