Prospectus

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# Prospectus

## Legislation

Whether prospectus is required:

* Prospectus Regulation,
* Prospectus Regulation Rules (PRR)
* Pt VI of the FSMA 2000 (Official Listing)

Information the prospectus should contain:

* Prospectus Regulation
* Commission Delegated Regulation (EU) 2019/980 (the PR Regulation)
* (EU) 2019/979 (the Prospectus RTS Regulation)

## Purpose

Main marketing document of the IPO process. Information meant to encourage investors to invest in the company. But contents are mostly prescribed.

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Note

Listing particulars are only required for the the issue of certain specialist securities, such as debt securities (e.g., bonds) or depositary receipts (certificates which represent ownership of shares). Different from prospectus.

## Requirements

* EU-wide regime introduced by the Prospectus Regulation.
* s 85 FSMA 2000 regime. This was subsequently amended to bring it closely in line with the Prospectus Regulation.
* 01/01/21: Govt. maintaining the overlapping system.
* Who knows why; could be to ensure that criminal sanctions for breach of s 85 FSMA 2000 remain enforceable in the UK.
* Lots of Prospectus Regulation also repeated in the Prospectus Regulation Rules (PRR).

### When Needed

* Art 3 Prospectus Regulation: a prospectus approved by the FCA is required if the company wants to:
  + offer securities to the public in the EU (Art 3(1) of the Prospectus Regulation); or
  + admit securities to trading on a regulated market situated or operating in the EU (even if there is no offer to the public) (Art 3(3) of the Prospectus Regulation).
* s 85 FSMA 2000 – similar except
  + s 85(1) requires an offer of ‘transferable securities’ to the public in the UK; and
  + s 85(2) requires a request for admission of ‘transferable securities’ to trading on a regulated market in the UK .

We focus on IPOs of ordinary shares where a prospectus is required. There are some exemptions. But these apply narrowly only to a particular head of Art 3.

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Example

Consider IPO which involves both an offer to the public and admission to trading, even if it benefits from one of the ‘offer to the public’ exemptions. It will still require a prospectus unless one of the ‘admission to trading’ exemptions also applies.

### Art 3(1)

Refers to all public offers of shares, both shares listed on the Official List and shares not listed on the Official List (such as shares listed on AIM).

#### Offer to the Public

* Art 2(d) Prospectus Regulation: there will be an offer if there is 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’.
  + Write out this whole definition in an exam.
* A placing still constitutes a public offer for these purposes (despite what LR Appendix 1.1 says)

#### Securities

* Article 2(a) of the Prospectus Regulation defines ‘securities’ as ‘transferable securities’ by reference to Article 4(1)(44) of the Markets in Financial Instruments Directive II (MiFID II).
* Includes shares, but not Govt issued securities.

#### In the EU

* Article 3(1) of the Prospectus Regulation requires the offer to the public to take place ‘in the Union’.
* From 1 January 2021 this test is amended to ‘in the UK’ rather than ‘in the EU’.

### S 85(1) FSMA 2000

* Similarly refers to all public offers of shares (including AIM ones).
* s 103 FSMA: ‘offer of transferable securities to the public’ has the meaning in s 102B of the FSMA 2000:

#### Offer

* There will be an offer if there is a communication to any person which presents sufficient information, on the shares to be offered and the terms on which they are offered, to enable an investor to decide to buy or subscribe for those shares (s 102B(1)).
* The communication may be made in any form and by any means (s 102B(3)).

#### Transferrable Securities

* Section 102A(3) defines ‘transferable security’ by reference to Article 4(1)(44) MiFID II.

#### To the Public

* Section 102B(2) of the FSMA 2000 provides that if the offer is made to ‘a person in the United Kingdom’ it is made to the public in the UK.
* Very wide definition, but then there are lots of exemptions, like “qualified investors” or “150 persons” exemption.

