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INVESTOR COMPENSATION ACT, 1998

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AN ACT TO ENABLE EFFECT TO BE GIVEN TO DIRECTIVE NO. 97/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 3 MARCH 1997 ON INVESTOR COMPENSATION SCHEMES⁽¹⁾, TO PROVIDE FOR INVESTOR COMPENSATION, TO AMEND THE CENTRAL BANK ACT, 1989, THE INSURANCE ACT, 1989, THE SOLICITORS (AMENDMENT) ACT, 1994, THE STOCK EXCHANGE ACT, 1995, AND THE INVESTMENT INTERMEDIARIES ACT, 1995, AND TO PROVIDE FOR RELATED MATTERS. [13th July, 1998]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART I

Preliminary and General

1.—(1) This Act may be cited as the Investor Compensation Act, 1998. Short title and commencement.

(2) This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or different provisions.

2.—(1) In this Act, unless the context otherwise requires— Interpretation.

“Act of 1963” means the Companies Act, 1963;

“Act of 1989” means the Insurance Act, 1989;

“Act of 1994” means the Solicitors (Amendment) Act, 1994;

“Act of 1995” means the Investment Intermediaries Act, 1995;

“administrator” means, where a liquidator or official assignee has been appointed to an investment firm by the Court, that liquidator or official assignee, or where an administrator has been appointed to an investment firm by the supervisory authority, that administrator;

⁽¹⁾O.J. No. L84, 26.3.1977.

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“approved professional body” has the meaning assigned to it by the Act of 1995;

“authorised investment business firm” has the meaning assigned to it by *subsection (4)*;

“authorised investment firm” means—

- (a) an authorised investment business firm, or
- (b) an authorised member firm, or
- (c) a credit institution the authorisation of which by the Bank under Directive No. 77/780/EEC of 12 December 1977⁽¹⁾ and Directive No. 89/646/EEC of 15 December 1989⁽²⁾ extends to one or more of the investment services listed in section A of the Annex to the Investment Services Directive, or
- (d) an insurance intermediary;

“authorised member firm” has the meaning assigned to it by the Stock Exchange Act, 1995;

“authorised officer” means a person authorised for the purposes of *section 9*;

“Bank” means the Central Bank of Ireland;

“Board” means the Board of the Company;

“branch”, in the case of an investment firm which is subject to the Investment Services Directive, means a place of business which is part of an investment firm, which has no separate legal personality and which provides investment services for which the investment firm has been authorised by the Bank or by a competent authority in another Member State, and all the places of business set up in the same Member State by an investment firm which has its head office in another Member State shall be regarded as a single branch;

“certified person” has the meaning assigned to it by section 55 of the Act of 1995;

“client” means a person who has entrusted money or investment instruments to an investment firm in connection with the provision of investment business services by the investment firm;

“close relative” means a brother, sister, parent or spouse of a client or a child of the client or of the spouse of the client, where “spouse”, in relation to the client, shall not include a spouse who is living separately and apart from the client;

“Company” means the Investor Compensation Company Limited;

“compensatable loss” has the meaning assigned to it by *section 30(1)*;

“competent authority” means a competent authority for the purposes of the Investor Compensation Directive;

⁽¹⁾O.J. No. L322, 17.12.1977.

⁽²⁾O.J. No. L386, 30.12.1989.

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“Court” means the High Court;

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“credit institution” means a credit institution within the meaning of Article 1 of Council Directive No. 77/780/EEC of 12 December 1977⁽¹⁾ as amended by Council Directive No. 89/646/EEC of 15 December 1989⁽²⁾ but does not include the institutions referred to in Article 2(2) of the first mentioned Directive;

“director” includes any person occupying the position of director by whatever name called and any person who effectively directs or has a material influence over the business of an investment firm and includes a shadow director within the meaning of the Companies Act, 1990;

“ECU” has the same meaning as in Council Regulations (EC) No. 3320/94 of 22 December 1994 on the consolidation of the existing Community legislation on the definition of the ECU following the entry into force of the Treaty on European Union⁽³⁾;

“eligible investor” means a person, not being an excluded investor, who is a client of an investment firm and has made an application for payment under *section 34*;

“employee” has the same meaning as in the Act of 1995;

“excluded investor” means a client of an investment firm which has been the subject of a determination by the supervisory authority under *section 31* or a ruling and, in relation to that investment firm, is—

(a) a professional or institutional client, including:

- (i) an investment firm;
- (ii) an investment firm for the purposes of the Investment Services Directive;
- (iii) a credit institution as defined in Article 1 of Council Directive No. 77/780/EEC;
- (iv) a financial institution as defined in Article 1(6) of Council Directive No. 89/646/EEC of 15 December 1989⁽²⁾;
- (v) an insurance undertaking;
- (vi) an undertaking for collective investment; or
- (vii) a pension or retirement fund, or

(b) a local authority, or

(c) a director, manager or personally liable member of the investment firm, a holder of at least 5 per cent. of the capital of the investment firm, a person responsible for carrying out the statutory audit of the investment firm or a client with similar status in a group undertaking, or

⁽¹⁾O.J. No. L322, 17.12.1977.

⁽²⁾O.J. No. L386, 30.12.1989.

⁽³⁾O.J. No. L350, 31.12.1994.

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- (d) a close relative or a third party acting on behalf of a client referred to in *paragraph (c)*, or
- (e) another firm in a group undertaking, or
- (f) a client who has any responsibility for, or has taken advantage of, facts relating to the investment firm which gave rise to the firm's financial difficulties or contributed to the deterioration of its financial situation, or
- (g) a company which is of such a size that it is not permitted to draw up abridged balance sheets under Article 11 of the Fourth Council Directive No. 78/660/EEC of 25 July 1978⁽¹⁾ based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies, or
- (h) a client specified by the supervisory authority as an excluded investor in accordance with *section 35(8)*;

“functions” includes powers and duties and references to the performance of functions include, as respects powers and duties, references to the exercise of the powers and the carrying out of the duties;

“group undertaking”, in relation to an investment firm, means a group undertaking within the meaning of the Companies (Amendment) Act, 1986, of which the investment firm is a part;

“insurance intermediary” has the meaning assigned to it by the Act of 1989 but excludes a solicitor in respect of whom a practising certificate (within the meaning of the Solicitors Acts, 1954 to 1994) is in force where the activities of the solicitor arise only incidentally to the provision of legal services;

“insurance undertaking” has the meaning assigned to it by the European Communities (Non-Life Insurance) Framework Regulations, 1994 (S.I. No. 359 of 1994), or under the European Communities (Life Assurance) Framework Regulations, 1994 (S.I. No. 360 of 1994);

“investment business firm” has the meaning assigned to it by the Act of 1995;

“investment business services” has the meaning assigned to it by the Act of 1995 and includes the activities of an insurance intermediary;

“investment firm” means—

- (a) an authorised investment business firm or a person (being a person who was an authorised investment business firm) whose authorisation has been revoked,
- (b) an authorised member firm or a person (being a person who was an authorised member firm) whose authorisation has been revoked,
- (c) a credit institution licensed in the State or a credit institution whose authorisation by the Bank under Council Directive 77/780/EEC of 12 December 1977 as amended by Council Directive 89/646/EEC of 15 December 1989 as amended and extended from time to time extends to one or more of the investment services listed in the Annex to the

⁽¹⁾O.J. No. L222, 14.08.1978.

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whose authorisation by the Bank under Council Directive
77/780/EEC of 12 December 1977 as amended by Council
Directive 89/646/EEC of 15 December 1989 as amended
and extended from time to time has been revoked or a
credit institution whose authorisation by the Bank under
Council Directive 77/780/EEC of 12 December 1977 as
amended by Council Directive 89/646/EEC of 15
December 1989 as amended and extended from time to
time no longer extends to one or more of the investment
services listed in the Annex to the Investment Services
Directive, or

(d) an insurance intermediary or a person who was formerly an
insurance intermediary;

“investment instruments” has the meaning assigned to it by the Act
of 1995;

“investment product intermediary” has the meaning assigned to it
by the Act of 1995;

“Investment Services Directive” means Council Directive No.
93/22/EEC of 10 May 1993⁽¹⁾;

“Investor Compensation Directive” means Directive No. 97/9/EC of
the European Parliament and of the Council of 3 March 1997⁽²⁾;

“joint investment business” means investment business services pro-
vided for the account of two or more persons or over which two or
more persons have rights that may be exercised by means of the
signature of one or more of those persons;

“local authority” means a local authority for the purposes of the
Local Government Act, 1941 and where appropriate a provincial,
regional, local and municipal authority;

“member firm” has the meaning assigned to it by the Stock
Exchange Act, 1995;

“Member State” means a Member State of the European Com-
munities;

“Minister” means the Minister for Finance;

“prescribed” means prescribed by regulations made by the Minister
and cognate words shall be construed accordingly;

“product producer” means a product producer for the purposes of
the Act of 1995 or an insurance undertaking;

“professional investor” means a client of an investment firm who the
investment firm can show has sufficient and appropriate expertise in
investment instruments to be categorised as a professional investor
and who has acknowledged in writing to that investment firm that
he or she has been made aware of the consequences of being categor-
ised as a professional investor and is categorised by that investment
firm as a professional investor;

“restricted activity investment product intermediary” has the mean-
ing assigned to it by the Act of 1995;

⁽¹⁾O.J. No. L141, 11.06.1993.

⁽²⁾O.J. No. L84, 26.03.97.

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“ruling” means a decision made by a court in relation to an investment firm for reasons which are directly related to the financial circumstances of the investment firm which has the effect that clients of the investment firm are precluded for the time being from pursuing claims against the investment firm for the return of money owed to or belonging to the client and held on behalf of the client by the investment firm in connection with the provision of investment business services and for the return of investment instruments belonging to the client and held, administered or managed by the investment firm on behalf of the client in connection with the provision of investment business services;

“solicitor” has the meaning assigned to it in section 3 (as substituted by the Act of 1994) of the Solicitors Act, 1954;

“supervisory authority” means the supervisory authority referred to in *section 8(1)*;

“written appointment” means an appointment in writing for the purposes of section 27 of the Act of 1995 or an appointment in writing for the purposes of section 44 or 49 of the Act of 1989.

(2) A word or expression that is used in this Act and is also used in the Investor Compensation Directive has, unless the contrary intention is indicated, the same meaning in this Act as it has in that Directive.

(3) In this Act—

- (a) a reference to a section or a Schedule is to a section of or Schedule to this Act, unless it is indicated that reference to some other enactment is intended,
- (b) a reference to a subsection, paragraph or subparagraph is a reference to the subsection, paragraph or subparagraph of the provision in which the reference occurs, unless it is indicated that reference to some other provision is intended, and
- (c) a reference to any enactment shall be construed as a reference to that enactment as amended, adapted or extended by or under any subsequent enactment including this Act.

(4) In this Act, “authorised investment business firm” has the meaning assigned to it by the Act of 1995 and, where the Minister has not made regulations under section 2(8)(a) of the Act of 1995, this definition excludes a restricted activity investment product intermediary who is a solicitor in respect of whom a practising certificate (within the meaning of the Solicitors Acts, 1954 to 1994) is in force unless that restricted activity investment product intermediary has informed the supervisory authority and the Company that he or she is a restricted activity investment product intermediary.

(5) Notwithstanding *subsection (1)*, an authorised investment business firm—

- (a) to which the Minister has given a certificate under section 446(2) of the Taxes Consolidation Act, 1997,
- (b) which is not an investment firm within the meaning of the Investor Compensation Directive, and

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- (c) where any investment business services provided by the firm Pt.I S.2
are part of the trading operations of the investment firm
to which the certificate given to it by the Minister under
section 446(2) of the Taxes Consolidation Act, 1997,
refers,

shall not be an authorised investment firm or an investment firm for
the purposes of this Act.

(6) References in this Act to books, records or other documents,
or to any of them, shall be construed as including any document or
information kept in a non-legible form (whether stored electronically
or otherwise) which is capable of being reproduced in a legible form
and all the electronic or other automatic means, if any, by which such
document or information is so capable of being reproduced and to
which the person, whose books, records or other documents (as so
construed) are inspected for the purposes of this Act, has access.

3.—(1) Where a notice, direction or other document is authorised Service of notices.
or required by or under this Act or regulations made thereunder to
be served on a person, it shall, unless otherwise specified in this Act,
be addressed to the person by name and shall be served on or given
to the person in one of the following ways—

- (a) by delivering it to the person, or by leaving it at the address
at which the person ordinarily resides or, in a case in
which an address for service has been furnished, at that
address,
- (b) by sending it by ordinary prepaid post addressed to the per-
son at the address at which the person ordinarily resides
or, in a case in which an address for service has been
furnished, at that address, or
- (c) in the case of an officer or employee of an investment firm,
by sending it to the person by ordinary pre-paid post
addressed to the person at the address of the principal
office of that investment firm.

(2) A notice, direction or other document referred to in *subsection*
(1) may—

- (a) in the case of an investment firm or any body corporate, be
served on the secretary or other employee or officer of
that investment firm or body corporate,
- (b) in the case of a partnership, be served on any partner, or
- (c) in the case of an unincorporated association other than a
partnership, be served on any member of its governing
body.

4.—(1) The expenses incurred by the Minister in the admin- Expenses.
istration of this Act shall, to such extent as may be sanctioned by the
Minister, be paid out of monies provided by the Oireachtas.

(2) The expenses incurred by the Bank in the administration of
this Act shall be paid out of the general fund of the Bank except
where otherwise provided in this Act or any other enactment.

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Pt.I
Power to make
regulations.

5.—(1) The Minister may make regulations for enabling this Act to have effect.

(2) Regulations under this Act may contain such incidental, supplementary and consequential provisions as appear to the Minister to be expedient for any purpose of this Act.

(3) The Minister may make regulations for prescribing any matter referred to in this Act as prescribed.

Laying of
regulations before
Houses of
Oireachtas.

6.—Every regulation made under this Act shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

Repeals.

7.—The Acts mentioned in *column (2)* of the *First Schedule* to this Act are hereby repealed to the extent mentioned in *column (3)* of that Schedule.

Appointment of
supervisory
authority and
competent
authority.

8.—(1) The Bank shall be the supervisory authority for investor compensation under this Act.

(2) The Bank shall be the competent authority in the State for the purposes of the Investor Compensation Directive.

(3) Subject to *subsection (4)*, the supervisory authority shall carry out its functions under this Act in accordance with this Act in order to promote—

- (a) the protection of the clients of investment firms,
- (b) the maintenance of an effective system of compensation for the clients of investment firms, and
- (c) the maintenance of the proper and orderly regulation and supervision of investment firms and financial markets.

(4) The supervisory authority shall carry out its functions under this Act having regard to the Investor Compensation Directive, the text of which is set out for convenience of reference in the *Third Schedule*.

Authorised officers.

9.—(1) *Subsections (2)* and *(3)* shall apply in relation to an investment firm in respect of insurance business carried on by that investment firm as an insurance intermediary.

(2) Where the supervisory authority forms the view that an insurance intermediary may be unable to repay money belonging to a client of that insurance intermediary, the supervisory authority may authorise in writing a person to be an authorised officer to investigate whether the insurance intermediary is unable to repay money to or otherwise discharge its obligations towards clients of the insurance intermediary and to make a report to the supervisory authority in respect of that insurance intermediary.

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(3) Sections 64 and 65 of the Act of 1995 shall apply to an authorised officer appointed under *subsection (2)* as if the person appointed were appointed for the purposes of the Act of 1995 and the powers available to an authorised officer under those sections applied in relation to insurance intermediaries for the purposes of this Act. Pt.I S.9

(4) The following shall be authorised officers for the purposes of this Act—

- (a) in relation to investment firms which are investment business firms—
 - (i) an authorised officer appointed under section 64 of the Act of 1995, or
 - (ii) an inspector appointed under section 66 or 73 of the Act of 1995;
- (b) in relation to investment firms which are stock exchange member firms—
 - (i) an authorised officer appointed under section 55 of the Stock Exchange Act, 1995, or
 - (ii) an inspector appointed under section 57 or 64 of the Stock Exchange Act, 1995;
- (c) in relation to investment firms which are credit institutions—
 - (i) an authorised person appointed under section 41 of the Building Societies Act, 1989, or
 - (ii) an inspector appointed under section 45 of the Building Societies Act, 1989, or
 - (iii) an authorised officer appointed under section 17 of the Central Bank Act, 1971 (as amended by section 36 of the Central Bank Act, 1989, and by Regulation 39 of the European Communities (Licensing and Supervision of Credit Institutions) Regulations, 1992 (S.I. No. 395 of 1992)), or
 - (iv) an authorised officer for the purposes of section 24 of the Trustee Savings Bank Act, 1989,

and the rights and powers of such authorised officers shall, with the necessary modifications, apply in relation to obtaining such information as the supervisory authority may require to enable it to exercise any of its functions under this Act.

PART II

Administration of Investor Compensation

10.—(1) As soon as may be after the commencement of this section, the Minister shall take such steps as appear to him or her to be necessary or desirable to procure that a limited company to be known as “The Investor Compensation Company Limited” and in this Act referred to as “the Company” and satisfying the conditions laid down by this Act shall be formed and registered by the Bank under the Companies Acts, 1963 to 1990. Formation of Company.

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(2) The following conditions shall be satisfied by the Company—

- (a) the Company shall be a company limited by guarantee,
- (b) the name of the Company shall be “The Investor Compensation Company Limited”, and
- (c) the memorandum of association and articles of association of the Company shall be in a form consistent with this Act.

Alteration of memorandum of association and articles of association of Company.

11.—(1) Notwithstanding anything contained in the Companies Acts, 1963 to 1990, no alteration in the memorandum of association or articles of association of the Company which has been made shall be valid unless made with the prior approval of the supervisory authority.

(2) The supervisory authority shall have power to require changes to be made to the memorandum of association and the articles of association of the Company.

Objects and powers of Company.