#### Exemptions

* Set out in Article 1(4) (PRR 1.2.3EU) and Article 3(2) of the Prospectus Regulation and s 86(1)(e) of the FSMA 2000.
* Offers to qualified investors only (Art 1(4)(a))
  + Includes institutional investors and certain wealthy individuals.
* Offers to natural or legal persons (who are not qualified investors) in each Member State (Art 1(4)(b)).
* Offers involving significant investment by each investor (Art (1)(4)(c) and (d)).
  + This will apply where each investor invests a minimum total consideration of €100,000 (Art 1(4)(d)) or where the shares being offered are denominated in amounts of at least €100,000 (or equivalent) (Art 1(4)(c)).
* Share swaps (Art 1(4)(e))
  + The issue of shares must not involve any increase in the company’s issued share capital.
* Offers in conjunction with takeovers or mergers (Art (1)(4)(f))
  + An “exempted document” must be published instead.
* Bonus issues and scrip dividends of a class of shares already listed (Art 1(4)(h)).
  + But need another documents for this
* Offers by listed companies to employees and/or directors (Art 1(4)(i)))
* Small offers.
  + Section 86(1)(e) of the FSMA 2000 exempts offers where the total consideration for the transferable securities being offered cannot exceed €8 million.

Exemptions can be combined.

### Article 3(3)

Application to trade in a regulated market.

#### Securities

As with Art 3(1) above.

#### Admit to Trading

IPOs on the Main Market fulfil the criterion.

#### Regulated Market

Essentially a multilateral system of trading in a system in accordance with the non-discretionary rules of the system.

Regulated market defined by MiFIR and includes the main market of the London Stock Exchange.

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Important

The Main Market of the Stock Exchange is a regulated market under MiFID II but AIM is not. not. Other regulated markets in the UK include Cboe Europe Equities Regulated Market, AQSE Main Market and Euronext London.

### S 85(2) FSMA 2000

Admitting transferable securities to trading on a regulated market.

#### Transferable Securities

Ordinary shares are transferable securities and satisfy this definition.

#### Admit to Trading

Main Market admissions satisfies this.

#### Regulated Market

This is defined in s 103(1) of the FSMA 2000. This refers to the definition contained in Article 4(1)(21) of MiFID II (see above).

#### Exemptions

Set out in Article 1(5) of the Prospectus Regulation (PRR 1.2.4EU). Principally,

1. Admission of shares representing less than 20% of shares of the same class already admitted to trading on the same regulated market (Art 1(5)(a)).
   1. Offers of shares for which a prospectus was required in the 12-month period are excluded.
   2. So shares admitted over the last 12 months which have not benefitted from any other exemption are included.
2. Shares of a class already listed resulting from the exercise of exchange or conversion rights representing less than 20% of the same class already admitted to trading on the same market (Art 1(5)(b)).
3. Share swaps (Art 1(5)(d)). As 6.4.1.4(d) above.
4. Offers in conjunction with takeovers (by way of share-for-share exchange) or mergers (Art 1(5)(e) and (f)). As at 6.4.1.4(e) an exempted document must be available.
5. Bonus issues and scrip dividends of a class of shares already listed (Art 1(5)(g)). As 6.4.1.4(f) above.
6. Offers to employees and/or directors of a class already listed (Art 1(5)(h)).
7. Shares already admitted to trading on another regulated market (Art 1(5)(j)) subject to the fulfilment of certain conditions.

Exemptions can be combined, with the exception of 1(5)(a) and (b), which cannot be used together if this results in the 20% threshold being exceeded (Art 1(6)).

### Voluntary Prospectus

Company can voluntarily submit a prospectus for approval by the FCA where it has the benefit of one of the exemptions.

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Important

* an IPO;
* involving the offer or sale of ordinary shares;
* which will be listed on the Official List and admitted to trading on the Main Market,

will require a prospectus, unless it benefits from both :

1. an ‘offer to the public’ exemption; and
2. an ‘admission to trading’ exemption.

[see table in textbook].

## Content

The Prospectus Regulation and the PR Regulation (PRR Appendix 2) prescribe the content of a prospectus.

### General Requirements

Article 6(1) and Article 6(2) (PRR 2.1.1EU) provide for the general content requirements of a prospectus. These provisions require that any prospectus must:

* Contain the necessary information which is material to an investor for making an informed assessment of (i) the assets and liabilities, profits and losses, financial position and prospects of the company, (ii) the rights attaching to any securities (for our purposes, shares), and (iii) the reasons for the issue and its impact on the company (Art 6(1)).
* Be written and presented in an easily analysable, concise and comprehensible form (Art 6(2)).

### Specific Requirements

The minimum content requirements which apply for a prospectus depend on the type of company issuing shares and the company’s circumstances.

* The starting point is Article 7 of the Prospectus Regulation, which sets out the content for the first part of a full prospectus, known as the summary.
* For the content of the remainder of the prospectus, it is necessary to turn to the PR Regulation. Chapter II of the PR Regulation sets out a series of Articles.
* For our IPO of ordinary shares, the appropriate annexes are Annexes 1, 11 and 20 (which you can also find in Appendix 2 to the Prospectus Regulation Rules).
* PRR 3.1.4R requires the company to take all reasonable care to ensure that the prospectus contains the necessary information required by Article 6 and the Annexes of the PR Regulation.
* Under Article 15 of the Prospectus Regulation (PRR 2.6), it is possible to produce an abbreviated prospectus for certain smaller companies:
  + SMEs
  + Companies with reduced market capital.

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Definition

SME defined in Article 2(f) of the Prospectus Regulation as companies which, according to their last annual or consolidated accounts, meet at least two of the following three criteria:

* employees
* a total balance sheet not exceeding €43 000 000;
* an annual net turnover not exceeding €50 000 000.

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Definition

A company has reduced market capitalisation in Article 15(1)(b) of the Prospectus Regulation if it is a company having had an average market capitalisation of less than €500 000 000 on the basis of end-year quotes during the last three calendar years.

A SME growth market is defined in Article 4(1)(12) of MiFID II. In the UK, AIM is an example of such a market.

#### Prospectus Format

Can be a single document or 3 separate documents (Art 6(3) (PRR 2.2.1EU)):

1. Summary
2. Registration document, and
3. Securities note.

Article 24 of the PR Regulation (PRR 2.2.4EU) sets out requirements as to the basic **format** of the prospectus.

The splitting into 3 is intended to help companies which regularly issue shares. Article 12(2) of the Prospectus Regulation provides that any approved registration document remains valid for up to 12 months from the date of approval (subject to the requirement to update). So for a new issue of shares, the company can potentially issue just a new summary and new securities note.

Usual for a company to first seek approval of just a registration document, and then for a full prospectus (better to market a single document).

Art 24(1) PR Regulation sets out the order of information:

1. table of contents;
2. summary;
3. risk factors; and
4. information required by the Annexes of the PR Regulation (which for an ordinary IPO will be Annexes 1, 11 and 20).

## Key Documents

### Summary

Article 7 of the Prospectus Regulation provides that the prospectus must include a self-contained summary. This must set out, in no more than seven sides of printed A4 paper, in a way that is easy to read and in clear, non-technical, concise and comprehensible language.

The summary must not cross-refer to other parts of the prospectus or incorporate information by reference. It must therefore be self-contained.