12.—(1) The principal objects of the Company shall be stated in its memorandum of association to be—

- (a) to establish and maintain, having consulted the supervisory authority, arrangements for the making of payments to clients of investment firms in accordance with this Act,
- (b) to maintain a fund or funds out of which payments shall be made in accordance with this Act and, where appropriate, the Investor Compensation Directive, and to meet such other payments or expenses as may be paid out of the fund or funds in accordance with this Act,
- (c) to advise the supervisory authority on matters relating to compensation for clients of investment firms, and
- (d) to process claims for compensation by clients of investment firms as expeditiously as possible and to ensure that compensation is paid without undue delay.

(2) Nothing in this section shall prevent or restrict the inclusion among the objects of the Company as stated in its memorandum of association of all such objects and powers as are reasonably necessary or proper for or incidental or ancillary to the attainment of the principal objects referred to in *subsection (1)* and are not inconsistent with this Act or with any conditions or requirements imposed on the Company by the supervisory authority.

(3) The Company shall have power to do anything which appears to it to be requisite, advantageous or incidental to, or which appears to it to facilitate, either directly or indirectly, the performance by it of its functions as specified in this Act or in its memorandum of association.

Powers of Company.

13.—(1) The Company shall have power to borrow or raise money, subject to the approval of the supervisory authority.

(2) Subject to the approval of the supervisory authority, the Company may place monies paid into the fund or funds maintained by

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the Company in accordance with *section 19* on deposit or may invest such monies in securities in which trustees are authorised by law to invest trust funds. Pt.II S.13

14.—(1) The Company shall keep all proper and usual accounts of all monies paid into the fund or funds maintained by the Company in accordance with *section 19* and of all disbursements from such fund or funds including an income and expenditure account and a balance sheet. Accounts of Company and audits.

(2) The supervisory authority shall have power to request an audit or audits of the accounts of the Company from time to time.

15.—The Company may, if it reasonably considers it is appropriate to do so, having regard to its duties generally under this Act, perform any of its functions through or by any of its officers or employees or any other person duly authorised by the Company. Performance of functions.

16.—Section 182 (Removal of directors) of the Act of 1963 shall not apply to the Company. Non-application of section 182 (Removal of directors) of Act of 1963.

17.—The Minister may, with the consent of the Minister for Enterprise, Trade and Employment, prescribe bodies or persons to be members of the Company, or, where a body is an unincorporated body of persons, to nominate an individual or body corporate to be a member of the Company. Members of Company.

18.—(1) The articles of association of the Company shall provide that the appointment of directors shall be subject to this Act. Directors of Company.

(2) The number of directors of the Company, including the chairperson and deputy chairperson, shall be such number as shall be prescribed from time to time by the Minister, with the agreement of the Minister for Enterprise, Trade and Employment.

(3) The Minister, with the agreement of the Minister for Enterprise, Trade and Employment, may from time to time prescribe bodies which appear to the Minister to represent the financial services industry and each such body may nominate a director to be appointed by the Company.

(4) The Minister for Enterprise, Trade and Employment, with the agreement of the Minister, may from time to time prescribe bodies or individuals which appear to the Minister for Enterprise, Trade and Employment to represent the interests of the clients of investment firms and,

(a) in the case of bodies so prescribed, each such body may nominate a director to be appointed by the Company, and

(b) in the case of individuals so prescribed, the Company shall appoint each such individual to be a director of the Company.

(5) The Governor of the Bank shall nominate and appoint the chairperson and deputy chairperson of the Board.

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(6) The Minister may, with the agreement of the Minister for Enterprise, Trade and Employment, prescribe that a body (or its successors) prescribed in accordance with *subsection (3) or (4)* may nominate and appoint more than one director where it appears to the Minister to be in the interests of ensuring the equal representation of the financial services industry and of investors, provided that the number of directors to be nominated by bodies representing the financial services industry shall be equal to the number representing the interests of investors.

(7) The Governor of the Bank and each body or person referred to in *subsection (3)* may nominate and appoint one or more persons to be each an alternate director to the director or directors of the Company appointed by him or her.

(8) The directors of the Company may act notwithstanding one or more vacancies in their number.

Establishment of fund.

19.—(1) The Company shall establish and maintain a fund or funds out of which payments shall be made in accordance with this Act to clients of investment firms and may establish and maintain in respect of specified classes or categories of investment firms particular funds in accordance with this Act.

(2) A fund shall not be established by the Company unless it has been approved of by the supervisory authority.

(3) The supervisory authority shall not approve of the establishment of a fund unless it is satisfied that the approval is not liable to prejudice the operation of any other funds maintained by the Company or by an investor compensation scheme approved of under *section 25*.

(4) The supervisory authority may, following consultation with the Company, revoke the approval of the establishment of a fund or funds under *subsection (2)* where the supervisory authority considers that conditions have materially changed since the granting of the approval such that, if approval for the establishment of the fund were sought at that time, a different decision would be taken in relation to the approval.

(5) The supervisory authority may, when approving of a fund under *subsection (2)* or subsequently, impose conditions or requirements on the Company.

(6) Conditions or requirements imposed under *subsection (5)* may relate *inter alia* to the fund or funds maintained by the Company or to such other matters as the supervisory authority may consider appropriate.

(7) Where funds are credited by the Company to a fund established in respect of a particular class or category of investment firm, those funds shall be used exclusively for making payments to clients in accordance with *section 34* in respect of those investment firms and no other.

(8) Notwithstanding *subsection (7)*, where the Company, having consulted the supervisory authority, considers it appropriate to do so, the Company may make payments from a fund maintained to make payments in respect of a class or category of investment firm in order to meet its obligations under this Act in respect of other

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investment firms, subject to such payments being repaid from the assets of the fund or funds maintained by the Company to make payments under *section 34* in respect of such other investment firms, together with payment of interest on the amount of such payments at a rate of interest to be determined by the Company.

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20.—(1) The Bank may provide administrative services to the Company or may establish a subsidiary in accordance with *section 23* of the Central Bank Act, 1997, which may, among other things, provide those services.

Administrative services for Company.

(2) The expenses of the Bank or of a subsidiary of the Bank in providing administrative services to the Company, including the expenses of an administrator appointed in accordance with *section 33*, shall be met from the resources of the company.

21.—(1) This section applies to investment firms but does not apply to certified persons in respect of whom an investor compensation scheme has been approved of under *section 25*.

Contributions of investment firms.

(2) An authorised investment firm shall pay to the Company such contribution to the fund or funds maintained by the Company as the Company may specify from time to time.

(3) (a) The Company may specify different rates or amounts of contributions or different bases for the calculation of contributions for different classes or categories of investment firm.

(b) Notwithstanding the generality of *paragraph (a)*, the Company, when specifying rates or amounts of contributions or bases for the calculation of contributions for investment firms which are investment firms for the purposes of the Investment Services Directive, may take account of any money or investment instruments entrusted to such a firm, before or after the commencement of this Act, where such money or investment instruments were entrusted by the client in connection with the provision of investment business services which are investment business for the purposes of the Investor Compensation Directive.

(4) Where an investment firm does not comply with its obligations under this section, the investment firm shall, in addition to the payment of a sum to discharge its obligations under *subsection (2)*, be liable to pay interest to the Company on all or any part of a contribution which has not been paid by the date or dates specified by the Company at a rate of 1.25 per cent. per month (or part of a month), on and from the date on which the contribution becomes due or such other amount of interest as may be prescribed by the Minister under this section.

(5) Any sums due under this section shall be recoverable as a simple contract debt in any court of competent jurisdiction.

(6) (a) The supervisory authority may impose conditions or requirements on authorised investment firms in relation to its functions under this Act.

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(b) Without prejudice to the generality of *paragraph (a)*, the supervisory authority may impose conditions or requirements in relation to the provision of information which the supervisory authority requires to exercise its functions under this Act.

(c) An authorised investment firm may appeal to the Court against the imposition of any condition or requirement imposed under *paragraph (a)* and, on hearing an appeal under this section, the Court may confirm, vary or rescind any condition or requirement imposed on an authorised investment firm under this section.

Maintenance of funds.

22.—(1) Where the Company has specified that amounts standing to the credit of a fund maintained by the Company in accordance with *section 19* shall be used to make payments in accordance with this Act solely to clients of a class or classes or category or categories of investment firm specified by the Company, the contributions paid by such investment firms under *section 21(2)* shall stand to the credit of that fund.

(2) Subject to *subsection (3)*, the Company shall, having consulted the supervisory authority, decide—

(a) the contributions to be paid by authorised investment firms to the fund or funds maintained by the Company in accordance with *section 19(1)*, and

(b) the amount of the balance to be maintained by the Company in a fund or funds maintained by the Company under *section 19(1)*.

(3) In making a decision under *subsection (2)*, the Company—

(a) shall endeavour to ensure that—

(i) the Company is in a position to meet any reasonably foreseeable obligation under this Act,

(ii) the Company maintains a sufficient balance in all funds maintained by it which will enable it to meet such obligations, and

(b) shall have regard to—

(i) the amount standing to the credit of the fund or funds maintained by the Company,

(ii) the funding capacity of those authorised investment firms which are obliged to make contributions to those funds in accordance with this section, and

(iii) any other matter which the Company, or the Company on the advice of the supervisory authority, considers relevant.

Costs of administration.

23.—Notwithstanding *section 19*, the costs of administration and management of the Board and of the Company shall be defrayed from the resources of the Company, including contributions paid by investment firms in accordance with *section 21(2)* to the fund or funds maintained by the Company.

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24.—The Board shall establish and maintain procedures to investigate complaints against it by investment firms and by investors.

Pt.II
Procedures to investigate complaints.

25.—(1) The supervisory authority may, following an application being made to it by an approved professional body and following consultation with the Company, approve or refuse to approve of a proposal for the establishment of a compensation scheme to provide compensation in accordance with this Act for a specified category or categories of certified person.

Approval of investor compensation schemes.

(2) An approved professional body which has applied under *subsection (1)* shall be informed—

- (a) whether or not the approval has been granted, within six months of the date of receipt of the application for approval, or
- (b) where additional information in relation to the application for approval has been sought by the supervisory authority, within a period of six months after the receipt by the supervisory authority of the additional information, or the period of twelve months after the receipt of the application for approval, whichever is the sooner.

(3) The supervisory authority may impose conditions or requirements in relation to a compensation scheme for which approval has been sought under *subsection (1)* or which has been approved of under that subsection.

(4) Conditions or requirements imposed under *subsection (3)* may relate among other things to—

- (a) the terms and conditions under which investment firms may participate in an investor compensation scheme,
- (b) the amount of the contributions to be made by members of the compensation scheme, and
- (c) procedures for the enforcement of compliance by members of the compensation scheme with the obligations to which they are subject by virtue of being members of the compensation scheme.

(5) An application for approval under *subsection (1)* shall be in such form and contain such particulars as the supervisory authority shall specify from time to time.

(6) A proposed investor compensation scheme shall not be approved of by the supervisory authority unless the approved professional body applying to establish the scheme satisfies the supervisory authority—

- (a) that it will enable compensation to be paid to clients of investment firms in accordance with this Act,
- (b) that the rules of the proposed scheme contain sufficient provisions so as to enable it to operate in accordance with this Act and in accordance with any conditions or requirements, or both, as the supervisory authority may impose,

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- (c) as to the probity and competence of each of the directors and managers or other responsible persons of the proposed scheme,
- (d) that the funding arrangements to be put in place and the manner in which the proposed scheme is to be constituted are such that the scheme shall have reasonable provisions in place to provide for compensation for investors, and
- (e) that the operation of the scheme is not likely to prejudice the operation of any other investor compensation scheme approved by the supervisory authority or of the investor compensation arrangements established by the Company.

(7) Whenever the supervisory authority refuses to approve of a compensation scheme in accordance with this section, it shall serve notice on the persons proposing the compensation scheme stating that it refuses to approve of the compensation scheme and setting out the reasons for that refusal in the notice and the persons proposing the compensation scheme may, within 21 days of receipt of such notice, appeal to the Court against the decision.

(8) The supervisory authority may, at any time prior to the grant or refusal of approval, request further information from the approved professional body or may instruct an authorised officer to make such inquiries or carry out such investigation as may be necessary for the purpose of evaluating an application under this section.

(9) Any proposed amendment of or addition to, as appropriate, the memorandum of association or articles of association or rules of a company operating an investor compensation scheme approved under this section or of the rules of such a compensation scheme shall not be made without the consent in writing of the supervisory authority, and the supervisory authority may approve of, or refuse to approve of, such amendment or addition as it thinks fit.

(10) The supervisory authority may require changes to be made to the memorandum of association or articles of association of a company operating an investor compensation scheme under this section or to the rules under which such a compensation scheme operates.

Revocation of approval of compensation scheme.

26.—The supervisory authority may, following consultation with the Company, apply to the Court in a summary manner for an order revoking the approval of a compensation scheme under *section 25* where—

- (a) the supervisory authority considers that the compensation scheme has not complied with conditions or requirements imposed by the supervisory authority under *section 25*,
- or
- (b) conditions have materially changed since the granting of the approval such that, if an application for approval were made at the time of the application to the Court, a different decision would be taken in relation to the application for approval.

Failure by investment firms to comply with obligations.

27.—(1) The Company shall notify the supervisory authority where an investment firm which is not a member of a compensation scheme approved of by the supervisory authority under *section 25* fails to comply with the obligations imposed on it by and under this Act.

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(2) An approved professional body which has established a compensation scheme approved of by the supervisory authority under *section 25* shall notify the supervisory authority where it has failed to ensure compliance by an investment firm which is a member of the scheme with the obligations to which it is subject by virtue of its membership of that scheme. Pt.II S.27

(3) Where the supervisory authority has been informed in accordance with *subsection (1)* or *(2)* that an investment firm has failed to comply with obligations or where an investment firm has failed to comply with conditions or requirements imposed under *section 21*, the supervisory authority may give a direction in writing to the investment firm and to the directors and those responsible for the management of that investment firm requiring the investment firm to do either or both of the following:

- (a) to comply with such obligations, or with those conditions or requirements imposed under *section 21* including the payment of any outstanding sums owed by it to the Company or to the compensation scheme approved of under *section 25* by a date specified by the supervisory authority, or
- (b) to suspend for such period (not exceeding twelve months) as shall be specified in the direction any or all of the following:
 - (i) the carrying on of the business of an investment firm;
 - (ii) the making of payments to which *paragraph (a)* does not relate;
 - (iii) the acquisition or disposal of any assets or liabilities;
 - (iv) entering into transactions of any kind specified by the supervisory authority or entering into them except in specified circumstances or to a specified extent;
 - (v) soliciting business from persons of a kind specified by the supervisory authority or otherwise than from such persons;
 - (vi) carrying on business in a manner specified by the supervisory authority or otherwise than in such a manner.

(4) A direction under *subsection (3)* shall have effect from the date specified by the supervisory authority.

(5) The *Second Schedule* shall apply as respects a direction by the supervisory authority under this section.

28.—(1) Where the supervisory authority gives a direction under *section 27*, and, following a reasonable period, is satisfied that the said direction is not being complied with, it may apply to the Court in a summary manner for an order confirming the direction. Application to Court for confirmation of direction.

(2) The Court may, on an application being made under *subsection (1)*, hear evidence from creditors and the Court may make such interim or interlocutory order, if any, as it considers fit, in any application under this section.

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(3) While a direction made under *section 27* is in force, no winding-up proceedings in relation to the investment firm or, in the case of an investment firm which is constituted as an unincorporated body of persons, no proceedings for an order of dissolution, or, in the case of an investment firm which is constituted as a sole trader, no bankruptcy proceedings, may be commenced or resolution for winding-up passed in relation to the investment firm, and no receiver shall be appointed over the assets or over any part of the assets of the investment firm and such assets shall not be attached, sequestered or otherwise distrained except with the prior sanction of the Court.

(4) The Court may hear proceedings or part of proceedings under this section otherwise than in public.

(5) A creditor who is affected by a direction under *section 27(3)* may apply to the Court to vary or set aside that direction where it affects the interests of the creditor to a material degree.

(6) Subject to *subsection (7)*, where an investment firm fails to comply with a direction given under *section 27*, the supervisory authority shall—

- (a) in the case of an investment firm which is an authorised investment business firm for the purposes of the Act of 1995, apply to the Court for an order revoking the authorisation of the investment firm in accordance with section 16(2) of the Act of 1995 and, for these purposes, the failure of the investment firm to comply with its obligations under this Act shall constitute circumstances in which the supervisory authority may apply to the Court in summary manner for an order revoking the authorisation of the investment business firm in accordance with section 16(2) of the Act of 1995,
- (b) in the case of an investment firm which is an authorised member firm for the purposes of the Stock Exchange Act, 1995, apply to the Court for an order revoking the authorisation of the investment firm in accordance with section 24 of that Act and, for these purposes, the failure of the investment firm to comply with its obligations under this Act shall constitute circumstances in which the Bank may apply to the Court in summary manner for an order revoking the authorisation of the authorised member firm in accordance with section 24(2) of the Stock Exchange Act, 1995;
- (c) in the case of an investment firm which is a credit institution, the Bank shall amend the authorisation of the credit institution under Council Directive No. 77/780/EEC of 12 December 1977 and Council Directive No. 89/646/EEC of 15 December 1989 so that the authorisation of the credit institution no longer permits the provision of investment services listed in the Annex to the Investment Services Directive and shall so inform the credit institution immediately, or
- (d) in the case of an investment firm which is an insurance intermediary, inform the Company and the investment firm that the investment firm has failed to comply with its obligations under this Act.

(7) In the case of an investment firm which is subject to the Investor Compensation Directive, the supervisory authority shall give not less than twelve months notice to the investment firm of its intention to take action against the investment firm in accordance with *paragraph (a), (b) or (c) of subsection (6)* as appropriate. Pt.II S.28

29.—(1) Notwithstanding section 16 of the Central Bank Act, 1989, where the supervisory authority has revoked the authorisation of an investment business firm or, in the case of an investment firm which is an insurance intermediary, informed the Company that the investment firm has failed to comply with its obligations under this Act, the supervisory authority shall inform those product producers from whom the investment firm held a valid written appointment at that time that the investment firm has failed to comply with its obligations under this Act. Product producers.

(2) Product producers who have been informed by the supervisory authority in accordance with *subsection (1)* that an investment firm has failed to comply with its obligations under this Act shall, on being so informed, cancel the written appointments of the investment firm.