Summary must comprise 4 sections:

1. an introduction containing warnings;
   * Art 7(5): series of compulsory warnings to include
2. key information on the company;
   * Art 7(6) sets out key information, which should include:
     + ‘Who is the issuer of the securities’?
     + What is the key financial information regarding the issuer’? This must be set out in table format in accordance with Annex I to the Prospectus RTS Regulation for an ordinary trading company
     + ‘What are the key risks that are specific to the issuer’? The maximum number of risks that can be included is 15 (Art 7(10)).
3. key information on the shares; and
   * Art 7(7). Compulsory sub-headings include:
     + ‘What are the main features of the securities’?
     + ‘Where will the securities be traded?’
     + ‘What are the key risks that are specific to the securities'?
4. key information on the offer to the public and/or admission to trading on a regulated market (Art 7(4)).
   * Art 7(8). Sub-headings:
     + ‘Under which conditions and timetable can I invest in this security’?
     + ‘Why is this prospectus being produced’?

### Registration Document

Provides general information about the company.

Article 2 of the PR Regulation (PRR 2.3.1EU) requires that it should contain the information set out in Annex 1 to the PR Regulation. Includes:

1. Persons responsible, third party information, experts’ reports and competent authority approval. Known as the “responsibility statement”.
2. Statutory auditors
3. Risk factors.
   * Should include the most material risk factors specific to the company (Art 16).
   * Should not be generic (Art 54)
   * Possible to use categories. List the most material risks first.
4. Information about the issuer.
5. Business overview.
6. Organisational structure.
7. Operating and financial review.
8. Capital resources.
9. Regulatory environment
10. Trend information – significant trends in production, sales and inventory.
11. Profit forecasts or estimates. Set out assumptions on which the forecast is based and independent auditor/ accountant report.
12. Administrative, management and supervising bodies and senior management.
    1. Info on directors, founders, senior managers.
    2. Details of convictions for fraudulent offences in last 5 years, any insolvency events, any public sanctions on any directors.
    3. p 77 textbook.
    4. There's also an FCA technical note that it also applies to senior managers.
13. Remuneration and benefits (of directors and possibly senior managers)
14. Board practices
    1. Periods of service, service contract information, corporate governance compliance.
15. Employees.
16. Major shareholders.
17. Related party transactions.
18. Financial information concerning issuer's assets and liabilities, financial position and profits/ losses. Includes information on any litigation or arbitration.
19. Additional information.
    1. Share capital and history.
    2. Memorandum and articles.
20. Material contracts
    1. Material means those entered into outside of the ordinary course of business:
       1. In the last 2 years (if the contract is material) or
       2. At any time (time (if the contract provides the company or any member of the company’s group with any entitlement or obligation which is still material to the company or the group as at the date the registration document is published).
21. Documents available (on a named website).
    1. Should include articles and memorandum.

### Securities Note

The securities note must contain information about the securities (for our purposes, shares) to be offered or admitted. Should include:

1. Persons responsible, third party information, experts' reports and competent authority approval ("responsibility statement").
2. Risk factors
3. Essential information
   1. Working capital statement (statement that company believes working capital is sufficient for issuer's present requirements/ how additional working capital will be provided).
4. Information concerning the securities to be offered/ admitted to trading.
   1. Rights attaching to shares like voting rights and pre-emption rights.
   2. Resolutions and authorisations by which the shares were created/ issued.
5. T&Cs of the offer of securities to the public.
   1. Total amount of the offer
   2. Period for which offer available
   3. Circumstances of revocation.
6. Admission to trading and dealing arrangements.
7. Selling securities holders.
   1. Name and address of selling shareholders, number and class of shares sold.
8. Expense of issue/ offer.
   1. Total net proceeds and estimate of total expenses.
9. Dilution
10. Additional information

### Incorporation by Reference

Under Article 19 UK Prospectus Regulation, information can be incorporated by reference into the prospectus (registration document or securities note). Information must:

1. be contained in a document listed in Article 19(1) of the Prospectus Regulation
2. be the most recent available to the company (Art 19(1));
3. be accessible using a cross-referenced list in the prospectus and contain hyperlinks to all documents (Art 19(2); and
4. be presented in searchable electronic format when the draft prospectus is being reviewed by the FCA, unless the information has already been approved by or filed with the FCA (Art 19(3)).

### Omission of Information

Article 18(1) of the Prospectus Regulation (PRR 2.8.1EU) provides that the FCA has the discretion to authorise the omission of any information required if;

1. disclosure of the information would be contrary to the public interest; or
2. disclosure of the information would be seriously detrimental to the company and the omission of the information is not likely to mislead investors; or
3. the information to be omitted is of minor importance and is unlikely to influence the investors’ assessment.

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Action

The clear message is that if the PR Regulation, or the general disclosure requirement in Article 6(1) of the Prospectus Regulation (PRR 2.1.1EU), require such disclosure then the prospectus must contain that information. The FCA will exercise its discretion to omit information only in exceptional circumstances.

### Check Content

Mark up to highlight all changes from the prospectus previously submitted to the FCA (to speed up approval).

## Responsibility

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If the prospectus is wrong, can investors be compensated?

Yes (Art II Prospectus Regulation and FSMA 2000)

### Who is Responsible

Where, as in our case, the prospectus relates to equity securities (ordinary shares) for which the UK is the home Member State, PRR 5.3.2R(2) provides that the following are responsible:

1. Issuer (company)
2. Directors of the company at the date of publication
3. Anyone named and who agreed to be named in the prospectus as a director, or as having agreed to become a director
4. Anyone who accepts/ is stated to accept responsibility for the prospectus
5. Anyone other than the company offering shares (e.g., selling shareholders)
6. Person requesting admission to trading of the shares (if not the company).
7. Anyone else who authorises the contents (e.g., accountants)
   1. Sponsors not considered to have authorised the prospectus (PRR 5.3.10R).
   2. Lawyers also exempted under PRR 5.3.10: they do not have responsibility, only giving advice in a professional context.
   3. Accountants will usually limit their liability to the information they have looked at. 5.3.9R: a person may accept responsible for only part of the contents, and then responsible only to the extent specified and only if material in question is included.

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Selling shareholders

Prospectus Regulation Rule 5.3.8R provides that a person will not be responsible under PRR 5.3.2R(2)(d) if the shareholder is making the offer in association with the issuer and it is primarily the issuer, or the issuing company’s advisers, who draw up the prospectus.

### Meaning of Responsibility

Must ensure all relevant information is included in the prospectus. A responsibility statement must be included in the prospectus pursuant to item 1.2 of both Annex 1 and Annex 11 of the PR Regulation.

## Liability

May be civil and/ or criminal liability in relation to any inaccuracies, misstatements or omissions.

### Civil Liability

#### S 91 FSMA 2000

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s 91 FSMA 2000 - Penalties for breach of Part 6 rules

(1) If the FCA considers that—

* (a) an issuer of listed securities, or
* (b) an applicant for listing,

has contravened any provision of listing rules, it may impose on him a penalty of such amount as it considers appropriate.

(1A) If the FCA considers that—

* (a) an issuer of transferable securities,
* (b) a person offering transferable securities to the public or requesting their admission to trading on a regulated market,
* (c) an applicant for the approval of a prospectus in relation to transferable securities,
* (d) a person on whom a requirement has been imposed under section 87K or 87L, or
* (e) any other person to whom any provision of, or made in accordance with, the prospectus regulation applies,

has contravened a provision of this Part or of prospectus rules, or a provision of or made in accordance with the prospectus regulation, or a requirement imposed on him under such a provision, it may impose on him a penalty of such amount as it considers appropriate.

(1B) If the FCA considers—

* (a) that a person has contravened—
  + (i) a provision of qualifying transparency legislation, or
  + (ii) a provision of corporate governance rules, or
* (b) that a person on whom a requirement has been imposed under section 89L (power to suspend or prohibit trading of securities in case of infringement of applicable transparency obligation), has contravened that requirement,

it may impose on the person a penalty of such amount as it considers appropriate.