(3) It shall be an offence for a product producer who has been informed by the supervisory authority in accordance with *subsection (1)* that an investment firm has failed to comply with its obligations under this Act to accept any orders transmitted by the investment firm on behalf of a client or any moneys belonging to a client after it has been so informed except with the approval in writing of the supervisory authority.

(4) A product producer shall not give a written appointment to an investment firm unless, to the best of its knowledge and belief, having caused reasonable inquiry to be made, the investment firm is not an investment business firm the authorisation of which has been revoked under section 16 of the Act of 1995 without being subsequently re-instated.

(5) A product producer shall not give a written appointment to an investment firm which is an insurance intermediary, except with the approval in writing of the supervisory authority, unless, to the best of its knowledge and belief, having caused reasonable inquiry to be made, the investment firm is not an investment firm to which *section 28(6)(d)* applies, and notwithstanding section 16 of the Central Bank Act, 1989, the supervisory authority may give such approval in writing.

PART III

Payment of Compensation to Investors

30.—(1) In this Part—

Interpretation for
Part III.

“compensatable loss” means 90 per cent. of the amount of an investor’s net loss or 20,000 ECUs whichever is the lesser;

“net loss”, in relation to every client of an investment firm, means the amount of the liability of the investment firm in respect of—

- (a) money owed to or belonging to the client and held on behalf of the client by the investment firm in connection with the provision of investment business services by the investment firm, and

- (b) investment instruments, the value of the investment instruments being determined, where possible, by reference to their market value, belonging to the client and held, administered or managed on behalf of the client by the investment firm in connection with the provision of investment business services by the investment firm,

on the day of a determination made under *section 31(3)* or a ruling, as appropriate, which the investment firm is unable to discharge in accordance with the legal and contractual conditions applicable but shall not include—

- (i) any amount to which *subsection (2)* relates,
- (ii) any monies or investment instruments held or maintained by an investment firm on behalf of an excluded investor,
- (iii) money or investment instruments arising out of transactions in respect of which an offence has been committed under Part IV or section 57 or 58 of the Criminal Justice Act, 1994, or in respect of which there has been a criminal conviction for money laundering as defined in Article 1 of Council Directive No. 91/308/EEC of 10 June 1991⁽¹⁾ on prevention of the use of the financial system for the purpose of money laundering.

(2) In calculating the amount of a client's net loss—

- (a) there shall be deducted from the total liability of the investment firm to the client of the investment firm the amount of any liability of any person to that investment firm in respect of which a right of set-off against that net loss existed immediately before the determination by the supervisory authority under *section 31(3)* or ruling or in respect of which such a right would have existed had—

- (i) the money or investment instruments been repayable on demand, and

- (ii) such liability fallen due,

immediately before such determination or ruling;

- (b) no account shall be taken of any debt of the investment firm unless it has been proved;

- (c) no account shall be taken of—

- (i) money owed to or belonging to a client and held on behalf of the client by an investment firm in connection with the provision of investment services by the investment firm to the client and

- (ii) investment instruments belonging to a client and held, administered or managed on behalf of the client by the investment firm in connection with the provision of investment services to the client,

⁽¹⁾O.J. No. L166, 28.06.1991.

where the money or investment instruments were entrusted by the client to the investment firm at any time when the investment firm was not an authorised investment firm, unless the supervisory authority is satisfied that, at the time the money or investment instruments were so entrusted, the client did not know and could not reasonably be expected to have known that the investment firm was not an authorised investment firm;

(d) account shall be taken, in the case of an insurance intermediary, of the amount of an insurance policy premium paid by the client to the insurance intermediary but not remitted to an insurance undertaking or, where a client of an insurance intermediary has suffered financial loss arising from the failure of the insurance intermediary to place on behalf of the client insurance of a class specified in Annex 1 to the European Communities (Life Assurance) Framework Regulations, 1994 or Annex 1 to the European Communities (Non-Life Insurance) Framework Regulations, 1994, the amount of that financial loss.

(3) Without prejudice to *subsection (2)*,

(a) “net loss” includes money or investment instruments entrusted by a client to an investment firm, being an investment firm for the purposes of the Investor Compensation Directive, before or after the commencement of this Act, where such money or investment instruments were entrusted by the client in connection with the provision of investment business services which are investment business for the purposes of the Investor Compensation Directive;

(b) “net loss” includes, in the case of an investment firm which is not an investment firm for the purposes of the Investor Compensation Directive, money or investment instruments entrusted by a client to the investment firm after the commencement of this Act.

(4) Proof of debt for the purposes of *subsection (2)(b)* may be furnished by way of detailed statement of account, affidavit of debt or any prescribed means.

31.—(1) Where it appears to the supervisory authority that an investment firm is unable for the time being, for reasons which are directly related to its financial circumstances, to meet its obligations arising from claims by clients and to have no reasonably foreseeable opportunity of being able to do so, the supervisory authority shall serve notice on the investment firm that it proposes to make a determination to that effect.

Determination that an investment firm cannot meet its obligations.

(2) An investment firm which has been informed by the supervisory authority that the supervisory authority proposes to make a determination in accordance with *subsection (1)* may, within three weeks, appeal to the Court against the proposal of the supervisory authority and the Court may allow or disallow the appeal.

(3) Where there has been no appeal or the Court has disallowed the appeal under *subsection (2)*, the supervisory authority may make a determination within the meaning of *subsection (1)*.

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(4) In making a determination in accordance with *subsection (3)*, the supervisory authority shall have regard to—

- (a) any report of an authorised officer,
- (b) any report of an authorised officer which indicates that a director, manager or shareholder of the investment firm has been unable, having been given reasonable notice to do so, to produce evidence of the existence of the assets and liabilities of the investment firm, or
- (c) any other information in the possession of the supervisory authority.

Applications for compensation.

32.—(1) On being informed by the supervisory authority that—

- (a) a determination has been made under *section 31(3)*, or
- (b) a court has made a ruling,

the Company or, where applicable in the case of an investment firm which is or was a member of a compensation scheme approved of under *section 25*, the person responsible for administering that compensation scheme, shall—

- (i) where possible, inform clients of the investment firm concerned by ordinary pre-paid post of the determination or ruling and invite applications for payments under *section 34*, by a date which shall not be less than five months from the date of the determination or ruling, and
- (ii) publish notices in any of the newspapers circulating in the State or elsewhere or in the *Iris Oifigiúil* giving notice of the determination or ruling and inviting applications for payments under *section 34*, by a date which shall not be less than five months from the date of the determination or ruling.

(2) Where the supervisory authority is satisfied that an investor was unable for good reason to make an application for a payment under *section 34* within the period of time stipulated by the Company or compensation scheme, the supervisory authority shall direct the Company or compensation scheme to treat the application as if it were made within the period of time stipulated.

(3) The Company and a compensation scheme approved of under *section 25* shall not be liable to make a payment under *section 34* where an application for payment is not made within the period of time stipulated by the Company or compensation scheme, where the supervisory authority has not directed the Company or compensation scheme to treat the application as if it were made within the period of time stipulated in accordance with the provisions of *subsection (2)*.

(4) Nothing in this section shall prohibit an individual from applying for payment under *section 34*.

Appointment of an administrator.

33.—(1) The supervisory authority may appoint an administrator to an investment firm in respect of which a determination has been made in accordance with *section 31(3)* or in respect of which a court has made a ruling.

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(2) An administrator appointed by the supervisory authority to an investment firm under *subsection (1)* shall have the powers of an authorised officer under the Act of 1995 in relation to the investment firm and the powers available to an authorised officer under that Act shall apply in relation to investment firms accordingly. Pt.III S.33

(3) The administrator shall deliver to the Company or to the compensation scheme approved of under *section 25*, of which the investment firm is or was a member, as appropriate, and to the supervisory authority, as soon as practicable, the names of eligible investors and a statement of the net loss of each such investor and a statement of the compensatable loss of each such investor.

(4) An administrator may apply to the Court to determine any question arising in relation to his or her functions under this Act.

34.—(1) In the case of an investment firm in respect of which the supervisory authority has made a determination under *section 31* or a court has made a ruling, where the investment firm was not a member of a compensation scheme approved of under *section 25* at the time of the determination or ruling, the Company shall pay to each eligible investor an amount equal to the compensatable loss of that eligible investor. Payment of compensation.

(2) In the case of an investment firm in respect of which the supervisory authority has made a determination under *section 31* or a court has made a ruling, where the investment firm was a member of a compensation scheme approved of under *section 25* at the time of the determination or ruling, that compensation scheme shall pay to each eligible investor an amount equal to the compensatable loss of that eligible investor.

(3) Until the 31st day of December, 1999, where—

- (a) compensatable loss arises from the provision of investment business services by an authorised investment firm in another Member State, and
- (b) the investment business services provided are investment business for the purposes of the Investor Compensation Directive,

the Company shall pay to the eligible investor an amount which is equal to the lesser of—

- (i) that compensatable loss, or
- (ii) the amount to which the eligible investor would be entitled in accordance with Article 7 of the Investor Compensation Directive if the investment firm was an investment firm authorised in accordance with the Investment Services Directive in that other Member State or a credit institution authorised in accordance with Council Directive 77/780/EEC as amended by Council Directive 89/646/EEC in that other Member State.

(4) Where the Company has made a payment under *subsection (1)* and all or part of such payment relates to net losses of a client arising from investment business services provided by the investment firm while it was a member of a compensation scheme approved of under *section 25*, the relevant compensation scheme shall pay to the Company an amount which bears to the compensatable loss of the

client the same proportion as the client's net loss arising while the investment firm was a member of the compensation scheme bears to the client's net loss.

(5) Where a compensation scheme approved of under *section 25* has made a payment under *subsection (2)* and all or part of such payment relates to net losses of a client arising from investment business services provided by the investment firm while it was not a member of a compensation scheme approved of under *section 25*, the Company shall pay to the relevant compensation scheme an amount which bears to the compensatable loss of the client the same proportion as the client's net loss arising while the investment firm was not a member of the compensation scheme approved of under *section 25* bears to the client's net loss.

(6) Where an investment firm has paid contributions to different funds maintained by the Company by virtue of a change in the class or category of investment firm to which the investment firm belonged, and net losses of clients of the investment firm arose while the investment firm belonged to such different classes or categories, the Company shall endeavour to ensure that payments made under this section shall be made from the fund maintained in respect of the appropriate class or category of investment firm.

(7) Where a dispute or difference arises in respect of payments under *subsection (4), (5) or (6)*, that dispute or difference shall be resolved under regulations made by the Minister on the advice of the supervisory authority.

Further provisions relating to payment of compensation.

35.—(1) Subject to *subsections (2) and (3)*, the Company or a compensation scheme approved of under *section 25* shall make payments under *section 34* in respect of compensatable losses of which it has been informed by the administrator under *section 33(3)* as soon as practicable and at the latest within three months of the date on which the administrator advises the Company or compensation scheme of the amount of an eligible investor's compensatable loss.

(2) (a) Subject to the approval of the supervisory authority and to such conditions or requirements as may be specified by the supervisory authority, the Company or a compensation scheme approved of under *section 25* may, in exceptional circumstances, postpone the making of a payment under *section 34*.

(b) The supervisory authority, when giving approval or prescribing conditions or requirements for the purposes of *paragraph (a)*, shall have regard to the requirements of Article 9 of the Investor Compensation Directive.

(3) Notwithstanding the time limits provided for in *subsections (1) and (2)*, where an eligible investor has been charged with an offence under Part IV or section 57 or 58 of the Criminal Justice Act, 1994, or otherwise arising out of or in relation to money laundering as defined in Article 1 of Council Directive No. 91/308/EEC of 10 June 1991, the supervisory authority may direct the Company or a compensation scheme approved under *section 25*, as appropriate, to suspend any payment to the eligible investor pending the judgment of the court concerned in respect of the charge or charges.

(4) Where the Company or a compensation scheme approved of under *section 25* has made a payment under *section 34* to an eligible investor, proof of those payments shall be given to the Company or

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the investor compensation scheme by the person to whom the monies were so paid. Pt.III S.35

(5) Where the Company or an investor compensation scheme approved of under *section 25* has made a payment under *section 34* to an eligible investor, the Company or compensation scheme shall be subrogated to the rights of that eligible investor in liquidation proceedings against the investment firm for an amount equal to the amount paid by the Company or the compensation scheme under *section 34* to that eligible investor.

(6) Where the Company or an investor compensation scheme approved of under *section 25* has made a payment under *section 34* to an eligible investor, the Company or compensation scheme shall be subrogated to the rights of that eligible investor in respect of any payments made under a bond held by the investment firm in accordance with section 51 of the Act of 1995 or section 47 of the Act of 1989 and in respect of any payments made under a policy of professional indemnity insurance held by the investment firm in respect of the eligible investor's net loss.

(7) A client of an investment firm may appeal to the Court against any refusal to make a payment under *section 34* or against the amount of any payment made under that section.

(8) Where a claim for payment under *section 34* arises in respect of monies belonging to an investor and held by an investment firm which is a credit institution in connection with investment business such that a claim for payment could also be made under the European Communities (Deposit Guarantee Schemes) Regulations, 1995 (S.I. No. 168 of 1995), in respect of those monies, the supervisory authority shall specify that the client is either—

- (a) an excluded depositor for the purposes of the European Communities (Deposit Guarantee Schemes) Regulations, 1995, or
- (b) an excluded investor for the purposes of this Act.

36.—(1) In this section—

Provisions relating to restricted intermediaries.

“receipted monies” means the value of client money or investment instruments forming part of the net loss of an eligible investor which were entrusted by the eligible investor to a restricted intermediary for transmission to an identifiable product producer from which the restricted intermediary held a valid written appointment at the time the money or investment instruments were so entrusted;

“restricted intermediary” means an investment firm which is or was—

- (a) a restricted activity investment product intermediary, or
- (b) an insurance intermediary which is not an authorised investment business firm (unless the investment firm is a restricted activity investment product intermediary),

or both and is not a member of a compensation scheme approved of under *section 25*.

(2) A product producer from which a restricted intermediary held a valid written appointment shall pay to the Company, in respect of

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each eligible investor to whom the Company is liable to make a payment under *section 34* in respect of that restricted intermediary, an amount which bears to the compensatable loss of each such eligible investor the same proportion as the receipted monies of the eligible investor intended for transmission to that product producer bear to the net loss of the eligible investor.

(3) Product producers shall be subrogated to the Company in respect of any claim of the Company against an investment firm in respect of monies paid to the Company by product producers under this section.

(4) Nothing in any contract shall limit or vary the liability of a product producer under this section.

PART IV

Miscellaneous

Joint accounts and trustees.

37.—(1) Where—

- (a) an eligible investor is a trustee making an application for payment under *section 34* on behalf of a trust, and
- (b) any beneficiary of the trust concerned is beneficially entitled against the trustees to any identifiable part of the amount so claimed, either absolutely or jointly with a fixed number of other beneficiaries,

then, the net loss in respect of which the trustee makes an application for payment under *section 34* shall be treated, but only for the purpose of ascertaining a compensatable loss—

- (i) where the beneficiary is entitled absolutely, as if legal ownership of the money and investment instruments which comprise the net loss had passed to the beneficiary,
- (ii) where the beneficiary is entitled jointly with a number of other beneficiaries, as if the money and investment instruments which comprise the net loss were joint investment business maintained by the beneficiaries and legal and joint ownership had passed to the beneficiaries concerned.

(2) Where persons (being persons other than trustees or persons to whom *subsection (1)* applies) having, or treated by virtue of *subsection (1)* as having, joint ownership of money or investment instruments comprising a net loss are entitled to the money or investment instruments by virtue of their joint ownership of the monies or investment instruments, then, they shall, in the absence of special terms and conditions, each be treated, but only for the purpose of ascertaining a compensatable loss, as having a separate investment equal to the amount that would be produced by dividing equally the money and the value of the investment instruments concerned among the number of persons having joint ownership.

(3) Where two or more persons are entitled to money or investment instruments received, held, controlled or paid by an investment firm as members of a partnership, association or grouping of a similar nature, without legal personality (whether or not in equal shares), such money or investment instruments shall be treated as a single investment.

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(4) The supervisory authority and, where necessary for the purposes of ascertaining a net loss, the administrator concerned may require any person claiming payment under *section 34* to supply sufficient information to enable a decision to be made as to whether this section applies to such money or investment instruments. Pt.IV S.37

(5) Where, in a case to which *subsection (1)* or *(2)* applies, a client's claim for payment under *section 34* also relates to other money or investment instruments, that other money or investment instruments shall, for the purpose of ascertaining a net loss, be aggregated with any amount of money or investment instruments maintained by that person for the purpose of either or both *subsections (1)* and *(2)* and the compensatable loss so ascertained shall be divided and duly paid to the person concerned and either or both (as the circumstances may require) the trustees concerned and the said person jointly with others, in the same proportion or proportions as the amounts so aggregated bear to each other.

38.—(1) Except where *subsection (2)* applies, investment firms shall make available to actual and intending investors such information concerning investor compensation as may be specified by the supervisory authority in a manner and form specified by the supervisory authority. Information to investors and advertising.

(2) Where a branch of an investment firm authorised or formerly authorised by the supervisory authority is established in another Member State in accordance with the provisions of the Investment Services Directive, the information provided for in *subsection (1)* shall be made available in the prescribed manner in the official language or languages of the Member State in which the branch is established.

(3) Except with the prior written consent of the supervisory authority, an investment firm shall not advertise or cause to be advertised the fact (however expressed) that monies or investment instruments placed with the investment firm are protected by or through an investor compensation fund.

39.—(1) This section applies where an investment firm has established a branch in another Member State in accordance with the provisions of Article 17 of the Investment Services Directive or in accordance with the provisions of Article 18 of Council Directive No. 89/646/EEC of 15 December, 1989 and has under the provisions of Article 7 of the Investor Compensation Directive joined an investor compensation scheme within the territory of that Member State. Investment firms joining compensation schemes in other Member States.

(2) Where the supervisory authority has been notified that a branch established in another Member State which has joined an investor compensation scheme for the purposes of *subsection (1)* has not complied with the obligations imposed on it as a consequence of its membership of that investor compensation scheme, the supervisory authority shall, in collaboration with that investor compensation scheme, take all appropriate measures to ensure that those obligations are complied with.