(2) If, in the case of a contravention by a person referred to in subsection (1), (1A) or (1B)(a)(ii) or (b)] (“P”), the FCA considers that another person who was at the material time a director of P was knowingly concerned in the contravention, it may impose upon him a penalty of such amount as it considers appropriate.

(2A) If—

* (a) a person has contravened a provision mentioned in subsection (1B)(a)(i), and
* (b) the FCA considers that another person (“A”), who was at the material time a relevant officer of the person, was knowingly concerned in the contravention,

the FCA may impose upon A a penalty of such amount as it considers appropriate.

(2B) In subsection (2A) “relevant officer” of a person means—

* (a) a director or other similar officer of the person, or
* (b) if the affairs of the person are managed by its members, a member of the person.

(3) If the FCA is entitled to impose a penalty on a person under this section in respect of a particular matter it may, instead of imposing a penalty on him in respect of that matter, publish a statement censuring him.

(4) Nothing in this section prevents the FCA from taking any other steps which it has power to take under this Part.

(5) A penalty under this section is **payable to the FCA**.

(6) The FCA may not take action against a person under this section after the end of the period of 3 years beginning with the first day on which it knew of the contravention unless proceedings against that person, in respect of the contravention, were begun before the end of that period.

(7) For the purposes of subsection (6)—

* (a) the FCA is to be treated as knowing of a contravention if it has information from which the contravention can reasonably be inferred; and
* (b) proceedings against a person in respect of a contravention are to be treated as begun when a warning notice is given to him under section 92.

A breach of Article 6 of the Prospectus Regulation governing the content of the prospectus gives the FCA the power to impose a number of sanctions, including fining the company or imposing a censure on the company, a director or former director.

Section 91 of the Financial Services and Markets Act 2000 provides sanctions for breach of the 'Part 6 Rules'.

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Part 6 Rules

The 'Part 6 Rules' are defined in s103 FSMA 2000 with reference to the rule making powers of the FCA under s73A FSMA 2000. These include powers to make:

* Rules relating to the Official List referred to in Part 6 as "listing rules". This includes the Listing Rules contained in the FCA's Listing Rules Sourcebook.
* Rules relating to transferable securities referred in Part 6 as "prospectus rules". This includes the Prospectus Regulation Rules Sourcebook.
* Corporate governance rules are also included in the definition and include the rules made under DTR 7.2.

Section 91(1) deals with breach of the Listing Rules, section 91(1A) deals with breach of the Prospectus Rules and Section 91(1B) deals with breach of the Corporate Governance Rules. Breaches of the Market Abuse Regulation are dealt with separately in s123.

Fine or public censure (saying you did something wrong, can be embarrassing). Any director can be subject to the same penalties.

#### S 90 FSMA 2000

Sets out the liability which a person is most likely to face for problems **arising out of the contents of the prospectus**.

Those responsible for listing particulars must pay compensation to anyone who has **acquired shares** which are the subject of the listing particulars, and has **suffered loss** as a result of any **inaccurate** or **misleading statement** in the document, or any **omission** of information which should have been disclosed under s 87A.

Scope:

* “Who has acquired” – what about someone who bought shares from the original investor.
* “As a result of” – must the investor have relied on/ read the document?
* Very unclear.

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Note

There has not been any judicial decision on this, so some questions about this.

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Warning

Note that section 90(1) does not require the person claiming compensation to prove that they relied on the relevant statement or omission when they acquired the securities. It also does not require the person claiming compensation to have acquired the securities in the offer to which the prospectus relates.