(3) *Sections 27* and *28* shall apply to an investment firm to which *subsection (2)* applies as if the obligations to which the investment firm is subject as a consequence of its membership of a compensation scheme in another Member State in accordance with Article 7 of the Investor Compensation Directive were obligations imposed on the investment firm by or under this Act.

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Membership of compensation scheme by investment firm authorised in another Member State.

40.—(1) In this section—

“client” means an investor who has, in connection with investment business, entrusted money or investment instruments to a branch established in the State by an investment firm in accordance with the provisions of Article 17 of the Investment Services Directive or in accordance with the provisions of Article 18 of Council Directive No. 89/646/EEC;

“competent authority”, in relation to an investment firm, means a competent authority for the purposes of the Investor Compensation Directive in another Member State;

“eligible investor” means a client of an investment firm who is entitled to compensation in accordance with Article 2 and the first paragraph of Article 7.1 of the Investor Compensation Directive and who has made an application for compensation within the meaning of Article 2 of that Directive;

“investment business” has the same meaning as it has in the Investor Compensation Directive;

“investment firm” means an investment firm within the meaning of *subsection (2)*;

“investor” has the same meaning as it has in the Investor Compensation Directive.

(2) An investment firm (within the meaning of the Investment Services Directive) which is authorised in another Member State for the purposes of that Directive or of Council Directive No. 89/646/EEC of 15 December 1989 which has established a branch in the State in accordance with the provisions of Article 17 of the Investment Services Directive and which wishes to exercise the option of participating in investor compensation arrangements in the State in accordance with Article 7.1 of the Investor Compensation Directive, shall notify the Company accordingly and shall then be and become an investment firm for the purposes of this Act.

(3) An investment firm shall supply all relevant information which the Company may request and shall pay a contribution to a fund maintained by the Company in accordance with *subsection (4)*.

(4) The contribution to be paid by an investment firm to the Company in accordance with *section 21* shall be determined by the Company, with the agreement of the supervisory authority, on an annual basis, having regard to Article 7 and the guiding principles set out in Annex II of the Investor Compensation Directive.

(5) The contribution to be paid by an investment firm to the Company in accordance with *section 21* shall stand to the credit of the fund maintained by the Company which, in the view of the supervisory authority, most closely meets the requirements of the fourth paragraph of Article 7.1 of the Investor Compensation Directive.

(6) *Sections 27, 28, 31, 32 and 33* shall not apply to an investment firm within the meaning of this section.

(7) The amount payable under *section 34* to an eligible investor in the case of an investment firm shall be an amount equal to the amount by which the eligible investor’s compensatable loss relating to money or investment instruments entrusted by the eligible investor to a branch of the investment firm in connection with investment

business exceeds the amount of compensation payable to the eligible investor in accordance with Article 2 and the first paragraph of Article 7.1 of the Investor Compensation Directive. Pt.IV S.40

(8) The Company shall make payment under *subsection (8)* as soon as practicable and at the latest within three months of the date on which the Company is informed by the competent authority of the amount of compensation payable to the eligible investor in accordance with Articles 2 and 7.1, first paragraph, of the Investor Compensation Directive, unless the competent authority agrees that payment may be made later than three months after that date.

(9) Where an investment firm has not complied with its obligations under this Act, the Company shall inform the competent authority and the supervisory authority and may, with the consent of the competent authority, notify the investment firm that, with effect from a specified date, being a date not less than 12 months after the date of the notification, the Company shall not be liable to make payments under *section 34* to clients of the investment firm in respect of money or investment instruments entrusted by clients to the investment firm after the date specified by the Company unless the investment firm has complied in full with its obligations under this Act within 12 months of the date of the notification.

(10) If an investment firm does not comply fully with its obligations under this Act following a notification by the Company under *subsection (9)*, the Company shall not, with effect from the date specified by the Company in accordance with *subsection (9)*, be liable to make payments in accordance with *section 34* to clients of the investment firm in respect of money or investment instruments entrusted by clients to the investment firm in connection with investment business after the date specified by the Company.

(11) Where an investment firm has not complied in full with its obligations under this Act within 12 months of the date of the notification referred to in *subsection (9)*, the Company shall, on the expiry of that period of 12 months, inform the investment firm and clients of the investment firm that the Company shall not be liable to make payments under *section 34* to clients of the investment firm in respect of money or investment instruments entrusted by clients to the investment firm in connection with investment business after the date specified by the Company in accordance with *subsection (9)*.

(12) Where an investment firm notifies the Company that it no longer wishes to exercise the option of participating in investor compensation arrangements in the State in accordance with Article 7.1 of the Investor Compensation Directive, the Company shall not, with effect from the date of such notification, be liable to make payments under *section 34* to clients of the investment firm in respect of money or investment instruments entrusted by clients to the investment firm in connection with investment business after the date of such notification.

41.—(1) The supervisory authority may require authorised investment firms to effect a policy of professional indemnity insurance in a form specified by the supervisory authority (and different forms may be specified for different classes of authorised investment firm), indemnifying the authorised investment firm up to such sum, in such manner, in respect of such matters and valid for such minimum period as the supervisory authority may specify from time to time.

Compulsory insurance of authorised investment firms.

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(2) When the supervisory authority requires an authorised investment firm to effect a policy of professional indemnity insurance it shall have regard to any existing statutory requirements for a particular category or categories of investment firm to hold professional indemnity insurance.

Exemption from liability for damages.

42.—(1) The supervisory authority or any employee or officer of the supervisory authority or a subsidiary established by the Bank for the purposes of *section 20* or any employee or officer of the subsidiary or an authorised officer for the purposes of *section 9* or any member of the Board of the supervisory authority or any member of the Board of the subsidiary shall not be liable in damages for anything done or omitted in the discharge or purported discharge of any of its functions under this Act unless it is shown that the act or omission was in bad faith.

(2) The Board of the Company or any employee or officer of the Company shall not be liable in damages for anything done or omitted in the discharge or purported discharge of any of its functions under this Act unless it is shown that the act or omission was in bad faith.

(3) Without prejudice to the generality of *subsections (1) and (2)*, the approval, supervision, regulation or revocation of approval of a fund for the purposes of *section 19* or an investor compensation scheme under this Act shall not constitute a warranty or other claim as to the solvency or performance of the fund or any investment firm which has contributed to the fund or investor compensation scheme or any of its members and the State and the supervisory authority and the Company shall not be liable in respect of any loss or losses incurred through the insolvency, default or performance of the fund or investment firm or investor compensation scheme or any of its members.

Offences and penalties.

43.—(1) A person who is guilty of an offence under *section 29(3)* or subsection *(4), (7) or (8)* of this section shall be liable—

(a) on summary conviction to a fine not exceeding £1,500 or, at the discretion of the court in the case of an individual, to imprisonment for a term not exceeding 12 months, or both, or

(b) on conviction on indictment, to a fine not exceeding £1,000,000 or, at the discretion of the court in the case of an individual, to imprisonment for a term not exceeding 10 years, or both.

(2) Summary proceedings in relation to an offence under this Act may be brought and prosecuted by the Director of Public Prosecutions or by the supervisory authority.

(3) Notwithstanding *section 10(4)* of the Petty Sessions (Ireland) Act, 1851, summary proceedings for any offence under this Act may be instituted within two years from the date of the discovery of the offence.

(4) Where an offence under this Act is committed by a body corporate or by an unincorporated body or person or by a sole trader and is proved to have been committed with the consent, connivance or approval of, or to be attributable to, or to have been facilitated by any neglect on the part of, any officer or employee of that entity or person purporting to act on behalf of that entity, that officer or

employee shall be guilty of an offence and shall be liable to be proceeded against and punished as if that officer or employee were guilty of the first-mentioned offence, provided, however, that an officer or employee shall not be sentenced to imprisonment for such an offence unless in the opinion of the court the offence was committed wilfully.

(5) (a) Where, on an application made in a summary manner by a supervisory authority, the Court is of the opinion that there has occurred or is occurring—

(i) a contravention of this Act, or

(ii) a failure to comply with a condition or requirement imposed by the supervisory authority in accordance with this Act or with a direction issued by the supervisory authority under *section 27*,

the Court may by order prohibit the continuance of the contravention or failure by the person or persons concerned.

(b) The Court when considering the application may make such interim or interlocutory order as it considers appropriate.

(c) This section is without prejudice to the statutory functions of the supervisory authority.

(d) Where the Court is satisfied, because of the nature or circumstances of the case or otherwise in the interests of justice, that it is desirable, the whole or any part of proceedings under this section may be held otherwise than in public.

(6) If the contravention, breach or failure in respect of which a person was convicted under *subsection (1)* or *(4)* is continued after conviction, the officer or employee shall be guilty of a further offence on every day on which the contravention, breach or failure continues and for each such offence the officer or employee shall be liable on summary conviction to a fine not exceeding £1,500 or on conviction on indictment to a fine not exceeding £5,000.

(7) A person who, in purported compliance with any provision of this Act or any regulation made thereunder—

(a) provides an answer or explanation, makes a statement or produces, lodges or delivers any return, report, certificate, balance sheet or other document false in a material particular, knowing it to be false, or

(b) recklessly provides an answer or explanation, makes a statement or produces, lodges or delivers any return, report, certificate, balance sheet or other document false in a material particular, or

(c) knowingly withholds or omits information,

shall be guilty of an offence.

(8) (a) An officer of a product producer or of an investment firm who destroys, mutilates or falsifies, or is privy to the destruction, mutilation or falsification of any record or

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document affecting or relating to the property or affairs of the product producer or any investment firm, or makes or is privy to the making of a false entry therein, shall, unless the officer proves that he or she had no intention not to comply with the law, be guilty of an offence.

- (b) Any person mentioned in *paragraph (a)* who fraudulently disposes of, alters or makes an omission in any such record or document, or who is privy to the disposal of, altering or making of an omission in any such record or document shall be guilty of an offence.

(9) Where there is a contravention of this Act applicable to a partnership each partner may be charged alone or jointly with any one or more of the partners with any offence in respect of such contravention and on conviction shall be liable for the penalty imposed.

(10) In any proceedings for an offence under this Act applicable to partnerships it shall be a defence for a partner charged to prove—

- (a) that the commission of the offence was due to a mistake or the reliance on information supplied to the partner or to the act or default of another person, an accident or some other cause beyond his or her control, and
- (b) that the partner took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or herself or any other person under his or her control.

(11) Nothing in this Act or any other enactment, and no rule of law, shall preclude the prosecution of a partner for an offence of which another partner or any other person has been previously charged or convicted.

Amendment of section 2(7) of Act of 1995.

44—Section 2 of the Act of 1995 is hereby amended by the substitution for subsection (7) of the following:

“(7) Notwithstanding subsection (1) of this section, or any provision of Part VII of this Act, a solicitor in respect of whom a practising certificate (within the meaning of the Solicitors Acts, 1954 to 1994) is in force shall not be an investment business firm by virtue of the provision in a manner incidental to the provision of legal services of investment business services or investment advice, where—

- (a) he does not hold himself out as being an investment business firm, and
- (b) when acting as an investment product intermediary he does not hold an appointment in writing other than from—
- (i) an investment firm authorised in accordance with Directive 93/22/EEC of 10 May 1993⁽¹⁾ by a competent authority of another Member State, or an authorised investment business firm (not

⁽¹⁾O.J. No. L141, 11/6/93.

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being a restricted activity investment product-intermediary or a certified person), or a member firm within the meaning of the Stock Exchange Act, 1995, or Pt.IV S.44

- (ii) a credit institution authorised in accordance with Directives 77/780/EEC of 12 December, 1977⁽¹⁾ and 89/646/EEC of 15 December, 1989⁽²⁾, or
- (iii) a manager of a collective investment undertaking authorised to market units in collective investments to the public,

which is situate in the State or the relevant branch of which is situate in the State.”.

45.—Section 2 of the Act of 1994 is hereby amended by—

Amendment of section 2 of Act of 1994.

(a) the insertion of the following definitions:

“‘authorised investment business firm’ has the meaning assigned to it in *section 2* of the *Investor Compensation Act, 1998*;”;

“‘investment business services’ has the meaning assigned to it in *section 2* of the *Investor Compensation Act, 1998*;” and

(b) the substitution of the following definition for the definition of legal services:

“‘legal services’ means services of a legal or financial nature provided by a solicitor arising from that solicitor’s practice as a solicitor, and includes any part of such services; and, for the avoidance of doubt, includes any investment business services provided by a solicitor who is not an authorised investment business firm;”.

46.—The Act of 1994 is hereby amended by the insertion of the following section after section 30:

Insertion of new section in Act of 1994.

“30A.—(1) Where it appears to the Society, after consultation with the Minister, that it is necessary to do so for the purpose of ensuring the fair and reasonable implementation in the public interest of the provisions of section 26 of the Act of 1994 and the provisions of sections 21 and 22 (as substituted by the Act of 1994) of the Act of 1960 (or regulations made by the Society relating thereto), the Society may make regulations, with the consent of the Minister, providing that a solicitor who—

- (a) is an authorised investment business firm, or
- (b) is, or who holds himself out as being, an insurance intermediary,

shall, as a condition of being issued with a practising certificate, effect and maintain, in respect of—

⁽¹⁾O.J. No. L.322, 17/12/77.

⁽²⁾O.J. No. L.386, 30/12/89.

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- (i) the provision of investment business services as an authorised investment business firm, or
- (ii) activities as an insurance intermediary,

such form or forms of indemnity against losses suffered by a client in consequence of the default, howsoever arising, of the solicitor or any employee, agent or independent contractor of the solicitor as shall be equivalent to the indemnity that would be provided to a client of a solicitor in the provision of legal services by means of the Compensation Fund or by means of the indemnity cover maintained pursuant to section 26 of this Act (or regulations made by the Society relating thereto).

(2) The Society shall not amend regulations made pursuant to subsection (1) of this section without the consent of the Minister.

(3) The Minister may—

- (a) direct the Society to make regulations under subsection (1) of this section or to amend regulations made under subsection (1) or (2) of this section;
- (b) by regulations vary upwards the maximum amount of indemnity against losses specified in regulations made by the Society pursuant to subsection (1) or (2) of this section having regard to changes in the value of money generally in the State since the said maximum amount was first specified.

(4) In this section, ‘insurance intermediary’ has the meaning assigned to it in section 2 of the *Investor Compensation Act, 1998*.”

Provisions relating to solicitors.

47.—(1) (a) A solicitor in respect of whom a practising certificate (within the meaning of the Solicitors Acts, 1954 to 1994) is in force shall be an investment business firm—

- (i) where the solicitor provides investment business services or investment advice in a manner which is not incidental to the provision of legal services, or
- (ii) where the solicitor holds himself or herself out as being an investment business firm, or
- (iii) where, when acting as an investment product intermediary in a manner incidental to the provision of legal services, the solicitor holds an appointment in writing other than from—

(I) an investment firm authorised in accordance with the Investment Services Directive by a competent authority of another Member State, or an authorised investment business firm (not being a restricted activity investment product intermediary or a certified person), or a member firm within the meaning of the Stock Exchange Act, 1995, or

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(II) a credit institution authorised in accordance with Directives 77/780/EEC of 12 December, 1977, and 89/646/EEC of 15 December, 1989, or

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(III) a manager of a collective investment undertaking authorised to market units in collective investments to the public,

which is situate in the State or the relevant branch of which is situate in the State,

and shall be required to be authorised as an authorised investment business firm pursuant to the provisions of the Act of 1995.

(b) A solicitor, in respect of whom a practising certificate (within the meaning of the Solicitors Acts, 1954 to 1994) is in force, who is an insurance intermediary or who holds himself out to be an insurance intermediary shall be an investment firm for the purposes of this Act and shall inform the supervisory authority and the Company that he or she is an investment firm for the purposes of this Act.

(2) (a) Section 26 of the Act of 1994 and sections 21 and 22 (as substituted by the Act of 1994) of the Act of 1960 (or regulations made by the Society relating thereto) shall not apply to a solicitor in respect of whom a practising certificate (within the meaning of the Solicitors Acts, 1954 to 1994) is in force in relation to the provision by the solicitor of investment business services (whether or not including the activities of an insurance intermediary) as an authorised investment business firm, or in relation to a solicitor who is an insurance intermediary and who has informed the supervisory authority and the Company pursuant to *subsection (1)(b)* that he or she is an investment firm.

(b) No client of a solicitor in respect of whom a practising certificate (within the meaning of the Solicitors Acts, 1954 to 1994) is in force and who is an authorised investment business firm, or who is an insurance intermediary and has informed the supervisory authority and the Company pursuant to *subsection (1)(b)* that he or she is an investment firm, shall, in respect of any loss suffered in consequence of the default, howsoever arising, of the solicitor, or any employee, agent or independent contractor of the solicitor in relation to the provision of investment business services as an authorised investment business firm or in relation to the solicitor acting as an insurance intermediary, be entitled to make a claim against the Compensation Fund (within the meaning of the Act of 1994) or against the indemnity cover maintained pursuant to section 26 of the Act of 1994 and regulations made thereunder.

(c) Nothing in this section shall otherwise affect the obligations of a solicitor in respect of whom a practising certificate (within the meaning of the Solicitors Acts, 1954 to 1994) is in force or the rights of a client, arising under

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section 26 of the Act of 1994 or sections 21 and 22 (as substituted by the Act of 1994) of the Solicitors (Amendment) Act, 1960 (or regulations made by the Society relating thereto), in respect of the provision by the solicitor of legal services.

PART V

Miscellaneous Amendments

Amendment of section 16 of Central Bank Act, 1989.

48.—The Central Bank Act, 1989, is hereby amended in section 16(2) by the insertion of the following paragraph after paragraph (i):

“(i) made to the Investor Compensation Company Limited or to a subsidiary established by the Bank for the purposes of providing administrative services to the Investor Compensation Company Limited,”.

Amendment of section 44 of Act of 1989.

49.—Section 44 of the Act of 1989 is hereby amended by the insertion after subsection (2) of the following subsection:

“(3) A person shall not act as or hold himself out to be an insurance broker unless he complies with the provisions of the *Investor Compensation Act, 1998*.”.

Amendment of section 46 of Act of 1989.

50.—Section 46 of the Act of 1989 is hereby amended in subsection (1) by the substitution for paragraph (b) of the following:

“(b) a person who complies with the requirements of this Act but is not a member of a recognised representative body,

and the person is in compliance with the *Investor Compensation Act, 1998*.”.

Amendment of section 49 of Act of 1989.

51.—Section 49 of the Act of 1989 is hereby amended in subsection (1) by the insertion after paragraph (a) of the following paragraph:

“(aa) he complies with the *Investor Compensation Act, 1998*,”.

Amendment of section 2 of Act of 1995.

52.—Section 2 of the Act of 1995 is hereby amended—

(a) in subsection (1)—

(i) in the definition of “investment advice” by the insertion in paragraph (d) after “and the purchase” of “or sale” and the paragraph as so amended is set out in the Table to this paragraph.

TABLE

(d) advice to undertakings on capital structure, industrial strategy and related matters and advice relating to mergers and the purchase or sale of undertakings.

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- (ii) in the definition of “investment advice” in paragraph Pt.V S.52
(e) by the substitution for “is a necessary part of” of
“arises from” and the paragraph as so amended is
set out in the Table to this subparagraph.

TABLE

(e) advice given by persons in the course of the carrying on of any profession or business not otherwise constituting the business of an investment business firm, where the giving of such advice arises from other advice or services given in the course of carrying on that profession or business, and where the giving of investment advice is not remunerated or rewarded separately from such other advice or services;

- (iii) in the definition of “investment business firm” by the insertion after “credit institution” of “or member firm (within the meaning of the Stock Exchange Act, 1995)” in each place it occurs and the definition as so amended is set out in the Table to this subparagraph.

TABLE

“investment business firm” means any person, other than a member firm within the meaning of the Stock Exchange Act, 1995, who provides one or more investment business services or investment advice to third parties on a professional basis and for this purpose where an individual provides an investment business service and where that service is carried on solely for the account of and under the full and unconditional responsibility of an investment business firm or an insurance undertaking or a credit institution or member firm (within the meaning of the Stock Exchange Act, 1995) that activity shall be regarded as the activity of the investment business firm, insurance undertaking or credit institution or member firm (within the meaning of the Stock Exchange Act, 1995) itself;

- (iv) in the definition of “investment instruments”—
- (I) in paragraph (a) by the insertion after “certificates representing securities,” of “or money market instruments,”,
 - (II) in paragraph (g) by the substitution for “financial instruments” of “investment instruments”,
 - (III) by the insertion after paragraph (j) of the following paragraph:

“(j) a rolling spot foreign exchange contract,”,
 - (IV) by the insertion after paragraph (k) of the following paragraph:

“(kk) a tracker bond or similar instrument,”,

and
 - (V) by the insertion after subparagraph (III) of “and the Minister may, by regulation, having consulted the supervisory authority, amend this

definition from time to time by adding to the list of instruments in this definition any other instruments which, in the opinion of the Minister, have characteristics similar to the instruments listed in this definition.”,

and the definition as so amended is set out in the Table to this subparagraph.

TABLE

“investment instruments” includes—

- (a) transferable securities including shares, warrants, debentures including debenture stock, loan stock, bonds, certificates of deposits and other instruments creating or acknowledging indebtedness issued by or on behalf of any body corporate or mutual body, government and public securities, including loan stock, bonds and other instruments creating or acknowledging indebtedness issued by or on behalf of a government, local authority or public authority, bonds or other instruments creating or acknowledging indebtedness, certificates representing securities, money market instruments,
- (b) non-transferable securities creating or acknowledging indebtedness issued by or on behalf of a government, local authority or public authority,
- (c) units or shares in undertakings for collective investments in transferable securities within the meaning of European Communities (Undertakings for Collective Investments in Transferable Securities) Regulations, 1989 (S.I. No. 78 of 1989), and any subsequent amendments thereto, units in a unit trust, shares in an investment company, capital contributions to an investment limited partnership,
- (d) financial futures contracts, including currency futures, interest rate futures, bond futures, share index futures and comparable contracts,
- (e) commodity futures contracts,
- (f) forward interest rate agreements,
- (g) agreements to exchange payments based on movements in interest rates, currency exchange rates, commodities, share indices and other investment instruments,
- (h) sale and repurchase and reverse repurchase agreements involving transferable securities,
- (i) agreements for the borrowing and lending of transferable securities,
- (j) certificates or other instruments which confer all or any of the following rights, namely—
 - (i) property rights in respect of any investment instrument referred to in *paragraph (a)* of this definition; or
 - (ii) any right to acquire, dispose of, underwrite or convert an investment instrument, being a right to which the holder would be entitled if he held any such investment to which the certificate or instrument relates; or
 - (iii) a contractual right (other than an option) to acquire any such investment instrument otherwise than by subscription,
- (jj) a rolling spot foreign exchange contract,
- (k) options including—
 - (i) options in any instrument in paragraphs (a) to (jj) of this definition, or
 - (ii) currency, interest rate, commodity and stock options including index option contracts,

(kk) a tracker bond or similar instrument,

(l) hybrid instruments involving two or more investment instruments,

and includes any investment instrument in dematerialised form,

but this definition shall not be construed as applying to—

(I) any instrument acknowledging or creating indebtedness for, or for money borrowed to defray, the consideration payable under a contract for the supply of goods or services; or

(II) a cheque or other similar bill of exchange, a banker's draft or a letter of credit; or

(III) a banknote, a statement showing a balance in a current, deposit or savings account or (by reason of any financial obligation contained in it) to a lease or other disposition of property, or an insurance policy;

and the Minister, may by regulation, having consulted the supervisory authority, amend this definition from time to time by adding to the list of instruments in this definition any other instruments which, in the opinion of the Minister, have characteristics similar to the instruments listed in this definition;

(b) in subsection (6)—

(i) in paragraph (a) by the insertion after “provides investment business services” of “or investment advice”,

(ii) in paragraph (e) by the substitution for “64/25” of “64/225”,

(iii) by the substitution for paragraph (f) of the following paragraph—

“(f) collective investment undertakings and the depositaries and managers of such undertakings, insofar as the activities of the collective investment undertaking or the depositaries or the managers are subject to regulation by the Bank, or”, and

(iv) by the substitution for paragraph (h) of the following paragraphs:

“(h) credit institutions which provide investment business services or investment advice and which, in so doing, do not exceed the terms of authorisations under Directive No. 77/780/EEC of 12 December 1977⁽¹⁾ as amended by Council Directive 89/646/EEC of 15 December 1989⁽²⁾ as amended and extended from time to time, or

(i) an investment business firm which the supervisory authority has determined does not require an authorisation because the provision of investment business services is only carried out because it is necessary to the main activities of the investment business firm, and, for these purposes, the determination of the supervisory authority shall be for a fixed period only

⁽¹⁾O.J. No. L322, 17.12.1977.

⁽²⁾O.J. No. L386, 30.12.1989.

and shall be subject to whatever reporting requirements the supervisory authority deems appropriate, or

- (j) the personal representative of a deceased person in respect of his actions as a personal representative or a trustee in respect of his actions as a trustee of a trust, where 'personal representative' has the same meaning as it has in the Succession Act, 1965, and 'trustee' has the same meaning that it has in the Trustee Act, 1893, provided that this paragraph shall not apply where the principal objective of the trust is to provide investment services to members of the public, or
- (k) notwithstanding the obligations imposed on liquidators and receivers under this Act, a person appointed as a liquidator or receiver of a company in respect of any activities relating to the liquidation or receivership, or
- (l) any collective investment undertaking including its manager which is not established in the State but which:
 - (i) has received approval from the Bank, under the powers granted to it under other enactments, to market units of the undertaking in the State; or
 - (ii) has been authorised by the competent authority of another Member State under Council Directive 85/611/EEC⁽¹⁾, or
- (m) a practising member of an approved professional body, not being a certified person, who holds at his principal place of business, on behalf of clients, share certificates in private limited companies owned by those clients where the member holds the share certificates only in order to facilitate the orderly management of the private limited company's statutory records, where the holding of the share certificates arises from the provision of professional services by the member to the client."

Amendment of section 9 of Act of 1995.

53.—Section 9 of the Act of 1995 is hereby amended by the insertion after subsection (2) of the following subsection:

“(3)(a) The supervisory authority may arrange for the publication of notices in any of the newspapers circulating in the State or elsewhere or in the *Iris Oifigiúil* where the supervisory authority reasonably believes that a company registered in the State or any other person operating in the State is acting as an investment business firm or claiming or holding itself out

⁽¹⁾O.J. No. L375, 31.12.1985.

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to be an investment business firm without an authorisation as required in paragraph (a) or (b) of subsection (1) of this section. Pt.V S.53

- (b) The supervisory authority shall endeavour to provide the investment business firm with seven days notice of its intention to publish in accordance with paragraph (a) of this subsection.”.

54.—Section 10 of the Act of 1995 is hereby amended—

Amendment of section 10 of Act of 1995.

(a) in subsection (3)—

- (i) by the substitution for “Whenever a supervisory authority refuses” of “Whenever a supervisory authority decides to refuse”,
- (ii) by the substitution for “intention” of “decision”,
- (iii) by the designation of that subsection as paragraph (a) and the insertion after paragraph (a) of the following paragraphs:

“(b) If the proposed investment business firm does not make an appeal within the period specified in paragraph (a) of this subsection, the supervisory authority shall issue to the proposed investment business firm notice of its decision to refuse to authorise it.

(c) The supervisory authority shall publish notice of the refusal of authorisation to a proposed investment business firm in the *Iris Oifigiúil* and in one or more newspapers circulating in the State within 28 days of the decision to refuse the authorisation.”,

and the subsection as so amended is set out in the Table to this paragraph.

TABLE

- (3) (a) Whenever a supervisory authority decides to refuse to grant authorisation to a proposed investment business firm under this section it shall serve notice on the proposed investment business firm of its decision to refuse to authorise it and stating the reasons therefor and the proposed investment business firm may within 21 days of receipt of such notice appeal to the Court against the decision.
- (b) If the proposed investment business firm does not make an appeal within the period specified in paragraph (a) of this subsection, the supervisory authority shall issue to the proposed investment business firm notice of its decision to refuse to authorise it.
- (c) The supervisory authority shall publish notice of the refusal of authorisation to a proposed investment business firm in the *Iris Oifigiúil* and in one or more newspapers circulating in the State within 28 days of the decision to refuse the authorisation.
- (b) in subsection (5) by the insertion in paragraph (a) after “does not already exist,” of “or is an industrial or provident society,” and the paragraph as so amended is set out in the Table to this paragraph.

TABLE

- (a) it is a company incorporated by statute or under the Companies Acts, or is incorporated outside the State or is a company made under Royal Charter or it draws up a partnership agreement, where it is constituted as an unincorporated body of persons, if such an agreement does not already exist, or is an industrial or provident society, or is a sole trader and the proposed investment business firm has made arrangements to ensure that its activities will be carried out in such a manner that the requirements of Article 3 (3) of Council Directive No. 93/22/EEC of 10 May 1993⁽¹⁾, are complied with.

Amendment of section 14 of Act of 1995.

55.—Section 14 of the Act of 1995 is hereby amended in subsection (1) by the substitution for “Without prejudice to section 10 of this Act, where the supervisory authority grants an authorisation under that section, it may” of “The supervisory authority may, in respect of an authorised investment business firm, including an investment business firm which is deemed to be authorised under section 26 of this Act,” and the subsection as so amended is set out in the Table to this section.

TABLE

(1) The supervisory authority may, in respect of an authorised investment business firm, including an investment business firm which is deemed to be authorised under section 26 of this Act, do all or any of the following, namely:

- (a) make its authorisation subject to such conditions or requirements, or both, as it considers fit, relating to the proper and orderly regulation and supervision of an authorised investment business firm,
- (b) impose conditions or requirements or both which relate to matters in an associated undertaking or a related undertaking,
- (c) at any time impose conditions or requirements or both on an authorised investment business firm and either amend or revoke any condition or requirement imposed under this paragraph or under paragraph (a) or (b) of this subsection:

Provided the said conditions or requirements do not contravene any guidelines in that behalf which may be issued by the Minister to the supervisory authority from time to time in the interests of the proper and orderly regulation of investment business firms or the protection of investors or both and that the guidelines are published in the *Iris Oifigiúil*.

Amendment of section 16 of Act of 1995.

56.—Section 16 of the Act of 1995 is hereby amended in subsection (8) by the insertion after “*Iris Oifigiúil*” of “and in one or more newspapers circulating in the State” and the subsection as so amended is set out in the Table to this section.

TABLE

(8) The supervisory authority shall publish notice of revocation of an authorisation of an authorised investment business firm in the *Iris Oifigiúil* and in one or more newspapers circulating in the State within 28 days of such revocation.

Amendment of section 17 of Act of 1995.

57.—Section 17 of the Act of 1995 is hereby amended by the insertion after subsection (3) of the following subsection:

“(4) The supervisory authority shall maintain a register or registers of investment business firms of which it has been informed by a competent authority in another Member State under Articles 17 and 18 of the Council Directive No. 93/22/EEC of 10 May, 1993 on investment services in the securities field⁽¹⁾.”.

⁽¹⁾O.J. No. L141, 11.06.1993.

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58.—Section 21 of the Act of 1995 is hereby amended in subsection (1)—

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section 21 of Act of
1995.

- (a) in paragraph (e) by the insertion after “authorised investment business firms” of “, former authorised investment business firms, proposed investment business firms or investment business firms” and the paragraph as so amended is set out in the Table to this paragraph.

TABLE

(e) directors and those responsible for the management of authorised investment business firms, former authorised investment business firms, proposed investment business firms or investment business firms,

- (b) in paragraph (f) by the insertion after “acting as” of “or on behalf of” and the paragraph as so amended is set out in the Table to this paragraph.

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(f) any person purporting to act or whom the supervisory authority reasonably believes is acting as or on behalf of an investment business firm,

- (c) by the insertion after paragraph (f) of the following paragraph:

“(g) directors of that investment business firm or those responsible for the management of that investment business firm who have failed to co-operate with an authorised officer appointed under section 64 of this Act as amended by section 48 of the Central Bank Act, 1997, or an inspector appointed under sections 66, 67 or 73 of this Act,”

and

- (d) in subsection (5) by the substitution for “which said direction shall have immediate effect,” of “the direction shall have effect from the date specified by the supervisory authority, and”.

59.—Section 26 (as amended by the Central Bank Act, 1997) of the Act of 1995 is hereby amended—

Amendment of
section 26 of Act of
1995.

- (a) in subsection (1)—

- (i) by the substitution for “or engaging in all or any of these services and, in the course of engaging in any of these services transmits orders only to all or any of the following, namely—” of “or engaging in all or any of these services or providing investment advice in relation to these services and, in the course of engaging in any of these services transmits orders only to all or any of the following product producers, namely—” and

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- (ii) in subparagraph (i) by the substitution for “not being a restricted activity investment product intermediary, or a certified person,” of “not being a restricted activity investment product intermediary or a certified person,”,

and the subsection as so amended is set out in the Table to this paragraph.

TABLE

(1) In this Act “restricted activity investment product intermediary” means a person whose only investment business service is receiving and transmitting orders in units or shares in undertakings for collective investments in transferable securities within the meaning of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 1989 (S.I. No. 78 of 1989), and any subsequent amendments thereto, units in a unit trust, other collective scheme instruments, or receiving and transmitting—

- (a) orders in shares in a company which are listed on a stock exchange or bonds so listed, or
- (b) orders in prize bonds, or
- (c) acting as a deposit agent or as a deposit broker,

or engaging in all or any of these services or providing investment advice in relation to these services and, in the course of engaging in any of these services transmits orders only to all or any of the following product producers, namely—

- (i) investment firms authorised in accordance with Directive 93/22/EEC of 10 May, 1993⁽¹⁾ by a competent authority of another Member State, or to an authorised investment business firm, not being a restricted activity investment product intermediary or a certified person, or to a member firm, within the meaning of the Stock Exchange Act, 1995, in the State;
- (ii) credit institutions authorised in accordance with Directives 77/780/EEC of 12 December, 1977⁽²⁾ and 89/646/EEC of 15 December, 1989⁽³⁾;
- (iii) to such other branches of investment business firms or credit institutions authorised in a third country as the supervisory authority may approve from time to time;
- (iv) collective investment undertakings authorised under the law of a Member State of the European Union to market units in collective investments to the public, and to the managers of such undertakings;
- (v) investment companies with fixed capital as defined in Article 15(4) of Council Directive 77/91/EEC of 13 December, 1976⁽⁴⁾ the securities of which are listed or dealt in on a regulated market in a Member State;
- (vi) the Prize Bond Company Ltd. or any successor to it as operator of the Prize Bond scheme,

and which does not hold clients' funds or securities, so that in its dealings with clients it does not become a debtor to its clients, but this shall not prevent it from—

- (I) taking non-negotiable cheques or similar instruments made out to one of the undertakings mentioned at subparagraphs (i) to (vi) of this subsection, for the purposes of the receipt and transmission of orders, or
- (II) when acting as a deposit agent, taking cash from a client for the client's account with a credit institution.

⁽¹⁾O.J. No. L141, 11.06.1993.

⁽²⁾O.J. No. L322, 17.12.1977.

⁽³⁾O.J. No. L386, 30.12.1989.

⁽⁴⁾O.J. No. L 26, 30.01.1977.

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(b) in subsection (2) by the substitution for “A restricted activity investment product intermediary shall, while it remains a restricted activity investment product intermediary, and notwithstanding section 10 of this Act, be deemed to be an authorised investment business firm for the purposes of this Act,” of “A person who is a restricted activity investment product intermediary on a day specified by the Minister shall, while it remains a restricted activity investment product intermediary, and notwithstanding section 10 of this Act, be deemed to be an authorised investment business firm for the purposes of this Act.”, and the subsection as so amended is set out in the Table to this paragraph.

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TABLE

(2) A person who is a restricted activity investment product intermediary on a day specified by the Minister shall, while it remains a restricted activity investment product intermediary, and notwithstanding section 10 of this Act, be deemed to be an authorised investment business firm for the purposes of this Act, provided that the restricted activity investment product intermediary has not had its authorisation revoked under section 16(2) of this Act and not reinstated and that no director, officer or manager of the restricted activity investment product intermediary has been such a director, officer or manager of an investment business firm which has had its authorisation under section 16(2) of this Act revoked and not re-instated.