[FSMA 2000, Sch 10](https://plus.lexis.com/uk/document/?pdmfid=1001073&crid=41b69b73-ccf6-4a19-afca-d7cf3feab3f9&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials-uk%2Furn%3AcontentItem%3A63ND-70V3-GXF6-80SM-00000-00&pdcontentcomponentid=280374&pdteaserkey=&pdislpamode=false&pddocumentnumber=2&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=ht5k&earg=sr1&prid=f1f04e49-dba0-4ca9-a413-e149ae3d473a#) sets out seven defences, only one of which the defendant has to prove to avoid liability under s 90. Exemptions from liability:

1. if, at the time the prospectus was submitted to the FCA, the persons responsible (having made reasonable enquiries) **believed** the erroneous information was true and not misleading;
2. where loss arises as a result of a statement by an **expert**;
3. where a **correction** had been published before shares were acquired;
4. where the erroneous information was reproduced from a **public official document**; and
5. where the person seeking compensation acquired the shares **knowing** the information was deficient.

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Note

The due diligence and verification processes not only reduce the likelihood that the prospectus contains an untrue or misleading statement or omission but also help to support, if necessary, any argument of reasonable belief, and that reasonable enquiries were made.

#### Liability in Tort

May be tortious liability for:

1. Negligent misstatement
   1. Hedley Byrne v Heller [1964] AC 465
   2. By Caparo Industries v Dickman [1990] 2 AC 605 (HL), no duty owed to any subsequent purchaser of the shares.
2. Deceit
   1. If statement made fraudulently.
3. Misrepresentation Act 1967.
   1. If the investor invests on the basis of an incorrect or misleading prospectus, may be able to rescind the contract and/ or claim damages from the other party.

#### Liability in Contract

The prospectus will form the whole or part of any contract between an investor buying shares and the company issuing shares/ any existing shareholder selling shares to the investor as part of the IPO. May be able to rescind contract/ sue the other party for damages.

#### Advertising

Article 22 Prospectus Regulation (PRR 3.3.1EU) lays down a number of requirements relating to advertisements in connection with a prospectus, which are supplemented by Articles 13–16 of the Prospectus RTS Regulation.

If the information is inaccurate, misleading or inconsistent then liability can also arise for breach of the Prospectus Regulation. Advertising permitted providing they do not undermine the primacy of the prospectus.

### Criminal Liability

The FCA has special powers to bring criminal prosecutions, including for the offences set out in ss 401 and 402 of the FSMA 2000.

#### S 89 & 90 FSA 2012

* s 89 - **misleading statements**
  + Criminal offence for any person to make a statement which he knows to be false or misleading in a material respect, to conceal dishonestly any material facts or recklessly make a statement which is misleading.
* s 90 - **misleading impressions.**
  + Catches anything any person does to create a false or misleading impression as to the market in, or price or vale of the shares, if he does so deliberately to induce investors to buy investments, sell them, underwrite them or refrain from so doing or, while knowing the impression to be false or misleading makes a gain or causes a loss.

#### Theft Act 1968

s 19 Theft Act 1968: imposes criminal penalties on any director who makes false or misleading statements with intent to deceive shareholders.

##### S 85(3) FSMA 2000

It is a criminal offence for a person to offer shares to the public or request their admission to trading without providing an approved prospectus to the public.

#### Fraud Act 2006

Under s 12, if the offence is committed by a company then a director or other officer of the company is (in addition to the company) liable for that offence if he consents to or connives in that offence. The penalties for these offences under s 1 are a maximum of 10 years’ imprisonment and an unlimited fine.

## Verification

The verification process is usually conducted by the issuer's lawyers and reviewed by the underwriter's lawyers. The verification exercise in respect of the prospectus usually starts once there is a relatively advanced draft of the document, as the process typically involves preparation of verification notes covering all material information/statements of fact in the prospectus, together with the back-up materials collated in respect of such information/statements.

Ensure that:

1. each material statement of fact or opinion in the document is not only true, but also not misleading in the context in which it appears;
2. the document as a whole gives a true and fair impression of the history, business and prospects of the company; and
3. the document does not omit any information which makes it misleading or which contravenes the Prospectus Regulation and s 87A of the FSMA 2000.