60.—Section 28 (as amended by the Central Bank Act, 1997) of the Act of 1995 is hereby amended by the insertion after subsection (4) of the following subsection—

Amendment of section 28 of Act of 1995.

“(5) It shall be an offence for a product producer to accept any orders transmitted by an investment business firm on behalf of a client or any moneys belonging to the client unless the investment business firm is an investment business firm—

(a) which has been authorised under section 10 of this Act or is deemed to be authorised under section 26 or 63 of this Act, and

(b) to whom the product producer has given an appointment in writing pursuant to Part IV of this Act and the product producer has not withdrawn, cancelled or revoked the said appointment in writing.”.

61.—Section 31 of the Act of 1995 is hereby amended by the insertion after subsection (5) of the following subsection:

Amendment of section 31 of Act of 1995.

“(6) (a) Where the appointment in writing of an investment product intermediary is discontinued, the investment product intermediary shall ensure the publication of a notice to be known as a ‘notice of discontinuance’, being a notice that the appointment in writing has been discontinued, in one or more of the newspapers circulating in the State within fourteen days of being informed by the product producer of the discontinuance of the appointment in writing.

(b) Where an investment product intermediary the appointment in writing of whom has been discontinued does not publish a notice of discontinuance in

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accordance with the requirements of paragraph (a), the product producer who discontinued the appointment in writing shall ensure the publication of a notice of discontinuance in one or more of the newspapers circulating in the State.”.

Amendment of section 33 of Act of 1995.

62.—Section 33 of the Act of 1995 is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

“(2) (a) A supervisory authority may set out requirements in respect of the accounts and audit of an authorised investment business firm which is constituted as an unincorporated body of persons or as a sole trader including requirements which are analogous to those set out in the Companies Acts and may impose duties or obligations on the auditor or on the authorised investment business firm concerned.

(b) The auditor of an authorised investment business firm shall inform the supervisory authority as soon as possible after an audit has been finalised whether, in the course of an audit of the authorised investment business firm, he identified any breaches of this Act.”;

and

(b) by the insertion after subsection (15) of the following subsection:

“(16) The supervisory authority may require the auditor of a proposed investment business firm to furnish any information that is required to be furnished by the auditor of an authorised investment business firm under sections 32 and 35 and this section of this Act.”.

Amendment of section 38 of Act of 1995.

63.—Section 38 of the Act of 1995 is hereby amended in subsection (2) by the insertion in paragraph (a) before “exceed” of “reach or” and the subsection as so amended is set out in the Table to this section.

TABLE

(2) In this Part “acquiring transaction” means any direct or indirect acquisition by a person or more than one person acting in concert of shares or other interest in an authorised investment business firm:

Provided that after the proposed acquisition—

- (a) the proportion of voting rights or capital held by the person or persons making the acquiring transaction would reach or exceed a qualifying holding, or
- (b) the proportion of voting rights or capital held by the person or persons making the acquiring transaction would reach or exceed 20 per cent., 33 per cent. or 50 per cent., or
- (c) an authorised investment business firm would become a subsidiary of the acquirer.

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64.—Section 52 of the Act of 1995 is hereby amended by the substitution for subsection (7) of the following subsection:

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section 52 of Act of
1995.

- “(7) (a) No liquidator, receiver, administrator, examiner, official assignee or creditor of an investment business firm shall have or obtain any recourse or right against client money or client investment instruments or documents of title relating to such investment instruments received, held, controlled or paid on behalf of a client by an investment business firm, until all proper claims of clients or of their heirs, successors or assigns against client money and client investment instruments or documents of title relating to such investment instruments have been satisfied in full.
- (b) Notwithstanding *paragraph (a)* of this subsection, a liquidator, receiver, administrator, examiner or official assignee may have recourse or right against client money or client investment instruments or documents of title relating to such investment instruments received, held, controlled or paid on behalf of a client by an investment business firm in respect of such reasonable expenses as are incurred in the carrying out of their functions under this Act or under the *Investor Compensation Act, 1998*, or incurred in the distribution of client money and investment instruments to clients of the investment business firm where the assets of the investment business firm have been exhausted.
- (c) A liquidator, receiver, administrator, examiner or official assignee shall apply to the Court before seeking recourse or right against client money or client investment instruments or documents of title relating to such investment instruments received, held, controlled or paid on behalf of a client by an investment business firm under *paragraph (b)* of this subsection and the Court shall determine the matter and make such order as it sees fit.”.

65.—Section 54 of the Act of 1995 is hereby amended—

Amendment of
section 54 of Act of
1995.

- (a) by the deletion of “authorised” before “investment business firm” wherever it occurs, and
- (b) by the substitution for “officers or former officers or both” of “officers or beneficial owners or former officers or former beneficial owners or any of these” wherever it occurs,

and the section as so amended is set out in the Table to this section.

TABLE

54.—(1) If—

- (a) an investment business firm is being wound up and is unable to pay all of its debts and has contravened section 19, 52(3), 52(5) or 52(6) of this Act, and
- (b) the Court considers that such contravention has contributed to the inability of an investment business firm to pay all of its debts or

has resulted in substantial uncertainty as to the amount, location, ownership or otherwise of the assets and liabilities of an investment business firm or of the money or investment instruments of clients of the said investment business firm or has substantially impeded its orderly winding-up.

the Court, on the application of the liquidator or receiver or a supervisory authority or any creditor or client or investor, may, if it thinks it proper to do so, declare that any one or more of the officers or beneficial owners or former officers or former beneficial owners or any of these of the said investment business firm who is or are in default shall be personally liable, without any limitation of liability, for all, or such part as may be specified by the Court, of the debts and other liabilities of the said investment business firm.

(2) (a) Where the Court makes a declaration under subsection (1) of this section, it may give such directions as it thinks proper for the purpose of giving effect to the declaration and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from an investment business firm to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of an investment business firm held by or vested in him or any company or other person on his behalf, or any person claiming as assignee from or through the person liable under the declaration or any company or person acting on his behalf, and may, from time to time, make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection.

(b) In paragraph (a) of this subsection “assignee” includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation or mortgage was created, issued or transferred or the interest created but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the grounds of which the declaration is made.

(3) The Court shall not make a declaration under subsection (1) of this section in respect of a person if it considers that—

(a) he took all reasonable steps to secure compliance by an investment business firm with section 19, 52(3), 52(5) or 52(6) of this Act, or

(b) he had reasonable grounds for believing and did believe that a competent and reliable person, acting under the supervision or control of a director who has been formally allocated such responsibility, was charged with the duty of ensuring that section 19, 52(3), 52(5) or 52(6) of this Act was complied with and was in a position to discharge that duty.

(4) This section shall have effect notwithstanding that the person concerned may be liable to be prosecuted for a criminal offence in respect of the matters on the ground of which the declaration is to be made or that such person has been convicted of such an offence.

(5) In this section “officer”, in relation to an investment business firm, includes a person who has been convicted of an offence under section 34 or 79(7) of this Act or section 194 of the Companies Act, 1990 in relation to a statement concerning the keeping of proper accounting records by an investment business firm concerned.

(6) A person who, being a director of an investment business firm, fails to take all reasonable steps to secure compliance by an investment business firm with the requirements of section 19, 52(3), 52(5) or 52(6) of this Act, or has by his own wilful act been the cause of any default by an investment business firm thereunder, shall be guilty of an offence:

Provided, however, that—

(a) in any proceedings against a person in respect of an offence under this section consisting of a failure to take reasonable steps to secure compliance by an investment business firm with the requirements of this section, it shall be a defence to prove that he had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of ensuring that those requirements were complied with and was in a position to discharge that duty, and

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(b) a person shall not be sentenced to imprisonment for such an offence unless, in the opinion of the Court, the offence was committed wilfully. Pt.V S.65

66.—Section 65 of the Act of 1995 is hereby amended in subsection (2) by the insertion after paragraph (h) of the following paragraph: Amendment of section 65 of Act of 1995.

“(hh) may communicate with any client of an investment business firm for the purpose of confirming the investment business services which were provided to the client;”.

67.—Section 74 of the Act of 1995 is hereby amended— Amendment of section 74 of Act of 1995.

(a) in subsection (7) by the substitution for “may dismiss the application or may make a determination that” of “may make a determination as to whether” and the subsection as so amended is set out in the Table to this paragraph.

TABLE

(7) Following an inquiry by a Committee appointed under subsection (5) of this section, that Committee may make a determination as to whether there has been a breach of a condition or requirement, and may do all or any of the following:

- (a) issue a reprimand to an investment business firm or professional body,
- (b) direct that an investment business firm or professional body shall pay the supervisory authority a specified sum, not to exceed £500,000, in respect of any breach of a condition or requirement,
- (c) arrange for the publication of such details as it deems proper concerning a determination made under this subsection in the *Iris Oifigiúil* and in one or more newspapers circulating in the State,
- (d) make such order as to costs as it thinks fit.

(b) in subsection (8) by the insertion before “and the Court may vary” of “within two months of the date of the determination of the Committee or such further period as the Court thinks fit” and the subsection as so amended is set out in the Table to this paragraph.

TABLE

(8) An investment business firm or professional body may appeal to the Court against a determination of the Committee issued under subsection (7) of this section within two months of the date of the determination of the Committee or such further period as the Court thinks fit and the Court may vary or annul the determination of the Committee.

68.—Section 75 of the Act of 1995 is hereby amended by the substitution for subsection (2) of the following subsection: Amendment of section 75 of Act of 1995.

“(2) Any books or documents of which possession is taken under this section may be retained for a period of six months or—

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- (i) if within that period there are commenced any such criminal proceedings as are mentioned in subsection (1)(a) of section 78 of this Act (being proceedings to which the books or documents are relevant), until the conclusion of those proceedings, or
- (ii) if within that period there is commenced an investigation by An Garda Síochána into matters relating to subsection (1)(a) of section 78 of this Act (and the books or documents are relevant to the investigation), until the conclusion of the investigation.”.

Amendment of section 79 of Act of 1995.

69.—Section 79 of the Act of 1995 is hereby amended—

- (a) in subsection (1) by the insertion of “28(5),” before “30”, and
- (b) by the deletion of subsection (7) and the substitution of the following subsection:

“(7) A person who, in purported compliance with any provision of this Act or any regulation made thereunder—

- (a) provides an answer or explanation, makes a statement or produces, lodges or delivers any return, report, certificate, balance sheet or other document false in a material particular, knowing it to be false, or
 - (b) recklessly provides an answer or explanation, makes a statement or produces, lodges or delivers any return, report, certificate, balance sheet or other document false in a material particular, or
 - (c) knowingly withholds or omits information,
- shall be guilty of an offence.”.

Amendment of section 8 of Stock Exchange Act, 1995.

70.—Section 8 of the Stock Exchange Act, 1995, is hereby amended by the insertion after subsection (4) of the following subsection:

- “(5) (a) The Bank may arrange for the publication of notices in any of the newspapers circulating in the State or elsewhere or in the *Iris Oifigiúil* where the Bank reasonably believes that a company registered in the State or any other person operating in the State is acting as a stock exchange or claiming or holding itself out to be a stock exchange without an approval as required in section 8(2) of this Act.
- (b) The Bank shall endeavour to provide the stock exchange with seven days notice of its intention to publish in accordance with paragraph (a) of this subsection.”.

Amendment of section 14 of Stock Exchange Act, 1995.

71.—Section 14 of the Stock Exchange Act, 1995, is hereby amended by the substitution for subsection (7) of the following subsection:

“(7) The Bank shall publish notice of the revocation of an approval of an existing stock exchange in the *Iris Oifigiúil* and

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in one or more newspapers circulating in the State within 28 days of the revocation of the approval.” Pt.V S.71

72.—Section 17 of the Stock Exchange Act, 1995, is hereby amended by the insertion after subsection (2) of the following subsection—
Amendment of section 17 of Stock Exchange Act, 1995.

“(3) (a) The Bank may arrange for the publication of notices in any of the newspapers circulating in the State or elsewhere or in the *Iris Oifigiúil* where the Bank reasonably believes that a company registered in the State or any other person operating in the State is acting as a member firm or claiming or holding itself out to be a member firm without an authorisation as required in section 17(2) of this Act.

(b) The Bank shall endeavour to provide the member firm with seven days notice of its intention to publish in accordance with paragraph (a) of this subsection.”.

73.—Section 18 of the Stock Exchange Act, 1995, is hereby amended by the substitution for subsection (3) of the following subsection—
Amendment of section 18 of Stock Exchange Act, 1995.

“(3) (a) Whenever the Bank decides to refuse to grant authorisation to a proposed member firm under this section, it shall serve notice on the proposed member firm of its decision to refuse to authorise it and stating the reasons therefor and the proposed member firm may within 21 days of receipt of such notice appeal to the Court against the decision.

(b) If the proposed member firm does not make an appeal within the period specified in paragraph (a) of this subsection, the Bank shall issue to the proposed member firm notice of its decision to refuse to authorise it.

(c) The Bank shall publish notice of the refusal of authorisation to a proposed member firm in the *Iris Oifigiúil* and in one or more newspapers circulating in the State within 28 days of the decision to refuse authorisation.”.

74.—Section 24 of the Stock Exchange Act, 1995, is hereby amended by the substitution for subsection (8) of the following subsection—
Amendment of section 24 of Stock Exchange Act, 1995.

“(8) The Bank shall publish notice of the revocation of the authorisation of an authorised member firm in the *Iris Oifigiúil* and in one or more newspapers circulating in the State within 28 days of the revocation of the authorisation.”.

75.—Section 29 of the Stock Exchange Act, 1995, is hereby amended—
Amendment of section 29 of Stock Exchange Act, 1995.

(a) in subsection (1)—

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- (i) by the substitution for paragraph (i) of the following paragraph:

“(i) directors and those responsible for the management of approved stock exchanges, formerly approved stock exchanges, proposed stock exchanges or stock exchanges and authorised member firms, formerly authorised member firms, proposed member firms or member firms;”,

- (ii) by the insertion after paragraph (i) of the following paragraphs:

“(j) any person purporting to act or whom the Bank reasonably believes is acting as or on behalf of a stock exchange or member firm;

(k) directors of a stock exchange or member firm or those responsible for the management of that stock exchange or member firm who have failed to co-operate with an authorised officer appointed under section 55 of this Act, or an inspector appointed under section 57, 58 or 64 of this Act,”

- (b) in subsection (5) by the substitution for “which said direction shall have immediate effect” of “which said direction shall have effect from a date specified by the Bank”.

Amendment of section 34 of Stock Exchange Act, 1995.

76.—Section 34 of the Stock Exchange Act, 1995, is hereby amended—

- (a) by the designation of subsection (2) as paragraph (a) and the insertion after paragraph (a) of the following paragraph:

“(b) The auditor of an approved stock exchange or authorised member firm shall inform the Bank as soon as possible after an audit has been finalised whether, in the course of the audit of the approved stock exchange or authorised member firm, he identified any breaches of the Act.”,

- (b) by the insertion after subsection (15) of the following subsection:

“(16) The Bank may require the auditor of a proposed stock exchange or member firm to furnish any information that is required to be furnished by the auditor of an approved stock exchange or authorised member firm in sections 34 and 36 of this Act.”.

Amendment of section 39 of Stock Exchange Act, 1995.

77.—Section 39 of the Stock Exchange Act, 1995, is hereby amended in subsection (2) by the insertion in paragraph (a) before “exceed” of “reach or” and the subsection as so amended is set out in the Table to this section.

(2) In this Part “acquiring transaction” means any direct or indirect acquisition by a person or more than one person acting in concert of shares or other interest in an approved stock exchange or authorised member firm, provided that, after the proposed acquisition—

- (a) the proportion of voting rights or capital held by the person or persons making the acquiring transaction would reach or exceed a qualifying holding, or
- (b) the proportion of voting rights or capital held by the person or persons making the acquiring transaction would reach or exceed 20 per cent., 33 per cent. or 50 per cent., or
- (c) the approved stock exchange or authorised member firm would become a subsidiary of the acquirer.

78.—Section 52 of the Stock Exchange Act, 1995, is hereby amended by the substitution for subsection (5) of the following subsection: Amendment of section 52 of Stock Exchange Act, 1995.

“(5) (a) No liquidator, receiver, administrator, examiner or creditor of a member firm shall have or obtain any recourse or right against a client’s money or a client’s investment instruments or a client’s documents of title relating to such investment instruments received, held, controlled or paid on behalf of the client until all proper claims of the client or of the client’s heirs, successors or assigns against the client’s money or the client’s investment instruments or documents of title have been satisfied in full.

(b) Notwithstanding paragraph (a) of section 52(5) of this Act, a liquidator, receiver, administrator, examiner or creditor may have recourse or right against a client’s money or a client’s investment instruments or a client’s documents of title relating to such investment instruments received, held, controlled or paid on behalf of a client by a member firm in respect of such reasonable expenses as are incurred in the carrying out of their functions under this Act or under the *Investor Compensation Act, 1998* or incurred in the distribution of client money and investment instruments to clients of the member firm where the assets of the member firm have been exhausted.

(c) A liquidator, receiver, administrator, examiner or official assignee shall apply to the Court before seeking recourse or right against client money or client investment instruments or documents of title relating to such investment instruments received, held, controlled or paid on behalf of a client by a member firm under paragraph (b) of this subsection and the Court shall determine the matter and make such order as it sees fit.”.

79.—Section 54 of the Stock Exchange Act, 1995, is hereby amended— Amendment of section 54 of Stock Exchange Act, 1995.

- (a) by the deletion of “approved” before “stock exchange” wherever it occurs,

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- (b) by the deletion of “authorised” before “member firm” wherever it occurs, and
- (c) by the substitution for “officers or former officers or both” of “officers or beneficial owners or former officers or former beneficial owners or any of these” wherever it occurs,

and the section as so amended is set out in the Table to this section.

TABLE

54.—(1) If—

- (a) a stock exchange or member firm is being wound up and is unable to pay all of its debts and has contravened section 15, 27 or 52(3) of this Act, and
- (b) the Court considers that such contravention has contributed to the inability of the stock exchange or member firm to pay all of its debts or has resulted in substantial uncertainty as to the amount, location, ownership or otherwise of the assets and liabilities of the stock exchange or member firm or of the money or investment instruments of clients of the said stock exchange or member firm or has substantially impeded its orderly winding-up,

the Court, on the application of the liquidator or receiver or the Bank or any creditor or client or investor, may, if it thinks it proper to do so, declare that any one or more of the officers or beneficial owners or former officers or former beneficial owners or any of these of the said stock exchange or member firm who is or are in default shall be personally liable, without any limitation of liability, for all, or such part as may be specified by the Court, of the debts and other liabilities of the said stock exchange or member firm.

(2) (a) Where the Court makes a declaration under subsection (1) of this section, it may give such directions as it thinks proper for the purpose of giving effect to the declaration and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the stock exchange or member firm to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the stock exchange or member firm held by or vested in him or any company or other person on his behalf, or any person claiming as assignee from or through the person liable under the declaration or any company or person acting on his behalf, and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection.

(b) In paragraph (a) of this subsection “assignee” includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation or mortgage was created, issued or transferred or the interest created but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the grounds of which the declaration is made.

(3) The Court shall not make a declaration under subsection (1) of this section in respect of a person if it considers that—

- (a) he took all reasonable steps to secure compliance by the stock exchange or member firm with section 15, 27 or 52(3) of this Act, or
- (b) he had reasonable grounds for believing and did believe that a competent and reliable person, acting under the supervision or control of a director who has been formally allocated such responsibility, was charged with the duty of ensuring that section 15, 27 or 52(3) of this Act was complied with and was in a position to discharge that duty.

(4) This section shall have effect notwithstanding that the person concerned may be liable to be prosecuted for a criminal offence in respect of the matters on the ground of which the declaration is to be made or that such person has been convicted of such an offence.

(5) In this section “officer”, in relation to a stock exchange or member firm, includes a person who has been convicted of an offence under section 194 of the Companies Act, 1990 or section 35 or 70(7) of this Act, in relation to a statement concerning the keeping of proper accounting records by the stock exchange or member firm concerned.

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(6) A person who, being a director of a stock exchange or member firm, fails to take all reasonable steps to secure compliance by the stock exchange or member firm with the requirements of section 15, 27 or 52(3) of this Act or has by his own wilful act been the cause of any default by the stock exchange or member firm thereunder, shall be guilty of an offence:

Provided, however, that—

- (a) in any proceedings against a person in respect of an offence under this section consisting of a failure to take reasonable steps to secure compliance by the stock exchange or member firm with the requirements of this section, it shall be a defence to prove that he had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of ensuring that those requirements were complied with and was in a position to discharge that duty, and
- (b) a person shall not be sentenced to imprisonment for such an offence unless, in the opinion of the Court, the offence was committed wilfully.

80.—Section 56 of the Stock Exchange Act, 1995, is hereby amended in subsection (2)—

Amendment of section 56 of Stock Exchange Act, 1995.

(a) by the insertion after paragraph (a) of the following paragraph:

“(aa) secure for later inspection any premises or any part of a premises in which books, records or other documents are kept or there are reasonable grounds for believing that such books or records or other documents are kept,”,

(b) by the insertion after paragraph (b) of the following paragraph:

“(bb) subject to a warrant being issued for that purpose by a judge of the District Court, remove for a reasonable period for further examination any books, records or other documents which the officer finds in the course of his inspection,”,

(c) by the insertion after paragraph (c) of the following paragraphs:

“(cc) require any person by or on whose behalf data equipment is or has been used or any person having charge of, or otherwise concerned with the operation of, the data equipment or any associated apparatus or material, to afford the authorised officer reasonable assistance in relation thereto,

(ccc) summon, at any reasonable time, any other person employed in connection with the investment business service or investment advice to give to the authorised officer any information which the officer may reasonably require in regard to such activity and to produce to the authorised officer any books, records or other documents which are in that person’s power or control,”,

and

(d) by the insertion after paragraph (d) of the following paragraph:

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“(dd) may communicate with any client of a stock exchange or member firm for the purpose of confirming the investment services which were provided to the client.”.

Amendment of section 65 of Stock Exchange Act, 1995.

81.—Section 65 of the Stock Exchange Act, 1995, is hereby amended—

- (a) in subsection (7) by the substitution for “may dismiss the application or may make a determination that” of “may make a determination as to whether”, and
- (b) in subsection (8) by the insertion after “section” of “within two months of the date of that determination or such further period as the Court thinks fit and the Court may vary or annul the determination of the Committee”,

and those subsections as so amended are set out in the Table to this section.

TABLE

(7) Following an inquiry by a Committee appointed under subsection (5) of this section, that Committee may make a determination as to whether there has been a breach of a condition or requirement and may do all or any of the following—

- (a) issue a reprimand to an approved stock exchange or a member firm,
- (b) direct that an approved stock exchange or member firm shall pay the Bank a specified sum, not to exceed £500,000, in respect of any breach of a condition or requirement,
- (c) publish such details as it deems proper concerning a determination made under this subsection in the *Iris Oifigiúil* and in one or more newspapers circulating in the State,
- (d) make such order as to costs as it thinks fit.

(8) An approved stock exchange or a member firm may appeal to the Court against a determination of the Committee issued under subsection (7) of this section within two months of the date of that determination or such further period as the Court thinks fit and the Court may vary or annul the determination of the Committee.

Amendment of section 66 of Stock Exchange Act, 1995.

82.—Section 66 of the Stock Exchange Act, 1995, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) Any books or documents of which possession is taken under this section may be retained for a period of six months or—

- (i) if within that period there are commenced any such criminal proceedings as are mentioned in subsection (1)(a) of section 69 of this Act (being proceedings to which the books or documents are relevant), until the conclusion of those proceedings, or
- (ii) if within that period there is commenced an investigation by An Garda Síochána into matters relating to subsection (1)(a) of section 69 of this Act (and the books or documents are relevant to the investigation), until the conclusion of the investigation.”.

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83.—Section 70 of the Stock Exchange Act, 1995, is hereby amended by the deletion of subsection (7) and the substitution of the following subsection:

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Amendment of section 70 of Stock Exchange Act, 1995.

“(7) A person who, in purported compliance with any provision of this Act or any regulation made thereunder—

- (a) provides an answer or explanation, makes a statement or produces, lodges or delivers any return, report, certificate, balance sheet or other document false in a material particular, knowing it to be false, or
- (b) recklessly provides an answer or explanation, makes a statement or produces, lodges or delivers any return, report, certificate, balance sheet or other document false in a material particular, or
- (c) knowingly withholds or omits information,

shall be guilty of an offence.”.

FIRST SCHEDULE

Section 7.

Repeals

Number and Year	Short Title	Extent of Repeal
No. 3 of 1989	Insurance Act, 1989	s.47 (in so far as it imposes an obligation to hold a bond)
No. 9 of 1995	Stock Exchange Act, 1995	s.51
No. 11 of 1995	Investment Intermediaries Act, 1995	s.28(4), 50, 51 (in so far as it imposes an obligation to hold a bond)

SECOND SCHEDULE

Section 27.

Supplementary Provision in Relation to a Direction by a Supervisory Authority under *Section 27*

1. In this Schedule, a reference to an investment firm includes reference to directors and those responsible for the management of an investment firm.

2. A supervisory authority may revoke a direction given under *section 27* of this Act unless an order under *section 28* of this Act has been made by the Court in respect of the direction.

3. An investment firm to which a direction has been given under *section 27* of this Act may apply to the Court for, and the Court may grant, an order varying or setting aside the direction.

4. Where a supervisory authority applies to the Court for an order confirming a direction under *section 27* of this Act, the Court may grant an order confirming the direction or setting it aside, or confirming it and extending the period of its operation for such time not exceeding the period of 12 months from the date the direction commenced to have effect, as the Court may, having regard to the circumstances, consider appropriate.

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5. In addition to, or in lieu of, an order under *section 28*, the Court may make such other order in the case as may appear to it necessary, including an order directing any person who holds money or other assets for or on behalf of the investment firm or client of such investment business firm, or a specified person, not to dispose of any of those assets except on such conditions and in such circumstances as are specified in the order.

6. A direction which has been confirmed by the Court shall terminate:

- (a) at the end of the period of operation specified by the Court,
- (b) on the making by the Court of an order for termination on the application of the supervisory authority,
- (c) on the making of a winding-up order in respect of the investment firm or, where an investment firm is constituted as an unincorporated body of persons, a dissolution order, or where an investment firm is a sole trader, an adjudication of bankruptcy,
- (d) on the making by the Court of an order for termination where the Court considers that the circumstances that gave rise to the direction have ceased to exist and that it would be unjust and inequitable not to make the order,

whichever first occurs.

7. The Court may by order revoke or amend an order made by it under *paragraph 4*.

8. Where a direction is given by the supervisory authority in accordance with *section 27*—

- (a) the investment firm to which the direction has been given shall take all necessary steps to secure that its assets or client or investor assets, wherever held, are not depleted without the prior authorisation of the supervisory authority, and
- (b) the supervisory authority may direct a credit institution or any institution exempt under *section 7* of the Central Bank Act, 1971, or any other financial institution which holds an account of any description of the investment firm including holdings of investment instruments of the investment firm to which the direction has been given, to suspend the making of payments or other transaction from the account without the prior authorisation of the supervisory authority.

Section 8.

THIRD SCHEDULE

**DIRECTIVE 97/9/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL
of 3 March 1997
on investor-compensation schemes**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF
THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,
and in particular Article 57 (2) thereof,

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Having regard to the proposal from the Commission ⁽¹⁾, Sch.3

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Having regard to the opinion of the European Monetary Institute ⁽³⁾,

Acting in accordance with the procedure laid down in Article 189b of the Treaty ⁽⁴⁾ in the light of the joint text approved by the Conciliation Committee on 18 December 1996,

(1) Whereas on 10 May 1993 the Council adopted Directive 93/22/EEC on investment services in the securities field ⁽⁵⁾; whereas that Directive is an essential instrument for the achievement of the internal market for investment firms;

(2) Whereas Directive 93/22/EEC lays down prudential rules which investment firms must observe at all times, including rules the purpose of which is to protect as far as possible investor's rights in respect of money or instruments belonging to them;

(3) Whereas, however, no system of supervision can provide complete protection, particularly where acts of fraud are committed;

(4) Whereas the protection of investors and the maintenance of confidence in the financial system are an important aspect of the completion and proper functioning of the internal market in this area; whereas to that end it is therefore essential that each Member State should have an investor-compensation scheme that guarantees a harmonized minimum level of protection at least for the small investor in the event of an investment firm being unable to meet its obligations to its investor clients;

(5) Whereas small investors will therefore be able to purchase investment services from branches of Community investment firms or on the basis of the cross-border provision of services as confidently as from domestic investment firms, in the knowledge that a harmonized minimum level of protection would be available to them in the event of an investment firm being unable to meet its obligations to its investor clients;

(6) Whereas, in the absence of such minimum harmonization, a host Member State might consider itself justified, by considerations of investor protection, in requiring membership of its compensation scheme when a Community investment firm operating through a branch or under the freedom to provide services either belonged to no investor-compensation scheme in its home Member State or belonged to a scheme which was not regarded as offering equivalent protection; whereas such a requirement might prejudice the operation of the internal market;

⁽¹⁾O.J. No. C 321, 27.11.1993, p. 15 and O.J. No. C 382, 31.12.1994, p. 27.

⁽²⁾O.J. No. C 127, 7.5.1994, p. 1.

⁽³⁾Opinion delivered on 28 July 1995.

⁽⁴⁾European Parliament opinion of 19 April 1994 (O.J. No. C 128, 9.5.1994, p. 85), Council common position of 23 October 1995 (O.J. No. C 320, 30.11.1995, p. 9) and European Parliament Decision of 12 March 1996 (O.J. No. C 96, 1.4.1996, p. 28). Decision of the Council of 17 February 1997 and Decision of the European Parliament of 19 February 1997 (O.J. No. C 85, 17.3.1997).

⁽⁵⁾O.J. No. L 141, 11.6.1993, p. 27.

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(7) Whereas although most Member States currently have some investor-compensation arrangements those arrangements do not in general cover all investment firms that hold the single authorization provided for in Directive 93/22/EEC;

(8) Whereas, therefore, every Member State should be required to have an investor-compensation scheme or schemes to which every such investment firm would belong; whereas each scheme must cover money and instruments held by an investment firm in connection with an investor's investment operations which, where an investment firm is unable to meet its obligations to its investor clients, cannot be returned to the investor; whereas this is entirely without prejudice to the rules and procedures applicable in each Member State as regards the decisions to be taken in the event of the insolvency or winding-up of an investment firm;

(9) Whereas the definition of investment firm includes credit institutions which are authorized to provide investment services; whereas every such credit institution must also be required to belong to an investor-compensation scheme to cover its investment business; whereas, however, it is not necessary to require such a credit institution to belong to two separate schemes where a single scheme meets the requirements both of this Directive and of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes ⁽¹⁾; whereas, however, in the case of investment firms which are credit institutions it may in certain cases be difficult to distinguish between deposits covered by Directive 94/19/EC and money held in connection with investment business; whereas Member States should be allowed to determine which Directive shall apply to such claims;

(10) Whereas Directive 94/19/EC allows a Member State to exempt a credit institution from the obligation to belong to a deposit-guarantee scheme where that credit institution belongs to a system which protects the credit institution itself and, in particular, ensures its solvency; whereas, where a credit institution belonging to such a system is also an investment firm, a Member State should also be allowed, subject to certain conditions, to exempt it from the obligation to belong to an investor-compensation scheme;

(11) Whereas a harmonized minimum level of compensation of ECU 20 000 for each investor should be sufficient to protect the interests of the small investor where an investment firm is unable to meet its obligations to its investor clients; whereas it would therefore appear reasonable to set the harmonized minimum level of compensation at ECU 20 000; whereas, as in Directive 94/19/EC, limited transitional provisions might be required to enable compensation schemes to comply with that figure since this applies equally to Member States which, when this Directive is adopted, do not have any such scheme;

(12) Whereas the same figure was adopted in Directive 94/19/EC;

(13) Whereas in order to encourage investors to take due care in their choice of investment firms it is reasonable to allow Member States to require investors to bear a proportion of any loss; whereas, however, an investor must be covered for at least 90% of any loss as long as the compensation paid is less than the Community minimum;

⁽¹⁾O.J. No. L 135, 31.5.1994, p. 5.

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(14) Whereas certain Member States' schemes offer levels of cover higher than the harmonized minimum level of protection under this Directive; whereas, however, it does not seem desirable to require any change in those schemes in that respect; Sch.3

(15) Whereas the retention in the Community of schemes providing levels of cover higher than the harmonized minimum may, within the same territory, lead to disparities in compensation and unequal conditions of competition between national investment firms and branches of firms from other Member States; whereas, in order to counteract those disadvantages, branches should be authorized to join their host countries' schemes so that they may offer their investors the same cover as is provided by the schemes of the countries in which they are located; whereas it is appropriate that, in its report on the application of this Directive, the Commission should indicate the extent to which branches have exercised that option and any difficulties which they or the investor-compensation schemes may have encountered in implementing those provisions; whereas the possibility that home Member States' schemes should themselves offer such supplementary cover, subject to the conditions such schemes may lay down, is not ruled out;

(16) Whereas market disturbances could be caused by branches of investment firms established in Member States other than their Member States of origin which offer levels of cover higher than those offered by investment firms authorized in their host Member States; whereas it is not appropriate that the level or scope of cover offered by compensation schemes should become an instrument of competition; whereas it is therefore necessary, at least during an initial period, to stipulate that neither the level nor the scope of cover offered by a home Member State's scheme to investors at branches located in another Member State should exceed the maximum level or scope offered by the corresponding scheme in the host Member State; whereas any market disturbances should be reviewed at an early date, on the basis of the experience acquired and in the light of developments in the financial sector;

(17) Whereas a Member State must be able to exclude certain categories of specifically listed investments or investors, if it does not consider that they need special protection, from the cover afforded by investor-compensation schemes;

(18) Whereas some Member States have investor-compensation schemes under the responsibility of professional organizations; whereas in other Member States there are schemes that have been set up and are regulated on a statutory basis; whereas that diversity of status poses a problem only with regard to compulsory membership of and exclusion from schemes; whereas it is therefore necessary to take steps to limit the powers of schemes in that area;

(19) Whereas the investor must be compensated without excessive delay once the validity of his claim has been established; whereas the compensation scheme itself must be able to fix a reasonable period for the presentation of claims; whereas, however, the fact that such a period has expired may not be invoked against an investor who for good reason has not been able to present his claim within the time allowed;

(20) Whereas informing investors of compensation arrangements is an essential element of investor protection; whereas Article 12 of Directive 93/22/EEC required investment firms to inform investors, before doing business with them, of the possible application of a

compensation scheme; whereas, therefore, this Directive should lay down rules on informing such intending investors regarding the compensation schemes covering their investment business;

(21) Whereas, however, the unregulated use in advertising of references to the amount and scope of a compensation scheme could affect the stability of the financial system or investor confidence; whereas Member States should therefore lay down rules to limit such references;

(22) Whereas in principle this Directive requires every investment firm to join an investor-compensation scheme; whereas the Directives governing the admission of any investment firm the head office of which is in a non-member country, and in particular Directive 93/22/EEC, allow Member States to decide whether and subject to what conditions to permit branches of such investment firms to operate within their territories; whereas such branches will not enjoy the freedom to provide services under the second paragraph of Article 59 of the Treaty, or the right of establishment in Member States other than those in which they are established; whereas, accordingly, a Member State admitting such branches must decide how to apply the principles of this Directive to such branches in accordance with Article 5 of Directive 93/22/EEC and with the need to protect investors and maintain the integrity of the financial system; whereas it is essential that investors at such branches should be fully aware of the compensation arrangements applicable to them;

(23) Whereas it is not indispensable in this Directive to harmonize the ways in which investor-compensation schemes are to be financed given, on the one hand, that the cost of financing such schemes must, in principle, be borne by investment firms themselves and, on the other hand, that the financing capacities of such schemes must be in proportion to their liabilities; whereas that must not, however, jeopardize the stability of the financial system of the Member State concerned;

(24) Whereas this Directive may not result in the Member States or their competent authorities being made liable in respect of investors if they have ensured that one or more schemes for the compensation or protection of investors under the conditions prescribed in this Directive have been introduced and officially recognized;

(25) Whereas, in conclusion, a minimum degree of harmonization of investor-compensation arrangements is necessary for the completion of the internal market for investment firms since it will make it possible for investors to do business with such firms with greater confidence, especially firms from other Member States, and make it possible to avoid any difficulties caused by host Member States applying national investor-protection rules that are not coordinated at Community level; whereas a binding Community Directive is the only appropriate instrument for the achievement of the desired objective in the general absence of investor-compensation arrangements corresponding to the coverage of Directive 93/22/EEC; whereas this Directive effects only the minimum harmonization required, allows Member States to prescribe wider or higher coverage if they desire and give Member States the necessary latitude as regards the organization and financing of investor-compensation schemes,

Article 1

For the purpose of this Directive:

1. 'investment firm' shall mean an investment firm as defined in Article 1 (2) of Directive 93/22/EEC

— authorized in accordance with Article 3 of Directive 93/22/EEC,

or

— authorized as a credit institution in accordance with Council Directive 77/780/EEC ⁽¹⁾ and Council Directive 89/646/EEC ⁽²⁾, the authorization of which covers one or more of the investment services listed in Section A of the Annex to Directive 93/22/EEC;

2. 'investment business' shall mean any investment service as defined in Article 1 (1) of Directive 93/22/EEC and the service referred to in point 1 of Section C of the Annex to that Directive,

3. 'instruments' shall mean the instruments listed in Section B of the Annex to Directive 93/22/EEC;

4. 'investor' shall mean any person who has entrusted money or instruments to an investment firm in connection with investment business;

5. 'branch' shall mean a place of business which is a part of an investment firm, which has no legal personality and which provides investment services for which the investment firm has been authorised; all the places of business set up in the same Member State by an investment firm with headquarters in another Member State shall be regarded as a single branch;

6. 'joint investment business' shall mean investment business carried out for the account of two or more persons or over which two or more persons have rights that may be exercised by means of the signature of one or more of those persons;

7. 'competent authorities' shall mean the authorities defined in Article 22 of Directive 93/22/EEC; those authorities may, if appropriate, be those defined in Article 1 of Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis ⁽³⁾.