Provides directors with evidence that they have taken reasonable care to ensure the information required by Prospectus Regulation and s 87A FSMA 2000 has been included.

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Note

In terms of civil liability, verification can provide evidence to assist in establishing a defence to a claim for statutory compensation on the basis that the prospectus contained an untrue or misleading statement, or a material omission of a matter required to be included.

In terms of criminal liability, verification can provide evidence to assist in establishing a defence against any criminal charges that the prospectus contained a statement that a defendant knew was misleading, false or deceptive, that a defendant was reckless as to whether any such statement was misleading, false or deceptive, or that a defendant was dishonest in concealing any material facts.

## Types of Prospectus

### Full/ Final Prospectus

* The document submitted to the FCA for approval

### Preliminary/ Price-range Prospectus

* Virtually identical to the above and must be approved by the FCA before it can be sent out. But the price for shares offered will not be specified as a fixed amount; there will be a price range.
* Approval by FCA = can be sent out to any investor.
* Pricing statement does not require prior approval by the FCA.
* Article 21(1) of the Prospectus Regulation (PRR 3.2.1EU), an approved prospectus (be it full or preliminary) must be made available to investors at least six working days before the close of the offer.

#### Pathfinder Prospectus

* This is a draft of the prospectus which is sent out to prospective investors to stimulate interest in the IPO.
* The impact of s 21 is that it is an offence for a company to send out a pathfinder to induce investors to buy shares.
* Avoid by sending the s 21 only to persons exempt from s 21 (mainly institutional investors).
* Pathfinder must comply with the rules for advertising in Art 22 Prospectus Regulation (PRR 3.3.1EU).

If deciding to use a preliminary prospectus, the publication of a subsequent prospectus grants investors the right to withdraw their acceptance of the offer (Art 23(2) Prospectus Regulation). Another disadvantage: investors have the right to withdraw acceptances of the offer within 2 working days of the date the offer is priced.

#### Supplementary

Article 23(1) of the Prospectus Regulation (PRR 3.4.1EU) provides that if, in the period between the approval of the prospectus and the closing of the offer period or the time when dealings in shares commence, there arises or is noted any significant new factor, material mistake or inaccuracy relating to the information included in the approved prospectus which may affect the assessment of the shares, the company must produce a supplementary prospectus without delay.

FCA must approve such a prospectus within 5 days.

## Validity

A prospectus is valid for 12 months after its approval, for any further offers or admissions to trading, provided that it is updated by a supplementary prospectus, approved by the FCA.

## Passporting

The Prospectus Regulation has ensured that each Member State has the same rules regarding the drawing up of a prospectus. This has enabled the introduction of a ‘passporting’ procedure under Articles 24–26, whereby a company will not need to produce a prospectus for an offer of shares to the public, or an admission of shares to trading, in one EEA Member State (‘MS2’) if another EEA Member State (‘MS1’) has already approved and published a prospectus in the previous 12 months.

* Just need to translate (only) the summary into the local language and request a certificate of approval from the competent authority.
* Article 25(1) of the Prospectus Regulation states that any request for such a certificate can be included with the company’s application for approval of the initial prospectus.
* The competent authority in MS1 must send the certificate of approval and an electronic copy of the prospectus within one working day following approval of the prospectus to the competent authority in MS2 and also notify ESMA.

Many companies in the UK have taken advantage of the passporting procedure for an offer of shares in more than one EEA Member State. UK companies need to prepare an additional separate prospects from the FCA approved one for an offer of shares into the EEA. Must be approved by the competent authority in a Member State in which the offer is to be made, and then can be passported into other EEA countries.

## Future Developments

### Financial Services Future Regulatory Framework Review

Consultation issued in July 2021, including a proposal to replace retained EU Regulations and Delegated Regulations with rules in FCA handbook.

### UK Prospectus Regime Review

Additional UK Govt. consultation, expected to result in significant amendments to the current prospectus regime.