Article 2

1. Each Member State shall ensure that within its territory one or more investor-compensation schemes are introduced and officially recognized. Except in the circumstances envisaged in the second subparagraph and in Article 5 (3), no investment firm authorized in that Member State may carry on investment business unless it belongs to such a scheme.

⁽¹⁾First Council Directive 77/780/EEC of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (O.J. No. L 322, 17.12.1977, p. 30). Directive as last amended by Directive 89/646/EEC (O.J. No. L 386, 30.12.1989, p. 1).

⁽²⁾Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (O.J. No. L 386, 30.12.1989, p. 1). Directive as last amended by Directive 92/30/EEC (O.J. No. L 110, 28.4.1992, p. 52).

⁽³⁾O.J. No. L 110, 28.4.1992, p. 52.

[No. 37.] *Investor Compensation Act, 1998.* [1998.]

Sch.3

A Member State may, however, exempt a credit institution to which this Directive applies from the obligation to belong to an investor-compensation scheme where that credit institution is already exempt under Article 3 (1) of Directive 94/19/EC from the obligation to belong to a deposit-guarantee scheme, provided that the protection and information given to depositors are also given to investors on the same terms and investors thus enjoy protection at least equivalent to that afforded by an investor-compensation scheme.

Any Member State that avails itself of that option shall inform the Commission accordingly; it shall, in particular, disclose the characteristics of the protective systems in question and the credit institutions covered by them for the purposes of this Directive, as well as any subsequent changes to the information supplied. The Commission shall inform the Council thereof.

2. A scheme shall provide cover for investors in accordance with Article 4 where either:

- the competent authorities have determined that in their view an instrument firm appears, for the time being, for reasons directly related to its financial circumstances, to be unable to meet its obligations arising out of investors' claims and has no early prospect of being able to do so,

or

- a judicial authority has made a ruling, for reasons directly related to an investment firm's financial circumstances, which has the effect of suspending investors' ability to make claims against it,

whichever is the earlier.

Cover shall be provided for claims arising out of an investment firm's inability to:

- repay money owed to or belonging to investors and held on their behalf in connection with investment business,

or

- return to investors any instruments belonging to them and held, administered or managed on their behalf in connection with investment business,

in accordance with the legal and contractual conditions applicable.

3. Any claim under paragraph 2 on a credit institution which, in a given Member State, would be subject both to this Directive and to Directive 94/19/EC shall be directed by that Member State to a scheme under one or other of those Directives as that Member State shall consider appropriate. No claim shall be eligible for compensation more than once under those Directives.

4. The amount of an investor's claim shall be calculated in accordance with the legal and contractual conditions, in particular those concerning set off and counter-claims, that are applicable to the assessment, on the date of the determination or ruling referred to in paragraph 2, of the amount of the money or the value, determined where possible by reference to the market value, of the instruments belonging to the investor which the investment firm is unable to repay or return.

Claims arising out of transactions in connection with which a criminal conviction has been obtained for money laundering, as defined in Article 1 of the Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering⁽¹⁾, shall be excluded from any compensation under investor-compensation schemes.

Article 4

1. Member States shall ensure that schemes provide for cover of not less than ECU 20 000 for each investor in respect of the claims referred to in Article 2 (2).

Until 31 December 1999 Member States in which, when this Directive is adopted, cover is less than ECU 20 000 may retain that lower level of cover, provided it is not less than ECU 15 000. That option shall also be available to Member States to which the transitional provisions of the second subparagraph of Article 7 (1) of Directive 94/19/EC apply.

2. A Member State may provide that certain investors shall be excluded from cover by schemes or shall be granted a lower level of cover. Those exclusions shall be as listed in Annex I.

3. This Article shall not preclude the retention or adoption of provisions which afford greater or more comprehensive cover to investors.

4. A Member State may limit the cover provided for in paragraph 1 or that referred to in paragraph 3 to a specified percentage of an investor's claim. The percentage covered must, however, be equal to or exceed 90% of the claim as long as the amount to be paid under the scheme is less than ECU 20 000.

Article 5

1. If an investment firm required by Article 2 (1) to belong to a scheme does not meet the obligations incumbent on it as a member of that scheme, the competent authorities which issued its authorization shall be notified and, in cooperation with the compensation scheme, shall take all measures appropriate, including the imposition of penalties, to ensure that the investment firm meets its obligations.

2. If those measures fail to secure compliance on the part of the investment firm, the scheme may, where national law permits the exclusion of a member, with the express consent of the competent authorities, give not less than 12 months' notice of its intention of excluding the investment firm from membership of the scheme. The scheme shall continue to provide cover under the second subparagraph of Article 2 (2) in respect of investment business transacted during that period. If, on expiry of the period of notice, the investment firm has not met its obligations, the compensation scheme may, again having obtained the express consent of the competent authorities, exclude it.

⁽¹⁾O.J. No. L 166, 28.6.1991, p. 77.

[No. 37.] *Investor Compensation Act, 1998.* [1998.]

Sch.3

3. Where national law permits, and with the express consent of the competent authorities which issued its authorization, an investment firm excluded from an investor-compensation scheme may continue to provide investment services if, before its exclusion, it made alternative compensation arrangements which ensure that investors will enjoy cover that is at least equivalent to that offered by the officially recognized scheme and has characteristics equivalent to those of that scheme.

4. If an investment firm the exclusion of which is proposed under paragraph 2 is unable to make alternative arrangements which comply with the conditions imposed in paragraph 3, the competent authorities which issued its authorization shall withdraw it forthwith.

Article 6

After the withdrawal of an investment firm's authorization, cover under the second subparagraph of Article 2 (2) shall continue to be provided in respect of investment business transacted up to the time of that withdrawal.

Article 7

1. Investor-compensation schemes introduced and officially recognized in a Member State in accordance with Article 2 (1) shall also cover investors at branches set up by investment firms in other Member States.

Until 31 December 1999, neither the level nor the scope, including the percentage, of the cover provided for may exceed the maximum level or scope of the cover offered by the corresponding compensation scheme within the territory of the host Member State. Before that date the Commission shall draw up a report on the basis of the experience acquired in applying this subparagraph and Article 4 (1) of Directive 94/19/EC referred to above and shall consider the need to continue those provisions. If appropriate, the Commission shall submit a proposal for a Directive to the European Parliament and the Council, with a view to the extension of their validity.

Where the level or scope, including the percentage, of the cover offered by the host Member State's investor-compensation scheme exceeds the level or scope of the cover provided in the Member State in which an investment firm is authorized, the host Member State shall ensure that there is an officially recognized scheme within its territory which a branch may join voluntarily in order to supplement the cover which its investors already enjoy by virtue of its membership of its home Member State's scheme.

If a branch joins such a scheme, that scheme shall be one that covers the category of institution to which the branch belongs or most closely corresponds in its host Member State.

Member States shall ensure that objective and generally applied conditions are established concerning branches' membership of all investor-compensation schemes. Admission shall be conditional on a branch meeting the relevant membership obligations, including in particular the payment of all contributions and other charges. Member States shall follow the guiding principles set out in Annex II in implementing this paragraph.

[1998.] *Investor Compensation Act, 1998.* [No. 37.]

2. If a branch which has exercised the option of voluntary membership under paragraph 1 does not meet the obligations incumbent on it as a member of an investor-compensation scheme, the competent authorities which issued its authorization shall be notified and, in cooperation with the compensation scheme, shall take all measures necessary to ensure that the branch meets the aforementioned obligations. Sch.3

If those measures fail to ensure that the branch meets the obligations referred to in this Article, after an appropriate period of notice of not less than 12 months the compensation scheme may, with the consent of the competent authorities which issued the authorization, exclude the branch. Investment business transacted before the date of exclusion shall continue to be covered after that date by the compensation scheme of which the branch was a voluntary member. Investors shall be informed of the withdrawal of the supplementary cover and of the date on which it takes effect.

Article 8

1. The cover provided for in Article 4 (1), (3) and (4) shall apply to the investor's aggregate claim on the same investment firm under this Directive irrespective of the number of accounts, the currency and location within the Community.

Member States may, however, provide that funds in currencies other than those of the Member States and the ecu shall be excluded from cover or be subject to lower cover. This option shall not apply to instruments.

2. Each investor's share in joint investment business shall be taken into account in calculating the cover provided for in Article 4 (1), (3) and (4).

In the absence of special provisions, claims shall be divided equally amongst investors.

Member States may provide that claims relating to joint investment business to which two or more persons are entitled as members of a business partnership, association or grouping of a similar nature which has no legal personality may, for the purpose of calculating the limits provided for in Article 4 (1), (3) and (4), be aggregated and treated as if arising from an investment made by a single investor.

3. Where an investor is not absolutely entitled to the sums or securities held, the person who is absolutely entitled shall receive the compensation, provided that that person has been or can be identified before the date of the determination or ruling referred to in Article 2 (2).

If two or more persons are absolutely entitled, the share of each under the arrangements subject to which the sums or the securities are managed shall be taken into account when the limits laid down in Article 4 (1), (3) and (4) are calculated.

This provision shall not apply to collective-investment undertakings.

Article 9

1. The compensation scheme shall take appropriate measures to inform investors of the determination or ruling referred to in Article 2 (2) and, if they are to be compensated, to compensate them as soon as possible. It may fix a period during which investors shall be required to submit their claims. That period may not be less than five months from the date of the aforementioned determination or ruling or from the date on which that determination or ruling is made public.

The fact that that period has expired may not, however, be invoked by the scheme to deny cover to an investor who has been unable to assert his right to compensation in time.

2. The scheme shall be in a position to pay an investor's claim as soon as possible and at the latest within three months of the establishment of the eligibility and the amount of the claim.

In wholly exceptional circumstances and in special cases a compensation scheme may apply to the competent authorities for an extension of the time limit. No such extension may exceed three months.

3. Notwithstanding the time limit laid down in paragraph 2, where an investor or any other person entitled to or having an interest in investment business has been charged with an offence arising out of or in relation to money laundering as defined in Article 1 of Directive 91/308/EEC, the compensation scheme may suspend any payment pending the judgment of the court.

Article 10

1. Member States shall ensure that each investment firm takes appropriate measures to make available to actual and intending investors the information necessary for the identification of the investor-compensation scheme of which the investment firm and its branches within the Community are members or any alternative arrangement provided for under the second subparagraph of Article 2 (1) or Article 5 (3). Investors shall be informed of the provisions of the investor-compensation scheme or any alternative arrangement applicable, including the amount and scope of the cover offered by the compensation scheme and any rules laid down by the Member States pursuant to Article 2 (3). That information shall be made available in a readily comprehensible manner.

Information shall also be given on request concerning the conditions governing compensation and the formalities which must be completed to obtain compensation.

2. The information provided for in paragraph 1 shall be made available in the manner prescribed by national law in the official language or languages of the Member State in which a branch is established.

3. Member States shall establish rules limiting the use in advertising of the information referred to in paragraph 1 in order to prevent such use from affecting the stability of the financial system or investor confidence. In particular, a Member State may restrict such advertising to a factual reference to the scheme to which an investment firm belongs.

1. Each Member State shall check whether branches established by an investment firm the head office of which is outwith the Community have cover equivalent to that prescribed in this Directive. Failing such cover, a Member State may, subject to Article 5 of Directive 93/22/EEC, stipulate that branches established by an investment firm the head office of which is outwith the Community shall join investor-compensation schemes in operation within its territory.

2. Actual and intending investors at branches established by an investment firm the head office of which is outwith the Community shall be provided by that investment firm with all relevant information concerning the compensation arrangements which cover their investments.

3. The information provided for in paragraph 2 shall be made available in the manner prescribed by national law in the official language or languages of the Member State in which a branch is established and shall be drafted in a clear and comprehensible form.

Article 12

Without prejudice to any other rights which they may have under national law, schemes which make payments in order to compensate investors shall have the right of subrogation to the rights of those investors in liquidation proceedings for amounts equal to their payments.

Article 13

Member States shall ensure that an investor's right to compensation may be the subject of an action by the investor against the compensation scheme.

Article 14

No later than 31 December 1999 the Commission shall submit a report to the European Parliament and to the Council on the application of this Directive together, where appropriate, with proposals for its revision.

Article 15

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive no later than 26 September 1998. They shall forthwith inform the Commission thereof.

When the Member States adopt those measures, they shall contain references to this Directive or shall be accompanied by such references on the occasion of their official publication. The methods of making such references shall be laid down by the Member States.

2. The Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

[No. 37.] *Investor Compensation Act, 1998.* [1998.]

Sch.3

Article 16

Article 12 of Directive 93/22/EEC shall be repealed with effect from the date referred to in Article 15 (1).

Article 17

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 18

This Directive is addressed to the Member States.

Done at Brussels, 3 March 1997.

For the European Parliament

The President

J.M. GIL-ROBLES

For the Council

The President

M. DE BOER

LIST OF EXCLUSIONS REFERRED TO IN ARTICLE 4(2)

1. Professional and institutional investors, including:
 - investment firms as defined in Article 1 (2) of Directive 93/22/EEC,
 - credit institutions as defined in the first indent of Article 1 of Council Directive 77/780/EEC,
 - financial institutions as defined in Article 1 (6) of Council Directive 89/646/EEC,
 - insurance undertakings,
 - collective-investment undertakings,
 - pension and retirement funds.Other professional and institutional investors.
2. Supranational institutions, government and central administrative authorities.
3. Provincial, regional, local and municipal authorities.
4. Directors, managers and personally liable members of investment firms, persons holding 5% or more of the capital of such investment firms, persons responsible for carrying out the statutory audits of investment firms' accounting documents and investors with similar status in other firms within the same group as such a firm.
5. Close relatives and third parties acting on behalf of the investors referred to in point 4.
6. Other firms in the same group.
7. Investors who have any responsibility for or have taken advantage of certain facts relating to an investment firm which gave rise to the firm's financial difficulties or contributed to the deterioration of its financial situation.
8. Companies which are of such a size that they are not permitted to draw up abridged balance sheets under Article 11 of the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies ⁽¹⁾.

ANNEX II

GUIDING PRINCIPLES

(Referred to in the fifth subparagraph of Article 7 (1))

Where a branch applies to join a host Member State's scheme for supplementary cover, the host Member State's scheme will bilaterally establish with the home Member State's scheme appropriate rules and procedures for the payment of compensation to investors at that branch. The following principles will apply both to the drawing up of those procedures and in the framing of the membership conditions applicable to that branch (as referred to in Article 7 (1)):

⁽¹⁾O.J. No. L 222, 14.8.1978, p. 11. Directive as last amended by Directive 94/8/EC (O.J. No. L 82, 25.3.1994, p. 33).

[No. 37.] *Investor Compensation Act, 1998.* [1998.]

Sch.3

- (a) the host Member State's scheme will retain full rights to impose its objective and generally applied rules on participating investment firms; it will be able to require the provision of relevant information and be entitled to verify such information with the home Member State's competent authorities;
- (b) the host Member State's scheme will meet claims for supplementary compensation after it has been informed by the home Member State's competent authorities of the determination or ruling referred to in Article 2 (2). The host Member State's scheme will retain full rights to verify an investor's entitlement according to its own standards and procedures before paying supplementary compensation;
- (c) the host Member State's and the home Member State's schemes will cooperate fully with each other to ensure that investors receive compensation promptly and in the correct amounts. In particular, they will agree on how the existence of a counterclaim which may give rise to set-off under either scheme will affect the compensation paid to the investor by each scheme;
- (d) the host Member State's scheme will be entitled to charge branches for supplementary cover on an appropriate basis which takes into account the cover funded by the home Member State's scheme. To facilitate charging, the host Member State's scheme will be entitled to assume that its liability will in all circumstances be limited to the excess of the cover it has offered over the cover offered by the home Member State regardless of whether the home Member State actually pays any compensation in respect of claims by investors within the host Member State's territory.